

SUPREME COURT LIVE

February 21, 2014
West High School, Anchorage

ORAL ARGUMENT CASE SUMMARY

Janet Hudson, on behalf of herself and others,
Petitioners,

v.

Citibank (South Dakota) NA, Alaska Law Offices, Inc., and Clayton Walker,
Respondents.

Cynthia Stewart, on behalf of herself and others,
Petitioners,

v.

Midland Funding LLC, Alaska Law Offices, Inc., and Clayton Walker,
Respondents.

Supreme Court Case Nos. S-14740/S-14826 (consolidated)

Disclaimer: *This summary of the case highlights the major issues raised but is not intended to be comprehensive. It has been prepared for educational purposes only by the Supreme Court LIVE program staff and does not reflect the input or views of any member of the court.*

OVERVIEW OF THE CASE

These consolidated cases arose from lawsuits to collect on past-due credit card debt. After getting default judgments against two credit cardholders in Alaska state court, the attorney in the cases asked for attorney's fees under Alaska law. The court awarded attorney's fees, which became part of the judgments against the cardholders. The cardholders later brought class action lawsuits in Alaska state court against the credit card companies and their attorney; the class action lawsuits claimed that the attorney handling the collection cases had improperly claimed excessive attorney's fees under Alaska law. Relying on part of the cardholder agreements, the credit card companies asked the court to let an arbitrator decide the cases. The cardholders opposed this request, arguing that an arbitrator did not have the power to give them an order that would apply in other cases and that the arbitration agreement should be disregarded because it violated state law provisions. The superior court decided to send the case to an arbitrator, but it revised the cardholder agreement so that the arbitrator had the authority to give the cardholders an order that applied to others. The cardholders asked the Alaska Supreme Court to look at the court's order even though the case was not yet over in superior court, and the Supreme

Court agreed to consider several issues.

ATTORNEYS

Attorneys for the Petitioners, Janet Hudson and Cynthia Stewart:

James J. Davis, Jr., Goriune Dudukian, Robert Lynch
Northern Justice Project LLC, Anchorage

Matthew Wessler
Public Justice, P.C., Washington, DC

Attorney for Appellees, Alaska Law Offices, Inc. and Clayton Walker:

Marc Wilhelm
Richmond & Quinn, Anchorage

Attorney for Appellees, Citibank (South Dakota) NA and Midland Funding LLC:

Jon Dawson, Elizabeth Hodes
Davis Wright Tremaine LLP, Anchorage

QUESTIONS PRESENTED FOR REVIEW

1. Did the credit card companies give up (waive) their right to arbitration by bringing the court cases on the debts?
2. If they did waive their right to arbitrate, what is the scope of the waiver?
3. Can a private arbitrator grant statewide injunctions under Alaska's Unfair Trade Practices and Consumer Protection Act (UTPA)?

MAJOR AUTHORITIES TO CONSIDER

- **U.S. Constitution, Article VI**, Supremacy clause
- **U.S. Constitution, Article I, § 10**, Restrictions upon powers of states
- **Alaska Constitution, Article 1, § 15**, Prohibited state action

United States Supreme Court Case Law

- ***AT&T Mobility LLC v. Concepcion***, 131 S.Ct. 1740 (2011).
- ***CompuCredit Corp. v. Greenwood***, 132 S.Ct. 665 (2012).
- ***American Express Co. v. Italian Colors Restaurant***, 133 S.Ct. 2304 (2013).

Federal Circuit Case Law

- ***Kilgore v. KeyBank, National Association***, 718 F.3d 1052 (9th Cir. 2013).
- ***Chavarria v. Ralphs Grocery Co.***, 733 F.3d 916 (9th Cir. 2013).
- ***Davis v. O'Melveny & Myers***, 485 F.3d 1066 (9th Cir. 2007).
- ***Gutierrez v. Wells Fargo Bank, NA***, 704 F.3d 712 (9th Cir. 2012).

Alaska Rules of Court

- Alaska Rule of Civil Procedure 23, Class Actions
- Alaska Rule of Civil Procedure 82, Attorney's Fees
- Alaska Rule of Appellate Procedure 402, Petitions for Review of Non-appealable Orders or Decisions

Alaska Supreme Court Case Law

- ***Johnson v. Aleut Corporation***, 307 P.3d 942 (Alaska 2013) (review of arbitrator's decision).
- ***Vockner v. Erickson***, 712 P.2d 379 (Alaska 1986) (unconscionability).
- ***Carr-Gottstein Foods Co. v. Wasilla, LLC.***, 182 P.3d 1131 (Alaska 2008) (implied waiver of contract right).
- ***OK Lumber Co. v. Alaska Railroad Corp.***, 123 P.3d 1076 (Alaska 2005) (adhesion contract).
- ***Osbakken v. Whittington***, 289 P.3d 894 (Alaska 2013) (UTPA injunctions).
- ***Gibson v. Nye Frontier Ford, Inc.***, 205 P.3d 1091 (Alaska 2009) (arbitration clause enforcement).
- ***Kenai Chrysler Center v. Denison***, 167 P.3d 1240 (Alaska 2007) (void contract, UTPA violation).

SUMMARY OF THE CASE

Janet Hudson opened a credit card account with Citibank (South Dakota) N.A. in 1999. The credit card agreement said that South Dakota law governed the agreement. Citibank later mailed Hudson a change in its cardholder agreement, which told her that a provision would be added permitting disputes related to her account to be submitted to arbitration. The credit card company allowed her to opt out of the added provision if she notified it by a certain date. If she opted out of the arbitration provision, she could continue to use her card until the end of her "current membership year," at which point she would have to pay off any remaining balance under the existing credit card agreement.

Hudson did not opt out and continued to use her credit card. At some point she fell behind in payments, and Citibank, through an attorney, filed a lawsuit against Hudson in Alaska

state court. Hudson did not respond to the lawsuit, and the court entered a **default judgment** against her. (After a court enters a default judgment in a case, the person who is being sued must take extra steps to have the court consider any arguments or evidence she wants to present.) Citibank's attorney asked the court to award attorney's fees under Alaska Civil Rule 82. The court awarded fees of \$2417.02. Citibank then **executed** on the judgment (got a court order permitting it to take Hudson's property to pay the judgment) and seized some of Hudson's money from her bank account.

Not long after Citibank executed on the judgment, Hudson began a class action lawsuit in Alaska state court. She alleged that Citibank and its attorney violated the Alaska Unfair Trade Practices and Consumer Protection Act (UTPA) by having a practice of asking for excessive attorney's fees in collection lawsuits. She asked the court to issue an order, called an injunction, prohibiting Citibank and its attorney from seeking excessive fees.

Citibank's attorney asked the court to send the case to arbitration under the terms of the amendment to the cardholder agreement. The arbitration amendment did not allow class-action type claims. Hudson objected to using arbitration in part because it did not allow an injunction that would apply to other people's claims. She argued that Citibank had given up, or waived, its right to ask for arbitration because it brought a court case against her for the debt. Citibank relied on federal cases to argue that under the Federal Arbitration Act, it did not matter that Hudson had to give up her rights to bring a class action or to try to get an injunction that applied to others. It also argued that it had not waived its right to request arbitration.

* * * *

Cynthia Stewart opened a credit card account with Citibank (South Dakota), N.A. in 2002. Her cardholder agreement, like Hudson's, said that South Dakota law applied. Stewart's agreement had an arbitration provision in it from the time she opened the account.

Stewart fell behind in payments on her credit card. In 2010 Citibank sold its interest in her delinquent account to Midland Funding LLC (Midland). Midland, through an attorney, sued Stewart in Alaska state court in 2010. She did not file an answer, and the court entered a default judgment against her. The default judgment included attorney's fees. Midland executed on the judgment, and shortly afterwards, Stewart filed a class action complaint against Midland in Alaska state court. Midland asked the court to send the case to arbitration, and Stewart opposed this request.

DECISION BELOW

Both Hudson's case and Stewart's case were assigned to the same superior court judge. He considered the legal arguments the parties made, and in Hudson's case, he issued a 64-page decision covering a number of disputed issues. The decision was made without

holding a trial or other evidentiary hearing. The judge decided that South Dakota law applied to some issues but that Alaska law applied to other issues, specifically the question whether Citibank could require arbitration of the dispute. The superior court decided that Citibank had not waived its right to arbitrate. The court also decided that because the ability to get a public injunction cannot be waived under Alaska law, the arbitrator could issue an injunction that applied to others besides Hudson, even though the agreement said the arbitrator could only decide Hudson's claims individually. The superior court **stayed** the lawsuit (put it on hold) until the arbitration was complete. The judge decided to do the same thing in Stewart's case.

Because the lawsuit was not over — the superior court stayed it until the arbitration was completed — the parties did not have a right to appeal their case to the Alaska Supreme Court. Instead they asked the Alaska Supreme Court to review several issues. (The Alaska Rules of Appellate Procedure give the Supreme Court discretion to review issues before a final judgment is entered in a case.) The Supreme Court decided to review the issues of waiver and non-party injunctive relief.

LEGAL ISSUES GENERALLY

An appeal is an opportunity for a person who has lost his lawsuit in the **trial court** to ask an **appellate court** to look at the trial court decision for errors. In Alaska, parties in most **civil** lawsuits have a right of appeal to the Alaska Supreme Court after the trial court issues a final judgment. Sometimes the parties in a lawsuit can **petition** (ask) the Alaska Supreme Court to review legal issues before the trial court has issued a final judgment, but the Supreme Court does not have to look at the issues. When the Supreme Court agrees to review legal questions before a final judgment has issued, it limits its review to the issues it has agreed to look at. It will not decide other issues. In this case, the Supreme Court only agreed to consider three questions.

Waiver of Right to Request Arbitration

One of the functions of the court system in our society is to resolve disputes between people. The court system is the branch of government that has been delegated general power to apply the law to disputes between two or more people or entities. (Some administrative agencies in the executive branch can resolve some disputes, but we are not concerned with administrative agencies here.) People can also agree to resolve their disputes privately, in other ways, and one alternative dispute resolution process is **arbitration**. In arbitration, an **arbitrator**, who is a neutral third party, acts in a manner similar to a judge — she hears the parties' evidence and arguments and issues a decision that is binding on the parties. Arbitrators often have some training or experience or both in the subject matter in which they provide arbitration services. Arbitration can be less expensive than litigation (going to court), and it can also be faster. But there is no right to appeal an arbitrator's decision and courts do not generally want to second-guess

arbitrators, so if a party to an arbitration feels that the arbitrator got it wrong, there is little he can do. Also, an arbitrator does not have the same enforcement power that a court does; for example, an arbitrator cannot issue a **writ of execution**, an order that permits a judgment creditor to seize a judgment debtor's property.

In this case the consumers want the court to hear their case because they want an injunction that prevents the credit card companies and their attorneys from getting attorney's fees in other cases in the same manner they used in these cases. They want the court to hear their cases as **class actions**, which are cases in which an individual represents the interests of many people.

Ultimately this case is about understanding a **contract** between the credit card company and two consumers. A **contract** is an agreement in which one person agrees to do something in exchange for some benefit. A contract can be either oral or written. Contracts are generally governed by the **common law**, or judge-made law. At common law there are defenses to formation and enforcement of contracts. Some defenses to contract formation can result in a decision that the contract was **void**, which means that it legally never existed.

The principle of freedom of contract is important in our legal system, and the U.S. and Alaska Constitutions both prohibit laws that impair the obligation of contracts. In this case, the consumers entered into a contract with a credit card company. In exchange for getting the credit card, which lets the consumers purchase things they might not otherwise be able to afford, the consumers agreed to all of the things in their cardholder agreements. The part of the cardholder agreement that is in dispute in this case is the arbitration clause, which says that either the cardholder or the credit card company can ask for **arbitration** when there is a dispute. If either party asks for arbitration, both parties give up their right to bring a lawsuit in court. The agreement in this case also says that the arbitrator can only decide the individual cardholder's claims, so the arbitrator cannot award relief to a whole class of people, even if they all have the same basic claim.

Even though two people have agreed to something in a contract and the contract is valid, they can **waive** (give up) their right to enforce a part of the contract. Waivers can be express or implied. An express waiver is a statement agreeing to give up a right. An **implied waiver** happens when a party to a contract acts in a way that makes others think he is giving up the right. The dispute in this case about waiver is whether the credit card companies and their attorney gave up their right to request arbitration by suing the cardholders in court. The parties dispute whether federal law or Alaska law applies to the waiver question; they also dispute whether the companies met the legal standard for waiver. Because the trial court decided the case without an evidentiary hearing, the parties also dispute the **standard of review**, which is the level of scrutiny the appellate court applies to the trial court's decision.

Cardholders' Position: The cardholders argue the Supreme Court should

review the waiver issue **de novo**, which means that it gives no deference to the trial court. They argue that Alaska law applies to the waiver issue and that the companies have impliedly waived their right to request arbitration by bringing the collection lawsuits. They argue that under Alaska law they do not have to show **prejudice** (damage to their legal rights). According to the cardholders, by bringing lawsuits instead of seeking arbitration on the debts, the companies and their attorney showed that they were not interested in using an alternative dispute resolution forum; they were happy with the court. They also argue that if they have to show prejudice, they have been prejudiced by the court judgments entered against them.

Attorney's Position: The attorney argues that federal law rather than state law applies because under the Supremacy Clause of the United States Constitution, the **Federal Arbitration Act**, a federal statute enacted in 1925, is controlling. The attorney also argues that under federal law, the cardholders have to show prejudice. According to the attorney, the companies and he did not act in any way that was inconsistent with their right to arbitrate, and even if they had, the cardholders have not shown prejudice. He asserts that he did not need to ask for arbitration before suing because there was no underlying dispute about the debt.

Companies' Position: The companies argue first that the arbitrator, not the court, should decide the question of waiver. They argue that the standard of review is **clear error**, which is a deferential standard of review. The companies agree with the attorney that federal law governs the issue of waiver, and they argue that they have taken no action that was inconsistent with their right to arbitrate. They also argue that there is no prejudice to the cardholders from arbitrating their claim about attorney's fees.

Scope of Waiver

The parties also dispute whether the UTPA (the Unfair Trade Practices and Consumer Protection Act) claims the cardholders are making are related closely enough to the collection actions to be within the scope of any waiver of the right to arbitrate.

Cardholders' Position: The UTPA claims arise from the same facts and cause of action as the collection action. Because the companies waived their right to arbitrate by bringing a lawsuit on the debts, they have waived their right to arbitrate the closely related question of the manner in which they asked for attorney's fees in the collection lawsuits.

Attorney's Position: The right to ask for arbitration did not come into effect until the cardholders filed the UTPA lawsuit because there was no disagreement to be resolved before that. The issues raised in the lawsuits

and the relief the cardholders are seeking are so different from the underlying debt collection action that the credit card companies or the attorney could have asked for arbitration even if the cardholders had participated in the debt collection lawsuits and brought the claims up there.

Companies' Position: Because the cardholders brought their UTPA claims as separate lawsuits after the end of the court cases about the underlying debts, the issues are sufficiently different that any waiver does not cover the UTPA claims.

Injunctive Relief

The last question the Alaska Supreme Court agreed to consider is whether a private arbitrator has the authority to issue statewide injunctions under the UTPA. Understanding this question requires some background explanation. The UTPA is consumer protection legislation that was enacted in 1970. The UTPA provides protection to consumers by making a long list of actions unlawful in consumer transactions. One of the UTPA's purposes was to allow consumers to bring to court small claims that it otherwise might not be worthwhile to pursue; it permits a court to award three times actual damages or damages of \$500, whichever is greater, when there is a violation of the UTPA. Many states have laws similar to Alaska's UTPA.

One provision of the UTPA that was added later is called the private attorney general provision. An **attorney general** is a lawyer who represents the government in court and provides legal advice to the executive branch of government. Attorneys general can bring legal action on behalf of the public to protect the public. For example, many state attorneys general joined to sue tobacco companies for damages related to harm from cigarette smoking. Because the resources of the attorney general's office may not be adequate to bring all lawsuits that have merit, the legislature decided to permit private individuals to bring lawsuits under the UTPA challenging a business practice that may violate the UTPA. The UTPA permits a court to issue an order disallowing a practice that a business engages in; that order can apply to others besides the person who brought the lawsuit. To protect consumers even more, the legislature said that some parts of the UTPA cannot be waived in a contract; in other words, a consumer cannot be forced to agree to give up the protections of the UTPA.

The Federal Arbitration Act (FAA) was enacted by the United States Congress in 1925 to encourage arbitration and to counteract negative treatment of arbitration agreements by courts. The FAA requires a court to honor arbitration agreements, but it also says that any "generally applicable" state law defenses to contracts can make a contract for arbitration unenforceable. The United States Supreme Court decided in *AT&T Mobility LLC v. Concepcion*, a case that came from California, that an arbitration clause that prohibited class claims was valid even if state law, as interpreted by the California Supreme Court, did not allow waiver of class action claims. The parties in this case dispute how broadly

the rule in *Concepcion* applies.

The trial court in Hudson's case decided that the arbitration clause permitting the arbitrator to decide the cardholders' claims only on an individual basis was not enforceable under Alaska state law because of the non-waiver provision of Alaska's UTPA. It decided that the agreement would be unenforceable as written, so the court **reformed** (changed) the contract to make it valid under state law; the court decided that the arbitrator could award public injunctive relief under the UTPA if the arbitrator thought it was needed.

None of the parties agreed with this part of the trial court's order, but they have different reasons for disagreeing with the order.

Cardholders' Position: The cardholder agreements only allow for individual claims, and it would be unfair to consumers who did not agree to arbitration to let a private arbitrator decide their claims. Private arbitration is naturally incompatible with a public injunction because a public injunction requires the forum that issued the injunction to have continuing jurisdiction (to continue to be able to rule on the injunction and monitor whether people are complying with it). Also, an arbitrator's award does not have precedential value because it is a private dispute resolution mechanism.

Attorney's Position: First, the UTPA does not apply to banks or lawyers. As a general matter, an arbitrator has the authority to issue a public injunction, but only when the parties to the contract agree to it. The parties to this contract did not agree to allow an arbitrator to decide any issue except individual issues. Because arbitration is a private contractual right, the parties can decide what issues an arbitrator can and cannot decide, and the court has to enforce the agreement as written.

Companies' Position: The parties to this contract agreed to arbitrate only individual claims. Federal law in favor of arbitration **preempts** (displaces) the UTPA provision here, so the cardholders cannot get the relief they are seeking. An arbitrator only has the power to resolve disputes that the parties to the contract agreed to. Here, the parties agreed that the arbitrator could only decide individual claims, so the arbitrator cannot issue a public injunction.

QUESTIONS FOR STUDENTS TO CONSIDER

1. Look in the excerpts of record in this case and find the contract between the parties. Who wrote it? Identify some of the things each party agreed to do in the contract.

2. What are some ways you can tell whether someone has agreed to a contract? How did Hudson agree to the arbitration provision? Did she have any choice in agreeing to it? Explain your answer.
3. Freedom of contract is based in part on the idea that people should be free to organize their own affairs as they see fit without interference from others, but it also assumes that the people who enter into a contract have somewhat equal bargaining power. Do you think the parties to this contract had similar bargaining power? What could a consumer do if she did not like the terms of the contract?
4. Two statutes are discussed in this case, the Federal Arbitration Act and the Alaska Unfair Trade Practices and Consumer Protection Act. Who enacted these laws and when? What do you think are some of the reasons these laws were enacted?
5. Why does the Federal Arbitration Act apply to this case? Who can change what the Federal Arbitration Act says? Why would someone want to change it?
6. What are some policy reasons for enacting the UTPA? What are policy reasons for enacting the Federal Arbitration Act? Do you think these policies conflict? Why or why not?
7. Alaska is unusual among the states of the United States in awarding attorney's fees in most lawsuits. What do you think of Alaska's Civil Rule 82, which awards attorney's fees? Whom does the rule help? Can you think of situations when it might not be fair to make someone pay the other side's attorney's fees?
8. Why do you think the cardholders sued the credit card companies if the only thing they are complaining about in their lawsuit is what their attorney did after he got a judgment?
9. Why do the cardholders think the companies waived their right to request arbitration? Do you think the subject matter of the two lawsuits is closely related? What makes them related? What makes them different?
10. What do you think is cardholder's strongest argument on appeal? What do you think is their weakest argument? Explain.
11. What do you think is the attorney's strongest argument? What do you think is his weakest argument? Explain.
12. What do you think is the credit card companies' strongest argument? What do you think is their weakest argument? Explain.
13. If you were a justice on the Alaska Supreme Court, how would you decide this

case? Explain.