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Lucinda Housley Luetkemeyer

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NOTE

In a Class of Their Own: The Eighth Circuit Upholds a Credit Card Agreement's Class Action Waiver and Mandatory Arbitration Clause

Cicle v. Chase Bank USA, 583 F.3d 549 (8th Cir. 2009).

LUCINDA HOUSLEY LUETKEMEYER*

I. INTRODUCTION

"[O]nly a lunatic or a fanatic sues for \$30."¹ These words, written by Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit as part of a decision noting the advantages of class action lawsuits,² explain the reality millions of American consumers face when they agree to an arbitration clause that contains a class action waiver. For many of these consumers, the cost of litigating or arbitrating against a corporate defendant drastically outweighs the relatively modest claims they may assert due to a company's alleged wrongdoing. As a result, consumer plaintiffs and their advocates claim that class action bans in mandatory arbitration agreements effectively immunize corporations from liability for potential wrongdoing.³

In an attempt to limit class action suits, companies routinely require customers to assent to arbitration agreements that include class action waivers.⁴ The Federal Arbitration Act provides that an agreement to arbitrate is enfor-

* B.J., B.A., University of Missouri-Columbia, 2008; J.D. Candidate, University of Missouri School of Law, 2011; Senior Lead Articles Editor, *Missouri Law Review*, 2010-2011. I am grateful to Dean Bob Bailey, Director of the Center for the Study of Dispute Resolution at the University of Missouri School of Law, for his advice and guidance and to the members of the *Missouri Law Review* for their tireless editing. Special thanks go to Vicky Trippe and Elizabeth Brixey, two fine journalism teachers from whom I learned the importance of storytelling.

1. *Carnegie v. Household Int'l., Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.").

2. *Id.*

3. F. Paul Bland, Jr. & Claire Prestel, *Challenging Class Action Bans in Mandatory Arbitration Clauses*, 10 *CARDOZO J. CONFLICT RESOL.* 369, 370 (2009).

4. Posting of Scott L. Nelson to Consumer Law & Policy Blog, <http://pubcit.typepad.com/clpblog/2007/09/eleventh-circui.html> (Sept. 6, 2007, 17:53 EST).

ceable unless common law contract defenses, such as unconscionability, warrant the revocation of the contract.⁵ In recent years, American courts have ruled on the enforceability of class action waivers in arbitration agreements with varying results across circuits.⁶ Many courts have held that class action waiver provisions are unconscionable and unenforceable,⁷ whereas others have reached the opposite result.⁸ Though courts are split on the enforceability of class action bans, there is a “definite trend” of courts striking them down as unconscionable.⁹ Despite this trend and the growing outcry from consumer protection groups about the unfairness of such provisions,¹⁰ these clauses remain too valuable to corporate defendants for them to give up their fight,¹¹ and some courts continue to uphold such clauses as enforceable.¹²

The United States Court of Appeals for the Eighth Circuit recently joined the cadre of courts to uphold class action waivers in arbitration agreements. In *Cicle v. Chase Bank USA*, the court held that a Missouri woman’s putative class action suit against a credit card company was barred due to the

5. William M. Howard, Annotation, *Validity of Arbitration Clause Precluding Class Actions*, 13 A.L.R. 6th 145 (2006 & Supp. 2010) (citing Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2 (2006)).

6. See Alan S. Kaplinsky & Mark J. Levin, *Class Action Waivers Gain Legislative and Judicial Traction*, 62 BUS. LAW. 703 (2007) (discusses recent cases involving class action waivers).

7. *Homa v. Am. Express Co.*, 558 F.3d 225, 233 (3d Cir. 2009); *In re Am. Express Merchs.’ Litig.*, 554 F.3d 300, 320 (2d Cir. 2009), *vacated sub nom.* *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010); *Davis v. Chase Bank USA, N.A.*, 299 Fed. App’x 662, 664 (9th Cir. 2008); *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1219 (9th Cir. 2008); *Klussman v. Cross Country Bank*, 36 Cal. Rptr. 3d 728, 733 (Cal. Ct. App. 2005); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 868 (Cal. Ct. App. 2002).

8. See *Pleasant v. Am. Express Co.*, 541 F.3d 853, 859 (8th Cir. 2008); *Lloyd v. MBNA Am. Bank, N.A.*, 27 Fed. App’x. 82 (3d Cir. 2002); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 378 (3d Cir. 2000); *Battels v. Sears Nat’l Bank*, 365 F. Supp. 2d 1205, 1216 (M.D. Ala. 2005); *Pick v. Discover Fin. Servs., Inc.*, No. Civ.A. 00-935-SLR, 2001 WL 1180278, at *5 (D. Del. Sept. 28, 2001); *Goetsch v. Shell Oil Co.*, 197 F.R.D. 574, 578 (W.D.N.C. 2000); *Jones v. Citigroup, Inc.*, 38 Cal. Rptr. 3d 461, 466 (Cal. Ct. App. 2006), *review granted*, 135 P.2d 2 (Cal. 2006), *transferred*, 171 P.3d 547 (Cal. 2007); *Discover Bank v. Superior Court*, 36 Cal. Rptr. 3d 456, 460 (Cal. Ct. App. 2005); *Strand v. U.S. Bank Nat’l Ass’n*, 693 N.W.2d 918, 927 (N.D. 2005).

9. Pamela A. MacLean, *Class Action Waivers Hit a Wall: Courts Find Waivers ‘Unconscionable,’ Refuse to Compel Arbitration*, 29 NAT’L L.J. 5, 5 (2007).

10. Amici Curiae Brief of National Ass’n of Consumer Advocates (NACA) & Nat’l Consumer Law Center (NCLC) Filed in Support of Plaintiff-Appellee’s Petition for Rehearing or Rehearing *en banc* at 10-13, *Cicle v. Chase Bank USA*, 583 F.3d 549 (8th Cir. 2009) (No. 08-1362).

11. Bland & Prestel, *supra* note 3, at 393.

12. See Kaplinsky & Levin, *supra* note 6.

class action waiver in her card agreement's arbitration clause.¹³ The Eighth Circuit reversed a sharply worded federal district court order¹⁴ and rejected the plaintiff's contention that the class action waiver was a "de facto immunity provision[]" for the credit card company which would leave her and other similarly situation plaintiffs effectively without a remedy.¹⁵ In reaching its decision, the Eighth Circuit overlooked Missouri's fundamental public policy disfavoring class action bars in arbitration provisions and effectively ignored several Missouri state court decisions handed down after oral argument that starkly conflict with the court's decision.¹⁶

II. FACTS AND HOLDING

Missouri resident Virginia Cicle received a Chase Bank credit card in the mail in April 2002.¹⁷ The "Mastercard and Visa Cardmember Agreement" that accompanied the card contained a binding arbitration provision barring Cicle from participating in a class action lawsuit against Chase Bank.¹⁸

ARBITRATION AGREEMENT: PLEASE READ THIS AGREEMENT CAREFULLY. IT PROVIDES THAT ANY DISPUTE MAY BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT. YOU WILL NOT BE ABLE TO BRING A CLASS ACTION OR OTHER REPRESENTATIVE ACTION IN COURT SUCH AS THAT IN THE FORM OF A PRIVATE ATTORNEY GENERAL ACTION, NOR WILL YOU BE ABLE TO BRING ANY CLAIM IN ARBITRATION AS A CLASS ACTION OR OTHER REPRESENTATIVE ACTION. YOU WILL NOT BE ABLE TO BE PART OF ANY CLASS ACTION OR OTHER REPRESENTATIVE ACTION BROUGHT BY ANYONE ELSE, OR BE REPRESENTED IN A CLASS ACTION OR OTHER

13. 583 F.3d at 557.

14. Order, *Cicle v. Chase Bank USA*, No. 07-04103-CV-C-NKL (W.D. Mo. Dec. 21, 2007).

15. Plaintiff's Suggestions in Opposition to Defendant's Motion to Compel Arbitration and to Stay Litigation at 9-12, *Cicle*, No. 07-04103-CV-C-NKL (W.D. Mo. Oct. 15, 2007).

16. See Petition for Rehearing or Rehearing *en banc*, *Cicle*, 583 F.3d 549 (No. 08-1362) (referencing *Huch v. Charter Commc'ns, Inc.*, 290 S.W.3d 721 (Mo. 2009) (en banc) (handed down on Aug. 4, 2009) and *Woods v. QC Fin. Servs., Inc.*, 280 S.W.3d 90 (Mo. App. E.D. 2008) (handed down on Dec. 23, 2008)).

17. Order, *supra* note 14, at 1.

18. *Id.* at 1, 3-4.

REPRESENTATIVE ACTION. IN THE ABSENCE OF THIS ARBITRATION AGREEMENT, YOU AND WE MAY OTHERWISE HAVE HAD A RIGHT OR OPPORTUNITY TO BRING CLAIMS IN A COURT, BEFORE A JUDGE OR JURY, AND/OR TO PARTICIPATE OR BE REPRESENTED IN A CASE FILED IN COURT BY OTHERS (INCLUDING CLASS ACTIONS AND OTHER REPRESENTATIVE ACTIONS). OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT, SUCH AS DISCOVERY OR THE RIGHT TO APPEAL THE DECISION MAY BE MORE LIMITED. EXCEPT AS OTHERWISE PROVIDED BELOW, THOSE RIGHTS ARE WAIVED.¹⁹

The arbitration clause, while barring class action suits, allowed Cicle to pursue any claim against Chase in small claims court and provided that if she sought arbitration, the arbitrator could award either party attorney's fees or punitive damages to the extent permissible under the law.²⁰ Under the provision's terms, Chase agreed to pay for Cicle's first arbitration filing fee up to \$500 and agreed to pay the arbitration costs for the first two days of hearings.²¹

The agreement did not require Cicle's signature, as her assent to its mandatory terms was deemed to be effective when she began using the card.²² Cicle, therefore, became a Chase cardholder on April 19, 2002, when she first used the card.²³ The cardmember agreement contained a provision that allowed Chase to change the terms of the agreement at any time, with notification to the customer.²⁴ Over the next few years, the cardholder agreement was revised, with notice to Cicle, on several occasions.²⁵

From January 2004 to April 2004, Chase applied a 7.99% interest rate to Cicle's purchases.²⁶ In May 2004, Chase received a notification that Cicle had a negative entry on her credit report from another creditor and, as a result, dramatically increased the interest rate on her purchases to 25.99%.²⁷ Cicle later discovered that the negative entry was due to an unpaid forty-three dollar Lane Bryant credit card bill that was never forwarded to her new ad-

19. *Cicle*, 583 F.3d at 551-52.

20. Order, *supra* note 14, at 4.

21. *Id.*

22. See Petition for Rehearing or Rehearing *en banc*, *supra* note 16, at 2.

23. Order, *supra* note 14, at 1-2.

24. *Id.* at 2.

25. *Id.*; see also *Cicle v. Chase Bank USA*, 583 F.3d 549, 551 (8th Cir. 2009).

26. Order, *supra* note 14, at 2; see also *Cicle*, 583 F.3d at 551.

27. Order, *supra* note 14, at 2-3.

dress.²⁸ Cicle received no notice of the increased interest rate, which Chase retroactively applied to the previous month's billing cycle.²⁹ As a result of the increased interest rate, Cicle incurred approximately eighty dollars in additional finance charges.³⁰ Between 2004 and 2007, Chase Bank accumulated more than \$5,000,000 from retroactive late fees like the one levied against Virginia Cicle.³¹

Over the next year, Chase amended the existing cardholder agreement several times; among these amendments was a choice-of-law clause stating that Delaware law governed in case of a conflict.³² In order to reject Chase's proposed changes, Cicle had to affirmatively notify Chase in writing of her timely rejection, which she never did.³³ According to the cardmember agreement's terms, her continued use of the card constituted acceptance of the proposed changes.³⁴

In 2007, Cicle brought a putative class action suit in Missouri state court against Chase Bank USA, alleging that the company imposed illegal penalties and violated the Missouri Merchandising Practices Act (MMPA) when it increased the interest rate charged on her credit card balance.³⁵ Chase removed the case to federal court on the basis of federal question jurisdiction over the National Bank Act and diversity jurisdiction as provided for by the Class Action Fairness Act.³⁶ Chase then filed a motion to compel arbitration and to resist the class action litigation, citing the cardmember agreement provisions.³⁷

The U.S. District Court for the Western District of Missouri found the fee-sharing terms and the class action waiver of the arbitration agreement to be both procedurally and substantively unconscionable.³⁸ In her order, Judge Nanette Laughrey ruled that Missouri law applied because enforcing the card agreement under Delaware law, which assuredly would approve of the class action waiver, would be contrary to Missouri's fundamental policy under the MMPA of allowing class action lawsuits.³⁹ The district court determined that

28. Affidavit of Virginia Cicle, *Cicle v. Chase Bank USA, N.A.*, No. 07:04103-CV-C-NKL (Oct. 15, 2007); Plaintiff's Suggestions in Opposition to Defendant's Motion, *supra* note 15, at 2.

29. *Cicle*, 583 F.3d at 551; Petition for Rehearing or Rehearing *en banc*, *supra* note 16, at 2.

30. Order, *supra* note 14, at 3.

31. Petition for Rehearing or Rehearing *en banc*, *supra* note 16, at 2 (citing Affidavit of Chase employee at Joint Appendix 009, ¶ 22).

32. *Cicle*, 583 F.3d at 553; Order, *supra* note 14, at 3.

33. *Cicle*, 583 F.3d at 555.

34. Plaintiff's Petition for Rehearing or Rehearing *en banc*, *supra* note 16, at 2.

35. *Cicle*, 583 F.3d at 551.

36. *Id.*

37. *Id.*

38. Order, *supra* 14, at 7-16.

39. *Id.* at 6 & n.1.

if the contract were enforceable under Missouri law, Delaware law would have applied to the dispute.⁴⁰

The district court found the cardmember agreement to be procedurally unconscionable due to the fact that it was mailed to Cicle in a “take it or leave it” fashion.⁴¹ The court further ruled that Chase discouraged thoughtful consideration of the contract terms when it did not require Cicle to read, sign, or acknowledge the agreement in order to accept it.⁴² In addition to the finding of procedural unconscionability, Judge Laughrey found the agreement to be substantively unconscionable due to the class action waiver, which eliminated Cicle’s opportunity for redress given the individual and relatively minor pecuniary damages involved in the instant dispute.⁴³ Finally, the court ruled that the existence of a cost-sharing provision could not overcome the harm of the class action bar due to the possibility that Cicle could nonetheless bear the brunt of financial responsibility for her claim.⁴⁴

The court opined at length about the practical importance of allowing plaintiffs like Cicle to pursue their claims as class actions, given the low likelihood that an attorney would undertake individual representation of a plaintiff with such a small claim.⁴⁵ In perhaps the best summation of the theme and tone of the order, the court stated:

Although the arbitration agreement and cost-splitting provisions attempt to lessen the financial burdens on claimants, the result is the same: plaintiffs are forced to take on the same risks associated with bringing a class action without any of the benefits. . . . The practical effect is Chase is afforded immunity for its potential violations of the Missouri Merchandising Practices Act.⁴⁶

In an interesting move, the district court conditionally granted Chase’s motion to compel arbitration and stay litigation if Chase agreed to pay all costs and fees associated with the arbitration.⁴⁷ Chase declined to pay Cicle’s costs and fees, so the Western District declined to enforce the arbitration clause, finding that it was unconscionable under Missouri law.⁴⁸ Chase appealed to the Eighth Circuit.⁴⁹

On appeal, the Eighth Circuit upheld the class action waiver contained in the cardmember agreement’s arbitration clause, finding that it was neither

40. *Id.* at 5-6.

41. *Id.* at 7.

42. *Id.* at 7-8.

43. *Id.* at 8-16.

44. *Id.* at 10-16.

45. *Id.*

46. *Id.* at 15.

47. *Id.* at 17-18.

48. *Cicle v. Chase Bank USA*, 583 F.3d 549, 553 (8th Cir. 2009).

49. *Id.*

procedurally nor substantively unconscionable.⁵⁰ The court held that when an arbitration agreement containing a class action bar provides consumers the opportunity to reject changes, allows them to pursue minor claims in small claims court, and gives the arbitrator permission to award punitive damages and attorney's fees to either party, the class action waiver is not unconscionable.⁵¹

III. LEGAL BACKGROUND

This section first discusses choice-of-law provisions in cases involving consumer contracts and national banks and the various tests for determining whether the law of the chosen state or the forum state applies. It then explains the standard for enforceability of compelled arbitration provisions as interpreted in Missouri and across various circuits under the Federal Arbitration Act and state law. Next, this section more specifically analyzes the enforceability of class action waivers within arbitration clauses and discusses recent federal cases on the subject, explaining how various circuits and Missouri courts have treated class action waivers in credit card arbitration agreements. Finally, this section outlines and discusses recent cases that shed light on Missouri's public policy regarding class action waivers in arbitration agreements.

A. Choice of Law

Federal courts sitting in diversity must apply the forum state's choice-of-law rules.⁵² Missouri law provides that a contract's choice-of-law clause is enforceable unless applying the law would be "contrary to a fundamental policy of Missouri."⁵³ When this test is applied to class action waivers in Missouri, the central inquiry is whether the forum state has a fundamental policy against class action bans.⁵⁴ In cases where one party is a national bank, a court can choose to invoke the National Bank Act, which adopts the choice of law of the state where the bank is domiciled.⁵⁵

Courts look to the choice-of-law provision within the contract as evidence of the parties' agreement, but they can also find guidance in the Restatement (Second) of Conflicts of Laws, which provides that the chosen state in the contract's choice-of-law provision must bear a "substantial relationship to the parties or transaction at issue or [the parties must have some other]

50. *Id.* at 557.

51. *Id.* at 555-56.

52. *Prudential Ins. Co. of Am. v. Kamrath*, 475 F.3d 920, 924 (8th Cir. 2007) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)).

53. *Kagan v. Master Home Prods. Ltd.*, 193 S.W.3d 401, 407 (Mo. App. E.D. 2006); *accord Baxter Int'l, Inc. v. Morris*, 976 F.2d 1189, 1196 (8th Cir. 1992).

54. *Bland & Prestel*, *supra* note 3, at 384.

55. *See First Nat'l Bank in Mena v. Nowlin*, 509 F.2d 872, 876 (8th Cir 1975).

reasonable basis for [their] choice.”⁵⁶ The court must also determine (1) whether the plaintiff’s forum state has a greater interest than the chosen state in the determination of the case’s particular issues and (2) the particular state’s law that would apply as a default if the parties had never agreed to a choice-of-law provision.⁵⁷ This “materially greater interest” test is often applied along with the Restatement and an analysis of the forum state’s “fundamental” policy for or against class action bans.⁵⁸

In sum, the party who wishes to have the case heard in a forum other than that provided for in a choice-of-law provision must show that its chosen state has a materially greater interest in the outcome of the case and that the law of the chosen state contravenes the fundamental policy of the forum state. Several recent decisions across circuits have held class action waivers to be unenforceable under choice-of-law analysis.⁵⁹

B. The Federal Arbitration Act and the Enforceability of Compelled Arbitration Provisions

The Federal Arbitration Act (FAA) governs the enforceability of arbitration provisions in consumer contracts such as the credit card agreements at issue in the instant case.⁶⁰ Though the FAA is a substantive federal arbitration law,⁶¹ it preserves state common law contract law as it regulates arbitration agreements.⁶² Under the FAA, an arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁶³ The Eighth Circuit has held that

56. *Doerhoff v. Gen. Growth Props., Inc.*, No. 06-04099-CV-C-SOW, 2006 U.S. Dist. LEXIS 80946, at *13 (W.D. Mo. Nov. 6, 2006) (citing RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 187(2)(a) (1971)).

57. *Id.* The Federal Arbitration Act reads:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2006).

58. *Bland & Prestel*, *supra* note 3, at 383-84.

59. *See Homa v. Am. Express Co.*, 558 F.3d 225, 233 (3d Cir. 2009); *Doerhoff*, 2006 U.S. Dist. LEXIS 80946, at *18-19; *Klussman v. Cross Country Bank*, 36 Cal. Rptr. 3d 728, 734-41 (Cal. Ct. App. 2005).

60. 9 U.S.C. § 2.

61. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

62. 9 U.S.C. § 2.

63. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273 (1995) (quoting 9 U.S.C. § 2).

the FAA promulgates a “liberal . . . policy favoring arbitration agreements.”⁶⁴ When a state court must rule on the validity of an arbitration provision that falls within the FAA, the court must apply the FAA’s substantive law, but may apply the state’s rules of procedure “so long as they do not defeat any of the substantive rights granted by Congress in the [FAA].”⁶⁵ The United States Supreme Court has held that this means the FAA does not prevent a court from striking down an arbitration clause under “a principle that applies to contracts generally.”⁶⁶

In determining whether an arbitration agreement should be enforced, courts first ask whether there was a valid arbitration agreement and, second, whether the current dispute falls within the scope of the arbitration agreement.⁶⁷ States may regulate arbitration clauses in contracts under common law contract principles and may invalidate arbitration provisions due to basic defenses to contract, such as duress, fraud, or unconscionability.⁶⁸

In order to invalidate a contract provision as unconscionable, the plaintiff must show that the provision at issue is “one ‘such as no man in his senses and not under delusion would make, on the one hand, and as no honest and fair man would accept on the other’.”⁶⁹ A court applying Missouri law generally must find that the provision is both substantively and procedurally unconscionable.⁷⁰ Procedural unconscionability involves the process of contract formation and can include pressure from one of the parties, a fine-print “adhesion” contract, misrepresentation, or relative unfairness in the bargaining positions of the parties.⁷¹ Substantive unconscionability, on the other hand, arises in agreements that contain unduly harsh terms.⁷² At the time the Eighth

64. *Lyster v. Ryan’s Family Steak Houses, Inc.*, 239 F.3d 943, 945 (8th Cir. 2001); *see also* *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985); *Suburban Leisure Ctr., Inc. v. AMF Bowling Prods., Inc.*, 468 F.3d 523, 526 (8th Cir. 2006).

65. *Whitney v. Alltel Commc’ns, Inc.*, 173 S.W.3d 300, 306 (Mo. App. W.D. 2005) (citing *Greenpoint Credit, LLC v. Reynolds*, 151 S.W.3d 868, 873 n.3 (Mo. App. S.D. 2004)).

66. *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1219 (9th Cir. 2008) (using *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996), as an example).

67. *MedCam, Inc. v. MCNC*, 414 F.3d 972, 974 (8th Cir. 2005).

68. *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 107 (Mo. App. E.D. 2003).

69. *Smith v. Kriska*, 113 S.W.3d 293, 298 (Mo. App. E.D. 2003) (quoting *Liberly Fin. Mgmt. Corp. v. Beneficial Data Processing Corp.*, 670 S.W.2d 40, 49 (Mo. App. E.D. 1984)).

70. *Whitney*, 173 S.W.3d at 308. *But see* *Brewer v. Mo. Title Loans, Inc.*, No. SC 90647, 2010 WL 3430411, *3 (Mo. Aug. 31, 2010) (en banc) (stating that a strong showing of substantive unconscionability relieves a party from having to show procedural unfairness in certain situations, discussed *infra* note 73 and accompanying text). The new standard articulated in *Brewer* was not in effect during the instant case.

71. *Funding Sys. Leasing Corp. v. King Louis Int’l, Inc.*, 597 S.W.2d 624, 634 (Mo. App. W.D. 1979).

72. *Id.*

Circuit heard Virginia Cicle's case against Chase Bank, Missouri law required courts to consider both substantive and procedural unconscionability in conjunction with each other in a sort of balancing test that objectively looked at the totality of the circumstances.⁷³

Plaintiffs who challenge the procedural conscionability of contracts that contain fine-print, boilerplate language often claim that the contracts are ones of adhesion.⁷⁴ Missouri courts have dealt with the conscionability of form contracts in general and have found that they are *not* "inherently sinister and automatically unenforceable.' Because the bulk of contracts signed in this country are form contracts . . . any rule automatically invalidating adhesion contracts would be 'completely unworkable.'"⁷⁵ Though an adhesion contract is not automatically unenforceable in Missouri, courts are free to strike down as unenforceable those provisions which do not comport with each party's reasonable expectations and are unconscionably unfair considering all the circumstances of the transaction.⁷⁶

73. *Whitney*, 173 S.W.3d at 308 ("[I]f there exists gross procedural unconscionability then not much [is] needed by way of substantive unconscionability . . ."). However, the Supreme Court of Missouri departed from this precedent in a 2010 decision that held that if a contract's terms are sufficiently substantively unconscionable, a finding of procedural unconscionability is not required. In *Brewer v. Missouri Title Loans, Inc.*, the court held:

This general rule [requiring both types of unconscionability] provides an acceptable analytical framework for most cases because a party who employs procedurally unconscionable bargaining tactics usually does so with the goal of inducing the other party into a one-sided contract. Nonetheless, there are cases in which a contract provision is sufficiently unfair to warrant a finding of unconscionability on substantive grounds alone. . . . Under Missouri law, unconscionability can be procedural, substantive or a combination of both.

2010 WL 3430411, at *3.

Although the Supreme Court of Missouri's decision in *Brewer* represents a significant shift in the law regarding the requirements for a finding of unconscionability, the instant case was decided before *Brewer* reached the state supreme court and therefore was decided when Missouri courts still were required to find both types of unconscionability before invalidating a contractual provision on that ground.

74. An adhesion contract is defined as "a form contract created by the stronger of the contracting parties. It is offered on a 'take this or nothing' basis." *Zemelman v. Equity Mut. Ins. Co.*, 935 S.W.2d 673, 675 (Mo. App. W.D. 1996) (internal quotation marks omitted) (quoting *Robin v. Blue Cross Hosp. Serv., Inc.*, 637 S.W.2d 695, 697 (Mo. 1982) (en banc)).

75. *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 107 (Mo. App. E.D. 2003) (citation omitted) (quoting *Hartland Computer Leasing Corp. v. Ins. Man, Inc.*, 770 S.W.2d 525, 527 (Mo. App. E.D. 1989)).

76. *Hartland*, 770 S.W.2d at 527.

*C. The Enforceability of Class Action Waivers in
Arbitration Clauses Across the Circuits*

Plaintiffs who challenge the enforceability of class action waivers in arbitration agreements usually bring their claim under one of several frameworks: the class action ban (1) is effectively exculpatory on public policy grounds;⁷⁷ (2) is unconscionable;⁷⁸ (3) conflicts with state laws;⁷⁹ or (4) violates federal statutory rights.⁸⁰

When a court strikes down a class action ban due to its exculpatory effect or its unconscionability, successful plaintiffs usually argue that the ban effectively immunizes the corporate defendant from liability for potential wrongdoing.⁸¹ In order to prove that the class action waiver is effectively exculpatory or unconscionable, plaintiffs highlight the modest size of their claims in order to demonstrate that class action is necessary because individual litigation is impractical or prohibitively expensive.⁸² Some courts have determined that without the benefit of class action protection, the corporate defendant will avoid liability and many class members' claims will go unremedied.⁸³ On the other hand, courts that uphold class action waivers as enforceable are often persuaded by corporate defendants' counter-arguments; these counter-arguments include the applicability of a choice-of-law clause in which the chosen state does not have a strong policy against class action bans and that fee-shifting provisions within the arbitration agreement make individual claims more feasible and affordable.⁸⁴

There is hardly unanimity among American courts, within or among circuits, with respect to the enforceability of class action waivers.⁸⁵ Adding to the uncertainty is the U.S. Supreme Court's silence; the Court has not yet ruled on the enforceability of an express class action waiver in a consumer arbitration agreement, though it recently granted certiorari to a case posing

77. Bland & Prestel, *supra* note 3, at 375.

78. *Id.* at 375-76; Nina Yadava, *Can You Hear Me Now? The Courts Send a Stronger Signal Regarding Arbitration Class Action Waivers in Consumer Telecommunications Contracts*, 41 COLUM. J.L. & SOC. PROBS. 547, 554-58 (2008).

79. Yadava, *supra* note 78, at 558-60.

80. *Id.* at 561.

81. Bland & Prestel, *supra* note 3, at 376.

82. *Id.* at 376-77.

83. *Id.* at 377; see *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 984, 986 (9th Cir. 2007) (holding a class action waiver to be unconscionable because the plaintiffs would be unable to bring personal claims for small dollar amounts); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005) (invalidating a class action ban because it "deliberately cheat[ed] large numbers of consumers out of individually small sums of money"); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1003-04 (Wash. 2007).

84. Bland & Prestel, *supra* note 3, at 382.

85. See *infra* notes 87-118 and accompanying text.

that very issue.⁸⁶ Nevertheless, an analysis of recent cases across circuits sheds meaningful light on current trends in the enforceability of class action bans and provides a helpful framework for discussing the instant decision.

In one of the most aggressive decisions invalidating a class action waiver,⁸⁷ the First Circuit held in the 2006 case *Kristian v. Comcast Corp.* that a class action ban could effectively deprive a plaintiff of his statutory rights.⁸⁸ The court held that had the class action waiver been upheld, the corporate defendant would be “essentially shielded from private consumer antitrust enforcement liability, even in cases where it ha[d] violated the law.”⁸⁹

The next year, the Eleventh Circuit joined the growing list of circuits to invalidate class action waivers when it held in *Dale v. Comcast Corp.* that a class action ban in an agreement between cable subscribers and Comcast was unconscionable because the cost of litigating over eleven-dollar fees would mean effective immunity for Comcast.⁹⁰ The court also cited the lack of a fee-shifting feature to award attorney’s fees to the prevailing party as a factor that made the waiver unconscionable.⁹¹ The panel held that “[c]orporations should not be permitted to use class action waivers as a means to exculpate themselves from liability for small-value claims.”⁹²

In deciding in favor of the plaintiff, the Eleventh Circuit noted that it was not establishing an across-the-board rule of unenforceability of class action bans but instead that each arbitration provision’s class waiver must be judged by its facts:

Relevant circumstances may include, but are not limited to, the fairness of the provisions, the cost to an individual plaintiff of vindicating the claim when compared to the plaintiff’s potential recovery, the ability to recover attorneys’ fees and other costs and thus obtain legal representation to prosecute the underlying claim, the practical affect [sic] the waiver will have on a company’s abili-

86. *Conception v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 3322 (May 24, 2010) (No. 09-893); *see also* Alan S. Kaplinsky & Mark J. Levin, *Consensus or Conflict? Most (But Not All) Courts Enforce Express Class Action Waivers in Consumer Arbitration Agreements*, 60 *BUS. LAW.* 775, 775 (2005) (“One of the most important arbitration questions that has yet to be definitively resolved by the U.S. Supreme Court is the enforceability of an express class action waiver in a consumer arbitration agreement.”).

87. *Yadava*, *supra* note 78, at 561.

88. 446 F.3d 25, 51 (1st Cir. 2006).

89. *Id.* at 61.

90. 498 F.3d 1216, 1224 (11th Cir. 2007).

91. *Id.*

92. *Id.*

ty to engage in unchecked market behavior, and related public policy concerns.⁹³

In 2008, the Ninth Circuit held that an arbitration clause in a consumer agreement was unconscionable due to its class action waiver.⁹⁴ In *Lowden v. T-Mobile USA, Inc.*, the court invalidated a class action waiver as substantively unconscionable and, as a result, unenforceable because it deprived plaintiffs of any real remedy and effectively immunized the corporate defendant from liability.⁹⁵ The Ninth Circuit relied on the decision it made the previous year in *Shroyer v. New Cingular Wireless Servs., Inc.*⁹⁶ In *Shroyer*, the court held that because unconscionability is a “generally applicable” defense to contract enforcement, a finding of unconscionability can invalidate a class action ban in an arbitration agreement when the claims are small.⁹⁷

In a 2009 decision analyzing both the choice of law issue and the enforceability of a class action waiver in a credit card agreement, the Third Circuit determined that a forum state’s policy against class action bans is a *fundamental* policy under the Restatement (Second) of Conflicts of Law.⁹⁸ The case, *Homa v. American Express Co.*, involved a situation where the cardholder agreement would have applied the law of a state that clearly allowed for waiver of the right to a class action, even though the forum state’s public policy conflicted with the law of the agreement’s chosen state.⁹⁹ The contract at issue was a form contract that bore “the hallmarks of a contract of adhesion,” as it was presented in a standardized form and involved a very small amount of damages.¹⁰⁰ The court held that the law of the forum state, which had a clear policy opposing class action bars in arbitration agreements, applied and the court invalidated the class action waiver as unconscionable.¹⁰¹

93. *Id.*

94. *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1219 (9th Cir. 2008).

95. *Id.* at 1217-19.

96. *Id.* at 1219-21; *see also* *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007).

97. *Shroyer*, 498 F.3d at 986-87.

98. *Homa v. Am. Express Co.*, 558 F.3d 225, 227-28, 231 (3d Cir. 2009) (referring to RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1969)).

99. *Id.* at 227.

100. *Id.* at 231.

101. *Id.*

*D. Missouri and Eighth Circuit Cases Regarding
Class Action Waivers*

In determining whether a court will enforce a class action waiver, a key question is whether doing so would conflict with the fundamental public policy of the forum state. Unlike Utah, for example, which has enacted a state statute validating class action waivers,¹⁰² Missouri's public policy regarding the validity of class action bans must be gleaned from case law and the general precepts of the Missouri Merchandising Practices Act.¹⁰³

At the time *Cicle* was decided,¹⁰⁴ the leading Missouri case regarding the unconscionability of arbitration provisions was *Whitney v. Alltel Communications, Inc.*¹⁰⁵ In *Whitney*, the Missouri Court of Appeals, Western District, heard the case of a customer who sued his cell phone provider alleging that the company violated the Missouri Merchandising Practices Act when it charged an eighty-eight-cent monthly fee on his billing statement.¹⁰⁶ The plaintiff sought class action certification, and the corporate defendant moved to compel arbitration pursuant to the mandatory arbitration clause and class action bar therein.¹⁰⁷ The court found the arbitration provision procedurally unconscionable due to the lack of negotiation between the parties, the "take it or leave it" nature of the provision, and the defendant's superior bargaining position.¹⁰⁸ In addition, the court found substantive unconscionability due to the class action waiver and a part of the contract requiring the consumer to bear arbitration costs.¹⁰⁹

The *Whitney* court held that the class action waiver and the requirement that the customer bear arbitration costs limited the plaintiff and similarly situated consumers "to a forum where the expense of pursuing most claims related to incorrect billing would far exceed the amount in controversy."¹¹⁰ Because the plaintiff's eighty-eight-cent claim "would not be economically feasible" to pursue on its own, the court found that "[p]rohibiting class treat-

102. UTAH CODE ANN. § 70C-3-104 (West 2010) (providing that "a creditor may contract . . . for a waiver by the debtor of the right to initiate or participate in a class action").

103. MO. REV. STAT. §§ 407.010-.130 (2000 & Supp. 2009).

104. The Eighth Circuit handed down *Cicle v. Chase Bank USA* on October 6, 2009. 583 F.3d 549 (8th Cir. 2009). On August 31, 2010, the Supreme Court of Missouri handed down *Brewer v. Missouri Title Loans, Inc.*, which is now the leading Missouri case regarding the unconscionability of arbitration provisions. No. SC 90647, 2010 WL 3430411 (Mo. Aug. 31, 2010) (en banc). See *supra* note 73 and accompanying text.

105. 173 S.W.3d 300 (Mo. App. W.D. 2005).

106. *Id.* at 304.

107. *Id.*

108. *Id.* at 310.

109. *Id.* at 313.

110. *Id.*

ment of these claims would leave consumers with relatively small claims without a practical remedy, and without a procedure (class actions) expressly provided for” under the MMPA and Missouri common law.¹¹¹ Most importantly, the *Whitney* court established the rule “that an arbitration clause that defeats the prospect of class-action treatment [in] a setting where the practical effect affords the defendant immunity is unconscionable.”¹¹² After finding both procedural and substantive unconscionability for the foregoing reasons, the *Whitney* court invalidated the arbitration agreement.¹¹³

Just a few weeks before the Missouri Court of Appeals, Western District, released its decision in *Whitney*, the United States District Court for the Western District of Missouri handed down *Sprague v. Household International*, which held that the presence of a class action waiver in an arbitration agreement weighs in favor of finding it substantively unconscionable.¹¹⁴ There, as in previous cases, the court reasoned that customers “have little incentive to proceed individually” to recover relatively small monetary amounts.¹¹⁵

Only one year earlier, in 2008, the Eighth Circuit made the opposite determination and upheld a ban on class actions in a similar case. In *Pleasants v. American Express Co.*, a plaintiff brought a putative class action against American Express alleging that the credit card company violated the Truth in Lending Act (TILA) when it issued preloaded debit cards without making required disclosures.¹¹⁶ The court held that an arbitration provision containing a class action ban is enforceable and not unconscionable under Missouri law when the class action waiver is prominently displayed and because TILA contains a fee-shifting provision.¹¹⁷ The Eighth Circuit, applying Missouri law, upheld the class action waiver as valid because the arbitration agreement appeared plainly and conspicuously in the agreement and did not limit the cardholder’s damages.¹¹⁸

Three Missouri cases, two decided before the Eighth Circuit’s opinion in *Cicle* and one decided after the opinion in *Cicle* but before the Eighth Circuit

111. *Id.* at 309.

112. *Id.* (quoting *Leonard v. Terminix Int’l Co.*, 854 So. 2d 529, 536 (Ala. 2003) (per curiam)).

113. *Id.* at 310-14. When the Eighth Circuit heard *Pleasants v. American Express Co.*, it distinguished *Whitney* to uphold the arbitration agreement on the basis that the clause in question did not limit the customer’s remedy. 541 F.3d 853, 858-59 (8th Cir. 2008).

114. 473 F. Supp. 2d 966, 973 (W.D. Mo. 2005).

115. *Id.* at 974.

116. 541 F.3d at 855.

117. *Id.* at 858-59.

118. *Id.* The Eighth Circuit previously upheld a class action ban in a 1995 case, *In re Piper Funds, Inc.*, when it applied Minnesota law to find that a party’s “contractual and statutory right to arbitrate may not be sacrificed on the altar of efficient class action management.” 71 F.3d 298, 303 (8th Cir. 1995).

denied Cicle's petition to rehear the case, indicate that Missouri's fundamental public policy tends to disfavor class action waivers.¹¹⁹ In the first case, *Woods v. QC Financial Services, Inc.*, the Missouri Court of Appeals, Eastern District, held that a class action waiver in an arbitration clause was unenforceable because it reduced the chance that the plaintiff would be able to attract competent counsel and would have the practical effect of exculpating the corporate defendant's wrongful conduct.¹²⁰ In *Woods*, the plaintiffs filed a putative class action against a payday loan company, and the defendant lender attempted to invoke the arbitration agreement's class action bar.¹²¹ The court held that "the class action waiver can prevent an aggregate recovery that can serve as a source of contingency fees for potential attorneys in light of the small dollar amount at issue."¹²² In invalidating the class action waiver under Missouri common law and the MMPA, the *Woods* court established that class action waivers that give de facto immunity to corporate defendants are unenforceable.¹²³

The second of the recent Missouri state cases to demonstrate the state's public policy disfavoring class action bars is the 2009 Supreme Court of Missouri case *Huch v. Charter Communications, Inc.*¹²⁴ In *Huch*, a unanimous court held that the Missouri Merchandising Practices Act affords certain protections to Missouri consumers, including the right to a class action, and that no waiver or contract shall deprive any Missouri consumer of such protections.¹²⁵ Finding that Missouri public policy protects all of the rights within the MMPA, the court held that the statute is "'obviously a declaration of state policy and [a matter] of Missouri's substantive law."¹²⁶ The *Huch* court held that the right to a class action is one of several main protections given to consumers in the MMPA¹²⁷ and that any attempt by the defendant to waive the plaintiff's ability to pursue a class action is unenforceable.¹²⁸ In reaching its

119. See *Huch v. Charter Commc'ns, Inc.*, 290 S.W.3d 721, 726 (Mo. 2009) (en banc); *Woods v. QC Fin. Servs., Inc.*, 280 S.W.3d 90, 98 (Mo. App. E.D. 2008); *Ruhl v. Lee's Summit Honda*, No. WD 70189, 2009 WL 3571309 (Mo. App. W.D. Nov. 3, 2009), *transferred*, 322 S.W.3d 136 (Mo. 2010) (en banc). Almost a year after the Eighth Circuit's decision in *Cicle*, the Supreme Court of Missouri decided two cases invalidating class action waivers as unconscionable. See *Ruhl v. Lee's Summit Honda*, 322 S.W.3d 136, 140 (Mo. 2010) (en banc), *reh'g denied*, Oct. 26, 2010; *Brewer v. Mo. Title Loans, Inc.*, No. SC 90647, 2010 WL 3430411, at *3 (Mo. Aug. 31, 2010) (en banc).

120. *Woods*, 280 S.W.3d at 97.

121. *Id.* at 92.

122. *Id.* at 97-98.

123. See *id.* at 99.

124. 290 S.W.3d 721.

125. *Id.* at 725-26.

126. *Id.* at 726 (quoting *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 498 (Mo. 1992) (en banc)).

127. MO. REV. STAT. § 407.025.2 (2000).

128. *Huch*, 290 S.W.3d at 725-26.

holding, the court cited a 1992 Supreme Court of Missouri decision, which held that the public policy of the MMPA is “so strong that parties will not be allowed to waive its benefits.”¹²⁹ The Supreme Court of Missouri bolstered its decision with a cite to *Whitney*,¹³⁰ indicating that *Whitney*’s holding invalidating a class action bar was further evidence of state public policy against such provisions.

A third case handed down before the Eighth Circuit declined to rehear *Cicle* sheds light on Missouri’s substantive policy regarding class action waivers. In *Ruhl v. Lee’s Summit Honda*, the Missouri Court of Appeals, Western District, relied on *Huch* to hold that a class action ban in a consumer agreement that gives rise to an alleged MMPA violation is unenforceable.¹³¹ The court held that a class action waiver in a contract to purchase a car was invalid due to substantive and procedural unconscionability; in particular, the court was concerned about its practical effect of immunizing the dealer from liability for alleged MMPA violations.¹³² The court held that “[t]o enforce the class action waiver in a situation of unequal bargaining power, on a pre-printed form, would unfairly deprive” the consumer of her right to a class action under Missouri law.¹³³

IV. INSTANT DECISION

In *Cicle v. Chase Bank USA*, the Eighth Circuit added its voice to the growing debate over the enforcement of class action waivers in consumer arbitration agreements and joined the side of federal circuit courts that have upheld the validity of such provisions.¹³⁴ The *Cicle* decision is controversial – lauded by some commentators as an example of the court “absolutely [getting] it right,”¹³⁵ and sharply criticized by others as “a step backward in what

129. *Id.* at 725 (quoting *High Life Sales Co.*, 823 S.W.2d at 498).

130. *Id.* at 726 (citing *Whitney v. Alltel Commc’ns, Inc.*, 173 S.W.3d 300, 314 (Mo. App. W.D. 2005)).

131. See *Ruhl v. Lee’s Summit Honda*, No. WD 70189, 2009 WL 3571309, *6 & n.6 (Mo. App. W.D. Nov. 3, 2009), *transferred*, 322 S.W.3d 136 (Mo. 2010) (en banc).

132. *Id.* at *6.

133. *Id.* (citing *Huch*, 290 S.W.3d at 727). Nearly a year after the Eighth Circuit decided *Cicle*, the Supreme Court of Missouri affirmed the trial court’s finding of unconscionability and allowed *Ruhl* to bring a class action. *Ruhl v. Lee’s Summit Honda*, 322 S.W.3d 136, 139-40 (Mo. 2010) (en banc). The court held that requiring the plaintiff to pursue her claim under such unconscionable circumstances would effectively immunize the defendant and allow it to continue its purportedly deceptive practices. *Id.*

134. 583 F.3d 549 (8th Cir. 2009); see also *supra* Part III.C (discussing federal circuit decisions).

135. Anthony R. McClure, *Eighth Circuit Upholds Class-Action Waiver*, ABA LITIG. NEWS, Dec. 23, 2009, available at <http://www.abanet.org/litigation/litigation>

has been an otherwise commendable movement toward restoring victims' rights."¹³⁶ The Eighth Circuit's unanimous opinion, written by Judge Pasco Bowman, relied on its previous holding in *Pleasants*¹³⁷ and attempted to distinguish the instant case from *Whitney*¹³⁸ to reverse the district court order and enforce the class action waiver and arbitration provision.¹³⁹

Judge Bowman began the decision by reviewing the district court's determination that Missouri law applied, analyzing the lower court's decision in light of the contract's choice-of-law clause preferring Delaware law.¹⁴⁰ The court noted that federal courts sitting in diversity apply the forum state's choice-of-law rules and recognized that Missouri law generally enforces choice-of-law provisions unless doing so would be contrary to Missouri's fundamental public policy.¹⁴¹ Early in the opinion, the court held that it was unnecessary to rule on whether Missouri or Delaware law should apply, holding that it would reverse the district court's decision in either situation.¹⁴² Later in the decision, the court determined that the district court erred when it held that Cicle's contract was contrary to Missouri's fundamental policy.¹⁴³ As a result, the panel reversed the district court's finding that Missouri law should apply while also addressing the substantive issue of whether Missouri law would invalidate the class action waiver.¹⁴⁴

The panel then discussed the Federal Arbitration Act and the enforceability of mandatory arbitration provisions, explaining that although the FAA expresses Congress' preference for using arbitration to resolve disputes, general contract defenses such as unconscionability are still grounds for the invalidation of such provisions.¹⁴⁵ Judge Bowman next addressed the broad issue of procedural unconscionability, citing *Whitney*'s rule that there must be at least some finding of both procedural and substantive unfairness before a contract may be invalidated due to unconscionability.¹⁴⁶ The court set the bar high for a finding of unconscionability when it cited the *Pleasants* rule that an agreement is unconscionable only when "there is 'an inequality so strong, gross, and manifest that it must be impossible to state it to one with common

news/top_stories/cicle-chase-eighth-circuit-class-action-waiver.html (citing a comment by Alan S. Kaplinsky).

136. *Id.* (citing a comment by Daniel R. Karon).

137. *See supra* note 116-18 and accompanying text.

138. *See supra* note 104-13 and accompanying text.

139. *Cicle*, 583 F.3d at 555-56.

140. *Id.* at 553.

141. *Id.* (citing *Kagan v. Master Home Prods., Ltd.*, 193 S.W.3d 401, 407 (Mo. App. E.D. 2006)).

142. *Id.*

143. *Id.* at 555-56.

144. *Id.* at 555-57.

145. *Id.* at 554.

146. *Id.* *But see* *Brewer v. Mo. Title Loans, Inc.*, No. SC 90647, 2010 WL 3430411 (Mo. Aug. 31, 2010) (en banc) (holding that unconscionability can be procedural, substantive, or a combination of both).

sense without producing an exclamation at the inequality of it.”¹⁴⁷ The court rejected the district court’s finding that the provision’s small print made the agreement procedurally unconscionable due to the bold-faced headings and all-uppercase font that introduced the class action waiver and arbitration agreement.¹⁴⁸

Next, the panel rejected the plaintiff’s argument that the agreement was an adhesion contract, noting that Cicle had an opportunity to reject Chase’s proposed changes in writing, yet failed to do so.¹⁴⁹ Distinguishing *Whitney* from the instant case, the court pointed out that in *Whitney*, the arbitration provision appeared in fine print on the back of the customer’s bill and offered no similar chance for the customer to reject the changes in writing.¹⁵⁰ Though it recognized that Chase was in a “superior bargaining position,” the court held that no evidence in the record suggested that the credit card company pressured or coerced Cicle into the agreement.¹⁵¹ Reasoning that all of modern commerce would halt if every form contract were deemed unconscionable due to its pre-printed, take-it-or-leave-it structure, the court found that a blanket rule “invalidating [such] contracts would be ‘completely unworkable.’”¹⁵²

The court then addressed the central issue of whether the contract’s class action ban was substantively unconscionable.¹⁵³ After noting the district court’s reliance on *Whitney* to find that Cicle and similarly situated consumers would have no effective remedy if the class action waiver stayed in place, the court attempted to distinguish the contract in *Whitney* from Cicle’s contract.¹⁵⁴ The court pointed out that the *Whitney* contract did not provide an alternative or exception to the binding arbitration¹⁵⁵ and consequently distinguished it from Chase’s agreement, which allowed for individual adjudication in small claims court.¹⁵⁶ Because of this exception, the court found that the opportunity for Cicle to pursue her claim in small claims court provided her with an “inexpensive, quick, and easy adjudication.”¹⁵⁷ In doing so, the panel rejected the district court’s finding that Cicle was effectively left without a remedy.

147. *Cicle*, 583 F.3d at 554 (quoting *Pleasants v. Am. Express Co.*, 541 F.3d 853, 857 (8th Cir. 2008)).

148. *Id.*

149. *Id.* at 555.

150. *Id.* at 554-55 (citing *Whitney v. Alltel Commc’ns, Inc.*, 173 S.W.3d 300, 310 (Mo. App. W.D. 2005)).

151. *Id.* at 555.

152. *Id.* (quoting *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 107 (Mo. App. E.D. 2003)).

153. *Id.*

154. *Id.*

155. *Id.*; see also *Whitney*, 173 S.W.3d at 309.

156. *Cicle*, 583 F.3d at 555.

157. *Id.*

After determining that the contract was not procedurally unconscionable and distinguishing Cicle's agreement from the one found substantively unconscionable in *Whitney*, the court analyzed whether class action waivers violate Missouri's fundamental public policy.¹⁵⁸ In a brief discussion, the Eighth Circuit found that the district court "overstated[d]" the case when it held that the class action waiver violated Missouri's fundamental policy under the MMPA.¹⁵⁹ The MMPA's allowance of class actions does not suggest that the state's public policy favors them or that deceptive merchandising practices would continue without the use of class actions, the court reasoned.¹⁶⁰ Further, the court emphasized that the class action bar did not limit Cicle's remedies or Chase's liabilities under the MMPA, comparing the instant case to *Pleasants*, where the Eighth Circuit upheld a class action waiver when alternative remedies were available.¹⁶¹ In holding that the class action waiver was not violative of Missouri's public policy, the Eighth Circuit relied on the plain language of the MMPA and the holding in *Pleasants*, citing no Missouri state court cases as evidence of Missouri's public policy.¹⁶² In sum, the court held that the class action waiver was not substantively unconscionable and that the district court erred in severing it from Cicle's contract.¹⁶³

Finally, the court addressed whether the contract's mandatory arbitration provision was substantively unconscionable due to the cost and fee-sharing provisions.¹⁶⁴ The court rejected the district court's finding that Cicle and other consumers would risk incurring substantial costs that would make pursuit of their claims effectively impossible and give Chase de facto immunity from liability.¹⁶⁵ Instead, the court emphasized the agreement's provision that Chase would reimburse Cicle for the initial arbitration fee up to \$500 and would pay for the first two days of arbitration.¹⁶⁶ In addition, the court found it persuasive that the agreement allowed the administrator to require Chase Bank to pay for Cicle's arbitration fees if the arbitrator found good reason to do so.¹⁶⁷

The court rejected a finding of unconscionability based on the mere possibility that Cicle could be forced to bear additional costs, reasoning that the cost-shifting provisions "save [the agreement] from being unconscionable on its face."¹⁶⁸ As to whether the specific circumstances of the instant dispute made the provision unconscionable in fact, the court found Cicle's affidavit

158. *Id.* at 555-56.

159. *Id.* (citing Order, *supra* note 14, at 9).

160. *Id.* at 556 (citing MO. REV. STAT. § 407.025.2 (2000)).

161. *Id.* (citing *Pleasants v. Am. Express Co.*, 541 F.3d 853, 858 (8th Cir. 2008)).

162. *Id.* at 555-56.

163. *See id.* at 556.

164. *Id.*

165. *Id.* at 556-57.

166. *Id.* at 556.

167. *Id.*

168. *Id.*

listing potential costs associated with arbitration to be insufficient evidence that arbitration would be prohibitively expensive.¹⁶⁹ To support its finding, the court cited one of its 2004 opinions, which held that a plaintiff who seeks to invalidate an arbitration agreement due to its expense must provide sufficient evidence estimating the length of the arbitration and the corresponding cost.¹⁷⁰ Because Cicle's affidavit showed the estimated arbitration costs for an unrelated type of arbitration, the court found it "purely speculative" and thus insufficient to support a legal conclusion of unconscionability in her case.¹⁷¹

Because the cardmember agreement provided Cicle with the opportunity to reject changes, allowed her to pursue her claim in small claims court, and gave the arbitrator permission to award punitive damages and attorney's fees to either party, the class action waiver and arbitration agreement were not unconscionable and, as a result, should be enforced.¹⁷²

For the foregoing reasons, the Eighth Circuit reversed the district court's order and remanded the case with instructions to grant Chase's motion to compel arbitration and stay litigation.¹⁷³ After the court issued its decision, Cicle petitioned for a rehearing of the case due to two Missouri state court decisions supporting her position that were handed down after oral argument but before the Eighth Circuit released its opinion.¹⁷⁴ A week later, the National Association of Consumer Advocates and the National Consumer Law Center filed an amicus brief in support of Cicle's petition for rehearing.¹⁷⁵ Cicle's amici argued that the Supreme Court of Missouri's recent decision in *Huch* and the Missouri Court of Appeals' decision in *Woods* not only provided evidence of Missouri's fundamental public policy opposing class action waivers but also directly conflicted with the court's decision and as such provided a basis for rehearing.¹⁷⁶ In a letter addressed to the court, Cicle notified the court of the November 3, 2009, Missouri Court of Appeals for the Western District's holding in *Ruhl* "that a class action bar in a consumer contract alleging an [MMPA violation] is unenforceable."¹⁷⁷ The Eighth Circuit re-

169. *Id.* at 556-57.

170. *Id.* at 556-57 (quoting *Faber v. Menard, Inc.*, 367 F.3d 1048, 1054 (8th Cir. 2004)).

171. *Id.* at 557.

172. *Id.*

173. *Id.*

174. See Plaintiff's Petition for Rehearing or Rehearing *en banc*, *supra* note 16.

175. See Amici Curiae Brief of National Ass'n of Consumer Advocates (NACA) & National Consumer Law Center (NCLC), *supra* note 10.

176. *Id.* at 6-13.

177. Letter from Timothy W. Van Ronzelen, Counsel for Plaintiff, Virginia Cicle, to Michael E. Gans, Clerk of the Court, U.S. Court of Appeals for the Eighth Circuit (Nov. 4, 2009) (on file with author) (advising the Eighth Circuit of the *Ruhl* decision, decided on Nov. 3, 2009, pursuant to Fed. R. Civ. P. 28(j)).

jected the petition for rehearing and issued its mandate on December 1, 2009.¹⁷⁸

V. COMMENT

In *Cicle v. Chase Bank USA*, the Eighth Circuit joined the side of courts that have upheld class action waivers as enforceable,¹⁷⁹ despite recent Missouri state court decisions recognizing that such class action bans violate Missouri's fundamental public policy.¹⁸⁰ Though the court's decision in the instant case is in line with similar cases across various circuits, it is nevertheless noteworthy for several reasons. First, the Eighth Circuit overlooked Missouri's fundamental public policy disfavoring class action bars in arbitration provisions, and it effectively ignored at least three Missouri state court decisions that starkly conflict with the court's decision in *Cicle*.¹⁸¹ In addition, the court's holding that the class action waiver and form arbitration agreement were not unconscionable is troubling because it effectively awards immunity to the credit card company while stripping Missouri consumers of the MMPA protections they deserve.¹⁸² As a result, the practical effect of the decision discourages consumers from pursuing potentially worthy claims due to the expense of individual litigation.

Missouri's public policy prefers class actions as a remedy for consumers, as evidenced by Missouri courts' recent interpretations of the MMPA.¹⁸³ In *Woods v. QC Financial Services, Inc.*, the Missouri Court of Appeals, Eastern District, held that a class action ban "reduces the possibility of attracting competent counsel to advance the cause of action, and thus can functionally exculpate wrongful conduct."¹⁸⁴ The *Woods* court also noted that a plaintiff's chance of recovering attorney's fees or costs "is illusory if it is unlikely that counsel would be willing to undertake the representation."¹⁸⁵ The 2009 Missouri Court of Appeals case *Ruhl v. Lee's Summit Honda* provides further evidence of Missouri's public policy disfavoring class action

178. Mandate, *Cicle*, 583 F.3d 549 (8th Cir. 2009) (No. 08-1362).

179. 583 F.3d 549 (8th Cir. 2009); see *supra* note 8 and accompanying text and cases cited therein.

180. *Huch v. Charter Commc'ns, Inc.*, 290 S.W.3d 721, 727 (Mo. 2009) (en banc); *Ruhl v. Lee's Summit Honda*, No. WD 70189, 2009 WL 3571309, *3 (Mo. App. W.D. Nov. 3, 2009); *Woods v. QC Fin. Servs., Inc.*, 280 S.W.3d 90, 99 (Mo. App. E.D. 2008).

181. *Huch*, 290 S.W.3d at 727; *Ruhl*, 2009 WL 3571309, at *3; *Woods*, 280 S.W.3d at 99.

182. See Order, *supra* note 14, at 10 (citing *Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300, 314 (Mo. App. W.D. 2005)).

183. See *Huch*, 290 S.W.3d at 727; *Ruhl*, 2009 WL 3571309, at *3; *Woods*, 280 S.W.3d at 99.

184. *Woods*, 280 S.W.3d at 97.

185. *Id.*

bans.¹⁸⁶ In *Ruhl*, the court held that “[t]o enforce [a] class action waiver in a situation of unequal bargaining power, on a preprinted form, would unfairly deprive” a consumer of her right to a class action under Missouri law.¹⁸⁷ In reaching its decision, the Eighth Circuit ignored *Woods*’ holding that no rational plaintiff or attorney would pursue such a modest claim in the first place without the ability to aggregate those claims into class actions.¹⁸⁸ The panel also failed to consider that the *Ruhl* court found procedural unconscionability in a factual situation very similar to Cicle’s claim.

The Missouri legislature expressed a “clear policy to protect consumers”¹⁸⁹ when it enacted the MMPA.¹⁹⁰ The instant court failed to consider that policy and the fact that the Act gives Missouri consumers the right to a class action.¹⁹¹ In the Supreme Court of Missouri’s most recent case to address consumer protections under the MMPA, the court held that the Act’s protections cannot be waived by agreement and that “[a] class action lawsuit . . . is authorized when the unlawful conduct has caused similar injury to ‘numerous other persons.’”¹⁹² The *Huch* court’s finding was bolstered by a citation to a 1992 Supreme Court of Missouri decision, which held that the public policy of the MMPA is “so strong that parties will not be allowed to waive its benefits.”¹⁹³ In perhaps the strongest language declaring that the MMPA’s statutory protections cannot be waived, the Supreme Court of Missouri held in *Huch* that “[t]he Missouri statutes in question, relating to merchandising and trade practices, are obviously a declaration of state policy and are matters of Missouri’s substantive law. To allow these laws to be ignored by waiver or by contract, adhesive or otherwise, renders the statutes useless and meaningless.”¹⁹⁴ The Eighth Circuit’s holding in the instant case ignores Missouri’s fundamental public policies disfavoring class action bans and disallowing parties to waive the consumer protections of the MMPA.

The court’s cursory discussion of Missouri’s fundamental public policy regarding class action waivers failed to adequately address Missouri’s disfavor of class action bans. The Eighth Circuit did not cite any of the recent Missouri state court decisions that indicated that Missouri’s fundamental pol-

186. *Ruhl*, 2009 WL 3571309, at *6.

187. *Id.*

188. *Woods*, 280 S.W.3d at 97-98.

189. *Huch v. Charter Commc’ns, Inc.*, 290 S.W.3d 290 S.W.3d 721, 725 (Mo. 2009) (en banc).

190. Missouri Merchandising Practices Act, MO. REV. STAT. § 407.025.2 (2000).

191. *Id.*

192. *Huch*, 290 S.W.3d at 725 (citing MO. REV. STAT. § 407.025.2).

193. *Id.* (quoting *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 498 (Mo. 1992) (en banc)).

194. *Id.* at 726 (quoting *High Life Sales Co.*, 823 S.W.2d at 498).

icy favors the allowance of class actions,¹⁹⁵ as each of those cases was handed down after oral argument and not briefed by the parties. While it is possible, perhaps, that the issue of enforceability of class action waivers in an MMPA violation case was debatable at the time of oral argument, now that *Huch*, *Woods*, and *Ruhl* have been handed down, Missouri's substantive law is clear.¹⁹⁶ Though the absence of these cases in the court's *original* decision may be justified, the court should have reopened the case for rehearing upon notification by the plaintiff and amici of these three applicable cases.¹⁹⁷ Because federal courts sitting in diversity must apply substantive state law,¹⁹⁸ the panel erred when it originally held for Chase Bank and when it subsequently denied the plaintiff's motion for rehearing.

Even if the Eighth Circuit had not ignored the three Missouri state court cases and had not refused to reopen the case, its original decision for Chase Bank nevertheless may have been wrongly decided. Class actions, as a matter of public policy, are necessary for modest claims such as Cicle's because the small size of such claims makes individual litigation impractical and too expensive. As a middle-aged, unemployed woman whose only income is her monthly disability check,¹⁹⁹ Virginia Cicle could not afford to prosecute her

195. *Huch*, 290 S.W.3d at 726; *Ruhl v. Lee's Summit Honda*, No. WD 70189, 2009 WL 3571309, *6 (Mo. App. W.D. Nov. 3, 2009); *Woods v. QC Fin. Servs., Inc.*, 280 S.W.3d. 90, 98 (Mo. App. E.D. 2008).

196. In addition to the anti-class action waiver policy articulated by the Supreme Court of Missouri in *Huch* and the state appeals court in *Woods* and *Ruhl*, the Supreme Court of Missouri recently reiterated its distaste for the bans. Almost a year after the Eighth Circuit's decision in *Cicle*, the Supreme Court of Missouri decided two cases that emphasized Missouri's public policy disfavoring class action bans in arbitration provisions. In one, the court heard the appeal of *Ruhl* from the Western District and held that requiring the plaintiff to pursue her claim under such unconscionable circumstances would effectively immunize the defendant and allow it to continue its purportedly deceptive practices. *Ruhl v. Lee's Summit Honda*, 322 S.W.3d 136 (Mo. 2010) (en banc). The other case is *Brewer v. Missouri Title Loans, Inc.*, in which the Supreme Court of Missouri upheld a trial court's finding of unconscionability in an arbitration clause containing a class-action waiver. No. SC 90647, 2010 WL 3430411, *6 (Mo. Aug. 31, 2010) (en banc). The *Brewer* court heard facts similar to those in the instant case and invalidated the class-action waiver, holding that such bans are invalid "when the practical effect of forcing a case to individual arbitration is to deny the injured party a remedy – because a reasonable attorney would not take the suit if it could not be brought on a class basis either in court or through class arbitration." *Id.* at *3.

197. See Plaintiff's Petition for Rehearing or Rehearing *en banc*, *supra* note 16; Amici Curiae Brief of National Ass'n of Consumer Advocates (NACA) and National Consumer Law Center (NCLC), *supra* note 10.

198. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); see also *Orion Fin. Corp. of S.D. v. Am. Foods Group, Inc.*, 281 F.3d 733, 738 (8th Cir. 2002) (holding that a federal court sitting in diversity should "interpret state law, not . . . fashion it.").

199. See Plaintiff's Suggestions in Opposition to Defendant's Motion, *supra* note 15, at 1-2.

eighty-dollar claim against Chase Bank on her own. She proved she was unable to handle the cost of litigating her claim individually, as hiring a lawyer and taking on Chase Bank in small claims court would be financially and logically unfeasible.²⁰⁰

The Missouri Court of Appeals recognized in *Whitney v. Alltel Communications, Inc.* that small individual claims are not “economically feasible to prosecute” and that class action bars leave consumers “without a practical remedy.”²⁰¹ As Judge Laughrey pointed out in her order, class actions were created because “attorneys are generally unwilling to take on individual arbitrations to recover trivial amounts of money.”²⁰² The fact is, and Judge Laughrey ruled, that Virginia Cicle risks having to pay costs and fees whether she brings her claim against Chase in small claims court or arbitration, but “what makes that risk worth taking is the class action mechanism.”²⁰³

The U.S. Supreme Court has recognized the principle that class actions are necessary for small individual claims. In the 1997 case *Amchem Products, Inc. v. Windsor*, the Court held that “small recoveries do not provide the incentive for any individual to bring a solo action.”²⁰⁴ It is for precisely this reason that Chase Bank and other corporate defendants insert class action waivers into consumer contracts – doing so eliminates the incentive for corporations to avoid harmful and potentially fraudulent behavior and deprives individual consumers of an affordable day in court. As long as courts continue to uphold class action bans that effectively exculpate corporate defendants, potentially meritorious claims such as Virginia Cicle’s will go unremedied.

In addition to their role as a necessary tool to pursue modest individual claims, class actions also deter wrongdoers from illegal acts. The prospect of class action litigation undoubtedly has a deterrent effect on corporate defendants whose acts could open them up to large-scale liability. Class actions, therefore, serve society and the public interest by encouraging the enforcement of legal rights, and provisions that bar consumers’ rights to class action litigation allow defendants to continue their potentially fraudulent behavior with relatively little fear of financial liability or legal penalty. The threat of a few plaintiffs filing claims against a corporate defendant in small claims court

200. Affidavit of Virginia Cicle, *supra* note 28, at 2. Cicle was unemployed and disabled; her only income was derived from her monthly social security check and her temporary disability insurance. *Id.* at 1-2. Cicle pled that she did “not have the means to pay for arbitration fees or other costs associated with an arbitration” and would not have the ability to hire any attorney were it not for a contingency fee arrangement. *Id.* at 2.

201. 173 S.W.3d 300, 309 (Mo. App. W.D. 2005).

202. Order, *supra* note 14, at 13 (quoting *Scott v. Cingular Wireless*, 161 P.3d 1000, 1007 (Wash. 2007)).

203. *Id.*

204. 521 U.S. 591, 617 (1997).

does not meaningfully deter a company that makes millions in profits off its potentially illegal back charges – like Chase Bank²⁰⁵ – from its behavior.

Despite corporate defendants' arguments that fee-shifting provisions such as the one in Cicle's card agreement are adequate substitutes for class actions,²⁰⁶ this is simply not the case. Fee-shifting provisions provide minimal protection to consumers who choose to pursue individual claims in small claims court or seek arbitration, due to the risk that they might have to foot the entire bill, including the defendant's attorney's fees. In contrast, there is little incentive for attorneys to take on these modest individual claims when the costs are likely to greatly outweigh the individual plaintiff's recovery.²⁰⁷ As the First Circuit stated in *Kristian*, "the disproportion between the damages awarded to an individual consumer . . . and the attorney's fees incurred to prevail on the claim would be so enormous that it is highly unlikely that an attorney could ever begin to justify being made whole by the court."²⁰⁸ While the potential for an award of attorney's fees makes pursuit of an individual claim incrementally more attractive to plaintiffs, it is not a meaningful substitute for class actions. Despite Chase Bank's argument that the agreement's fee-shifting provision is not unconscionable and that it provides consumers with a meaningful remedy, the reality is that it does not provide an attorney with an adequate incentive to take on the risk of representing a plaintiff like Virginia Cicle against a wealthy corporate defendant like Chase Bank.

The Eighth Circuit further erred when it held that the arbitration clause was not substantively unconscionable for its prohibitive expense because Cicle's affidavit listing the estimated costs of arbitration was "purely speculative," and therefore insufficient to prove that arbitration would be prohibitively expensive in her case.²⁰⁹ While plaintiffs bear the burden of proving unconscionability, Cicle's affidavit listing her income, taken together with the affidavit of an attorney who arbitrates consumer fraud cases,²¹⁰ made it plainly clear that the potential costs would be prohibitive. Even if Chase agreed to pay the costs for the first two days of arbitrating Cicle's claim as the agreement allowed, initial filing fees for arbitration and the arbitrator's hourly fees

205. See *supra* note 31 and accompanying text (noting that Chase Bank made approximately \$5,000,000 from charges like the one levied against Virginia Cicle).

206. Bland & Prestel, *supra* note 3, at 391 ("Corporate defendants often argue that fee-shifting statutes provide sufficient incentives for attorneys to take on individual claims, making class actions unnecessary and preventing class action bans from being exculpatory.").

207. See *Brewer v. Mo. Title Loans, Inc.*, No. SC 90647, 2010 WL 3430411, *3 (Mo. Aug. 31, 2010) (en banc) (noting that "a reasonable attorney would not take the suit if it could not be brought on a class basis either in court or through class arbitration").

208. *Kristian v. Comcast Corp.*, 446 F.3d 25, 59 n.21 (1st Cir. 2006).

209. *Cicle v. Chase Bank USA*, 583 F.3d 549, 557 (8th Cir. 2009).

210. Order, *supra* note 14, at 14-15 (discussing Affidavit of Charles Speer, a plaintiff's attorney for class action arbitrations).

for any additional days would likely be higher than the \$500 Chase was required to reimburse Cicle under the cardmember agreement.²¹¹

The Eighth Circuit's decision in *Cicle* contradicts recent Missouri state court opinions that clearly articulate Missouri's fundamental public policy in favor of class actions.²¹² The opinion also ignores persuasive public policy arguments that class actions are necessary for small individual claims and that they deter deceptive corporate behavior. In doing so, the decision creates an unworkable split of authority between Missouri state and federal case law as to the enforceability of class action bars. Due to the Supreme Court of Missouri's holding in *Huch* that the MMPA statutory provisions guarantee consumers the protection of class actions and are "obviously a declaration of state policy and are matters of Missouri's substantive law,"²¹³ class action bars may be deemed unenforceable in Missouri state courts. However, after *Cicle*, the same class action waivers will be enforceable in federal courts. This inconsistency is problematic for litigants and judges, and it creates an incentive for corporate defendants to continue their allegedly deceptive behavior by removing any claims to federal court, where their class action bars will be upheld.

VI. CONCLUSION

In *Cicle v. Chase Bank USA*, the Eighth Circuit joined the cadre of federal circuits to uphold class action waivers as enforceable,²¹⁴ despite Missouri state court decisions handed down before the Eighth Circuit issued its mandate in *Cicle* that hold that class action bans violate Missouri's fundamental public policy.²¹⁵ The court erred when it denied the plaintiff's motion to reopen the case in light of the recent state court cases directly on point, and the resulting opinion creates a troublesome split of authority. Now plaintiff consumers who pursue their claims against corporate defendants could face starkly opposite results depending on whether they file in state or federal court. Nevertheless, most troubling is the court's holding that the class action waiver and form arbitration agreement at issue were not unconscionable, as the decision's precedent effectively awards immunity to corporate defendants while stripping Missouri consumers of the MMPA protections they deserve.

211. *Id.* at 15-16.

212. See *supra* note 180 and accompanying text.

213. *Huch v. Charter Commc'ns, Inc.*, 290 S.W.3d 721, 726 (Mo. 2009) (en banc) (quoting *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 498 (Mo. 1992) (en banc)).

214. See *supra* note 8 and accompanying text and cases cited therein.

215. *Huch*, 290 S.W.3d 721; *Ruhl v. Lee's Summit Honda*, WD 70189, 2009 WL 3571309, *3 (Mo. App. W.D. Nov. 3, 2009); *Woods v. QC Fin. Servs., Inc.*, 280 S.W.3d 90 (Mo. App. E.D. 2008).

