

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).

Hudson Cook, LLP, provides articles, webinars and other content on its website from time to time provided both by attorneys with Hudson Cook, LLP, and by other outside authors, for information purposes only. Hudson Cook, LLP, does not warrant the accuracy or completeness of the content, and has no duty to correct or update information contained on its website. The views and opinions contained in the content provided on the Hudson Cook, LLP, website do not constitute the views and opinion of the firm. Such content does not constitute legal advice from such authors or from Hudson Cook, LLP. For legal advice on a matter, one should seek the advice of counsel.

SUBSCRIBE TO INSIGHTS

HUDSON COOK

Celebrating its 25th anniversary in 2022, Hudson Cook, LLP is a national law firm representing the financial services industry in compliance, privacy, litigation, regulatory and enforcement matters.

7037 Ridge Road, Suite 300, Hanover, Maryland 21076
410.684.3200

www.hudsoncook.com

© Hudson Cook, LLP. All rights reserved. Privacy Policy | Legal Notice
Attorney Advertising: Prior Results Do Not Guarantee a Similar Outcome

