Appeal No. 2012AP2115 **Cir. Ct. No. 2011CV285**

WISCONSIN COURT OF APPEALS
DISTRICT IV

TIMOTHY WILLIAMS,

PLAINTIFF-APPELLANT,

V.

VALUED SERVICES OF WISCONSIN LLC D/B/A CHECK ADVANCE REEDSBURG,

DEFENDANT-RESPONDENT.

FILED

AUG 08, 2013

Diane M. Fremgen
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

Once again we have been asked to draw the line of unconscionability for short-term loans with very high interest rates, and once again we believe the question is appropriately addressed to our supreme court.[1] In this case, the challenged loans had annualized interest rates of 385% and 246%. The borrower, Timothy Williams, contends that the loans were unconscionable under the Wisconsin Consumer Act (WCA). Williams contends that the combination of the high interest rates and other terms of the loans, the disparate bargaining power

[1] We believe that the other issues in dispute in this appeal may be resolved based on existing case law, either by the supreme court or by this court on remand. *See* ***State v. Tabor***, 2005 WI App 107, 282 Wis. 2d 768, 699 N.W.2d 663; ***State v. Post***, 197 Wis. 2d 279, 541 N.W.2d 115 (1995). We therefore do not address the merits of those arguments in this certification.

between the parties, and Williams' demonstrated inability to repay rendered the loans unconscionable.

The lender, Valued Services of Wisconsin, disputes that the loans were substantively or procedurally unconscionable. It contends that the loans were standard consumer loans and that the WCA prohibits a finding of unconscionability based on a claim of an excessively high interest rate.

We recently certified the issue of whether short-term loans with annualized interest rates of 446% to 1338% crossed the line of unconscionability. *See* ***Payday Loan Store of Wis., Inc. v. Mount***, No. 2010AP2298, unpublished certification (WI App June 30, 2011); *certification granted*, 2011 WI 89, 336 Wis. 2d 641, 804 N.W.2d 82; *certification dismissed*, 2012 WI 2, 338 Wis. 2d 325, 808 N.W.2d 717. The supreme court granted certification on that issue, but then dismissed the certification on the parties' voluntary dismissal. *See* ***id.*** We again certify to the supreme court the question of where to draw the line of unconscionability for short-term loans with extremely high interest rates.

A decision in this case will have statewide impact on consumer credit transactions and provide guidance to lower courts faced with disputes over those transactions. Accordingly, we certify the appeal in this case to the Wisconsin Supreme Court for its review and determination.

Background

On December 14, 2010, Williams obtained a short-term personal loan from Valued Services. The loan was for $550, and was due to be repaid approximately one month later, on January 10, 2011. The annualized interest rate was listed at 385.28%, with a total finance charge of $156.75.

On January 10, 2011, the day the December loan was due, Williams obtained another loan from Valued Services to repay the December loan. The January loan was for $706, with an annualized interest rate of 246.51%, and a total finance charge of $1241.40. It required Williams to repay the loan in twelve monthly payments, beginning February 9, 2011.

Valued Services' file for Williams showed that Williams' sole source of income was a monthly social security payment of $1147. It also showed that in November 2010, Williams had an ending checking account balance of $8.32.

In March 2011, Williams filed this action against Valued Services. Williams argued that Valued Services violated the WCA by issuing loans to Williams that were both procedurally and substantively unconscionable.

Williams and Valued Services both moved for summary judgment. The court determined that, on the undisputed facts, the loans were not unconscionable. The court granted Valued Services' motion for summary judgment and dismissed Williams' action. Williams appeals.

Discussion

Under the WCA, a court may refuse to enforce a consumer credit transaction if it determines, as a matter of law, that any aspect of

the transaction is unconscionable. *See* WIS. STAT. § 425.107(1) (2011-12).[2] The issue in this case is whether the loans that Valued Services issued to Williams in December 2010 and January 2011 were unconscionable based on their high interest rates and other material terms, the imbalance of power between the parties, and the obvious inability of Williams to timely repay the loans.

The WCA provides the following guidelines for courts in determining whether a consumer credit transaction is unconscionable under subsection (1):

> Without limiting the scope of sub. (1), the court may consider, among other things, the following as pertinent to the issue of unconscionability:
>
> (a) That the practice unfairly takes advantage of the lack of knowledge, ability, experience or capacity of customers;
>
> (b) That those engaging in the practice know of the inability of customers to receive benefits properly anticipated from the goods or services involved;
>
> (c) That there exists a gross disparity between the price of goods or services and their value as measured by the price at which similar goods or services are readily obtainable by other customers, or by other tests of true value;
>
> (d) That the practice may enable merchants to take advantage of the inability of customers reasonably to

[2] WISCONSIN STAT. § 425.107(1) provides:

> With respect to a consumer credit transaction, if the court as a matter of law finds that any aspect of the transaction, any conduct directed against the customer by a party to the transaction, or any result of the transaction is unconscionable, the court shall, in addition to the remedy and penalty authorized in sub. (5), either refuse to enforce the transaction against the customer, or so limit the application of any unconscionable aspect or conduct to avoid any unconscionable result.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

> protect their interests by reason of physical or mental infirmities, illiteracy or inability to understand the language of the agreement, ignorance or lack of education or similar factors;
>
> (e) That the terms of the transaction require customers to waive legal rights;
>
> (f) That the terms of the transaction require customers to unreasonably jeopardize money or property beyond the money or property immediately at issue in the transaction;
>
> (g) That the natural effect of the practice would reasonably cause or aid in causing customers to misunderstand the true nature of the transaction or their rights and duties thereunder;
>
> (h) That the writing purporting to evidence the obligation of the customer in the transaction contains terms or provisions or authorizes practices prohibited by law; and
>
> (i) Definitions of unconscionability in statutes, regulations, rulings and decisions of legislative, administrative or judicial bodies.

WIS. STAT. § 425.107(3).

Williams contends that Valued Services followed an unconscionable course of conduct by issuing the December 2010 and January 2011 loans to Williams. He argues that the summary judgment material establishes that Valued Services knew that Williams would be unable to pay the December loan by the January due date and unfairly took advantage of Williams' lack of knowledge and experience in issuing Williams high interest loans that required Williams to waive his legal rights. *See* WIS. STAT. § 425.107(3)(a) and (e). Williams argues that the very high annualized interest rates on the loans—385% and 246%—demonstrate "a gross disparity between the price of goods or services and their value as measured by the price at which similar goods or services are readily obtainable by other customers or by other tests of true value." *See* § 425.107(3)(c).

Williams also contends that Valued Services' conduct was unconscionable under the common law test for unconscionability. *See* WIS. STAT. § 425.107(3)(i); ***Wisconsin Auto Title Loans, Inc. v. Jones***, 2006 WI 53, ¶¶29-33, 290 Wis. 2d 514, 714 N.W.2d 155 (explaining the common law test for unconscionability, which requires showing of both procedural and substantive unconscionability). He argues that the loans were procedurally unconscionable because: Valued Services had far greater power, sophistication, and experience; Williams had few other options for obtaining cash; the loan forms were prepared by attorneys for Valued Services and offered to Williams on a take-it-or-leave-it basis; and Williams did not have access to legal advice when signing the loan documents. *See* ***Wisconsin Auto Title Loans***, 290 Wis. 2d 514, ¶34 ("Determining whether procedural unconscionability exists requires examining factors that bear upon the formation of the contract, that is, whether there was a 'real and voluntary meeting of the minds' of the contracting parties."). Williams argues that the loans were substantively unconscionable based on the very high annualized interest rates and because Valued Services knew that Williams would be unable to repay the loans. *See* ***id.***, ¶35 ("Substantive unconscionability addresses the fairness and reasonableness of the contract provision subject to challenge.").

Valued Services responds that there was no procedural unconscionability in the loans it issued to Williams because Williams had the option to opt out of arbitration and to revoke his consent to an electronic funds transfer in the event of his default on the loan, and that Williams exercised his bargaining power by taking those options. In support, it cites ***Hoffman v. Citibank (South Dakota) N.A.***, 546 F.3d 1078, 1085 (9th Cir. 2008), which held that a customer's meaningful opportunity to opt out of contract terms may

preclude a finding of procedural unconscionability. Valued Services also asserts that the availability of other lenders of consumer loans in the area weighs against a finding of procedural unconscionability. *See* ***Wisconsin Auto Title Loans***, 290 Wis. 2d 514, ¶34. It asserts that, in this case, Williams' signing of the contracts represented a valid meeting of the minds. Next, Valued Services contends that the loans were not substantively unconscionable because the WCA specifically states that there is no maximum limit on "finance charges" for consumer loans.[3] *See* WIS. STAT. § 422.201(2)(bn). Valued Services also points out that, as a general matter, consumers may waive rights in loan contracts without necessarily rendering the loan unconscionable. *See* ***Cottonwood Fin., Ltd. v. Estes***, 2012 WI App 12, ¶2, 339 Wis. 2d 472, 810 N.W.2d 852.

The crux of this case, as in the previously certified ***Payday***, is the question of the extent to which a very high interest rate for a short-term consumer loan may render the loan unconscionable.[4] Valued Services argues that because

[3] Under WIS. STAT. § 421.301(20), "'[f]inance charge' means the sum of all charges, payable directly or indirectly by the customer as an incident to or as a condition of the extension of credit, … includ[ing] … (a) [i]nterest …."

[4] In ***Payday Loan Store of Wis., Inc. v. Mount***, No. 2010AP2298, unpublished certification (WI App June 30, 2011); *certification granted*, 2011 WI 89, 336 Wis. 2d 641, 804 N.W.2d 82; *certification dismissed*, 2012 WI 2, 338 Wis. 2d 325, 808 N.W.2d 717, the circuit court found that the interest rates for the disputed loans were unconscionable, and granted summary judgment to the borrower on that basis. On appeal, Payday argued that a court may not determine that an interest rate is in itself unconscionable, because the WCA expressly permits any finance charge. ***Id.*** It argued that the legislature enacted WIS. STAT. § 422.201(2)(bn) to foreclose claims by consumers that the interest rate of a loan is in itself unconscionable by expressly permitting any amount of finance charges, including any interest rate. ***Id.*** The respondent, Jessica Mount, argued that the absence of an interest rate cap in the Wisconsin statutes does not defeat a claim that an interest rate is in itself unconscionable. ***Id.***; *see generally* 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 129 at p. 556 (1963) (absent a statutory cap on interest rates, interest rates are valid "up to the point at which unconscionability becomes a factor"). We certified the question of whether, under the WCA, a court may find a particular interest rate to be unconscionable. ***Id.***

the WCA states that there is no maximum limit on finance charges, therefore an annualized interest rate of any amount is "expressly permitted" and thus "not in itself unconscionable" under WIS. STAT. § 425.107(4) ("Any charge or practice expressly permitted by [the WCA] is not in itself unconscionable…."). Williams disagrees, arguing that "at some point an interest rate must become unconscionable under WIS. STAT. § 425.107." He posits that, under Valued Services' interpretation of the WCA, lenders could set interest rates upwards of 5000% and courts would be unable to intervene. Williams argues that this would contravene the role of the courts to stop behavior that shocks the conscience, citing ***Gumz v. Chickering***, 19 Wis. 2d 625, 635, 121 N.W.2d 279 (1963).

As we stated in our certification of ***Payday***, No. 2010AP2298 at 4, we think that it is unclear whether the WCA allows a court to determine that a particular interest rate for a short-term loan is in itself unconscionable. If the legislature has "expressly permitted" lending money at any interest rate by providing that there is no maximum limit on finance charges in consumer credit transactions, then no interest rate, no matter how high, is in itself unconscionable under the WCA. *See* WIS. STAT. §§ 422.201(2)(bn), 425.107(1) and (4). If, however, Valued Services is wrong and the act of lending money with an astronomical interest rate is not "expressly permitted" by the WCA, then an astronomical interest rate may in itself cross the line of unconscionability.

Here, however, Williams does not limit his unconscionability argument to a claim that the interest rate for each of his loans was in itself unconscionable. Rather, Williams argues that the interest rates, together with other terms of the loans, Williams' demonstrated inability to repay the loans, and the disparate bargaining power between the parties, rendered the loans unconscionable. Thus, this case does not rest upon whether the WCA allows a

finding that an interest rate is in itself unconscionable; even if Valued Services is correct that its interest rates are "expressly permitted" under the WCA, it appears that the interest rates may be considered along with other factors in the court's unconscionability analysis. *See* WIS. STAT. § 425.107(4) ("[E]ven though a practice or charge is authorized by [the WCA], the totality of a creditor's conduct may show that such practice or charge is part of an unconscionable course of conduct."). At the same time, while unconscionability must be decided on a case-by-case basis, we recognize that the very high interest rates in this case, as in similar cases, are the focal point of the unconscionability claim.

We think that it is unclear what role a very high interest rate should play in a court's analysis of unconscionability under the WCA, either in itself or together with other factors. Guidance by the supreme court will assist consumer law practitioners and lower courts in resolving disputes over short-term loan interest rates.

We believe that the Wisconsin Supreme Court should decide the question of whether the WCA precludes a court from determining that an astronomical annualized interest rate on a short-term loan is in itself unconscionable. Whether the WCA precludes a court from determining that an interest rate is in itself unconscionable is a question of statutory interpretation that has not yet been addressed by the courts. Additionally, this case presents the question of what role a very high interest rate plays in a court's determination of unconscionability. Because this appeal presents issues of significant statewide importance, we believe it is appropriately addressed to the Wisconsin Supreme Court.