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## Tennessee High Court Clarifies Tennessee Law to Avoid Preemption

In *Berent v. CMH Homes, Inc.*, No. E2013-01214-SC-R11-CV, 2015 WL 3526984, —S.W.3d—(Tenn. June 5, 2015), the Tennessee Supreme Court considered whether the FAA as interpreted by the U.S. Supreme Court in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), preempted a state common-law rule rendering certain arbitration agreements invalid as unconscionable. The Tennessee Supreme Court had previously set forth the common law rule in *Taylor v. Butler*, 142 S.W.3d 277 (Tenn. 2004). There, it held unconscionable an arbitration provision in a consumer adhesion contract for financing an automobile because it contained non-mutual remedies, *i.e.*, it permitted the seller/lender to bring essentially any claim in court or arbitration, but confined the buyer/borrower to arbitration only. *Taylor*, 142 S.W.3d at 286–87. In *Berent*, the Tennessee Supreme Court faced similar facts plus a preemption challenge to the *Taylor* rule based on the U.S. Supreme Court's intervening decision in *Concepcion*.

In *Berent*, the buyer of a mobile home and its seller/purchase-financing lender entered into a consumer adhesion contract that required them to arbitrate all disputes except small claims. *Berent*, 2015 WL 3526984, at \*2. As a further exception, the contract permitted the seller/lender to sue in court to “enforce the security interest” it held in the mobile home or to “seek preliminary relief.” *Id.* Relying on *Taylor*, the district and intermediate appellate courts invalidated the contract. In the Tennessee Supreme Court, the seller interposed a preemption challenge based on *Concepcion* and, in the alternative, attacked the lower courts' application of *Taylor* to the facts of the case.

The Tennessee Supreme Court first found that the FAA did not preempt the *Taylor* rule. It initially noted that, since *Concepcion*, a circuit split has developed regarding whether “the FAA preempts a state common-law rule that non-mutuality of remedies in the arbitration provision of an adhesive contract is *per se* unconscionable and renders the arbitration provision unenforceable.” *Id.* at \*7. It then turned to examining whether *Taylor* set forth a *per se* rule that, potentially, could be preempted—*i.e.*, whether, under *Taylor*, any degree of non-mutuality of remedies in a consumer adhesion contract renders it unconscionable.

The court found that *Taylor* did not set forth a *per se* rule. While acknowledging that *Taylor* was “not a model of clarity,” the court noted that, instead of applying a bright-line rule, the *Taylor* opinion looked to the particular facts and circumstances of the contract at issue and applied general unconscionability principles thereto. *Id.* at \*8–\*9. Further, intermediate Tennessee appellate courts had not applied *Taylor* as setting forth a *per se* rule. *Id.* at \*8. And, those courts had also applied *Taylor* outside of the arbitration-provision context as a case setting forth general unconscionability principles. *Id.* at \*9.

From this, the Tennessee Supreme Court concluded that the *Taylor* rule escaped *Concepcion* preemption because it does not constitute a defense that applies only to arbitration or derives its meaning from the fact that an arbitration agreement is at issue. *Id.* at \*9–\*10. To the contrary, the rule is just a particular application of a “standard common-law defense[]” of unconscionability that, under *Concepcion*, is not preempted by the FAA, which “permits courts to invalidate an arbitration agreement for reasons such as unconscionability so long as they ‘place arbitration agreements on an equal footing with other contracts.’” *Id.* at \*10 (quoting *Concepcion*, 131 S. Ct. at 1745).

With the preemption hurdle cleared, the Tennessee Supreme Court went on to apply the *Taylor* rule to the facts of the case and rejected the buyer's challenge to the arbitration agreement as unconscionable, notwithstanding the non-mutuality of remedies therein. *Id.* at \*14. The court reasoned that the degree of non-mutuality of the agreement in *Berent* was not as unbalanced as the non-mutuality at issue in *Taylor*. *Id.* at \*13–\*14. Indeed, in *Taylor*, the agreement confined the buyer to arbitration while allowing the seller to elect litigation or arbitration. *Id.* In contrast, in *Berent* the non-mutuality extended only to permitting the seller/lender to use litigation to enforce its security interest in the property at issue and obtain preliminary relief. *Id.* Further, unlike in *Taylor*, the non-mutual “carve out” in *Berent* served a legitimate business purpose: preserving the *status quo* pending arbitration and allowing the seller to take advantage of state-law foreclosure mechanisms, which are highly prescribed to include safeguards for both parties. *Id.* at \*14. In short, the Tennessee Supreme Court concluded that the *Berent* agreement was not unconscionable because it was not beyond the expectations of an ordinary person or oppressive. *Id.*

It will continue to be interesting how courts grapple with the *Concepcion* decision and common-law challenges to arbitration contracts.

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