

Introduction

The Florida Supreme Court's decision on March 20, 2014, in *Basulto v. Hialeah Automotive*, No. SC09-2358, is not the end of enforceable arbitration agreements with consumers in Florida, but it does serve as a warning that it is time to review consumer arbitration clauses to ensure that they are clear and fair.

Background

The facts in *Basulto* presented a perfect storm for unenforceability of an arbitration agreement. The Basultos purchased a 2005 Dodge Caravan from Hialeah Automotive. As part of the transaction, the Spanish-only speaking buyers were required to sign multiple documents in English that contained conflicting dispute resolution provisions. There was a jury trial waiver (arguably implying a right to go to court), a provision calling for arbitration with one arbitrator, and a third provision calling for arbitration with a panel of three arbitrators. In addition, there were waivers of substantive legal rights embedded in the dispute resolution clauses, including a waiver of the right to seek punitive damages. When the dealership employees explained in Spanish the arbitration process and the rights being waived, they got it wrong.

Findings

The trial court found that the conflicting dispute resolution provisions, the language barrier and the inaccurate Spanish-language explanation of the agreements by the dealership resulted in so much confusion and ambiguity that there was never a "meeting of the minds" on arbitrating any dispute arising from the transaction. The Supreme Court agreed, dictating that courts must apply a three-part test when analyzing the enforceability of an arbitration agreement: "(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." Finding that the first requirement was not satisfied, the Court held that the trial court's ruling should have been affirmed. For the avoidance of doubt, the Court did not rule, as a matter of law, that consumer contracts must be translated into the buyer's first language.

Exercising its discretionary authority, the Supreme Court went on to clarify the standard for the unconscionability defense under Florida law. Reviewing precedent, the Court reminded litigants that a successful unconscionability defense requires a showing of both *procedural* and *substantive* unconscionability. "Procedural unconscionability" concerns the circumstances surrounding formation of the agreement, such as unequal bargaining power between the parties. "Substantive unconscionability" relates to the overall fairness of the substantive terms of the purported agreement. Without attempting to apply this standard to the facts of *Basulto*, the Supreme Court reiterated that courts must conclude that both elements of unconscionability are present, but

clarified that courts must also weigh the elements on a "sliding scale." The greater the discrepancy between the parties' respective bargaining power, the less unfair the substantive terms must be for the contract to be unconscionable (and thus unenforceable). Conversely, the harsher the substantive terms, the less significant the discrepancy between the parties' roles in the transaction must be.

Opportunity to Clarify Arbitration Clauses

Basulto does not present a sea-change in the enforceability of arbitration clauses in consumer transactions in Florida, as much as it suggests that businesses dealing with consumers need to ensure that the provisions of their arbitration contracts are clear, understandable and reasonably fair. For example, had there been a single arbitration agreement in the Basulto's sales paperwork that was reasonably explained by the sales team, arbitration would likely have been compelled. Accordingly, we recommend businesses review their consumer agreements with an eye towards: (1) making the arbitration clause a stand-alone document that is separate from the other agreement(s); (2) making the arbitration agreement short, simple and fair; and (3) possibly even translating the arbitration agreement into Spanish, given the significant number of Spanish speaking consumers in Florida.

If you have questions about arbitration clauses and agreements with consumers, or need someone to review your contracts, please contact the Squire Sanders lawyer with whom you usually work or one of the individuals listed in this publication.

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