



INDIANA COURT RULES THAT SILENCE AND INACTION DOES NOT CREATE AN ENFORCEABLE AGREEMENT TO ARBITRATE

On October 24, 2023, the Supreme Court of Indiana ruled on a case involving a consumer's acceptance of a credit union's ("CU") arbitration addendum. *Land v. IU Credit Union*, ___ N.E.3d ___, 2023 WL 6985790 (Ind., Oct. 24, 2023). The case focused on two key facts: (i) whether notice to the consumer of an arbitration addendum was reasonable and valid and (ii) whether the consumer's silence and inaction amounted to assent to the arbitration addendum. The subject of the lawsuit is a proposed 2019 addendum to an agreement between a CU and its consumer. The addendum was provided to the consumer via email and U.S. postal mail, proposing the following amendments: (i) that either party may require arbitration for disputes regardless of the other party's consent and (ii) that the consumer is prohibited from initiating or joining in a class action lawsuit.

The consumer filed a class-action complaint, unrelated to the arbitration addendum, against the CU. The CU then moved to compel individual arbitration against the consumer citing the arbitration addendum. The trial court ruled in favor of the CU and the Indiana court of appeals reversed, holding there was no reasonable notice.

The Supreme Court of Indiana held that the CU did provide reasonable notice of the arbitration addendum, which the court viewed as an offer. The court held that while the CU's email notification may not have qualified as reasonable notice by itself, the postal notice was sufficient. Neither the email nor its subject line indicated that there was a "new notice" to review that would indicate a change to the agreement. The text of the email and the subject line simply indicated the consumer had a "new eStatement" to review, which did not clearly indicate an important change to the agreement. Thus, the court held the email alone provided insufficient notice. The document *Land* received by regular U.S. mail consisted of a two-page monthly account statement, the first page of which noted the Addendum in bold, all-capital letters and directed her to review the updated terms "included in this mailing." The court explained that a monthly bank statement contains information at the heart of the service relationship, making it well-suited to

communicate change-of-terms notices and other important information. Thus, the court held that the mailed statement provided reasonable written notice of the offer to amend the agreement. The remaining question for the court was whether the valid offer was accepted.

The court focused on whether the consumer's silence indicated assent to the new terms. In ruling that silence did not amount to assent, the court noted:

- (1) The CU was unable to show that the consumer's silence and inaction showed an *intent* to accept the offer. This was further supported by the fact that the consumer filed a class-action lawsuit against the CU, in violation of the proposed arbitration addendum, effective proof that the consumer did not intend to be bound by the addendum.
- (2) Nothing in the arbitration addendum indicated that continued use of the account would constitute acceptance of the new terms, which may have allowed a different conclusion with regard to the consumer's intent as a result of general silence and inaction.
- (3) Silence and inaction (as acceptance) was not consistent with the CU's course of dealing with the consumer on other occasions. In the past, the CU would require the consumer to click an "accept" button to approve new terms.

The court ultimately concluded that there was no enforceable agreement to arbitrate between the CU and the consumer and remanded the case for further proceedings in line with its ruling.

Changes in terms are typically subject to fundamental contract principles governing the modifications and amendments in the absence of statutory override or clear prior agreement between the parties regarding the modification and amendment process. Financial institutions need to provide clear notice of changes in the terms of agreements and obtain valid assent to these changes. The consumer assent process needs to be thought through carefully. We can help develop workable plans. Let us help you!

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