10-29-2008

Carroll v. MBNA American Bank Appellant's Reply Brief Dckt. 34765

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,

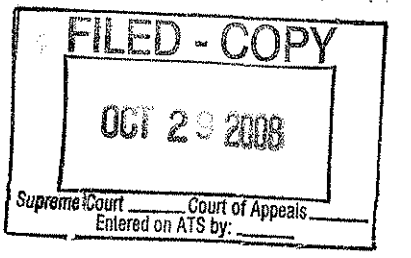
vs.

DAVID F. CAPPS,

Defendant/Appellant,

Docket no. 34765

Idaho County Case No. **CV-36747**



APPELLANT'S REPLY 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, ID 83536, (208) 935-7962, Appellants

JEFFREY M. WILSON, Attorney at Law
Residing at 420 W. Washington, P.O. Box 1544, Boise, ID 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.140-143) and Carroll (R. Vol. I, p. 138-139) 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

ARGUMENT I

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

MBNA cites Watters v. Wachovia Bank, N.A., 127 S.Ct. 1559, 1564, 167 L.Ed2d 389 (2007) followed by Nagle v. Herold, 30 F.Supp. 905, 906, (W.D. New York 1939), concluding with Smiley v. Citibank (South Dakota) N.A., 517 U.S. 735, 737, 116 S.Ct 1730, 135 L.Ed.2d 25 (1996) leading to the idea that the use of the laws of the state where a national bank is located is effectively mandated. That is not true. Watters only states that **state** law controls contract terms and does not specify *which* state law should be used. The Nagle decision is in a Federal Court in the District of New York, is not binding on this court, and the Smiley decision only applies to interest rates and associated charges. None of these cases dictate, or even suggest, that Idaho law should not apply to the formation or modification of a contract.

In contracts, a choice of law provision is not even reached until the plaintiff proves that there is a valid and enforceable contract to begin with. MBNA has failed to put the original contract on the court record and as such, has failed to prove the existence of a valid and enforceable contract. Even with the assumption that such a contract exists, the means of modifying the contract have not been established, and no proof of a proper modification to the contract has been provided by MBNA. There is also no proof that an agreement to arbitrate exists.

MBNA argues that their amendment to include arbitration was not done unilaterally, and as such is not against the public policy of the State of Idaho. MBNA argues that the amendment

was properly done under Delaware law, specifically Title 5 § 952(a). In discussing that particular statute, the trial court clearly stated "In the case where there is clear statutory authority allowing unilateral amendment, courts have not hesitated to give effect to the mandate of the FAA that arbitration agreements must be enforced." According to the court's decision, under Delaware law, the amendment is unilateral.

Statutes from other states that violate the public policy do not have to be given effect. In Discover Bank v. Shea, 827 A.2d 358 (N.J. Super. 2001) the question was whether or not to give effect to Delaware statute Title 5 § 952. The New Jersey court held,

> "Discover attempts to avoid Badie and the similar principles of New Jersey law by arguing that, under Delaware law (namely 5 Del. C. § 952), it was permitted to make such a unilateral addition to its credit card agreement. While Discover's credit card agreement provides that Delaware law applies, the Delaware law clearly violates New Jersey Public Policy and under New Jersey law that choice of law provision cannot be given effect. In New Jersey, the unilateral addition of an arbitration agreement into a contract of adhesion cannot be given legal effect."

In this case, it is uncontested that this is a contract of adhesion.

MBNA states, "Here, there is no argument that Delaware law allows for an agreement to be amended without a meeting of the minds, and is therefore against the public policy of Idaho." MBNA then goes on to state, "Nevertheless, the record fails to establish that there was a lack of mutuality of obligation, contract specificity or a distinct understanding shared by the parties." Yet the Supplemental Affidavit of Capps (R. Vol. I, p. 315) states, "7. That I have never voluntarily, knowingly or intelligently agreed to arbitration with MBNA America Bank at any time." The Supplemental Affidavit of Carroll (R. Vol. I, p. 312) also states, "7. That I have never voluntarily, knowingly or intelligently agreed to arbitration with MBNA America Bank at any time." These statements, under oath, certainly establish a lack of a distinct understanding shared by the parties. When Capps and Carroll asked MBNA for any evidence of a meeting of

the minds, MBNA provided nothing in response. There is clear evidence on the record that there was no meeting of the minds, and nothing that contradicts that evidence. Amendment of an agreement under Delaware statute Title 5 § 952(a) is done without a meeting of the minds and is clearly against the public policy of the State of Idaho. Delaware case law also does not recognize an agreement without a meeting of the minds.

MBNA argues that, "In this case, there can be no doubt that Appellants consented to the amendment of the parties' agreement to include arbitration. While, silence or failure to reject an offer usually is not evidence of intent to accept the offer, an offer may be accepted by silence if the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer." MBNA provides no evidence that Capps and Carroll intended to accept the offer. Contrary to MBNA's claims, Capps and Carroll have clearly stated in their affidavits that they "have never voluntarily, knowingly or intelligently agreed to arbitration with MBNA America Bank at any time." Therefore there is no evidence of any kind that Capps and Carroll intended to accept the offer, only evidence of their lack of intent. If there is no demonstrated intent to accept the offer, silence and inaction does not create that consent.

The Idaho Credit Code does allow for changes to be made in open-ended credit agreements, but those changes must be made with a meeting of the minds and cannot be made unilaterally. Neither of those conditions is present. Contrary to MBNA's claim, even though MBNA was allowed to amend its credit card agreement under Idaho law, the attempted change was not properly accomplished.

ARGUMENT II

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

MBNA states, "the record fails to establish that there was a lack of mutuality of obligation, contract specificity or a distinct understanding shared by the parties." That statement is not true. The affidavits of Capps and Carroll both establish that there was no shared understanding by the parties regarding arbitration. MBNA has placed no evidence whatsoever on the record to counter the statements, made under oath, of Capps and Carroll, or to prove a meeting of the minds ever took place regarding arbitration.

In Thomas v. Schmelzer, 118 Idaho 353, 796 P.2d 1026 (1990), the Court of Appeals of Idaho held,

> "[2,3] Proof of a "meeting of the minds" requires evidence that the parties had a mutual understanding of the terms of their agreement and that they mutually assented to be bound by those terms. The determination of whether there was sufficient evidence to show a meeting of the minds to form an express agreement is a question of fact to be resolved by the trier of fact. *Glenn v. Gotzinger*, 106 Idaho 109, 675 P.2d 824 (1984); *Bischoff v. Quong-Watkins Properties*, 113 Idaho 826, 748 P.2d 410 (Ct.App. 1987)."

In Delaware, the process is the same. In Coca-Cola Bottling Co. v. Coca-Cola Co. 769 F.Supp. 599, 629 (D.Del. 1991) on the issue of substituting High Fructose Corn Sweetener [HFCS] for sugar, the court held,

> "[19-21] 94. The Company's unilateral substitution of HFCS for sugar in the syrup may be construed as an offer to amend paragraph 10 and the unamended contracts to provide for use of HFCS as the sweetener in the syrup. In order for the terms of a contract to be amended, both parties must manifest assent to the changed terms. If one party alters its performance, such alteration may be considered as an offer to amend the contract, and assent by the other party will be treated as an acceptance of the offer to substitute the altered terms. *Restatement (Second) of Contracts* § 287 & comment a. Plaintiffs clearly have not manifested assent to amendment of their unamended contracts as they

incorporate paragraph 10 of the Consent Decrees to include HFCS in the absence of a corresponding amendment to the pricing provisions.
The Company has not obtained plaintiffs' consent to substitute HFCS for granulated sugar from cane or beet as the sweetener in Coca-Cola beverage syrup, and consequently, the unamended contracts have not been amended to provide for the use of HFCS in place of sugar."

In Carlson v. Hallinan Del.Ch., 925 A.2d 506, 524 (2006), the court held,

> "The burden is on the plaintiff to prove by a preponderance of the evidence the existence of the contract to which the defendant is a party. Three elements are necessary to prove the existence of an enforceable contract: (1) the intent of the parties to be bound by it; (2) sufficiently definite terms; and (3) consideration."

There is no evidence that Capps and Carroll intended to be bound by an agreement to arbitrate.

In Figueroa v. Kit-San Co. 123 Idaho 149 (App. 1992), the Court of Appeals of Idaho held,

> "[3] Parties to a contract must have a mutual understanding or meeting of the minds regarding essential contract terms in order for the contract to be binding. *Thomas v. Schmelzer*, 118 Idaho 353, 796 P.2d 1026 (Ct.App. 1990); 67 AM.JUR.2D *Sales* § 129, p. 398 (1985). A meeting of the minds requires an expression of assent or conduct sufficient to show agreement. 67 AM.JUR.2D *Sales* § 129, p. 398."
>
> "[5-7] ...Silence ordinarily does not establish acceptance without knowledge that silence is a mode of acceptance and the offeree intends to accept. *Vogt v. Madden*, 110 Idaho 6, 713 P.2d 442 (Ct.App. 1985); *Eimco Div., Envirotech Corp. v. United Pacific Ins. Co.*, 109 Idaho 762, 710 P.2d 672 (Ct.App. 1985); *See* J. CALAMARI AND PERILLO, CONTRACTS § 2-21, p. 63-68 (2nd ed. 1977). A party cannot state an agreement on his own terms and unilaterally form a contract. *D.R. Curtis Company v. Mason*, 103 Idaho 476, 649 P.2d 1232 (Ct.App. 1982).

There is no evidence on the record establishing a meeting of the minds regarding arbitration.

The trial court's decision that there was a meeting of the minds is not based on substantial and competent evidence and should be reversed.

ARGUMENT III

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

MBNA argues that because Capps and Carroll did not specifically raise the Idaho Rules of Evidence 1002, 1003 and 1004 in the district court that the entire issue cannot be considered or reviewed. Just because the specific Rules of Evidence were not raised by Capps and Carroll in the trial court does not excuse MBNA from complying with them. MBNA bears the burden of proving the existence of an enforceable contract, and the existence of an enforceable agreement to arbitrate. MBNA has done neither.

The fact that the original agreement did not contain an arbitration provision is uncontested. MBNA had the burden of proving that they amended the contract according to the terms of the original agreement. MBNA presented no evidence of the original agreement, or of the terms and conditions of the original agreement. Without that evidence on the court record, there is no proof that the alleged arbitration provision was ever properly made, and is therefore not a proper part of the agreement.

MBNA claims to have amended the agreement under Delaware Code Title 5 § 952(a) (addressed in Argument V below), but the statute only applies when the agreement does not otherwise prohibit amendment of the agreement. Without the original agreement on the court record, there is no proof that the Delaware statute applies. MBNA has failed to prove the existence of an agreement to arbitrate.

Other states are reaching the same conclusion. See the following cases:

CACV v. Corda, 2005 WL 3664087 (Conn. Super. Dec. 16, 2005) "The assignee alleged that the arbitration clause in a brochure filed with the court was the one to which the debtor consented. But, the court found that there was no evidence, aside from the assignee's assertion, that the debtor ever agreed to any such thing. The case was dismissed."

Creech v. MBNA, 250 S.W.3d 715 (Mo. Ct. App. 2008) "We affirm the trial court's judgment that Appellant (MBNA) failed to prove that the agreement between Respondent (Creech) and Appellant was included or amended to include an arbitration provision."

FIA v. Thompson, 2008 WL 624904 (N.Y. Dist. Ct. Mar. 10, 2008) "Similarly lacking from the papers submitted by the petitioner (FIA) is sufficient proof that the parties entered into a written agreement to submit their dispute to arbitration. The only proof of such an agreement offered by the petitioner is a copy of what is labeled "Credit Card Agreement Additional Terms and Conditions." This document is undated, does not make a reference to any particular account or cardholder and is not signed by any party. The petitioner has not offered any proof that these terms and conditions, which include an arbitration provision, were ever actually accepted by the Respondent (Thompson), either in writing or by his use of the card."

Galle v. MBNA, 2006 WL 839531 (S.D. Miss. Mar. 28, 2006) "Galle did not sign an agreement with MBNA after his account was transferred. Thus, there is no evidence that Galle voluntarily and knowingly waives his right to access to the courts. For this reason, the arbitration provision is unenforceable."

Gerber v. Citigroup, Inc., 2008 WL 596112, *1 (E.D.Cal. Feb 29, 2008) "Because defendant has failed to demonstrate that plaintiff was bound to change in terms notices mailed to his home address under California law, Citibank has failed to demonstrate that a valid agreement to arbitrate exists."

MBNA v. Berlin, 2005 WL 3193850 (Ohio Ct. App. Nov. 30, 2005) "When the company filed an application to confirm and enforce the arbitration award, it only attached a copy of the arbitration award to its application. The magistrate determined that the trial court lacked subject matter jurisdiction over the case because the company had not filed all necessary documents required by Ohio Rev. Code Ann. § 2711.14 with its application."

MBNA v. Nelson, 15 Misc.3d 1148(A), 2007 WL 1704618 (Table) (N.Y. Civ. Ct. May 24, 2007) "The Petition is dismissed without prejudice, due to the failure of the Petitioner to provide the following proof: Allegation and proof of the Petitioner's legal status, and whether it is authorized to do business in New York, in accordance with New York law; Complete copy of the *actual* retail credit contract, including any subsequent amendments, alleged to have been entered into between the Petitioner and the Respondent; Affidavit establishing Respondent received notice of the alleged agreement, including any subsequent amendments; Objective proof that the alleged agreement, and any amendments, issued by Petitioner are binding on Respondent; Allegation and proof that the arbitration award was affirmed; Submission of the calculations used by the arbitrator to arrive at the final award, the specific claims submitted by Petitioner for arbitration and the claims ruled upon by the arbitrator; Current and complete non-military affidavit."

MBNA v. Straub, 815 N.Y.S.2d 450 (N.Y. Civ. Ct. 2006) "No agreement with an arbitration clause is tendered, nor is there a supporting affidavit establishing that any such agreement was binding. The notice of the arbitration session as mandated by the CPLR."

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?

MBNA states, "Appellants argue that Respondent's Application for Confirmation of Arbitration Award was defective when filed pursuant to 9 U.S.C. § 13. However, such argument was never raised below, and therefore, cannot be considered or reviewed."

Capps and Carroll refer this Court to their BRIEF ON THE APPLICABILITY OF DELAWARE LAW AND THE IDAHO CREDIT CODE page 6 & 7 of 15 (R. Vol. I, p. 206-7), specifically,

> Other states have been protecting their residents from the unfair business practices of MBNA. In an April 28th, 2006 decision, *MBNA America Bank, N.A. v. Loretta Credit* (No. 94,380), attached as EXHIBIT A, the Kansas Supreme Court struck down an arbitration award after MBNA failed to provide any proof of an agreement to arbitrate. The Federal Arbitration Act [FAA] 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 the 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 or umpire; 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." (emphasis added).

The agreement was not present in *MBNA America Bank, N.A. v. Credit* when MBNA filed for confirmation, and was a major factor in the court's rejection of the arbitration award. This is a condition which is also present in this case. **MBNA did not file the arbitration agreement with its request for confirmation of the award letter against Capps or Carroll.** (Emphasis added).

Other states have protected their residents from MBNA in a similar manner. Ohio also dismissed MBNA's application to confirm an arbitration award letter for the very same reason in *MBNA America Bank, N.A., v. Berlin*, 2005 WL 3193850 (Ohio App. 9 Dist.)."

MBNA America Bank v. Credit is in the record at (R. Vol. I, p. 216 – 220) and is now cited as, 132 P.3d 898 (Kansas 2006). In MBNA v. Berlin, 2005 WL 3193850 (Ohio Ct. App. Nov. 30, 2005), the court held, "When the company filed an application to confirm and enforce the arbitration award, it only attached a copy of the arbitration award to its application. The magistrate determined that the trial court lacked subject matter jurisdiction over the case because the company had not filed all necessary documents required by Ohio Rev. Code Ann. § 2711.14 with its application." See also MBNA v. Straub, 815 N.Y.S.2d 450 (N.Y. Civ. Ct. 2006). An agreement to arbitrate confers jurisdiction on the arbitrator and on the District Court to confirm the award. Without the agreement, there is no jurisdiction for the arbitrator to create the award letter, nor is there jurisdiction in the trial court to confirm the award.

The trial court examined the MBNA v. Credit case (R. Vol. I, p. 347-50), noting the profound similarities between the two cases. The only difference noted by the trial court is (R. Vol. I, p. 350, L. 14 – 15), "In contrast to *MBNA v. Credit*, I have found that an arbitration

agreement existed between the parties." Capps and Carroll have to ask; what is the purpose of reconsideration if the trial court simply uses its first decision to reject all new information? Isn't the function of a motion for reconsideration to re-make the initial decision based on the new information presented? If there really was a valid and enforceable agreement to arbitrate, why wasn't it filed along with the request for confirmation as required? The trial court's decision was not based on substantial and competent evidence and should be reversed.

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?

MBNA argues that a "lack of voluntariness [sic] and lack of knowledge have not been established." Yet the Supplemental Affidavit of Capps (R. Vol. I, p. 315) states, "7. That I have never voluntarily, knowingly or intelligently agreed to arbitration with MBNA America Bank at any time." The Supplemental Affidavit of Carroll (R. Vol. I, p. 312) also states, "7. That I have never voluntarily, knowingly or intelligently agreed to arbitration with MBNA America Bank at any time." These statements, under oath, certainly establish a lack of any voluntary agreement or assent to arbitration. Carroll's Affidavit in Support of Brief in Support of Opposition to Confirmation of Award Letter (R. Vol. I, p. 37) states, "4. That I have not been aware of any attempt from MBNA to alter the agreement to include an arbitration clause." Capps placed an affidavit on the court record with the same wording. These statements, under oath, certainly

establish a lack of knowledge concerning MBNA's attempted modification to include arbitration in its agreements.

MBNA argues "There is nothing in the record evidencing high-pressure tactics, coercion, oppression, duress, or a great imbalance in bargaining power. There is nothing in the record evidencing a lack of understanding regarding the contract terms arising from the use of inconspicuous print, ambiguous wording, or complex legalistic language, the lack of opportunity to study the contract and inquire about its terms, or disparity in the sophistication, knowledge, or experience of the parties." That statement is only partially true. As Capps stated in his Supplemental Affidavit (R. Vol. I, p. 315), "4. That I open all mail which I receive addressed to me. 5. That I examine all of the contents of the envelope. 6. That I do not recall any offer or notice to amend the card agreement with MBNA America Bank to include arbitration." Carroll also stated in her Supplemental Affidavit (R. Vol. I, p. 312), "4. That I open all mail which I receive addressed to me. 5. That I examine all of the contents of the envelope. 6. That I do not recall any offer or notice to amend the card agreement with MBNA America Bank to include arbitration." These statements, under oath, certainly are evidence that there was a lack of opportunity for Capps and Carroll to study the alleged arbitration provision and inquire about its terms. As demonstrated by the results of the Lake – Snell study (R. Vol. I, p. 245-275), 7 out of 8 to 9 out of 10 people did not read or understand the notice. AT&T's notice (subject of the Lake – Snell study) was mailed in a separate envelope, most of which were marked "Important Notice." MBNA mailed out their supposed notice along with the monthly bill and probably with other advertisements, making it much less noticeable.

In addition, the selection of the National Arbitration Forum [NAF] created a great imbalance in bargaining power within the arbitration process. In the record are the following documents evidencing systemic bias in favor of the repeat corporate client (MBNA):

- Declaration of Michael Geist (R. Vol. I, p. 142 – 145)
- Deposition of Edward C. Anderson (R. Vol. I, p.146 – 151)
- NAF letter (R. Vol. I, p.152)
- NAF letter (R. Vol I, p. 153
- NAF Code of procedure (R. Vol. I, p. 154-155)
- Declaration of Gregory Duhl (R. Vol. I, p. 156 – 160)

On June 19, 2002 the Supreme Court of Appeals of West Virginia heard and decided a certified question from the Circuit Court of Lincoln County in Civil Action No. 00-C-146 (See *Exhibit A*):

"The certified question is as follows:

> Whether a lender's form compulsory arbitration clause or rider, which mandates that all disputes arising out of a consumer transaction be submitted to a lender-designated decision maker compensated through a case-volume fee system whereby the decision maker's income as an arbitrator is dependant on continued referrals from the creditor, so impinges on neutrality and fundamental fairness that it is unconscionable and unenforceable under West Virginia law.

The trial court answered the question in the affirmative.

On June 13, 2002, this court issued an opinion in the case of State ex rel. Dunlap v. Berger, ___ W.Va.___, ___ S.E.2d___ (No. 30035, June 13 2002). Based on the opinion in *Dunlap*, and particularly in light of the discussion at footnote 12 therein, the Court is of the opinion that the Circuit Court of Lincoln County correctly answered the certified question, and accordingly this matter is dismissed and the case is remanded to the circuit court."

While MBNA argues that the arbitration provision is not unconscionable, the rest of Issue V is not addressed. The rest of the issues are uncontested:

- There is no original agreement on the record;

- There is no proof that Delaware statute Title 5 § 952(a) applies;
- There is no proof that Capps and Carroll intended to accept, or in fact did accept MBNA's offer to include an arbitration provision in the cardholder agreement;
- There is no "meeting of the minds" regarding arbitration; and,
- The "bill stuffer" notice was not effective.

Delaware statute Title 5 § 952(a) begins, "Unless the agreement governing a revolving credit plan otherwise provides." MBNA did not place the original agreement on the record, so there is no proof that the agreement either provides for, or does not provide for, and as such there is no proof that Delaware statute Title 5 § 952(a) applies. MBNA bears the burden of proof that the Delaware statute applies. MBNA provided no such proof. Without the original agreement on the record, MBNA cannot prove that another agreement, governing or otherwise, is an authorized substitute for the original, or that changes of any kind were authorized by the original agreement. MBNA has failed to place any such evidence on the record. Accordingly, the decision of the trial court based on Delaware statute Title 5 § 952(a) that an agreement to arbitrate exists is not based on substantial and competent evidence and should be reversed.

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, INTELLIGENTLY AND VOLUNTARILY CONSENTING TO THE WAIVER?

MBNA argues that, "For all the reasons articulated above, the trial court did not err in finding that such agreement existed and was valid. Accordingly, the trial court did not err in finding that Appellants waived the right to a jury trial." The Supplemental Affidavits of Capps and Carroll (R. Vol. I, p. 315) and (R. Vol. I, p. 312) respectively state, "7. That I have never voluntarily, knowingly or intelligently agreed to arbitration with MBNA America Bank at any time." These statements, made under oath, at least raise the supposition that Capps and Carroll did not waive their rights to a jury trial. MBNA has provided no evidence, documentary or otherwise, demonstrating that Capps and Carroll knowingly, intelligently and voluntarily waived their right to a jury trial.

In Badie v. Bank of America, 67 Cal.App.4th 779, 79 Cal.Rptr2d 273 (Cal.App. Dist.1 11/03/1998), the court held,

> [39] Where, as in this case, a party has the unilateral right to change the terms of a contract, it does not act in an "objectively reasonable" manner (Lazar v. Hertz Corp., supra, 143 Cal.App.3d at p. 141) when it attempts to "recapture" a foregone opportunity by adding an entirely new term which has no bearing on any subject, issue, right, or obligation addressed in the original contract and which was not within the reasonable contemplation of the parties when the contract was entered into. That is particularly true where the new term deprives the other party of his right to a jury trial and his right to select a judicial forum for dispute resolution."
>
> [59] "In light of the importance of the jury trial in our system of jurisprudence, any waiver thereof should appear in clear and unmistakable form." Where it is doubtful whether a party has waived his or her constitutionally-protected right to a jury trial, the question should be resolved in favor of preserving that right. (Id. At pp. 1127-1128; Byram v. Superior Court (1977) 74 Cal.App.3d 648, 654.)
>
> [61] We find no unambiguous and unequivocal waiver of the right to a jury trial either in the language of the change of terms provision or in any other part of the original account agreements. Nor do we find an unambiguous and unequivocal waiver in any customer's failure to close or stop using an account immediately after receiving the "bill stuffers" because, as even the trial court concluded, the notice contained in the "bill stuffer" was "not designed to achieve 'knowing consent'" to the ADR provision.
>
> [64] However, the bank's interpretation of the change of terms provision would dispense with the requirement for a clear and unmistakable indication that the consumer intended

> to waive the right to a jury trial. Because we find no unambiguous and unequivocal waiver of that right here, and because the right to select a judicial forum, whether a bench trial or a jury trial, as distinguished from arbitration or some other method of dispute resolution, is a substantial right not lightly to be deemed waived (Arista Films, Inc. v. Gilford Securities, Inc., supra, 43 Cal.App.4th at p. 502; Chan v. Drexel Burnham Lambert, Inc., supra, 178 Cal.App.3d at p. 643), the bank's interpretation of the change of terms provision must be rejected.

In Discover Bank v. Shea, supra, in the court's choice of law analysis, the court held,

> "3. New Jersey has strong policy interests in protecting its citizens' rights to sue in court as well as their rights to jury trials. The waiver of rights must be clear, knowing, informed, without coercion and unequivocal. Delaware has no legitimate interests in having its law in this regard applied."

In Discover Bank v. Shea, supra, the court also held,

> "The amendment to the agreement was included with a monthly statement, as a "bill stuffer" and not seen by Mr. Shea. Mr. Shea did not have a unconditional "right" to opt out of the arbitration clause since Discover admits that it would have closed Mr. Shea's account if he had not agreed to be bound by the arbitration clause.
> Mr. Shea has a substantial investment in the credit he has developed with Discover. If Mr. Shea's credit with Discover was terminated, he would have had to apply for new credit, which may not have been possible to obtain. The potential loss of credit which would have accompanied a rejection of the arbitration clause, effectively created a barrier to such rejection, making the issue of proper notice and consent that much more important. Mr. Shea completed no affirmative act to be bound by the arbitration clause, he never "consented" to it, and it cannot be applied in this case."

See Galle v. MBNA, 2006 WL 839531 (S.D. Miss. Mar. 28, 2006) "Galle did not sign an agreement with MBNA after his account was transferred. Thus, there is no evidence that Galle voluntarily and knowingly waives his right to access to the courts. For this reason, the arbitration provision is unenforceable."

MBNA has provided no evidence whatsoever that Capps and Carroll knowingly, intelligently and voluntarily waived their constitutionally protected right to a trial by jury. The waiver of a substantive right cannot be assumed, but must be proven by substantial and competent evidence, which is lacking in this case. There was, and is, no agreement to arbitrate

this or any dispute between Capps, Carroll and MBNA. The decision of the trial court is not based on substantial and competent evidence and should be reversed.

CLOSING ARGUMENT

Consumers are under an unprecedented assault on their rights through the mechanism of Mandatory Binding Arbitration. What started as an alternative to the traditional court system has gradually become a commercialized rubber-stamp system for large corporations interested in skirting the requirements of the law. On top of the list of biased arbitration organizations is the National Arbitration Forum [NAF]. On June 12, 2007, attorney F. Paul Bland, Jr., staff attorney for Public Justice (Formerly Trial Lawyers for Public Justice), testified before the Subcommittee on *Commercial and Administrative* Law of the U.S. House of Representatives' Committee on the Judiciary's Hearing on Mandatory Binding Arbitration Agreements: Are They Fair to Consumers?" Some practices of the NAF were addressed, an excerpt of which follows:

> "In the last few months, there have also been two publicly disclosed episodes of arbitrators who were handling cases for the National Arbitration Forum ("NAF") being blackballed after ruling for consumers against NAF's most prominent client, MBNA Bank. The first episode of an NAF arbitrator being blackballed is described in the deposition of Harvard Law professor Elizabeth Bartholet, taken on September 26, 2006, by a lawyer challenging NAF as being biased in a consumer case against Gateway Computers. Professor Bartholet had also served as an independent contractor arbitrator for NAF, until she resigned. Her deposition describes how she was also blackballed by a credit card company after she ruled against it in a single arbitration. At the time that the credit card company decided to block her from hearing any more cases involving itself,

she was scheduled to hear a number of other cases. NAF sent out letters to the consumers falsely stating that she would no longer be the arbitrator in their cases, because she had a scheduling conflict. The professor, however, did not have a scheduling conflict; instead, NAF had sent out this explanation to conceal the fact that in reality she had been blackballed by a lender who did not like how she ruled in a past case.

The second recent disclosure came in an article written by Richard Neely, a former justice of the West Virginia Supreme Court in the 2006 September/October issue of the West Virginia Lawyer. After retiring from the bench, Justice Neely was approached by NAF to serve as one of its independent-contractor arbitrators, and he agreed to do so. He reported that when he did not award a bank the full amount of attorneys' fees it asked for, that he found himself barred from handling anymore cases involving that bank. He explained that banks, as "professional litigants," can make use of their superior knowledge of arbitrators past decisions to help insure that their cases are heard by NAF arbitrators who will rule for them."

A complete transcript of attorney F. Paul Bland's testimony is available upon request.

Our main point is that while this Court may be limited in curtailing this rubber-stamp process within the NAF, it is not limited in curtailing the trial courts in the State of Idaho from simply acting as one more rubber-stamp in an unjust system of commercialized arbitration. This court can establish standards regarding the basic contract elements of providing documentary evidence of a signed arbitration agreement, the necessity of a clear, documented meeting of the minds regarding arbitration, clear and conscious recognition of a waiver of the consumer's right to a trial by jury, and the prohibition of unilateral amendments waiving consumer's constitutionally protected rights – especially when done through ineffective methods such as the

"bill stuffer" form of notice. The standards set forth in MBNA v. Straub and MBNA v. Nelson supra, are hereby suggested.

The trial courts in the State of Idaho depend on this Court's guidance in establishing a minimum set of standards under which arbitration awards may be confirmed. The citizens of the State of Idaho depend even more on this Court protecting their rights in contracts of adhesion with corporate giants and biased commercial arbitration companies such as the NAF. The State of Idaho and this Court have established public policies to protect the citizens of Idaho over the years. Because of recent changes in the field of Alternative Dispute Resolution [ADR] it is time for this Court to clarify the policies regarding confirmation of arbitration awards to protect the citizens of the State of Idaho from the ravages of the new corporate greed imbedded in Mandatory Binding Arbitration and the commercial arbitration companies that cater to that greed. This Court has the authority and the responsibility to act in the interest of the people and citizens of the State of Idaho. Capps and Carroll pray that you do so now.

Dated this 27TH day of October 2008.

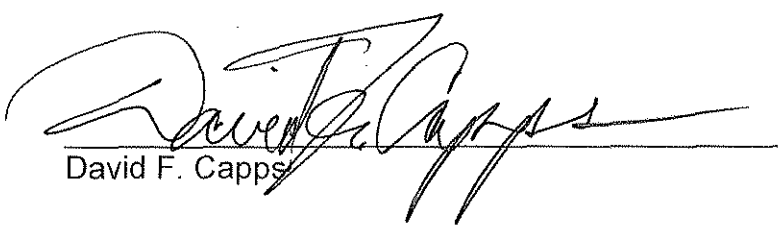
David F. Capps, Defendant/Appellant, *in propria persona*

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

CERTIFICATE OF SERVICE

I, David F. Capps, do hereby certify, under penalty of perjury, that I mailed a true and correct copy of this APPELLANT'S REPLY BRIEF to the attorney for the opposing party this 27th day of October, 2008, by Certified Mail # 7006 2150 0003 4551 2399 at the following address:

Jeffrey M. Wilson
Wilson & McColl
420 W. Washington
P.O. Box 1544
Boise, ID 83701



David F. Capps

EXHIBIT A

Per Curiam:

Margaret Toppings, et al.,
Plaintiffs

vs. No. 30108

FILED
June 19, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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OF WEST VIRGINIA

Meritech Mortgage Services, Inc.,
a corporation, and division of Saxon
Mortgage, Inc., et al., Defendants

This case involves a certified question from the Circuit Court of Lincoln County, in Civil Action No. 00-C-146.

The certified question is as follows:

> Whether a lender's form compulsory arbitration clause or rider, which mandates that all disputes arising out of a consumer transaction be submitted to a lender-designated decision maker compensated through a case-volume fee system whereby the decision maker's income as an arbitrator is dependent on continued referrals from the creditor, so impinges on neutrality and fundamental fairness that it is unconscionable and unenforceable under West Virginia law.

The trial court answered the question in the affirmative.

On June 13, 2002, this Court issued an opinion in the case of *State ex rel. Dunlap v. Berger*, ___ W.Va. ___, ___ S.E.2d ___ (No. 30035, June 13, 2002). Based on the opinion in *Dunlap*, and particularly in light of the discussion at footnote 12 therein, the Court is of the opinion that the Circuit Court of Lincoln County correctly answered the certified question, and accordingly this matter is dismissed and the case is remanded to the circuit court.

Justice Maynard would issue a full opinion in this case.

Question Answered, Dismissed and Remanded.