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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ROCHELLE JONES et al.,	
Plaintiffs and Respondents,	G033663
v.	(Super. Ct. No. 03CC00242)
CITIGROUP, INC., et al.,	O P I N I O N
Defendants and Appellants.	

Appeal from an order of the Superior Court of Orange County, Jonathan H. Cannon, Judge. Reversed and remanded.

Stroock & Stroock & Lavan, Julia B. Strickland, Mary D. Manesis and Keith A. Custis for Defendants and Appellants.

Lakeshore Law Center and Jeffrey Wilens for Plaintiffs and Respondents.

Defendants Citigroup, Inc., Citibank Federal Savings Bank, Citibank (South Dakota), N.A., and Citibank USA, N.A. appeal from an order denying their petition to compel arbitration of an unfair competition action filed by plaintiffs Rochelle Jones and Theresa Wilens under Business and Professions Code section 17200. They contend provisions of the applicable credit card agreements bar plaintiffs' class and private attorney general actions and require individual arbitration. Defendants argue the court erred by applying California rather than South Dakota law to find the ban on class and representative arbitrations unconscionable and that such a ban is not unconscionable. We agree plaintiffs have not shown procedural unconscionability and therefore the arbitration provision may be enforced. We remand for the superior court to issue a new order granting the petition to compel arbitration.

FACTS AND PROCEDURAL BACKGROUND

Plaintiffs filed an action, individually and as private attorneys general, under Business and Professions Code section 17200 alleging defendants violated Civil Code section 1748.9 by failing to make required disclosures about finance charges and interest rates incurred when using a check drawn against a credit card account. The complaint alleges defendants recovered transaction fees and finance charges from credit card holders who used the so-called convenience checks. Jones also brought her claim on behalf of a putative class limited to California residents.

Defendants filed a motion to compel plaintiffs to arbitrate their claims on an individual basis and to stay the action based on a provision in the credit card agreements. In support of their motion, defendants submitted a declaration setting out the terms of the credit card agreements with plaintiffs. They provided the laws of South Dakota and the United States would govern. They also stated that defendants could

"change this Agreement . . . at any time." After plaintiffs opened their accounts, defendants sent to plaintiffs with their billing statements a document entitled "Notice of Change in Terms Regarding Binding Arbitration to Your Citibank Card Agreement." (Bold omitted.) The front of their billing statements contained the following language: "Please see the enclosed change in terms notice for important information about the binding arbitration provision we are adding to your Citibank card agreement." (Capitalization omitted.)

The change in terms notice, or so-called bill stuffer, described the addition of a binding arbitration provision to the cardholder agreement. It stated that either defendants or plaintiffs "may, without the other's consent, elect mandatory, binding arbitration for any claim, dispute, or controversy between [them]." It also provided that all claims based on the current or a prior account or the relationship between the parties were subject to arbitration.

The change in terms notice also advised plaintiffs: "If you do not wish to accept the binding arbitration provision contained in this change in terms notice, you must notify us in writing within 26 days after the Statement/Closing date indicated on your [current] billing statement stating your non acceptance. . . . If you notify us by that time that you do not accept the binding arbitration provisions contained in this change in terms notice, you can continue to use your card(s) under your existing terms until the end of your current membership year or the expiration date on your card(s), whichever is later. At that time your account will be closed and you will be able to pay off your remaining balance under your existing terms." Neither plaintiff opted out of the arbitration agreement.

Included within the arbitration agreement was the following language: "Please read this provision of the agreement carefully. It provides that any dispute may be resolved by binding arbitration. Arbitration replaces the right to go to court, including

the right to a jury and the right to participate in a class action or similar proceeding. In arbitration, a dispute is resolved by an arbitrator instead of a judge or jury. Arbitration procedures are simpler and more limited than court procedures." (Capitalization and bold omitted.)

The agreement also stated: "Claims must be brought in the name of an individual person or entity and must proceed on an individual (non-class, non-representative) basis. The arbitrator will not award relief for or against anyone who is not a party. If you or we require arbitration of a Claim, neither you, we, nor any other person may pursue the Claim in arbitration as a class action, private attorney general action or other representative action, nor may any such Claim be pursued on your or our behalf in any litigation in any court. Claims, including assigned Claims, of two or more persons may not be joined or consolidated in the same arbitration." Another portion of the notice reiterated this provision, stating: "Claims and remedies sought as part of a class action, private attorney general or other representative action are subject to arbitration on an individual (non-class, non-representative) basis, and the arbitrator may award relief only on an individual (non-class, non-representative) basis."

The agreement stated it was governed by the Federal Arbitration Act (9 U.S.C. §§ 1-16; FAA.) It also provided that the "arbitrator will apply applicable substantive law consistent with the FAA . . . ." The agreement excluded small claims actions from arbitration.

Within approximately six months of the amendment to the agreement, Jones opened a second credit card account with defendants. The original agreement for the second account contained the arbitration provisions.

In opposing the motion to compel arbitration, plaintiffs did not file their own declarations or object to any portion of defendants' declaration. The court denied the motion, finding that "the exclusion of class and representative actions is unconscionable under California Law."

DISCUSSION

Defendants set out several arguments as to why the court erred in denying their motion to compel arbitration. These include its refusal to engage in a choice of law analysis with the conclusion South Dakota law would govern interpretation of the arbitration agreement; its failure to find the FAA controls and preempts application of California law to invalidate the arbitration provision based on unconscionability; and its failure to find the arbitration provision enforceable.

After the case was briefed and argued, the California Supreme Court rendered its decision in a case containing similar issues, *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (*Discover*). We afforded the parties the opportunity to file supplemental briefs. *Discover* provides the framework for resolution of this case.

In *Discover* the court "conclude[d] that, at least under some circumstances, the law in California is that class action waivers in consumer contracts of adhesion are unenforceable, whether the consumer is being asked to waive the right to class action litigation or the right to classwide arbitration." (*Discover, supra,* 36 Cal.4th at p. 153.) In that case the defendant issued a credit card to the plaintiff. The cardholder agreement did not contain an arbitration provision. Subsequently, by using a change of terms notice included with the bill, the defendant amended the agreement to bar class action and private attorney general arbitrations. The amendment also provided that if a cardholder did not agree to arbitration, he or she was required to notify the bank and stop using the credit card; continued use of the card would be deemed acceptance of the amended terms.

Because there was a choice of law dispute that was remanded back to the appellate court for determination, the *Discover* court did not decide the enforceability of the ban on classwide arbitration at issue in its case. And it did "not hold that all class

action waivers are necessarily unconscionable." (*Discover, supra*, 36 Cal.4th at p. 162.) Rather, it held that "when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person of property of another.' (Civ. Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced." (*Id.* at pp. 162-163.) In other words, where a contract is both procedurally and substantively unconscionable under California law, it may be unenforceable.

To reach this conclusion, the court revisited the general rule that for a provision to be invalidated based on unconscionability, there must be both procedural and substantive unconscionability. (*Discover, supra*, 36 Cal.4th at p. 160; see *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114.) Procedural unconscionability results from surprise or oppression based on unequal bargaining power. Generally it arises from an adhesion contract drafted by the stronger party and that gives the weaker party only two choices, to accept the terms as presented or reject the contract. (*Discover, supra*, 36 Cal.4th at p. 160.)

In analyzing unconscionability, *Discover* discussed *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094 (*Szetela*) with approval. The facts in *Szetela* were similar to those in *Discover* in terms of how the amendment was presented to the cardholder. *Szetela* found procedural unconscionability based on the adhesive nature of a contract attempting to ban classwide arbitration. (*Id*. at p. 1100.) *Discover* relied on *Szetela* for its holding about procedural unconscionability when it stated, "an element of procedural unconscionability is present" "when[] a consumer is given an amendment to

its cardholder agreement in the form of a 'bill stuffer' that he would be deemed to accept if he did not close his account . . . ." (*Discover supra*, 36 Cal.4th at p. 160.) Similarly in *Aral v. Earthlink, Inc.* (2005) 134 Cal.App.4th 544, relying on *Discover*, the court found "quintessential procedural unconscionability" because "the terms of the agreement were presented on a 'take it or leave it' basis . . . with no opportunity to opt out." (*Id*. at p. 557.)

Our case is different. Here, although the change was made in a "bill stuffer," plaintiffs were given an opportunity to opt out of arbitration. By giving written notice of their rejection of the amendment, they could continue to use their cards until the cards expired and then would be able to pay off their balances under the terms of their existing agreement without acceleration. This does not present the take it or leave it scenario described in *Discover* or *Szetela* as being procedurally unconscionable. Rather, it appears that defendant was cognizant of the oppressive nature of forcing a nonconsenting cardholder to either agree to arbitration or immediately cancel the account and took steps to avoid it.

Themselves relying on *Szetela*, plaintiffs contend the unilateral change in terms using a "bill stuffer" is "sufficient by itself to make the [a]rbitration [p]rovision procedurally unconscionable." But their claim they were put in a take it or leave it situation is refuted by the choice they were given to opt out of arbitration. And plaintiffs fail to acknowledge the different facts in *Szetela*.

Plaintiffs also seem to argue the means of its transmission rendered the amendment unconscionable, stating, "We have all seen what is typically stuffed in with our monthly credit card bills," and claiming the amendment "was probably buried in 'junk mail' that accompanies bills." We reject plaintiffs' attempt to go beyond the record. They filed no declaration in opposition to the motion to compel arbitration and so failed to offer any evidence about how the amendment was actually presented to them, whether they saw the change in terms notice, or whether it was, in fact, mixed in with

junk mail. In addition, there is undisputed evidence that the inclusion of the amendment was prominently noted on the front of the bill itself. Moreover, *Discover* plainly does not say using "bill stuffers" as a means of amending an agreement is, per se, unconscionable. It focuses instead on the take it or leave it nature of the contractual modification. (*Discover*, *supra,* 36 Cal.4th at pp. 160, 162-163.)

Nor does *Badie v. Bank of America* (1998) 67 Cal.App.4th 779 support plaintiffs' argument. There, the appellate court refused to enforce an amendment adding an arbitration provision to an existing account by a change of terms notice. The primary basis for its decision was a determination that the original agreement was ambiguous as to whether it could be unilaterally amended to include such a provision. (*Id.* at pp. 798-799, 801, 807.) The court did not rely on the principle of unconscionability.

In our case, by contrast, before the addition of the arbitration provision, the parties had already agreed defendant could "change this Agreement . . . at any time." California law specifically allows parties to agree to modify a contract. (Civ. Code, § 1698.) "A written contract may expressly provide for modification. [Citation.] When a modification is in accordance with a provision authorizing and setting forth a method for its revision the rule that a contract in writing may be altered only by another written contract or an executed oral agreement has no application because there is no alteration. The modification is in accordance with the terms of the contract. [Citation.]" (*Busch v. Globe Industries* (1962) 200 Cal.App.2d 315, 320.) The right to unilaterally add a term to the contract in and of itself does not offend California's public policy. And, of course, none of the arguments as to the propriety of amendments apply to Jones's second credit card agreement. It was never amended but contained the arbitration provision from its inception.

In sum, plaintiffs cited no law, and we found none, that holds use of a change of terms notice included with a billing statement where the bill itself prominently

states the agreement is being amended, and regardless of its terms, is unconscionable. Despite its refusal to enforce an amendment contained in a "bill stuffer," *Badie* did not so hold. Neither did *Szetela* or *Discover*. Nor do we.

One of the issues defendants raised was whether the trial court erred in failing to engage in a choice of law analysis and then determining that South Dakota rather than California law should apply. They argue that under South Dakota law, both procedural and substantive unconscionability are required to void an agreement. They further contend there is no procedural unconscionability because the amendment to the agreement by way of a change of terms notice is proper under South Dakota law.

Although plaintiffs discuss this issue, they have not convinced us that the law of South Dakota would bar enforcement of the class action waiver under the circumstances of this case. They do not direct us to any case applying South Dakota law that has held provisions waiving class actions are unconscionable. Rather, they cite cases that found contractual terms other than class action waivers unconscionable because they were one-sided. The best plaintiffs can conclude from them is that "[t]here is every reason to believe, or at least *hope*, that . . . South Dakota . . . would follow California's lead and recognize that class action waivers in consumer adhesion contracts are unconscionable . . ." and that "it is *possible* South Dakota law would produce the same result as under California law." (Italics added.) Because the parties have not demonstrated that the laws of South Dakota would lead to a different result than that reached under California law, a choice of law analysis is not required.

Further, because we decide the case on the ground there is no procedural unconscionability, we have no need to discuss any of the other arguments raised as to the issue of enforcement of the arbitration provision.

DISPOSITION

The order is reversed and the matter is remanded for the superior court to enter a new order granting appellants' motion to compel arbitration. In the interest of justice, the parties shall bear their own costs.

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RYLAARSDAM, ACTING P. J.

I CONCUR:

BEDSWORTH, J.

MOORE, J., Dissenting.

I respectfully dissent.

With regard to procedural unconscionability, the crux of the majority's argument turns on the factual distinction between this case and the facts in *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094 (*Szetela*). In that case, if the consumer did not accept the terms of the "bill stuffer" amendment to the cardholder agreement, the bank would immediately close the account, and the consumer would be permitted to pay off any balance under the existing terms. (*Id.* at p. 1097.) Here, the plaintiffs may opt out of the arbitration agreement, and their accounts will remain open until the end of current membership year or until their current cards expire, at which time the defendants will close the account. (Maj. opn., *ante*, p. 3.)

The majority believes that this is sufficiently distinguishable from *Szetela* and *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (*Discover*). While in this case the defendants do allow the cardholder to continue using the account for a limited period of time, this does not, in my view, save the provision from procedural unconscionability. Ultimately, whether in a few months or several years, the cardholder is left in the same position — either accept the arbitration clause or forfeit the ability to use a credit card. It does indeed present "the terms of the agreement . . . on a 'take it or leave it' basis . . . with no opportunity to opt out." (*Aral v. Earthlink, Inc.* (2005) 134 Cal.App.4th 544, 557.) The only difference here is that the consequences are less immediate, but they exist nonetheless. The short grace period is ultimately a distinction without a difference. In a relatively short amount of time, all of defendants' remaining customers will be bound by an arbitration clause, whether or not they want it.

As we noted in *Szetela*, such clauses are of no benefit to the consumer. Indeed, a clause prohibiting any form of collective representation "seriously jeopardizes customers' consumer rights by prohibiting any effective means of litigating Discover's business practices. This is not only substantively unconscionable, it violates public

policy by granting Discover a 'get out of jail free' card while compromising important consumer rights." (*Szetela, supra*, 97 Cal.App.4th at p. 1101.)

The result here is no different. For most consumers, a credit card is a necessity, not a luxury. A consumer cannot rent a car, reserve airline tickets, stay in a hotel or make purchases on the Internet without a credit card. Given this reality, it is an illusion to say that most consumers have a reasonable choice between surrendering their credit cards or their right to a jury trial. Seeking credit from another institution is not a viable option either, as the vast majority, if not all, credit card companies are now demanding that consumers accept arbitration clauses. Thus, holding that a relatively short grace period saves the arbitration clause from unconscionability results in an end-run around *Szetela*.

MOORE, J.