

No. 2023-0496

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA, COUNTY, OHIO
CASE No. CA-22-111532

KHADIJA SMITH,

Plaintiff-Appellee

v.

JAVITCH BLOCK, LLC, et al.,

Defendants-Appellants

**MEMORANDUM IN SUPPORT OF JURISDICTION BY
AMICI OHIO CREDITOR'S ATTORNEYS ASSOCIATION, NATIONAL
CREDITOR'S BAR ASSOCIATION, AND ACA INTERNATIONAL**

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TABLE OF CONTENTS

I. INTEREST OF AMICI CURIAE.....1

II. EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT
GENERAL INTEREST 2

III. STATEMENT OF THE CASE AND FACTS..... 7

IV. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

A. FIRST PROPOSITION OF LAW

PURSUANT TO THE FEDERAL ARBITRATION ACT, STATE LAW
PRESUMPTIONS IN FAVOR OF ARBITRABILITY EQUALLY APPLY TO
WHETHER THE AGENT OF A PARTY TO THE AGREEMENT HAS STANDING
TO MOVE TO STAY OR COMPEL ARBITRATION. (*Council of Smaller
Enterprises v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 666 [1998], quoting *AT
& T Techs., Inc. v. Commc’ns Workers of Am.*, 475U.S. 643, 648–649 [1986],
applied.) 7

B. SECOND PROPOSITION OF LAW

A CLASS-ACTION WAIVER, MADE PART OF AN AGREEMENT TO ARBITRATE
ON AN INDIVIDUAL BASIS GOVERNED BY THE FEDERAL ARBITRATION
ACT, IS VALID AND ENFORCEABLE AS A MATTER OF LAW BY BOTH PARTIES
TO THE CONTRACT AND THEIR AGENTS AND CANNOT BE AVOIDED BY
ARTFUL PLEADING NAMING ONLY THE AGENT. (*Epic Sys. Corp. v. Lewis*, 138
S. Ct. 1612, 1621 [2018], explained and applied.) 10

V. CONCLUSION..... 10

CERTIFICATE OF SERVICE 11

INTRODUCTION

Amici Curiae Ohio Creditor's Attorneys Association, National Creditor's Bar Association, and ACA International, the Association of Credit and Collection Professionals, ("Amici Members," collectively), respectfully submit this brief in support of Appellants.

I. INTEREST OF AMICI CURIAE

The Ohio Creditor's Attorneys Association (OCAA) is a leading voice of Ohio attorneys who focus on representing creditors in Ohio. The OCAA's members come from Ohio's largest, and smallest, law firms, as well as national banks and small businesses. OCAA's mission is to advance the legal profession and preserve the rights of attorneys to represent creditors without fear of discrimination.

The National Creditors Bar Association (NCBA) is a nationwide, not-for-profit bar association of over 400 law firms and individual members, totaling over 2,500 attorneys, who are regularly engaged in the practice of creditors' rights law. The NCBA's membership standards promote professional, responsible, and ethical practices in the lawful collection of consumer debts and other litigation on behalf of creditors. The NCBA and its members have an ongoing interest in matters involving the interpretation and application of federal and state laws affecting creditors' rights and regularly files, either individually or in partnerships such as this, *amicus curiae* briefs.

ACA International (ACA) is a nonprofit corporation based in Minneapolis, Minnesota. Founded in 1939, as the American Collectors Association, ACA is the largest trade group for the debt-collection industry. ACA has members in every state and more than 30 countries. ACA represents more than 1,800 member organizations and their more than 133,000 employees worldwide, including third-party collection agencies, asset

buyers, attorneys, creditors, and vendor affiliates. ACA International, Advocacy Booklet (Nov. 21, 2022), bit.ly/3UKuh5m.

ACA's members include sole proprietorships, partnerships, small businesses, and large corporations. Some members operate within a single state while others are large multinational corporations that operate in every state. Nearly 90% of ACA's members are small businesses with limited resources. *Id.* Many of their customers are small businesses as well.

This case is of the utmost importance to Amici Members because the holding from the court of appeals threatens to make attorneys (and other agents) the target of class action lawsuits, eliminating millions of consumer arbitration agreements that exist between businesses and their customers.

II. THIS CASE IS ONE OF GREAT PUBLIC AND GENERAL INTEREST.

The Eighth District Court of Appeals improperly rewrote the Arbitration Agreement in this case to remove the ability of agents to invoke the Arbitration Agreement. The court of appeals inserted language into the agreement:

If either party to the Agreement files a lawsuit asserting claims that are subject to arbitration, the other party **to the Agreement** may file a motion to compel arbitration with the court.

Smith v. Javitch Block LLC, 8th Dist. Cuyahoga No. 111532, 2023-Ohio-607, ¶ 41 (“*Smith II*”) (bold emphasis added). The language in bold is not in the Arbitration Agreement. In contrast, here are the binding words of the Arbitration Agreement:

If a party files a lawsuit in court asserting claim(s) that are subject to arbitration and the other party files a motion with the court to compel arbitration, which is granted, it will be the responsibility of the party asserting the claim(s) to commence the arbitration proceeding.

Smith, II, supra, ¶ 34. The clause uses “party” as it relates to the “lawsuit.”

With the decision below, Amici Members will become the target of disagreements between creditors and their customers. This is demonstrated in Appellee’s Complaint here. Appellee seeks to have current Ohio judgments declared “void”, even though the plaintiffs/judgment creditors in those cases are not named as defendants here. It is Appellee’s ill-disguised plan to eliminate the judgment creditors’ rights by barring the attorneys from acting on the judgments. Appellee’s Complaint seeks “injunctive relief to the class restraining defendants from filing cases in municipal courts lacking territorial jurisdiction and from **collecting or attempting to collect debt from the persons subjected to such unlawful conduct.**” *Complaint, Prayer for Relief, para. c* (Emphasis added). In an effort to avoid her Arbitration Agreement, Appellee sued only the lawyers, not the signatory to the Arbitration Agreement. Appellee hopes to obtain a judgment on behalf of a class of judgment debtors, declaring that the judgments against them are void. *Complaint, ¶¶ 1 and 2.*

Class-action lawsuits have been one of the most prominent and costly types of litigation in the United States. *See* Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. Chi. Legal. F. 475, 475 (2003). The decision below will only encourage claims against attorneys and agents to strategically avoid written arbitration agreements.

The vast majority of arbitration agreements and class-action waivers intended to benefit Amici Members are governed by the Federal Arbitration Act (the “FAA”), 9 U.S.C. § 1 et seq. Individual arbitration provides a fast, consumer-friendly, and efficient means of resolving customer disputes. To that end, “the Supreme Court has told lower courts to resolve some ambiguities in arbitration contracts in an arbitration-friendly way.”

AtriCure, Inc. v. Meng, 12 F.4th 516, 523 (6th Cir. 2021) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

There is no question that Appellants are "agents" of their client. As agents, attorneys may invoke arbitration clauses which cover claims against "agents". *Grand Wireless, Inc. v. Verizon Wireless, Inc.*, 748 F.3d 1, 11 (1st Cir. 2014). The court of appeals recognized these black-letter truths, but nonetheless held that only the signatories to the arbitration agreement may *actually file* a motion to compel arbitration. That conclusion violates the spirit and the letter of the FAA.

The FAA, like Ohio law, protects the parties' arbitration agreement against inconsistent judicial determinations and public policies. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019). Amici and their clients (the judgment creditors) were confident that the FAA would protect the enforceability of arbitration agreements that include claims against "agents" of the signatories.

That confidence has been shattered by the appellate decision below. The Eighth District Court of Appeals held the following:

- (1) PRA stands in Synchrony Bank's shoes as the assignee of the Agreement,
- (2) Smith agreed to arbitrate "any dispute or claim" between her and PRA and/or its agents, and
- (3) Smith's dispute against Javitch in this case related to her credit-card account "because the collections action could not arise but for Smith's account.

Smith II, supra, ¶ 25.

Since PRA (Appellant's principal) sent a demand to Appellee that she initiate arbitration, those findings and conclusions should have settled the matter, and Appellants should have been permitted to file their motion to compel arbitration with a class waiver.

Nonetheless, the court of appeals erected an additional hurdle to frustrate the original intent of the Arbitration Agreement. The court of appeals added language to the

arbitration agreement requiring that the creditor/principal *file* the motion to compel arbitration, even though the creditor/principal was purposefully not added as a Defendant.

The appellate holding renders the contract language benefiting “agents” meaningless. Under no circumstances would the court of appeals permit Appellants to file a motion to compel arbitration. The FAA was intended to avoid this sort of animus toward arbitration agreements. The decision is not only a stark example of judicial legislating, but it also runs afoul of the announced purposes of the FAA. In this vein, the Supreme Court has held that Section Two of the Federal Arbitration Act—the “savings clause”—requires that that states not adopt interpretations of arbitration agreements that render those agreements void. *See, e.g., AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (“a court may not ‘rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what ... the state legislature cannot.’” (quoting *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987))).

If the appellate decision stands, it will no doubt open a floodgate of class actions against Amici Members, as proxies for the creditors they represent. *Complaint*, ¶¶ 1-2, and Prayer for Relief (seeking bar to execution of the prior judgments). Since many judgment creditors are corporations, banks, and lenders, they are unable to represent themselves in court: they can only act through their attorneys.

Amici Members view arbitration as a viable and predictable mechanism for resolving disputes arising from consumer transactions, and their clients rely heavily on this Court’s prior decisions validating individual arbitration in transacting business in Ohio. *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884

N.E.2d 12, ¶ 27; *Williams v. Aetna Fin. Co.* (1998), 83 Ohio St.3d 464, 471, 700 N.E.2d 859. “[A]rbitration is favored because it provides the parties thereto with a relatively expeditious and economical means of resolving a dispute.” *Schaefer v. Allstate Ins. Co.* (1992), 63 Ohio St.3d 708, 712, 590 N.E.2d 1242, quoting *Mahoning Cty. Bd. of Mental Retardation & Dev. Disabilities v. Mahoning Cty. TMR Edn. Assn.* (1986), 22 Ohio St.3d 80, 83, 22 OBR 95, 488 N.E.2d 872. All doubts should be resolved in favor of arbitration. *Ignazio v. Clear Channel Broadcasting, Inc.*, 113 Ohio St.3d 276, 2007-Ohio 1947, 865 N.E.2d 18, ¶ 18.

The decision of the court of appeals rewards creative lawyering by allowing attorneys to be named in class action litigation designed to undo judgments obtained by their clients in prior cases. Specifically, the decision of the court of appeals means that enforcement of an arbitration agreement will depend on whether the plaintiff chooses to file suit against the principal or only the principal’s agent, disregarding the express coverage of claims against agents.

Millions of Ohio arbitration agreements have been effectively nullified by the appellate decision. Yet, the very same arbitration agreements would be enforceable if the creditor was named as a defendant. This type of gamesmanship is what Congress intended to overcome when it enacted the FAA. Only this Court can make it right and restore the overriding policy favoring arbitration. *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

Review should be granted in this case because the appellate decision eviscerates both the letter and the spirit of the FAA. The appellate decision hangs as a cloud over the ability of Amici Members who are saddled with the undue burden of litigating the validity (and enforceability) of their client’s judgments on a class-wide basis. Appellee, and the

putative class she seeks to represent, have already agreed to resolve any disputes in a rational, predictable, consumer-friendly, and cost-effective manner: arbitration. All of the consumer arbitration programs established by the clients of Amici Members are on the line.

Amici Members desire to be heard on the critically important questions presented by Appellants and have a strong interest in the outcome of this case.

III. STATEMENT OF THE CASE AND FACTS

The Amici Members adopt the Statement of the Case and Facts as articulated by Appellants. Importantly, the case arrives at the Court's doorstep free of any disputed fact.

IV. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW 1:

PURSUANT TO THE FEDERAL ARBITRATION ACT, STATE LAW PRESUMPTIONS IN FAVOR OF ARBITRABILITY EQUALLY APPLY TO WHETHER THE AGENT OF A PARTY TO THE AGREEMENT HAS STANDING TO MOVE TO STAY OR COMPEL ARBITRATION. (*Council of Smaller Enterprises v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 666 [1998], quoting *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475U.S. 643, 648–649 [1986], applied.)

The rule of law applied below jettisons the carefully crafted language of the FAA, 9 U.S.C. § 3 which permits the “parties” to the litigation to file a motion to compel arbitration.

[O]n application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

No language in the Arbitration Agreement forbade Appellants from filing a motion to compel arbitration. In fact, the court of appeals acknowledged that “[t]he Agreement is

silent on whether a party, here PRA, must be named as a defendant to invoke its rights under the Agreement.” *Smith II*, ¶ 30.

This Court has already rejected creative pleading to avoid a binding arbitration clause. *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St. 3d 185, 842 N.E. 2d 488, ¶ 19 (2006) (“creative pleading of claims as something other than contractual cannot overcome a broad arbitration provision”). If left in place, the appellate holding will reverberate to other courts, rewarding artful pleading (suing only the agents and not the principal) to avoid arbitration. This would frustrate the letter and the spirit of the FAA and Ohio’s public policy in favor of arbitration.

“The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.” *AT&T Mobility LLC*, 563 U.S. at 344. Likewise, the Ohio General Assembly and Ohio courts have expressed a strong public policy favoring arbitration. *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009Ohio-2054, 908 N.E.2d 408, ¶ 15 *citing* R.C. Chapter 2711 and *Taylor Bldg. Corp of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 27. Because of the strong presumption favoring arbitration, all doubts should be resolved in its favor. *Hayes, supra citing Ignazio v. Clear Channel Broadcasting, Inc.*, 113 Ohio St.3d 276, 2007-Ohio-1947, 865 N.E.2d 18, ¶ 18.

Although this case turns on application of the FAA, it is easy to see that the decision below will affect future cases decided under the Ohio Arbitration Act. The decision has enacted a new procedural hurdle not found in the FAA or state law: namely, that the Arbitration Agreement must expressly state that agents of the signatories are empowered to *file* a motion to compel arbitration. That is contrary to the FAA, 9 U.S.C. § 3, which authorizes “parties” to the litigation to file a motion to compel arbitration.

Until the appellate decision here, the rights of agents to file motions to compel arbitration was not in jeopardy. See *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31 (2009); *Crawford Professional Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 257 (5th Cir.2014); *Rivera v. Rent A Ctr., Inc.*, 8th Dist. Cuyahoga No. 101959, 2015-Ohio-3765, at *4-6; *Zilbert v. Proficio Mtge. Ventures, L.L.C.*, 8th Dist. Cuyahoga No. 100299, 2014-Ohio-1838, at *7; *McCaskey v. Sanford-Brown College*, 8th Dist. Cuyahoga No. 97261, 2012-Ohio-1543, at *3-4; *Tomovich v. USA Waterproofing & Found. Services, Inc.*, 9th Dist. Lorain No. 07CA009150, 2007-Ohio-6214, at *3; *Genaw v. Lieb*, 2nd Dist. Montgomery No. CIV.A. 20593, 2005-Ohio-807, at *2-4; *Terry v. Bishop Homes of Copley, Inc.*, 9th Dist. Summit No. 21244, 2003-Ohio-1468, at *5-6; *Manos v. Vizar*, 9th Dist. Medina No. 96 CA 2581-M, 1997 WL 416402, *2 (July 7, 1997). The decision below assures that Ohio attorneys (and other agents of signatories) will face uncertain and potential class-wide liability for claims that would have to be arbitrated if brought against the attorneys' clients.

The Eighth District thus erred when it held: “[T]he Agreement unambiguously sets forth restrictions concerning motions to compel arbitration during a pending lawsuit, stating that if either party to the Agreement files a lawsuit asserting claims that are subject to arbitration, the other party to the Agreement may file a motion to compel arbitration with the court.” *Smith II, supra*, ¶ 41. There are no such “restrictions” in the Arbitration Agreement. In fact, the words “to the Agreement” are not in the Arbitration Agreement. In finding such a restriction, the Eighth District has erected a new procedural prerequisite that is contrary to 9 U.S.C. § 3. Parties who have bound themselves to an arbitration agreement should not be encouraged to sue only the agents of the signatories so as to fit themselves within the exception created by the court of appeals.

This Court should exercise its discretionary jurisdiction, and reverse.

PROPOSITION OF LAW 2:

A CLASS-ACTION WAIVER, MADE PART OF AN AGREEMENT TO ARBITRATE ON AN INDIVIDUAL BASIS GOVERNED BY THE FEDERAL ARBITRATION ACT, IS VALID AND ENFORCEABLE AS A MATTER OF LAW BY BOTH PARTIES TO THE CONTRACT AND THEIR AGENTS AND CANNOT BE AVOIDED BY ARTFUL PLEADING NAMING ONLY THE AGENT. (*Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 [2018], explained and applied.)

Contrary to the appellate decision, class action waivers are enforceable under the FAA. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) Here, it appears that the court of appeals reasoned that Appellants “[have] no standing to enforce the class-action waiver provision” because there is “no language to suggest that Smith is precluded from pursuing class claims against an agent of PRA.” *Smith II*, ¶46. Again, that erects the same anti-arbitration hurdle in defiance of the Arbitration Agreement. The FAA (9 U.S.C. § 3) gave standing to Appellants, and the Arbitration Agreement expressly waives any class action covered by the Arbitration clause. Amici Members maintain that this decision will turn well-settled law on class waivers upside down.

V. CONCLUSION

For all of the above reasons, Amici Members respectfully request that this Court accept jurisdiction, clarify that Ohio courts should not rewrite Arbitration Agreements to erect hurdles standing in the way of an otherwise enforceable Arbitration Agreement which covers the claims and parties to the litigation, and reverse the judgment of the court of appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was sent via email (if listed) and regular U.S. Mail, Postage prepaid on this 17th day of April 2023, to the following:

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