IN THE SUPREME COURT OF MISSOURI
EN BANC

BEVERLEY BREWER,	)	
	)	
Plaintiff/Respondent,	)	
	)	
vs.	)	No. SC90647
	)	
MISSOURI TITLE LOANS, INC.,	)	
	)	
Defendant/Appellant.	)	

Supplemental Brief of
Appellant Missouri Title Loans, Inc.

Appeal from the Circuit Court
City of St. Louis

Hon. David Dowd
Circuit Judge

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Jurisdictional Statement

This Court has jurisdiction of this appeal pursuant to Art. V § 10 of the Missouri Constitution, having transferred the case from the Missouri Court of Appeals, Eastern District, on March 10, 2010. After transfer, the Court "review[s] the cause as though on original appeal." Buchweiser v. Estate of Laberer, 695 S.W.2d 125, 127 (Mo. banc 1985).

The case is currently before the Court on remand from the Supreme Court of the United States. On May 2, 2011, that Court granted Missouri Title's petition for a writ of certiorari, vacated this Court's original judgment, and remanded for further consideration in light of AT&T Mobility LLC v. Concepcion, 563 U.S. ___, 131 S. Ct. 1740 (2011). App. A3.

Statement of Facts

1. The Parties.

Plaintiff/Respondent Beverley Brewer (Ms. Brewer) is a citizen of Missouri. L.F. 7. In the fall of 2006, she was working as a legal secretary at the law firm then known as Husch & Eppenberger. L.F. 272. Before her employment at Husch, Ms. Brewer worked as a legal secretary at Thompson Coburn. Id.

She has substantial prior experience with the law in her personal capacity. She has on several occasions been sued by her landlords. L.F. 273. In one of those cases, she had signed a lease without reading it and hence was surprised to learn that it contained a provision for automatic renewal at an increased rent. L.F. 273-74.

Missouri Title Loans, Inc. (Missouri Title) is a Missouri corporation licensed by the Division of Finance as:

- A consumer credit loan company under § 367.100, R. S. Mo.
- A small loan company under § 408.500, R. S. Mo. et seq.
- A title loan lender under § 367.500, R. S. Mo. et seq.

L.F. 45-46. As such, Missouri Title offers a variety of statutorily authorized loans to consumers.

2. The Loan.

In the fall of 2006, Ms. Brewer needed money to purchase Christmas presents. L.F. 276. She searched the internet to determine what her options were

and located approximately 20 different lenders. L.F. 276-77. From those 20, she selected three, including Missouri Title, for follow-up. L.F. 277-77A. She could have chosen any one of the 20 as her lender. L.F. 277A.

On December 12, 2006, Ms. Brewer chose to borrow $2,215 from Missouri Title for thirty days. The finance charges were $564.37. The loan was secured by the title to Ms. Brewer's 2003 Buick Rendezvous. To document the transaction, she signed a loan agreement, promissory note and security agreement. L.F. 277B-77C; 287-88.

Ms. Brewer had an opportunity to read the proposed contract before signing it, and Missouri Title made no effort to discourage her from doing so. L.F. 270; 277C. Despite her previous experience with unread leases, Ms. Brewer decided that she did not need to read the proposed title loan contract. L.F. 277D.

The loan agreement contained an arbitration clause acknowledging that the transaction involved interstate commerce "under the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.)." It further provided that "[a]ny and all disputes, controversies or claims . . . arising out of or related to" the agreement would "be decided by binding arbitration under the FAA" in accordance with American Arbitration Association (AAA) rules. L.F. 288.

The arbitration clause provided that the parties would each be responsible for their own expenses but it in no way purported to limit the power of the arbitrator to award statutory attorneys' fees. Both AAA's Consumer Rule C-7(c) and its Consumer Due Process Protocol, No. 14, require the arbitrator to apply

applicable substantive law and empower the arbitrator to grant the same relief and remedies that would be available in court. In bold print and capital letters, the agreement further provided that Ms. Brewer "waives any right" to litigate before a court or a jury and she agreed not to "participate in a class action or a class-wide arbitration." L.F. 288. Immediately before the signature line, in capital letters and bold face, the agreement recites that it "contains a binding arbitration provision that may be enforced by the parties." Id.

The petition alleges a variety of statutory violations in Ms. Brewer's loan, including a violation of the Missouri Merchandising Practice Act (MMPA), all of which are subject to individual arbitration under the terms of the arbitration clause. The exact nature of those violations is irrelevant to this appeal, which concerns the forum in which the case will be heard rather than the merits. What is relevant to this appeal is the prayer for, and availability of, statutory attorneys' fee under the MMPA. L.F. 133; 149.

3. Proceedings Below.

This action was originally filed by Althea Peete. L.F. 2. In amended pleadings, Ms. Brewer joined the lawsuit as a party plaintiff and Ms. Peete ultimately withdrew. L.F. 11. Count I of the various petitions sought a declaratory judgment that the class waiver was unconscionable. The other counts sought to certify a class of Missouri Title borrowers as redress for the alleged statutory violations.

The trial court conducted a hearing on the merits of Count I. At that hearing, Ms. Brewer argued that the class waiver was substantively unconscionable because her claim had such low actual damages that she would be unable to induce a lawyer to represent her.

The principal evidence that she adduced in support of that proposition were the depositions of three attorneys: Bernard Brown, Dale Irwin, and John Ammann. Messrs. Brown and Irwin are in private practice and represent consumers in cases involving consumer claims. Mr. Ammann runs a clinical program at St. Louis University Law School representing consumers in such cases. This Court's opinion in Brewer I summarizes the predictions of each witness:

- Mr. Ammann testified that "it would be very hard, 'if not impossible,' for a consumer to find counsel."
- Mr. Brown testified that "it would be 'exceedingly difficult,' if not 'outright rare,' to find representation for individual claims."
- Mr. Irwin testified that "the likelihood of an individual finding an attorney to represent him or her was 'virtually nil.'"

323 S.W.3d at 23. Mr. Irwin did not discuss the four individual low-dollar consumer claims he has personally prosecuted in the United States District Court for the Western District of Missouri: McCallister v. A&S Collections Associates, Inc., No. 4:99-cv-01156; Clark v. D.A.N. Joint Venture III, L.P, et al., No. 4:05-cv-1191; Davis v. Landmark Dodge, Inc., No. 4:06-cv-145; Chernoff v. Nationwide Credit, Inc., No. 4:07-cv-301.

The trial court entered judgment for Ms. Brewer on Count I of her petition, finding that the class waiver was unconscionable. The trial court struck the class waiver and directed the parties to arbitration. Pursuant to Rule 74.01(b), the trial court designated its judgment on Count I as final and this appeal followed.

Missouri Title submits this supplemental brief in accordance with the Court's order of May 31, 2011. App. A4.

Points Relied On

I. The Trial Court Erred In Refusing To Enforce Brewer's Arbitration Clause On An Individual Basis, Because The FAA Preempts Missouri's Common Law Of Unconscionability, In That Such Law Frustrates The Overriding Federal Interest In Enforcing Arbitration Agreements As Drafted.

AT&T Mobility LLC v. Concepcion, 563 U.S. ___, 131 S. Ct. 1740 (2011).

II. The Trial Court Erred In Refusing To Enforce Brewer's Arbitration Clause On An Individual Basis, Because The Clause Is Not Unconscionable, In That Statutory Attorneys' Fees Do Make It Possible For Consumers With Low-Dollar Claims To Obtain Counsel.

American Civil Liberties Union v. Miller, 803 S.W.2d 592 (Mo. banc) (Blackmar, J., dissenting), cert. denied, 500 U.S. 943 (1991);

Perdue v. Kenny A., __ U.S. __, 130 S. Ct. 1662 (2010);

Drahozal, "Arbitration Costs and Contingent Fee Contracts," 59 Vand. L. Rev. 729 (2006).

Argument

I. The Trial Court Erred In Refusing To Enforce Brewer's Arbitration Clause On An Individual Basis, Because The FAA Preempts Missouri's Common Law Of Unconscionability, In That Such Law Frustrates The Overriding Federal Interest In Enforcing Arbitration Agreements As Drafted.

AT&T Mobility LLC v. Concepcion, 563 U.S. ___, 131 S. Ct. 1740 (2011), holds that the FAA preempts state laws that find arbitration clauses unconscionable if they fail to provide for class arbitration. The opinion expressly rejected not only the holding in Brewer v. Missouri Title Loans, Inc., 323 S.W.3d 18 (Mo. banc 2010) (Brewer I), but also its rationale. In light of Concepcion, this Court should reverse the trial court's order and remand with instructions to arbitrate Ms. Brewer's individual claim.[1]

The majority opinion in Brewer I held that the class waiver was substantively unconscionable, because no attorney would be likely to accept an individual, low-dollar consumer case. According to the majority, this alleged "inability to retain counsel leaves the consumer with no meaningful avenue of redressing" his or her claims. 323 S.W.3d at 23, citing Discover Bank v. Superior

[1] This Point presents a pure question of law which this Court reviews de novo. Delta Airlines, Inc. v. Director of Revenue, 908 S.W.2d 353, 355 (Mo. banc 1995).

Court, 30 Cal. Rptr. 3d 76 (Cal. 2005). Given the "unavailability of class arbitration under the FAA," the "entire arbitration agreement" is unconscionable and the "only way to remedy" it is to "strike the entire arbitration agreement." Id. at 24.

None of this analysis survived Concepcion. In that case, both the District Court and the Ninth Circuit reached exactly the same conclusion as Brewer I: the inability to proceed with a class action made the arbitration clause unconscionable and hence unenforceable. Laster v. AT&T Mobility LLC, 584 F.3d 849, 853 (9th Cir. 2009), aff'g 2008 WL 5216255 (S.D. Cal. 2008). Like Brewer I, both opinions relied heavily on Discover Bank. 584 F.3d at 854-56; 2008 WL 5216255 at *8-10.[2]

The Supreme Court of the United States reversed. It first noted that the FAA preempts "generally applicable contract defenses" if they "stand as an obstacle to the accomplishment of the FAA's objectives." 131 S.Ct at 1748. It

[2] Under Discover Bank, a class action waiver in an arbitration agreement is unconscionable if: (a) the agreement is a consumer contract of adhesion drafted by a party with superior bargaining power; (b) the agreement occurs in a setting in which disputes between the contracting parties predictably involve small damages; and (c) plaintiff alleges that the party with the superior bargaining power has carried out a scheme deliberately to cheat large numbers of consumers out of individually small sums of money. 30 Cal. Rptr. 3d at 87.

then held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA" Id. Therefore, "California's Discover Bank rule is preempted by the FAA." Id. at 1753.

Concepcion also specifically rejected the rationale of Brewer I. The Court acknowledged the dissent's concern in Concepcion that "class proceedings are necessary to prosecute small-dollar claims." 131 S. Ct. at 1753. The Court rejected that concern, because "states cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." Id.

In the Concepcion majority's view, this result was essential to fulfill the purposes of the FAA. "The principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms." 131 S. Ct. at 1748 (internal punctuation omitted). Another important objective is to encourage "efficient and speedy dispute resolution." Id. at 1749. Refusing to enforce arbitration agreements that do not permit class arbitration "would frustrate *both*" of these goals. Id. (emphasis original).

Pursuant to Concepcion, an arbitration agreement that bars class-wide arbitration is valid and enforceable under the FAA, even if such an agreement is unconscionable under state law or violates state public policy. Even before Concepcion, the Supreme Court of the United States had admonished that the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,

460 U.S. 1, 20 (1983) (emphasis original). Accord, Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985) ("[t]he preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation").

Concepcion also took note of the "judicial hostility towards arbitration" which "manifested itself in a great variety of devices and formulas declaring arbitration against public policy." 131 S. Ct. at 1747 (internal punctuation omitted). And it observed that "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." Id.

The same appears to be true of some Missouri courts. Since 2000, Missouri appellate courts have issued twelve published opinions in which a party argued that an arbitration clause was unconscionable.[3] In ***eleven*** of those twelve cases, courts found the clause to be unconscionable in whole or in part. In non-arbitration cases, the proportion was almost exactly the opposite: ten out of twelve appellate courts rejected an argument that the contract was unconscionable.

Similarly, most Missouri cases discussing unconscionability require both procedural and substantive unconscionability. The two cases holding that substantive unconscionability alone suffices each involved arbitration clauses.

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[3] Missouri cases discussing unconscionability are identified in the Appendix. App. A5.

Brewer I, 323 S.W.3d at 22; Ruhl v. Lee's Summit Honda, 322 S.W.3d 136, 139 n.2 (Mo. banc 2010). Like California, Missouri courts do not address the unconscionability of arbitration clauses under the same standards applicable to other contracts.

Concepcion rejects the result reached in Brewer I and expressly overrules one of its primary authorities, Discover Bank. Concepcion specifically rejects the rationale of Brewer I and adopts a rationale diametrically opposed to it. Holding an arbitration clause unconscionable because it does not permit class arbitration "would frustrate *both* of" the FAA's objectives: "enforcement of private agreements and encouragement of efficient and speedy dispute resolution." 131 S. Ct. at 1749 (emphasis original). "Because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Brewer I "is preempted by the FAA." Id. at 1753 (internal punctuation omitted).

The Court must be aware of the implications of Brewer I. The absence of meaningful judicial review of an arbitration award, Concepcion, 131 S. Ct. at 1752, means that no properly-advised company will ever consent to class arbitration. Thus, arbitration clauses will be unenforceable in any case in which plaintiff can plausibly allege that a class action is necessary to induce lawyers to take the case. That is likely to include most consumer cases and many employment cases.

Some might regard that as an acceptable outcome. But it is fundamentally at odds with the settled policy of the FAA as declared by the Supreme Court of the

United States in Concepcion. Concepcion and Brewer I simply cannot co-exist. Brewer I held that, "as there is no affirmative agreement to class arbitration, the class action must proceed in court." 323 S.W.3d at 21. Concepcion holds exactly the opposite: the federal interest in arbitration trumps the state interest in class actions. The FAA preempts state law that conditions the enforcement of an arbitration clause on the availability of class procedures. 131 S.Ct at 1748 ("[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA").

The FAA creates a body of federal substantive arbitration law that is binding on state and federal courts alike, and the federal statute preempts inconsistent state law. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272-73 (1995); Southland Corp. v. Keating, 465 U.S. 1, 15-16 (1984). Cf. In re Arrington, 270 S.W.2d 39, 44 (1954) ("as to the area . . . covered by the Federal statute, . . . Missouri . . . itself . . . recognizes the supremacy of the action taken by the Congress in the field preempted" and "we must follow the Federal statute and the rulings of the United States courts"). As a result, the Court should reverse the trial court's judgment and remand with instructions to dismiss the action, or stay the action, pending the arbitration of Ms. Brewer's individual claim.

II. The Trial Court Erred In Refusing To Enforce Brewer's Arbitration Clause On An Individual Basis, Because The Clause Is Not Unconscionable, In That Statutory Attorneys' Fees Do Make It Possible For Consumers With Low-Dollar Claims To Obtain Counsel.

Wholly apart from Concepcion, the Court must reverse the trial court's judgment, because its premise – that statutory attorneys' fees will not attract lawyers to individual low-dollar claims – is false.[4] Brewer I squarely acknowledges that some arbitration clauses are enforceable even if they do not provide for class arbitration. 323 S.W.3d at 21:

> It is only when the practical effect of forcing a case to individual arbitration is to deny the injured party a remedy – because a reasonable attorney would not take the suit if it could not be brought on a class basis either in court or through class arbitration – that a requirement for individual arbitration is unconscionable.

Id.

The explicit premise of Brewer I, therefore, is that consumers with low-dollar claims will be unable to secure legal counsel for their individual claims, despite the attorneys' fee provisions in virtually all consumer protection statutes.

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[4] "The question of whether or not McBride's motion to compel arbitration should have been granted is one of law, to be decided de novo." State ex rel. Vincent v. Schneider, 194 S.W.3d 853, 856 (Mo. banc 2006).

323 S.W.3d at 23. The only basis for that finding is the self-serving testimony of three plaintiff's expert-witness/consumer lawyers speculating, with no reasonable basis, that attorneys will not accept individual claims like Ms. Brewer's. The judicial records of the state and federal courts in Missouri directly refute this theory.

The purpose of a statutory attorneys' fee award is to provide lawyers "with incentive to prosecute" cases that "they would otherwise be unable or unwilling to afford." American Civil Liberties Union v. Miller, 803 S.W.2d 592, 598-99 n.8 (Mo. banc) (Blackmar, J., dissenting), cert. denied, 500 U.S. 943 (1991), quoting Ramos v. Lamm, 713 F.2d 546, 552 (10th Cir. 1983). Accord, Perdue v. Kenny A, ___ U.S. ___, 130 S. Ct. 1662, 1672 (2010) ("a 'reasonable' fee is a fee that is sufficient to induce a capable attorney to undertake the representation").

Thus, "an award of attorney's fees may be proper even if the prevailing party suffered only nominal damages." Turner v. Shalberg, 70 S.W.3d 653, 660 (Mo. App. 2002). Accord, Gilliland v. Missouri Athletic Club, 273 S.W.3d 516, 523 (Mo. banc 2009) ("[i]n human rights cases, the amount of the verdict or judgment may have little bearing on the amount of attorneys' fees").

Accordingly, an attorneys' fee statute makes it possible for individuals to prosecute claims that otherwise might not make economic sense. It thus satisfies one "fundamental objective" of class actions: "to allow numerous small claimants to join together and sue as one where pursuit of their individual claims would otherwise be impractical." 2 Newberg on Class Actions, § 4:40 at 321 (4th Ed.

2002). Accord, Hale v. Wal-Mart Stores, Inc., 231 S.W.3d 215, 222 (Mo. App. 2007) (class actions "allow a remedy for those for whom it would be unrealistic to expect to resort to individual litigation"); Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights").

In short, the availability of statutory attorneys' fees fundamentally alters the calculus on whether attorneys will take small-dollar cases. As one leading scholar put it:

> The prospect of a fee recovery may make even a case seeking small monetary damages attractive to an attorney. Thus, in evaluating the amount at stake in arbitration (and thus whether the claim is economical to bring), a court must consider not only the damages sought by the claimant but also any possible attorneys' fee recovery.

Drahozal, "Arbitration Costs and Contingent Fee Contracts," 59 Vand. L. Rev. 729, 772 (2006).

The empirical evidence confirms this common sense conclusion. There are many examples of cases in which a sizeable attorneys' fee was awarded even though the plaintiff's individual recovery was relatively small.[5] Moreover, the

[5] See, e.g., Dee v. Sweet, 218 Ga. App. 18, 460 S.E.2d 110 (1995) (awarding $258,360 in attorneys' fees and $1.00 in actual damages); Ex parte Edwards, 601

overwhelming majority of federal Truth in Lending Act (TILA) lawsuits filed each year are individual (not class action) lawsuits, even though the vast majority of suits involve small-dollar claims and although TILA permits class actions.

TILA allows actual damages; statutory damages not materially larger than the $4,500 at issue here and in most cases considerably smaller; and attorneys' fees. 15 U.S.C. § 1640(a). In order to recover actual damages, however, a TILA plaintiff has to prove detrimental reliance – i.e., a causal link between the lender's non-compliance and the borrower's injuries. Turner v. Beneficial Corp., 242 F.3d 1023, 1028 (11th Cir.), cert. denied, 534 U.S. 820 (2001). For these reasons, an award of actual damages under TILA is rare.

So. 2d 82 (Ala. 1992) ($43,000 in attorneys' fees regarding $2,544 note); Johnson v. Eaton, 958 F. Supp. 261, 264 (M.D. La. 1997) ($13,410 fee award, nearly 27 times damage award); Ratner v. Chemical Bank N.Y. Trust Co., 54 F.R.D. 412, 416 (S.D.N.Y. 1972) ($20,000 attorney fee; $0 actual damages and $100 of statutory damages); Vandzura v. C&S Adjusters, Inc., No. 95-2540, 1997 U.S. Dist. LEXIS 1254 (E.D. Pa. Feb. 10, 1997) ($500 in statutory and actual damages and **$**14,735.02 in attorneys' fees and costs); Nelson v. Select Fin. Services, Inc., No. 05-3473, 2006 U.S. Dist. LEXIS 42637 (E.D. Pa. June 8, 2006) ($1,000 in statutory damages and $24,693.80 in attorneys' fees and costs).

Nevertheless, the inability to obtain substantial actual damages has not deterred the filing of numerous individual TILA cases, as the following table proves:

Year	Total Cases	Class Actions	Individual Actions
2002	576	37	539
2003	513	39	474
2004	574	20	554
2005	492	19	473
2006	688	17	671
2007	705	40	665
2008	784	51	733
2009	1,360	40	1,320
2010	945	17	928

Source: LexisNexis CourtLink database.

The statistics do not reflect what percentage of these individual cases was filed *pro se* and what percentage involved private counsel. But surely, a substantial fraction of them have private counsel. The relatively small number of class actions is clear empirical evidence that the attorneys' fee provisions of TILA work as Congress intended, in incentivizing lawyers to take the low-dollar cases.

There is more direct evidence in cases involving the federal Fair Debt Collection Practices Act (FDCPA). Counsel to Missouri Title subscribes to a

daily on-line service listing the kinds of cases filed in the United States District Court for the Eastern District of Missouri, as well as the parties and the plaintiff's counsel. Between July 1, 2010 and December 16, 2010, private counsel filed 99 FDCPA cases on behalf of individual plaintiffs in that one judicial district. There was one FDCPA class action during that period in the Eastern District of Missouri.

Counsel subscribes to a similar service listing the kinds of cases filed in the United States District Court for the Western District of Missouri in Kansas City and in Jackson County. Between November 1, 2010 and May 17, 2011, there were a total of 60 individual unfair debt collection cases filed by private counsel.

A Westlaw search covering just the last two years produced three published opinions from federal judges in Missouri involving low-dollar FDCPA claims in which the plaintiff was represented by private counsel. Thomas v. Consumer Adjustment Co., 579 F. Supp. 2d 1290 (E.D. Mo. 2008) (four phone calls over a $295 debt); Wells v. Southwestern Bell Tel. Co., 626 F. Supp. 2d 1001 (W.D. Mo. 2009) (plaintiff paid $72.94 in disputed charges and was the subject of harassing phone calls); Eckert v. LVNV Funding LLC, 647 F. Supp. 2d 1096 (E.D. Mo. 2009) (disputed credit of $1,297.03).

Missouri courts have had the same experience with low-dollar claims under the MMPA. In Wages v. Young, 261 S.W.3d 711 (Mo. App. 2008), private counsel represented plaintiff in an MMPA claim over an $1,800 auto repair. In Kirby v. Grand Crowne Travel Network, LLC, 229 S.W.3d 253 (Mo. App. 2007), private counsel represented plaintiffs in a dispute over $3,389 in actual damages.

The court of appeals enforced the arbitration clause, albeit reluctantly. In Walsh v. Al West Chrysler, Inc., 211 S.W.3d 673 (Mo. App. 2007), private counsel filed an MMPA claim in which plaintiffs had sustained no benefit of the bargain damages and sought only the value of their time in searching for another vehicle. In Woods v. Mehlville Chrysler-Plymouth, Inc., 198 S.W.3d 165 (Mo. App. 2006), the MMPA dispute was over $500. Private counsel represented plaintiff in two separate lawsuits over this sum.

One of plaintiff's experts, Dale Irwin, testified that the likelihood of an individual finding an attorney to represent his or her interest in this kind of low-dollar case was "'virtually nil.'" 323 S.W.3d at 23. Mr. Irwin did not disclose that he personally litigates low-dollar cases in the United States District Court for the Western District of Missouri on behalf of consumers under statutes that authorize attorneys' fees to a prevailing plaintiff:

- McCallister v. A&S Collections Associates, Inc., No. 4:99-cv-01156, filed December 6, 1999. The complaint alleged a violation of the FDCPA in attempting to collect an alleged $274.87 debt. The complaint does not allege any economic damages.
- Clark v. D.A.N. Joint Venture III, L.P, et al., No. 4:05-cv-01191, filed on November 23, 2005. The complaint alleged a violation of the FDCPA in attempting to collect a time-barred debt. The only economic damages alleged are attorneys' fees in an unspecified amount.

- Davis v. Landmark Dodge, Inc., No. 4:06-cv-00145, removed from state court on February 21, 2006. The complaint alleged a violation of the Fair Credit Reporting Act, in connection with an alleged theft of credit information. It alleged no specific economic damages, just damage to reputation and time and inconvenience.
- Chernoff v. Nationwide Credit, Inc., No. 4:07-cv-00301, removed from state court on April 17, 2007. The complaint alleged a violation of the FDCPA that allegedly caused plaintiffs to incur an additional $1,000 in interest.

Moreover, Brewer I hardly reflects the parlous state of the legal economy today. The Simon Law Firm might not have taken this case on an individual basis but there are plenty of competent lawyers who would gladly accept an opportunity to earn a $10,000 or $15,000 fee.

The only authority that Brewer I cited on the effect of statutory attorneys' fees in low-dollar cases is Woods v. QC Fin. Services, Inc., 280 S.W.3d 90 (Mo. App. 2008). The Woods Court acknowledged the argument that "the availability of attorneys' fees provides a strong incentive for attorneys to take an individual's case." 280 S.W.3d at 97. But it held that remedy was "illusory if it is unlikely that counsel would be willing to undertake the representation." Id.

With all respect, that holding entirely begs the question. The issue is *whether* the availability of statutory attorneys' fees makes it likely that an attorney will take a low-value case to arbitration. The empirical evidence that Missouri

Title has submitted that private counsel regularly file such cases in courts is sufficient proof that statutory attorneys' fee provisions accomplish precisely what the legislature intended, viz., giving parties with low-dollar cases ample means to vindicate their legal rights.

The entire premise of Brewer I is that lawyers will not accept individual consumer cases. The premise is wrong. The dissent in this Court's opinion in Ruhl is correct:

> [S]ection 407.025 provides for the recovery of punitive damages and attorneys fees . . . . These additional awards specified by the legislature present further incentive for an aggrieved individual to bring suit, and they undercut the majority's rationale that class action procedures are required for an adequate remedy.

322 S.W.3d at 141 (Price, C.J., dissenting).

Conclusion

For the foregoing reasons, Missouri Title respectfully prays that the Court reverse the judgment of the trial court and remand the case with instructions either to dismiss or to stay the case pending arbitration of Ms. Brewer's individual claim.

Respectfully Submitted,

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Certificate of Compliance

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 5,452 words, exclusive of the sections exempted by Rule 84.06(b)(2) of the Missouri Supreme Court Rules, based on the word count that is part of Microsoft Office Word 2003 SP-3. The undersigned counsel further certifies that the diskette has been scanned and is free of viruses.

_____

Martin M. Green

Certificate of Service

I certify that one copy of this brief and one copy on compact disk, as required by Missouri Supreme Court Rule 84.06(g), were served on each of the counsel identified below by placement in the United States Mail, postage paid, on June __, 2011:

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