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Illinois Appellate Court Puts Scare Into Corporations By Striking Down Arbitration Agreement

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Illinois Appellate Court Puts Scare Into Corporations By Striking Down Arbitration Agreement

The Illinois 5th District Appellate Court set a high bar for major businesses and bestowed increased protection on Illinois consumers this summer when it ruled that a satellite broadcasting company could not enforce the mandatory arbitration provision of its standard customer service agreement because the agreement was procedurally unconscionable.[48]

DirecTV is a national satellite television provider that works through hundreds of independent retailers around the country to sign up customers for its satellite service.[49] A potential customer usually first purchases the necessary television equipment from the independent retailer; then the customer calls DirecTV personally to sign up for one of the company's satellite packages.[50] DirecTV typically then waits until after service is activated to mail the customer for the first time a copy of the parties' proposed written contract, called the "Customer Agreement." The company typically sends the contract in the same envelope as the first bill.[51]

In November 1999, Charlotte Bess purchased the necessary equipment and signed up for a DirecTV service plan. Thereafter, she received a copy of DirecTV's October 1999 Customer Service Agreement, which specified that if the customer does not accept the terms of the agreement, she must notify DirecTV immediately to cancel her service. If she does not do this and continues to receive the service, the Customer Agreement states she accepts the terms of the contract.[52] Among it terms, the contract stated that the customer incurs a "deactivation fee" if and when she cancels her service. The contract did not contain a provision, however, concerning any refund

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[48] Bess v. DirecTV, Inc., 2007 WL 2013613 (Ill. App. 5 Dist. 2007).

[49] *Id.* at *1.

[50] *Id.*

[51] *Id.*

[52] *Id.* at *1.

for the already purchased television equipment.[53] Also, the contract stated that Bess would receive a bill from DirecTV once every 30 days, and if DirecTV did not receive payment in full before issuing its next statement, it would charge Bess a $5 administrative late fee.[54]

Bess eventually sued DirecTV over this provision, arguing that the $5 administrative late fee was improper because the company's true cost for the inconvenience of a late-paying customer amounted to far less than $5.[55] Bess argued that the fee violates both Illinois common law regarding liquidated damages and the Illinois Consumer Fraud and Deceptive Business Practices Act.[56]

However, Bess' contract with DirecTV also contained an arbitration agreement, whereby Bess waived her right to a jury trial.[57] The contract first included an informal dispute resolution clause, under which Bess must first notify DirecTV of her claim at least 60 days before starting any formal proceeding.[58] The contract also included a formal dispute resolution clause, under which both parties agreed that any legal claim "will be resolved only by binding arbitration."[59] The contract stated that Bess would pay a fee of $125 if she initiated the arbitration and would pay certain other fees related to the arbitration.[60] The contract declared in bold print: **"ARBITRATION MEANS YOU WAIVE YOUR RIGHT TO A JURY TRIAL."**[61]

DirecTV notified Bess in December 2000 that it intended to enforce the contract's provisions and then filed a motion in court to compel arbitration and stay Bess' action so the arbitration could move forward.[62] However, the trial court declined DirecTV's motion, finding that the arbitration clause was both procedurally and

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[53] *Bess*, 2007 WL 2013613 at *1.

[54] *Id.* at *1.

[55] *Id.* *2.

[56] *See* 815 ILCS 505/1 et seq.

[57] *Bess*, 2007 WL 2013613 at *1.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Bess*, 2007 WL 2013613 at *2.

substantively unconscionable.[63] A three-justice panel of the Appellate Court of Illinois for the 5th District affirmed the trial court in a 2-1 decision.

The court first affirmed the fundamental importance of enforcing valid arbitration agreements, but asserted that a party can be forced into arbitration "only if he or she has in fact entered into a valid, enforceable contract waiving his or her right to a judicial forum."[64] The court here was most concerned with whether the Customer Agreement was procedurally unconscionable, i.e. whether it was "so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it" and whether there is "disparity of bargaining power between the drafter . . . and the party claiming unconscionability."[65] The court said it must analyze procedural unconscionability by looking at the totality of the circumstances.[66]

The court noted that the DirecTV arbitration provision was printed on a 10-paneled, fold-up pamphlet in about an eight-point font, with each panel containing more than 700 words.[67] The court also noted the disparate bargaining position between DirecTV and Bess and that DirecTV issued the provision to Bess on a take-it-or-leave-it basis.[68] However, the court said all these facts were relevant, but more was required for a finding of procedural unconscionability—there must be "some impropriety during the process of forming the contract depriving a party of a meaningful choice."[69]

The court found such impropriety in the fact that Bess never saw the contract before she signed up for the DirecTV satellite service, and that if she cancelled the contract she would be charged a "deactivation fee" and be on the hook for her already-purchased satellite equipment.[70] The court applied an Illinois Supreme Court de-

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[63] *Id.*

[64] *Id.* at *3.

[65] *Id.* at *5.

[66] *Id.* at *4.

[67] *Bess*, 2007 WL 2013613 at *5.

[68] *Id.*

[69] *Id.* at *6.

[70] *Id.* at *7.

cision, *Razor v. Hyundai Motor America*[71], to the case. In *Razor*, the Supreme Court held that a consequential damages provision in a preprinted limited warranty form was unenforceable because it was not conveyed to the consumer at or before the time of the purchase.[72] The appellate court extended this line of reasoning to preprinted customer agreements like the one Bess entered into with DirecTV. Citing *Razor*, the court said "it simply does not matter how large the type was or how clearly . . . expressed if the consumer did not have the opportunity to *see* the language before entering into the contract."[73] The court said that Bess never saw the arbitration clause before entering into her contract, and there was no way for her to have seen the provision until she received her first bill.[74] Moreover, the court said that by making Bess buy her equipment first, DirecTV "required Bess to contract to receive its service and substantially change her economic position *before* she was provided with the. . .[a]greement . . . [t]herefore, Bess was deprived of a meaningful choice."[75]

The appellate court found that the procedural unconscionability of Bess' contract rose to such a level that it invalidated the arbitration provision, thereby allowing Bess to proceed with her action in court.[76] The appellate court declined to determine whether the contract also was substantively unconscionable because it was unnecessary to the outcome of the case.[77]

However, one justice on the court forcefully dissented. Justice James K. Donovan agreed that Bess' customer agreement was "unconscionable to a certain extent," but argued that this by itself could not render the entire arbitration provision unenforceable.[78]

Justice Donovan cited an Illinois Supreme Court case, *Kinkel v. Cingular Wireless, LLC,* that reviewed a cell phone service agreement similar to the DirecTV contract, and found that even though the

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[71] Razor v. Hyundai Motor America, 222 Ill.2d 75 (2006).

[72] *Id.* at 102-03.

[73] *Bess*, 2007 WL 2013613 at *6.

[74] *Id.*

[75] *Id.* at *7.

[76] *Id.*

[77] *Id.* at *8.

[78] *Bess*, 2007 WL 2013613 at *8 (Donovan, J., dissenting).

contract did not inform the consumer of the costs of the arbitration process or that she would be required to pay some of the costs, this procedural unconscionability did not by itself render a class action waiver in the agreement unenforceable.[79] The court in that case said that such form contracts:

> are a fact of modern life. Consumers routinely sign such agreements to obtain credit cards, rental cars, land and cellular telephone service, home furnishings and appliances, loans, and other products and services. It cannot reasonably be said that all such contracts are so procedurally unconscionable as to be unenforceable.[80]

Justice Donovan said *Kinkel* should hold sway and reasoned that the *Razor* case was distinguishable, because a limited warranty like the one in *Razor* is entirely different from the standard customer service agreement at issue in the case at bar.[81] He argued the strong public policy favoring arbitration agreements, unlike limited warranties. He also emphasized how customary such customer contracts are these days, and how typical it is to send the agreement after purchase is made or inside the product box, where the customer accepts or rejects to contract after purchase.[82]

Further, Justice Donovan cited case law from the 7th Circuit which argued that consumers as a whole are better off "when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such agreements, read or unread."[83]

Justice Donovan found that the deactivation fee in Bess' contract was somewhat procedurally unconscionable, but that such provisions are increasingly commonplace.[84] Also, he found no direct evidence that Bess would not get a refund for her purchased equip-

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[79] *Id.* at *8 (citing Kinkel v. Cingular Wireless, LLC, 223 Ill.2d 1, 27 (2006)).

[80] *Kinkel*, 223 Ill.2d at 26.

[81] *Bess*, 2007 WL 2013613 at *8.

[82] Id. at *9.

[83] Id. at *8 (citing Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149 (7th Cir. 1997).

[84] *Bess*, 2007 WL 2013613 at *9.

ment.[85] Thus, he concluded that the arbitration agreement still should have been enforceable.[86]

The Illinois decision comes at a time when mandatory arbitration agreements and the familiar small-type, pre-printed customer contracts typical of countless everyday consumer transactions are coming under increasing scrutiny in courts across the nation. In September 2007, the U.S. Court of Appeals for the 11th Circuit found a class action waiver unconscionable as written in the arbitration agreement of a customer contract issued by cable giant Comcast Corp.[87] The Washington Supreme Court reached a similar decision recently, ruling that cell phone provider Cingular Wireless could not enforce its arbitration agreement forcing consumers to waive their rights to a class action.[88]

The decision in *Bess* should reverberate through corporate America because it attacks the arbitration agreements generally and strikes down as unconscionable procedures that have become standard across the country. The Illinois Supreme Court has yet to address the issue.

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[85] Id.

[86] Id.

[87] Gene Dale v. Comcast Corp., 2007 WL 2471222 (11th Cir. 2007).

[88] Phuong Cat Le, *State High Court Says Consumers Can't Sign Away Class Action Rights*, SEATTLE POST-INTELLIGENCER, July 13, 2007, at A1.