“LOSER PAYS” AND COST-SHIFTING CLAUSES IN ARBITRATION AGREEMENTS MAY BE UNENFORCEABLE

NOVEMBER 2017

Ohio appellate courts have recently held that “loser pays” and similar cost-shifting clauses in consumer arbitration agreements violate Ohio public policy. In Gaither v. Wall & Associates, LLC, the plaintiff challenged the enforceability of an arbitration agreement that included a “loser pays” clause. 2017-Ohio-765 (2d Dist.). The “loser pays,” or cost-shifting, clause required the loser to pay the costs and attorney fees of the substantially prevailing party. The court severed the “loser pays” provision and considered it separately. It otherwise enforced the agreement – i.e., the substantive underlying claims were subject to arbitration.

The Ohio appellate court held that the “loser pays” clause was void as a matter of Ohio public policy under the Ohio Consumer Sales Practices Act (CSPA). It explained that “contracts which bring about results which the law seeks to prevent are unenforceable as against public policy.” It adopted the reasoning of the Ohio Eighth District Court of Appeals in DeVito v. Autos Direct Online, Inc. and Hedeen v. Autos Direct Online, Inc., that “an arbitration agreement violated public policy to the extent it required an arbitrator to award the prevailing party reasonable attorney fees even where the consumer did not file the action in bad faith.” DeVito, 2015-Ohio-3336 at ¶ 11 (8th Dist.); Hedeen, 2014-Ohio-4200 at ¶¶ 44, 48 (8th Dist.). “The CSPA reflects a strong public policy that consumers who bring good faith claims against suppliers will not have to pay the supplier’s attorney fees under R.C. 1345.09(F), even if the consumer loses his or [her] claim against the supplier.” In the consumer context, a “loser pays” provision “effectively nullifies [the] statutory protection provided to consumers by the CSPA.”

Despite these rulings, it seems likely that courts will enforce a cost-shifting clause that adopts CSPA § 1345.09(F). It provides: The court may award to the prevailing party a reasonable attorney’s fee limited to the work reasonably performed and limited pursuant to § 1345.092 of the Revised Code, if either of the following apply: (1) the consumer brought or maintained an action that is groundless and the consumer filed or maintained the action in bad faith; (2) the supplier has committed a CSPA violation. Suppliers therefore may use § 1345.09(F) to preserve their statutory right to recover attorney fees and costs under appropriate circumstances without rendering their cost-shifting clauses unenforceable.

Companies also should consider using CSPA § 1345.092 to craft a “right to cure” provision in agreements used in consumer sales. It authorizes a supplier to offer allegedly aggrieved consumers a remedy. If the consumer rejects the remedy, proceeds with a claim, and wins actual damages that are not of greater value than the offer, the consumer cannot recover treble damages, costs, and attorney fees available under the CSPA. Used properly by suppliers, it limits a consumer to recovering actual damages.

In summary, suppliers may be able to preserve their ability to recover costs and attorney fees and limit a consumer’s economic recovery only to actual damages if they take advantage of the CSPA’s supplier-friendly cost-shifting and right to cure provisions. The key for suppliers is to comply with these provisions by tracking their language in consumer contracts. Doing so should only require straightforward revisions to existing contracts that ultimately may help deter frivolous litigation.

ADDITIONAL INFORMATION

For additional information, please contact:

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