

NOV 14 2012

No. 301419

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

KARLA BERSANTE and BRAND BERSANTE, together and as the
marital community which they together comprise,
Respondent,

v.

NOTEWORLD, LLC, d/b/a Noteworld Servicing Center, a Delaware
limited liability company; and FREEDOM DEBT CENTER, a California
corporation,
Appellants.

AMENDED RESPONDENTS' REPLY BRIEF

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I. INTRODUCTION

The Petitioners appeal from an order denying a Motion to Compel Arbitration. The Respondents assert that the trial court correctly ruled that arbitration is not appropriate where, as here, there exists grounds for the revocation of the contract. The trial court found the evidence presented in the initial complaint sufficient to make this finding. The trial court correctly determined that this matter is uniquely within the purview of Washington State, and therefore arbitration in California, under California law, is inappropriate to determine this issue.

II. STATEMENT OF THE CASE

On August 29, 2009, the Bersantes entered into a “Debt Settlement Agreement” (“Agreement”) with Freedom Debt Center (“Freedom”). CP 3. Under Paragraph 1 of the Agreement, labeled “Services,” Freedom agreed to provide the Bersantes’ “debt settlement services” and that the service “consists of the negotiation and settlement with creditors of unsecured debt on behalf” of the Bersantes. CP 3. It is undisputed that Freedom is a “debt adjuster” within the meaning of RCW 18.28.010. After making 11 payments and having 65% of the money applied to Freedom’s fees instead of paid to the Bersantes, they decided to terminate the contract and brought the current lawsuit. The Bersantes’ claim was brought under the Washington Debt Adjustment Act (“DAA”) and the Washington Consumer Protection Act (“CPA”) for the revocation of the contract. Under the unambiguous language of the DAA, charging excessive fees

results in the contract being voided. RCW 18.28.090. The voiding of the contract necessarily renders the arbitration clause void as well.

The trial court agreed with the Bersantes, denying the motion to compel arbitration and the motion to stay. Freedom's appeal followed.

III. ARGUMENT

A. Summary of Argument

The trial court's decision correctly denied Freedom's motion to compel arbitration and should be upheld. Federal and state policies favoring arbitration exist; however, they are not absolute. The Federal Arbitration Act (FAA) contains a "savings clause" under 9 U.S.C. § 2 that permits arbitration agreements to be declared unenforceable upon "grounds as exist at law or in equity for the revocation of any contract." Federal Arbitration Act 9 U.S.C. § 2. The trial court correctly decided that the savings clause in the FAA was applicable to the DAA, as the Bersantes' claim, "alleges a violation of law". CP 72-73.

It is undisputed that Freedom is a debt adjuster under RCW 18.28.010. As such, it is clear that the DAA governs Freedom's actions. Under the DAA, for-profit debt adjusters who charge fees in excess of 15% overall or for any one payment are in violation of the statute. RCW 18.28.090. The penalty assessed under the statute is two-fold: revocation of the contract and the statute makes any person who violates the statute, or aids or abets another's violation of the statute, guilty of a misdemeanor. RCW 18.28.190. Based upon the unambiguous language of the statute and the undisputed facts that Freedom charged fees in excess of 15% for each

payment, the trial court correctly determined that the Bersantes had sufficiently set forth a legal argument, if proven, which would invalidate and provide a basis to revoke the contract. CP 73.

The trial court did not abuse its discretion in relying on the evidence provided in the initial complaint. The argument forwarded by the Bersantes relied upon the DAA and the presence of excessive fees. That the fees paid were well in excess of the statutory maximum is not in dispute and was supported in the initial complaint. Based upon the unambiguous language of that statute, the trial court correctly determined there was sufficient evidence to support the Bersantes' argument and that decision should be upheld.

B. The argument brought forward by the Bersantes is based on the WA Debt Adjustment Act which is a “grounds as exist at law or in equity for the revocation of any contract.”

Arbitration is a favored form of dispute resolution. Indeed, section 2 of the FAA makes agreements to arbitrate “valid, irrevocable and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*” 9 U.S.C. § 2 (emphasis added). This “savings clause permits for generally applicable contract defenses, such as fraud, duress, or unconscionability.” *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740, 1746 (2011). The trial court’s ruling reflects its belief that the Bersantes’ argument was based upon such grounds:

Acknowledging the public policy preference for arbitration, this Complaint alleges a violation of law. Although that violation of law may “relate to the contract” in a broad

sense it more clearly falls within the type of statutory challenge contemplated in the Federal arbitration statute itself, 9 USC, Section 2, that excepts from arbitration any grounds at law or in equity for revocation.

RP at 6, ln. 9-15.

The trial court correctly noted that RCW 18.28 presents a legal argument for revocation of the contract. CP 72. A recent federal case in Eastern Washington reached a similar conclusion, “to the extent an argument can be made under the [DAA] should be considered a controversy that relates to or arises out of the contract...the Court finds that enforcement of the forum selection clause in this case would be unreasonable.” *Bradley v. Morgan Drexen, Inc.*, 2009 WL 2870, No. CV-09-109-RHW, slip op. at 3 (Aug. 31, 2009 E.D.WA) (class action against debt adjuster in Washington where court denied enforcement of a forum selection clause in a foreign venue). In interpreting a statute, courts look first to the statutes plain meaning. *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 11-12, 43 P.3d 4 (2002). Voiding the contract as required under RCW 18.28 090 would necessarily include the arbitration clause. Furthermore, RCW 18.28.190 makes it a crime to violate the DAA. As was pointed out in a *Morgan Drexen*, “[i]t is inconceivable that a victim of a Washington crime would have to seek redress in the California courts, or would have to forego vindicating their rights because of a forum selection clause.” *Morgan Drexen* at 3.

Debt adjusting has been scrutinized for decades in Washington due to the “abuses inherent in the debt adjusting industry.” *Carlson v. Global*

Client Solutions, LLC., 171 Wash.2d 486, 495 (2011). Indeed this abuse was so troubling that the Attorney General’s Consumer Protection and Antitrust Division counseled the legislature that “[i]t is our considered opinion that *debt adjusting for profit in this state should not be regulated but rather should be prohibited* ...our experience in this area indicates that this field, even with regulation is open to abuse.” *Id.* at 502 (quoting Wash. Legis. Budget Comm., Sunset Audit Program and Fiscal Review of Debt Adjusting, Licensing and Regulatory Activities app. 1 (Preliminary Report Sept. 17, 1977) (emphasis added)).

The Washington legislature did not enact this course of action, but instead drafted and enacted RCW 18.28 “as a remedial statute enacted to stem the ‘numerous and deceptive practices’ rife in the growing debt adjustment industry” with the intent that it “should be construed liberally in favor of the consumers it aims to protect.” *Id.* at 498. *Carlson* was a unanimous decision dealing specifically with debt adjusters in Washington and it clearly spelled out the Court’s distaste for the abusive practices of many debt adjustment companies. Justice Chambers, in his concurring opinion in *Carlson* while requesting the legislature to act, went so far as to note, “as cats are drawn to cream, many for-profit debt adjusters will be attracted to the most unsophisticated consumers.” *Id.* at 502.

The court in *Morgan Drexen* also noted Washington’s strong interest in protecting its citizens from predatory debt adjuster practices. The *Morgan Drexen* court noted the defendant’s business “directly targets

those individuals who are in financially-dire circumstances, and thus, would be financially unable to litigate their relatively small claims outside their local jurisdiction.” *Morgan Drexen* at 4. The court observed that the contract resembled an adhesion contract and the effect would be that the “[d]efendant can violate state consumer laws with impunity knowing that it is highly unlikely that its customers would be able to pursue any legal action against them if the lawsuit would have to be pursued in the state of California.” *Id.* at 4. *See also, Scott v. Cingular Wireless* 160 Wash.2d 843, 855, 161 P.3d 1000 (2007) (holding an arbitration agreement substantively unconscionable because it effectively exculpated the defendant for potentially widespread misconduct).

Appellants attempt to invoke the recent Supreme Court case of *AT&T Mobility v. Concepcion* ignores the savings clause of 9 U.S.C. § 2. *Concepcion* held that the FAA preempted California’s rule which classified most collective-arbitration waivers in consumer contracts as unconscionable. *Concepcion* permitted generally applicable contract defenses, but not “*defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.*” *Concepcion*, at 1746 (emphasis added). Appellants agree that general contract defenses still apply so long as they are consistent with the FAA. Appellant’s Brief at 12. The DAA imposes just such a defense.

Additionally as noted above, violating the DAA constitutes an unfair or deceptive act or practice under the CPA. RCW 18.28.185. At no

point does the DAA apply to defenses that apply “*only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.*” (emphasis added) *Concepcion*, at 1746. The trial court correctly determined that the DAA remedies are general contract defenses unaffected by the FAA. A recent post-*Concepcion* case in California came to a similar conclusion:

With the exception of the *Discover Bank* rule, the Court acknowledged that the doctrine of unconscionability is still a basis for invalidating arbitration provisions Thus, *Concepcion* is inapplicable where, as here, we are not concerned with a class action waiver or a judicially imposed procedure that conflicts with the arbitration provision and the purposes of the Federal Arbitration Act.

Sanchez v. Valencia Holding Co., LLC, 132 Cal.Rptr.3d 517, at 527 (2011) (arbitration clause dispute stemming from automobile transaction).

Concepcion was focused on those laws which specifically targeted arbitration clauses or stood as obstacles to the FAA, neither of which is applicable here. Thus, the trial court’s ruling should be upheld. The trial court’s holding accomplishes what *Concepcion* urged under the FAA and placed “arbitration agreements on an equal footing with other contracts.” *Concepcion* at 1745. The DAA voids *all* contracts that violate the statute. In charging excessive fees Freedom has violated the DAA and therefore the contract between the Bersantes and Freedom is void. This necessarily includes the arbitration and severability clauses.

C. The language within the arbitration agreements in *Concepcion* and other like decisions appear to weigh language within the

arbitration agreement not found in the arbitration clause at issue.

Concepcion is likewise distinguishable based on the specific terms in the agreement itself. According to the arbitration terms in *Concepcion* any disputes “*must* take place in the county in which the customer is billed,” AT&T agreed to pay costs for all non frivolous claims, and would not seek attorneys’ fees, among other terms. *Concepcion* at 1744 (emphasis added). In comparison, the terms in the instant matter demand arbitration takes place in Orange County, California, regardless of the customers location, and the “*prevailing party* in any action or proceeding” is entitled to costs, including attorney’s fees. CP 12 (emphasis added).

Indeed, differing terms among arbitration agreements appear to be a common theme, especially the venue where any arbitration must take place. *See eg.*, (*AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011); *Scott v. Cingular Wireless*, 160 Wash.2d 843 (2007) (arbitration to be filed in county of customers billing address and company would pay costs of arbitration); *Schnall v. AT&T Wireless Services, Inc* 171 Wash.2d 260 (2011) (choice of law provision upheld where it requires litigation in the jurisdiction customers signed their contract). *But see*, *Bradley v. Morgan Drexen, Inc.*, 2009 WL 2870, No. CV-09-109-RHW, slip op. at 3 (Aug. 31, 2009 E.D.WA); *Doe v. New Leaf Academy of North Carolina, LLC* C.A. No. 8:10 cv 02365 JMC, slip op. (Sept. 22, 2011 D.S.C) (severing a forum selection cause based upon disparate bargaining power of the parties and case specific facts); *Sanchez v. Valencia Holding Co., LLC*,

200 Cal.App.4th 11 (2011) (arbitration conducted in consumers federal district and company would advance filing fees). Thus, while *Concepcion* and other cases are relevant in supporting arbitration on the whole, the specific terms of the arbitration agreements appears to play a factor in a court's deliberative processes as well.

D. The Trial Court should be permitted broad discretion in its determination that the evidence presented was sufficient to support Bersantes' claim under the WA Debt Adjustment Act.

Trial courts exercise broad discretion when deciding evidentiary matters, and will not be overturned unless there was a manifest abuse of that discretion. *Hayes v. Wieber Enterprises, Inc.*, 105 Wash.App. 611, 615, 20 P.3d 496 (2001) (quoting *Cox v. Spangler*, 141 Wash.2d 431, 439, 5 P.3d 1265 (2000)). A trial court abuses its discretion when it bases its decision on untenable grounds or untenable reasons. *Id.* at 615 (quoting *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971)). See e.g., *Kappelman v. Lutz*, 141 Wash.App. 580 (2007) (trial court judge did not abuse their discretion in exclusion of motorcycle operating license requirement in negligence case). Here, the Bersantes' complaint alleged a violation of law under the DAA. Included in the initial complaint were financial statements showing that fees in excess of the statutory maximum had been charged. CP 20, 26-42. It is not disputed that the fees exceed the statutory maximum. Under the statute one of the penalties for charging excess fees is that the contract is void. RCW 18.28.090. That the trial

court determined that the initial complaint contained sufficient evidence that excessive fees were charged is well within that court's discretion.

IV. CONCLUSION

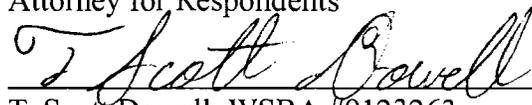
For the above stated reasons, Respondents respectfully request this Court to confirm the decision of the trial court denying Appellants' motion to compel arbitration. Respondents request reasonable attorney fees and expenses related to this appeal pursuant to RAP 18.1(b).

RESPECTFULLY SUBMITTED, this 14th day of March, 2012.

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