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No. 71806-1

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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JENNIFER WIESE and CANDY BRADISON,  
Individually and on Behalf of All Others Similarly Situated,

Respondents,

v.

CACH, LLC, a Delaware corporation,

Appellant.

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Appeal from the Superior Court of King County  
The Honorable Mary Yu  
No. 13-2-33354-6 SEA

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**BRIEF OF RESPONDENTS**

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JENNIFER WIESE and CANDY BRADISON  
v.  
CACH, LLC  
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## INTRODUCTION

The Washington Supreme Court recently and unanimously held that “debt buyers fall within the definition of ‘collection agency’ under the Washington Collection Agency Act when they solicit claims for collection.” *Gray v. Suttell & Assoc.*, No. 88414-5, 2014 Wash. LEXIS 647, at \*1 (Aug. 28, 2014). Collection agencies “cannot file collection lawsuits without a license.” *Id.* The filing of a collection lawsuit by an unlicensed collection agency is an “unfair act or practice” under the Washington Consumer Protection Act. RCW 19.16.440. And any “judgment obtained by an unlicensed collection agency is void”—a nullity which must be vacated. *Finch v. LVNV Funding LLC*, 71 A.3d 193, 199 (Md. Ct. Spec. App. 2013) (citing *LVNV Funding, LLC v. Trice*, 952 N.E.2d 1232 (Ill. App. 2011)).

Appellant CACH, LLC, operated an unlicensed collection agency in this state, buying debts from credit card companies (like FIA Card Services, N.A.), and filing collection lawsuits against Respondents Wiese and Bradison (“Plaintiffs”), as well as a Class of other debtors who had allegedly defaulted on their credit card accounts. CP 2-4, 6, 8 (Complaint, ¶¶ 1.3, 1.4, 1.10, 2.3, 4.1, 4.2, 4.13, 4.14). CACH obtained judgments, almost always by way of default, and sought to collect on those judgments (*e.g.*, by garnishing wages). CP 7, 15-16 (Complaint at ¶¶ 4.6, 4.7, 5.4).

Plaintiffs have brought this action to vacate the judgments, since they were obtained by an unlicensed collection agency: “Because CACH

was not licensed as a collection agency at the time, the lawsuits against Plaintiffs and all other Class members violated RCW 19.16.260 and the judgments are therefore void and voidable.” CP 9 (Complaint at ¶ 4.15).

To put this another way, the heart of this case is “whether Defendants committed fraud upon the courts; whether the judgments obtained by CACH against Washington consumers should be vacated due to fraud, misrepresentation and/or misconduct, as void or voidable.” CP 14-15 (Complaint at ¶ 5.3(c)(i)-(j)). Indeed, the primary relief sought is declaratory, injunctive, and equitable: an order “to vacate the judgments and default judgments CACH unlawfully obtained against Plaintiffs and Class members.” CP 16, 20 (Complaint at ¶ 5.7, Prayer H).

CACH moved to compel this vacatur action to arbitration under the agreement Plaintiffs had entered with FIA. CP 39-49 (CACH’s Motion to Compel Arbitration). But the arbitration agreement contains a plain and unambiguous limitation on a party’s ability to select arbitration: “Arbitration may be selected at any time unless a judgment has been rendered.” CP 54-103 (Exhibits A and B to Mills Declaration) (underline added). Since judgments regarding the accounts were rendered in the collection actions, the governing arbitration agreement itself forbids either party from now selecting arbitration. This judgment limitation is a provision which FIA drafted and inserted into the arbitration clause itself. CACH is bound by the language of the arbitration clause. Its present effort to seek to compel arbitration well after judgments have been

rendered is irreconcilably inconsistent with the contract language. This case is no more complicated than that.

Indeed, the central dispute between CACH and the Plaintiffs—in both the collection actions and in this vacatur action—is whether CACH is entitled to collect on the credit card accounts. Since CACH chose to litigate that dispute in the judicial forum, it waived its right to select arbitration when the Plaintiffs took up their side of the dispute. See *United Computer Sys., Inc. v. AT&T Corp.*, 298 F.3d 756 (9<sup>th</sup> Cir. 2002); accord *Otis Hous. Ass'n v. Ha*, 165 Wn.2d 582, 588 (2009).

Even though the dispute in the collection actions and this vacatur action is the same, the collection action judgments do not render the dispute *res judicata*. Washington law allows a party to attack “judgments deemed to be void or procured through fraud.” *Corporate Loan & Sec. Co., Inc. v. Peterson*, 64 Wn.2d 241, 243 (1964) (citations omitted). Indeed, sometimes “the only available remedy for the vacation of a judgment is an independent action in equity or a collateral attack.” *Id.* at 244 (citation omitted). Since judgments obtained by an unlicensed collection agency like CACH are void—and Plaintiffs have alleged they were procured through fraud, CP 7, 15 (Complaint at ¶¶ 4.5, 5.3(i))—this vacatur action is an appropriate “independent action” or a “collateral attack” on those judgments.

Therefore, this Court should affirm the trial court’s decision denying CACH’s motion to compel arbitration of this vacatur action or to dismiss it based on the defense of *res judicata*. Since judgments were

rendered on the account dispute, neither party can select arbitration under the plain language of the agreement; and even if there were no judgments, CACH's decision to litigate the account dispute waived any right to arbitrate it now; and, in any event, the judgments do not constitute *res judicata* of this vacatur action, which is a proper collateral attack.

#### **STATEMENT OF THE ISSUES**

1. Since judgments were rendered on the collection disputes in the collection actions, can CACH now select arbitration, given the plain language of the arbitration agreement? **(No)**

2. Does CACH's decision to file the collection actions constitute waiver of any right to arbitrate account disputes? **(Yes)**

3. Do the *res judicata* or collateral estoppel doctrines bar Plaintiffs' vacatur action? **(No)**

#### **STATEMENT OF THE CASE**

Plaintiffs each had a credit card account with FIA, which was governed by a credit card agreement containing an arbitration clause that allowed either party to select arbitration of "any claim or dispute" unless "a judgment has been rendered." CP 54-103 (Exs. A and B to Mills Decl.).

When Plaintiffs allegedly defaulted on their accounts, FIA sold the rights to collect on those accounts to CACH. CACH filed collection lawsuits against each Plaintiff which falsely claimed CACH had "paid all licenses and fees due and is authorized to bring this action." In truth,

CACH was not licensed as a collection agency in Washington and was not authorized to bring the collection actions. Nor had it paid any licenses or fees due. CP 7-8 (Complaint at ¶¶ 4.5, 4.10). Based on CACH's fraud on the court, the trial court granted default judgments. CP 7-8 (Complaint at ¶¶ 4.6, 4.11).

Therefore, Plaintiffs brought this action to vacate the judgments obtained when CACH was unlicensed. CACH filed a motion to compel the dispute to arbitration. Judge (now Justice) Mary Yu, after full briefing and oral argument, denied CACH's motion. Justice Yu's decision should be affirmed.

### **ARGUMENT**

**I. Under the terms of the arbitration agreements, since judgments were rendered in the collection actions, neither party can select arbitration.**

The arbitration clause in the credit card agreements expressly limits the parties' option to arbitrate: "Arbitration may be selected at any time unless a judgment has been rendered." Judgments were rendered on the question of whether CACH is entitled to collect on Plaintiffs' accounts. Thus, under the plain language of the arbitration agreements, after having obtained judgments on the accounts, CACH cannot now select arbitration. That is the beginning and end of the analysis.

Indeed, "Washington continues to follow the objective manifestation theory of contract [which seeks] to determine the parties' intent by focusing on the objective manifestation of the agreement, rather

than on the unexpressed subjective intent of the parties.” *Hearst Communs., Inc. v. Seattle Times*, 154 Wn.2d 493, 503 (2005). Thus, courts must “give words in a contract their ordinary, usual, and popular meaning” and must only look at “what was written.” *Id.* at 504.

The arbitration clause is clear and unambiguous, and it clearly establishes a condition precedent to selecting arbitration—that no judgment has been rendered. To put this another way, the arbitration clause contains a basic restriction on the parties’ ability to select arbitration—that no judgment has yet been rendered on their dispute. Washington courts cannot contravene the clear intention of the parties to this particular arbitration clause to set a condition precedent. *Id.* at 504.

Thus, this Court need only apply the express terms of the agreement: Since judgments were rendered in the collection cases, neither CACH nor the Plaintiffs can now select arbitration, and CACH’s motion to compel that forbidden selection was properly denied.

CACH does not deal with the arbitration clauses’ judgment restriction until page 17 of its brief, and it mentions it only in passing. Perhaps it is hoping this Court will not read the clause that actually governs this appeal. There is no grey area in the language FIA employed in its arbitration clause: “Arbitration may be selected at any time unless a judgment has been rendered.” This clause so clearly dictates the outcome of this appeal that CACH can only try to change the clause to say something it does not.

In the first instance, CACH says the judgment restriction is “claim-specific,” something which the clause does not say. CACH proposes that only judgments on particular causes of action preclude arbitration of those same causes of action. So, in CACH’s view, it is only precluded from arbitrating the breach of contract cause of action that it brought in the collection actions. In this way, CACH is asking this Court to re-write the arbitration clause in its favor, as follows:

Arbitration **<of a specific cause of action>** may be selected at any time unless a judgment **<on that specific cause of action>** has been rendered.

Such additions are forbidden. *See Hearst Comms., Inc.*, 154 Wn.2d at 504 (“We do not interpret what was intended to be written but what was written.”).

Moreover, CACH’s claim-specific argument misreads the arbitration clause. The arbitration agreement says: “Any claim or dispute (“Claim”) by either you or us against the other [may be subject to arbitration].” CACH consistently ignores the words “or dispute” and focuses exclusively on “claim,” which they take to mean a specific cause of action. And, so the argument goes, since only the breach of contract claim was litigated to judgment in the collection action, the arbitration clause only prohibits arbitration of that specific quote-unquote “claim.” Similarly, all of CACH’s waiver arguments are premised on the notion that it only litigated (and thus only waived) specific causes of action in the collection lawsuits.

But the arbitration clause is not limited to “causes of action” or even “claims.” It also includes “disputes.” See *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 425 (1997) (“or” is a disjunctive conjunction). Once again, CACH would have this Court impermissibly re-write the contract, this time by deleting a key term:

Any claim ~~or dispute~~ (“Claim”) by either you or us against the other [may be subject to arbitration].

This the Court cannot do. Instead, it must give the word “dispute” its ordinary, usual, and popular meaning: “a conflict or controversy.” *Black’s Law Dictionary* (7<sup>th</sup> ed.), p. 383. It is beyond cavil that CACH and the Plaintiffs have a conflict or controversy between them: CACH asserts that it is entitled to collect on the credit card accounts; Plaintiffs assert that it is not so entitled because it was not properly licensed.

The collection lawsuits were part of this conflict or controversy: CACH sued the Plaintiffs in order to collect on the credit card accounts. This vacatur action is part of the same conflict or controversy: Plaintiffs sued CACH in order to prevent collection on the credit card accounts.

Since the conflict central to both the collection actions and this vacatur action are the same—and judgment was rendered on that conflict in the collection actions—under the plain terms of the arbitration agreement, neither party can now elect arbitration of this “dispute.”

By the same token, since CACH chose to litigate this “dispute” in court, it waived any right to elect arbitration of the controversy thereafter.

**II. CACH waived any right to arbitrate by choosing to litigate.**

Given the judgment limitation, CACH has no right to compel arbitration of the dispute with the Plaintiffs. Even if CACH did have such a right, it waived arbitration by choosing to litigate the account dispute.

**A. Arbitration agreements are simply contracts, governed by contract law, including the law of waiver.**

“Arbitration is simply a matter of contract between parties.” *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). The purpose of the Federal Arbitration Act was simply “to place arbitration agreements on the same footing as other contracts.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Thus, the U.S. Supreme Court has expressly rejected suggestions, like those of CACH here, that the Act was intended to promote or mandate arbitration; rather, the Act “merely [supports] the enforcement ... of privately negotiated arbitration agreements.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985). Indeed, the Act was intended only “to make arbitration agreements as enforceable as other contracts, but not more so.” *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

“The right to arbitration, like any other contract right, can be waived.” *United States v. Park Place Assoc.*, 563 F.3d 907, 921 (9<sup>th</sup> Cir. 2009); *see also Welborn Clinic v. Medquist, Inc.*, 301 F.3d 634, 637 (7<sup>th</sup> Cir. 2002) (“Like any other contractual right, the right to arbitrate a claim may be waived.”); *Burton-Dixie Corp v. Timothy McCarthy Constr. Co.*, 436 F.2d 405, 407 (5<sup>th</sup> Cir. 1976) (“It is well established that agreements

to submit disputes to arbitrators, just like any other contract terms, may be waived.”); *Nat’l Foundation for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987) (waiver applies to arbitration agreements “as in any other contractual context”). Indeed, “Washington courts have long held that the contractual right to arbitration may be waived.” *Otis Hous. Ass’n*, 165 Wn.2d at 587.

“In the Ninth Circuit, arbitration rights are subject to constructive waiver if three conditions are met: (1) the waiving party must have knowledge of an existing right to compel arbitration; (2) there must be acts by that party inconsistent with such an existing right; and (3) there must be prejudice resulting from the waiving party’s inconsistent acts.” *United Computer Sys.*, 298 F.3d at 765; *cf. Otis Hous. Ass’n*, 165 Wn.2d at 587 (“The right to arbitrate is waived by conduct inconsistent with any other intent...”). There is no dispute that CACH knew of its contractual rights when it filed the collection lawsuits, which was action inconsistent with arbitration, and resulted in prejudice to the Plaintiffs.

**B. Litigation of the account dispute is action inconsistent with arbitration.**

The Washington Supreme Court has been crystal clear: “Simply put ... a party waives a right to arbitrate if it elects to litigate instead of arbitrate.” *Otis Hous. Ass’n*, 165 Wn.2d at 587. Washington appellate courts, including this one, have consistently applied this rule. *See Shelper Constr., Inc. v. Leonard*, 175 Wn. App. 239, 248-249 (Wash. Ct. App. 2013) (Division I) (parties chose to file suit against each other and litigate

dispute, waiving any right to arbitrate); *River House Dev., Inc. v. Integrus Architecture, PS*, 167 Wn. App. 221, 239 (Wash. Ct. App. 2012) (Division III) (party waived right to arbitrate by initiating suit and engaging in discovery in superior court rather than filing for arbitration).

Federal appellate courts, including the Ninth Circuit, have adopted and applied the same rule: “A party who brings suit acts inconsistently with its right to compel arbitration.” *United Computer Sys., Inc.*, 298 F.3d at 756; *see also Erdman Co. v. Phoenix Land & Acquisition, LLC*, 650 F.3d 1115, 1118 (8<sup>th</sup> Cir. 2011); *Louisiana Stadium & Expo. Dist. v. Merrill Lynch*, 626 F.3d 156, 160 (2<sup>nd</sup> Cir. 2010); *Nicholas v. KBR, Inc.*, 565 F.3d 904, 908 (5<sup>th</sup> Cir. 2009); *Worldsource Coil Coating, Inc. v. McGraw Constr. Co.*, 946 F.2d 473, 477 (6<sup>th</sup> Cir. 1991); *Cabintree of Wis., Inc. v. Kraftmade Cabinetry, Inc.*, 50 F.3d 388, 391 (7<sup>th</sup> Cir. 1995).

CACH initiated litigation—and litigated all the way to judgment. It is only now, post-judgment, that CACH seeks to arbitrate the Plaintiffs’ claims that CACH is not entitled to collect on the accounts. Since CACH chose to litigate the account dispute, it waived any right to later compel arbitration of that dispute.

### **C. Prejudice**

Although the test for prejudice “is not a bright line rule,” factors to consider include “(1) the extent of delay, (2) the degree of litigation preceding the motion to compel arbitration, (3) the resulting expenses, and (4) other surrounding circumstances.” *Grant & Assoc. v. Gonzales*, 2006

Wash. App. LEXIS 2290, at \*12 (Wash. Ct. App. Oct. 17, 2006) (citing *Letizia v. Prudential Bache Sec. Inc.*, 802 F.2d 1185, 1187 (9<sup>th</sup> Cir. 1986)). Each of these factors is present in this case.

**1. Extent of Delay**

CACH filed its lawsuit against Ms. Wiese in 2011 and against Ms. Bradison in 2010. CP 7-8 (Complaint at ¶¶ 4.3, 4.8). CACH did not seek arbitration until December 2013. CP 39-49 (CACH's Motion to Compel Arbitration). This multiple-year delay is substantially greater than the four-month delay the court of appeals found to be prejudicial in *Grant & Assoc.*, 2006 Wash. App. LEXIS 2290 at \*4.

**2. Degree of Litigation**

CACH litigated all the way to judgment. This is the ultimate use of judicial machinery and is certainly a far greater degree of litigation than that which was found to be prejudicial in *Steele v. Lundgren*, 85 Wn. App. 845, 856 (Wash. Ct. App. 1997) (filing an answer and reaching an agreement on joinder). CACH also took action upon its judgment by using further judicial process: garnishment against Ms. Wiese. CP 7 (Complaint at ¶ 4.7).

**3. Resulting Expenses**

As a result of CACH's decision to litigate in the judicial forum rather than to arbitrate in the arbitral forum, each Plaintiff incurred \$299.50 in litigation costs; Ms. Bradison incurred \$650.00 in attorney's fees; and Ms. Wiese had her wages garnished. CP 116-120, CP 4

(Judgments against Wiese and Bradison; Complaint at ¶¶ 2.1-2.2). While no court has suggested a dollar-amount standard for prejudice, the court of appeals in *Grant & Assoc.* recognized that, especially for people in “precarious financial situation[s],” incurring litigation expenses is prejudicial. 2006 Wash. App. LEXIS 2290 at \*14. Ms. Wiese was “financially struggling” and Ms. Bradison was “financially struggling” after her husband and daughter both passed away within 11 days of each other. CP 4 (Complaint at ¶¶ 2.1-2.2).

#### **4. Other Circumstances**

CACH has already obtained judgments from superior courts. If Plaintiffs are compelled to submit to arbitration, CACH will stand upon those judgment and argue that the arbitrator should not—or cannot—second-guess superior court judgments. The existence of the judgments will undoubtedly put the Plaintiffs at a severe and unfair disadvantage before the arbitration even beings. It is because of this sort of prejudice that courts have observed that “[t]he courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration.” *Christensen v. Dewor Developments*, 661 P.2d 1088, 1092 (Cal. 1983) (quoting *DeSaprio v. Kohlmeyer*, 321 N.E.2d 770, 773 (N.Y. 1974)).

#### **III. The doctrines of *res judicata* and collateral estoppel do not apply to actions seeking to vacate judgments.**

Notwithstanding the doctrines of *res judicata* and collateral estoppel, a party against whom judgment has been rendered may file “an

independent suit” or a “collateral attack” to vacate that judgment on the basis that the judgment is “void or procured through fraud.” *Corporate Loan & Sec. Co.*, 64 Wn.2d at 243. “A person against whom a judgment is taken without jurisdiction may move against the judgment, or may prosecute an independent action and procure its vacation.” *Stolze v. Stolze*, 111 Wash. 398, 399 (1920) (quoting *Boylan v. Bock*, 60 Wash. 423, 454 (1910)). That is, Washington “affords two processes for seeking the vacation of a judgment; one by motion in the original action, and the other by an independent equitable suit.” *Id.*

“[T]he two remedies are concurrent, and an adverse judgment in one proceeding is a bar to an action for similar relief under a different name or in a different form.” *Boylan* at 454 (citations omitted). Thus, an underlying judgment does not bar or estop a party from bringing an independent action to vacate that judgment. It is only the denial of a motion to vacate the judgment in the first action that can raise a *res judicata* bar to a subsequent, independent vacatur action. *Boylan* at 455.

The Plaintiffs in this vacatur action did not move to vacate the collection action judgments—and no court ruled on any such motions. As such, the Plaintiffs remain entitled to elect the other remedy: an independent vacatur action. And that is precisely what they have done in this case.

## CONCLUSION

The plain language of the arbitration agreement decides this appeal. CACH cannot compel the Plaintiffs to arbitration since a judgment has been rendered on the collection dispute that is at the heart of this case. Even if those judgments had not been rendered, by pursuing them through litigation, CACH waived any right to select arbitration. Justice Yu's decision denying CACH's motion to compel arbitration should be affirmed. Although Defendants extol the supposed judicial preference for arbitration, this state recognizes the fundamental interest in ensuring that all parties have access to justice and the right to a remedy for a wrong. *See generally Carter v. University of Washington*, 85 W.2d 391 (1975). Here CACH practiced a fraud on the court by creating a fiction and achieving a judgment based upon such fiction. The legal process should be a search for the truth.

And since this action is for vacatur of a judgment—and no motion to vacate was filed or ruled upon in the underlying collections actions—the bars of *res judicata* and collateral estoppel do not apply. Washington law has long endorsed vacatur actions like this one.

Respectfully submitted on October 8, 2014,

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CERTIFICATE OF SERVICE

I hereby certify that on 10-8-14, I served the foregoing via JIS to the Clerk's Office of the Court of Appeals Division I and provided a copy of the document via email to all counsel of record as follows:

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