No. 12-2617

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DEBORAH JACKSON, et al. Plaintiffs-Appellants, v. PAYDAY FINANCIAL, LLC, et al. Defendant-Appellees.	)))))))))	On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:11-cv-09288 The Honorable CHARLES P. KOCORAS, Judge Presiding.

BRIEF OF AMICUS CURIAE ILLINOIS ATTORNEY GENERAL IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL

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INTEREST OF THE AMICUS CURIAE

On May 10, 2013, after hearing oral argument in this case, this Court issued an order inviting the Illinois Attorney General to file a brief as amicus curiae. The Court authorized the Attorney General to "address any aspect of the case in which she has an interest," and expressed "a special interest" "in the State's view on the validity of the arbitration clause." On May 29, 2013, the Attorney General notified the Court of her intent to file an amicus curiae brief.

Plaintiffs' complaint includes allegations that defendants violated Illinois' criminal usury statute, Interest Act, and Consumer Fraud Act. Doc. 14 at 9-15. The Illinois Attorney General has authority to enforce each of these laws. See 15 ILCS 205/4 (2010) (describing Attorney General's duty to investigate and prosecute violations of law, including certain criminal offenses); 815 ILCS 205/11 (2010) (providing Department of Financial Institutions with authority to enforce Interest Act "under the direction and supervision of the Attorney General"); 815 ILCS 505/7 (2010) (providing Attorney General with authority to enforce Consumer Fraud Act). Accordingly, the Attorney General has a substantial interest in ensuring that plaintiffs are able to vindicate their rights under Illinois laws that the Attorney General is charged with enforcing.

On May 22, 2013, this Court entered an order remanding this case to the district court for findings of fact on two questions. On June 18, 2013, this Court extended the Attorney General's time to file her amicus curiae brief until 15 days

after the district court transmits its findings of fact. Because the district court transmitted its findings of fact on August 29, the Attorney General's brief is timely filed 15 days later, on September 13, 2013.

STATEMENT

Plaintiffs, who are Illinois residents and ordinary consumers, brought this class-action lawsuit in the circuit court of Cook County, Illinois. Doc. 65 at 3. The suit was subsequently removed to federal court pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d). Id. Plaintiffs alleged that defendants, who include internet lenders and debt collectors, violated Illinois law by charging plaintiffs annual interest rates of nearly 140%. Doc. 65 at 3; see also Doc. 14 at ¶¶ 48-50. This appeal raises the question whether, as the district court held, plaintiffs' lawsuit must be dismissed for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3), because plaintiffs' loan agreements with defendants contain boilerplate arbitration provisions requiring that any disputes arising under the agreements be arbitrated on the Cheyenne River Indian Reservation in South Dakota, by a tribal arbitrator, and pursuant to the tribe's consumer dispute rules. Doc. 65 at 4-8.

After hearing oral argument, this Court entered an order remanding this case to the district court for findings of fact on whether (1) applicable tribal law is readily available to the public and, if so, under what conditions; and (2) the arbitrator and method of arbitration required under the parties' contract are actually available. In findings transmitted on August 29, 2013, the district court answered the first question in the affirmative, concluding that Tribal Law is available to the public through "reasonable means." Doc. 95 at 2. But the court found that "the answer to the second question is a resounding no." Id. at 5-6. The parties' contracts permitted arbitration by an arbitrator obtained through "purely subjective selection by only one of the parties" (regardless of the arbitrator's qualifications or bias), and, in addition,

defendants appeared to be engaged in a scheme "to evade licensure by state agencies and to exploit Indian Tribal Sovereign Immunity to shield its deceptive practices from prosecution by state and federal regulators." Id. at 4-5. Thus, the district court held, the contracts' "promise of a meaningful and fairly conducted arbitration is a sham and an illusion." Id. at 6.

SUMMARY OF THE ARGUMENT

This Court should decline to enforce the arbitration provisions in plaintiffs' loan agreements for three, distinct reasons.

First, because (as the district court found) the process for selecting an arbitrator is so flawed that "the promise of a meaningful and fairly conducted arbitration is a sham and illusion," Doc. 95 at 6, the agreements to arbitrate are unconscionable as a matter of Illinois law and thus unenforceable consistent with § 2 of the Federal Arbitration Act (FAA), see 9 U.S.C. § 2. See Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (pursuant to § 2, generally applicable state contract defenses, including unconscionability, "may be applied to invalidate arbitration agreements"). Nor should this Court sever the provision designating the Tribe as arbitrator and order the district court to appoint a substitute arbitrator, because that provision was essential to the agreements to arbitrate and thus the agreements fail without it.

Second, Illinois has a strong public policy against enforcing contractual provisions requiring adjudication of plaintiffs' claims in a distant, inconvenient forum where, as in this case, the provision is embedded in contracts involving unsophisticated consumers in small transactions who lacked any real opportunity to consider whether to accept the clause. In this regard, Illinois law is more protective of consumers than federal law. See IFC Credit Corp. v. Aliano Bros. Gen. Contractors, Inc., 437 F.3d 606, 611 (7th Cir. 2006) (contrasting federal law on

validity with Illinois law, which is "more lenient" toward party challenging forum selection clause "when there is a significant inequality of size or commercial sophistication between the parties"). Because it would violate Illinois' public policy to enforce the agreements to arbitrate on the South Dakota reservation, those agreements should not be enforced.

Third, defendants' counsel conceded at oral argument that tribal usury law—unlike Illinois law—does not preclude the exceedingly high-interest loans plaintiffs challenge here. Counsel further indicated that, under tribal choice-of-law rules, the tribal forum may apply tribal law to plaintiffs' substantive claims. Under Illinois law, however, plaintiffs' claims may not be waived. See 815 ILCS 505/10c (2010). If plaintiffs cannot vindicate their non-waivable, state statutory rights in the arbitral forum, there is a third, independent basis to deny enforcement of the agreements to arbitrate. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 & n.19 (1985).

ARGUMENT

I. The Arbitration Agreements Are Invalid As A Matter Of Generally Applicable Illinois Contract Law.

Section 2 of the FAA provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "In determining whether a valid arbitration agreement arose between the parties, a federal court should look to the state law that ordinarily governs the formation of contracts." Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1130 (7th Cir. 1997). "[G]enerally applicable [state] contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements." Casarotto, 517 U.S. at 687; accord Rent-A-Center West, Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010). Thus, in Green v. U.S. Cash Advance Illinois, LLC, No. 13-1262, 2013 WL 3880219 (7th Cir. July 30, 2013) (petition for rehearing en banc pending), this Court stated that while § 5 of the FAA generally requires the district court to appoint a substitute arbitrator in cases where a contract's designated arbitrator is unavailable, see 9 U.S.C. § 5, a court should, consistent with § 2, declare arbitration provisions "as a whole unenforceable" if "ordinary statelaw principles" "permit revocation of the contract," 2013 WL 3880219 at *4.[1]

[1] Green includes dictum adopting a uniquely robust interpretation of § 5. See 2013 WL 3880219, at *9, *12 (Hamilton, J., dissenting) (explaining that majority adopted "broad and mistaken dictum" and "cho[se] the wrong side in a circuit split" when it stated that § 5 requires a district court to appoint a substitute arbitrator even in cases where the parties' "contractual selection of an arbitrator was

Here, the agreements to arbitrate are unenforceable as a matter of generally applicable Illinois contract law for two reasons. First, the district court's finding that the process for selecting an arbitrator is so flawed that "the promise of a meaningful and fairly conducted arbitration is a sham and an illusion," Doc. 95 at 6, establishes that the agreements are unconscionable under Illinois law. Second, Illinois law disfavors enforcement of contractual provisions requiring plaintiffs to adjudicate their claims in a distant, inconvenient forum, when that provision is embedded in a consumer contract of adhesion. And because the selection of the Tribe as arbitrator was essential to the agreements to arbitrate, Illinois law mandates that the unenforceable provisions cannot be severed but, instead, the arbitration agreements as a whole must be stricken from the parties' contracts.

A. The District Court's Findings Establish That The Arbitration Agreements Are Unconscionably "One-Sided" And Thus Unenforceable Under Illinois Law.

On remand, the district court found that neither the arbitrator nor the method of arbitration required under the parties' contracts is actually available. Doc. 95 at 4-6 (because contract permits arbitration by arbitrator obtained through "purely subjective selection by only one of the parties" and was "devised for the purpose of evading federal and state regulation of Defendants' activities," court held that "the

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exclusive"). But Green did not doubt that, consistent with § 2, a district court should decline to enforce an agreement to arbitrate if the designated arbitrator was unavailable and "ordinary statelaw principles" "permit revocation of the contract." 2013 WL 3880219, at *4; see also infra Part I.C. The Court did not consider such an argument in Green, however, because neither party had preserved it. See 2013 WL 3880219, at *4.

[contract's] promise of a meaningful and fairly conducted arbitration is a sham and illusion"). In light of these findings, this Court should decline to enforce the agreements to arbitrate.

Under Illinois law, a contract provision is unenforceable if it is either procedurally or substantively unconscionable, or both. See Estate of Davis v. Wells Fargo Bank, 633 F.3d 529, 535 (7th Cir. 2011) (citing Razor v. Hyundai Motor Amer., 854 N.E.2d 607, 622 (Ill. 2006)). "Procedural unconscionability refers to a situation in which a term is so difficult to find, read, or understand that the party could not fairly be said to have been aware she was agreeing to it." Id. "Procedural unconscionability also takes into account the party's relative lack of bargaining power." Id. (citing Razor, 854 N.E.2d at 622, and Frank's Maint. & Eng'g, Inc. v. C.A. Roberts Co., 408 N.E.2d 403, 410 (Ill. App. Ct. 1980)). "Substantive unconscionability . . . refers to contractual terms which are inordinately one-sided in one party's favor." Id. (citing Razor, 854 N.E.2d at 622, and Rosen v. SCIL, LLC, 799 N.E.2d 488, 493 (Ill. App. Ct. 2003)).

This Court need not decide whether the arbitration provisions here are procedurally unconscionable (although the disparity in the parties' bargaining power favors such a finding), because the district court's findings that the provisions permit defendants to select an arbitrator regardless of qualifications and bias and, in addition, were "devised for the purpose of evading federal and state regulation of Defendants' activities," Doc. 95 at 4-6, establish that the provisions are so

"one-sided" that they qualify as substantively unconscionable and therefore unenforceable under Illinois law, Davis, 633 F.3d at 535.

On this point, the Fourth Circuit's decision in Hooters of America, Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999), is instructive. In Hooters, the court declined to enforce an arbitration agreement with provisions that were "so one-sided that their only possible purpose [was] to undermine the neutrality of the proceeding." Id. at 938. The agreement provided, among other unfair procedures, that Hooters and the employee-plaintiff would each select an arbitrator, who would in turn select the third arbitrator. See id. But the plaintiff's arbitrator and the third arbitrator were required to be selected from a list created exclusively by Hooters: Hooters was "free to devise lists of partial arbitrators who have existing relationships, financial or familial, with [it]," and to "punish[] arbitrators who rule against the company by removing them from the list." Id. at 938-39. Such a mechanism for selecting an arbitration panel, the court held, was one "crafted to ensure a biased decisionmaker," and the court accordingly invalidated the arbitration agreement as unconscionable. Id. at 938.

Consistent with Hooters, "Courts of Appeals have not hesitated to conclude that provisions in arbitration agreements that give [one party] an unreasonable advantage over [the other] in the selection of an arbitrator are unconscionable" and thus unenforceable. Nino v. Jewelry Exch., Inc., 609 F.3d 191, 204 (3d Cir. 2010); see also id. at 204-07 (invalidating arbitration agreement because its "one-sided nature,"

including flawed arbitrator selection provision, "reveals unmistakably that [defendant] was not seeking a bona fide mechanism for dispute resolution, but rather sought to impose a scheme that it knew or should have known would provide it with an impermissible advantage") (internal quotation marks omitted); Murray v. United Food & Commercial Workers Int'l Union, 289 F.3d 297, 302-04 (4th Cir. 2002) (invalidating as unconscionable arbitration agreement that included, among other "one-sided" provisions, flawed arbitrator selection process); Penn v. Ryan's Family Steak Houses, Inc., 269 F.3d 753, 756, 758-61 (7th Cir. 2001) (invalidating arbitration agreement providing for arbitral forum that had both "strong incentive" and "ample opportunity to tilt the scales" in favor of one party over the other).[2]

In light of the district court's finding that the process for selecting an arbitrator is so one-sided that "the promise of a meaningful and fairly conducted arbitration is a sham and illusion," Doc. 95 and 6, this Court should hold that the agreements to arbitrate are unconscionable as a matter of Illinois law and therefore unenforceable.

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[2] In Penn, the district court, relying on Hooters, invalidated the arbitration agreement based on findings, inter alia, that it "would create an arbitration panel that was biased." 269 F.3d at 755-56. This Court affirmed on a different ground, holding that the arbitration agreement lacked mutuality of obligation, and therefore was unenforceable under state law. Id. at 758-61. But the Court left open the possibility—realized in Hooters—that a designated arbitration system might be "so deeply flawed that it should be rejected on its face" (in lieu of "compelling its use in arbitrations and evaluating the enforceability of particular awards"). Id. at 758.

B. Where, As Here, A Contract Involves An Unsophisticated Consumer In A Small Transaction, Illinois Law Disfavors Enforcement Of Provisions Requiring Plaintiffs To Adjudicate Claims In A Distant Forum.

"[A] forum selection clause is presumptively valid and enforceable unless," inter alia, "'[its] enforcement . . . would contravene a strong public policy of the forum in which the suit is brought, declared by statute or judicial decision.'" AAR Int'l, Inc. v. Nimelias Enters. S.A., 250 F.3d 510, 525 (7th Cir. 2001) (quoting Bonny v. Soc'y of Lloyd's, 3 F.3d 156, 160 (7th Cir. 1993)) (second set of internal brackets and ellipses in original). Illinois has a strong public policy against enforcing provisions requiring plaintiffs to adjudicate claims in a distant, inconvenient forum where, as in this case, the clause is embedded in contracts "involving unsophisticated consumers in small transactions in the marketplace without any real opportunity to consider [whether to accept the clause]." IFC Credit Corp. v. Rieker Shoe Corp., 881 N.E.2d 382, 394 (Ill. App. Ct. 2007); accord Compass Envtl., Inc. v. Polu Kai Svcs., LLC, 882 N.E.2d 1149, 1158 (Ill. App. Ct. 2008). Accordingly, consistent with Illinois public policy, this Court should decline to enforce the agreements to resolve plaintiffs' claims on the South Dakota reservation.

In IFC Credit Corp. v. Aliano Brothers General Contractors, Inc., 437 F.3d 606 (7th Cir. 2006), this Court recognized and explained the important state concerns at stake. In that case, the Court contrasted federal law governing the validity of forum selection clauses with Illinois law on validity. See id. at 609-12. Under federal law, the Court explained, courts treat forum selection clauses in consumer contracts no

differently from clauses in contracts between two, equally sophisticated parties: all forum selection clauses are "enforceable to the same extent as the usual terms of a contract, which mainly means unless it was procured by fraud or related conduct." Id. at 610 (discussing Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991)). By contrast, "Illinois law on validity is more lenient toward the [party challenging the forum selection clause] than the federal law when there is a significant inequality of size or commercial sophistication between the parties, especially if the transaction is so small that the unsophisticated party might not be expected to be careful about reading boilerplate provisions that would come into play only in the event of a lawsuit, normally a remote possibility." Id. at 611 (citing Mellon First United Leasing v. Hansen, 705 N.E.2d 121, 125-26 (Ill. App. Ct. 1998)).

Thus, in Mellon, the Illinois appellate court declined to enforce a forum selection clause designating Illinois as the forum state in a lawsuit brought by an Illinois leasing company to recover $3,810.91 from a California accountant for rental of mailing equipment. See 705 N.E.2d at 123-24. The state court explained that the California defendant challenging the Illinois forum was "more akin to an ordinary consumer involved in a small transaction than a sophisticated businessperson of stature equal to the leasing company." Id. at 126. Moreover, the forum selection clause was not "reached through arm's length negotiation between experienced businesspersons"; "[r]ather, it was part of boilerplate language in small print on the back of a preprinted form used by plaintiff in its lease agreements." Id. at 125-26.

Under these circumstances, the Illinois court held, "it would be unfair and unreasonable to require defendant to litigate this small claim in Illinois." Id. at 126.

In Williams v. Illinois State Scholarship Commission, 563 N.E.2d 465 (Ill. 1990), the Illinois Supreme Court gave similar reasons for declining to enforce a provision requiring that all suits under a contract between a state agency that provided financial assistance to students and the student borrowers be brought in a single, Illinois county. See id. at 486-87. First, the Court held that federal law precluded the clause's enforcement, because resort to the contractual forum would "effectively deprive [the student borrowers] of their day in court." *Id.* at 486-87 (citing, inter alia, The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972)). The Court then gave an additional, state-law reason for declining to enforce the clause: it appeared in an "adhesion contract[], in that the [student borrowers] were in a disparate bargaining position, and, if they wanted the loan were forced to 'take it or leave it.'" Id. at 487. Under Illinois law, the Court explained, "a forum selection clause embedded in an adhesion contract" is entitled to "far less weight" than a clause that arises from "'an arm's-length negotiation between experienced and successful businessmen,' [that is] 'not part of a boilerplate agreement indicating unequal bargaining power.'" Id. (quoting Calanca v. D & S Mfg. Co., 510 N.E.2d 21, 23 (Ill. App. Ct. 1987)); see also Martin-Trigona v. Roderick, 331 N.E.2d 100, 101 (Ill. App. Ct. 1975) (venue waiver provision was "void as against public policy," in case

involving residential landlord who tried to sue in Cook County, Illinois to recover rent from defendants who had rented apartment in Champaign County, Illinois).

In short,"Illinois courts have not accepted the federal law trend of enforcing forum selection clauses in contracts involving unsophisticated consumers in small transactions in the marketplace without any real opportunity to consider the acceptance of a forum selection clause." IFC Credit, 881 N.E.2d at 394; accord Compass Envtl., 882 N.E.2d at 1158; see also Dace Int'l, Inc. v. Apple Computer, Inc., 655 N.E.2d 974, 979 (Ill. App. Ct. 1995) (discussing Carnival Cruise, in which United States Supreme Court enforced forum selection clause in consumer contract, and stating that "we do not wish future courts to construe our holding here [enforcing forum selection clause in contract between two, equally sophisticated business entities] as agreement with Carnival as to contracts used by unsophisticated consumers in small transactions in the marketplace").[3]

The forum selection clauses in this case fall comfortably within the Illinois rule described in Mellon and Williams. As explained, Illinois validity law focuses on the relative sophistication of the parties, the size of the transaction, and whether a

[3] The court in IFC Credit questioned Mellon's reasoning to the extent it held that a forum selection clause agreed to by two business entities might be invalid under Illinois law, merely because one was more sophisticated than the other. See IFC Credit, 881 N.E.2d at 394. At the same time, however, IFC Credit reaffirmed the Illinois rule that forum selection clauses in consumer contracts of adhesion are disfavored. See id. ("clarif[ying] that Illinois courts have not accepted the federal law trend" to the contrary). IFC Credit's favorable discussion of Dace (which declined to follow federal law "as to contracts used by unsophisticated consumers in small transactions in the marketplace," 655 N.E.2d at 979) confirms this. See IFC Credit, 881 N.E.2d at 394.

challenged forum selection clause was negotiated or part of "boilerplate language" in the contract. Here, plaintiffs are unsophisticated consumers who lack defendants' substantial business experience and expertise. The agreements at issue contemplated loans in the amount of $2,525.00, precisely the type of small, marketplace transactions referred to in Mellon. And plaintiffs had no real choice other than to take or leave the agreements as written—including the agreements' boilerplate forum selection clauses—making them exactly the type of adhesive contracts the Illinois Supreme Court declined to enforce in Williams. For all these reasons, the forum selection clauses here are contrary to Illinois public policy, and they should not be enforced. See AAR Int'l, 250 F.3d at 525 (forum selection clause will not be enforced if "'enforcement . . . would contravene a strong public policy of the forum in which the suit is brought, declared by statute or judicial decision'") (quoting Bonny, 3 F.3d at 160) (ellipses in original).

Other factors also favor nonenforcement of these provisions. Beyond the relative sophistication of the parties and the size of the transaction, when deciding whether to enforce a forum selection clause, Illinois courts also consider "(1) which law governs the formation and construction of the contract; (2) the residency of the parties; (3) the place of execution and/or performance of the contract; (4) the location of the parties and the witnesses participating in the litigation; (5) the inconvenience to the parties of any particular location; and (6) whether the clause was equally

bargained for." Mellon, 705 N.E.2d at 125 (citing Dace, 655 N.E.2d at 977); accord Calanca, 510 N.E.2d at 23-24.

Here, plaintiffs are Illinois residents, they executed the loan agreements in Illinois, and they have not set foot on the Cheyenne River Indian Reservation for any part of this transaction. The residency and place of execution factors thus disfavor the contractual forum, as does the location of the parties and witnesses who would be participating in the litigation. Similarly, the inconvenience would appear to be greater to plaintiffs in requiring them to travel to South Dakota, where the reservation is located, as compared to defendants who routinely transact business in Illinois. And, as explained, the forum selection clauses were contained in boilerplate language embedded in loan agreements that plaintiffs, who are ordinary consumers in difficult financial circumstances, did not negotiate.

To be sure, because the loan agreements provide for application of tribal law, the first factor may favor enforcement. Weighing all factors, however, the forum selection clauses are not enforceable under Illinois law. Thus, consistent with Illinois law and the State's strong public policy against enforcing provisions in consumer contracts of adhesion that require plaintiffs to adjudicate their claims in a distant, inconvenient forum, this Court should decline to enforce the agreements to resolve plaintiffs' claims on the South Dakota reservation.

C. The Federal Arbitration Act Does Not Require Enforcement Of The Arbitration Agreements.

Finally, the Illinois rules invalidating contract provisions that are "inordinately one-sided," Razor, 854 N.E.2d at 622, and giving little "weight" to forum selection clauses embedded in consumer contracts of adhesion, Williams, 563 N.E.2d at 487, are generally applicable state contract defenses. The FAA thus does not mandate enforcement of the agreements to arbitrate.

Although under § 2 of the FAA "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions," "generally applicable [state] contract defenses . . . may be applied to invalidate arbitration agreements without contravening" the Act. Casarotto, 517 U.S. at 687 (emphasis in original); see also 9 U.S.C. § 2. Thus, state contract defenses are fully applicable to arbitration agreements as long as the state rules do not "appl[y] in a fashion that disfavors arbitration" (as compared to litigation). AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011). The United States Supreme Court has explained that a state rule "disfavors arbitration" if its application would either "have a disproportionate impact on arbitration agreements" or "interfere[] with fundamental attributes of arbitration." Id. at 1747, 1748; see also id. at 1753 (holding that FAA preempts California rule conditioning enforcement of arbitration clause on availability of classwide arbitration because classwide arbitration "is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law").

The Illinois contract defenses at issue here do not "disproportiona[lly] impact" arbitration agreements. Concepcion, 131 S. Ct. at 1747. To the contrary, these rules apply equally to contracts purporting to specify a forum for litigation as they do to contracts designating an arbitral forum. Indeed, in Mellon, Williams, and Martin-Trigona, see supra pp. 13-16, Illinois courts declined to enforce provisions requiring contracting parties to sue in a designated judicial forum. And, unlike the California rule at issue in Concepcion (requiring classwide proceedings, which the Supreme Court explained, "lacks [the] benefits" of arbitration), Illinois law does not "interfere[] with [arbitration's] fundamental attributes." 131 S. Ct. at 1748, 1753. Rather, parties remain free to contract for "arbitration as envisioned by the FAA." Id. at 1753. The Illinois rules merely require that arbitration be (in the words of the district court below) "meaningful and fairly conducted," Doc. 95 at 6; these rules do not interfere with the arbitral proceedings themselves. Thus, the Illinois rules are "generally applicable" contract defenses, as the FAA's § 2 requires.

Nor does the FAA require this Court to sever the unenforceable provisions and order the district court to appoint a substitute arbitrator. In determining whether it is appropriate to sever an unlawful provision and enforce the remainder of a contract, Illinois courts have "long relied on the principle that an entire contract or a clause therein fails if the stricken portion constitutes an essential term of the contract or clause, but the remainder stands if the stricken portion is not essential to the bargain." Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 277 (Ill. 2006). Here,

the selection of the Tribe as arbitrator was essential to the agreements to arbitrate, and those agreements cannot be enforced without it.

Thus, in Inetianbor v. Cashcall, Inc., No. 13-60066-CIV, 2013 WL 4494125 (S.D. Fla. Aug. 19, 2013), a Florida district court declined to enforce a materially indistinguishable arbitration agreement because, the court held, the tribal forum was not available, and the designation of the Tribe as arbitrator was "integral" to the agreement. Id. at *6 (adopting prior holding to that effect, see Inetianbor v. Cashcall, Inc., No. 13-60066-CIV, 2013 WL 1325327, *3-4 (S.D. Fla. Apr. 1, 2013)).[4] "Given the repeated, specific, and exclusive references to the tribe's role throughout the arbitration agreement," the court explained, "the choice of arbitrator was as important a consideration as the agreement to arbitrate itself." Inetianbor, 2013 WL 1325327, at *4; see also id. (noting provisions specifying that, for purposes of resolving any disputes arising out of the agreement, (1) tribal court had exclusive subject-matter jurisdiction, (2) tribal court had exclusive personal jurisdiction over plaintiff; (3) those disputes would be resolved by arbitration conducted by tribe; (4) in selecting their arbitrator, parties could choose either Tribal Elder or a panel of three

[4] The district court below and the district court in Inetianbor appear to have provided different reasons for finding the tribal forum unavailable. The Inetianbor court held that the forum was unavailable because the defendants had "failed—despite numerous opportunities—to show that the Tribe is available through an authorized representative to conduct arbitrations" and, in addition, because defense counsel had conceded that the Tribe "does not have any consumer dispute rules." 2013 WL 4494125, at *5-6. The basis for an unavailability finding, however, is not material to the question whether the provision designating the Tribe as arbitrator should be severed and a substitute arbitrator appointed.

members of Tribal Counsel; and (5) the arbitration would be conducted pursuant to tribal laws and consumer dispute rules). Plaintiffs' contracts are materially indistinguishable, see Doc. 14, Exhs. A, B, Z, and this Court should decline to enforce the agreements to arbitrate for the reasons given in Inetianbor.

To be sure, in Green, this Court expressed "skeptic[ism]" about a rule providing that the unavailability of a designated arbitrator makes an arbitration agreement unenforceable if the arbitrator was "integral" to the agreement. 2013 WL 3880219, at *3; see also id. at *12 (Hamilton, J., dissenting) (agreeing "with the majority's criticism of that non-statutory test" and describing an "examin[ation of] the relevant texts to determine whether the contractual selection of an arbitrator was exclusive or not" as "[t]he sounder method" for deciding whether to order a substitute arbitrator). But these statements were dictum, see id. at *12 (Hamilton, J., dissenting), and, in any event, were made in the course of discussing the requirements of § 5 of the FAA, see id. at *5. The Court was clear that it was not foreclosing the possibility that an arbitration agreement as a whole might be invalid pursuant to § 2 and a generally applicable state contract defense. See id. at *4 ("Section 2 of the Arbitration Act could provide a better foundation for an 'integral part' escape hatch."). Thus, for the reasons given in Inetianbor, and consistent with decisions including Hooters, see supra p. 10-11, this Court should hold that the agreements to arbitrate as a whole are unenforceable as a matter of Illinois contract law.

II. This Court Should Decline To Enforce The Arbitration Agreements Unless The Tribal Forum Will Apply Illinois Law To Resolve Plaintiffs' Claims.

The agreements to arbitrate in the parties' contracts are unenforceable for a third, distinct reason. If, as defendants' counsel appeared to concede at oral argument, plaintiffs cannot vindicate their rights under Illinois law in the tribal forum, this court must "condemn[] the agreement[s] as against public policy." Mitsubishi, 473 U.S. at 637 n.19.

Plaintiffs' complaint alleged that defendants violated the Illinois Consumer Fraud Act, 815 ILCS 505/1 (2010) et seq., by contracting for and collecting finance charges, interest, and fees that exceed the amounts permitted by Illinois' criminal and civil usury laws. Doc. 14 ¶¶ 78-82. The Illinois Consumer Fraud Act, in turn, provides that its protections may not be contractually waived. See 815 ILCS 505/10c (2010) ("Any waiver or modification of the rights, provisions, or remedies of this Act shall be void and unenforceable."). "By including the anti-waiver provision[]" in the Act, the Illinois General Assembly "made clear that the public policy of these laws should not be thwarted." Bonny, 3 F.3d at 160-61; see also Wright-Moore Corp. v. Ricoh Corp., 908 F.2d 128, 132 (7th Cir. 1990) ("The public policy, articulated in the nonwaiver provisions of the [state] statute is clear: a franchisor, through its superior bargaining power, should not be permitted to force the franchisee to waive the legislatively provided protections, whether directly through waiver provisions or indirectly through choice of law.").

Unless the tribal forum will afford plaintiffs the opportunity to vindicate their rights under the Illinois Consumer Fraud Act, the agreements are unenforceable, because the forum-selection and choice-of-law clauses would operate as a "prospective waiver" of plaintiffs' non-waivable rights, violating Illinois' public policy. Mitsubishi, 473 U.S. at 637 n.19 (If "choice-of-forum and choice-of-law clauses operate[] in tandem as a prospective waiver of a party's right to pursue statutory remedies," court must "condemn[] the agreement as against public policy."); see also Bonny, 3 F.3d at 160-62 (applying Mitsubishi's effective vindication doctrine).[5]

At oral argument, defendants' counsel acknowledged that tribal law would allow interest rates higher than what Illinois usury law permits and, indeed, would not prohibit the loan terms plaintiffs challenge. See Oral Argument Recording at 19:05-19:40, 34:11-34:26. Thus, if plaintiffs can prove their allegations, enforcement of the arbitration clauses in their loan agreements would amount to a waiver of their state statutory rights—unless the tribal forum determines that Illinois law provides the applicable substantive law. But at oral argument defendants' counsel suggested that tribal choice-of-law rules point to application of tribal rather than Illinois usury law. See Oral Argument Recording at 24:36-25:11 (Judge Ripple stating that counsel

[5] The Supreme Court's description of the effective vindication doctrine in Mitsubishi was dictum. See Amer. Exp. Co. v. Italian Colors Rest., Inc., 133 S. Ct. 2304, 2310 & n.2 (2013). The Court has repeatedly invoked this dictum, however, see id. at 2310 (collecting cases), and the courts of appeals "must respect" it, United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (en banc) (noting "the Supreme Court's entitlement to speak through its opinions as well as through its technical holdings").

was "talking out of both sides of [her] mouth" on this issue). If plaintiffs could not pursue their non-waivable rights under the Illinois Consumer Fraud Act in the tribal forum, then the arbitration agreements are unenforceable as against public policy. See Wright-Moore, 908 F.2d at 132 (declining to enforce New York choice-of-law provision, which would effectively "waive the legislatively provided protections" of Indiana law, because "[t]he public policy, articulated in the nonwaiver provisions of the [Indiana] statute is clear" and "sufficient to render the choice to opt out of Indiana[] law one that cannot be made by agreement").

In that regard, this case is distinguishable from Mitsubishi. There, the Supreme Court honored a contract providing for arbitration before the Japan Commercial Arbitration Association pursuant to "the laws of the Swiss Confederation" because the party seeking to enforce it conceded at oral argument "that American law applied to the antitrust claims and represented that the claims had been submitted to the arbitration panel in Japan on that basis," and, in addition, "[t]he record confirm[ed] that . . . the arbitral panel had taken these claims under submission." 473 U.S. at 637 n.19 (internal quotation marks omitted). "[A]t this stage in the proceedings," the Supreme Court explained, there was no doubt that the party challenging the arbitration agreement "effectively may vindicate its statutory cause of action in the arbitral forum." Id. at 637 & n.19. The Court added, however, that if it became clear that the challenger could not vindicate its rights under

American antitrust law in the arbitral forum, the Court "would have little hesitation in condemning the agreement as against public policy." Id. at 637 n.19.

For similar reasons, this case is distinguishable from Bonny, where this Court rejected the plaintiffs' argument that they could not effectively vindicate their rights under American securities law if compelled to litigate their claims in English courts and under English law, as their contracts with the defendants required. See 3 F.3d at 159-62. English law, the Court explained, "affords plaintiffs a cause of action for fraud similar to that available for the claims they have brought under [American law]," and pursuant to which they "could potentially receive some compensation for their injuries." Id. at 161. At worst, the plaintiffs would "have to structure their case differently than if they were proceeding in federal district court," because American law had "lighter scienter and causation requirements." Id. Given "the availability of remedies under British law" ("as well as the international nature of the transaction involved"), enforcement of the forum selection and choice-of-law clauses thus would "not offend the policies behind the [American] securities laws." Id. at 162.

Unlike counsel in Mitsubishi, defendants' counsel did not concede at oral argument that the tribal forum will apply Illinois law to plaintiffs' statutory claims. To the contrary, she suggested that tribal law may apply to those claims. And, contrary to the circumstances in Bonny, defendants' counsel made clear that plaintiffs have no remedy under tribal law. Because the forum selection and choice-of-law clauses operate "in tandem" to preclude plaintiffs from effectively

vindicating their state statutory rights, Mitsubishi, 473 U.S. at 637 n.19, the agreements to arbitrate should not be enforced.

CONCLUSION

The Illinois Attorney General, as amicus curiae, requests that this Court reverse the judgment of the district court and decline to enforce the agreements to arbitrate.

Respectfully submitted,

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RULE 32(a)(7)(C) CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that the attached brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because the brief contains, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), 6,111 words of text.

/s/ Jane Elinor Notz
JANE ELINOR NOTZ

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2013, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Respectfully submitted,

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