

## **Negating Defenses of Procedural Unconscionability in Loan Documents**

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Defaulted borrowers often attempt to argue that the waiver of defenses language included in loan documents is unconscionable and therefore unenforceable. However, for a contract to be held to be unenforceable under Florida law, the contract must be both procedurally and substantively unconscionable. *See Golden v. Mobile Oil Corp.*, 882 F.2d 490, 493 (11th Cir. 1989); *Gainesville Health Care Center v. Weston*, 857 So. 2d 278, 284 (Fla. 1st DCA 2003). If a contract is found to be either procedurally or substantively conscionable, then the contract is enforceable. *See Eldridge v. Integrated Health Services, Inc.*, 805 So. 2d 982 (Fla. 2d DCA 2001)(emphasis added).

As to the issue of procedural unconscionability, Florida courts will typically consider all relevant factors including: (1) the manner in which the contract was entered into; (2) the relative bargaining power of the parties and whether the complaining party had a meaningful choice at the time the contract was entered into; (3) whether the terms were merely presented on a "take-it-or-leave-it" basis; and (4) the complaining party's ability and opportunity to understand the disputed terms of the contract. *Powertel, Inc. v. Bexley*, 743 So. 2d 570,574 (Fla. 1st DCA 1999); *see also Fonte v. AT&T Wireless, Inc.*, 903 So. 2d 1019, 1026 n.2 (Fla. 4th DCA 2005). Moreover, Florida courts have uniformly held that where the complaining party is free to obtain the services contracted for elsewhere, there is no procedural unconscionability. *Voicestream, Wireless Corp. v. U.S. Commc'ns, /Inc.*, 912 So. 2d 34, 40-41 (Fla. 4th DCA 2005); *Fonte*, 903 So. 2d at 1026; *Orkin Exterminating Co., Inc. v. Petsch*, 872 So. 2d 259, 266 (Fla. 2d DCA 2004). This is true even when one of the parties has essentially "unilateral bargaining power." *Fonte*, 903 So. 2d at 1025-1027. Accordingly, in order to establish that a contract is procedurally unconscionable, the complaining party must establish that it could not obtain the desired services from another provider. *Voicestream*, 912 So. 2d at 40; *see also Petsch*, 872 So. 2d at 266.

In the case of standard bank lending documents and arm's length commercial transactions, it is difficult for defaulted borrowers to establish that the loan documents themselves, or specific waivers contained therein are procedurally unconscionable. Specifically, in most sophisticated commercial transactions, defaulted borrowers cannot contend that: (1) they did not read the loan documents; (2) they desired to obtain counsel to review their loan documents but were not able to do so; (3) they objected to any provision (which would necessarily include waiver of defenses) at the time they signed the loan documents; or (4) they were refused in negotiating any term of the loan documents. Most importantly, most defaulted commercial borrowers cannot assert that they could not have walked away if any of the terms of the loan documents were unacceptable. I am particularly amused when I see these defenses, as I know that the defendant is now throwing the proverbial hail-mary, hoping to connect with a sympathetic trial judge and finder of fact.

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