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Resisting Equal Footing: Did the Wisconsin Supreme Court Disguise an Assault on Arbitration

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Resisting Equal Footing: Did the Wisconsin Supreme Court Disguise an Assault on Arbitration?

Wisconsin Auto Title Loans, Inc. v. Jones[1]

I. INTRODUCTION

It is well settled that state courts may apply state contract principles when determining if an arbitration clause is enforceable;[2] however, states are prohibited from enforcing laws that treat arbitration agreements differently than other contracts.[3] Placing arbitration agreements on an equal footing with other contracts results from judicial preference for arbitration. When a court overreaches to find an arbitration agreement to be procedurally and substantively unconscionable, the overreaching may stem from the court's erroneous preference for adjudication over arbitration. The issue becomes more apparent when the court had the option to enforce the agreement without the unconscionable provision, yet chose not to enforce the entire contract. In *Wisconsin Auto Title Loans, Inc.*, the Wisconsin Supreme Court erred by ignoring the FAA's policy of treating arbitration and adjudication as equally legitimate fora.[4]

II. FACTS AND HOLDING

On December 6, 2001, Jones, the borrower, entered into an $800 loan agreement with Wisconsin Auto Title Loans (WATL) to pay for bills and living expenses.[5] As a condition to the agreement, he delivered a key and title to his automobile as security,[6] purchased a one-year membership in WATL's "Continental Car Club," and paid a filing fee for the auto title.[7] The loan agreement required Jones to repay the full balance of the loan at 300% interest by January 3, 2002.[8] In addition, the loan agreement relegated all of the borrower's claims to arbitration, whereas WATL reserved the right to obtain a deficiency judgment in circuit court.[9] Jones consented to the terms by signing the loan agreement.[10]

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1. 714 N.W.2d 155 (2006).
2. Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987).
3. Doctor's Assoc. v. Casarotto, 517 U.S. 681, 682 (1996).
4. *See* Rodriguez de Quijas v. Shearson/American Express, Inc, 490 U.S. 477, 481 (1989).
5. *Jones*, 714 N.W.2d at 160. The "loan agreement" consisted of a promissory note and security agreement granting the borrower the $800 loan.
6. *Id.* A 1992 Infiniti. *Id.*
7. Wis. Auto Title Loans, Inc. v. Jones, 696 N.W.2d 214, 216 (Wis. Ct. App. 2005).
8. *Jones*, 714 N.W.2d at 160. $1,197.08, which includes $800 original loan amount, $243.08, and a $154 payment for the money Jones borrowed from WATL to pay its fees. *Id.*
9. *Id.* The arbitration clause required arbitration on all claims except for WATL's right to recover the secured collateral in a replevin action.

> BORROWER and LENDER agree that the transactions contemplated by, and occurring under, this Agreement involve "commerce" under the Federal Arbitration Act (FAA) (9 U.S.C. §§ 1 et.

Jones made a number of partial payments on the loan beginning in January 2002; however, he failed to pay the full balance on January 3, 2002.[11] As a result, WATL served him with a notice of default on April 22, 2002.[12] The notice stated that interest would continue to accrue on the loan, and full payment was required by May 6, 2002, in order to avoid litigation and repossession of the car.[13] Jones failed to settle the amount due, so WATL filed an action in circuit court for "small claims-replevin" on May 10, 2002, to recover the automobile under Wis. Stat. § 425.205.[14]

Jones' answer admitted that a loan agreement existed between the parties but denied the amount financed, interest, and balance due.[15] He also counterclaimed on behalf of himself and a class of like-customers of WATL. The counterclaim alleged that WATL willfully and knowingly hid transaction costs from its customers, failed to properly disclose information concerning interest and finance charges, failed to properly advise customers of rights and obligations before commencing collection practices, employed unconscionable loan rates and charges, and used an unconscionable loan agreement.[16]

In response, WATL first moved to compel arbitration of the counterclaims pursuant to the parties' contract, the Federal Arbitration Act, and Wis. Stat. § 788.03.[17] Second, WATL moved to stay litigation of the counterclaims pending arbitration.[18] However, WATL did not move to stay the replevin litigation pending arbitration, exercising its belief that under the loan agreement the replevin action was not subject to arbitration.[19] Jones objected to the motions arguing that the loan agreement allowed for litigation of issues relating to defaults on the loan. Jones later asserted that the arbitration clause was unenforceable.[20]

The circuit court found that the arbitration clause was unconscionable because it was one-sided and a result of unequal bargaining power, and it denied

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seq.). Any and all disputes, controversies or claims (collectively, "claims" or "claim"), whether preexisting, present or future, between the BORROWER and LENDER, or between BORROWER and any of LENDER's officers, directors, employees, agents, affiliates, or shareholders, arising out of or related to this Agreement (*save and except the LENDER's right to enforce the BORROWER's payment obligations in the event of default, by judicial or other process, including self-help repossession*) shall be decided by binding arbitration under the FAA. (emphasis added).

Id. at 160-61.

10. *Id.* at 161.

11. *Id.*

12. *Id.*

13. *Id.* at 161-62. The notice informed Jones that WATL held "The right to commence action for your entire outstanding balance and/or for repossession of your motor vehicle securing the note without further notice, demand, or right to cure." *Id.*

14. *Id.* at 162. "[A] creditor seeking to obtain possession of collateral or goods subject to a consumer lease shall commence an action for replevin of the collateral or leased good." WIS. STAT. § 425.205 (2005).

15. *Jones*, 714 N.W.2d at 162.

16. *Id.*

17. *Id.* "The party aggrieved by the alleged failure, neglect or refusal of another to perform under a written agreement for arbitration may petition any court of record having jurisdiction of the parties or of the property for an order directing that such arbitration proceed as provided for in such agreement." WIS. STAT. § 788.03 (2005).

18. *Jones*, 714 N.W.2d at 162.

19. *Id.*; *supra*, note 9.

20. *Jones*, 714 N.W.2d at 163.

WATL's motion to compel arbitration without ever holding an evidentiary hearing.[21] The court of appeals affirmed the circuit court's holding.[22] The Wisconsin Supreme Court granted review and found the arbitration clause to be both substantively and procedurally unconscionable.[23] In affirming the circuit court's order, the supreme court held that when enough factual evidence exists to indicate not only that the parties lack a true meeting of the minds, but also that the terms of the clause are too one-sided, the arbitration clause is rendered unenforceable.[24]

III. LEGAL BACKGROUND

A. Judicial Interpretation of Arbitration Clauses

Although, today, arbitration agreements permeate nearly every area of legal practice, they have not always been held in such high regard. Scholars have long pointed out that change in the Supreme Court's treatment of arbitration clauses required overcoming a deeply ingrained judicial attitude that arbitration was inferior to adjudication.[25]

The last case employing what has become known as "judicial hostility" towards arbitration was *Wilko v. Swan*.[26] There, the Supreme Court weighed the right of individuals to select arbitration over adjudication against the Congressional intent of the Securities Act to protect investors' rights.[27] The Court decided that Congressional intent was best supported by prohibiting waiver of a judicial forum even though the parties agreed to arbitrate.[28]

The view adopted by the Court struggled soon after *Wilko*.[29] Arbitration began gaining favor four years later, when the Court treated arbitration preferentially in labor-management cases.[30] The pro-arbitration movement gathered increasing momentum when commercial arbitration agreements garnered the same treatment as the labor-management cases.[31] Finally, the Supreme Court overruled *Wilko*, effectively cementing a pro-arbitration position as a legitimate alternative to the judiciary.[32]

Because arbitration conjures preferential treatment, the Court has gone to great lengths to ensure uniform use. Traditionally, the courts only applied the Federal Arbitration Act (FAA) to federal arbitration cases; however in 1984, the

21. *Id.* at 162 n.8.
22. *Id.* at 163.
23. *Id.* at 178.
24. *Id.* at 178. Justice Roggensack dissented on the grounds that, "there [were] not sufficient facts of record to support the majority opinion's conclusion that the arbitration provision of the contract [was] procedurally unconscionable." *Id.* at 179.
25. LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS 508-09 (3rd ed. 2005).
26. 346 U.S. 427 (1953).
27. *Id.* at 438.
28. *Id.*
29. RISKIN, *supra* note 25, at 509.
30. *Id.* (citing United Steelworkers v. American Mfg. Co., 363 U.S. 564; United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574; United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593).
31. *Id.*
32. *Id.* (citing Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989)).

Supreme Court mandated in *Southland Corp. v. Keating*[33] that the FAA applies to state arbitration clauses.[34] The FAA applies to "a written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction."[35] The Court interpreted the FAA as manifesting Congressional intent to provide a uniform set of arbitration laws in federal and state courts and to allow parties to choose an arbitration forum over a judicial forum.[36] Although the FAA seems to revoke state authority all together, states retain some authority in enforcing arbitration clauses.[37] Specifically, state contract law determines whether the arbitration clause itself is enforceable by applying state contract laws to the arbitration provision.[38]

In *Allied-Bruce Terminix Companies, Inc. v. Dobson*,[39] the Supreme Court broadened the scope of the FAA to place arbitration clauses on "the same footing as a contract's other terms."[40] While states could invalidate arbitration agreements by applying state contract law, they could not apply that contract law differently to an arbitration provision and to the contract's other terms.[41]

Doctor's Associates v. Casarotto[42] extended *Allied-Bruce Terminix Companies* and reigned in the attempts of states to invalidate arbitration clauses. A franchisee challenged a franchisor's arbitration agreement, and Montana's highest court ruled that the agreement was unenforceable under a state statute.[43] The state statute required agreements subject to arbitration to be accompanied by a front page notice which was underlined and in capital type.[44] While affirming the rights of states to invalidate arbitration clauses that fail under state contract principals, the Supreme Court had to decide whether state statutes that treated arbitration clauses differently from other contracts conflicted with the FAA.[45] The Court held that the state statute did conflict with the FAA, pointing out that special requirements for arbitration clauses do not conform with the FAA's requirements that such laws "[arise] to govern issues concerning the validity, revocability, and

33. 465 U.S. 1 (1984).
34. *Id.* at 10.
35. 9 U.S.C. § 2 (2000).
36. *Keating*, 465 U.S. at 10.
37. Perry v. Thomas, 482 U.S. 483, 492, n.9 (1987).
38. *Id.*

> [S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract arbitrate is at issue does not comport with this requirement of [9 U.S.C.] § 2... A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.

Id.

39. 513 U.S. 265 (1995).
40. *Id.* at 275.
41. *Id.* at 281.
42. 517 U.S. 681 (1996).
43. *Id.* at 683-84.
44. *Id.* at 681.
45. *Id.*

enforceability of contracts generally."[46] Thus, the FAA preempted the Montana statute.[47] The effect of *Casarotto* was to again place arbitration agreements on equal footing with other contracts.[48]

Favor for arbitration clauses forces those challenging them to overcome significant burdens. In *Green Tree Financial Corp.-Alabama v. Randolph*,[49] a purchaser of a mobile home brought a judicial action against her lender under two federal statutes.[50] The purchaser claimed that the arbitration agreement failed to state which party would bear the expense of arbitration, and she would have to forego her claims against the lender for financial reasons if she was required to pay costs.[51] The lower court granted the lender's motion to compel arbitration, refusing to recognize the purchaser's claim that the forum discriminated against her due to her lack of resources.[52] The Supreme Court held that when a party claims that an arbitration clause is invalid because of prohibitive costs, the party holds the burden of proving the likelihood of incurring the costs.[53] The purchaser failed to prove that she would be likely to bear the expense of arbitration, so the Court compelled arbitration.[54]

As noted above, state contract law determines questions of arbitration clause validity.[55] Wisconsin courts recognize that any questionable enforcement of an arbitration provision in the state should be decided in favor of arbitration.[56] The state courts have also only allowed application of state contract law if it "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally."[57]

B. Procedural Unconscionability under Wisconsin Law

When a contract or clause is found to be unconscionable, Wisconsin requires the court to decide among three options.[58] First, the entire agreement can be deemed unenforceable.[59] Second, the agreement can be enforced without the unconscionable clause.[60] Finally, the court may limit the unconscionable provi-

46. *Id.* at 686-87.
47. *Id.* at 687.
48. *Id.* at 682.
49. 531 U.S. 79 (2000).
50. *Id.* at 79-80.
51. *Id.*
52. *Id.* at 81.
53. *Id.* at 91-92. To invalidate the agreement on that basis would undermine the "liberal federal policy favoring arbitration agreements." Similarly, we believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs. *Id.*
54. *Id.*
55. Perry v. Thomas, 482 U.S. 483, 492, n.9 (1987).
56. Wis. Auto Title Loans v. Jones, 696 N.W.2d 214, 218 (Wis. Ct. App. 2004) (citing Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983)).
57. *Perry*, 482 U.S. at 492.
58. WIS. STAT. § 402.302(1) (2005).
59. *Id.*
60. *Id.*

sion enough to prevent an unconscionable result.[61] The court determines unconscionability at the moment when the contract was formed.[62]

Unconscionability can be broken down into two elements, substantive unconscionability and procedural unconscionability. Substantive unconscionability refers to oppressive terms in a contract.[63] Procedural unconscionability refers to unfair surprise.[64] Wisconsin defines unconscionability as "the absence of a meaningful choice on the part of one party (procedural), together with contract terms that are unreasonably favorable to the other party (substantive)."[65] Like many states, Wisconsin reasons that in order to find a contract unconscionable, the court must find a certain amount of both substantive and procedural unconscionability.[66]

Procedural unconscionability "relates to factors bearing on the meeting of the minds of the contracting parties."[67] While the determination is fact based, the Wisconsin courts have created a list of factors to be considered when determining if procedural unconscionability exists between contracting parties. Those factors include age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alteration in the printed terms were possible, and whether there were alternative sources of supply for the goods in question.[68]

Wisconsin courts have created certain guidelines for finding procedural unconscionability. In *Discount Fabric House of Racine, Inc. v. Wisconsin Telephone Company*,[69] the Wisconsin Supreme Court ruled that a contract was procedurally unconscionable.[70] A drapery business signed an advertising contract with the local telephone book publisher to run a quarter-page display ad in the yellow pages.[71] When the publisher negligently excluded the business name from the ad, the business sued for damages even though their contract absolved the publisher from any liability for errors or omissions.[72] After reviewing the factual findings, the court ruled the contract to be procedurally unconscionable.[73] First, there was no alternative advertising source to seek out because all yellow pages advertising that year used the same form contract.[74] Second, alteration of the terms was impossible because none of the salesmen held authority to change terms and no negotiation with advertisers had ever taken place regarding price or terms.[75]

The Wisconsin court of appeals held another agreement to be procedurally unconscionable in *Leasefirst v. Hartford Rexall Drugs*.[76] A store owner signed a

61. *Id.*
62. *Id.*
63. ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 29.4 (Joseph M. Perillo ed., LexisNexis 2002).
64. *Id.*
65. Leasefirst v. Hartford Rexall Drugs, Inc., 483 N.W.2d 585, 587 (1992) (citing Disc. Fabric House of Racine, Inc. v. Wis. Tel. Co., 345 N.W.2d 417, 424 (1984)).
66. *Disc. Fabric House,* 345 N.W.2d at 425.
67. Pietroske, Inc. v. Globalcom, Inc., 685 N.W.2d 884, 887 (2004).
68. *Disc. Fabric House,* 345 N.W.2d at 425.
69. 345 N.W.2d 417 (1984).
70. *Id.* at 425.
71. *Id.* at 418.
72. *Id.*
73. *Id.* at 426.
74. *Id.* at 418.
75. *Id.*
76. 483 N.W.2d 585 (1992).

forum selection clause in connection with the purchase of a video review machine.[77] After an evidentiary hearing to determine the facts, the court found procedural unconscionability because the clause was not explained or mentioned to the purchaser, the clause was written in small print, there was a lack of negotiation, and the salesman failed to tell the purchaser that there was a third party capable of exercising the forum selection clause.[78]

Pietroske, Inc. v. Globalcom, Inc.[79] also involved a motion to enforce a forum selection clause against a purchaser, but the court specifically distinguished this case from *Leasefirst*.[80] While *Pietroske* also involved a representative of a seller who failed to flag the clause for the purchaser's attention, the purchaser was an experienced businessman and held sole authority to sign contracts on behalf of his corporation.[81] Additionally, the contract was written in plain English, contained a warning of the terms and conditions, and the clause was not written in smaller print.[82] Due to these differences, the court held that the forum selection clause was not procedurally unconscionable.[83]

Wisconsin courts have specifically addressed adhesion contracts' relationship to procedural unconscionability. Contracts of adhesion are standardized, non-negotiable agreements that resemble "not [an agreement] of haggle or cooperative process but rather of a fly and flypaper."[84] State law defines some of adhesion contracts' parameters. According to *Katze v. Randolph & Scott Mutual Fire Insurance Company*,[85] Wisconsin defines adhesion contracts as those on a "take it or leave it" basis.[86] Most adhesion contracts are standard form agreements, but not every standard form agreement is an adhesion contract.[87] For example, a standard form contract allows the parties to negotiate certain terms, but an adhesion contract does not.[88] The essence of an adhesion contract is that the non-drafting party is left with the choice of either accepting the agreement as it is, or not forming a contract at all.[89] This can lead to procedurally unconscionable contracts where the parties do not have equal bargaining power and experience in contracting.[90] The party with the weaker bargaining position accepts the contract terms out of lack of choice because, for example, the contract offeror has little competition or the weaker party cannot comparatively shop.[91]

Deminsky v. Arlington Plastics Machinery[92] applied the *Katze* adhesion contract definition to a case determining unconscionability.[93] In *Deminsky*, a business

77. *Id.* at 586.
78. *Id.* at 588.
79. 685 N.W.2d 884 (Wis. Ct. App. 2004).
80. *Id.* at 888.
81. *Id.* at 889.
82. *Id.* at 888.
83. *Id.*
84. ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1.4 (Joseph M. Perillo ed., West Publ'g 1993) (citing Arthur Leff, *Contract as a Thing*, 19 AM. U. L. REV. 131, 143 (1970)).
85. 341 N.W.2d 689 (1984).
86. *Id.* at 691.
87. *Id.*
88. *Id.*
89. *Id.* at 692.
90. *Id.*
91. *Id.*
92. 657 N.W.2d 411 (2003).

purchasing a snow fence grinder agreed to indemnify the seller for any injury caused by the machine.[94] The purchaser argued that the indemnity clause was an adhesion contract and unconscionable, but the court disagreed.[95] The court observed that the purchaser had alternative dealers available from which to purchase.[96] The court also deferred to a party's right to make choices among sellers.[97] Deals should not be declared unconscionable just because the purchaser dislikes the terms.[98] Finally, the court distinguished *Discount Fabric* where the purchasers of the advertisement had no alternative choices for advertising to people in the telephone book.[99]

C. *Burden of Proof*

Wisconsin places the burden of proof upon the plaintiff in most cases.[100] A trial court's findings of facts are presumed to be valid unless the reviewing court deems them clearly erroneous as contrary to the great weight and clear preponderance of the evidence.[101] Specific to contract law, the burden of proof is placed upon the party claiming that a clause is unenforceable.[102]

In *Datronic Rental Corporation v. DeSol, Inc.*,[103] the court held that evidentiary hearings are required to determine questions of unconscionability because such questions require a law and fact analysis.[104] In *Datronic*, a lessee challenged the validity of a forum selection clause, on unconscionability grounds.[105] However, the court held that there was no evidence to support unconscionability because no evidentiary hearing took place.[106] Other courts have cited *Datronic*'s requirement for an evidentiary hearing in unconscionability cases.[107]

There are some circumstances in which courts may rely on facts without holding an evidentiary hearing. First, any allegations not denied in a party's answer are deemed admitted.[108] Second, a court may rely on facts agreed upon by

93. *Id.*

94. *Id.* at 414.

95. *Id.* at 423-24. The court framed the question of unconscionability by way of an adhesion contract in terms of substantive unconscionability. A better analysis would have focused on procedural unconscionability.

96. *Id.* at 424.

97. *Id.*

98. *Id.*

99. *Id.* (citing Disc. Fabric House of Racine, Inc. v. Wis. Tel. Co., 345 N.W.2d 417, 424 (1984)).

100. Household Util., Inc. v. Andrews Co., 236 N.W.2d 663, 667 (1974). "The plaintiff has the burden, in most cases, to present facts which will support his claim to relief." *Id.*

101. *Id.*

102. Wassenaar v. Panos, 331 N.W.2d 357, 361 (1983).

103. 474 N.W.2d 780 (1991).

104. *Id.* at 782.

105. *Id.*

106. *Id.*

107. *See* Leasefirst v. Hartford Rexall Drugs, Inc., 483 N.W.2d 585, 587 (1992) ("An evidentiary hearing is required to enable the court to make the necessary factual findings to support a conclusion that a clause is unconscionable."); Kohler Co. v. Wixen, 555 N.W.2d 640, 646 (1996) ("An evidentiary hearing was held on this matter which concluded that the clause was not procedurally unconscionable.").

108. WIS. STAT. § 802.02(4) (2005).

both parties.[109] Third, a court can take judicial notice of facts of "verifiable certainty."[110] Finally, the court can make reasonable inferences from the facts of record.[111] Wisconsin authority also suggests that a party can waive its right to an evidentiary hearing if it does not object to inferred factual findings in its main brief.[112]

In *Hedtcke v. Sentry Ins. Co.*,[113] the Wisconsin Supreme Court defined the boundaries of the circuit courts' discretion in terms of making reasonable inferences of the facts.[114] The court held:

> The trial court must undertake a reasonable inquiry and examination of the facts as the basis of its decision. The exercise of discretion must depend on facts that are of record or that are reasonably derived by inference from the record and the basis of that exercise of discretion should be set forth.[115]

As a result, the court established requirements for reversing circuit courts on abuse of discretion grounds, including reversal if "facts of record fail to support the circuit court's decision."[116]

Although the courts have ruled that facts may be "reasonably inferred" from the record, a precise definition of what constitutes "reasonable" does not exist; however, Wisconsin courts have created some guidelines. In *County of Dane v. McManus*,[117] an appellate court could not reasonably infer facts alleged by a lawyer in his oral argument because those facts were not present in the trial court's record.[118] In *Merco Distributing Corporation v. Commercial Police Alarm Company, Inc.*,[119] the Wisconsin Supreme Court reversed a trial court finding based upon facts that could not be reasonably inferred from the record.[120] The court reasoned that a judgment cannot be based on "conjecture, unproved assumptions, or mere possibilities."[121] Finally, *Wisconsin State Employees Union v. Henderson*[122] warned appellate courts not to engage in fact finding.[123] Trial courts hold the responsibility of developing the factual record, so motions presented at the

109. State v. Lombard, 678 N.W.2d 338, 345 (Wis. Ct. App. 2004).
110. Fringer v. Venema, 132 N.W.2d 565, 569-70 (1965).
111. Hedtcke v. Sentry Ins. Co., 326 N.W.2d 727, 732 (1982) (citing Howard v. Duersten, 260 N.W.2d 274 (1977)).
112. Swartwout v. Bilsie, 302 N.W.2d 508, 512, n.2 (Wis. Ct. App. 1981). The court of appeals stated that it will not "as a general rule, consider issues raised by appellants for the first time in a reply brief."
113. 326 N.W.2d 727 (1982).
114. *Id.* at 732.
115. *Id.* (quoting Howard v. Duersten, 260 N.W.2d 274, 276 (1977)).
116. *Id.* The circuit court will also be reversed if it fails to exercise its discretion or applies the wrong legal standard. *Id.*
117. 198 N.W.2d 667 (1972).
118. *Id.* at 674.
119. 267 N.W.2d 652 (1978).
120. *Id.* at 655.
121. *Id.* (quoting Schwalbach v. Antigo Electric & Gas, Inc., 135 N.W.2d 263, 265 (1965)).
122. 317 N.W.2d 170 (1982).
123. *Id.* at 171 (citing Barrera v. State, 298 N.W.2d 820, 826 (1980); Wurtz v. Fleishman, 293 N.W.2d 155, 159, n.3 (1980); and Rohl v. State, 292 N.W.2d 636, 640 (1980)).

appellate level requiring additional fact finding must be remanded to the trial court.[124] Fact finding is beyond appellate courts' jurisdiction.[125]

IV. INSTANT DECISION

In *Wisconsin Auto Title Loans, Inc. v. Jones*,[126] the Wisconsin supreme court considered whether an arbitration clause was unconscionable, and therefore, unenforceable.[127] The court reviewed the factual findings of the trial court under a clearly erroneous standard.[128] This standard allows reversal only when the findings are against the great weight and clear preponderance of the evidence.[129]

The court began its analysis by establishing the basic laws determining whether an arbitration clause is unconscionable.[130] First, parties are free to contract without government interference.[131] Second, arbitration provisions are presumed valid under Wisconsin law, but may be invalidated for reasons applicable to all contracts.[132] Third, only agreements that display both procedural and substantive unconscionability are invalid on unconscionability grounds.[133] Finally, the burden of proof lies with the party seeking to invalidate a contract provision.[134]

Next, the court discussed unconscionability.[135] Unconscionability is determined on a case-by-case basis by determining whether the clause has a sufficient quantum of procedural and substantive unconscionability.[136] The more procedural unconscionability that exists, the less substantive unconscionability that is required, and vice versa.[137] Procedural unconscionability relates to the formation of the contract and whether the parties had a true meeting of the minds.[138] Substantive unconscionability refers to the fairness of the contract provision itself.[139]

An evidentiary hearing was not required to determine procedural unconscionability because the trial court record had sufficient facts from which to draw reasonable inferences.[140] Additionally, WATL waived its objection to the lack of an evidentiary hearing by not raising the issue until its reply brief.[141] The court used reasonable inferences from the facts of record to determine procedural unconscionability.[142]

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124. *Id.* at 171-72.
125. *Id.* 172.
126. Wis. Auto Title Loans, Inc. v. Jones, 714 N.W.2d 155 (2006).
127. *Id.* at 159.
128. *Id.* at 163.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 163-64.
133. *Id.* at 164.
134. *Id.*
135. *Id.* at 164-65.
136. *Id.* at 165.
137. *Id.*
138. *Id.*
139. *Id.* at 166.
140. *Id.* at 167-68, 171.
141. *Id.* at 167.
142. *Id.* at 167-68.

WATL and Jones entered into the agreement with unequal bargaining power because WATL was experienced in making loans and Jones was indigent.[143] Jones' petition for fee waiver to the circuit court and his willingness to borrow money from WATL at such disadvantageous terms evidenced his indigence.[144] He also lacked an alternative means of obtaining a loan because the contract warned him to go elsewhere if he could find a better interest rate.[145] The court also found the agreement to be an adhesion contract.[146]

The arbitration clause was procedurally unconscionable because the parties did not achieve a voluntary meeting of the minds.[147] Because the arbitration provision was an adhesion contract and Jones had no alternative means of obtaining credit, he only entered into the contract as a result of his unequal bargaining position.[148]

The court next considered whether the contract was substantively unconscionable.[149] The contract gave WATL a significant advantage over Jones by allowing itself the right to adjudicate self-help repossession or enforcement of Jones' payment obligations in the event of default.[150] This provision was unfair because it effectively allowed adjudication of all WATL's claims against Jones.[151] That meant WATL could choose its forum while Jones was limited to arbitration.[152] The court found the arbitration clause to be substantively unconscionable due to its extreme one-sidedness in favor of WATL.[153]

Finally, the court concluded that the FAA did not preempt state law in this matter because states apply their own contract law to determine the enforceability of arbitration clauses.[154] Wisconsin contract law was determined not to single out arbitration clauses in any way.[155]

In the dissenting opinion, Justices Roggensack and Wilcox staunchly disagreed with the majority's analysis of procedural unconscionability because of the lack of an evidentiary hearing.[156] Because the facts used to establish procedural unconscionability were not uncontested, stipulated, admitted by the pleadings, or developed in an evidentiary hearing, the admission of those facts was clearly erro-

143. *Id.* at 169.
144. *Id.*
145. *Id.* at 170.
146. *Id.* In order to combat future procedural unconscionability findings, WATL's lawyers, including Ed Heiser, added a clause into its contract that allowed the borrower to rescind the contract within five days of signing. The borrower now has a reasonable time to investigate or contemplate the agreement. This way, the contract is no longer on a "take-it-or-leave-it" basis, and thus is not an adhesion contract. While this seems like a detriment incurred by WATL as a reaction to the instant decision, it actually has very little impact on business because borrowers obtaining title loans are very unlikely to rescind the agreement. Memorandum from Edward J. Heiser, Jr., Attorney, Whyte Hirschboeck Dudek S.C. (Sept. 29, 2006) (on file with author).
147. *Id.* at 171.
148. *Id.*
149. *Id.* at 171.
150. *Id.* at 172.
151. *Id.*
152. *Id.*
153. *Id.* at 173. As a result of this ruling, WATL changed its contract to bind both parties to arbitration without reserving the right to adjudicate for itself. Heiser, *supra* note 146.
154. *Id.* at 176.
155. *Id.*
156. *Id.* at 179.

neous.[157] By assuming the facts from the record, the court shifted the burden of proof from Jones to WATL and failed to hold the circuit court accountable for not performing its fact-finding duty.[158]

V. COMMENT

A. How the Court Should Have Ruled on Procedural Unconscionability

Wisconsin Auto Title Loans indicates that the court may assume material facts from the record. These facts can be used to satisfy the procedural element of unconscionability without ever holding an evidentiary hearing. The court erred in two respects. First, fairness required an evidentiary hearing. WATL's interest in a fair trial is just as important as Jones' interest. Second, the assumed facts do not warrant a finding of procedural unconscionability. The court stretched beyond Wisconsin precedent to hold there was procedural unconscionability.

First, the trial court should have held an evidentiary hearing, and the appellate courts should not have relied so heavily on assumed facts from the record. Assuming some facts from the record does make sense in situations where a fact is obvious and holding a hearing would waste time and resources; however, it is inequitable to remove the claimant's burden of proof by assuming all of the facts necessary to establish the claim. Wisconsin courts do not allow appellate courts to find facts, and, therefore, appellate courts are required to defer to trial courts' findings.[159]

A review of the assumed facts reveals that they do not prove procedural unconscionability because they rested upon unproved assumptions and conjecture.[160] For example, the court assumed that Jones had no bargaining power because he was seeking a loan at such a high rate;[161] however, an evidentiary hearing might have revealed that there were alternative means of obtaining a better loan. Determining Jones had no alternatives without an evidentiary hearing is a dangerous assumption considering the court found procedural unconscionability based on the parties' unequal bargaining power.[162]

The supreme court essentially handcuffed WATL by refusing to consider the request it raised in its reply brief for an evidentiary hearing, especially after the trial court failed to perform its duty to hold an evidentiary hearing.[163] The lack of a hearing initially advantaged WATL, since the duty to prove the facts to render unconscionability rested with Jones. WATL could not anticipate the court's broad factual assumptions that removed Jones' burden of proof. WATL relied on prece-

157. *Id.* at 181 (citing Schreiber v. Physicians Ins. Co. of Wis., 588 N.W.2d 26, 30 (1999)).

158. *Id.* Justices Butler, Jr., and Crooks concurred with the opinion. The Justices called for legislative action to prohibit predatory lending. They contended that a 300 percent interest rate on a short-term loan was unreasonable, especially considering the financial plight of the consumers who seek such loans. Predatory lending drives those in need into even deeper dire straights and subjects them to a "perpetual debt treadmill," where the high rates charged to the consumer make it difficult for the borrower to repay the loan. *Id.* at 178-79.

159. Fringer v. Venema, 132 N.W.2d 565, 569-70 (1965).

160. Schwalbach v. Antigo Elec. & Gas, Inc., 135 N.W.2d 263, 265 (1965).

161. Wis. Auto Title Loans v. Jones, 714 N.W.2d at 169-70.

162. *Id.* at 171.

163. Swartwout v. Bilsie, 302 N.W.2d 508, 512, n.2 (Wis. Ct. App. 1981).

dent that required evidentiary hearings for cases deciding unconscionable contract provisions.[164]

The Wisconsin Supreme Court protected judicial failure at the trial court level. The trial court had a duty to "undertake a reasonable inquiry and examination of the facts as the basis of its decision."[165] The trial court should have understood the need for an evidentiary hearing due to the factual nature of unconscionability cases. When an element in a cause of action is fact-based like procedural unconscionability, holding an evidentiary hearing is the only logical practice.[166] Courts should all agree that having adequate information is essential in order to produce an accurate opinion.[167] In spite of this gross error, a hearing was not granted because the courts do not "as a general rule, consider issues raised by appellants for the first time in a reply brief."[168] The court prejudiced WATL as a result of trial court error. WATL was subjected to a severe disadvantage because it essentially assumed the burden of proof from Jones when the court refused to require an evidentiary hearing. Jones never had to prove anything.

After failing to require an evidentiary hearing, the court erred a second time by deviating from Wisconsin procedural unconscionability precedent. Unconscionability has been found when language was written in small print, a clause was not explained or mentioned, there was a lack of negotiation, and a material fact was withheld.[169] In the instant decision, however, Jones was well aware of the arbitration provision, and it was conspicuously written.[170] All material facts were disclosed.[171] In fact, he was warned to go elsewhere if he could qualify for a more favorable loan.[172] The difference is that he was unable to negotiate the terms of the contract. The non-negotiability of the contract is not dispositive.

In *Discount Fabric House of Racine, Inc. v. Wisconsin Telephone Co.*,[173] an adhesion contract was used to waive the liability of a phone company if it failed to properly advertise a business in the phone book. The agreement was ruled unconscionable because *Discount Fabric* had no alternative source for phone book advertising.[174] The instant case is distinguishable because, even though Jones had no ability to negotiate, he could have gone to another lender.

The present case is similar to the facts in *Deminsky v. Arlington Plastics Machinery*.[175] Here too, Jones could have gone to alternative dealers, and the court should have deferred to his right to freely contract. The fact that Jones did not like the contract's terms should not trump his right to enter into those terms. The court's assumption that Jones "lacked a meaningful, alternative means to obtain a more favorable loan" is questionable considering the lack of facts suggesting that

164. Datronic Rental Corp. v. DeSol, Inc., 474 N.W.2d 780, 782 (1991); Leasefirst v. Hartford Rexall Drugs, Inc., 483 N.W.2d 585, 587 (1992); Kohler Co. v. Wixen, 555 N.W.2d 640, 646 (1996).
165. Hedtcke v. Sentry Ins. Co., 326 N.W.2d 727, 732 (1982) (quoting Howard v. Deuersten, 260 N.W.2d 274, 276 (1997)).
166. *Leasefirst*, 483 N.W.2d at 587.
167. *Id.*
168. Wis. Auto Title Loans v. Jones, 714 N.W.2d 155, 167 (2006).
169. *Leasefirst*, 483 N.W.2d at 588.
170. *Jones*, 714 N.W.2d at 160-62.
171. *Id.*
172. *Id.* at 161.
173. 345 N.W.2d 417 (1984).
174. *Id.* at 426.
175. 657 N.W.2d 411 (2003).

a better deal was unavailable.[176] Surely, there were other title loan companies or payday lenders in the area. In fact, the clause that the court found to be substantively unconscionable was unique to WATL's contract, so he could have gone to another lender to obtain, if not a better interest rate, a more favorable arbitration clause.[177]

The arbitration provision was not unconscionable because Jones had choices. The court assumed, without an evidentiary hearing, that Jones had no other means of obtaining the loan. However, a meeting of the minds took place between WATL and Jones because the terms were fully disclosed, and Jones could have gone to another lender. Jones' assumed indigence is inconsequential.[178] Even though he may have needed money, WATL was not the only source, and Jones might have qualified for a lower interest loan somewhere else. The difficulty is that we will never know what kind of loan Jones could have qualified for because the court never held an evidentiary hearing to find out.[179] Instead, the court simply assumed Jones had no other options at the expense of WATL.

B. FAA Preemption

Whether the FAA should preempt Wisconsin law remains the most interesting issue presented by the instant decision. State laws must place arbitration agreements on the same footing as other contracts.[180] Wisconsin statutory law does not contain any provisions that treat arbitration agreements differently, which was the case in *Casarotto*; however, *Allied-Bruce Terminix Companies* forbids courts from applying normal contract laws differently to arbitration agreements. In other words, judges should not be able to apply state contract principles differently simply because the contract in question involves arbitration.[181] It is possible that the supreme court made precisely this error in the instant decision.

While the agreement was substantively unconscionable, the court had to stretch to find procedural unconscionability. The motivation for such an overreaching decision was either Jones' indigence, or the fact that the agreement involved arbitration over adjudication, or a combination of the two. If the motivation was Jones' indigence, the court's judgment was misplaced because indigence, by itself, is not a sufficient reason for finding procedural unconscionability when alternatives were available.[182] If the arbitration provision motivated the overreaching, the court violated *Allied-Bruce Terminix Companies*.[183]

There is one major piece of evidence indicating that the court treated the arbitration agreement differently than a contract: the court could have enforced the

176. *Jones*, 714 N.W.2d at 170.

177. Interview with Edward J. Heiser, Jr., Attorney, Whyte Hirschboeck Dudek S.C., in Milwaukee, Wis. (Sept. 22, 2006). The clause reserved some adjudicative rights for WATL while forcing all of Jones' claims to be arbitrated.

178. *Jones*, 714 N.W.2d at 169.

179. *Id.* at 160.

180. Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 281 (1995); Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

181. 513 U.S. 265, 281 (1995).

182. Disc. Fabric House of Racine, Inc. v. Wis. Tel. Co., 345 N.W.2d 417, 425 (1984).

183. 513 U.S. 265, 281 (1995).

agreement without the substantively unconscionable clause.[184] By not doing so, the court gave preferential treatment to a judicial forum. The FAA is interpreted specifically to combat judicial forum favoritism.

The court should have looked to federal law for guidance to ensure that it did not overstep *Allied-Bruce Terminix Companies*. A federal court could interpret the Wisconsin Supreme Court's opinion as being hostile towards arbitration. Because the FAA dictates federal policy in favor of arbitration, the supreme court could have produced a result that required arbitration with a modified ruling.[185] The court should have enforced the arbitration agreement, except for the substantively unconscionable clause that forced Jones to arbitrate all claims while reserving judicial action for WATL. The basic terms of the agreement would have remained, but the parties would have been on equal footing to enforce them. This result is a success for Jones because he gets the benefit of his bargain without having to possibly present his case in both an arbitration and judicial forum. A modified ruling benefits WATL because it gets the fair benefit of its bargain to compel arbitration of Jones' claims. WATL would also no longer be burdened by the lack of an evidentiary hearing. The ruling appeases the federal courts because it gives preferential treatment to the arbitration agreement without inequitably burdening either party. Finally, the supreme court could rest assured that it would not be overruled by a federal court.

VI. CONCLUSION

The Wisconsin Supreme Court's decision displays remnants of the judicial hostility towards arbitration agreements that the FAA sought to dissolve.[186] While the court has an interest in protecting consumers from unfair agreements, parties' freedom to contract must prevail. When terms are not misleading or ambiguous and alternative options are available, courts should treat arbitration agreements as enforceable contracts. A forum in arbitration is just as adequate as litigation, and the FAA proscribes discriminatory treatment. By overreaching to find an arbitration provision procedurally unconscionable, the court indicated that forcing a plaintiff to arbitrate would be unfair. Even if procedural unconscionability exists, courts in this situation should keep in mind the FAA's policies for favoring arbitration. By simply enforcing the agreement without the substantively unconscionable clause, all parties' interests are protected and arbitration retains its deferential stature.

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184. WIS. STAT. § 402.302 (2005).
185. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).
186. 9 U.S.C. § 2 (2000).