

New Jersey Invalidates Class Action Arbitration Waiver

Courts split on controversial issue

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The New Jersey Supreme Court has declared unconscionable a consumer loan contract provision that would have waived the consumer's right to class-wide arbitration. In refusing to enforce the waiver, the court disagreed with lower New Jersey courts' rulings on the issue: *Muhammad v. County Bank of Rehoboth Beach*.

The dispute arose out of a short-term, 21-day consumer loan for \$200 with a finance charge of \$60, which equates to an annual percentage interest rate of 608.33 percent. The plaintiff needed two 21-day extensions to repay the loan and incurred an additional \$60 charge for each extension, ultimately paying \$180 in interest on his \$200 loan. The loan documents included agreements to arbitrate any dispute and not to "bring, join or participate in class actions." The court affirmed the arbitration provision but not the class action waiver. "The public interest at stake in the ability of consumers effectively to pursue their statutory rights under this State's consumer protection laws overrides the defendants' right to seek enforcement of the class-arbitration bar in

their agreement," the court wrote. This conclusion, however, is quite controversial.

"This is a troubling decision for those providing services to consumers. It is possible the court was responding to the extreme facts of the case, including the contract's high interest rate. The court also seemed influenced by its very favorable view of the purported benefits of class actions for consumers," notes Amy J. Longo, Los Angeles, Co-Chair of the Section of Litigation's Class Actions and Derivative Suits Committee.

Is the class action procedure a right so important that it is unconscionable to enforce its contractual waiver? Recent challenges to similar provisions have yielded conflicting results. For example, the U.S. Court of Appeals for the Eleventh Circuit and courts in New York and Delaware have enforced similar waivers and rejected the assertion they are unconscionable. Utah recently enacted a statute expressly permitting enforcement of class action waivers (California and Alabama, however, have agreed with the New Jersey approach.

Another open question is how different jurisdictions will treat choice-of-law provisions. Although the California Supreme Court has held that class action waivers are unconscionable under California law, it has enforced a provision directing that Delaware law would govern any dispute between the parties. ☐

Resources:

- Muhammad v. County Bank of Rehoboth Beach*, 2006 N.J. LEXIS 1154 (N.J. Sup. Ct. Aug. 9, 2006).
- Mary S. Diemer, *Utah to Allow Class Action Waivers in Consumer Credit Agreements—Enforceability an Open Question*, 31 LITIGATION NEWS (Sept. 2006).
- Jenkins v. First Am. Cash Advance of Ga.*, 400 F.3d 868 (11th Cir. 2005).
- Tadillas v. Provident Nat'l Bank*, 786 N.Y.S.2d 478 (N.Y. App. Div. 2004).
- Edelstein v. MBNA Am. Bank*, 790 A.2d 1249 (Del. Super. 2001).
- Szatela v. Discover Bank*, 97 Cal. App. 4th 1094 (2002).
- Discover Bank v. Superior Court*, 134 Cal. App. 4th 886 (2005).
- Leonard v. Terminix Int'l Co.*, 854 So. 2d 529 (Ala. 2002).