

# AVOIDING ARBITRATION

- No agreement to Arbitrate
  - a. no meeting of the minds
  - b. Unconscionable
  - c. No consideration.

# NO AGREEMENT TO ARBITRATE

- Arbitration is a matter of contract, and a party cannot be required to arbitrate a dispute that it has not agreed to arbitrate.
- *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 435 (Mo. banc 2003)

# Unconscionable

- In *Brewer v. Missouri Title Loans*, 364 S.W.3d 486 (Mo. 2012), the Missouri Supreme Court set the standards for determining when an arbitration provision is unconscionable, and thus unenforceable, under traditional Missouri contract law.

# Unconscionable: factors to consider

- agreement is non-negotiable
- disparity in bargaining power
- agreement is one-sided
- agreement is inflexible and costly to the consumer
- agreement is a contract of adhesion



# One sided agreement

- The title company reserves its right to obtain its primary remedies through the court system while requiring Brewer to obtain her only meaningful remedy — monetary compensation for the alleged violation of consumer protection laws — through individual arbitration.

# One sided agreement

- The disparity in bargaining power, in addition to the disparity between Brewer's remedial options and the title company's remedial options, **constitutes strong evidence that the agreement is unconscionable.**

# NO CONSIDERATION

- a contract lacks valid consideration if it purports to contain mutual promises, yet allows one of the parties to retain the unilateral right to modify or alter the agreement as to permit the party to unilaterally divest itself of an obligation it otherwise promised to perform.

[Motormax Fin. Servs. Corp. v. Knight, 2015 Mo. App. LEXIS 815 \(Mo. Ct. App. Aug. 18, 2015\)](#)

# Mutual promises to arbitrate must be binding, not illusory

- A promise to arbitrate is illusory when the agreement promises mutuality of arbitration, but effectively allows one party to proceed in court on its claims while the other party is required to resolve its claims by arbitration

[Motormax Fin. Servs. Corp. v. Knight, 2015 Mo. App. LEXIS 815, 9-10 \(Mo. Ct. App. Aug. 18, 2015\)](#)



# Mutual promises to arbitrate must be binding, not illusory

- Alliance apparently interprets the agreement in this manner as it solved its own dispute with Greene by repossessing her vehicle, but now relies on the express language of the arbitration agreement to compel Greene to arbitrate her claims. There is no mutual promise to arbitrate in an agreement such as this and, therefore, Alliance has failed to prove the existence of a valid, enforceable arbitration agreement.<sup>n7</sup>

[Greene v. Alliance Auto., Inc., 435 S.W.3d 646, 654 \(Mo. Ct. App. 2014\)](#)

# Predatory lenders love one sided agreements

Why?

- Because the low cost, government subsidized court system allows inexpensive and efficient mass lawsuits and debt collection.
- And they anticipate repossession and default.

Waiver of Jury Trial and Arbitration Provision.

**THE PARTIES TO THIS AGREEMENT HEREBY AGREE TO ARBITRATE ANY DISPUTES RELATED TO THIS AGREEMENT.**

This arbitration agreement is made pursuant to a transaction in interstate commerce and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1. It is understood and agreed to by the parties of this Agreement that any and all claims, disputes, and controversies (hereinafter collectively referred to as a "claim" or "claims") arising out of, or in connection with, or relating in any way to this Agreement shall be resolved exclusively by individual (not class) binding arbitration. Arbitration shall be conducted by a single arbitrator administered by the American Arbitration Association in accordance with the Commercial Arbitration Rules of the American Arbitration Association. In the event that, for any reason, the American Arbitration Association is unavailable to arbitrate any claims, a court having jurisdiction shall appoint a neutral arbitrator pursuant to Section 5 of the Federal Arbitration Act at 9 U.S.C. Section 5. **THE PARTIES AGREE AND UNDERSTAND THAT THEY CHOOSE ARBITRATION INSTEAD OF LITIGATION TO RESOLVE DISPUTES.** The parties understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration, except as provided herein. **THE PARTIES WOULD HAVE A RIGHT TO LITIGATE DISPUTES THROUGH BINDING ARBITRATION, EXCEPT THAT THE LENDER MAY CHOOSE AT LENDER'S SOLE OPTION TO SEEK COLLECTION OF PAYMENT(S) DUE IN COURT RATHER THAN THROUGH ARBITRATION. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY LENDER.**



# USING ARBITRATION To Turn the Tables

- Demand arbitration where your client is judgment proof and you have no defenses you want to assert in court.
- The Predatory lenders wrote the contract/ and will not argue it is unconscionable



# GO AFTER

- Payday
- Title
- Installment
- Rent to Own
- Landlords?

# Will not want to arbitrate

- Small dollar
- No interest in throwing “good money after bad”
- Use your leverage as Legal Services.
- The collection machine is not geared to arbitration.
- Arbitration is Just Too Expensive

# AAA FEES

PARTY	DESK ARBITRATION	IN-PERSON OR TELEPHONIC HEARING – SINGLE ARBITRATOR	IN-PERSON OR TELEPHONIC HEARING – THREE OR MORE ARBITRATORS
Consumer	Filing Fee – \$200 (nonrefundable)	Filing Fee – \$200 (nonrefundable)	Filing Fee – \$200 (nonrefundable)
Business	Filing Fee – \$1500 Arbitrator Compensation – \$750 per case	Filing Fee – \$1500 Hearing Fee – \$500 Arbitrator Compensation – \$1500 per hearing day	Filing Fee – \$2000 Hearing Fee – \$500 Arbitrator Compensation – \$1500 per hearing day per arbitrator



# AAA FEES

## (v) Hearing Room Rental

The hearing fees described above do not cover the rental of hearing rooms. The AAA maintains rental hearing rooms in most offices for the convenience of the parties. Check with the administrator for availability and rates. Hearing room rental fees will be borne by the business.

## (vi) Abeyance Fee

Parties on cases held as inactive for one year will be assessed an annual abeyance fee of \$300. If a party refuses to pay the assessed fee, the opposing party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be administratively closed. All filing requirements, including payment of filing fees, must be met before a matter may be placed in abeyance.

## (vii) Expenses

All expenses of the arbitrator, including required travel and other expenses, and any AAA expenses, as well as the costs relating to proof and witnesses produced at the direction of the arbitrator, shall be borne by the business.



# AAA Fees

## (viii) Consumer Clause Review and Registry Fee

Please note that all fees described below are **nonrefundable**.

Businesses with arbitration clauses contained in their consumer agreements should submit their clause prior to **September 1, 2014**. The clause review and Registry fee submitted to the AAA at any time within the 2014 calendar year is \$650, which represents the cost of reviewing the clause and maintaining that clause on the Registry through 2015. A yearly Registry fee of \$500 will be charged to maintain each clause on the Registry for each calendar year thereafter.

For businesses submitting a clause at any time within the 2015 calendar year, the cost of reviewing the clause and maintaining that clause on the Registry is \$500. A yearly Registry fee of \$500 will be charged to maintain each clause on the Registry for each calendar year thereafter.

If the AAA receives a demand for consumer arbitration from an arbitration clause that was not previously submitted to the AAA for review and placement on the Registry, the business will incur an additional \$250 fee to conduct an expedited review of the clause.

Any subsequent changes, additions, deletions, or amendments to currently registered arbitration agreement must be resubmitted for review and a review fee of \$500 will be assessed at that time.

# IF YOU WANT TO GO TO COURT FILE ARBITRATION AGAINST PARTIES YOU THINK WILL NOT WANT TO PAY THE FEES

- May fail to pay and the arbitration will be dismissed with a refund to you.
- Result is a waiver of arbitration. Now file in court.
- Can use the cost of arbitration as a bargaining chip for settlement.
- Arbitration can be advantageous.

Thank You