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Arbitration Opt-Out?

March 29, 2019 | Nicole F. Munro

What is the scope of an arbitration opt-out? Does it apply only to a single credit transaction? Or does it apply to prior similar transactions refinanced as part of the last transaction?

In a recent case, a title lender found that a consumer's arbitration opt-out applied to a single arbitration in the third of three loan agreements with the same terms, but not to all prior credit transactions refinanced as part of the third loan agreement. And, based on the language of the arbitration clause, a court got to decide the issue of arbitrability.

Jesse Romero obtained three title loans from TitleMax of New Mexico, Inc., with his Jaguar serving as collateral for all three loans. The second loan paid off the first loan, and the third loan paid off the second loan. TitleMax's loan agreements contained identical arbitration clauses, which provided, among other things, that they did not include disputes about the validity, coverage, or scope of the arbitration clause and that the borrower could opt out.

Romero opted out of arbitration in his third loan agreement, but he did not opt out of arbitration in the first and second loans agreements. Romero sued Title Max, claiming that its title loan business violated New Mexico consumer protection statutes and common law. TitleMax moved to compel arbitration with respect to all claims associated with all three loan agreements.

The trial court determined that Romero had to proceed to arbitration on claims related to the first two loan agreements. However, because Romero properly exercised his right to opt out of arbitration on the third loan agreement, the court found that he could litigate claims arising from that loan agreement.

On appeal, TitleMax argued that the third loan was a refinancing of the second loan, and because Romero did not opt out of the arbitration clause in the second loan agreement, he must arbitrate all claims regarding the second loan and refinancings of the second loan, including the third loan. The U.S. Court of Appeals for the Tenth Circuit deemed this question to be one of arbitrability - a dispute about the coverage or scope of the arbitration clause. To determine whether the parties intended to submit the threshold question of arbitrability to an arbitrator or to a court, the appellate court looked to the written arbitration agreement.

Because the arbitration agreement stated that disputes about the validity, coverage, or scope of the arbitration clause were for a court to decide, the appellate court found that the trial court properly decided the issue of arbitrability. The appellate court also found that the trial court properly allowed the arbitration opt-out related to the third loan agreement. The appellate court noted that the arbitration clause in the third loan agreement "must mean *something*" - it gave Romero an opt-out right, which he validly exercised.

The trial and appellate courts may have decided this case differently had the loan agreements addressed the effect of opting out of arbitration or failing to opt out of arbitration on other transactions between the parties. If you're not sure if the arbitration clauses in your documents address this scenario, check with your lawyer.

Romero v. TitleMax of New Mexico, Inc., 2019 U.S. App. LEXIS 3541 (10th Cir. (D.N.M.) February 5, 2019).

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