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No. 29,702

IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
FILED
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ANDREA J. FELTS,
on behalf of herself and all others similarly situated,

Plaintiffs-Appellees,

v.

CLK MANAGEMENT, INC. f/k/a BAT SERVICES, INC.,

Defendant-Appellant.

ON APPEAL FROM THE BERNALILLO COUNTY COURT
SECOND JUDICIAL DISTRICT
CASE NO. CV 2008 13084
JUDGE NAN G. NASH

DEFENDANT-APPELLANT CLK MANAGEMENT, INC., f/k/a BAT SERVICES, INC. REPLY BRIEF TO BRIEF OF AMICUS CURIAE NEW MEXICO ATTORNEY GENERAL

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INTRODUCTION

The New Mexico Attorney General's Amicus Brief On Behalf Of Plaintiff/Appellee ("Amicus Brief") espouses arguments that are either irrelevant to this matter or actually support the Appellants' position. In large part, the Amicus Brief focuses on application of the liability provision of the New Mexico Unfair Practices Act ("UPA"), NMSA §§ 57-12-1, *et seq.*, arguing that the UPA is to be liberally construed and does not require a showing of intent, actual deceit by defendant or detrimental reliance by the plaintiff. However, the issues on appeal do not involve an application of the UPA's liability provisions. The only part of the UPA relevant to this appeal are the provisions for awarding attorney fees and costs, and a liberal construction of such provisions supports Appellants' argument that such statutory awards take this case out of the confines of the ruling in *Fiser v. Dell Computer Corp.*, 2008 NMSC-0046, 144 N.M. 464 (2008).

The Attorney General's arguments regarding "private attorney general" actions are also misplaced. This concept of private attorney general is irrelevant to the validity of a class action waiver, and in any event, is not recognized in New Mexico. Additionally, there is nothing in the UPA that would even suggest a class action is the favored method of vindicating consumer rights.

I. ARGUMENT

a. The Concept Of A "Private Attorney General" Does Not Require Or Even Implicate Class Actions And Is Not Recognized By New Mexico Courts

A cause of action under the UPA is not dependent upon the availability of a class action. Amicus argues that contractual class action waivers must not be enforced, because doing so would negatively impact on a private plaintiff's ability to act as a "private attorney general" to enforce the UPA. Amicus further claims that enforcing class action waivers would have a negative impact on consumer rights in New Mexico because the Attorney General is unable to bring sufficient actions on her/his own to fully enforce the UPA. As set forth below, however, Amicus misconstrues the concept of "private attorney general," and ignores that the concept of a private plaintiff enforcing the UPA is not dependent upon the availability of a class action—indeed the UPA itself provides a *disincentive* for individuals to join a class action.

The New Mexico Supreme Court has twice held that New Mexico does not recognize the concept of "private attorney general." *New Mexico Right To Choose/NARAL v. Johnson,* 1999-NMSC-028, ¶ 30, 127 N.M 450, 458-59 (1999) ("we are not satisfied that the use our equitable powers to create and apply a private attorney general doctrine would be principled."); *American Civil Liberties Union v. City of Albuquerque*, 1999-NMSC-044, ¶ 29, 128 N.M. 315, 325 (1999)

("We decline Plaintiff's invitation in this case to [recognize the doctrine of private attorney general.]"). In fact, in Section IV of the Amicus Brief, where the Attorney General claims that he relies upon the "PRIVATE ATTORNEY GENERAL SYSTEM" to help enforce the UPA, he does not cite a single New Mexico case adopting or implementing a private attorney general system. Amicus Brief at pp. 7-9. Instead, Amicus cites to *Jones v. General Motors Corp*, 1998-NMCA-020, 124 N.M. 606 (1998) and claims that *Jones* stands for the proposition the UPA relies upon "private attorneys" to help in its enforcement. The *Jones* case actually never uses the term "private attorney" and certainly did not adopt the actual "private attorney general" doctrine. Amicus' juxtaposition of this case with a string cite of non-New Mexico authorities implementing the actual legal doctrine of "private attorney general," in conjunction with failure to mention that New Mexico explicitly does not recognize a private attorney general, is dubious, at best.

Perhaps more importantly, a private attorney general, in and of itself, is not dependent upon the availability of a class action. The private attorney general doctrine simply involves the award of attorney fees to a private litigant for bringing actions enforcing statutes that vindicate important public policies—it does not affect substantive rights. *American Civil Liberties Union v. City of Albuquerque*, 1999-NMSC-044, ¶ 29, 128 N.M. 315, 325 (1999). In fact, of the ten cases cited by Amicus (all of which are non-New Mexico authorities), seven did not involve a

class action. Amicus Brief at pp. 7-9. The doctrine of private attorney general, thus, does not depend upon the availability of a class action, but is primarily concerned with an award of attorney fees. Under the UPA, a prevailing plaintiff is entitled to recover all of his or her attorney fees regardless of whether the action is brought as an individual or class action. Therefore, a contractual class action waiver is not essential to "the vindication of the legal rights" of consumers, as Amicus asserts.

b. The UPA Provides For Attorney Fees And Does Not Favor or Require Class Actions

Contrary to Amicus' assertion, the UPA does not require or "favor" class actions, and the UPA specifically provides an incentive for individuals to bring claims involving small dollar amounts. Amicus asserts that UPA Section 57-12-10(E) supports the proposition the class actions are one of the most effective enforcement tools for injured consumers. Answer Brief at p. 10. However, Amicus' argument actually supports Appellant CLK's position that the attorney fee provision in the UPA adequately protects the vindication of an individual consumer's rights.

In *Jones v. General Motors Corp*, 1998-NMCA-020, 124 N.M. 606 (1998) the court held that the purpose of attorney fees and costs provisions in a consumer protection act is: (1) to allow an injured plaintiff to pursue *his own claim*; and (2) to reimburse the *individual* and his attorney for enforcing the laws on behalf of the

public. *Jones*, 1998 NMCA, ¶ 25. *Compare* Opening Brief at p. 21, with Amicus Brief at p. 10. Thus, there appears to be agreement between Amicus and Appellant CLK that the purpose of the UPA attorney fees provisions is to enable a plaintiff to bring an individual claim using private attorneys even where amounts of recovery are small. There is simply no support for Amicus' claim that only a class action can effectively vindicate consumer rights.

Also, Amicus asserts that UPA Section 57-12-10(E) supports the proposition the class actions are one of the most effective enforcement tools for injured consumers. However, that section does not expressly or implicitly favor class actions over individuals under the UPA. To the contrary, UPA Section 57-12-10(E) actually provides *a disincentive* for consumers to join in class actions by *denying* unnamed class members the ability to recover trebled damages. While *all* plaintiffs who bring individual actions can recover treble damages, only the few named plaintiffs in class actions can do so. Thus, in class actions, the UPA requires the vast majority of the class to choose between accepting only actual damages or filing their own individual actions to recover three times the amount that they would have received as a member of the class. In accord with the statutory scheme enacted by the legislature, for a majority of potential claimants, an individual action provides for a superior award of damages vis-à-vis class actions, while at the same time ensuring that the prevailing plaintiff's attorney fees

and costs are paid. *Jones*, 1998 NMCA, ¶ 25. Accordingly, any notion that the UPA somehow favors class actions by its terms or that class actions are more favorable for class members than bringing an individual action is simply incorrect. Indeed, the unavailability of trebled damages for unnamed class members suggests that the UPA actually *disfavors* class actions.

In addition to simply being incorrect regarding the benefits of class actions, Amicus' public policy argument is also unsupported. Amicus argues that public policy necessitates that a class action be available for consumer claims. Federal law dictates that public policy considerations cannot support invalidating a class waiver in an arbitration agreement.

In *Johnson v. West Suburban Bank*, 225 F.3d 366 (3rd Cir. 2000), the Third Circuit held that claims under a federal statute may be referred to arbitration even if this may result in denial of a class action forum. In *Johnson*, the issue before the court was the enforceability of a "class action waiver" in connection with claims predicated on the Truth In Lending Act, 15 U.S.C. §§ 1601 *et.seq*. ("TILA"). The Third Circuit determined that the TILA does not foreclose the waiver of judicial remedies via an arbitration agreement. *Johnson*, 225 F.3d at 373. Additionally, the *Johnson* court held that: (1) even where a party may have waived their procedural right to request class certification in an arbitration, they still retained all of their substantive rights to relief; and (2) where a statutory right may be

vindicated in arbitration, a statute's public policy goals do not justify refusing to enforce an arbitration agreement. *Id.* at 373-74.

Like *Johnson*, the class action waiver is enforceable here because Felts has retained all of her substantive rights for relief in arbitration. *See* N.M.S.A. § 44-7A-22 (empowering an arbitrator to grant any relief provided for by New Mexico law). Thus, because plaintiffs maintain all of their statutory rights in arbitration, any alleged public policy concerns simply cannot justify refusing to enforce an arbitration agreement.

Here, referral to arbitration is particularly appropriate because the referral to arbitration does not unequivocally foreclose the availability of a class action in this matter. Appellants are simply asking the court to allow the arbitrator to decide the issue of *whether* the class action waiver is valid. Moreover, even assuming that the arbitrator would (appropriately) uphold the class action waiver, this is consistent with the preemptive federal law in this area. *Johnson*, 225 F.3d at 375-76 ("Whatever the benefits of class actions, the FAA '*requires* piecemeal resolution when necessary to give effect to an arbitration agreement.'" (Internal citations deleted)).

In sum, there is nothing in the UPA that even suggests a class action is favored as a mode of resolution. In fact, the UPA provides a disincentive for the vast majority of class members to join a class action, particularly in cases like the

present one, where the alleged trebled damages total thousands of dollars for a single plaintiff, yet remain unavailable to bulk of the class. Even if the UPA were construed to favor class actions, such a construction amounts to a refusal to give effect to the parties' arbitration agreement, and thus would be preempted by the FAA. *Volt Information Sciences v. Board of Trustees of The Leland Stanford Junior University*, 489 U.S. 468, 479 (1989).

The remainder of the Amicus Brief is equally bereft of authority. For example, the Amicus Brief cites to *Deposit Guaranty National Bank of Jackson, Mississippi v. Roper*, 445 U.S. 326 (1980) as support for its conclusion that class actions are favored or necessary. Amicus Brief at p. 13. However, *Roper* does not aid Amicus because it presumes that class actions are necessary due to the, "*financial incentives* that class actions offer to [attorneys]." (emphasis added). Amicus Brief at p. 13. Here, it has been well established that under the liberal application of the UPA urged by the Amicus, an attorney will get paid their fees, regardless of the size of the plaintiff's claim. Thus, Amicus' financial incentive argument is meritless.

Amicus also relies upon the affidavits filed by Appellee in the district court to support its argument that class actions are necessary to protect consumers. *See* Amicus Brief generally at pp. 14-15. However, as set forth in Appellant CLK's Reply Brief at note 10, these affidavits are wholly irrelevant to this appeal as they

do not address the facts of the case. However, even if the Court considered these Affidavits in support of the more general proposition that class actions are necessary to enforce the UPA, they are conclusory and not credible in their assertions that the attorney fees provision of the UPA would have no impact on enforcement actions. After discussing *ad nausum* the importance of attorney fee awards,[1] Amicus does an about-face and cites a clutch of cherry-picked affidavits that conclude attorney fee awards are irrelevant to determining the viability of a case. The Amicus cannot have it both ways. For numerous reasons, the Affidavits are not credible and should be disregarded.

CONCLUSION

Amicus' assertions that enforcement of the UPA will suffer without application of class actions is simply legally incorrect. The provisions for attorney fees alleviates the concerns that private litigants will not bring actions to help enforce the UPA. Additionally, there is nothing in the UPA that would even suggest that a class action is a superior method for vindicating consumer rights. In fact, the limited damages provisions for unnamed class members suggest just the opposite. Accordingly, Amicus' arguments should be rejected, and the district

[1] As set forth, *supra*, the doctrine of private attorney general is wholly based upon an award of attorney fees for individuals bringing actions to enforce statutes for the public good.

court's decision should be reversed, with instructions to order this dispute to arbitration.

Respectfully submitted this 29 day of July 2010.

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I hereby certify that the foregoing brief complies with the type-volume limitation pursuant to Rule 12-213(F) NMRA. The foregoing brief, including footnotes, contains 2,149 words of Times New Roman (14 point) proportional type. The word processing software used to prepare this brief was Microsoft Office Word 2007.

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