

LEGAL UPDATES

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# Trouble Brewing For Arbitration Clauses — What *Brewer v. Missouri Title Loans, Inc.* May Mean For Your Business

An arbitration clause that does not expressly authorize class action arbitration may be unenforceable in Missouri and could invalidate the entire clause, according to a recent decision by the state's Supreme Court. The recent opinion in *Brewer v. Missouri Title Loans Inc.* may significantly impact companies that rely on arbitration clauses to limit or otherwise define the scope of options available to resolve a contract dispute, particularly in employment and consumer contracts. Companies are advised to review existing contract terms to determine if they may be affected by the opinion.

In *Brewer v. Missouri Title Loans, Inc.*, the Supreme Court of Missouri struck an arbitration clause that waived class arbitration after finding the waiver was unconscionable. The contract at issue involved a \$2,215 loan to the plaintiff that was secured by a lien on her automobile. The court determined that the clause "effectively forfeited legal counsel in any claim that arose" under the contract because the plaintiff would be unlikely to obtain counsel to prosecute an individual claim for the small damages amount likely to be at issue.

The case is significant for its departure from existing precedent in two important respects. First, instead of requiring the plaintiff to show both substantive and procedural unconscionability to defeat an arbitration clause, the opinion clearly indicates that procedural unconscionability may not be necessary "if a contract provision is sufficiently unfair." Second, although the trial court followed existing protocol when it simply severed the unconscionable limitation on class arbitration from the contract requirement and directed that the balance of the case should proceed to arbitration, the Missouri Supreme Court held that a recent decision by the United States

Supreme Court nullified Missouri's precedent. "As [the U.S. Supreme Court] requires an affirmative consent to class arbitration before it may be compelled, its rationale would preclude Missouri Title Loans from being forced to submit to class arbitration." Therefore, the court struck the entire arbitration clause and required the case to proceed in court. When "individual arbitration would not be a feasible remedy," the court explained, the case must proceed as a class action. Since "there is no affirmative agreement to class arbitration, the class action must proceed in court."

## Implications

Existing case law effectively prohibits meaningful review of an arbitrator's award and therefore, few businesses are willing to risk consenting to class action arbitration. *Brewer* opens the door to further evasion of arbitration clauses in most consumer, and at least some, employment cases. According to *Brewer's* new precedent, a plaintiff need only allege that he or she is unlikely to attract a lawyer willing to take the case due to the nominal amount of the individual claim unless the potential exists to seek class certification. If a plaintiff can support the allegation with expert opinions that are credited by the trial court, *Brewer* mandates that the court strike the entire arbitration clause.

## What This Means To You

If your company wishes to maintain the right to arbitrate contract disputes, we recommend that you thoroughly review the arbitration clauses contained in your standard terms and conditions in light of *Brewer* and other recent case law. Husch Blackwell's team of experienced litigators and counselors has ideas on how to minimize the risk of class actions and draft enforceable arbitration provisions. We continue to follow developments in this area of the law and we are available to discuss these issues at your convenience.

## Contact Info

Please contact your Husch Blackwell attorney or one of the attorneys listed below for additional information and assistance.

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