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***Jackson v. Payday Financial, LLC*, 764 F. Supp.2d 765 (7th Cir. Aug. 22, 2014).**

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ABSTRACT

In *Jackson v. Payday Financial*, the Seventh Circuit Court of Appeals held loan a provision requiring arbitration in tribal court was unreasonable and substantially and procedurally unconscionable. The Court rejected Payday’s argument that the dispute belonged in tribal court, because there was no subject matter jurisdiction over Plaintiffs’ claims, and the defendants did not raise a colorable claim for tribal jurisdiction or tribal exhaustion.

I. INTRODUCTION

The Seventh Circuit held in *Jackson v. Payday Financial, LLC*, that the arbitration provision in the defendant loan entities’ short-term, high-interest loan agreement, which required arbitration in the Cheyenne River Sioux Tribe’s (“CRST”) courts, was unreasonable and substantially and procedurally unconscionable.¹ The district court erred in granting the defendant’s motion to dismiss for improper venue, and rejected the alternative finding that the dispute should be resolved in the tribal courts.² First, the Seventh Circuit established federal jurisdiction to review the case.³ Second, the court examined the loan agreement’s forum selection clause, and found it unreasonable because the tribal arbitral forum does not exist.⁴ Finally, the court rejected the defendants’ alternative argument that all litigation should be conducted in the CRST’s courts.⁵

¹ 764 F.3d 765 (7th Cir. Aug. 22, 2014).

² *Id.* at 770.

³ *Id.* at 784.

⁴ *Id.* at 776.

⁵ *Id.* at 786.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Illinois residents, Deborah Jackson, Linda Gonnella, and James Binkowski obtained loans online through loan entities' websites.⁶ All loan entities are owned by CRST member Martin A. Webb.⁷ The terms of the agreements specify the loans are “governed by the Indian Commerce Clause of the Constitution . . . and the laws of the [CRST],’ and are not subject ‘to the laws of any state.’”⁸ The agreements further require any disputes “be resolved by arbitration conducted by the CRST [] by an authorized representative in accordance with its consumer dispute rules and the terms of this (a)greement.”⁹ The agreement provides for arbitration by phone or video conference.¹⁰ Two of the agreements also state they are “subject solely to the exclusive laws and jurisdiction of the [CRST and its] reservation.”¹¹

Plaintiffs first brought their action in Illinois state court alleging violations of civil and criminal statutes.¹² They sought restitution, statutory damages, litigations costs, an injunction to prevent future lending to Illinois residents, and a declaration that the arbitration provisions were not enforceable. The loan entities removed the action to federal court, and moved for dismissal, arguing the agreement terms mandated arbitration conducted by CRST tribal court. The district court agreed, and dismissed for improper venue.¹³

Plaintiffs timely appealed. After oral argument, the Seventh Circuit remanded to the district court for limited factual findings as to: (1) whether CRST has applicable tribal law

⁶ *Id.* at 768.

⁷ These include Payday Financial, LLC, d/b/a Lakota Cash, d/b/a Big Sky Cash, d/b/a Big \$ky Cash, Western Sky Financial, LLC, d/b/a Western Sky Funding, d/b/a Western Sky, d/b/a westernsky.com, Great Sky Finance, LLC, d/b/a Great Sky Cash, d/b/a Great \$ky Cash, d/b/a GSKY, Red Stone Financial, LLC, d/b/a Red Stone Cash, Cashcall, Incorporated.

⁸ *Payday*, 764 F.3d at 769.

⁹ *Id.* at 769-770.

¹⁰ *Id.* at 769.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 769-770.

readily available to the public; and (2) whether CRST has an authorized arbitration mechanism available to the parties.¹⁴ On remand, the district court found that CRST “Tribal law . . . c[ould] be acquired by reasonable means,” but that the tribal courts “have virtually no experience in handling claims made against defendants through private arbitration As such, the promise of a meaningful and fairly conducted arbitration [wa]s a sham and an illusion.”¹⁵

III. ANALYSIS

A. Jurisdiction and Standard of Review

The Seventh Circuit reviewed the district court’s determination of federal jurisdiction based on the Class Action Fairness Act.¹⁶ All necessary elements of federal jurisdiction were met: \$5,000,000 in controversy, diversity of citizenship, and 100 or more plaintiffs in the class.¹⁷ The appellate jurisdiction to review the district court’s decision was valid under 28 U.S.C. § 1231.¹⁸ An arbitration agreement is a type of forum selection clause; and the parties agreed that de novo review of the enforceability of the clause was appropriate.¹⁹

B. The Validity of the Forum Selection Clause

As a general rule, courts enforce arbitration agreements according to their terms, and the Federal Arbitration Act.²⁰ First, the court applied *Abbott Laboratories v. Takeda Pharmaceutical Company*,²¹ that calls for the Seventh Circuit to apply the choice of law based on the terms’ provisions, here, the “Indian Commerce Clause . . . and the laws of the [CRST].”²² However, the loan entities turned to federal guidance because there was no tribal precedent on

¹⁴ *Payday*, 764 F.3d at 770.

¹⁵ *Id.*

¹⁶ *Id.* at 771; *See* 28 U.S.C. § 1332(d) (2012).

¹⁷ *Payday*, 764 F.3d at 772.

¹⁸ *Id.* at 772-773

¹⁹ *Id.* at 773.

²⁰ *Id.* at 773-774.

²¹ 476 F.3d 421 (7th Cir. 2007).

²² *Payday*, 764 F.3d at 775.

the issue.²³ The court then relied on *MS Bremen v. Zapata Off-Shore Co.*²⁴ and *Carnival Cruise Lines, Inc. v. Shute*²⁵, which provide sets of standards for overcoming a forum selection clause's presumption of validity, and determined enforcement of the loan agreements' clause was unreasonable.²⁶

If the forum selection clause was invalid and Illinois law governed, the court determined an "unconscionability" analysis was appropriate.²⁷ Because the record indicated no actual arbitration procedure existed within CRST tribal court, the Seventh Circuit also noted the impossibility for plaintiffs to understand the process because of inconsistent and misleading language.²⁸ Dispute resolution mechanisms did not exist, and "there simply was no prospect 'of a meaningful and fairly conducted arbitration.'"²⁹ Therefore, the court found the provision procedurally unconscionable.³⁰ Because the provision allowed the loan entities to represent the arbitration process as fair regardless of existent rules: "[t]he arbitration clause here is [substantively unconscionable and] void not simply because of a strong possibility of arbitrator bias, but because it provides that a decision is to be made under a process that is a sham from stem to stern."³¹

C. Tribal Court Jurisdiction over current Litigation

The loan entities alternatively argued that their forum selection clause required litigation within CRST tribal court.³² Under *Montana v. Unites States*³³ tribal jurisdiction does not extend

²³ *Id.* at 775.

²⁴ 407 U.S. 1, 10, 18 (1972).

²⁵ 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991).

²⁶ *Payday*, 764 F.3d at 776.

²⁷ *Id.* at 777.

²⁸ *Id.* at 778.

²⁹ *Id.* at 778-779.

³⁰ *Id.* at 781.

³¹ *Id.* at 778-779.

³² *Payday*, 764 F.3d at 781.

³³ 450 U.S. 544, 101 S. Ct. 1245, 65 L. Ed. 2d 492 (1981).

to nonmembers; however, the first exception states “[a] tribe may regulate . . . the activities of nonmembers who enter consensual relationships with . . . its members, through . . . contracts....”³⁴ *Plains Commercial Bank v. Long Family Land & Cattle Co.*³⁵ held if a tribe has no authority to regulate an activity, the tribal court has no jurisdiction to hear claims based on that activity.³⁶

The court found the plaintiffs did not enter the reservation; transactions were through a website while plaintiffs were in Illinois; and their activities did not concern tribal sovereignty or regulation.³⁷ Because tribal courts have limited jurisdiction, their authority to hear claims of nonmembers pertain to subject matter jurisdiction, not personal jurisdiction, as this court found. “[A] nonmember’s consent to tribal authority is not sufficient to establish the jurisdiction of a tribal court.”³⁸ Lastly, the court determined that tribal exhaustion was not required because the dispute did not pertain to nonmembers conduct on tribal lands; or raise issues of tribal integrity, sovereignty, self-government, or allocation of resources.³⁹

IV. CONCLUSION

The Seventh Circuit determined the CRST member-owned loan entities’ arbitration provision requiring arbitration in tribal courts was unreasonable, and substantively and procedurally unconscionable under federal, state, and tribal law. It reversed the district court’s dismissal for improper venue. The court found that CRST courts did not have subject matter jurisdiction of the dispute, and no colorable claim of tribal jurisdiction was raised to invoke the tribal exhaustion rule.

³⁴ *Payday*, 764 F.3d at 781-782 (citing *Montana v. U.S.*, 450 U.S. 544, 565-566 (1981)).

³⁵ 554 U.S. 316, 330, 128 S. Ct. 2709, 171 L. Ed. 2d 457 (2008).

³⁶ *Payday*, 764 F.3d at 782.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 785.