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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2008 – SC – 0789 – D

MICHAEL SCHNUERLE, AMY GILBERT, LANCE GILBERT, and ROBIN WOLFF **APPELLANTS**

v.

INSIGHT COMMUNICATIONS COMPANY, L.P. and INSIGHT COMMUNICATIONS MIDWEST, LLC **APPELLEES**

APPEAL FROM THE KENTUCKY COURT OF APPEALS
NO. 2006-CA-2121-MR
AFFIRMING THE JUDGMENT OF THE JEFFERSON CIRCUIT COURT
ACTION NO. 06-CI-4267

CROSS-APPELLANT'S REPLY BRIEF

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CERTIFICATE OF SERVICE

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Counsel for Insight

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INTRODUCTION

Because the facts wholly support the enforceability and effectiveness of the dispute resolution procedure ("DRP"), the Plaintiffs present their own vitriolic version of the facts through self-serving affidavits.[1] Not as a result of this litigation, but as a practice, Insight took immediate remedial action for its customers following an unexpected service interruption while Insight was upgrading its internet service for its customers. A total of 2,595 customers were credited for service not received prior to Plaintiff's filing their Complaint. *See* Affidavit of Greg Graff, ¶¶7, 14-16, TR Vol. 5 at 732-34, and attached at Insight Br. at Appendix 4. Plaintiffs filed their complaint on May 11, 2006; therefore, all of the customers who requested and received credit after May 11, 2006 and following the customer letter are not included in the nearly three thousand customers who had already been made whole prior to the litigation. It simply must be said that Insight's DRP is effective at resolving customer claims quickly, efficiently and effectively.

Plaintiffs admit in their Reply Brief that Insight's DRP does not prohibit damage awards or call for out-of-state arbitration. Plaintiffs' Reply Brief ("Pls. Reply Br.") at 3. In the face of their admission and the actual facts, Plaintiffs continue to argue that the DRP "prevents individuals from vindicating their rights and exculpates Insight from liability." *Id.* Nothing could be further from the truth. The facts belie their position, and the trial court and Court of Appeals have seen through the smoke-and-mirrors argument. Insight asks that this Court do the same.

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[1] As explained in Insight's Combined Brief ("Insight Br") at 32, the Court in *Francis v. AT&T Mobility, LLC*, 2009 WL 416063, *4 (E.D.Mich. 2009) held that proffered opinions of attorneys opining that they would be unwilling to represent an individual consumer protection act claimant overlooked the availability of an award of reasonable attorney fees. Additionally, the trial court flatly rejected the affidavits of the attorneys and the plaintiffs by finding to the contrary. Insight Br. at 32.

I. The facts conclusively show that the DRP is not exculpatory or unconscionable

Plaintiffs have advanced two insufficient bases for their argument that the DRP is substantively unconscionable: "(1) it denies Plaintiffs the ability to vindicate their rights; and (2) it allows Insight to escape liability for its misconduct." Pls. Reply Br. at 4. First, the DRP does not deny Plaintiffs the ability to vindicate their rights, because the Plaintiffs could have simply contacted Insight and received a credit like nearly three thousand other Insight customers did. Plaintiffs admit that they are not limited in their remedy under the DRP, and they could have pursued those remedies in small claims court or in arbitration. Second, Insight has not "escaped" from any liability. Instead, as the facts conclusively show, Insight has accepted and remedied the problem.

Plaintiffs contend that Insight "could" have drafted a "fair" customer agreement that allows customers to vindicate their rights and is not exculpatory. Pls. Reply Br. at 4. Insight has done just that. Insight's DRP is a fair agreement that allows customers to vindicate their rights and does not exculpate Insight. The trial court and the Court of Appeals agreed that under the facts of this case the DRP is enforceable. None of the case law or argument proffered by the Plaintiffs to this Court supports a different outcome.

Insight's Combined Brief explained that the DRP contained provisions providing for a customer service resolution procedure, a small claims option, in-state arbitration, no limitation on compensatory damages, attorneys' fees, or punitive damages, simple and flexible consumer procedures in arbitration, and recovery of fees and expenses of arbitration if successful. Insight Combined Brief ("Insight Br.") at 3-4. Plaintiffs have not shown that the availability of all remedies, recoverable expenses, and various consumer friendly forums is unconscionable or exculpatory.

Plaintiffs also cannot defend their position that a class action would be more cost effective. Instead, like the three thousand other customers, it would have been more cost effective to follow the DRP. In *Easter v. Compucredit Corp.*, 2009 US Dist. LEXIS 16354 (W.D. Ark. 2009), the Federal District Court enforced an arbitration clause with a class action waiver under the facts of that case. The Court noted that it "...cannot find that the class action prohibition standing alone renders the Arbitration Provision unconscionable." *Id.* at 17. The Court was also persuaded that the arbitration provision provided a cost-effective manner for seeking redress, and noted specifically that it would have been more cost effective to follow the arbitration procedure than file their case in court. *Id.* at 16.

Moreover, Plaintiffs have misinterpreted the holding in *Alexander v. S & M Motors, Inc.*, 28 S.W.3d 303 (Ky. 2000). This Court made clear in *Alexander* that a trial court abuses its discretion by refusing to award a prevailing plaintiff sufficient attorneys' fees to make her whole. The Plaintiffs attempt to couch the holding in *Alexander* as somehow related to the award of compensatory damages, but Plaintiffs are wrong. Pls. Reply Br. at 8-9. The award of compensatory damages was irrelevant. Instead, this Court found that the amount of punitive damages awarded was sufficient to make both claimant and counsel whole. The failure to make both claimant and counsel whole would have been an abuse of discretion by the trial court. *See Alexander* at 306; *and,* Insight Br. at 30-32.

In *Brueggemann v. NCOA Select, Inc. et al.*, 2009 US Dist LEXIS 55296 (S.D.Fla 2009), the Court noted that "The Eleventh Circuit has held that class action waivers in arbitration agreements are valid and enforceable, especially when the plaintiff would still

be entitled to attorney's fees awards."[2] *Id.* at 9-10; *citing Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005)(claims brought pursuant to statutes that provided for an award of attorney's fees); and, *Jenkins v. First American Cash Advance of Georgia, LLC*, 400 F.3d 868 (11th Cir. 2005)(arbitration agreement permitted the prevailing party to receive an award of attorney's fees if allowed by statute or applicable law).

Insight has clearly shown in its previous arguments that a majority of states and federal courts would uphold and enforce the Insight DRP. A rehashing of case law is unnecessary.

Plaintiffs, however, argue that the Third Circuit would not enforce the DRP based on *Homa v. American Express Co.*, 558 F.3d 225 (3rd Cir. 2009). Pls. Reply Br. at 11. In Plaintiffs' Opening Brief ("Pls. Opening Br.") at 22, *Homa* is listed in a string-cite with the quote "'[W]e hold that, if the claims at issue are of such a low value as effectively to preclude relief if decided individually, then ... the class-arbitration waiver is invalid and the class-arbitration waiver is unconscionable.'" However, as explained in this brief, *supra*, and in Insight Br. at 44, *Homa* is not persuasive in Kentucky and under the facts of this case. First, the Plaintiffs could have been made whole without litigation. Second, the Plaintiffs could have proceeded individually to small claims court. Third, the Plaintiffs could have recovered attorney fees and all other available remedies. Fourth, *Homa* involved complex litigation. Therefore, the logic of *Homa* is unavailing. Moreover, *Homa* has been distinguished by both *Cronin v. Citi Financial Services, Inc.*, ---F.Supp.2d ---, 2009 WL 1033613 (E.D.Pa. 2009) and *Adler v. Dell, Inc.*, --- F.Supp.2d -

[2] Insight's DRP is more consumer-friendly than the provision in *Brueggemann*, because the *Brueggeman* provision limited recovery of damages as well.

--, 2009 WL 646885 (E.D.Mich. 2009). Both cases enforced agreements to arbitrate individually.

In *Bonano v. Quizno's Franchise Co. LLC*, 2009 US Dist. LEXIS 37702 (D.Colo. 2009), the Federal District Court enforced a class action waiver in a franchise agreement. The agreement did not provide for arbitration, but only a wavier of class actions. In upholding the provision, the Court noted that *Kristian v. Comcast*, 446 F.3d 25 (1st Cir. 2006) and *In re American Express Merchants' Litigation,* 554 F.3d 300 (2nd Cir. 2009) were distinguishable because of "the nature of the claims at issue: antitrust versus what is essentially common law fraud." *Bonano* at 49. The Court went on to note that "In *Kristian* and *American Express*, the courts relied on the unique, *i.e.* complicated and expensive, aspects of antitrust law to support their refusal to enforce the arbitration clauses/class arbitration bars at issue." *Id.*

Plaintiffs also argued that *Leonard v. Terminix Int'l Co., L.P.*, 854 So.2d 529 (Ala. 2002) supports their argument, but again, the facts of that case illustrate why Insight's DRP is enforceable. Pls. Reply Br. at 11. In *Leonard*, the Alabama Supreme Court noted that the arbitration provision in that case limited recovery of "indirect, special, and consequential damages or loss of anticipated profits." *Id.* at 538. Moreover, the Court noted that the fees required for the arbitration clause were high and the rules were not consumer friendly. *Id.* at 535. Without restating the effective, efficient, and consumer-friendly terms of the DRP, suffice it to say that the *Leonard* case is not persuasive and does not suggest that Insight's DRP would be held unconscionable in Alabama under the facts of this case.

Finally, *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306 (6th Cir. 2000), indicates that the Sixth Circuit would enforce Insight's DRP. *Cf.* Pls. Reply Br. at 11. As explained in Insight Br. at 21-22, *Floss* involved complex litigation and an unfair arbitration forum. Again, Insight DRP and the facts of this case suggest that the Sixth Circuit would enforce the DRP and affirm the Court of Appeals.

Plaintiffs have failed to address the real issue raised by Insight's Combined Brief: that this case must be analyzed under the facts in this case. While denying their true position, Plaintiffs actually seek a *per se* rule against class action waivers in arbitration provisions. However, Insight has shown through the wealth of cited case law that the DRP is enforceable under the facts of this case. Therefore, the Court of Appeals must be affirmed.

II. Procedural unconscionability must be found under Kentucky Law and is not present in this case

Plaintiffs must prove procedural unconscionability to justify reversal of the Court of Appeals. Procedural unconscionability is required under *Conseco Fin. Serv. Corp. v. Wilder*, 47 S.W.3d 335, 343, n. 22 (Ky. App. 2001). *See*, Insight Br. at 33-34. Plaintiffs again must rely on their own vitriolic recitation of the "facts" to support their argument.

The trial court found (i) the DRP is in clear and concise language, (ii) the method of referring the reader to a different screen is a common practice in most web sites and many written contracts (usually by reference to an addendum), and (iii) persons seeking internet access have several alternatives. Trial Court Order, at Appendix 2.[3] Plaintiffs would like to rewrite the facts found by the trial court to support their argument;

[3] Appendix reference relates to the Appendix to Insight's Combined Brief.

however, the trial court found and the Court of Appeals affirmed that the DRP is not procedurally unconscionable under the facts of this case.

The Florida decision cited by Plaintiffs at Pls. Reply Br. at 12, n 4 specifically noted that it was decided only on the facts in that case where an arbitration provision with a class action waiver defeated the purpose of a consumer protection statute. *S.D.S. Autos, Inc. v. Chrzanowki*, 976 So.2d 600, 607 (Fla. Dist. Ct. App. 2007). In fact, that same court noted that "Courts have not invalidated every arbitration provision precluding consumers from seeking class-wide vindication of every statutory claim." *Id.*

Plaintiffs recognize that a contract of adhesion is not *per se* unconscionable. But, their only support of procedural unconscionability is the adherent nature of the contract. *Conseco* held that adhesive contracts are enforceable if not "abusive or unfair." *Conseco* at 343. As shown by Insight, the DRP is neither abusive nor unfair under the facts of this case.

In a recent New York case,[4] the Court noted that while the agreement was offered on a take-it-or-leave-it basis, but noted that the Plaintiff did not allege high pressure tactics, that she was not permitted to review the agreement with an attorney, or a lack of time to review the document. *Nayal v. HIP Network Services IPA, Inc.*, 620 F.Supp.2d 566, 572 (S.D.N.Y. 2009). The same is true in this case. Plaintiffs cannot show high pressure tactics or limited opportunity, with or without counsel, to review the terms of the service agreement and DRP. Thus, there is no evidence of procedural unconscionability in this case.

[4] As noted in Insight Br. at 56-60, New York law and Kentucky law are comparable on the issues presented in this case.

III. Severability would be appropriate to give full effect to the agreement to arbitrate if the class action waiver is unenforceable.

The Insight Service Agreement specifically states that "If any portion of the Dispute Resolution Section is determined to be unenforceable, then the remainder shall be given full force and effect." Service Agreement Dispute Resolution Clause Section (b), Appendix 3, page 8. This severability clause specifically provides that if a Court determined that a feature of the DRP is unenforceable, then the remainder must enforced. Therefore, in the event this Court reverses the Court of Appeals' enforcement of the class action waiver, the agreement to arbitrate is binding. Plaintiffs cannot and have not provide any basis to deny applicability of the arbitration clause if the class action waiver is held unenforceable.

Under *Dutschke v. Jim Russell Realtors*, 281 S.W.3d 817 (Ky. App. 2008) relying on *Louisville Peterbilt, Inc., v. Cox,* 132 S.W.3d 850 (Ky. 2004), a court must separate an otherwise valid arbitration clause from the contract to allow arbitration of all claims not going to the validity of the arbitration clause itself pursuant to KRS 417.050. Assuming, *arguendo*, that the class action waiver is deemed unenforceable by this Court, the KRS 417.050 savings clause requires the Plaintiffs' claims be arbitrated because the remaining issues would not go "to the validity of the arbitration clause itself." *See*, *Louisville Peterbilt, Inc.* at 855.

IV. Under New York law the Court of Appeals must be upheld

Insight explained the choice of law provision in its Combined Brief. Insight Br. at 56-60. Plaintiffs did not address the issue in their brief other than to comment, without citation or support, that "...Kentucky law, which indisputably governs this case..." Pls. Reply Br. at 1. However, as explained in detail in Insight's Combined Brief, New York

law was selected as the choice of law in the agreement. Choice of law provisions are permissible if reasonable. *Wallace Hardware Co. Inc., v. Abrams*, 223 F.3d 382 (6th Cir. 2000). The provision is reasonable and enforceable; however, the same result will be reached under either Kentucky or New York law.

In *Bar-Ayal v. Time Warner Cable Inc.*, 2006 WL 2990032 (S.D.N.Y. 2006), the New York District Court enforced an arbitration agreement. The Court found that the allegation that Time Warner had a monopoly on high-speed cable internet was a non-issue, because other types of high-speed internet are available from other providers. The trial court and Court of Appeals in this case made the same finding. Secondly, the court pointed out that the mere inequality of bargaining power is not enough for a finding of procedural unconscionability. The Court did not find substantive unconscionability either; however, the Insight DRP is more consumer-friendly than Time Warner's. Insight Br. at 59-60. Therefore, under both Kentucky and New York law, the DRP is enforceable under the facts of this case as found by both the trial court and the Court of Appeals.

V. The Federal Arbitration Act preempts public policy arguments against arbitration clauses that merely rekindle the hostility to arbitration

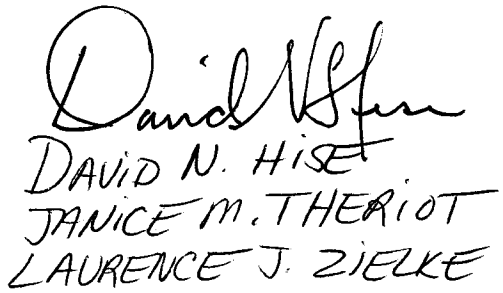
The Federal Arbitration Act ("FAA") is interpreted consistently with the Kentucky Uniform Arbitration Act ("KUAA"). Insight moved to compel arbitration under **both** the FAA and the KUAA, and the motion was granted. Agreements to arbitrate statutory consumer-protection claims do not violate public policy under eith the FAA or the KUAA. The FAA's provisions "manifest a liberal federal policy favoring arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991). It is unquestioned that the FAA preempts public policy arguments against

arbitration clauses that merely attempt to revitalize the anti-arbitration sentiment existing prior to the enactment of the FAA. A decision based solely upon a public policy determination against arbitration clauses is contrary to federal statutory and decisional law.

Plaintiffs are clearly presenting a public policy argument that is preempted by the FAA. While Plaintiffs argue that they do not seek a *per se* rule that arbitration clauses with a class action waiver are unconscionable, a cursory analysis reveals their words are without weight. With local arbitrations for customers, availability of attorney fees and costs, no limitation on damages, small claims option, consumer arbitration procedures, choice of type of form (telephonic, in-person, online, or no hearing), and a proven customer service resolution procedure, it begs the question, what more do Plaintiffs' require for an enforceable arbitration agreement? What feature would satisfy the Plaintiffs? The truth is obvious. The Plaintiffs seek a *per se* rule that an arbitration clause with a class action waiver is unconscionable. However, a *per se* rule is no more than a public policy determination preempted by the FAA.

CONCLUSION

The Court of Appeals' Opinion is well-reasoned and persuasive. Based upon the argument set forth in Insight's Combined Brief and in this Reply, Insight respectfully requests that this Court affirm the decision of the Court of the Appeals.



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