IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

DEADRA D. CUMMINS, on her own behalf and on behalf of those similarly situated, and IVAN and LaDONNA BELL, on their own behalf and on behalf of those similarly situated,

Plaintiffs,

v.

Civil Action No. 03-C-134
(Judge Louis H. Bloom)

FILED
2004 JUN -1 PM 1:29
CATHY S. GATSON CLERK
KANAWHA CTY. CIRCUIT COURT

H&R BLOCK, INC., H&R BLOCK TAX SERVICES, INC., H&R BLOCK EASTERN TAX SERVICES, INC., MELANIE LESTER, JASON BROWN, BOBBY HAGUE, ROBERT HECKERT, CYNTHIA LANTZ, CLARENCE E. MILLER, CARLA R. LEWIS, DEBRA RIGGLEMAN AND JOHN DOE,

Defendants,

ORDER DENYING SERVED DEFENDANTS' MOTION TO COMPEL ARBITRATION, ORAL MOTION TO SEVER ARBITRATION PROVISION, AND ORAL MOTION TO STAY PROCEEDINGS PENDING APPEAL

On the 18th day of March 2004, pursuant to notice, the parties appeared, by counsel, for the continuation of the December 11, 2003 hearing on "The Served Defendants' Motion to Dismiss and to Compel Arbitration" (hereinafter Defendants' Motion"). At the March 18th hearing, the defendants' counsel also orally moved to sever the arbitration provision, and defendants' counsel also moved for a stay pending an appeal of this Court's ruling on these issues.

The Court considered the Defendants' Motion seeking to compel arbitration based on the arbitration provision contained in the Refund Anticipation Loan (hereinafter "RAL") application documents. After reviewing the various pleadings, exhibits, pertinent case law, and arguments of counsel made on December 11, 2003 and March 18, 2004, the Court denies Defendants' Motion to

compel arbitration, denies the defendants' subsequent oral motion to sever the arbitration provision, and denies the defendants' oral motion for a stay pending appeal of this Court's ruling on the above-mentioned issues. These rulings are based on the following:

FINDINGS OF FACT

1. Defendants H & R Block, Inc, H & R Block Tax Services, Inc., H & R Block Eastern Tax Services, Inc., Robert Heckert, Cynthia Lantz, Clarence E. Miller, Carla R. Lewis, and Debra Riggleman (hereinafter collectively referred to as "Defendants"), on a previous day, filed "The Served Defendants' Motion to Dismiss and to Compel Arbitration.

2. Defendants' Motion asks this Court to dismiss this action and compel arbitration according to the arbitration provisions contained in RAL applications, which were signed by the Plaintiffs. The Defendants claim that the arbitration provision is governed by the Federal Arbitration Act. 9 U.S.C. §1, et seq.

3. The Plaintiffs thereafter filed "Plaintiffs' Response to Defendants' Motion to Dismiss" on October 14, 2003, which asks this Court to find that the arbitration provisions contained in the RAL documents are unenforceable because certain provisions are unconscionable under West Virginia law.

4. The Plaintiffs claim that certain provisions of the arbitration agreement severely restrict the Plaintiffs' access to a judicial forum, but have absolutely no effect on the Defendants' rights. Plaintiffs claim that the Supreme Court of Appeals of West Virginia held that provisions similar to the ones at hand were unenforceable as unconscionable. *See State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d 265 (W.Va. 2002); *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229, 511 S.E.2d 854, (W.Va. 1998).

5. The RAL Applications from 1996 forward, but within the putative class period, contained language substantially similar to that contained in the RAL documents for the Plaintiffs in 2002, a copy of which was submitted at this hearing, and which contained the following language:

> "HB hereby agrees not to invoke its right to arbitrate an individual claim I may bring in small claims court or an equivalent court, if any, so long as the claim is pending only in that court. No class actions or joinder or consolidation of claims with other persons, are permitted without consent of the parties hereto".
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> * . * . *
>
> "Nothing in this Arbitration Provision shall be construed to prevent HB's use of offset or other contractual rights involving payment of my income tax refund or other amount on deposit with HB to pay off any RAL debts or ERO or other fees now or hereafter owed by me to HB or any other RAL Lender or ERO or third party pursuant to the Documents or similar prior documents"; and
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> "Unless a class has been or is certified in one or more of these lawsuits prior to the effective date of this Arbitration Provision and the certification has not been overturned, I acknowledge that by signing the Documents, I may be giving up my right to participate as a member of such class if HB decides to arbitrate such a claim. This means I may not be able to obtain financial or other benefits which might ultimately be paid to or conferred upon members of the class".

6. The Plaintiffs also contend that the arbitration provisions constitute adhesion contracts which contain unconscionable terms, thus making the provisions unenforceable.

7. The Plaintiffs' underlying complaint contains, among others, a claim asserted under the West Virginia Consumer Credit and Protection Act (hereinafter "WVCCPA") found in West Virginia Code, section 46A-6C-1 et seq. The Plaintiffs contend that the arbitration provisions violate the WVCCPA and specifically that the Defendant's, by presenting the RAL application to the plaintiffs, caused consumers and buyers of services to waive certain rights in violation of West Virginia Code, section 46A-6C-8. Plaintiffs argue that because

the arbitration provisions result in the Plaintiffs waiving certain rights, the provisions are void under the same statute.

8. The Defendants claim that they are not a "credit service organization" as they did not obtain an extension of credit but only transmitted the Plaintiffs' RAL application to the lending institutions. Therefore, the Defendants claim that they are not subject to the WVCCPA.

9. The Plaintiffs counter by alleging that because the Defendants negotiated and arranged the RAL's , it acted as a broker, and thus is subject to the WVCCPA.

10. It is clear from the facts that the Defendants' were responsible for presenting the RAL application to the Plaintiffs' and then transferring that application to the lending institution.

11. Based on the evidence presented, this Court finds as fact that the arbitration provisions contained in the RAL applications allow the Defendants to force potential plaintiffs into arbitration, unless the plaintiffs bring their claims in small claims court.

12. This Court additionally finds as fact that the arbitration provisions preclude any plaintiff from pursuing any class action claims he or she may have against the Defendants, or joining any other plaintiff in claims against the Defendants. If the situation arose whereby the Defendants desired that plaintiffs' claims be joined, the Defendants could allow such joinder, if neither party forced arbitration. The effect of this is that the Defendants are not subject to a class action suit unless they so desire.

13. Furthermore, this Court finds as fact that the arbitration provisions do not prevent the Defendants from pursuing certain claims against plaintiffs, even if plaintiffs desire to have such claims subject to arbitration. Specifically, the Defendants can seek a judicial forum, over plaintiffs' objections, for matters relating to collection or other contractual rights involving payment of the plaintiffs' tax refunds' or other amounts on deposit with the

Defendants. However, if plaintiffs wanted to pursue similar actions, the Defendants have the ability, under the arbitration provisions, to force the plaintiffs into arbitration.

14. The arbitration provisions at issue in this case state that "[e]ach party shall bear the expense of their respective attorney's fees, regardless of which party prevails" and if the Defendants pursue claims relating to collection or other contractual rights, the plaintiffs are responsible for the attorney's fees, collection agency fees, and court costs incurred by the Defendants in pursuing such actions.

DISCUSSION OF THE LAW

1. In resolving this motion, this Court must apply general contract law principles relating to the revocation or enforcement of any contract, not just one for arbitration. The issue of whether a contract or provision is unconscionable "is an equitable principle and . . . should be made by the Court". Syllabus pt. 1, *Troy Min. Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 346 S.E. 2d 749 (1986).

Federal Arbitration Act Implications

2. The Federal Arbitration Act (hereinafter "FAA") establishes a national policy which favors arbitration, however, the FAA provides that contracts to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exists at law or in equity for the revocation of any contract". 9 U.S.C.A. §2.

3. The Supreme Court of Appeals of West Virginia (hereinafter "WVSCA") held that the Federal Arbitration Act allows "pre-dispute agreements to use arbitration as an alternative to litigation in court . . . only when arbitration . . .[allows] a party to fully and effectively vindicate their rights". *State ex rel. Dunlap v. Berger*, 211 W.Va. 556, n.3, 567 S.E.2d at 273 n.3.

4. The WVSCA also cited a United States Supreme Court decision in stating that the existence of a large arbitration cost can preclude a litigant from vindicating rights. *Id.*, at 565, 567 S.E. 2d at 281, *citing Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90, 121 S.Ct. 513, 522, 148 L.Ed.2d 373, 383 (2000).

West Virginia Consumer Credit and Protection Act

5. The WVCCPA describes a credit services organization as:

> "a person who, with respect to the extension of credit by others and in return for the payment of money or other valuable consideration, provides, or represents that the person can or will provide any of the following services: (1) Improving a buyer's credit record, history or rating; (2) Obtaining an extension of credit for a buyer; or (3) Providing advice or assistance to a buyer with regard to subdivision (1) or (2) of this subsection.
>
> *W.Va. Code, §46A-6C-2(a).*

6. Under the West Virginia Consumer Credit and Protection Act, credit services organizations are prohibited from causing a buyer to waive a right under Article 46A of the West Virginia Code, and such waiver by a buyer is void. W.Va. Code §46A-6C-8.

7. The WVCCPA states that: "With respect to a transaction which is or gives rise to a consumer credit sale, consumer lease or consumer loan" a Court can refuse to enforce an agreement or parts of an agreement which the Court finds, as a matter of law, are unconscionable. W.Va. Code, §46A-2-121.

Unconscionable Provisions

8. The WVSCA previously decided a case in which a lending company's loan agreement contained provisions requiring arbitration, but other provisions retained for the loan company the right to a judicial forum for purposes of collection and foreclosure proceedings. *Arnold v. United Companies Lending Corp.*, 204 W.Va. 229 511 S.E.2d 854, (W.Va. 1998). The

Court noted that the WVCCPA was specifically designed to eradicate these unconscionable provisions. *Arnold*, at 234, 511 S.E.2d at 859.

9. The WVSCA found in *Arnold* that there was no evidence that the loan broker made any other loan option available to the consumer and that the relative positions of the parties were an unsophisticated, elderly consumer and a national corporate lender. *Id.*, at 236, 511 S.E.2d at 861.

10. The WVSCA also held in *Arnold* that:

> "In real life we can envisage arbitration provisions being imposed upon consumers in contract situations where consumers are totally ignorant of the implications of what they are signing, and where consumers bargain away many of the protections which have been secured for them with such difficulty at common law".
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> * . * . *
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> "Where an arbitration agreement entered into as part of a consumer loan transaction contains a substantial waiver of the borrower's rights, including access to the courts, while preserving the lender's right to a judicial forum, the agreement is unconscionable, and, therefore, void and unenforceable as a matter of law".
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> *Id.*, at 236-37, 511 S.E.2d at 861-62 (W.Va. 1998).

11. The WVSCA addressed a similar issue in *State ex rel. Dunlap v. Berger*, where the Court found arbitration provisions limiting punitive damages and class action relief to be unconscionable in the context of an insurance agreement. *Dunlap*, 211 W.Va. 549, 567 S.E.2d 265 (W.Va. 2002).

12. The WVSCA in *Dunlap* also found that the provisions limiting punitive damages and class action relief were unconscionable provisions of a adhesion contract, which did not allow for the full exercise of the plaintiff's rights. *Dunlap*, at 567, 567 S.E. 2d at 283.

13. In finding that the contract in *Dunlap* was an adhesion contract the WVSCA noted various definitions of such contracts, which included "all form contracts submitted by one party on the basis of this or noting. *Id.*, at 557, 567 S.E.2d at 273.

14. The contract at issue in *Dunlap* was a pre-printed form. *Id.* at 554, 567 S.E.2d at 270.

15. The *Dunlap* Court held that:

> "Exculpatory provisions in a contract of adhesion that if applied would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable. Syllabus pt. 2, *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d 265 (W.Va. 2002).

16. The parties in *Dunlap* stipulated that the consumer could not obtain punitive damages or class action relief in an arbitration proceeding. *Id.*, at 563, 567 S.E.2d at 271. The *Dunlap* Court found that the $8.46 insurance charge that the consumer was challenging was the type of claim that class action claims and remedies are effective at addressing and that "[c]lass actions are essential to the enforcement and effective vindication of the public purposes and protections of the underlying [consumer protection] law. *Dunlap*, at 564, 567 S.E. 2d at 279.

CONCLUSIONS OF LAW

1. The arbitration provisions contained in RAL Documents, as cited above, are one-sided provisions of non-mutuality. The provisions preserve, almost exclusively for the Defendants, the rights of offset, self-help, and a judicial forum.

2. This non-mutuality is unconscionable under the plain language of the *Arnold* decision.

3. This Court finds that the arbitration provisions at issue are exculpatory and would unconscionably impair rights that are afforded under West Virginia law, which was designed to protect the public from these types of provisions.

4. The fact that the provisions preclude plaintiff's ability to participate in a class action unless the defendants decide to not force arbitration results in a situation, similar to that in *Dunlap*, where consumers are not able to effectively pursue their state law rights.

5. The only situation in which the plaintiffs could benefit from a class action suit is where the defendants would agree to not force arbitration. Of course, the defendants would not likely allow class action claims unless it was to their benefit.

6. At the hearing on the Defendants' Motion, counsel admitted that H & R Block voluntarily joined a class action from which it had already been dismissed on a motion to compel arbitration.

7. Although the Defendants claim that the plaintiffs have the same right as the defendants, to avoid class action by forcing arbitration, this equality is transparent. It is true that both parties may have an economic incentive to allow claims to be certified under a class action suit. However, as with many class action claims, the Defendants' ability to force arbitration effectively results in an inability of many plaintiffs to pursue their claims due to costs.

8. If forced into arbitration the plaintiffs, under the arbitration provisions, would then be responsible for their own attorney fees, and attorneys do not have the added incentive of taking their case based on the potential attorney fee award. Hinging the plaintiff's right to class action relief upon the Defendants' preferences is contrary to the intent of assuring West Virginia consumers the class action relief.

9. This type of restriction on the rights of West Virginia consumers is substantially limiting to state law rights, and such provisions, in the context of this case, are therefore unconscionable under West Virginia law.

10. Block has offered no serious evidence or argument to suggest that this clause would not effectively act as an exculpatory clause, nor have they drawn this Court's attention to any exceptional circumstances that would suggest that the provisions are conscionable.

11. Realistically, it is clear from this record that the arbitration clause at issue would not permit consumers, such as the plaintiffs, to effectively vindicate their legal rights with claims of this sort.

12. While a finding that the provisions are unconscionable is enough to defeat Defendants' Motion, the Plaintiffs also allege that the arbitration provisions constitute adhesion contracts. Based on the scant representations and evidence presented, the arbitration provisions may well constitute an adhesion contract, but this Court need not reach that issue at this point. Further discovery may reveal more conclusively whether this agreement was an adhesion contract.

13. For these reasons, this Court finds that at least two provisions of the Arbitration Provision contained in the RAL documents are unconscionable and violative of West Virginia state law. These provisions are unenforceable as defined by the Supreme Court of Appeals of West Virginia. *See State ex. rel. Dunlap v. Berger*, 211 W.Va. 549, 567 S.E.2d 265 (W. Va. 2002); *Arnold v. United Companies Lending* Corp., 204 W.Va. 229, 511 S.E.2d 854 (W.Va. 1998). West Virginia law, as articulated in these two cases, provides an independent and adequate basis for revocation of any contract, including whatever contractual obligations the RAL documents created between defendants and plaintiffs.

OPINION

1. For the reasons set forth above, the agreement to arbitrate is unconscionable and is not entitled to enforcement. Accordingly, the Served Defendants' Motion to Compel Arbitration is **DENIED**.

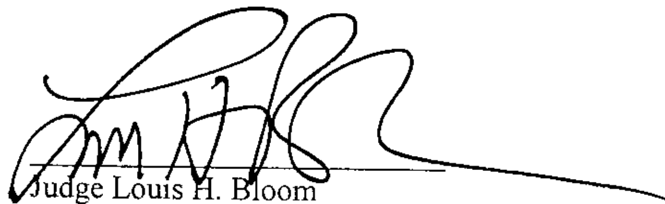
2. The Court next considered defendants' oral motion to sever the portions of the arbitration provisions deemed to be unconscionable and to enforce the remaining provisions. This Court finds that the parts of the arbitration provisions that are unconscionable are fundamental to the arbitration provisions as a whole and therefore, this Court finds that the entire arbitration provision is unenforceable and void. Defendants' oral motion to sever the arbitration provision is therefore **DENIED**.

3. The Court next considered the Defendants' oral motion to stay all proceedings pending appeal of this Court's ruling as to arbitration. After hearing the arguments of counsel, the Defendants' Motion to Stay is **DENIED**.

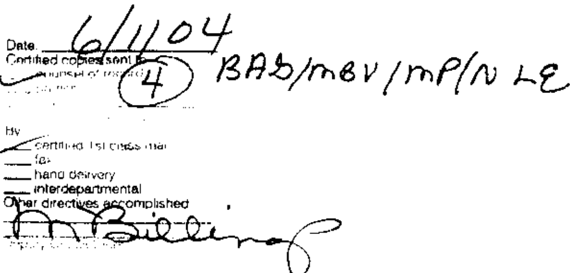
4. The objection of any party to the entry of this order is hereby noted and preserved.

5. The Clerk is **DIRECTED** to send certified copies of this Order to all counsel of record, which shall include Brian A. Glasser, Michael B. Victorson, and Michael D. Pospisil and N. Louise Ellingsworth. Copies of this Order for Mr. Pospisil and Ms. Ellingsworth shall be sent to Bryan Cave LLP, One Kansas City Place, 1200 Main Street, Suite 2500, Kansas City, Missouri, 64105-2100.

ENTER this 15 day of June 2004.



Judge Louis H. Bloom



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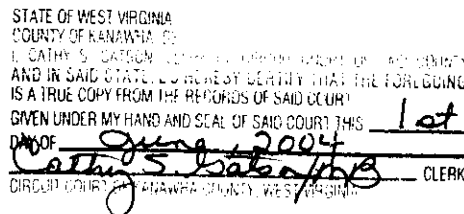

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 1st DAY OF June, 2004
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA