

109:4-3-28

Unconscionable Terms in Home Mortgage Loans .

(A) Pursuant to section 1345.031(C)(1) of the Revised Code, any unconscionable arbitration clause, unconscionable clause requiring the consumer to pay the supplier's attorney fees, or unconscionable liquidated damages clause included in a mortgage loan contract is unenforceable.

(B) Ohio contract law recognizes both substantive unconscionability and procedural unconscionability.

(1) Substantive unconscionability involves those factors which relate to the contract terms themselves and whether they are commercially reasonable in the context of the transaction involved. Although there is no exhaustive list of factors to apply, courts generally consider the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability.

(2) Procedural unconscionability involves those factors bearing on the relative bargaining position of the contracting parties to the transaction, including factors such as age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, and whether there were alternative sources of supply for the goods or services in question.

(C) Mortgage loan contract clauses that are unconscionable and unenforceable pursuant to section 1345.031(C) of the Revised Code, include, but shall not be limited to:

(1) An arbitration clause that is not clearly and conspicuously disclosed to the consumer;

(2) An arbitration clause that limits, restricts or precludes the applicability of any rights or remedies afforded the consumer under Chapter 1345 of the Revised Code;

(3) An arbitration clause that provides for a limitation on actions of a shorter duration than provided for by statute under state or federal law;

(4) An arbitration clause that fails to provide the consumer with fair and reasonable access to discover and present information, documents and other evidence necessary to support the consumer's claim or defense;

(5) An arbitration clause that requires that the arbitration decision remain confidential;

(6) An arbitration clause that fails to provide an appeal process for a decision on the basis that the decision is arbitrary, capricious or contrary to law;

- (7) A liquidated damages clause is unconscionable unless fixing the amount of actual damages is impracticable or extremely difficult, the amount selected represents a reasonable endeavor by the supplier and consumer to estimate fair compensation for the loss sustained by the breach described, and the amount is not a penalty. This provision does not prohibit a supplier from imposing and collecting late payment fees as permitted by law or from accelerating loan repayment in conformity with section 1345.031(B)(3) of the Revised Code;
- (8) A mandatory attorney fee clause that purports to bind the consumer to the payment of the supplier's attorney fees or legal costs in connection with the supplier's claim that the consumer has breached a term of the residential mortgage loan. This prohibition does not preclude the supplier from requesting or receiving an award of attorney fees or legal costs as a prevailing party in a civil action as provided by law and ordered by a court.
- (D) In determining whether or not an arbitration clause in a residential mortgage loan is unconscionable, great weight and due consideration shall be given to the Statement of Principles of the National Consumer Disputes Advisory Committee in the Consumer Due Process Protocol promulgated by the American Arbitration Association.

Effective:

R.C. 119.032 review dates:

Certification

Date

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