COURT OF APPEAL
FIFTH CIRCUIT
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CLERK

COURT OF APPEAL

FIFTH CIRCUIT

STATE OF LOUISIANA

CIVIL PROCEEDING

NO. 07-CA-604
c/w Nos. 07-CA-882
and 07-CA-884

NCO PORTFOLIO MANAGEMENT, INC.

VERSUS

BERTRAM GOUGISHA

FIA CARD SERVICES, N.A.

VERSUS

DOROTHY E. CHOUEST

MBNA AMERICA BANK, N.A.

VERSUS

NICHOLE BURDETT

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF BERTRAM GOUGISHA, DOROTHY E. CHOUEST, AND NICHOLE BURDETT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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Sprague v. Household International, 473 F. Supp. 2d 966 (W.D. Mo. 2005).

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STATEMENT OF INTEREST

The National Association of Consumer Advocates (NACA) is an association of more than 1,000 attorneys who represent hundreds of thousands of consumers victimized by abusive business practices. NACA is committed to consumer justice. NACA is concerned about the increasing use of arbitration proceedings before the National Arbitration Forum (NAF) to collect consumer debts, in particular given that NAF arbitrators rule for the creditor in over 99% of default cases.

INTRODUCTION

This case poses a simple question, which is of great consequence to Louisiana consumers: in a judicial proceeding to confirm an arbitration award, must the plaintiff prove that the parties entered into a contract in which they agreed to submit their disputes to arbitration, before the court can grant the motion to confirm the award? The answer is clearly "yes."

Arbitration is a matter of contract. Because an arbitrator derives the power to decide a dispute solely from an agreement by the parties to arbitrate, a court cannot confirm an arbitration award—just as it cannot compel arbitration—unless it first determines that a valid arbitration agreement exists.

This principle cannot be abandoned merely because the party against whom an arbitration award has been rendered did not move to vacate the award within 90 days. Rather, as most courts have recognized, the validity of the underlying arbitration award rests on the issue of whether the parties entered into a contract in which they agreed to arbitrate. It is the duty of the court to determine this threshold issue. Without proof of a valid contract to arbitrate, the court may not confirm the arbitration award.

Nowhere is this judicial role more critical than in actions to confirm debt collection awards issued by the National Arbitration Forum

(NAF). The NAF routinely issues default awards on behalf of creditors without any meaningful requirement that the creditor prove the debtor agreed to arbitration or even owes the debt. In such cases, the only check on this private proceeding is when a court is asked to put its judicial imprimatur on the creditor's award. If the rule advanced by the creditor Plaintiffs becomes the law of Louisiana, courts will be powerless to require the creditor to prove that the consumer agreed to arbitration, as long as the consumer has failed to affirmatively move to vacate the award. It will not matter whether the consumer was never notified of the arbitration; never served with notice of the confirmation proceeding; or never even opened the account in question.

A rule requiring Louisiana courts to rubber-stamp arbitration awards against unsuspecting consumers, no matter how strong the consumer's argument that he never consented to arbitration, and no matter how little evidence is presented that the consumer ever agreed to arbitrate, would result in a radical reduction of judicial protection to Louisiana consumers. The decision in this case will be the first appellate decision on this issue in this state. NACA strongly urges this Court to clarify that in Louisiana, as in other jurisdictions, a party seeking to confirm an arbitration award must first prove the existence of a contract in which the parties agreed to submit the dispute to arbitration, and that it is the duty of the court to make this determination, regardless of whether any motion to vacate has been filed.

ARGUMENT

THIS CASE INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE THAT SHOULD BE CLARIFIED BY THIS COURT.

I. An Arbitrator Cannot Declare Their Own Jurisdiction.

The Plaintiffs in these appeals argue that because a National

Arbitration Forum ("NAF") arbitrator found that the parties had agreed to arbitrate, the court is not permitted to question that finding. This argument flies in the face of years of U.S. Supreme Court jurisprudence holding that, because an arbitrator derives jurisdiction to decide disputes *solely* from an agreement between the parties, the question of whether the parties agreed to arbitrate a dispute is one that a court—not an arbitrator— must decide.

It is black-letter law that an arbitrator has no authority to decide anything unless he or she is given that authority by the parties through a valid arbitration agreement. As the Supreme Court has made clear:

> Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.

AT& T Technologies, Inc. v. *Commc'ns. Workers of America,* 475 U.S. 643, 648-49, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986) (citations and quotations omitted); *see also Volt Information Sciences. Inc.* v. *Bd. of Trustees ofLeland San ford Jr. Univ.*. 489 U.S. 468, 479 (1989) ("Arbitration under the [Federal Arbitration Act] is a matter of consent, not coercion.").

It is settled law that "the question of arbitrability ... is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Technologies, supra,* 475 U.S. at 656. The Court explained that "'[t]he duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the [contract] does in fact create such a duty.'" *Id.*, quoting *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 546-47, 84 S.Ct. 909, 912-13, 11 L.Ed.2d 898 (1964). *Id.*

Likewise, the federal appellate courts have recognized that

"[d]etermining whether there is a written agreement to arbitrate the controversy in question is a first and crucial step in any enforcement proceeding before a district court," *MCI Telecommunications Corp. v. Exalon Industries, Inc.*, 138 F.3d 426, 429 (1st Cir. 1998). Similarly, the Fifth Circuit has stated that "[i]n determining whether the parties have agreed to arbitrate the dispute in question, we must consider '(1) whether a valid agreement to arbitrate between the parties exists; and (2) whether the dispute in question falls within the scope of that arbitration agreement.'" *Painewebber Incorporated v. The Chase Manhattan Private Bank*, 260 F.3d 453, 462 (5th Cir. 2001).

Because arbitrators have no authority absent a valid agreement to arbitrate, the threshold determination of whether such an agreement exists is one that only a court—not an arbitrator—can make. The reason for not permitting an arbitrator to determine his/her own jurisdiction is simple: "[i]n the context of arbitration, the threshold issue [of whether a particular party is subject to an arbitration agreement] is not governed by the terms of the arbitration agreement, which would be a circular proposition, but by the court." *Offerdahl v. Silverstein.* 569 N.W.2d 834, 836 (Mich. Ct. App. 1997).

The determination of whether an agreement to arbitrate exists is unique: unlike a typical factual finding, it goes to the heart of the arbitrator's power to decide a dispute. Particularly given the high volume of debt collection arbitrations conducted by the NAF on behalf of creditors such as MBNA, and the documented cases in which NAF arbitrators have entered awards against consumers who had never agreed to arbitration (and who, in some cases, were not even MBNA cardholders), it is essential that courts first determine that the defendant in a confirmation proceeding is bound by an arbitration agreement, before confirming an award.

II. A Party Seeking To Confirm an Arbitration Award Must Prove the Existence of a Contract to Arbitrate

A myriad of courts across the country have held that the 90-day statute of limitations for filing a motion to vacate does *not* bar a party from arguing that no agreement to arbitrate exists in opposition to a petition to confirm the award. Similarly, a party seeking to confirm an arbitration award must file proof that the parties agreed to submit the dispute in question to binding arbitration, as a prerequisite to obtaining relief. The reasoning of these courts is convincing.

For instance, the First Circuit has flatly rejected the argument that the Plaintiffs make in these cases. In *MCI Telecommunications Corp. v. Exalon Industries, Inc.*, 138 F.3d 426 (1st Cir. 1998), the court analyzed the question under the FAA's 90-day time limit, and explained:

> [I]f the agreement to arbitrate does not exist, there is no obligation to arbitrate. A party that contends that it is not bound by an agreement to arbitrate can therefore simply ... raise the inexistence of a written contractual agreement to arbitrate as a defense to a proceeding seeking confirmation of the arbitration award, without the limitations contained in section 12, which are only applicable to those bound by a written agreement to arbitrate.
>
> *Id.* at 430.

Likewise, in *MBNA America Bank, N.A. v. Credit,* 132 P.3d 898 (Kan. 2006), MBNA argued that the court was required to confirm its award simply because the defendant had failed to timely move to vacate. The Kansas Supreme Court disagreed, holding that the trial court was still obligated to determine whether the parties had agreed to arbitrate, in order to avoid confirming an award that was "null and void." *Id.* at 900.

The supreme courts of Arkansas, Montana, Wisconsin, and Michigan have all reached the same conclusion. *Danner v. MBNA America Bank, N.A.,*___ S.W.2d ____, 2007 WL 1219747 (Ark. April 26, 2007) (court need not confirm NAF arbitration award against alleged debtor simply because debtor failed to timely challenge award); *Bank of America* v. *Dahlquist,* 152 P.3d 718 (Mont. 2007) (party is not required to challenge within three months an award issued by an

arbitrator who lacked jurisdiction to decide the case, because such an award is void *ab initio); Milwaukee Police Ass 'n v. Milwaukee,* 285 N.W.2d 119 (Wis. 1979) (party may oppose confirmation even if time limit for vacatur has passed); *Arrow Overall Supply Co. v. Peloquin Enterprises,* 323 N.W.2d 1 (Mich. 1982)(plaintiff moved to confirm an arbitration award, and the defendant responded that there was no agreement to arbitrate. The trial court confirmed the award, holding that the defendant's argument was untimely. Reversing, the high court held that "the defense of 'no valid agreement to arbitrate' may be raised in an action to confirm or enforce an arbitration award." *Id.* at 2). *See also Fischer v. MBNA America Bank, N.A.,*___ S.W. 2d ___, 2007 WL 779295 (Ky. Ct. App. Mar. 16,2007) (court erred by striking consumer's response to petition to confirm as untimely, where consumer argued that no agreement existed);; *In re North of England S.S. Co.,* 57 F.2d 672, 673 (2d Cir. 1932)("Although more than three months have elapsed ..., the appellant may still assert objections to the confirmation of the award.").

If the rule urged by the creditor Plaintiffs is adopted, Louisiana consumers will have far less protection against the entry of invalid arbitration awards than consumers in any of these other jurisdictions. This Court should follow the rulings of the many federal and state courts in holding that a party seeking to confirm an arbitration award must affirmatively prove that an arbitration agreement exists when it files a motion to confirm an arbitration award, regardless of whether the award has been vacated.

III. The Approach Advocated by the Creditor Parties Would Jeopardize The Rights of Consumers In Debt Collection Arbitrations.

The private arbitration company designated by MBNA in its credit card contracts, the National Arbitration Forum (NAF), conducts a high

volume of debt collection arbitrations on behalf of MBNA and its other creditor clients. A recent analysis of the NAF's consumer arbitrations in California show that debt collection arbitrations against MBNA cardholders account for over 50% of NAF arbitrations in the state.[1] The vast majority are "default" proceedings in which the arbitrator rules only on information provided by one side: the creditor. In these "default" cases, creditors win 99.9% of cases.[2] *See* Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers,* Sept. 2007, *at* http://www.citizen.org/documents/Final_wcover.pdf, at 14.[3]

Problems with NAF default awards have been documented by the courts. In a recent New Hampshire case, MBNA attempted to confirm an award that the NAF had entered against a man whose ex-wife had opened an MBNA account without his consent, and which he had never used or made payment on. The court refused to confirm the award, explaining:

> To hold otherwise would allow any credit card company to force victims of identity theft into arbitration, simply because that person's name is on the account Under MBNA's reasoning, any identity theft victim would be subject to arbitration simply because the perpetrator used the fraudulently obtained credit card after the arbitration provisions became effective.

MBNA America Bank, N.A. v. Cornock, No. 03-C-0018 (N.H. Super. Ct. March 20, 2007). *See also CACV v. Corda,* 2005 WL 3664087 (Conn. Super. Dec. 16,2005) (NAF's procedures "certainly result[] in a high likelihood that the outcome of the arbitration will be in the [debt collector's favor"); *Credit,* 132 P.3d at 902 (describing "national trend in which consumers are questioning MBNA and whether arbitration agreements exist" and criticizing "MBNA's casual approach to this

[1] The NAF does not provide data on arbitrations in any other state, and only recently started complying with California law. *See* Pam Smith, *Arbitrators Attack State Disclosure Law,* The Recorder, Oct. 18, 2005.

[2] NAF sued the District Attorney of San Francisco in an attempt to avoid complying with state law requiring it to publish this information.

litigation"); *MBNA America Bank, N.A. v. Barben,* 111 P.3d 663 (Kan. Ct. App. 2005) (noting a NAF award contained "patently ... untrue" information); *MBNA America Bank, N.A. v. Engen,* 128 Wa. App. 1050 (Wash. App. 2005) (reversing award entered by NAF against consumer who never agreed to arbitrate); *cf. Sprague v. Household International,* 473 F. Supp. 2d 966, 976 n. 8 (W.D. Mo. 2005) (criticizing NAF's position in the case as providing "further support for Plaintiffs' allegation that the NAF is biased in favor of financial institutions"); *Mercuro* v. *Superior Court,* 116 Cal. Rptr. 2d 671 (Ct. App. 2002) (finding repeat-player bias by NAF). Furthermore, NAF arbitrators who rule against creditors such as MBNA have been "blackballed" from deciding other debt collection cases.[3]

As the Christian Science Monitor recently reported:

> Richard Neely, a retired chief justice of the West Virginia Supreme Court, says he received two cases from the NAF in which he wouldn't charge consumers for the creditor's litigation related fees. He never received another case. After she decided against a credit-card company, awarding a consumer damages, Elizabeth Bartholet, a former NAF arbitrator and Harvard law professor... was repeatedly removed from cases by the credit-card company. Rather than telling alleged debtors that the creditors removed her, she said, at times NAF mailed letters saying she had a scheduling conflict and had withdrawn.

Baribeau, *supra,* at 13.[4] These examples underscore the need for this court's intervention. If the rule advanced by the Plaintiffs is adopted, courts will be required to confirm arbitration awards against any

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[3] Independent investigations have confirmed that the NAF steers cases towards arbitrators who predictably rule for corporations over consumers. *E.g.,* Michael Geist, *Fair? An Examination of the Allegations of Systematic Unfairness in the ICANN UDRP,* 27 Brook. J. Int'l Law 903, 912 (2002) (statistical analysis showed NAF funneled cases to arbitrators who most often ruled for its clients); Simone Baribeau,

[4] *See also* Associated Press, *Arbitration Stacked Against Consumers,* S.F. Chronicle, Sept. 28,2007, at C 1 and C2. The raw data is at National Arbitration Forum, California Consumer Arbitrations, at http://www.arb-forum.com/main.aspx?itemID=563&hideBar=False&navID=188&news=3.

individual who fails to bring a court action to vacate the award—even if the NAF should have never entered an award against her in the first place.

CONCLUSION

This Court should adopt the rule that a party moving to confirm an arbitration award must prove the existence of a contract in which the parties agreed to arbitrate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATE OF CONSUMER ADVOCATES IN SUPPORT OF BERTRAM GOUGISHA, DOROTHY E. CHOUEST, AND NICHOLE BURDETT by first class mail, properly addressed and postage prepaid, on this 28 day of February, 2008, on the following:

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