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IN THE SUPREME COURT OF THE STATE OF IDAHO

MIRIAM G. CARROLL,

Plaintiff-Appellant,

vs.

MBNA AMERICA BANK,

Defendant-Respondent,

MBNA AMERICA BANK,

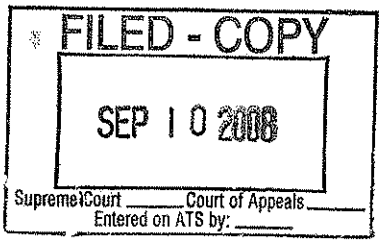
Plaintiff-Respondent

vs.

DAVID F. CAPPS,

Defendant-Appellant,

Docket No. 34765



APPELLANT'S BRIEF

Appeal from the District Court of the Second Judicial District of the State of Idaho, In and For the County of Idaho

HONORABLE JOHN H. BRADBURY
District Judge Presiding

MIRIAM G. CARROLL, *in propria persona*
DAVID F. CAPPS, *in propria persona*
Residing at 104 Jefferson Drive, Kamiah, Idaho, 83536-9410, (208) 935-7962, Appellants

JEFFREY M. WILSON, Attorney at Law
Residing at 420 W. Washington, Post Office Box 1544, Boise, Idaho 83701,
(208) 345-9100, for Respondent

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STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an action brought by MBNA America Bank, N.A. (hereinafter "MBNA"), to confirm arbitration awards. Pursuant to Idaho Code Section 7-911, an arbitration award may only be confirmed if there was a contractual agreement between the parties providing that any dispute arising between the parties will be resolved by arbitration. Both the Appellants in this action, David F. Capps and Miriam G. Carroll (hereinafter "Capps and Carroll"), have argued that they did not agree to arbitration. Further, Capps and Carroll have also argued that the laws of the State of Idaho control the dispute, and not the laws of the State of Delaware. MBNA has argued that the laws of the State of Delaware control and that MBNA has properly exercised its right to unilaterally amend the agreement under Delaware law.

B. COURSE OF PROCEEDINGS

MBNA filed an arbitration claim against each of the Appellants with the National Arbitration Forum (hereinafter "NAF"). Capps (R. Vol. I, p.140-43) and Carroll (R. Vol. I, p. 138-9) both timely objected in writing to the arbitration proceeding based on no agreement to arbitrate. MBNA and the NAF arbitrator proceeded over the objections of Capps and Carroll. Capps and Carroll did not participate in the arbitration proceedings. The NAF issued an award letter against Capps (R. Vol. II, p. 389) and against Carroll (R. Vol. I, p. 16). Carroll filed suit against MBNA on September 30, 2005 (case CV 36747 – R. Vol. I, p. 1-7 and p. 8-14) after receiving the award letter and Capps filed suit against MBNA on November 3, 2005 (case CV-36827), both within the 90 day time limit

specified in Idaho Code Section 7-912(b), seeking to have the award letters vacated. MBNA filed to confirm the award letter against Capps through Wilson & McColl, Attorneys at Law in Boise, Idaho, on January 17, 2006 (case CV-2006-5, filed in Lewis County (R. Vol. I, p. 386-89), which became CV-37201 when transferred to Idaho County). MBNA also filed to confirm the award letter against Carroll through Bishop, White & Marshall, Attorneys at Law in Seattle Washington on June 6, 2006 (case CV-37320 – R. Vol. II, p. 398). MBNA filed for Summary Judgment against each of the Appellants, which was denied (R. Vol. I, p. 20-35). On April 20, 2006 the cases (CV-36747 and CV-36827) against MBNA by Capps and Carroll were combined into case CV-36747 (R. Vol. II, p.390).

The District Court held a hearing on the issue of whether there was an agreement to arbitrate. Following the Court's decision on September 14, 2006 (R. Vol I, p. 100-109) that there was an agreement to arbitrate and confirming the award letters, Capps and Carroll filed a Rule 11(a) I.R.C.P. Motion for Reconsideration, followed by an amended Motion for Reconsideration on October 10, 2006 (R. Vol. I, p.110-129), which was ultimately denied on November 9, 2007 (R. Vol. I, p. 338-358). The confirmation case against Capps (CV-37201) was consolidated into the combined case, and post judgment, on December 7, 2007, the confirmation case against Carroll (CV-37320) was also consolidated into the combined case (R. Vol. I, p. 367). Capps and Carroll then appealed the District Court's decision that there was an agreement to arbitrate on November 15, 2007 (R. Vol. I, p. 359-366), and subsequently filed an Amended Notice of Interlocutory Appeal on December 7, 2007 (R. Vol. I, p. 368-375).

C. STATEMENT OF FACTS

Carroll opened a credit card account with MBNA on March 15, 1980 (R. Vol. I, p. 36-7). Capps opened a credit card account with MBNA on February 20, 1999 (R. Vol I. p. 73-4). Carroll provided an affidavit stating that she did not agree to arbitrate any dispute with MBNA and that the original agreement between Carroll and MBNA did not contain an agreement to arbitrate (R. Vol. I, p. 37, L.5-9). Capps provided an affidavit stating that he did not agree to arbitrate any dispute with MBNA and that the original agreement between Capps and MBNA did not contain an agreement to arbitrate (R. Vol. I, p. 74, L.5-9). It is undisputed that the original credit card agreement did not contain an arbitration clause requiring the parties to arbitrate any claims.

MBNA claims to have unilaterally amended the credit card agreement in January of 2000 to include a clause requiring any and all claims to be subject to arbitration with the NAF. Capps and Carroll claim to have not received any notification of arbitration and did not agree to any form of arbitration (R. Vol. I, p. 37, L. 7-8, and p. 74, L. 7-8). MBNA did not produce the original agreement, nor did MBNA include an agreement when filing for confirmation of the arbitration award letters against either Capps or Carroll as required by the Federal Arbitration Act [FAA] in Title 9 U.S.C. § 13. It is undisputed that the transactions involved in this action are for a consumer purpose.

ISSUES PRESENTED ON APPEAL

ISSUE NO.1

DID THE TRIAL COURT ERR IN FINDING THAT A DELAWARE CHOICE OF LAW PROVISION WAS VALID IN IDAHO CONSUMER CREDIT CONTRACTS?

ISSUE NO. 2

DID THE TRIAL COURT ERR IN FINDING THAT THERE WAS AN AGREEMENT TO ARBITRATE WITHOUT A "MEETING OF THE MINDS?

ISSUE NO. 3

DID THE TRIAL COURT ERR IN DECIDING THAT DELAWARE LAW CONTROLLED THE DISPUTE?

ISSUE NO. 4

DID THE TRIAL COURT ERR IN FINDING IN FAVOR OF MBNA WHEN THE APPLICATION FOR CONFIRMATION OF AN ARBITRATION AWARD WAS DEFECTIVE WHEN FILED?

ISSUE NO. 5

DID THE TRIAL COURT ERR IN FINDING THAT THE ARBITRATION PROVISION, WHICH WAS ADDED BY A NEGATIVE OPTION WITHOUT EFFECTIVE NOTICE, DID NOT VIOLATE BASIC CONTRACT PRINCIPLES, AND WAS SUBSTANTIALLY AND PROCEDURALLY CONSCIONABLE?

ISSUE NO. 6

DID THE TRIAL COURT ERR IN ALLOWING CAPPS' AND CARROLL'S CONSTITUTIONALLY PROTECTED RIGHT TO A TRIAL BY JURY (CONCERNING THE ORIGINAL DISPUTE) TO BE WAIVED THROUGH A "NEGATIVE OPTION" WITHOUT CAPPS AND CARROLL BOTH KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY CONSENTING TO THE WAIVER?

ARGUMENT I

DID THE TRIAL COURT ERR IN FINDING THAT A DELAWARE CHOICE OF LAW PROVISION WAS VALID IN IDAHO CONSUMER CREDIT CONTRACTS?

A. INTRODUCTION.

This is an action brought by MBNA to confirm arbitration awards. Pursuant to Idaho Code Section 7-911, an arbitration award may only be confirmed if there was a contractual agreement between the parties providing that any dispute arising between the parties will be resolved by arbitration. Both Capps and Carroll have stated in affidavits that they did not agree to arbitration (R. Vol. I, p. 37 and 74). Further, Capps and Carroll have also argued that the laws of the State of Idaho control the dispute, and not the laws of the State of Delaware. MBNA has argued that the laws of the State of Delaware control and that MBNA has properly exercised its right to amend the agreement unilaterally under Delaware law.

B. STANDARD OF REVIEW

When questions of law are presented, the Supreme Court exercises free review and is not bound by findings of the district court, but is free to draw its own conclusions from the evidence presented. Accomazzo v. CEDU Educational Services, Inc., 135 Idaho 145, 15 P.3d 1153.

The construction and application of a statute or statutes present pure questions of law, which are freely reviewed on appeal. Wilder v. Miller, 135 Idaho 382, 17 P.3d 883.

Review of an arbitrator's award is limited to whether any of the grounds for relief

stated in the Idaho Uniform Arbitration Act (UAA) exist. Idaho Code § 7-912(2004); Pac. Alaska Seafoods, Inc. v. Vic Hoskins Trucking Inc., 139 Idaho 472, 474, 80 P.3d 1073, 1075 (2003).

C. **THE IDAHO CREDIT CODE**

The State of Idaho has a public policy of protecting its residents against unfair practices by some suppliers of credit, having due regard for the interests of legitimate and scrupulous creditors (Idaho Code Section 28-41-102). Specifically, the Idaho Credit Code states, (I.C. 28-41-102) (See also R. Vol. I, p. 205, L. 21-26)

> "(1) This act shall be liberally construed and applied to promote its underlying purpose and policies." That "(2) The underlying purposes and policies of this act are:" ... "(c) To protect debtors against unfair practices by some suppliers of credit, having due regard for the interests of legitimate and scrupulous creditors;"

Pursuant to the Idaho Credit Code: (See also R. Vol. I, p. 204, L. 5-9)

> "28-41-204, APPLICABILITY. This act shall apply only to credit transactions for a consumer purpose, except for the following parts, chapters and sections, which shall apply to credit transactions for any and all purposes: (1) Part 1, Chapter 41, Title 28, Idaho Code."

It is undisputed that the transactions involved in this action are for a consumer purpose.

The Idaho Credit Code states (See also R. Vol. I, p. 204, L. 20-29),

> "28-41-201. TERRITORIAL APPLICATION. (1) Except as otherwise provided in this section, this act applies to sales and loans made in this state and to modifications, including refinancing, consolidations, and deferrals, made in this state, of sales and loans, wherever made. For purposes of this act a sale, loan, or modification of a sale or loan is made in this state if: ... (b) A consumer who is a resident of this state enters into the transaction with a creditor who has solicited or advertised in this state by any means including, but not limited to, mail, brochure, telephone, print, radio, television, internet or any other electronic means." (Emphasis added).

MBNA has entered into the State of Idaho, advertised by print, television, internet

and other means, and has solicited and conducted business with Idaho residents in the State of Idaho. Capps and Carroll were both residents of the State of Idaho when MBNA claims to have unilaterally amended the credit card agreement. These facts are uncontested and subject MBNA to the conditions of the Idaho Credit Code.

The trial court issued the following statement in its September 14, 2006 MEMORANDUM DECISION AND ORDER (R. Vol. I, p. 107, L. 8-15),

> The original credit card agreement in this case contained a choice of law clause under which the parties agreed that Delaware law would govern any issues arising concerning the contract. Under choice of law principles articulated in the Restatement (Second) of Conflict of Laws § 145 and accepted by the Idaho Supreme Court, Idaho courts give effect to such choice of law provisions unless that chosen forum has no significant relation to the parties or unless the law chosen violates some fundamental public policy of Idaho. *Seubert Excavators, Inc. v. Anderson Logging Co.*, 126 Idaho 648, 651, 889 P.2d 82, 85 (1995) (citing *Johnson v. Pischke*, 108 Idaho 397, 400, 700 P.2d 19, 22 (1985)). Neither of those two conditions is met in this case. (Emphasis added).

The trial court based its decision that Delaware law controlled on a choice of law clause in the alleged agreement. Even if there was a choice of law provision in the original credit card agreement, the Idaho Credit Code provides: (See also R. Vol. I, p. 205, L. 11-15)

> "28-41-201(8) Except as provided in subsection (7) of this section, the following agreements by a buyer or debtor are invalid with respect to regulated credit sales, regulated loans, or modifications thereof, to which this act applies: (a) That the law of another state shall apply." (Emphasis added).

Subsection (7) exempts the transaction if the buyer or debtor is not a resident of this state, which does not apply in this case.

Capps and Carroll argued during the original hearing that the laws and the actions of MBNA under their interpretation of Delaware law was against the public policy of Idaho.

In Bakker v. Thunder Spring-Wareham, LLC, 141 Idaho 185, 108 P.3d 332 (2005), the Supreme Court of Idaho held,

> "[3-6] Whether a contract violates public policy is a question of law for the court to determine from all the facts and circumstances of each case. *Quiring v. Quiring*, 130 Idaho 560, 566, 944 P.2d 695, 701 (1997) (citing *Sterns v. Williams*, 72 Idaho 276, 283, 240 P.2d 833, 840 (1952)). Public policy may be found and set forth in the statutes, judicial decisions or the constitution. *Quiring*, 130 Idaho at 566, 944 P.2d at 701."

There is a public policy in Idaho case law against unilateral amendments to agreements. Idaho does not recognize unilateral amendments to contracts or agreements. In Yellowpine Water User's Ass'n v. Imel, 105 Idaho 349, 670 P.2d 54, the Idaho Supreme Court held;

> "One party cannot unilaterally change the terms of a contract and attempts to add terms without the consent of all parties are ineffectual."

MBNA's interpretation that Delaware law provides for unilateral amendments to credit card contracts violates the fundamental public policy of Idaho regarding unilateral amendments.

There is also a public policy in Idaho case law against forming agreements without a true "meeting of the minds". In Gulf Employees Federal Credit Union v. Williams, 107 Idaho 890, 693 P.2d 1092, the Idaho Supreme Court held,

> "No enforceable contract exists unless it reflects a meeting of the minds and embodies a distinct understanding common to both parties."

MBNA's interpretation that Delaware law allows modifications to credit card contracts by mailing a notice to cardholders in the same envelope as the monthly statement violates the fundamental public policy of Idaho regarding the necessity of a true "meeting of the minds."

There is no meeting of the minds regarding arbitration between Capps, Carroll and MBNA. Carroll has provided her affidavit (R. Vol. I, p. 311 – 312) stating, "7. That I have never voluntarily, knowingly or intelligently agreed to arbitration with MBNA America Bank at any time." and "8. That to the best of my knowledge there is no agreement to arbitrate this dispute, or any dispute, with MBNA America Bank." Capps has also provided his affidavit (R. Vol. I, p. 314 – 315) stating, "7. That I have never voluntarily, knowingly or intelligently agreed to arbitration with MBNA America Bank at any time." and "8. That to the best of my knowledge there is no agreement to arbitrate this dispute, or any dispute, with MBNA America Bank."

Capps and Carroll specifically asked MBNA in discovery "**Interrogatory No. 7:** *State the evidence you have and/or will use at trial to prove the Plaintiff had knowledge* of the alleged Arbitration Agreement." (R. Vol. I, p. 50). MBNA's answer was, "Testimony of Greg Canapp; account records, including the card agreement; and the credit card account statements." There was no evidence whatsoever regarding any knowledge of an arbitration provision on the part of Capps and Carroll provided by Greg Canapp or MBNA. In the District Court's MEMORANDUM DECISION AND ORDER dated May 24, 2006, the Court noted (R. Vol. I, p. 25–26),

> "The affidavits of Ms. Carroll and Mr. Capps state that there was no agreement to arbitrate and that they were unaware of any attempt by MBNA Bank to amend their original credit card agreement to obtain one. Gregory Canapp, a Senior Personal Banking Officer at MBNA Bank, states that there was an agreement and purports to attach a copy of the current operative agreement and copies of monthly statements. No such documents are attached, a fact noted by Ms. Carroll and Mr. Capps in their briefs in opposition to the motion for summary judgment. MBNA Bank has taken no steps to remedy this situation."

Clearly there is no actual evidence of any knowledge or agreement on the part of Capps and Carroll to arbitrate this or any dispute with MBNA. There is not, and never has been, a meeting of the minds regarding arbitration between Capps, Carroll and MBNA. There was no distinct understanding regarding arbitration between the parties. Therefore no enforceable agreement regarding arbitration exists.

Capps and Carroll also brought the Idaho Credit Code before the trial court during reconsideration, demonstrating that Idaho had a strong statutory public policy against using the laws of another state in consumer credit contracts. The trial court's response in its November 7, 2007 MEMORANDUM DECISION AND ORDER and its November 8, 2007 AMENDED MEMORAMDUM DECISION AND ORDER was,

> "In my Memorandum Decision and Order of September 14, 2006, I held that using the Delaware choice of law clause did not violate Idaho's choice of law principles. I am not persuaded that decision was wrong. Because I find I did not err in applying Delaware's law, I do not address Mr. Capps and Ms. Carroll's discussion of the Idaho Credit Code." (R. Vol. I, p. 336, L. 2-7 and p. 357, L. 5-10 respectively).

In Kirkham v. 4.60 Acres of Land, 100 Idaho 781, 784, 605 P.2d 959, 962 (1980) the court stated,

> "However, it is generally held that the trial court abuses its discretion when it fails or refuses to properly apply the law."

While Capps and Carroll initially believed that Delaware law would apply, they gradually came to the realization that MBNA's reliance on its interpretation of Delaware law was creating injustice across the country. MBNA claims that since Capps and Carroll initially believed that Delaware law controlled the dispute, Capps and Carroll have waived any right to raise the issue that Idaho law actually controls the dispute.

The Idaho Credit Code also provides in 28-41-106(1) (See also R. Vol. I, p. 203, L. 10-11),

> "Except as otherwise provided in this act, a debtor may not waive or agree to forego rights or benefits under this act."

In Ting v. AT&T, 182 F.Supp.2d 902, 912 (N.D.Cal. 2002) the court evaluated the Lake-Snell survey (included in this case (R. Vol. I, p. 245-275) as a demonstration that the notification scheme for the addition of the arbitration provision is ineffective). The Ting court stated, (at 28, p. 912)

> "While I attach less weight to the responses to questions 2-3 and 11, since the form of the questions could have been improved, I could not ignore the clear trend of these answers, which indicate that people are unlikely to read solicitations received in the mail, even if from AT&T. Nor could I ignore their consistency with the results of AT&T's research."

The conclusion of the Lake-Snell survey, regarding the arbitration provision, stated, (R. Vol. I, p. 249, L. 3-8)

> "Finally, even after being reminded of the agreement, customers overwhelmingly believe they have not agreed to this provision. Ninety-four percent of customers say they have not agreed to this provision or are unsure (74 percent haven't agreed, 20 percent don't know). Only six percent of customers think they have agreed to this provision. Across demographic groups nearly nine out of ten customers say they have not agreed to this provision."

AT&T's notice of the arbitration provision was mailed in a separate envelope, most of which were marked "Important Notice". MBNA, by mailing out their notice of the arbitration provision as a bill stuffer, even though authorized by a Delaware statute, either knew, or should have known, that its notice would not be seen by a vast majority of its customers. Reliance on the bill stuffer notice for the arbitration provision as authorized under Delaware law is unfair and unscrupulous. The Idaho Credit Code was created to protect Idaho's citizens from just this kind of practice. This method of giving notice of

the arbitration provision, which does not require any recognition or acknowledgment to waive a substantive, constitutionally protected right, violates the fundamental public policy of the State of Idaho.

Any agreement that the laws of another state will apply is invalid under the Idaho Credit Code. The debtor cannot waive his or her rights to protection under the Idaho Credit Code. The wording of the statute is clear and unambiguous. In addition, the choice of Delaware law violates at least three (3) public policies of the State of Idaho. For the trial court to conclude that Delaware law applies is clearly reversible error.

ARGUMENT II.

DID THE TRIAL COURT ERR IN FINDING THAT THERE WAS AN AGREEMENT TO ARBITRATE WITHOUT A "MEETING OF THE MINDS?"

A. INTRODUCTION

This is an action brought by MBNA to confirm arbitration awards. MBNA claims to have unilaterally amended the cardholder agreement under the laws of Delaware to include an arbitration provision. Capps and Carroll have argued that the laws of the State of Idaho apply, not the laws of the State of Delaware. Capps and Carroll have also argued that there is no "meeting of the minds" on arbitration and that MBNA has provided no proof of a "meeting of the minds" regarding arbitration.

B. STANDARD OF REVIEW

Review of an arbitrator's award is limited to whether any of the grounds for relief stated in the Idaho Uniform Arbitration Act (UAA) exist. Idaho Code § 7-912(2004); Pac. Alaska Seafoods, Inc. v. Vic Hoskins Trucking Inc., 139 Idaho 472, 474, 80 P.3d 1073, 1075 (2003).

C. A MEETING OF THE MINDS IS REQUIRED FOR AN AGREEMENT TO EXIST

In Gulf Employees Federal Credit Union v. Williams, 107 Idaho 890, 693 P.2d 1092, the Idaho Supreme Court held,

> "No enforceable contract exists unless it reflects a meeting of the minds and embodies a distinct understanding common to both parties."

There is no meeting of the minds regarding arbitration between Capps, Carroll and MBNA. Carroll has provided her affidavit (R. Vol. I, p. 311 – 312) stating, "7. That I have never voluntarily, knowingly or intelligently agreed to arbitration with MBNA America Bank at any time." and "8. That to the best of my knowledge there is no agreement to arbitrate this dispute, or any dispute, with MBNA America Bank." Capps has also provided his affidavit (R. Vol. I, p. 314 – 315) stating, "7. That I have never voluntarily, knowingly or intelligently agreed to arbitration with MBNA America Bank at any time." and "8. That to the best of my knowledge there is no agreement to arbitrate this dispute, or any dispute, with MBNA America Bank."

Capps and Carroll specifically asked MBNA in discovery "**Interrogatory No. 7:** State the evidence you have and/or will use at trial to prove the Plaintiff had knowledge of the alleged Arbitration Agreement." (R. Vol. I, p. 50). MBNA's answer was, "Testimony of Greg Canapp; account records, including the card agreement; and the credit card account statements." There was no evidence whatsoever regarding any knowledge of an arbitration provision on the part of Capps and Carroll provided by Greg Canapp or MBNA. In the District Court's MEMORANDUM DECISION AND ORDER dated May 24, 2006, the Court noted (R. Vol. I, p. 25–26),

> "The affidavits of Ms. Carroll and Mr. Capps state that there was no agreement to arbitrate and that they were unaware of any attempt by MBNA Bank to amend their original credit card agreement to obtain one. Gregory Canapp, a Senior Personal Banking Officer at MBNA Bank, states that there was an agreement and purports to attach a copy of the current operative agreement and copies of monthly statements. No such documents are attached, a fact noted by Ms. Carroll and Mr. Capps in their briefs in opposition to the motion for summary judgment. MBNA Bank has taken no steps to remedy this situation."

Even in Delaware, a "meeting of the minds" is required and a clear understanding of the agreement is necessary. In Hieman Abner & Goldlust v. Ingram, C.A. No. 96C-05-047, SUPERIOR COURT OF DELAWARE, KENT, 1998 Del. Super. LEXIS 251, April 23, 1998, the Delaware court held that,

> "[2] It is of course, elementary that where a contract is sought to be made in the form of an offer and an acceptance, there is no meeting of the minds unless the acceptance is of the identical thing offered." (See also Mesa Partners v. Phillips Petroleum Co., Civil action No. 7871, COURT OF CHANCERY OF DELAWARE, NEW CASTLE, 488 A.2d 107; 1984 Del. Ch. LEXIS 540; and Martin Newark Dealership, Inc., v. Grube, C.A. No. 97-11-064 COURT OF COMMON PLEAS OF DELAWARE, NEW CASTLE, 1998 Del.C.P. LEXIS 2).

Because there was, and is, no meeting of the minds regarding arbitration, there is no agreement to arbitrate this, or any, dispute between Capps, Carroll and MBNA. Clearly there is no actual evidence of any knowledge or agreement on the part of Capps and Carroll to arbitrate this or any dispute with MBNA. There is not, and never has been, a meeting of the minds regarding arbitration between Capps, Carroll and MBNA. There was no distinct understanding regarding arbitration between the parties. Therefore no enforceable agreement regarding arbitration exists. The trial court committed reversible error in deciding otherwise.

ARGUMENT III.

DID THE TRIAL COURT ERR IN FINDING THAT DELAWARE LAW CONTROLLED THE DISPUTE?

A. INTRODUCTION

The only choice of law provision presented by MBNA was in an alleged cardholder agreement other than the original. The only arbitration provision presented was also in an alleged cardholder agreement other than the original. No testimony or evidence was presented as to why the original was not available. No testimony or evidence was presented stating that the alleged agreement was the same as the original or that the original agreement authorized any changes or substitution by another agreement. No testimony or evidence was presented stating that the original cardholder agreement contained an arbitration provision. No testimony was presented stating that the original agreement included a Delaware choice of law provision.

B. STANDARD OF REVIEW

> A trial court's findings of fact will not be set aside on appeal unless they are clearly erroneous. ... On appeal, this Court examines the record to see if challenged findings of fact are supported by substantial and competent evidence. Thomas v. Madsen, 142 Idaho 635, 637-38, 132 P.3d 392, 394-95 (2006)(citation omitted).

C. MBNA DID NOT PLACE THE ORIGINAL CONTRACT ON THE COURT RECORD

Under Rule 1002 of the Idaho Rules of Evidence, the original cardholder agreement is required.

"To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute."

Under Rule 1003, Idaho Rules of Evidence,

"A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity or continuing effectiveness of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

MBNA presented no evidence or testimony proving that the cardholder agreement offered by MBNA was in fact a duplicate of the original cardholder agreement. Capps and Carroll provided affidavits stating that the original cardholder agreement did not contain an arbitration provision (R. Vol. I, p. 36-7 and 73-4) thus raising a genuine question as to the authenticity of the alleged cardholder agreement presented by MBNA.

The fact that the original cardholder agreement did not contain an arbitration provision is uncontested by MBNA. MBNA provided no evidence or testimony that the original cardholder agreement was amended according to the terms and conditions of the original agreement.

Under Rule 1004 of the Idaho Rules of Evidence,

"Admissibility of other evidence of contents. The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:
(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless proponent lost or destroyed them in bad faith; or
(2) Original not obtainable. No original can be obtained by any reasonably practicable, available judicial process or procedure; or
(3) Original in possession of opponent at a time when an original was under the control of the party against whom offered, that party was put on notice by the pleadings or otherwise that the contents would be subject of proof at the hearing; and the party does not produce the original at the hearing; or
(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue."

No testimony was presented regarding the unavailability of the original agreement, or that the alleged agreement presented to the trial court was an exact duplicate of the original. No testimony was presented stating that the original agreement had a Delaware choice of law provision.

In MBNA America Bank, N.A., v. John L. McGoldrick, Idaho Supreme Court slip decisions, July 1 2008, the Idaho Supreme Court stated,

> "The district court found that McGoldrick's original cardholder agreement "did not have an arbitration provision, but gave MBNA the right to change the agreement under certain circumstances." There was no evidence admitted during the trial as to what those circumstances were or as to whether MBNA complied with them. Absent that evidence, MBNA failed to prove that it amended McGoldrick's original cardholder agreement to add a provision requiring mandatory arbitration, and it therefore failed to prove that there was an agreement to arbitrate. The order of the district court confirming the arbitration award is reversed."

The same basic conditions are present in this case: It is undisputed that there was no arbitration provision in the original cardholder agreement with either Capps or Carroll. MBNA did not admit the original agreement as evidence on the court record. There was no evidence admitted at the hearing on an agreement to arbitrate that MBNA complied with any terms or conditions in the original cardholder agreement in its attempt to add an arbitration provision. There was no evidence at the hearing on an agreement to arbitrate that there was a Delaware choice of law provision in the original cardholder agreement.

MBNA has failed to prove that it amended the cardholder agreement according to the terms and conditions of the original cardholder agreement to include the alleged arbitration provision. MBNA has also failed to prove that there was an agreement to arbitrate. The trial court's decision was not based on substantial and competent evidence and is grounds for reversible error.

ARGUMENT IV.

DID THE TRIAL COURT ERR IN FINDING IN FAVOR OF MBNA WHEN THE APPLICATION FOR CONFIRMATION OF AN ARBITRATION AWARD WAS DEFECTIVE WHEN FILED?

A. INTRODUCTION

This is an action brought by MBNA to confirm arbitration awards. The Federal Arbitration Act [FAA] specifies the necessary documents to be filed with a request to confirm an arbitration award. MBNA did not file the required documents with the Clerk of the Court when it filed for confirmation of the arbitration award.

B. STANDARD OF REVIEW

Review of an arbitrator's award is limited to whether any of the grounds for relief stated in the Idaho Uniform Arbitration Act (UAA) exist. Idaho Code § 7-912(2004); Pac. Alaska Seafoods, Inc. v. Vic Hoskins Trucking Inc., 139 Idaho 472, 474, 80 P.3d 1073, 1075 (2003).

C. THE APPLICATION FOR CONFIRMATION OF ARBITRATION AWARD WAS DEFECTIVE WHEN FILED

MBNA is involved in interstate commerce and it's alleged arbitration provision falls under the Federal Arbitration Act [FAA]. The FAA in Title 9 U.S.C. § 13 requires that any motion or request for confirmation of an arbitration award include the arbitration agreement. Specifically:

> "9 U.S.C. § 13. Papers filed with order on motions; Judgment; docketing; force and effect; enforcement. The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for entry of judgment thereon, also file the following papers with the clerk:
> (a) The agreement; the selection or appointment, if any, of an additional arbitrator; and each written extension of the time, if any, within which to make the

award.
(b) The award.
(c) Each notice, affidavit or other paper used upon an application to confirm, modify, or correct the award and a copy of each order of the court upon such an application."

MBNA did not file the arbitration agreement, or any agreement, with the clerk when it filed for confirmation of the award (R. Vol. I, p. 386-89).

MBNA has failed to file the agreement with the request for confirmation in other cases as well. The arbitration agreement was not present in MBNA America Bank, N.A. v. Credit (R. Vol. I, p. 216 – 220) when MBNA filed for confirmation of the award letter, and was a major factor in the court's rejection of the arbitration award. The Kansas Supreme Court case closely parallels this case, as does the Kansas Uniform Arbitration Act closely parallel the Idaho Uniform Arbitration Act. While the Kansas case is not binding on an Idaho court, this court may find its decision and reasoning compelling.

In Credit (supra), the Kansas Supreme Court stated (R. Vol. I, p. 219),

> "As mentioned above, MBNA failed to attach a copy of the arbitration agreement to its motion to confirm the award. This violated the Federal Arbitration Act for which MBNA intermittently expresses respect. See 9 U.S.C. § 13 (2000). This alone would have justified the district court in its decision to deny MBNA's motion to confirm the award."
>
> "Finally we note that a panel of our Court of Appeals has reached a similar conclusion on similar facts in another case involving MBNA's efforts to arbitrate a dispute. See *MBNA America Bank v. Barben*, No. 92,085, unpublished opinion filed May 20, 2005. We also note that these Kansas cases appear to reflect a national trend in which consumers are questioning MBNA and whether arbitration agreements exist. See e.g., *MBNA America Bank, N.A. v. Boata*, 94 Conn. App. 559, 893 A.2d 479 (2006); *MBNA America Bank, N.A. v. Rogers*, 838 N.E.2d 475 (Ind. App. 2005); *MBNA America Bank, N.A. v. Hart*, 710 N.W.2d 125 (N.D. 2006); *MBNA Am. Bank, N.A. v. Terry*, 2006 WL 513952 (Ohio); *MBNA America Bank, N.A. v. Berlin*, 2005 WL 3193850 (Ohio App.); *MBNA America Bank, N.A. v. Perese*, 2006 WL 398188 (Texas App.). Given MBNA's casual approach to this litigation, we are not surprised that the trend may be growing."

Other states have determined that there is no agreement to arbitrate on the same or similar grounds. In MBNA America Bank, N.A. v. Straub, 815 NYS2d 450 (N.Y.Civ.Ct. 2006) the court likewise refused to confirm an award entered on behalf of MBNA, where MBNA failed to submit evidence sufficient to permit the court to conclude that a binding credit card agreement with an arbitration provision existed. The court explained that, under either state law or the FAA, submission of the alleged agreement was necessary – but *not sufficient* - for confirmation. Rather, if a credit card contract is not signed by the cardholder, the bank must provide evidence, in the form of an "affidavit of a person with personal knowledge" presenting "the relevant documents and supporting proof" to demonstrate how the agreement became binding. *See also* MBNA America Bank, N.A. v. Forsmark, 2005 WL 2401444 (Mich. Ct. App. Sept. 29, 2005); MBNA America Bank, N.A. v. Boata, 94 Conn.App. 559, 893 A.2d 479; and, MBNA America Bank, N.A., v. Berlin, 2005 WL 3193850 (Ohio App. 9 Dist.).

MBNA's application for confirmation did not have the agreement filed with it, consequently depriving the trial court of jurisdiction. The trial court should have dismissed MBNA's claim either *sua sponte*, or when Capps and Carroll brought the issue up in reconsideration. To decide this case in favor of MBNA when the application was defective on its face was reversible error.

ARGUMENT V.

DID THE TRIAL COURT ERR IN FINDING THAT THE ARBITRATION PROVISION, WHICH WAS ADDED BY A NEGATIVE OPTION WITHOUT EFFECTIVE NOTICE, DID NOT VIOLATE BASIC CONTRACT PRINCIPLES, WAS SUBSTANTIALLY AND PROCEDURALLY CONSCIONABLE?

A. INTRODUCTION

This is an action brought by MBNA to confirm arbitration awards. MBNA claims to have unilaterally amended the cardholder agreement under the laws of Delaware to include an arbitration provision. Capps and Carroll have argued that the laws of the State of Idaho apply, not the laws of the State of Delaware. MBNA's interpretation of the laws of the State of Delaware make the application of Delaware law substantially and procedurally unconscionable in the State of Idaho.

B. STANDARD OF REVIEW

Review of an arbitrator's award is limited to whether any of the grounds for relief stated in the Idaho Uniform Arbitration Act (UAA) exist. Idaho Code § 7-912(2004); Pac. Alaska Seafoods, Inc. v. Vic Hoskins Trucking Inc., 139 Idaho 472, 474, 80 P.3d 1073, 1075 (2003).

C. THE NEGATIVE OPTION AND THE LACK OF EFFECTIVE NOTICE

The four required elements of contract formation are: (1) Agreement (includes an offer and an acceptance), (2) Consideration, (3) Contractual capacity, and (4) Legality. Modification of an agreement requires the same essential elements. Even if

the addition of an arbitration provision is a modification to an existing agreement, the agreement to arbitrate is treated as a separate and distinct agreement.

In a misinterpretation of Delaware statute Title 5 § 952, MBNA attempts to use the notification scheme for increases in the rate or rates of periodic interest specific to subsection (b) as a justification for adding new terms under subsection (a), in an apparent attempt to bypass the requirement to obtain the conscious and express consent of the cardholder. MBNA offers the cardholder the option of refusing the changes in subsection (b) regarding changes in interest rates by sending a written statement to that effect to MBNA (opting out). The cardholder not writing to MBNA and specifically rejecting the offer to amend allegedly accomplishes the supposed modification of the agreement without actual consent. This has become known as the negative option. No such opt-out provision is present in subsection (a) of § 952 of the Delaware statute.

In addition, subsection (a) of § 952, Delaware Code, states,

> "Unless the agreement governing a revolving credit plan otherwise provides, a bank may at any time and from time to time amend such agreement in any respect, whether or not the amendment or the subject of the amendment was originally contemplated or addressed by the parties or is integral to the relationship between the parties."

MBNA did not place the original agreement on the record, so the trial court had no means of determining whether the revolving credit plan originally agreed to by Capps and Carroll either otherwise provided for, or did not otherwise provide for such changes. As such, MBNA, and the trial court's reliance on the Delaware statute is not based on sufficient and competent evidence, and constitutes reversible error.

MBNA further attempts to use continued use of the card as an act on the part of the cardholder to indicate assent to the proposed arbitration clause. If a cardholder is aware of the proposed arbitration clause, and agrees to the arbitration, the cardholder will continue to use the card. If a cardholder is unaware of the proposed arbitration clause, and would not agree to it if they were aware of the proposed arbitration agreement, the cardholder would continue to use the card. The proposed act to indicate assent is ambiguous, and thus ineffective. The act of the cardholder must be specific to the proposed amendment. The Restatement (Second) of Contracts, Section 18, Manifestation of Mutual Assent (c), states;

> "A 'manifestation' of assent is not a mere appearance; the party must in some way be responsible for the appearance. There must be conduct and a conscious will to engage in that conduct. Thus, when a party is used as a mere mechanical instrument, his apparent assent does not affect his contractual relations." "This is true even though the other party reasonably believes that the assent is genuine."

For example, if a cardholder filed an arbitration claim against MBNA that would be a clear act in recognition of the agreement to arbitrate. Continued normal use of the card cannot be construed as assent to the proposed arbitration provision.

The "notice" referred to in the Delaware statute is not the amendment itself, but rather a notice of an offer to amend. Such an offer is dependant on the conscious recognition and acceptance of the offeree as required in the Common Law of Contracts.

As this proposed Arbitration agreement follows from the Federal Arbitration Act [FAA] and involves interstate commerce, it is important to consider what the Federal courts have said in this regard. It should be noted here that the FAA was intended;

> "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements on the same footing as other contracts." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24, 111 S.Ct 1647, 1651, 114 L.Ed. 2d 26 (1986).

As other Federal courts have noted;

> ""a party will suffer irreparable harm if compelled to arbitrate in the absence of any agreement to do so." GTMF v. TKN Sales, Inc., 2000 WL 364871, at *2 (S.D.N.Y. Apr. 7, 2000) rev'd on other grounds, 257 F.3d 235 (2d Cir. 2001); Mount Ararat Cemetery v. Cemetery Workers & Greens Attendants Union, 975 F.Supp. 445, 446, 447 (E.D.N.Y. 1997); Spear, Leeds & Kellogg v. Cent. Life Assurance Co., 879 F.Supp. 403 (S.D.N.Y. 1995) rev's on other grounds, 85 F.3d 21 (2d Cir. 1996)."

"The FAA policy in favor of enforcing arbitration clauses does not come into play in determining whether an agreement to arbitrate exists." Carson v. Giant Food, Inc., 175 F.3d 325, 329 (4th Cir. 1993); Va. Carolina Tools, Inc. v. Int'l Tool Supply, Inc., 984 F.2d 113, 117 (4th Cir. 1993); Badie v. Bank of Am., 67 Cal. App. 4th 779, 790, 79 Cal. Rptr. 2d 273, 280 (1998). "The question of whether parties have entered into an agreement to arbitrate is resolved through application of state contract principles that govern the formation of any contractual agreement." See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938. 944, 115 S. Ct., 1920, 131 L.Ed. 2d 985 (1995). "The policy favoring arbitration cannot displace the necessity for a voluntary agreement to arbitrate." Victoria v. Super. Ct., 40 Cal. 3d 734, 739, 222 Cal. Rptr. 1, 710 P.2d 833 (1985). "To apply the policy in favor of enforcing arbitration clauses to the question of whether an agreement to arbitrate exists, "would permit the presumption to displace the fundamental rule that parties can be required to arbitrate only that which they have agreed to arbitrate.""" Hendrick v. Brown & Root, Inc., 50 F.Supp. 2d 527, 538 (E.D.Va. 1999).

Specific to the present case, as explained in Myers v. MBNA America, 2001 WL 965063 (D.Mont.), the 9th Federal District Court in Montana held.

> "MBNA proposed the Arbitration Section as a change in the terms of the parties relationship that would be effective unless rejected by the cardholder. In other words, MBNA skipped offer and went straight to acceptance. Myers did not perform an act and did not forego the performance of an act. It should here be plainly set forth that an offeror has no power to cause the silence of the offeree to operate as an acceptance when the offeree does not intend it to be so. The offeree's conduct, coupled with the silence[,] may be such as to make the silence operative. The offeror's own language or other conduct may be such as to make the offeree's silence a sufficient acceptance binding on the offeror. But an offeror cannot, merely by saying that the offeree's silence will be taken as an acceptance, cause it to be such. The offeror cannot force the offeree to take pen in hand, to use a postage stamp, or to speak, under penalty of being bound by a contract by not expressing a rejection. Joseph M. Perillo, Corbin on Contracts § 3.18 (1993 & Supp. Fall 2000), at 407-08."
>
> "Circumstances may indicate that the offeree accepts the offer. *See id.* at 402-05. However, the only circumstance in this case that might indicate Myers' acceptance is her failure to notify MBNA of her rejection. That circumstance is dismissed by Perillo and by common sense. MBNA could argue that it gave up its right to a jury trial in exchange for Myers' doing the same. However, this is not evidence that anything was "bargained for." In sum there is no indication that Myers agreed to arbitrate the dispute with MBNA."

MBNA generally argues that the cardholder "agreed" to any changes it makes in the future as part of the cardholder agreement. Myers also addressed this argument,

> "If MBNA's argument that Myers "agreed" to arbitration when she agreed to allow MBNA to amend the agreement were accepted, there would be no reason to stop at arbitration. MBNA could "amend" the agreement to include a provision taking a security interest in Myers' home or requiring Myers to pay a penalty if she failed to convince three friends to sign up for MBNA cards. Such provisions were as much within the agreement of the parties at the outset of their relationship as the arbitration provision." In conclusion, the court held, "Absent circumstantial evidence that Myers accepted MBNA's offer to arbitrate their disputes, the arbitration Section cannot be enforced against Myers. Nor can her agreement to arbitrate be implied from her agreement to agree to MBNA's amendments."

MBNA has presented no evidence whatsoever of a "meeting of the minds", conscious knowledge of the offer to amend on the part of either Capps or Carroll, nor any evidence of Capps' or Carroll's agreement to arbitrate. The alleged addition of the arbitration clause is a parole modification. In Scott v. Castle, 104 Idaho 719, 662 P.2d 1163, the Idaho Supreme Court held that;

> "Parties to a written contract may modify its terms by subsequent oral agreement or may contract further with respect to its subject matter; however, one party to a contract cannot alter its terms without assent of the other and minds of the parties must meet as to any proposed modification, and fact of agreement may be implied from a course of conduct in accordance with its existence and assent may be implied from acts of one party in accordance with terms of change proposed by the other."

In the State of Idaho,

> "Generally, silence and inaction, or mere silence or failure to reject offer when it is made, does not constitute acceptance of offer, absent specific exceptions to rule which may be used to create contract." Vogt v. Madden, 713 P.2d 442, 110 Idaho 6, Idaho App. (1985). "Silence or failure to reject an offer usually is not evidence of intent to accept the offer, except if offeror has stated or given offeree reason to understand that assent may be manifested by silence or inaction, and offeree in remaining silent and inactive intends to accept the offer." Eimco Div. Envirotech Corp., v. United Pacific Ins. Co., 710 P.2d 672, 109 Idaho 762, Idaho App. 1985.

Capps and Carroll were not aware of any alleged contract modification regarding arbitration, there was no conscious knowledge of a proposed arbitration clause, there was no "meeting of the minds" regarding arbitration or its addition to the existing contract between Capps, Carroll and MBNA (see affidavits – R. Vol. I, p. 314-315 and 311-312 respectively). There was no intent on the part of Capps or Carroll to accept any arbitration agreement with MBNA by remaining silent or inactive. Capps and Carroll have not acted in a manner consistent with arbitration being a part of the contract. Since the act must be consistent with the proposed change, the only act Capps and Carroll could

have performed that would be consistent with an arbitration provision would have been to file an arbitration claim against MBNA. No such act was performed.

Even in Delaware, a "meeting of the minds" is required and a clear understanding of the agreement is necessary. In Hieman Abner & Goldlust v. Ingram, C.A. No. 96C-05-047, SUPERIOR COURT OF DELAWARE, KENT, 1998 Del. Super. LEXIS 251, April 23, 1998, the Delaware court held that,

> "[2] It is of course, elementary that where a contract is sought to be made in the form of an offer and an acceptance, there is no meeting of the minds unless the acceptance is of the identical thing offered." (See also Mesa Partners v. Phillips Petroleum Co., Civil action No. 7871, COURT OF CHANCERY OF DELAWARE, NEW CASTLE, 488 A.2d 107; 1984 Del. Ch. LEXIS 540; and Martin Newark Dealership, Inc., v. Grube, C.A. No. 97-11-064 COURT OF COMMON PLEAS OF DELAWARE, NEW CASTLE, 1998 Del.C.P. LEXIS 2).

Because there was, and is, no meeting of the minds regarding arbitration, there is no agreement to arbitrate this, or any, dispute between Capps, Carroll and MBNA.

Other companies have tried to use similar ineffective notice schemes used by MBNA. In Ting v. AT&T, 182, F.Supp.2d 902 (N.D.Cal. 2002) also 319 F.3d 1126, discovery revealed that AT&T had commissioned a survey to determine the percentage of people who actually looked at the contents of the envelopes that they received. In the AT&T case, attorney Paul Bland with Trial Lawyers for Public Justice, commissioned a study with Lake, Snell, Perry & Associates to conduct original research regarding the AT&T notice of arbitration, the number of people who saw it, and the number of people who actually read and understood it. The results of the Lake Snell study were presented to the trial court (R. Vol I, p. 245 to 275).

In Ting the court evaluated the Lake-Snell survey. The Ting court stated, (at 28, p. 912)

> "While I attach less weight to the responses to questions 2-3 and 11, since the form of the questions could have been improved, I could not ignore the clear trend of these answers, which indicate that people are unlikely to read solicitations received in the mail, even if from AT&T. Nor could I ignore their consistency with the results of AT&T's research."

The conclusion of the Lake-Snell survey, regarding the arbitration provision, stated, (R. Vol. I, p. 249, L. 3-8)

> "Finally, even after being reminded of the agreement, customers overwhelmingly believe they have not agreed to this provision. Ninety-four percent of customers say they have not agreed to this provision or are unsure (74 percent haven't agreed, 20 percent don't know). Only six percent of customers think they have agreed to this provision. Across demographic groups nearly nine out of ten customers say they have not agreed to this provision."

AT&T's notice of the arbitration provision was mailed in a separate envelope, most of which were marked "Important Notice". MBNA, by mailing out their notice of the arbitration provision as a bill stuffer, even though authorized by a Delaware statute, either knew, or should have known, that its notice would not be seen by a vast majority of its customers. Reliance on the bill stuffer notice for the arbitration provision as authorized under Delaware law is unfair and unscrupulous.

The Lake Snell survey included questions on the arbitration provision included by AT&T, as well as other contractual modifications. The results of the study indicated that 91% either don't remember seeing an arbitration provision (85 percent) or say they are unsure (6 percent) (R. Vol. I, p. 247). When customers were read portions of the arbitration provision over the phone, most said they have not heard of it or don't know (92 percent), only 9 percent said they remember reading or seeing it (R. Vol. I, p. 248). The Lake Snell study is generally consistent with the original AT&T study. The bottom line regarding MBNA's use of a bill stuffer for notice of the addition of an arbitration provision to their cardholder agreement is that 7 out of 8, to 9 out of 10 people did not

read or understand the notice. Such a notice has come to be referred to as a "stealth" notice, because even though it may have been sent out, most people never see it or hear about it. Under these conditions, MBNA's alleged notice of the arbitration provision and the opt-out provision cannot be considered effective notice.

In Lea Tai Textile Co., v. Manning Fabrics, Inc., (S.D.N.Y.) 411 F. Supp. 1404, the federal court held,

> "If a party wishes to bind another to arbitrate, that purpose must be accomplished in such a way that each party fully and clearly comprehends that an agreement to arbitrate exists."

MBNA, in using the "stealth" notice approach, and requiring an opt-out notification to keep an amendment from becoming effective (the negative option), clearly has tried to keep as many people as possible from realizing that MBNA was attempting to change their agreement. It is impossible to establish that each party fully and clearly comprehends that an agreement to arbitrate exists when MBNA either knew, or should have known that from 87% to 91% of their cardholders were not going to read the notice or the proposed amendment. This act, on the part of MBNA, while on the surface appears to be authorized by a Delaware statute, must still be considered deceptive and misleading. For the trial court to conclude that an agreement to arbitrate exists under these conditions is clearly reversible error.

ARGUMENT VI.

DID THE TRIAL COURT ERR IN ALLOWING CAPPS' AND CARROLL'S CONSTITUTIONALLY PROTECTED RIGHT TO A TRIAL BY JURY (CONCERNING THE ORIGINAL DISPUTE) TO BE WAIVED THROUGH A "NEGATIVE OPTION" WITHOUT CAPPS AND CARROLL BOTH KNOWINGLY, INTELLEGENTLY AND VOLUNTARILY CONSENTING TO THE WAIVER?

A. INTRODUCTION

This is an action brought by MBNA to confirm arbitration awards. The waiver of a substantive and constitutionally protected right cannot be waived with voluntary, intelligent and knowing consent. Mailing an alleged notice as a bill stuffer does not act as a waiver of this substantive and protected right.

B. STANDARD OF REVIEW

Review of an arbitrator's award is limited to whether any of the grounds for relief stated in the Idaho Uniform Arbitration Act (UAA) exist. Idaho Code § 7-912(2004); Pac. Alaska Seafoods, Inc. v. Vic Hoskins Trucking Inc., 139 Idaho 472, 474, 80 P.3d 1073, 1075 (2003).

C. THE FALSE WAIVER OF THE RIGHT TO A TRIAL BY JURY

"The FAA policy in favor of enforcing arbitration clauses does not come into play in determining whether an agreement to arbitrate exists." Carson v. Giant Food, Inc., 175 F.3d 325, 329 (4th Cir. 1993); Va. Carolina Tools, Inc. v. Int'l Tool Supply, Inc., 984 F.2d 113, 117 (4th Cir. 1993); Badie v. Bank of Am., 67 Cal. App. 4th 779, 790, 79 Cal. Rptr. 2d 273, 280 (1998). "The question of whether parties have entered into an agreement to

arbitrate is resolved through application of state contract principles that govern the formation of any contractual agreement." See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938. 944, 115 S. Ct., 1920, 131 L.Ed. 2d 985 (1995). "The policy favoring arbitration cannot displace the necessity for a voluntary agreement to arbitrate." Victoria v. Super. Ct., 40 Cal. 3d 734, 739, 222 Cal. Rptr. 1, 710 P.2d 833 (1985). "To apply the policy in favor of enforcing arbitration clauses to the question of whether an agreement to arbitrate exists, "would permit the presumption to displace the fundamental rule that parties can be required to arbitrate only that which they have agreed to arbitrate."" Hendrick v. Brown & Root, Inc., 50 F.Supp. 2d 527, 538 (E.D.Va. 1999).

Because one party claims that an agreement to arbitrate exists does not automatically waive the other party's right to a jury trial. There must, in fact, be a voluntary agreement to arbitrate the dispute. MBNA's bill stuffer notice of their arbitration provision is not an actual agreement to arbitrate, but rather is being used to imply that an agreement may exist, since there is no actual evidence of a meeting of the minds or any evidence of an intelligent, knowing and voluntary waiver of Capps' and Carroll's right to a trial by jury. In Van Vranken v. Fence-Craft, 91 Idaho 742, 745, 430 P.2d 488 (1967), the Supreme Court of Idaho held,

> "[2] The right to trial of issues by jury rests on a constitutional base. Idaho Const. Art. 1, § 7 (Farmer v. Loofbourrow, 75 Idaho 88, 267 P.2d 113, decided under former I. C. § R10-301). The waiver of such right cannot be made or enforced unless it appears to have been made in conformity with existing statute or rule, and not by implication. Farmer v. Loofbourrow, supra; Meal v. Drainage Dist. No. 2, 42 Idaho 624, 248 P. 22. See also: Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393, 57 S.Ct. 809, 812, 81 L.Ed. 1177 (1937), (where the United States Supreme Court stated: "[T]he right of jury trial is fundamental[;], courts indulge every reasonable presumption against waiver."); Lee Wing Chau v. Fusae K. Nagai, 353 P.2d 998 (Hawaii, 1960); Mozes v. Daru, 4 Ariz. App. 385, 420 P.2d 957 (1966); 5 Moore's Fed.Practice ¶ 38.43, p. 335; 31 Am.Jur., Jury, § 47, p. 51; 50 C.J.S. Juries § 110, p. 821."

Since MBNA's claim of an arbitration agreement flows from the Federal Arbitration Act [FAA], the claimed "waiver" of Capps' and Carroll's right to a trial by jury is also relevant under federal law. In Jackson v. Maxwell, 262 F.Supp. 494 (1966), the United States District Court, District of Idaho, S. D. held,

> "A waiver is the voluntary relinquishment of a known right. In federal law, there exists a strong presumption against the waiver of constitutionally guaranteed rights. Johnson v. Zerbst, supra, and Glasser v. United States, supra. To be effective, a waiver must be shown to have been knowingly and understandably made."

Capps and Carroll, in their Post-Hearing Memorandum (R. Vol. I, p. 169), raised the issue of MBNA's alleged arbitration clause waiving a constitutionally protected right, specifically the Seventh Amendment Right to a Trial by Jury. While the decisions of other state supreme courts is not binding, this court may find the reasoning compelling. Arbitration agreements in medical clinic practice are routinely signed by the patient, and yet, as the Supreme Court of Nevada held in Obstetrics and Gynecologists Wixted, Flanagan and Robinson v. Pepper, 693 P.2d 1259,

> "The contents of both affidavits are perfectly consistent with the conclusion that the agreement was never explained to respondent. On these facts the district court may well have found that respondent did not give an informed consent to the agreement and that no meeting of the minds occurred."

The court decided that the arbitration clause, even though signed by the patient, was not valid due to the lack of a clear understanding of the arbitration provision where there was no "meeting of the minds".

In a similar case, Broemmer v. Abortion Services of Phoenix, Ltd., 173 Ariz. 148, 840 P.2d 1013 (1992), the Supreme Court of Arizona also held that the signed arbitration agreement was not valid by stating,

> "The facts in the instant case present an even stronger argument in favor of holding the agreement unenforceable than do the facts in *Pepper*. In both cases, plaintiffs stated that they did not recall signing the agreement to arbitrate or having it explained to them." "Clearly, there was no conspicuous or explicit waiver of the fundamental right to a jury trial or any evidence that such rights were knowingly, voluntarily and intelligently waived."

Even in the dissenting opinion, the justices clearly stated,

> "The dissent is concerned that our decision today sends a 'mixed message.' It is, however, our intent to send a clear message. That message is: Contracts of adhesion will not be enforced unless they are conscionable and within the reasonable expectations of the parties. This is a well-established principle of contract law; today we merely apply it to the undisputed facts of the case before us."

See also Sosa v. Paulos, 924 P.2d 357, 299 Utah Adv. Rep. 26, 1996 Utah LEXIS 83 (1996).

Capps and Carroll had no expectation that MBNA would seek to remove their constitutionally protected right to a trial by jury by including an alleged notice as a bill stuffer in a monthly statement. Here there is no signed arbitration agreement; only MBNA's claim that an agreement exists because they sent out a notice as a bill stuffer in a monthly statement. Such alleged notice is not a knowing, voluntary, intelligent waiver of a substantive right. The trial court erred in allowing the waiver of Capps' and Carroll's substantive right to a trial by jury without substantial and competent evidence that such a waiver was actually made.

CONCLUSION

The evidence presented clearly demonstrates: that the alleged arbitration agreement was not properly formed, that the dependence on Delaware law was not valid, that there was no meeting of the minds on the issue of arbitration, and that the method of creating the alleged arbitration agreement is in violation of several fundamental public policies of the State of Idaho. In addition, the method of delivering the alleged notice of an arbitration provision did not rise to the legal level of effective notice, and the method of notification of the alleged arbitration provision does not rise to the level of a waiver of a constitutionally protected substantive right. The trial court's decision that an agreement to arbitrate exists and to confirm the arbitration award letters is clearly wrong and must be reversed. In Massey-Ferguson Credit Corp. v. Peterson, 102 Idaho 111, 626 P. 2d 767 (1981), the Supreme Court of Idaho held,

> "Where the findings of a trial court are clearly erroneous, we must set them aside. I.R.C.P. 52(a); *Marshall Bros., Inc. v. Geisler*, 99 Idaqho 734, 588 P.2d 933 (1978); *Russ Ballard v. Lava Hot Springs Resort, Inc.* 97 Idaho 572, 548 P.2d 72 (1976)."

Capps and Carroll request that this court reverse the judgment of the district court, vacate the award letters against them, and remand for further proceedings.

Respectfully submitted this 8TH day of September 2008.

David F. Capps, Appellant, *in propria persona*

Miriam G. Carroll, Appellant, *in propria persona*

CERTIFICATE OF SERVICE

I, David F. Capps, do hereby certify, under penalty of perjury, that I mailed two true and correct copies of this APPELLANT'S BRIEF to the attorney for the respondent this 8TH day of September 2008 by Certified Mail # 7006 2150 0003 4550 3199 at the following address:

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