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No U-Turns

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Interstate 70 is a 2,100-mile highway that begins in the mountains of Cove Fort, Utah, and ends just outside Baltimore. Parts of I-70 in Kansas and Missouri were among the first sections of interstate highway ever built, and the 1992 construction of a piece of I-70 in Colorado marked the completion of the interstate system as originally designed. Between the towns of Salina and Green River, Utah, travelers on I-70 drive for more than 100 miles without an exit, the longest such stretch of interstate in the country. Before attempting this part of the journey, drivers had better fill up. There are no service stations, and turning around is not an option.

It is common practice for creditors to sue consumers in court, particularly to collect a debt. In most cases, these collection actions go off without a hitch. Occasionally, though, the consumer fights back and hits the creditor with a countersuit. When this happens, the creditor may try to resolve the matter under a binding arbitration agreement rather than proceed in court. This is a particularly attractive option if the consumer is attempting to kick off a class action lawsuit. As a recent Missouri case illustrates, however, once a creditor gets onto the litigation highway, it may not be easy to turn around.

In 2017, Christopher Jones entered into a retail installment contract with DriveTime Car Sales Company, LLC, to finance the purchase of a vehicle. Kelly Donaldson and Robert Haulcy did the same. Each deal jacket included an arbitration agreement, which the buyers signed. The arbitration agreement gave the creditor the right to repossess the vehicle under certain conditions and included the following nonwaiver clause: "Even if you and we elect to litigate a Claim in court, you or we may elect to arbitrate any other Claim, including a new Claim in that lawsuit or any other lawsuit. Nothing in that litigation waives any rights in this Agreement." Following the purchases, the contracts, including the arbitration agreements, were assigned to Bridgecrest Acceptance Corporation.

When the buyers failed to make required payments, Bridgecrest repossessed and sold the vehicles. After the sales, Bridgecrest sued the buyers in court to recover the debt remaining under their RICs. The buyers filed counterclaims against Bridgecrest and raised putative class claims for unlawful and deceptive business practices. Rather than defend a class action lawsuit in court, Bridgecrest moved to compel arbitration under the terms of the arbitration agreement.

The buyers opposed the motion to arbitrate, arguing that, among other things, the arbitration agreement was unconscionable because it allowed Bridgecrest to initiate litigation in court as to certain claims without waiving Bridgecrest's right to compel arbitration of other claims. It also allowed Bridgecrest to engage in repossession without going to court. These provisions, the buyers argued, rendered the arbitration agreement one-sided and unduly harsh to consumers. The trial court sided with the buyers and denied Bridgecrest's motion to arbitrate. The appellate court affirmed the lower court's judgment. Bridgecrest then appealed to the Supreme Court of Missouri.

Fortunately for Bridgecrest, the Missouri high court rejected the buyers' arguments and reversed the judgments of the lower courts. While the high court agreed that one-sidedness or lack of mutuality can make a contract unenforceable when its terms are "unduly harsh" or when promises from one side are illusory, it found that the arbitration agreement the buyers signed was not one-sided. Rather, both the creditor and the buyers had the right to demand arbitration of any claim covered by the agreement, and the creditor had no right to unilaterally modify the terms.

Dealers and finance companies should learn two lessons from this case.

First, filing a lawsuit can put the creditor's ability to compel arbitration at risk. If a creditor chooses to go to court over one claim, it may get stuck there for all claims, including counterclaims the consumer may file. The court may find that the creditor's voluntary decision to proceed in court effectively waives the creditor's right to compel arbitration, or the consumer may successfully challenge the validity of the arbitration agreement. In Bridgecrest's case, the Missouri Supreme Court eventually enforced the arbitration agreement, but not before two lower courts struck it down. Had Bridgecrest not won its appeal, it would have been faced with the prospect of battling a class action lawsuit in court. Voluntarily filing lawsuits against consumers is a common practice, but it is not without risk.

Second, words matter. When it comes to arbitration agreements, as the adage goes, "say what you do, and do what you say." In this case, the creditor's arbitration agreement used precise language that stated the rights of each party in a way that was not one-sided. The language also was carefully tailored to reflect the creditor's actual collection practices. This wording was not enough to prevent two unfavorable lower court rulings, but the careful drafting eventually saved the day at the state's highest court.

Dealers and finance companies should have counsel review their contract documents and arbitration agreements and make sure the language matches their practices. Otherwise, they may find themselves on a road they do not wish to travel with no way to turn around.

Bridgecrest Acceptance Corporation v. Donaldson, 2022 Mo. LEXIS 207 (Mo. July 12, 2022).

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