The Arbitration Newsletter

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(John Allen Chalk, Sr., Editor)

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas, to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]

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NO TRIAL COURT DISCRETION!

When there is "no evidence" of state law contract defenses to a valid, enforceable agreement to arbitrate[2] and the dispute is covered by the arbitration agreement scope, "the trial court has no discretion but to compel arbitration and abuses its discretion by failing to do so."[3] In this Federal Arbitration Act case, an electronic documents preparation and signing for the purchase of a new 2019 Ford F-250 truck from a dealer over a two-hour period after 5:00 o'clock, p.m. did not constitute evidence of "procedural unconscionability."

The purchasers Mark and Stephanie Garza (the "Purchasers") later filed breach of contract and DTPA claims against both the dealer and the bank who financed the purchase. Both the dealer and the bank filed a motion to compel arbitration to which the Purchasers responded with the defense of procedural unconscionability. The alleged procedural unconscionability was based on the circumstances in which (i) the dealer's finance and insurance manager prepared the sale documents on his computer in the Purchasers' presence, (ii) allowed the Purchasers to review each page of the sale documents on an iPad as the pages were generated, and (iii) obtained the Purchasers' initials on each page as reviewed on the iPad.

The motion to compel had Mark Garza's affidavit attached in which the Purchasers complained that the dealer's "active manipulation, fraud, or imposition of undue advantage" caused the Purchasers not to read the documents before signing them.[4] The Purchasers claimed that they felt rushed through the process and were not given adequate time to review the documents

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[1] Nothing in The Arbitration Newsletter is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of *The Arbitration Newsletter* is to inform generally. The application of the comments in *The Arbitration Newsletter* to specific questions and cases should be discussed with the reader's independent legal counsel. My thanks to Madeline Bergstrom, a third-year law student at Texas A&M University School of Law, for her research and drafting assistance.

[2] Nichols Ford, Ltd., et al. v. Mark Garza and Stephanie Garza, 2021 Tex. App. LEXIS 7388, *1-4 (Tex.App. – Fort Worth (Sept. 2, 2021, no pet.) ("Motor Vehicle Retail Installment Sales Contract—Simple Finance Charge (With Arbitration Provision)" and a separate, stand-alone "Arbitration Agreement.").

[3] *Id.* *9-10 and 12.

[4] *Id.* at *10.

before signing.[5] Further, the Purchasers claimed that the contract was presented to them on an iPad device, where the screen "had not fully revealed each page's contents except for the portion near their initials or signatures and that by the time they saw the full contract, they had already signed everything electronically."[6] The trial court hearing consisted only of arguments of counsel. The trial judge offered no reasons for the denial of the motion to compel.[7]

The appellate court found that the Purchasers "had the burden to prove their defense" of a procedural unconscionability claim and no jury waiver claim.[8] The Purchasers offered no evidence in the motion to compel hearing "(1) that [they] were illiterate or had any difficulty speaking, reading, or understanding English; (2) that [they] objected to the use of the iPad to sign the contracts or that the iPad on which they signed the various documents was somehow defective or unreadable; (3) that AutoNation's manager misrepresented any contract terms, refused to allow the [Purchasers] to stop and read the iPad at any point, or refused to allow them to scroll through the documents on the iPad at their leisure; or (4) that there were any elements of fraud, imposition, trick, or artifice in the [Purchasers] signing the documents."[9] On its own, "unequal bargaining power does not establish grounds for invalidating an arbitration" and "the fact that a person does not read what he signs does not—by itself—render the agreement unconscionable."[10]

The Fort Worth Court of Appeals reversed and remanded for further proceedings.[11]

OBSERVATIONS

1. A trial court denial of a motion to compel arbitration is subject to an interlocutory appeal.[12]

2. The motion to compel arbitration hearing, although a summary procedure, may involve both factual and legal issues (even including a jury trial).[13]

3. The drafter of an arbitration agreement should consider including a jury waiver to prevent making the motion to compel hearing more than a summary proceeding.[14]

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[5] *Id.* at *6.
[6] *Id.* at *6-7.
[7] *Id.* at *8.
[8] *Id* at *9, 12-13.
[9] *Id.* at *11.
[10] *Id.* at *10-11.
[11] *Id.* at *9-10 ("If a valid arbitration agreement is presented, if the claims at issue fall within its scope, and if the opponent to arbitration fails to prove any defense to enforcement, then the trial court has no discretion but to compel arbitration and abuses its discretion by failing to do so.").
[12] *See* Tex. Civ. Prac. & Rem. §§171.098; 51.016; 9 U.S.C. §§4 and 16.
[13] *See* Tex. Civ. Prac. & Remedies §§51.016 and 171.021(b); and 9 U.S.C. §§ 4 and 16.
[14] Nichols Ford, 2021 Tex. App. LEXIS 7388, *2-4 and 12-13 (Dealer and bank had no burden of proof that jury waiver was knowingly and voluntarily executed because of no evidence of fraud.).

4. There are two different standards of review in a motion to compel hearing – deferential review of the trial court's findings of fact and de novo review of the trial court's conclusions of law.[15]

5. An effective defense of procedural unconscionability should provide evidence of fraud, deceit, misrepresentation, and lack of assistance for the opposing party's limited understanding of the applicable documents.[16]

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[15] *Id.* at *9.
[16] *Id.* at *10-11.