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ALERT

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OHIO COURT OF APPEALS STRIKES LOSER-PAYS PROVISION BUT UPHOLDS ARBITRATION AGREEMENT

In *DeVito v. Autos Direct Online, Inc*., the Ohio Eighth District Court of Appeals struck a provision in an arbitration agreement requiring the non-prevailing party to pay arbitration costs but otherwise upheld the arbitration agreement. 37 N.E.3d 194 (Ohio Ct. App. 2015).

The plaintiff brought an action against Autos Direct Online ("ADO") alleging Consumer Sales Practices Act ("CSPA") violations and fraud claims after ADO allegedly delivered an automobile with mechanical issues that ADO had represented would be fixed prior to delivery. ADO moved the court to stay the proceedings and refer the matter to arbitration pursuant to the arbitration agreement signed by ADO and plaintiff. The trial court granted the motion to compel arbitration and plaintiff appealed.

The Court of Appeals held the loser-pays provision to be both substantively and procedurally unconscionable. The court stated that the loser-pays provision would result in prohibitive costs for almost all vehicle buyers, as the filing fees, hearing fees and arbitrators' compensation fee were likely to total $7,000, not including attorneys' fees. Additionally, under typical American Arbitration Association (AAA) rules, awarding attorneys' fees to the prevailing party is within the arbitrator's discretion. Under the loser-pays provision in the arbitration agreement, the award of attorneys' fees to the prevailing party is mandatory. *Id.* The court also expressed concern that a diligent consumer would not be able to discern the extent of potential future liability, as the agreement itself did not contain the filing and arbitrator fees, but referred the consumer to the AAA official rules. The court stated, it is wrong to expect a consumer purchasing a vehicle online to research and decipher thoroughly the complex AAA commercial and consumer rules and procedures in order to know the potential costs of arbitration should she fail to prevail.

The court also held the loser-pays provision to be against public policy. The court specifically concluded that the loser-pays provision was an attempt to rewrite the CSPA attorneys' fees rule. Under the CSPA, the court may award attorneys' fees to the defendant prevailing party only if the consumer complaining of the act or practice that violated the CSPA has brought or maintained an action that is groundless, and the consumer filed or maintained the action in bad faith. Ohio Rev. Code § 1345.09(F). The court stated that the CSPA demonstrates a strong public policy that consumers who bring good faith claims under the CSPA will not have to pay attorneys' fees even if they lose their claims. The court found the loser-pays provision violated the public policy as set forth in the CSPA, rendering the provision against public policy.

However, instead of holding the entire arbitration agreement unconscionable, the court chose to strike the loser-pays provision and uphold the remainder of the arbitration agreement, citing Ohio's policy of encouraging arbitration. The court affirmed that a strong presumption exists in favor of utilizing legally-balanced arbitration when a claim falls within the scope of the arbitration. Specifically, the court stated that while inherently unfair language can and should be stricken, there is no authority inherent in the court to carte blanche strike down an otherwise valid arbitration agreement.

Thus, the court removed the portion of the arbitration agreement it deemed unconscionable and against public policy and upheld the non-offending portion of the parties' arbitration agreement. ❑

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