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ELEVENTH CIRCUIT FINDS PROVISIONS UNENFORCEABLE BASED ON PUBLIC POLICY

The U.S. Court of Appeals for the Eleventh Circuit affirmed a district court's determination that a forum selection clause and class action waiver (outside of an arbitration clause) in a small-dollar funding product were unenforceable under Georgia law because enforcing these provisions would contravene a clear public policy set forth in the Georgia Payday Lending Act ("PLA") and the Industrial Loan Act ("ILA"). *Davis v. Oasis Legal Finance Operating Company, LLC,* No. 18-105256 (11th Cir. Aug. 28, 2019).

The case involved funding agreements under which amounts of less than $3,000 were advanced to consumers and were repaid from any recoveries the consumers received in their respective personal injury lawsuits. A class of consumers sued Oasis in Georgia state court claiming that the agreements violated the PLA, ILA and Georgia usury laws. Oasis moved to dismiss the case and strike the class allegations from the complaint on the basis that the funding agreement's forum selection clause required the consumers to bring suit in Illinois and the class action waiver barred the consumers' ability to file a class action suit. The district court and Eleventh Circuit disagreed.

Before explaining the Eleventh Circuit's rationale for refusing to enforce each clause of the funding agreement, we note that the court treated this funding product as a loan subject to the PLA and ILA. In a footnote, the Eleventh Circuit explained that Oasis did not argue to the district court that the loans at issue were not loans under the PLA and ILA, even though the Georgia Supreme Court has held that loans in which the borrowers' obligations to repay are contingent upon success in an underlying personal-injury lawsuit are not "loans" under the PLA and ILA. Arguments regarding the nature of the product and applicability of the PLA and ILA were not properly before the Eleventh Circuit, so the court proceeding with its analysis by treating the product as a loan.

The Eleventh Circuit acknowledged that contract clauses, when properly bargained for, should be enforced except in the most exceptional cases. The U.S. Supreme Court has outlined the exceptional cases including when enforcement of the clause would contravene a strong public policy. The court identified Georgia's relevant public policy by analyzing statutory provisions and legislative comments accompanying the statute.

With respect to the forum selection clause, the PLA prohibits a loan contract from designating a court for the resolution of disputes in a county other than the county in which the borrower resides or the loan office is located. The Georgia legislature explained that this provision was intended to prohibit payday lenders from using forum selection clauses to avoid Georgia courts. Oasis argued without success that the unqualified term "county" in the PLA's forum provision includes the out-of-state county where Oasis's loan office is located and that the PLA does not apply to out-of-state lenders. The court cited provisions of the PLA to reject Oasis's interpretation of the statute. The court held that Georgia statutes establish a clear public policy against out-of-state lenders using forum selection clauses to avoid litigation in Georgia courts.

The court also held that the PLA and ILA establish the Georgia Legislature's intent to preserve class action as a remedy for consumers aggrieved by payday lenders and enforcing the class action waiver in the funding argument would undermine the purpose and spirit of the Georgia statutory scheme by eliminating the class action remedy for payday loans. Both the PLA and ILA contain provisions that allow claims under the statute to be brought by class action. The Eleventh Circuit said the class action waiver was unenforceable on the independent grounds of contravening public policy regardless of whether the provision is also procedurally or substantively unconscionable. The court distinguished cases cited by Oasis that found class action waivers in arbitration clauses were not void as against public policy, by noting that this case involves a class action waiver in a payday loan agreement.

Understanding the interplay of potentially applicable statutes in interstate lending is critical. While the Eleventh Circuit's ruling is based on Georgia law and a similar public policy determination may not be made in other states, the *Davis* case is a reminder of the different ways consumers can challenge the enforceability of contract provisions. ❑

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