DREHER TOMKIES LLP

ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

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OHIO COURT ENFORCES ARBITRATION CLAUSE BUT STRIKES LOSER PAYS PROVISION

The Ohio Court of Appeals held that an arbitration clause in a consumer contract was not unconscionable, but the court concluded that the “loser pays” provision was against Ohio public policy. *Gaither v. Wall & Associates, Inc.*, 79 N.E. 3d 620 (Ohio App. 2017). In light of the strong policy in Ohio for arbitration, the court determined that the best approach was to strike the “loser pays” provision and enforce the agreement to arbitrate.

The arbitration provision was in paragraph 13 a of three page contract for assistance with tax liens and tax debt. The last sentence of the provision provided:

> If arbitration is invoked in accordance with the provisions of this Agreement, the substantially prevailing party in the arbitration will be entitled to recover from the other all costs, fees, and expenses pertaining or attributable to such arbitration, including reasonable attorneys' fees for those claims on which the substantially prevailing party prevailed.

The consumer alleged the arbitration provision was unconscionable.

The court explained that the party asserting unconscionability of a contract bears the burden of proving that the agreement is both procedurally and substantively unconscionable. The court found that the consumer failed to present any evidence that the contract was procedurally unconscionable. The court stated that simply showing that a contract is preprinted and that the arbitration clause is a required term, without more, fails to demonstrate the unconscionability of an arbitration clause. Additionally, the court noted that the provision was not difficult to understand and that a contract of adhesion is not per se unconscionable. Thus, the consumer’s argument failed on the lack of procedural unconscionability alone.

The consumer argued that the arbitration clause was substantively unconscionable because it would require him to travel to Virginia and incur substantially more cost than if the case were adjudicated in Ohio. Again, the court found that the consumer failed to submit any evidence to support his argument. The consumer also argued that the loser pays provision made the arbitration clause substantively unconscionable. However, as the court had already concluded that the arbitration clause was not procedurally unconscionable, the consumer could not prevail on the basis of unconscionability.

After reviewing other Ohio decisions, the court found the loser pays provision to be against public policy. In light of the strong policy favoring arbitration the court struck the offending provision but still allowed enforcement of the agreement to arbitrate.

The case illustrates Ohio’s strong policy favoring arbitration. The case also demonstrates the importance of having consumer arbitration clauses that are easy to read and contain fair provisions.

Please contact us with questions or to discuss your arbitration clause. ❑

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