IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ANDREA J. FELTS,
on behalf of herself and all other
similarly situated,

Plaintiff-Appellee,

v.

CLK MANAGEMENT, INC. f/k/a
BAT SERVICES and
CASH ADVANCE NETWORK, INC.,

Defendants-Appellants.

No. 29,702
Consolidated with No. 30,142

Second Judicial District Court
No. CV 2008-13084
The Honorable Nan Nash

Oral Argument Requested

RESPONSE BRIEF OF APPELLANT CASH ADVANCE NETWORK, INC. TO AMICUS CURIAE BRIEF OF ATTORNEY GENERAL

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STATEMENT OF COMPLIANCE

As required by Rule 12-213(G), we certify that this Brief complies with the type-volume limitation of Rule 12-213(F)(3). According to Microsoft Office Word, the body of the Brief-in-Chief, as defined by Rule 12-213(F)(1), contains 3,244 words.

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INTRODUCTION

We recognize that the Attorney General is charged by law with the obligation to enforce New Mexico's Unfair Practices Act (the "UPA"), NMSA 1978, §57-12-1 *et seq.* The Attorney General's Amicus Brief on behalf of Plaintiff/Appellee ("Amicus Brief"), however, does not advance the purposes or goals of the UPA to encourage individuals and their counsel to pursue individual, small claims. Rather than support the articulated public polices of New Mexico in favor of arbitration, the Amicus Brief seeks to undermine this policy and subject arbitration agreements requiring the assertion of claims on an individual basis, and not as part of a class, to a unique level of scrutiny in violation of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§1-16.

The Attorney General's amicus brief is based on three flawed assumptions: (1) that a state court evaluating an arbitration agreement governed by the FAA may ignore preemptive federal law and conclude that the arbitration agreement is not worthy of enforcement when it includes a class action waiver; (2) that the New Mexico legislature intended to make class actions the primary form for enforcing the UPA; and (3) that the class action vehicle has such a positive societal role that the Court should ignore the expressed intention of parties to forego class actions. None of these assumptions is valid.

ARGUMENT

1. The Amicus Brief Fails To Account For Federal Law That Preempts A State Policy That Invalidates An Arbitration Agreement Solely Because It Contains A Class Waiver.

By focusing on the class waiver contained in an arbitration agreement of a small consumer claim, the Amicus Brief attempts to single out arbitration of such claims for disparate treatment. That approach cannot be reconciled with §2 of the FAA, which permits the invalidation of agreements to arbitrate only "upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). According to the Attorney General, class action waivers in consumer contracts involving small amounts of money are unconscionable under state law. But this principle of purported unconscionability is *not* one that applies to "*any* contract"; rather, it *only* applies to a certain class of contracts—consumer contracts involving relatively small amounts of money. This purported state law principle therefore fails to comply with §2 of the FAA, because arbitration agreements must be enforced and interpreted under the same principles of contract law applicable to contracts generally, placing arbitration agreements "upon the same footing as other contracts." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989).

The Attorney General argues that the public policy underlying New Mexico's UPA, favoring class actions, dictates that arbitration agreements in small

consumer contracts that contain class waivers are unenforceable. This notion, however, is contrary to the mandate of §2 of the FAA that all "private agreements to arbitrate are enforced according to their terms." *Volt*, 489 U.S. at 479. Section 2 of the FAA preempts any attempt to invoke state public policy as a ground for refusing to enforce an arbitration agreement. "What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The [FAA] makes any such state policy unlawful, for that kind of policy would place arbitration clauses on unequal 'footing,' directly contrary to the [FAA's] language and Congress' intent." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995). *See, e.g., Wince v. Easterbrooke Cellular Corp.*, No. 2:09-CV-135, 2010 WL 392975, at *4-5 (N.D. W.Va. Feb. 2, 2010) (upholding class-action waiver in arbitration agreement against unconscionability challenge in part because to do otherwise would impose "heightened requirements" on agreements to arbitrate). *See also Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 446 (2006) (under the FAA "the enforceability of [an] arbitration agreement [cannot] turn on [state] public policy.")

The purpose of the FAA was to reverse judicial hostility to and disfavor of arbitration agreements as being contrary to public policy. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). To construe §2 of the FAA to include "public policy" articulated by a state statute as a basis for refusing

to enforce an arbitration agreement as suggested by the Attorney General would erode the very purpose of the FAA of forbidding state public policy challenges to arbitration agreements.

Likewise, singling out class waivers in arbitration agreements violates the FAA by failing to put arbitration agreements on the same footing as other contracts. As the U.S. Court of Appeals for the Third Circuit has held, "[t]o the extent ... that [state cases] hold that the inclusion of a waiver of the right to bring judicial class actions in an arbitration agreement constitutes an unconscionable contract, they are not based 'upon such grounds as exist at law or in equity for the revocation of any contract' pursuant to section 2 of the FAA, and therefore cannot prevent the enforcement of the arbitration provision in this case. 9 U.S.C. § 2." *Gay v. CreditInform*, 511 F.3d 369, 394 (3d Cir. 2007). The court went on to hold that "[t]he Commerce and Supremacy Clauses of the United States Constitution are implicated" in addition to FAA preemption where, as here, a plaintiff "contends that the provision is unconscionable because of what it provides, i.e., arbitration of disputes on an individual basis in place of litigation possibly brought on a class action basis." *Id.*, citing U.S. Const. art. I, § 8, cl. 3; art. VI, cl. 2.

The Attorney General takes a narrow view of the FAA's preemptive force by suggesting that states can prohibit contractual bans on class actions based on public policy considerations pronounced in *Fiser v. Dell Computer Corp.*, 2008-

NMSC-046, 144 N.M. 464, 188 P.3d 1215. While this Court must defer to the Supreme Court of New Mexico on issues of state law, federal law controls this case. The U.S. Supreme Court has never held that a state policy favoring a particular procedural device, *i.e.*, a class action or class arbitration, could come within the exceptions of §2 of the FAA. To the contrary, the Supreme Court has held that under the FAA parties may structure their arbitration agreements as they see fit. *Volt*, 489 U.S. at 479.

Here, the Attorney General believes that the parties' arbitration agreement should be ignored and offers the rationale that an agreement to arbitrate small consumer claims on an individual basis is contrary to New Mexico's policy of using class actions to enforce the UPA. In making this argument, the Attorney General fails to recognize that a state policy favoring class actions has nothing to do with whether a plaintiff can effectively resolve a UPA claim in arbitration, and is not a valid basis to impose a procedural requirement, *i.e.*, a class action, on parties which did not agree to it. If this were the case, then states could require class procedures in the enforcement of consumer arbitration agreements regardless of what the parties' contract provides. Such a rule is not only contrary to Supreme Court precedents holding that arbitration "is a matter of consent, not coercion," *Stolt-Neilsen, S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010), it imposes conditions on the enforcement of consumer arbitration agreements which

are not applicable to contracts generally and irreconcilably conflict with §2 of the FAA's mandate that *all* arbitration agreements "shall be valid, irrevocable, and enforceable."

2. The Attorney General Makes Several Inaccurate Assumptions In Proposing That Class Action Relief Is Necessary For The Enforcement Of The UPA.

In expressing his view that the class waiver renders the arbitration clause unenforceable, the Attorney General makes several inaccurate assumptions. First, the Attorney General incorrectly assumes that this case or any other case would qualify for class certification absent a class waiver. There is nothing in the record to support such an assumption. Indeed, while class actions may provide greater leverage and power for a consumer, those benefits do not confer a *right* to a class action on any consumer or group of consumers. *Gilmer*, 500 U.S. at 32. To the contrary, even in litigation, one must meet each of the procedural hurdles for class certification. *See, e.g., Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 174 (5th Cir. 2004) ("The record does not reveal whether, in the absence of such a provision, there would otherwise be a realistic possibility that an arbitrator would order a class-wide proceeding; it may be that the contractual prohibitions merely make explicit what would otherwise happen in practice.")

Second, the Attorney General incorrectly assumes that class waivers and individual arbitration undermine the Attorney General's role in enforcing the UPA.

The U.S. Supreme Court has made clear that administrative agencies may not dictate the boundaries of unconscionability to suit their own needs. In *Gilmer*, for example, the Court rejected an argument that arbitration in lieu of agency proceedings would undermine the role of the Equal Employment Opportunity Commission in enforcing the Age Discrimination in Employment Act of 1967. *Gilmer*, 500 U.S. at 28-29. Similarly, in *Preston v. Ferrer*, 552 U.S. 346, 358 (2008), the Court gave no weight to the plaintiff's concern that arbitration allegedly would "undermine the Labor Commissioner's ability to stay informed of potential illegal activity." Indeed, the *Gilmer* Court said, "The 'mere involvement of an administrative agency in the enforcement of a statute' ... does not limit private parties' obligation to comply with their arbitration agreements." *Id.*

Finally, the Attorney General incorrectly infers that a clause calling for individual arbitration is unfair or unreasonable. "As a matter of contract law, ... the unconscionability doctrine is not a license for courts to police agreements for reasonableness or fairness. ... With a concept as nebulous as 'unconscionability' it is important that courts not thrust themselves into the paternalistic role of intervening to change contractual terms that the parties have agreed to, merely because the court believes the terms are unreasonable. The terms must shock the conscience." Steven J. Burton, *The New Judicial Hostility To Arbitration: Federal*

Preemption, Contract Unconscionability, And Agreements To Arbitrate, 2006 J. Disp. Resol. 469, 486-87 (2006). No less should be expected in the instant case.

3. The UPA Does Not Evidence That The Legislature Intended To Prohibit A Waiver Of A Class Action.

Central to the Attorney General's argument is that a class action waiver eliminates enforcement mechanisms available under the UPA, such as the class action and the "private attorney general" system. However, nothing in the UPA evidences a legislative intent to preclude the waiver of a judicial forum for the resolution of either individual or class claims. Therefore, no conclusion can be drawn that class actions are necessary to provide deterrence or to fulfill any of the purposes of the UPA.

The notion suggested by the Attorney General that a distinction should be made between enforcement of a statute by "private attorney generals" and adjudicating private disputes for the purpose of determining whether the parties should be compelled to arbitrate their disputes on an individual basis was rejected by the Third Circuit Court of Appeals in *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000). The case concerned whether the plaintiff could be compelled to arbitrate claims under the Truth in Lending Act ("TILA"), 15 U.S.C. §1601 *et seq.*, on an individual basis, and not as a class action. Applying the prevailing jurisprudence established by the Supreme Court in *Gilmer*, the Third Circuit Court of Appeals held that the arbitration agreement at issue was enforceable, even

though it rendered a class action to pursue TILA claims unavailable. *Johnson*, 225 F.3d at 377, 378.

In *Gilmer*, the Supreme Court rejected the argument that arbitration procedures do not further the purposes or social policies of the Age Discrimination in Employment Act merely because they do not provide for class actions. *Gilmer*, 500 U.S. at 32. Applying this analysis to the claims asserted under TILA, the *Johnson* court rejected arguments similar to those made by the Attorney General, explaining that "arbitration does not eliminate plaintiff incentives to assert rights under the [statute]" especially where, as in our case, the potential recovery is not somehow automatically increased by the use of the class mechanism. *Id.* at 374. The court observed that class actions do not necessarily provide financial incentives to pursue claims and that individual recoveries in class actions may in fact be lower than those possible in individual suits. *Id.* The court also found unpersuasive the argument that class actions provide incentive for attorneys to take small consumer claims, stating that arbitration doe not "choke off the supply of lawyers willing to pursue claims," particularly when attorneys' fees are provided by statute. *Id.* Where a statute provides for public remedies, as provided by the UPA, the unavailability of a class action does not result in the loss of deterrents for statutory violations. *Id.* at 376.

While the availability of class actions may have value for different policy reasons, *Johnson* explains that such policy considerations do not preclude private parties from contracting around the availability of a class action. *Id.* As we stated in our Brief-in-Chief (at pages 23-24), the availability of a class action is not detrimental to the statutory purposes of or the plaintiff's recovery under the UPA. Like *Johnson*, Felts retains all of her rights to obtain relief in an individual arbitration. "So long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

Moreover, while the Attorney General attempts to recast the UPA as a statute in which class actions are paramount, a comparison of potential recoveries in class actions and individual actions tells a far different story about the desirability of class actions for UPA claims. In fact, §57-12-10(E) limits the damages which may be recovered by class members by denying unnamed class members the ability to recover treble damages.

By enacting the UPA, the New Mexico legislature created a statute to provide a remedy against misleading identification and false or deceptive advertising. *See Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶22, 142 N.M. 437, 166 P.3d 1091. Nothing in the UPA indicates that a class action is the

primary enforcement tool. To the contrary, the legislature provided in the UPA a fee shifting mechanism to not only allow, but encourage plaintiffs to pursue their own *individual claims* where recoveries are small. *See Jones v. General Motors Corp.*, 1998-NMCA-020, 124 N.M. 606, 953 P.2d 1104. The UPA also encourages lawyers to pursue small claims on behalf of individual clients by providing for a recovery of attorney's fees for enforcing laws on behalf of the public. *Id.* at ¶25.

The UPA gives a claimant the option to choose the form, and the forum, for the resolution of claims. Therefore, the Attorney General's contention that enforcement of the UPA is achieved primarily though class actions is inconsistent with the express provisions of the UPA which permits individual claims and individual recoveries.

The cases cited by the Attorney General do not support the conclusion that enforcement of the UPA is accomplished only by "private attorneys general" suing in a judicial forum on a class basis. While these cases are many in number, none of them holds either that a class action waiver or an agreement to resolve of disputes by arbitration impedes the pursuit of consumer protection claims made by "private attorneys general." Those cases do suggest, however, that the overall statutory scheme and objective established by the various consumer protection statutes at issue in those cases is to encourage private, individual enforcement of

rights. For instance, *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178 (11th Cir. 1982) involved an individual's claim under the Truth in Lending Act, 15 U.S.C. §1601 *et seq.* ("TILA") arising from a motor vehicle sales contract. The issue before the court was whether TILA claims can be waived. The court answered this question in the negative, explaining that if individual TILA claims could be waived then the public interest in deterring undecipherable lending practices is hampered. In this case, Felts is not waiving any of her claims by pursuing them in arbitration.

In *McGowan v. King, Inc.*, 569 F.2d 845 (5th Cir. 1978), the concept of "private attorney general" was noted in the court's finding that the individual plaintiff was not required to prove he was deceived in order to enforce the liability provisions of TILA. In *Gilkey v. Central Clearing Co.*, 202 F.R.D. 515 (E.D. Mich. 2001), one of the few cases in the Attorney General's brief involving class claims, the court held that the assertion of potential compulsory counterclaims would not defeat class certification because cutting off the rights of others to assert TILA claims is contrary to TILA's intent of encouraging individual actions. *Aral v. Earthlink, Inc.*, 134 Cal.App.4th 544, 561 (2005) involved the reasonableness of a forum selection clause.

The next trio of cases cited by the Attorney General, *Adkinson v. Harpeth Ford-Mercury, Inc.*, No. 01-A-01-9009-CH00332, 1991 WL 17177 (Tenn. Ct.

App. Feb. 15, 1991), *Hernandez v. Monterey Village Assoc. Ltd. Partnership*, 553 A.2d 617 (Conn. Ct. App. 1989), and *Liess v. Lindemyer*, 354 N.W.2d 556 (Minn. Ct. App. 1984) each address the concept of a "private attorney general" action in connection with an award of attorney's fees under state consumer statutes. Similarly, *Baierl v. McTaggart*, 629 N.W.2d 277 (Wis. 2001) addressed the objective of a regulation affecting landlord-tenant rights to encourage private enforcement of legal rights. None of the cases cited by the Attorney General hints, in even the slightest way, that enforcement of consumer protection statutes depends upon the availability of class actions.

Moreover, while much of the Amicus Brief is designed to promote the benefits of class actions, such actions also present a risk of potential abuse. *See Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999)("[A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight.... [S]ome plaintiffs may be tempted to use the class device to wring settlements from defendants whose positions are justified but unpopular."); and *Epstein v. MCA, Inc.*, 50 F.3d 644, 667 (9th Cir. 1995), *overruled on other grounds sub nom., Matsushita v. Epstein*, 516 U.S. 367 (1996)("[C]lass members, unlike individual litigants in traditional lawsuits, are bound by the settlement even though they do not individually consent to its terms.") This is of particular concern in cases such as this one where

potential class members have chosen to protect their interests and obtain redress through individual arbitration, but now are at jeopardy of losing those rights for the sake of maintaining a class.

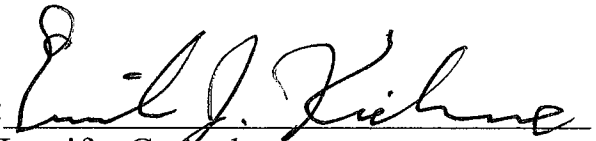
Arbitration offers many advantages to consumers who will often find it easier to vindicate their rights in the arbitral, rather than the judicial, forum. Given the strong federal and state policy favoring arbitration and the remedies available to a plaintiff in arbitration, there is no reason to think that the remedial and deterrent function of the UPA will not be served by a referral to arbitration of this case.

CONCLUSION

For the reasons set forth above and in CANI's Brief-in-Chief and Reply Brief, this Court should reverse the Order of November 18, 2009 and direct the District Court to stay the matter pending arbitration of Felts' claims.

Respectfully submitted,

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

By: 

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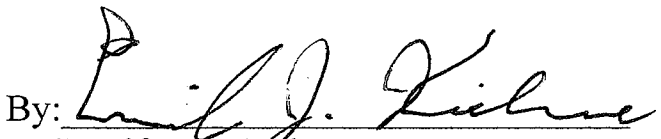
By: 
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