No. 08-1362

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

VIRGINIA CICLE,
Plaintiff-Appellee
v.
CHASE BANK USA, N.A.,
Defendant –Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

AMICI CURIAE BRIEF OF NATIONAL ASSOCIATION OF CONSUMER ADVOCATES (NACA) AND NATIONAL CONSUMER LAW CENTER (NCLC) FILED IN SUPPORT OF PLAINTIFF-APPELLEE'S PETITION FOR REHEARING OR REHEARING *EN BANC*.
NACA AND NCLC SUPPORT
AFFIRMANCE OF THE DISTRICT COURT'S DECISION.

Erich Vieth #83-67
John E. Campbell #08-466
Simon Law Firm, PC
701 Market Street, Ste. 1450
St. Louis, Missouri 63101
(314) 241-2929; (Fax) 314-241-2029
Attorneys for *Amici Curiae*, National Association of Consumer Advocates (NACA) and National Consumer Law Center (NCLC)

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INTEREST OF AMICI CURIAE

The members of the National Association of Consumer Advocates (NACA) are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary practice and areas of specialty involve the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members, as well as consumers, in the ongoing struggle to curb unfair and abusive business practices.

National Consumer Law Center, Inc. (NCLC) is a national research and advocacy organization focusing on the legal needs of low-income, financially distressed, and elderly consumers. NCLC is a nationally-recognized expert on consumer credit issues, including fringe banking products, and has drawn on this expertise to provide information, legal research, policy analyses, and market insight to Congress and state legislatures, administrative agencies, and courts for over 40 years. A major focus of NCLC's work has been to increase public awareness of, and to promote protections against, unfair and deceptive practices perpetrated against low-income and elderly consumers. NCLC publishes an eighteen-volume Consumer Credit and Sales Legal Practice Series, including, *inter alia*, *Unfair and Deceptive Acts and Practices* (7th ed. 2008) and *Consumer Arbitration Agreements* (5th ed. 2007 and 2008 Supplement). NCLC frequently is

asked to appear as *amicus curiae* in consumer law cases before courts around the country and does so in appropriate circumstances.

NACA and NCLC have filed this brief out of concern that two recent Missouri appellate cases directly conflict with this Court's decision of October 6, 2009. The two Missouri cases are *Woods v. QC Financial Services, Inc,* 280 S.W.3d 90 (Mo. App. 2008) and *Huch v. Charter Communications, Inc,* 290 S.W2d 721 (Mo. banc 2009). NACA and NCLC hereby join with the Plaintiff-Appellee to ask this court to re-examine its decision and opinion in light of the holdings of *Woods* and *Huch.*

SUMMARY OF ARGUMENT

Two recent Missouri appellate cases directly conflict with this Court's decision of October 6, 2009. The cases are *Woods v. QC Financial Services, Inc,* 280 S.W.3d 90 (Mo. App. 2008) and *Huch v. Charter Communications, Inc,* 290 S.W2d 721 (Mo. banc 2009).

In *Huch,* the Missouri Supreme Court recognized that the right to a class action is one of the consumer rights directly embedded into §407.025 RSMo, further ruling that it *violates public policy* to require customers to waive any of these Chapter 407 consumer rights.

In *Woods*, the Missouri Court of Appeals for the Eastern District held that class waivers (provisions that waive the right to bring class actions and class arbitrations) in small damages cases are unconscionable to the extent that they leave consumers "with no meaningful avenue of redress."

NACA and NCLC hereby join with the Plaintiff-Appellee to ask this Court to re-examine its decision and opinion in light of the holdings of *Woods* and *Huch.*

ARGUMENT

The National Association of Consumer Advocates (NACA) and National Consumer Law Center have filed this *amici* brief out of concern that two recent Missouri appellate cases directly conflict with this Court's decision of October 6, 2009. The Missouri cases are *Woods v. QC Financial Services, Inc,* 280 S.W.3d 90 (Mo. App. 2008) and *Huch v. Charter Communications, Inc,* 290 S.W2d 721 (Mo. banc 2009).

In *Woods*, the Missouri Court of Appeals for the Eastern District held that class waivers (provisions that bar class actions and class arbitrations) in small damages cases are unconscionable to the extent that they leave consumers with no meaningful avenue of redress. In *Huch,* the Missouri Supreme Court recognized that the right to a class action is a consumer right that is directly embedded into §407.025 RSMo, and that it violates public policy to deny customers any Chapter 407 rights.

Based on this Court's Opinion, it appears that this Court was not in a position to consider *Woods* or *Huch* while resolving this case. Knowledge of the existence of these two cases would have provided this Court with substantial critical guidance regarding the enforceability of class waivers in the context of consumer transactions. In fact, the holdings of these two cases strongly suggest that the Defendant's class waiver in this case is not enforceable pursuant to Missouri law.

Only recently did NACA learn that this Court did not have the benefit of these two recent Missouri decisions. NACA hereby joins with the Plaintiff-Appellee to ask this Court to re-examine its decision and opinion in light of the holdings of *Woods* and *Huch.* A re-hearing would allow this Court to adjust its interpretation of Missouri law to harmonize its holding with the holdings of *Woods* and *Huch.*

It is critically important for this Court to decide this diversity matter on the most recent pronouncements of Missouri law.[1] In diversity cases, a federal court is, "in effect, only another court of the State . . ."[2]

This Court is bound to apply the law of Missouri in this case, including the laws dictated by "statute or by its highest court" of Missouri, because "there is no federal general common law."[3] These same principles have been echoed by this Court: In a diversity case, contract must be construed according to state law.[4] The role of federal diversity courts "is to interpret state law, not to fashion it."[5]

NACA and NCLC have gone to the effort of filing this brief because the principles announced by *Woods* and *Huch* would substantially alter this Court's analysis of this case. For instance, in its opinion, this Court reasoned that Virginia

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[1] *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78, 58 S.Ct. 817, 822 (1938).
[2] *Guaranty Trust Co. of N.Y. v. York,* 326 U.S. 99, 108-109, 65 S.Ct. 1464, 1469 - 1470 (1945).
[3] *Erie R. Co. v. Tompkins, supra.*
[4] *Orion Financial Corp. of South Dakota v. American Foods Group, Inc.,* 281 F.3d 733, 738 (8th Cir. 2002).
[5] *Id.*

Cicle had "ample opportunity and time to opt out" and that there was no evidence of "high pressure sales tactics to coerce."[6] The *Woods* Court held, however, that the test regarding unconscionability is an objective test, not subjective:

> We consider the reasonable expectations of the average consumer when evaluating a form contract and consider the totality of the circumstances when weighing the evidence as to whether the contract is substantively unconscionable.[7]

Further, the *Woods* Court held that whether a particular customer was pressured, rushed or threatened was irrelevant to the analysis.[8] What is being analyzed is the *agreement,* not the customer.

In its Opinion, this Court also reasoned that the customer's option to file a small claims case weighed in favor of enforcing the class waiver.[9] In *Woods,* however, the Court found the class waiver to be substantively unconscionable even though that arbitration clause freely allowed customers to file small claims cases.[10]

This Court reasoned that the arbitration clause in this case did not limit customer remedies.[11] The arbitration provision in *Woods* didn't explicitly limit any consumer remedies either:

> Appellant claims that the class action waiver in the mandatory arbitration clause is not substantively unconscionable because it does not limit

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[6] Op cit. p. 8.
[7] *Woods* at 96.
[8] *Woods* at 95.
[9] Op cit. p. 9.
[10] *Woods* at 93.
[11] Op cit. p. 9-10.

> Respondent's substantive remedies or her ability to pursue those remedies, and provides that Appellant will pay all arbitration costs.[12]

Even with no remedy limitation, the *Woods* Court held that class waiver to be unconscionable because it prevented consumers from obtaining *any* remedy.

Both in this case and in *Woods,* the arbitration provision requires customers to litigate their small-damage claims individually, one-by-one, but no customer would ever attempt to litigate any such claim because no individual claim is of sufficient heft to attract the services of an attorney or to justify the expense in terms of time and money spent by the would-be plaintiff. According to the *Woods* Court:

> The terms of the arbitration provision in Appellant's loan contract leave consumers like Respondent with no meaningful avenue of redress through the courts. . . . By denying class arbitration, Appellant "has precluded the possibility that a group of its customers might join together to seek relief that would be impractical for any of them to obtain alone ... this is an advantage that inures only to" Appellant. The provision also insulates Appellant from the spectre of a ruling that would have precedential effect and value, such as application of collateral estoppel, on Appellant's business practice as a whole.[13]

In *Woods*, the Court held that class action waivers in consumer form contracts are unconscionable and therefore unenforceable to the extent that they "reduce the possibility of attracting competent counsel to advance the cause of action," and to the extent that they "functionally exculpate wrongful conduct."[14] The *Woods* holding made it clear that the holding of *Whitney* applied even where the amount in

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[12] *Woods* at 97.
[13] *Woods* at 98.
[14] *Woods* at 97.

controversy was hundreds of dollars and where the customers personally reviewed and signed the arbitration provision that contained the class waiver.

Based on the above-described conflicts with this Court's opinion, *Woods* bears heavily on the subject matter of this suit. In fact, *Woods* should alter this Court's analysis regarding the enforceability of the Chase Bank arbitration clause.

Woods is only half of the reason for this brief, however. This Court could have also benefitted being advised of the recent holding of the Missouri Supreme Court case of *Huch v. Charter*. *Huch* is a second independent ground requiring this Court to invalidate Appellant's class waiver in this case.

In its Opinion, this Court stated that Missouri public policy did not favor class actions.

> The MMPA **allows** for class actions, see Mo. Rev. Stat. § 407.025.2, but does not suggest that public policy favors class actions or that the wrongs sought to be remedied by the MMPA would continue unabated without the availability of class actions.[15]

In *Huch,* however, the Missouri Supreme Court disagreed in a 7-0 decision, proclaiming that it would not tolerate any attempt to deprive Missouri consumers of the protections granted to them pursuant to Chapter 407, the Merchandising Practices Act (MPA). In *Huch*, the Court ruled that merchants may not assert the long-established "voluntary payment doctrine" to chip away at MPA protections granted to consumers. After specifically listing the right to class actions as one of

[15] Op. cit p. 9.

the rights granted by Chapter 407, the Court reasoned that Missouri public policy protects all of the rights established by Chapter 407:

> The Missouri statutes in question, relating to merchandising and trade practices, are obviously a declaration of state policy and are matters of Missouri's substantive law. To allow these laws to be ignored by waiver or by contract, adhesive or otherwise, renders the statutes useless and meaningless.[16]

In *Huch,* the Missouri Supreme Court specifically recognized the MPA's "broad scope" and "the legislature's clear policy to protect consumers." The public policy of Missouri is that the MPA shall be broadly construed and that it shall be preserved intact for the benefit of Missouri consumers.[17]

In *Huch*, the Missouri Supreme Court thus expanded on the consumer protections recognized by *Woods,* with this three-step approach:

1. The Missouri Legislature has given Missouri consumers the right to a class action as one of several critical protections listed in the Merchandising Practices Act (§407.025.2 RSMo.);

2. Protections granted by the MPA, including the right to a class action, shall not be waived;

3. Defendant's attempt to waive Plaintiff's right to a class action is thus illegal and unenforceable.

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[16] *Huch v. Charter*, 290 S.W.3d 721, 726 (Mo. banc 2009); quoting *High Life Sales Co. v. Brown-Forman Corp.,* 823 S.W.2d 493, 498 (Mo. banc 1992); which was quoting *Electrical and Magneto Service Co.,* 941 F.2d 660, 663-664 (8th Cir. 1991). Emphasis added.

[17] *Huch* at 725.

In *Huch* the Missouri Supreme Court, dictated that merchants must respect each of the rights granted to consumers by the MPA. None of these rights, including the right to a class action, may be waived in any type of contract, adhesive or otherwise. In fact, never in Missouri legal history has any Missouri appellate case upheld a class merchant's attempt to urge a consumer waive the right to a class action. Such waivers have been stricken by at two Missouri appellate cases (*Woods* and *Whitney, supra)*, and numerous trial court decisions involving payday lenders, title lenders and automobile dealers.

CONCLUSION

For the above-stated reasons, NACA asks this Court to re-hear this case, taking into consideration the holdings of two recent consumer cases that bear heavily on the issues raised in this case: *Woods v. QC Financial Services, Inc,* 280 S.W.3d 90 (Mo. App. 2008) and *Huch v. Charter Communications, Inc,* 290 S.W2d 721 (Mo. banc 2009).

Simon Law Firm, PC

Erich Vieth #83-67
John E. Campbell #08-466
701 Market Street, Ste. 1450
St. Louis, MO 63101
(314) 241-2929; (fax) 314-241-2029
Attorneys for *Amici Curiae*, National Association of Consumer Advocates (NACA) and National Consumer Law Center (NCLC)

Certificate of Service and Compliance and Rule 26.1 Disclosure

1. Two copies of the foregoing were mailed this 27th day of October, 2009 to attorneys for the Appellant and Appellee:

COOK, VETTER, DOERHOFF AND LANDWEHR
Timothy Van Ronzelen
Matthew A. Clement
231 Madison
Jefferson City, MO 65101
573-635-7977

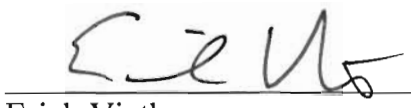
THOMPSON & COBURN
Christopher Martin Hohn
Roman P. Wuller
One US Bank Plaza
Suite 2600
St. Louis, MO 63101-1693
314-552-6000

2. Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Eighth Circuit Rule 28A(c), and exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this brief contains 2,523 words, as determined by the word count feature of MS Word. This complies with FRAP 29 and 32, which permit an amicus brief to contain no more than one-half of the 14,000 words allowed by an a principal brief.

3. Appellees hereby certify that the CD-ROM accompanying the paper version of this brief has been scanned for viruses and that it is virus-free.

4. One original and 9 copies of this brief have been hand-delivered to the Eight Circuit Court of Appeals on October 27, 2009, along with a CD-ROM containing this brief in PDF format.

5. **RULE 26.1 CERTIFICATION:** Amici curiae National Association of Consumer Advocates and National Consumer Law Center state that they have no parent corporation and no publicly held company owns 10 percent or more of their stock.



Erich Vieth