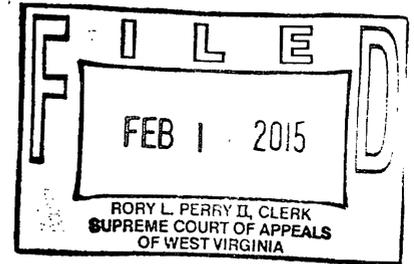


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-1215



NAVIENT SOLUTIONS, INC.,
FORMERLY KNOWN AS SALLIE MAE,
INC.
Petitioner

Appeal from an interlocutory order
of the Circuit Court of Raleigh
County (14-C-231(B))

V.)

JENNIFER ROBINETTE,
Respondent

Petitioner's Brief

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ASSIGNMENTS OF ERROR

1. Because the Application and Note constitute a single document, the trial court erred when it concluded that the promissory note section constituted a separate document that was not incorporated by the loan application.
2. Even if the loan application and promissory note were separate documents, the trial court erred when it concluded that the promissory note—including its arbitration agreement—was not incorporated by reference into the loan application.

STATEMENT OF THE CASE

Plaintiff-Respondent Jennifer Robinette (“**Robinette**”) obtained seven student loans from Navient Solutions, Inc., formerly known as Sallie Mae, Inc. (“**Navient**”) to finance her education at the University of Kentucky. (A.R. 134.)¹ The terms of each loan are identical and are set forth in the Tuition Answer Loan Application and Promissory Note (the “**Application and Note**”) Robinette executed at various times in 2006, 2007, and 2008. (*Id.* 134.) For each loan, Robinette accessed and filled out an Application and Note on Navient’s website. (*Id.* 176.) Each Application and Note was a single document that included a section for the borrower to provide information needed to make a loan decision, a section of instructions, and a promissory note. (*Id.* 176.)

Robinette signed the third page of each Application and Note. In each of those documents, there is text immediately before the signature block alerting the borrower to the promissory note that appears after the signature block. Each Application and Note provides:

1. References to the Appendix Record are set forth as “A.R. ___.”

Notice to ALL BORROWERS

- (a) Do not sign this before you read the Promissory Note even if otherwise advised.

* * *

I have read and agree to the terms of the Promissory Note accompaning this application.

* * *

The terms and conditions set forth in the Promissory Note constitute the entire agreement between us.

CAUTION – IT IS IMPORTANT THAT YOU THOROUGHLY READ THE CONTRACT BEFORE YOU SIGN IT.

(*Id.* 34, 48, 62, 76, 90, 103, 118.)

Each Application and Note contains an identical arbitration provision that provides, in relevant part:

T. ARBITRATION AGREEMENT

To the extent permitted under federal law, you and I agree that either party may elect to arbitrate – and require the other party to arbitrate – any Claim under the following terms and conditions. This Arbitration Agreement is part of the Signature Student Loan Promissory Note (“Note”).

1. **RIGHT TO REJECT:** I may reject this Arbitration Agreement by mailing a signed rejection notice to P.O. Box 147027 Gainesville, FL 32606 within 60 days after the date of my first disbursement. Any Rejection Notice must include my name, address, telephone number and loan or account number.

4. **“CLAIM”** means any legal claim, dispute or controversy between you and me that arises from or relates to in any way to this Note, including any dispute arising before the date of this Arbitration Agreement and any dispute relating to: (1) the

imposition or collection of principal, interest, attorneys' fees, collection costs or other fees or charges relating to this Note; (2) other provisions of this Note; (3) any application disclosure or other document relating in any way to this Note or the transactions evidence by this Note; (4) any insurance or other service or product offered or made available by or through you in connection with this Note, and any associated fees or charges; and (5) your methods of soliciting my business; and (6) any documents, instruments, advertising or promotional materials that contain information concerning the validity, enforceability, arbitrability or scope of this Arbitration Agreement or this Note; disputes involving alleged fraud or misrepresentation, breach of contract, or fiduciary duty, negligence or other torts, or violation of statute, regulation or common law. It includes disputes involving requests for injunctions or other equitable relief. However, "Claim" does not include any individual action brought by me in small claims court or my state's equivalent court, unless such action is transferred, removed or appealed to a different court. Also, "Claim" does not include any challenge to the validity and effect of the Class Action and Multi-Party waivers, which must be decided by a court.

(*Id.* 43, 57, 71, 85, 99, 113, 130 (emphasis in original).)

The arbitration agreements discuss the location and costs of arbitration, explain the process for starting arbitration, and explain getting additional information and the effect of an arbitration award. (*Id.*) Robinette did not send any notices of rejection with respect to the Arbitration Agreement contained in any Application and Note. (*Id.* 134.)

Despite executing the Application and Notes containing the arbitration agreements, Robinette sued Navient in the Circuit Court of Raleigh County for conduct Robinette alleged Navient took to collect amounts she owed under the Application and Notes. (*Id.* 1.) In the Complaint Robinette filed on March 12, 2014, she asserted claims for violations of the West Virginia Consumer Credit and

Protection Act, the West Virginia Computer Crime and Abuse Act, and the West Virginia Telephone Harassment Statute, as well as claims for intentional infliction of emotional distress and invasion of privacy. (*Id.*)

Navient filed a Motion to Compel Arbitration on May 30, 2014. Robinette opposed that motion solely on the ground that the arbitration agreements were not included in the Application and Notes she signed. The trial court denied Navient's Motion to Compel in an order dated October 16, 2014. Navient timely filed its Notice of Appeal on November 14, 2014.

SUMMARY OF ARGUMENT

The trial court should have compelled Robinette to arbitrate her dispute with Navient. It is undisputed that each Application and Note Robinette signed includes an arbitration agreement, and that the arbitration agreement applies to the claims Robinette asserts against Navient. Robinette did not argue in the trial court that the arbitration agreements were unconscionable or that any other defense precluded their application. Rather, Robinette argued that she did not assent to the arbitration agreements because they were contained in promissory notes separate from the loan applications she signed.

Robinette's argument fails because it rests on a false factual premise. Each Application and Note Robinette signed is a single document that includes a loan application, instructions, *and* a promissory note. The promissory note is part of the document, as is clear from the labeling of the documents and the language

immediately above the signature block, which states, in part, that “[t]he terms and conditions set forth in the Promissory Note constitute the entire agreement between us.” (A.R. 34, 48, 62, 76, 90, 103, 118.)

Even if the promissory note were a separate document, the loan application incorporates the promissory note by reference, thus making the arbitration agreement part of the agreements Robinette signed. In accordance with West Virginia law, the loan application makes a clear reference to the promissory note, describes the promissory note in such terms that its identity may be ascertained beyond doubt, and includes language to ensure that Robinette knew of and assented to the terms of the promissory note. Accordingly, this Court should reverse the trial court’s order and compel Robinette to arbitrate her claims against Navient.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Navient respectfully requests oral argument under Revised Rules of Appellate Procedure 19, because this Petition involves assignments of error in the application of settled law.

ARGUMENT

1. **Because the Application and Note constitute a single document, the trial court erred when it concluded that the Promissory Note section constituted a separate document that was not incorporated by the Loan Application.**

An order denying a motion to compel arbitration “is subject to immediate appeal under the collateral order doctrine.” *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 525, 745 S.E.2d 556, 563 (2013). This Court reviews de novo a trial court’s order denying a motion to compel arbitration. *Front*, 745 S.E.2d at 563.

Agreements to arbitrate are enforceable under the Federal Arbitration Act. 9 U.S.C. § 2. This Court has interpreted the Federal Arbitration Act to mean that an agreement “to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract.” *New v. GameStop, Inc.*, 753 S.E.2d 62, 69 (W. Va. 2013) (citations and internal quotation marks omitted). Robinette acknowledges in her Complaint that her transaction with Navient was an interstate transaction. (A.R. 3.) Further, Robinette and Navient agreed that their “Arbitration Agreement is made pursuant to a transaction involving interstate commerce and shall be governed by the FAA” (*Id.* 44, 58, 72, 86, 100, 114, 132.) Courts should enforce choice-of-law clauses in arbitration agreements. *Volt Information Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

Under the Federal Arbitration Act, courts should “treat arbitration agreements like any other contract.” *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 232 W. Va. 341, 356, 752 S.E.2d 372, 387 (2013). Therefore, “private agreements to arbitrate are enforced according to their terms.” *Ocwen Loan*

Servicing, 752 S.E.2d at 387. Courts may apply general contract defenses to invalidate arbitration agreements. *State ex rel. Richmond Am. Homes of W. Virginia, Inc. v. Sanders*, 228 W. Va. 125, 129, 717 S.E.2d 909, 912 (2011). But courts may not apply the law of contracts in a way that disfavors arbitration. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011).

Further, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration,” and “the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24–25 (1991). Therefore, courts should order arbitration of claims “unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *AT&T Technologies, Inc. v. Communication Workers of Am.*, 475 U.S. 643, 650 (1986) (citation and internal quotation marks omitted). “In [the] absence of any express provision excluding a particular grievance from arbitration . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.” *Id.*

Robinette has not argued that the arbitration agreements are unconscionable or that any other generally applicable contract defense precludes their application. Nor does Robinette contest that her claims against Navient fall within the scope of the Arbitration Agreements. Rather, the sole basis upon which Robinette resisted arbitration in the trial court was her contention that the promissory notes

containing the arbitration agreements were separate from and not incorporated within that loan applications she signed.

Robinette's argument fails because the Application and Note were presented to Robinette as one document. Robinette initiated the application for each loan she received by accessing the Application and Note on Sallie Mae's website. (A.R. 176.) Each Application and Note is a single document with three sections. The first section is the application, a three-page section that requests information from the borrower and includes a signature page. (*Id.* 172.) The second section consists of three pages of instructions, ending in an application checklist. (*Id.*) The third section is the promissory note. (*Id.*) The Application and Note contains text in the right margin of each page reading, "Tuition Answer Loan Application and Promissory Note," and includes the academic year for the loan. (*Id.*)

Thus, it is clear to any borrower that the Application and Note consists not only of a loan application, but also a promissory note. In fact, the Application and Note cautions the borrower not to sign until she reads the promissory note. (*Id.* 34, 48, 62, 76, 90, 103, 118.) The Application and Note also requires the borrower to affirm, "I have read and agree to the terms of the Promissory Note accompanying this application," and to acknowledge that "[t]he terms and conditions set forth in the Promissory Note constitute the entire agreement between us." (*Id.*)

The trial court concluded that the promissory note was a separate document from the application because "the loan application pages are numbered 1 through 3, and the Promissory Note begins anew at page 1." (*Id.* 221.) But the trial court's

statement is factually incorrect. While the page numbering begins anew after the three-page application, the page numbers do not begin on the promissory note but, instead, on the instructions for the application. (*Id.* 35, 49, 63, 77, 91, 105, 120.) Because the instructions for the loan application are unquestionably part of the same document as the application, the change in page numbers has no significance.

Further, the text in the right margin of each page of the Application and Note reads, “Tuition Answer Loan Application and Promissory Note,” and includes the academic year for the loan. (*Id.* 32-93, 102-107, 116-118, 120-122.) That labeling further makes it clear that the Application and Note is a single document.

The trial court, however, reasoned that the references in the loan application to the promissory note “would not be necessary if the loan application and Promissory Note were the same document.” (*Id.* 221.) But it is not unusual for one document to contain references to other parts of the document. Further, as explained in the following section, even if the promissory note is separate from the loan application, the loan application clearly incorporates the promissory note by reference.

- ii. **Even if the loan application and promissory note are separate documents, the trial court erred when it concluded that the promissory note—including its arbitration agreement—was not incorporated by reference into the loan application.**

Under West Virginia law, “parties may incorporate into their contract the terms of some other writing.” *State ex rel. U-Haul Co. of W. Virginia v. Zakaib*, 232 W. Va. 432, 441, 752 S.E.2d 586, 595 (2013). There are three requirements a written agreement must meet to incorporate by reference the terms of another agreement:

(1) the writing must make a clear reference to the other document so that the parties' assent to the reference is unmistakable;

(2) the writing must describe the other document in such terms that its identity may be ascertained beyond doubt; and

(3) it must be certain that the parties to the agreement had knowledge of and assented to the incorporated document so that the incorporation will not result in surprise or hardship.

U-Haul Co., 752 S.E.2d at 598.

Assuming, for the sake of argument, that the loan application is separate from the promissory note, the loan application unquestionably incorporates by reference the promissory note. First, the loan application has several clear references to the promissory note. The text immediately before the signature block in the loan application alerts the borrower to the promissory note that appears after the signature block. Each Application and Note provides:

Notice to ALL BORROWERS

(a) Do not sign this before you read the Promissory Note even if otherwise advised.

* * *

I have read and agree to the terms of the Promissory Note accompanying this application.

* * *

The terms and conditions set forth in the Promissory Note constitute the entire agreement between us.

CAUTION – IT IS IMPORTANT THAT YOU THOROUGHLY READ THE CONTRACT BEFORE YOU SIGN IT.

(*Id.* 34, 48, 62, 76, 90, 103, 118.)

Second, the loan application describes the promissory note in such terms that a borrower can ascertain its identity beyond doubt. There are multiple references in the loan application to the “Promissory Note,” and the loan application states that “[t]he terms and conditions set forth in the Promissory Note constitute the entire agreement between us.” (*Id.*) Thus, any borrower would know that the terms of the loan for which she is applying are set forth in a promissory note.

Third, it is certain that Robinette knew of and assented to the promissory note. Each time she signed an Application and Note, she affirmed that “I have read and agree to the terms of the Promissory Note accompanying this application.” (*Id.*) Robinette stated in the affidavit she submitted to the trial court that “[w]hen I signed a contract with Sallie Mae for a student loan I did not see an arbitration agreement.” (*Id.* 156.) But Robinette does not state that she did not see the promissory notes, nor could she given the representation she made each time she signed an Application and Note.

Robinette’s failure to read the promissory note does not release her from its terms, including the arbitration clause. “The law of this State is clear in holding that [a] party to a contract has a duty to read the instrument.” *Am. States Ins. Co. v. Surbaugh*, 231 W. Va. 288, 299, 745 S.E.2d 179, 190 (2013) (citation and internal quotation marks omitted); *see also Hager v. Am. Gen. Fin., Inc.*, 37 F. Supp. 2d 778, 788 (S.D.W. Va. 1999) (“It is a widely accepted principle of contracts that, absent fraud or other wrongful conduct, one who signs or accepts a written instrument will normally be bound in accordance with its written terms and cannot disaffirm the

contract simply by contending that he failed to read the contract or understand its contents.”); *see also Acme Food Co. v. Older*, 64 W. Va. 255 (1908) (“A man is not permitted to defeat or be relieved from the obligation of a written contract, merely by showing he signed it without having read it and in ignorance of its contents; but he is at liberty to show that, by the artifice, deception, and fraud of the other party or his agent, he was induced to sign it without having read it, and upon the assurance, and under the belief, so superinduced by the other party, that it was a paper wholly different in character from the one signed.”).

There is no evidence that Navient engaged in any fraud or other misconduct to prevent Robinette from learning the terms of the promissory notes. On the contrary, Navient cautioned borrowers not to sign the Application and Note without reading the document in its entirety. The trial court, however, concluded that a lender could not enforce an arbitration agreement contained in a promissory note because a “Promissory Note does not contemplate the inclusion of an arbitration agreement, which is something new and different beyond a promise to repay a loan.” (A.R. 221.) The court, therefore, treated the arbitration agreement contained in the Application and Note with greater suspicion than the document’s other commercial terms—exactly what the Federal Arbitration Act prohibits.

In reaching its decision, the trial court relied upon this Court’s decision in *State ex rel. U-Haul Co. of West Virginia v. Zakaib*, 232 W. Va. 432, 752 S.E.2d 586 (2013). But the facts of that case are completely different from the facts of this case. In *U-Haul Co.*, U-Haul presented its customers with a one-page contract, which

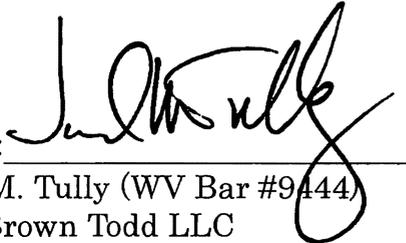
included an acknowledgment that the customer received and agreed to the terms and conditions of a separate rental contract addendum. *U-Haul Co.*, 752 S.E.2d at 590–91. But, unlike this case, U-Haul did not make the addendum containing the arbitration provision available to its customer until *after* the customer signed the one-page agreement. *Id.* By contrast, Navient provided Robinette with the loan application and promissory note in a single document and included text to ensure that she read the complete Application and Note.

Aside from *U-Haul*, which is readily distinguishable from this case, the only other case Robinette relied on to support her argument that the loan application did not incorporate the promissory note was a New York case decided in 1954, *Weiner v. Mercury Artists Corp.*, 284 A.D. 108, 130 N.Y.S.2d 570 (1954). In *Weiner*, as in *U-Haul Co.*, the parties signed a one-page agreement that did not include an arbitration clause. 130 N.Y.S.2d at 571. That agreement purported to incorporate the rules of the American Federation of Musicians, which were set forth in a 207-page document. *Id.* That document included a discussion of arbitration on pages 62–66, but the plaintiff never received the document. *Id.* Thus, *Weiner* is not analogous to this case and provides no authority for the trial court’s decision.

CONCLUSION

The trial court’s Order Denying Defendant’s Motion to Compel Arbitration should be reversed because the Application and Note constitute a single document that contains a valid and enforceable arbitration agreement. Even if the loan

application and promissory note were separate documents, the loan application incorporates the promissory note—including the arbitration agreement—by reference. Accordingly, Robinette is bound to arbitrate the claims she has asserted against Navient.

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CERTIFICATE OF SERVICE

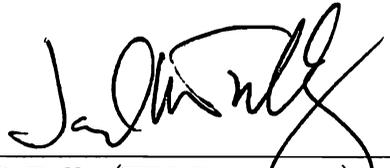
I hereby certify that on this 17th day of February, 2015, true and accurate copies of the foregoing **Petitioner's Brief** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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