

The More the Merrier: Court Rejects Waiver Argument, Enforces Arbitration Clause in Consumer Contract

December 23, 2015

A federal district court in Oklahoma recently rejected a defaulting borrower's attempt to argue that her lender's pursuit of foreclosure litigation waived the lender's right to insist on arbitration of the borrower's counterclaims, and also compelled arbitration of the borrower's third party claims against a lender-placed insurer, even though the insurer was not a signatory to the arbitration agreement. After her mortgage lender initiated a foreclosure proceeding in an Oklahoma state court, the borrower in *Beneficial Financial I Inc. v. Cravens* removed the action to federal court and asserted a variety of counterclaims against the lender related to the servicing of the mortgage. She also filed a third party claim against the insurance company that had issued lender-placed insurance ("LPI") to protect the mortgaged property after the borrower allowed her homeowner's insurance policy to lapse, claiming that the insurance was unnecessary, excessively expensive, and accelerated her inability to bring the delinquent mortgage loan current, the borrower demanded substantial compensatory and extra-contractual damages as well as the total release of her loan obligation. The lender and insurer jointly moved to compel arbitration pursuant to an arbitration clause in her loan agreement, which pre-dated the CFPB regulation banning arbitration provisions in home mortgage loans. The Court rejected the borrower's argument that her lender waived the right to compel arbitration by initially refusing to arbitrate the foreclosure dispute, and by filing the state court foreclosure action, finding that first, the arbitration rider included a carve-out for foreclosure actions and, thus, the filing of a foreclosure action was not inconsistent with the agreement. Additionally, although the court agreed that the loan servicer's initial refusal to arbitrate was inconsistent with its subsequent arbitration demand, it found that action insufficient to constitute a waiver. Given the strong federal policy in favor of arbitration, action inconsistent with the right to arbitrate is just one factor in making a waiver determination, and because other factors to establish a waiver were largely absent, the court found there was no waiver as a matter of law. Although the LPI insurer was not a

signatory to the loan agreement or arbitration clause, the court also granted the insurer's motion to compel arbitration under an equitable estoppel theory. Equitable estoppel can be used by a non-signatory to compel arbitration where the contracting party's claims against the non-signatory are related to the agreement that includes the arbitration clause, and where the claims allege interdependent or concerted conduct between the non-signatory and a signatory. Use of equitable estoppel to compel arbitration should be considered whenever a co-defendant's contract includes an arbitration clause.

Authored By



Julianna Thomas McCabe

Related Practices

[Consumer Finance](#)

[Life, Annuity, and Retirement Litigation](#)

©2024 Carlton Fields, P.A. Carlton Fields practices law in California through Carlton Fields, LLP. Carlton Fields publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information and educational purposes only, and should not be relied on as if it were advice about a particular fact situation. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship with Carlton Fields. This publication may not be quoted or referred to in any other publication or proceeding without the prior written consent of the firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our Contact Us form via the link below. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm. This site may contain hypertext links to information created and maintained by other entities. Carlton Fields does not control or guarantee the accuracy or completeness of this outside information, nor is the inclusion of a link to be intended as an endorsement of those outside sites.