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New Twist on an Old Approach: Missouri's Use of Unconscionability and Consent in the Class Arbitration Waiver Analysis - Brewer v. Missouri Title Loans, Inc., A

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A New Twist on an Old Approach: Missouri's Use of Unconscionability and Consent in the Class Arbitration Waiver Analysis

Brewer v. Missouri Title Loans, Inc.[1]

I. INTRODUCTION

In recent years, the inclusion of arbitration agreements in consumer product contracts has become increasingly popular. In an effort to shield themselves from the damaging effects of expensive class action suits by consumers, many companies have begun to include class arbitration waivers in their contracts, which effectively mandate individual arbitration.[2] These arbitration agreements were initially met with optimism.[3] However, courts have seemingly developed a sense of disdain toward them because of their apparent ability to perpetuate disreputable business practices. This has left many courts searching for ways to invalidate class arbitration waivers.

Brewer represents a new twist on an old approach. While the contract defense of unconscionability has been widely used in the battle against class arbitration waivers, the *Brewer* court chose to adopt a new framework for the unconscionability analysis.[4] Furthermore, in light of a recent U.S. Supreme Court decision concerning the contract defense of consent, the Supreme Court of Missouri also opted to depart from Missouri's typical treatment of arbitration agreements containing class arbitration waivers.[5] This note will examine the new foundation that has been laid for the class arbitration waiver analysis and the policy arguments surrounding it.

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1. 323 S.W.3d 18 (Mo. 2010).

2. *See* Ramona L. Lampley, *Is Arbitration Under Attack? Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 CORNELL J.L. & PUB. POL'Y 477, 478-79 (2009) ("In order to streamline the arbitration process and alleviate the burden of costly consumer class actions suits, manufacturers and service providers have started to require that consumers waive the right to proceed in court or in arbitration on a class-wide basis."); *see also* Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 75-76 (2004).

3. Lampley, *supra* note 2, at 479; *see also* Woods v. CQ Fin. Servs., Inc., 280 S.W.3d 90, 98 (Mo. App. E.D. 2008) ("Individualizing each claim absolutely and completely insulates and immunizes Appellant from scrutiny and accountability for its business practices and also serves as a disincentive for Appellant to avoid the type of conduct that might lead to class action litigation in the first place.") (footnote and internal quotations omitted), *abrogated in part by Brewer*, 323 S.W.3d 18.

4. *Brewer*, 323 S.W.3d at 21-22.

5. *Id.* at 20-21.

II. FACTS AND HOLDING

As a title lender, Missouri Title Loans, Inc. offers small, short-term loans to borrowers, which are secured by the title of the borrower's car.[6] The company operates roughly fifty branches in the state of Missouri and has done business with nearly 15,000 Missourians since 2001.[7] Plaintiff, Beverly Brewer, received a $2,215 loan from Missouri Title Loans, which was secured by the title to her 2003 Buick Rendezvous.[8] The annual percentage rate for Brewer's thirty-day loan was roughly 300 percent, which translated to $564.37 in finance charges.[9] In order to obtain this loan, Brewer signed a loan agreement, promissory note, and a security agreement.[10] The loan agreement contained a clause that required arbitration of any disputes and a waiver of Brewer's right to class arbitration, which effectively mandated individual arbitration of all claims.[11]

Brewer filed a class action petition against Missouri Title Loans (MTL), alleging violations of the Missouri Merchandising Practices Act (MMPA)[12] and several other statutes.[13] Based on the arbitration clause in the loan agreement, MTL filed a motion to dismiss Brewer's claims and to compel her to arbitrate the claims individually.[14] The trial court found the class arbitration waiver to be unconscionable and unenforceable.[15] Accordingly, the trial court entered a judgment partially granting MTL's motion and ordering the issue to continue to arbitration to determine whether it was a suitable matter for class arbitration.[16] MTL appealed, arguing three main points.[17] First, MTL asserted that the arbitration clause was not unconscionable because Brewer was not forced to obtain the loan from MTL.[18] Second, it maintained that the trial court's decision was preempted by the Federal Arbitration Act (FAA).[19] Finally, MTL argued that the class arbitration agreement acted as an exculpatory clause because it was clear and unambiguous, and because it does not give MTL any surprise advantage.[20]

The Missouri Court of Appeals for the Eastern District affirmed the holding of the trial court, finding the class arbitration waiver unconscionable and noting

6. Missouri Title Loan, Inc., v. City of St. Louis Bd. of Adjustment, 62 S.W.3d 408, 411 (Mo. App. E.D. 2001).

7. Substitute Brief of Plaintiff-Respondent at *16, Brewer v. Missouri Title Loans, Inc., 323 S.W.3d 18 (Mo. 2010) (No. SC 90647), 2010 WL 1604559.

8. *Brewer*, 323 S.W.3d at 20.

9. Brewer v. Missouri Title Loan, Inc., No. ED92569, 2009 Mo. App. LEXIS 1714, at *1 (Mo. App. E.D 2009).

10. *Brewer*, 323 S.W.3d at 20.

11. *Id.*

12. The Missouri Merchandising Practices Act (MMPA), enacted in 1976, was designed to supplement the common law action for fraud in an effort to further protect consumers from fraudulent business practices. Missouri v. Cont'l Servs. Inc., 84 S.W.3d 114, 117 (Mo. App. W.D. 2002); *see also* MMPA, Mo. Rev. Stat. §§ 407.010-407.1129 (2008).

13. *Brewer*, 323 S.W.3d at 20.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Brewer*, 2009 Mo. App. LEXIS 1714.

18. *Id.* at *4.

19. *Id.* at *10; *see also* Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16 (2006).

20. *Brewer*, 2009 Mo. App. LEXIS 1714, at *10.

that there was evidence of both substantive and procedural unconscionability.[21] However, the court let the remainder of the arbitration agreement stand.[22] With regard to MTL's second point, the appeals court held that the action was not preempted by the FAA because Missouri law clearly allows arbitration agreements to be invalidated using state law contract defenses, such as unconscionability.[23] Finally, the appeals court held that the arbitration agreement did not act as a valid exculpatory clause, because the company could not be allowed to use the arbitration agreement to immunize itself from liability.[24] MTL appealed to the Supreme Court of Missouri on August 31, 2010, and the court affirmed the holdings of the lower court, with one exception.[25]

The court not only held that the class arbitration waiver was invalid, due to its unconscionable aspects, but that the entire arbitration agreement was invalid because Missouri Title Loans could not be forced into class arbitration without prior consent.

III. LEGAL BACKGROUND

According to Section 2 of the FAA, a written arbitration agreement shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[26] While the courts are generally in favor of arbitration provisions, such provisions can be invalidated using state law contract defenses such as fraud, duress, or unconscionability.[27] This section will focus on the interplay between the FAA and state law contract defenses, specifically unconscionability and consent.

A. Determination of Unconscionability

The doctrine of unconscionability is perhaps the most widely used basis for challenging the enforceability of arbitration provisions.[28] In Missouri, the general concept of unconscionability has been defined as an injustice "so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it."[29] From the outset, it is imperative to note that there are two types of unconscionability: procedural and substantive.[30] Procedural unconscionability refers to the initial formation of a

21. *Id.* at *3-*10.
22. *Id.* at *1-*12.
23. *Id.* at *10.
24. *Id.* at *11.
25. *Brewer*, 323 S.W.3d at 24.
26. FAA, 9 U.S.C. § 2.
27. *See, e.g.*, Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 683, 686-87 (1996).
28. *See* Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight from Arbitration?*, 37 HOFSTRA L. REV. 71, 83 (2008); *see also* Sandra F. Gavin, *Unconscionability Found: A Look at Pre-Dispute Mandatory Arbitration Agreements 10 Years After* Doctor's Associates, Inc. v. Casarotto, 54 CLEV. ST. L. REV. 249, 260 (2006) ("[T]he arbitration wars have brought unconscionability back to center stage.").
29. McMullin v. McMullin, 926 S.W.2d 108, 110 (Mo. App. E.D. 1996) (citations and quotations omitted).
30. Whitney v. Alltel Commc'ns, Inc., 173 S.W.3d 300, 308 (Mo. App. W.D. 2005), *abrogated in part by Brewer*, 323 S.W.3d 18.

contract, and considers factors such as the relative bargaining power of the parties, fine print, misrepresentations, and high pressure exerted on the parties.[31] Substantive unconscionability, on the other hand, refers to any excessive harshness in the actual contract terms themselves.[32] Most states require a showing of both procedural and substantive unconscionability in order to invalidate a contractual provision.[33] Until very recently, Missouri followed this approach.

Missouri's use of this two-pronged unconscionability analysis began three decades ago with *Funding Systems Leasing Corp. v. King Louie International, Inc.*[34] "King Louie" owned a radio station and entered into an agreement with Funding Systems to lease station equipment.[35] Among other things, the agreement stated that defective equipment would not relieve King Louie of its duty under the lease.[36] After a third-party purchaser took over the lease from King Louie and refused to pay for malfunctioning equipment, Funding Systems brought suit and King Louie challenged the provision.[37] Although the court noted that, in general, both types of unconscionability must be present to invalidate a contract provision, it suggested that these concepts operate on a "sliding scale."[38] Thus, if significant substantive unconscionability is present, less evidence of procedural unconscionability is needed to strike a contract provision and vice versa.[39] However, after finding that the plaintiff could not demonstrate any amount of procedural unconscionability, the court held that the contract provision at issue was not unconscionable.[40] Missouri courts interpreted this holding to require a showing of both types of unconscionability.[41]

Whitney v. Alltel Communications, Inc. typifies Missouri's past treatment of unconscionability.[42] Jerry Whitney had been a customer of Alltel, a wireless telephone provider, since 1995.[43] Whitney filed a class action suit after Alltel included a small charge on his billing statements, claiming it was a mandatory tax.[44] Relying on an arbitration agreement and class arbitration waiver contained in the new "Terms and Conditions" that were included with Whitney's August statement in 2000, Alltel filed a motion to compel individual arbitration.[45] These new terms

31. Funding Sys. Leasing Corp. v. King Louie Int'l, Inc., 597 S.W.2d 624, 634 (Mo. App. W.D. 1979).

32. *Id.*

33. *See* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1278 (2003); Christopher B. McKinney, Note, *"Low-Value" & "Predictably Small": When Should Class-Arbitration Waivers Be Invalidated as Unconscionable*, 2007 J. DISP. RESOL. 579, 583 (2007).

34. 597 S.W.2d 624 (Mo. App. W.D. 1979).

35. *Id.* at 627.

36. *Id.* at 628.

37. *Id.*

38. *Id.* at 634.

39. *Id.*

40. *Funding Sys.*, 597 S.W.2d at 635-36.

41. *See* Repair Masters Constr. Inc. v. Gary, 277 S.W.3d 854, 858 (Mo. App. E.D. 2009); Shaffer v. Royal Gate Dodge, Inc., 300 S.W.3d 556, 559 (Mo. App. E.D. 2009); Kansas City Urology v. United Healthcare Servs., 261 S.W.3d 7, 15-16 (Mo. App. W.D. 2008); Woods v. QC Fin. Servs., Inc., 280 S.W.3d 90, 95 (Mo. App. E.D. 2008).

42. 173 S.W.3d 300 (Mo. App. W.D. 2005), *abrogated in part by Brewer*, 323 S.W.3d 18.

43. *Whitney*, 173 S.W.3d at 304.

44. *Id.*

45. *Id.*

altered the original contract and stated that a customer's continued use of Alltel's services would constitute an acceptance.[46]

Citing *Funding Systems*, the *Whitney* court determined that both types of unconscionability must be present to find a provision invalid.[47] The court found procedural unconscionably as the new terms were presented in a "take it or leave it" fashion,[48] Alltel was in a superior bargaining position, there was no negotiation, and the provision was in fine print on the back of a bill that Whitney was unlikely to see.[49] Substantive unconscionability also existed, as the claim was small and would be economically infeasible to prosecute individually.[50] Whitney would be required to bear all the costs of arbitration, with his potential recovery being minimal, effectively depriving him of a remedy.[51] After finding evidence of both procedural and substantive unconscionability, the court held that the arbitration agreement was invalid.[52]

Vincent v. Schneider was the first case to cast doubt on the two-pronged unconscionability analysis that had been so prevalent in Missouri in the past.[53] In *Vincent*, the plaintiffs purchased homes from the defendant and signed a contract that mandated arbitration at the seller's discretion, allowed the seller to choose the venue and the arbitrator, and forced the plaintiffs to bear the costs.[54] After the plaintiffs brought suit, the defendant filed a motion to compel arbitration.[55] The court found the provision to be substantively unconscionable because the defendant wanted the ability to select arbitration, select the actual arbitrator, and then force the plaintiffs to pay for it.[56] The court held that these three provisions of the arbitration agreement were impermissibly unconscionable, but that the rest of the agreement was enforceable.[57] Notably, however, the court attacked the terms of the agreement itself, but it never attacked the circumstances under which the contract was made, which is the hallmark of procedural unconscionability.

B. Severability of Unconscionable Provisions

After finding a provision unconscionable, the court must then determine how it will treat that provision in the context of the rest of the contract. Under Missouri law, if the court finds a contract provision unconscionable at the time it was made, it may refuse to enforce the contract altogether, sever the unconscionable provision and enforce the remainder of the contract, or enforce the entire contract

46. *Id.*
47. *Id.* at 308.
48. *See* Pendergast v. Sprint Nextel Corp., 592 F.3d 1119, 1137 n. 16 (11th Cir. 2010) (stating a "take it or leave it" basis generally refers to circumstances where a consumer has no opportunity to negotiate and cannot obtain the desired product without consenting to the terms of the contract) (citations and internal quotations omitted).
49. *Whitney*, 173 S.W.3d at 308-09.
50. *Id.* at 309.
51. *Id.*
52. *Id.*
53. 194 S.W.3d 853 (Mo. 2006).
54. *Id.* at 855-56.
55. *Id.* at 856.
56. *Id.* at 860-61.
57. *Id.* at 861.

but limit the application of the unconscionable portion.[58] The lower court's decision in *Brewer* to sever only the unconscionable class action waiver, but to let the rest of the arbitration agreement stand, was fairly typical of Missouri courts' behavior towards such provisions.

In *Swain v. Auto Services, Inc.*, a Missouri resident challenged an arbitration agreement with Auto Services, which was included in an auto service plan he had obtained from them after they refused to pay for repairs to his car.[59] The agreement provided, among other things, that the venue for arbitration would be in Arkansas.[60] The court found this provision invalid because part of the unconscionability analysis involved determining what a reasonable party could have expected and Swain, as a Missouri resident, could not have expected his dispute to be resolved in another state.[61] The court noted that if an invalid provision is not essential to the entire agreement, the rest of the agreement may stand.[62] Furthermore, the determination of whether a provision is essential involves the intent of the parities.[63] The court held that the venue provision was not essential because arbitration could occur anywhere without affecting the rest of the agreement, so the remainder of the arbitration agreement could be enforced without it.[64] The court further stated that invalidating the entire arbitration agreement would undercut the liberal federal policy in favor of such agreements.[65]

Woods v. QC Financial Services[66] is also informative because it is even more similar to *Brewer*. In *Woods*, the plaintiff challenged a mandatory arbitration agreement and class arbitration waiver that was included in the terms of a contract with the defendant, a payday lender.[67] The court found procedural unconscionability because the terms were offered on a take it or leave it basis, the agreement was in fine print, and the defendant admitted that it had never negotiated with any of its 400,000 customers.[68] Furthermore, the court determined that the defendant was clearly in a superior bargaining position.[69] It was a national company that did business with people who need money so badly that they were willing to borrow against their next paycheck at interest rates of at least 400 percent.[70] The court also found the presence of substantive unconscionability because the size of the claim was so small that settling the issue on an individual basis was economically impractical and unfeasible.[71] Thus, by prohibiting class arbitration, the defendant was effectively depriving its customers of a remedy.[72]

58. MO. REV. STAT. § 400.2-302(1) (2008).
59. Swain v. Auto Servs., Inc., 128 S.W.3d 103, 105 (Mo. App. E.D. 2003).
60. *Id.*
61. *Id.* at 108.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Swain*, 128 S.W.3d at 108.
66. 280 S.W.3d 90 (Mo. App. E.D. 2008).
67. *Id.* at 92-93.
68. *Id.* at 96.
69. *Id.*
70. *Id.*
71. *Woods*, 280 S.W.3d at 97-98.
72. *Id.* at 98.

The defendant in *Woods* challenged the trial court's decision to sever only the unconscionable class arbitration waiver.[73] It argued that, because the arbitration agreement required the defendant to pay all arbitration fees and because class arbitration would be much more expensive, allowing the plaintiffs to force them into class arbitration fundamentally altered the contract by imposing excessive arbitration fees for which the defendant never intended to assume liability.[74] The court found that the defendant's argument was disingenuous because it simply did not want to pay more to arbitrate its allegedly illegal practices.[75] In doing so, it upheld the trial court's decision to sever only the unconscionable class arbitration waiver and allowed the remainder of the agreement to stand, which would essentially allow Woods to compel the defendant into class arbitration.[76]

C. *Consent*- Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.[77]

Stolt-Nielsen and the contract doctrine of consent play an integral role in *Brewer*. Stolt-Nielsen is a shipping company that charters compartments on its vessels to customers such as AnimalFeeds.[78] The standard contract between Stolt-Nielsen and AnimalFeeds, known as a charter party, contained a mandatory arbitration provision that was silent on the issue of class arbitration.[79] After learning of an alleged anti-trust violation, AnimalFeeds and several other charterers brought suit against Stolt-Nielsen, and a judicial panel ordered consolidation of the cases.[80] In 2005, AnimalFeeds served Stolt-Nielsen with a demand for class arbitration and the two parties agreed to submit the issue to an arbitration panel to determine whether the arbitration clause permitted class arbitration.[81]

Taking into consideration the parties' stipulation that the arbitration clause was silent on the issue of class arbitration, the arbitration panel concluded that class arbitration was permitted because no evidence was introduced that the parties intended to preclude it.[82] The district court vacated the award, holding that the arbitrators should have applied federal maritime law, which requires the contract to be interpreted according to custom and usage.[83] The U.S. Court of Appeals for the Second Circuit reversed because Stolt-Nielsen cited no authority supporting the claim that federal maritime usage and custom was against class arbitration.[84] The U.S. Supreme Court granted certiorari to determine whether imposing class arbitration is consistent with the FAA when the arbitration agreement is silent on that issue.[85]

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73. *Id.* at 99-100.
74. *Id.*
75. *Woods*, 280 S.W.3d at 100.
76. *Id.*
77. 130 S. Ct. 1758 (2010).
78. *Id.* at 1764.
79. *Id.* at 1765.
80. *Id.*
81. *Id.*
82. *Stolt-Nielsen*, 130 S. Ct. at 1764.
83. *Id.*
84. *Id.*
85. *Id.* at 1764.

The Court began its analysis by noting that, under the FAA, arbitration "is a matter of consent, not coercion," and that the primary goal of the FAA is to enforce arbitration agreements according to their terms.[86] Given that the arbitrator derives power only from the parties' consent to submit their claim to arbitration, the intent and expectations of those parties control.[87] With this in mind, the Court determined that parties are free to structure arbitration agreements as they see fit, and to enter into such agreements with whomever they see fit.[88] Thus, a court cannot force a party to arbitrate any issue, or with a party, which he did not agree to.[89] Based on these principles, the Court held that, under the FAA, a party may not be forced to submit to class arbitration without a contractual basis for determining that the parties agreed to do so.[90]

The Court recognized that the arbitration panel's decision rested on the fact that the silent agreement did not preclude class arbitration and, therefore, it must be acceptable.[91] The Court found this logic to be "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent" and held that consent to class arbitration cannot be inferred simply from the act of submitting an issue to arbitration because class arbitration fundamentally alters the agreement.[92] Unlike individual arbitration, the indefinite multiplication of parties and issues that accompany class arbitration could undermine not only the parties' expectations of costs, but also their ability to maintain privacy and confidentiality.[93] This becomes even more of an issue when one considers that arbitration purports to bind even absent parties.[94] Perhaps more burdensome to the parties is the fact that, while the stakes are nearly as high as litigation, arbitration awards are subject only to limited judicial review.[95] Thus, because mere silence on the issue of class arbitration cannot be equated with consent to these additional burdens, the Court held that the parties could not be forced to submit to class arbitration.[96]

IV. INSTANT DECISION

A. The Majority Opinion

In *Brewer*, the court began its analysis by noting that, while the FAA generally requires all valid arbitration agreements affecting interstate commerce to be enforced, all or part of an invalid arbitration agreement may be invalidated using

86. *Id.* at 1773 (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Univ., 489 U.S. 468, 479 (1989)); *see also* FAA, 9 U.S.C. § 4 ("A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order *directing that such arbitration proceed in the manner provided for in such agreement*.") (emphasis added).

87. *Stolt-Nielsen*, 130 S. Ct. at 1774.

88. *Id.*

89. *Id.* at 1775.

90. *Id.* at 1776.

91. *Id.* at 1775.

92. *Id.* (footnote omitted).

93. *Stolt-Nielsen*, 130 S. Ct. at 1776.

94. *Id.*

95. *Id.*

96. *Id.*

state law contract defenses such as unconscionability, fraud, and duress.[97] In order to better understand the relationship between these contract defenses and the FAA, the court cited *Stolt-Nielsen* for the premise that a party cannot be compelled into class arbitration where the arbitration agreement is silent with respect to the issue.[98] The court noted that this holding was based on the fact that an arbitrator's power is derived from the consent of the parties and that the arbitrator in that case had no authority to allow a class action because there was no contractual basis for concluding that the parties had consented to it.[99]

Applying those principles to the facts at hand, the court recognized that the arbitration agreement in Brewer's contract was not silent with respect to class arbitration, as was the agreement in *Stolt-Nielsen*, but that MTL's case was actually stronger because it had explicitly withheld consent to class arbitration.[100] The court also determined that if it were to strike only the unconscionable portion, then the arbitration agreement would be silent with regard to class arbitration, essentially creating a similar situation to the one confronted in *Stolt-Nielsen*.[101] However, without affirmative consent to class arbitration, as *Stolt-Nielsen* requires, MTL could not be compelled to submit to class arbitration.[102]

The court then turned its attention to the decision of the trial court, which severed the unconscionable class arbitration waiver from the rest of the agreement and essentially allowed Brewer to force MTL into class arbitration.[103] The court stated that, even though this decision was consistent with other Missouri cases, allowing MTL to be forced into class arbitration was simply not an option because MTL did not consent to it.[104] They further stated that allowing the rest of the arbitration agreement to stand was also a problem because Brewer would still be forced into individual arbitration, as class arbitration was out of the question.[105] However, the court noted that the trial court had already determined that individual arbitration would be unconscionable in this case.[106] The court concluded that if this finding of unconscionability was correct, the unconscionable aspects of the contract could not be remedied by severing only the class arbitration waiver because Brewer could not be forced into individual arbitration and MTL could not be forced into class arbitration.[107] The court went on to determine whether the individual arbitration would be unconscionable under these circumstances.

The court first made note of the two types of unconscionability discussed above.[108] The court pointed to *Vincent v. Schneider*, a case in which the Supreme Court of Missouri held that a provision was unconscionable without ever addressing procedural unconscionability.[109] Although the case never explicitly stated that

97. *Brewer*, 323 S.W.3d at 20.
98. *Id.*; *see also Stolt-Nielsen*, 130 S. Ct. 1758.
99. *Brewer*, 323 S.W.3d at 20.
100. *Brewer*, 323 S.W.3d at 20.
101. *Id.* at 21.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Brewer*, 323 S.W.3d at 21.
107. *Id.*
108. *Id.* at 22.
109. Id.; *see also* Vincent v. Schneider, 194 S.W.3d 853 (Mo. 2006).

only substantive unconscionability is needed, it supported the conclusion that Missouri law requires only one type of unconscionability.[110] Thus, according to Missouri law, unconscionability can be substantive, procedural, or some combination of the two.[111]

The court in *Brewer* suggested that there was a sufficient amount of procedural unconscionability in the arbitration agreement to make it invalid.[112] To begin with, the terms of the agreement were difficult to understand, they were offered on a "take it or leave it" basis, and there was no evidence that Brewer had an opportunity to negotiate the terms of the contract.[113] Furthermore, as in *Woods*, Missouri Title Loans was clearly in a superior bargaining position because the company was doing business with customers in financial distress who were in such desperate need of funds that they were willing to take out the loans with incredibly high interest rates.[114]

The court also found that there was sufficient evidence of substantive unconscionability.[115] Brewer presented three experts who all testified that it would be nearly impossible for her to secure counsel for this type of claim because the subject matter is very complicated and requires significant discovery and expertise.[116] However, because of the nature of the case and the small damages at issue, it would be economically impractical for an attorney to take on such a case, especially when going up against a "heavily defended" opponent such as MTL.[117] Citing *Woods* once again, the court recognized that without the ability to retain counsel to aid her in navigating such a complicated issue, Brewer would be left without a meaningful avenue of redress.[118] Furthermore, this would allow companies such as MTL to continue with their unfair business practices by allowing them to put their customers in so weak a position that they would have no chance of a remedy.[119]

The court upheld the trial court's determination that the class arbitration waiver was unconscionable.[120] However, because the FAA would not allow class arbitration without Missouri Title Loans' express consent, the court determined that the only appropriate remedy would be to strike the arbitration agreement altogether and allow the matter to proceed to class litigation.[121]

B. Judge Price's Dissent

Judge Price began his dissent by recognizing the importance of two competing goals: the protection of consumers like Brewer and MTL's freedom of con-

110. *Brewer*, 323 S.W.3d at 22.
111. *Id.*
112. *Id.* at 23.
113. *Brewer*, 323 S.W.3d at 23.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*; *see also Woods*, 280 S.W.3d at 97-99.
119. *Brewer*, 323 S.W.3d at 23-24.
120. *Id.* at 24.
121. *Id.*

tract.[122] Ultimately, his dissent rested on a determination that the class arbitration waiver was not unconscionable.[123] He argued that, under Missouri law, evidence of both procedural and substantive unconscionability must be present to invalidate a contract provision.[124] Procedural unconscionability, he stated, is necessary to demonstrate that both parties have entered the agreement freely.[125] He rejected the idea that *Vincent* dispensed with the need for both types of unconscionability, and argued instead that the *Vincent* court "merely blue-pencil[ed] the substantively unconscionable provisions" out of the arbitration agreement, while letting the remaining agreement stand.[126] Judge Price then explained that, in his view, there was no evidence of procedural unconscionability.[127]

With regard to procedural unconscionability, he argued that there was no "high-pressure sales tactics" or coercive behavior on MTL's part, and also noted that the class arbitration waiver was written in bold capital letters.[128] While he recognized that MTL was most likely in a superior bargaining position and that Brewer was not able to negotiate the terms of the contract, he asserted that this alone is not enough and that Brewer must have some evidence that she was unable to find a better contract elsewhere.[129] He urged that the policy behind this idea is that these "take-it-or-leave-it agreements" are so common in business today that if we were to invalidate them all merely because one party was in a better bargaining position, "commerce would screech to a halt."[130] He went on to point out that Brewer stated that she did not think reading the loan agreement was important, that she had compiled a list of twenty other similar companies that she could have gone to, and that there was nothing stopping her from shopping for a loan agreement with more favorable terms.[131] Thus, in Judge Price's opinion, there was no procedural unconscionability.

Judge Price then went on to find that there was no evidence of substantive unconscionability.[132] The amount at issue in the case was $4,000, which did not include the interest that continued to accrue while the loan remained unpaid or other expenses and fees that Brewer might have been able to collect.[133] Although the size of this claim may have made it somewhat less attractive to attorneys, Judge Price urged that it did not bar Brewer from obtaining an adequate remedy.[134]

After determining that the arbitration agreement was not unconscionable, Judge Price then addressed the majority's use of *Stolt-Nielsen* and the contract

122. *Id.*
123. *Id.* at 24-25.
124. *Id.* at 25.
125. *Brewer*, 323 S.W.3d at 25.
126. *Id.* at 26; *see also* Mid-States Paint & Chem. Co. v. Herr, 746 S.W.2d 613, 616 (Mo. App. E.D. 1988) ("Under the blue pencil doctrine, if a restrictive covenant contains words which are unreasonable limitations and if stricken would have a reasonable contract, the court may 'blue pencil' or strike those words out . . . .") (citations omitted).
127. *Brewer*, 323 S.W.3d at 26 (Price, C.J., dissenting).
128. *Id.*
129. *Id.* at 26-27.
130. *Id.* (quoting Cicle v. Chase Bank USA, 583 F.3d 549, 554 (8th Cir. 2009)).
131. *Brewer*, 323 S.W.3d at 27 (Price, C.J., dissenting).
132. *Id.*
133. *Id.*
134. *Id.*

defense of consent.[135] He urged that *Stolt-Nielsen* only stands for the concept that parties cannot be forced into class arbitration when their agreement is silent on the issue and that it does not prohibit state courts from severing an unwanted portion from an arbitration agreement while letting the remainder stand.[136] In other words, individual arbitration would still be permissible even if class arbitration would not.[137] In fact, Judge Price asserted that if courts follow *Stolt-Nielsen*, individual arbitration is actually the default when an arbitration agreement is silent on the issue.[138] He stated that it is ultimately a question of the parties' intent, and it is clear from the evidence in the record that both parties contemplated some form of arbitration.[139] Thus, he concluded that it was error for the majority to strike the entire arbitration agreement, rather than merely severing what they believed to be an unconscionable class arbitration waiver.[140]

In his last point, Judge Price asserted that class arbitration waivers are enforceable and cited to cases from Missouri, as well as the Eighth and Third Circuits to support that proposition.[141] Furthermore, he noted that Missouri tends to give preferential treatment to arbitration clauses.[142] He urged that, while protection of consumers is particularly important with respect to the small loan industry, the benefits of that protection might not outweigh the costs.[143] Lenders, such as MTL, are likely to pass on the additional costs of litigation or class arbitration to their customers, or even abandon the market entirely.[144] He further stated that this type of balancing with respect to public policy is a job for the legislature.[145] Thus, Judge Price concluded that the entire arbitration agreement, including the class arbitration waiver, should be enforceable.[146]

V. COMMENT

Brewer represents a departure from past Missouri law in two significant ways. First, it dispenses with the requirement of showing both procedural and substantive unconscionability, holding instead that only one or the other is necessary to invalidate a provision. Second, rather than severing only the unconscionable class arbitration waiver, as was typical of past Missouri cases, the court used

135. *Id.*
136. *Id.*
137. *Brewer*, 323 S.W.3d at 27 (Price, C.J., dissenting).
138. *Id.* at 27-28.
139. *Id.* at 28.
140. *Id.*
141. *Id.*; *see also* Cicle v. Chase Bank USA, 583 F.3d 549, 555 (8th Cir. 2009) (holding that a class arbitration waiver was not unconscionable, despite the fact that the claim was small, because the plaintiff had the option of filing her claim individually in a small claims court); Pleasants v. Am. Express Co., 541 F.3d 853, 858-59 (8th Cir. 2008) (holding that a class arbitration waiver was not unconscionable where plaintiff's potential recovery exceeded the costs of pursuing the claim individually); *Woods*, 280 S.W.3d at 98 (absent public policy to the contrary, "a party may waive the provision of a contract or statute made for his benefit") (citations and quotations omitted); Gay v. Creditingform, 511 F.3d 369, 395 (3d Cir. 2007) (holding that a class arbitration waiver was not invalid without some showing of procedural unconscionability).
142. *Brewer*, 323 S.W.3d at 28 (Price, C.J., dissenting).
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*

the contract doctrine of consent to invalidate what remained of the arbitration agreement. While, at their heart, the doctrines of consent and unconscionability lie in contract, their impact on arbitration agreements has been profound.

The majority relied heavily on *Stolt-Nielsen* in holding that MTL could not be forced into class arbitration without its consent. Judge Price's dissent criticized the majority for mischaracterizing *Stolt-Nielsen* and for applying it to a case that was not silent as to class arbitration. While it is true that the contract in *Stolt-Nielsen* was silent regarding class arbitration, the U.S. Supreme Court supported the conclusion that when the parties' intentions with respect to class arbitration are unknown, their consent to such a provision cannot be implied. Furthermore, in the absence of this consent, the parties cannot be forced to arbitrate any particular issue, or with any particular party. In *Brewer*, MTL expressly withheld its consent to class arbitration, as was its right to do so. Surely the class arbitration waiver was indicative of MTL's intent to avoid class arbitration, despite its invalidity. To that extent, the majority's logic is fairly easy to follow.

Given the majority's concern for MTL's lack of consent, it is quite perplexing that, in the end, the court gave MTL the exact opposite of what they had expected when entering the contract. Nothing could have been further from what MTL consented to than class-wide litigation. The court relied on *Stolt-Nielsen* in holding that the remaining portion of the arbitration agreement was invalid. Yet this case is fundamentally different from *Stolt-Nielsen* because the intentions of the parties in *Brewer* were not unknown. To the contrary, the contract was very clear with regard to the procedures that MTL was willing to endure, and that did not include class litigation. Thus, by severing the entire arbitration agreement and putting Brewer in a position to force MTL into class litigation, the court specifically undermined the very same contract doctrine that it purported to uphold.

Much like the consent analysis, the court's unconscionability analysis is also flawed. Interestingly, the *Brewer* court found evidence of both types of unconscionability in the arbitration agreement at issue. Thus, one cannot help but question why the court abandoned, not only its own precedent, but also a long-standing and widely accepted judicial belief that both prongs of unconscionability must be satisfied to invalidate a provision when it was unnecessary to achieve their desired end.[147] Implicit in this inquiry is the need to examine the policy goals behind both approaches.

Several years before *Brewer*, the Supreme Court of Missouri in *Swain v. Auto Services, Inc.* suggested that standardized contracts are not inherently unconscionable.[148] The *Swain* court stated that because the vast majority of our contracts are "form contracts," any rule that would automatically invalidate them would prove to be "completely unworkable."[149] Citing to the Eighth Circuit, Judge Price's dissent similarly indicated that contracts like the one Brewer entered into are so commonplace today, that invalidating them without a showing that the agreement

147. *See* Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1074 (2006) (There is an "overwhelming judicial belief that evidence of both procedural and substantive unconscionability is required to sustain a claim.").

148. 128 S.W.3d 103, 107 (Mo. App. E.D. 2003).

149. *Id.*

process was tainted could bring commerce to a halt.[150] Presumably, this is because businesses will either be entrenched in litigation surrounding existing contracts, or because they will simply abandon what they consider to be risky markets. However, there are certain benefits with regard to standardized contracts, including more efficient use of both time and money by consumers and producers.[151] Treating standardized contracts as inherently unconscionable not only deprives society of these benefits, but also calls into question many of the numerous contracts that consumers enter into every day. The result of such a policy would be the chaos that was contemplated by the Supreme Court of Missouri in *Swain*.

While procedural unconscionability undoubtedly has its importance, it is possible that requiring it may not always be equitable. Here, the concern is with contracts that contain harsh, one-sided terms, notwithstanding the fact that there was no procedural unfairness in their creation. Should such contracts be given immunity by a policy that would require both types of unconscionability? The *Brewer* court certainly did not seem to think so. As a policy matter, the court also supports the argument that harsh class arbitration waivers, even where the consumer agrees to them, are unconscionable because they allow businesses to continue with bad practices.[152] However, one cannot escape the observation that, according to the court, this was not the type of contract with which they were presented. Thus, one can only assume either that the court did not think the evidence of procedural unconscionability in Brewer's contract was persuasive,[153] or it was merely making a point to set the precedent for future cases.

The unfortunate result of this shift by the *Brewer* court is an attitude of judicial paternalism[154] that rewards plaintiffs who fail to do their homework before signing contracts containing arbitration agreements. Furthermore, it directly undermines the parties' freedom to contract as they see fit and the predictability that parties contemplate when entering a contract. The entire point of a contract is to enable parties to know exactly what is expected of them, and what is to happen if either party falls short of those expectations. Yet the court in *Brewer* is essentially telling MTL, and all similar parties, that even if they fulfill every one of their promises made in the contract, their counterparts need not do the same. This is the result even if the process by which the contract was entered was entirely even-handed. Thus, even though MTL seemingly did what was necessary to apprise Brewer of the class arbitration waiver, the court says she need not comply with it.

In the end, courts are forced to make a choice between two competing goals: protection of consumers, such as Brewer, and the freedom to contract. While consumer protection is certainly a worthwhile goal, it simply cannot outweigh the benefits of requiring evidence of both procedural and substantive unconscionabili-

150. *Brewer*, 323 S.W.3d at 26-27 (Price, C.J. dissenting) (citing *Circle*, 583 F.3d at 555).

151. Joshua Fairfield, *The Cost of Consent: Optimal Standardization in the Law of Contract*, 58 EMORY L.J. 1401, 1435-37 (2009) (suggesting that the time and money saved by companies in using standardized contracts is passed on to consumers through lower product prices).

152. *Brewer*, 323 S.W.3d at 23-24.

153. Judge Price's dissent refers to Brewer's statements that she did not read the contract before signing it because she did not feel that it was important and that she compiled a list of at least twenty other companies she could have contracted with instead of Missouri Title Loans. These are factors that would undermine a finding of procedural unconscionability. *See Brewer*, 323 S.W.3d at 23-24.

154. *See* Lamplcy, *supra* note 2, at 479 ("In recent years . . . courts have examined the class-waiver arbitration agreement with increased paternalism on behalf of the consumer").

ty. MTL had a right to bargain for a class arbitration waiver and Brewer had a right to not accept it. The courts need to send a message that consumers cannot blindly enter contracts, as Brewer did, and simply hope for the best. Furthermore, the burden placed on consumers by this requirement is low because, based on Missouri's sliding scale approach, the consumer need only show minimal procedural unconscionability if enough substantive unconscionability is present, and vice versa. Requiring both will allow parties to know what is expected of them and afford parties the ability to rely comfortably on those expectations.

Nevertheless, the court has unreservedly followed the new framework set forth in *Brewer*. *Ruhl v. Lee's Summit Honda*[155] was a companion case decided on the same day as *Brewer*. When Ruhl bought her car from the dealership, she signed a contract that contained a $199.95 "Dealership Administrative Fee" and a mandatory arbitration agreement with a class action waiver.[156] After Ruhl filed a class action suit to recover the fee, Honda filed a motion to compel individual arbitration.[157] Following the *Brewer* logic, and citing to *Brewer* several times, the court held that the entire arbitration agreement was unconscionable and unenforceable.[158] Thus, while the *Brewer* decision is still new, the court has not given any indication that they intend to back down on their logic.

VI. CONCLUSION

Brewer exemplifies the clash between competing interests so common in consumer contracts today. Perhaps in an effort to strike some balance between the need to protect consumers and the parties' freedom of contract, the court departed from both Missouri precedent and also from the widely accepted two-pronged unconscionability analysis that is so prevalent in most jurisdictions. In doing so, they have specifically undermined the broad federal policy in favor of arbitration agreements.[159] While only time can tell what the true effect of this decision will be, the *Brewer* approach is sure to have far-reaching consequences with regard to class arbitration waivers, as well as other contract provisions.

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155. 322 S.W.3d 136 (Mo. 2010).
156. *Id.* at 138.
157. *Id.*
158. *Id.* at 138-40.
159. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24 (1983) ("Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.").