Silence is *Not* Always Golden: Land v. IU Credit Union

Banking Brief: Financial Services Insights

By Brandt Hardy and John Tanselle and Larry Tomlin on November 9, 2023

The spate of class-action lawsuits against banks and credit unions ("*Financial Institutions*") involving overdraft fees has prompted Indiana Financial Institutions to amend their existing account agreements to provide for arbitration (in lieu of costly litigation) and to prohibit consumers from initiating or joining into class-actions against Financial Institutions ("*Arbitration/Class Action Waivers*").

Historically, Indiana courts have allowed Arbitration/Class Action Waivers to be added to account agreements if the Financial Institutions (i) provided clear and conspicuous notice to consumers; (ii) offered an opt-out period and provided that a consumer's silence and continued use of the account(s) would constitute acceptance of the changes in terms; and (iii) allowed consumers to maintain their accounts after opting-out. However, in light of the recent Indiana Supreme Court decision, *Land v. IU Credit Union*, Financial Institutions must reevaluate what constitutes "acceptance" by the consumer.

In *Land*, the consumer maintained at least two (2) checking accounts with the credit union and registered for online banking for one of the accounts. As a result, when the credit union sought to amend its existing account agreement to include an arbitration and no-class action addendum, Land received two (2) notices, one via email and the other by regular US mail. In ruling on whether the addendum was enforceable, the Indiana Supreme Court held that:

- The credit union provided Land with reasonable written notice of its *offer* to amend the account agreement to include an arbitration and no-class action addendum. The notice sent by regular US mail was only two (2) pages and clearly referenced (in bold, all-capital letters) and included a copy of the addendum.
- On its own, the email notice did not qualify as effective or reasonable notice because the (i) subject line of the email read the same as if the credit union had only attached a routine monthly account statement, and (ii) body of the email did not mention the addendum. Without the notice sent by regular US mail, the credit union would have failed to provide reasonable notice.
- The 30 day opt-out period was a reasonable amount of time for Land to make an informed decision as to the addendum and was not overly burdensome. This finding is in-line with the holding in *Decker v. Star Fin. Grp., Inc.*, 204 N.E.3d 918 (Ind. 2023), which provided that allowing consumers 10 days to opt-out of arbitration and cancel their accounts was unreasonable.

- Land's silence and failure to opt-out within 30 days of receiving the notice ***did not*** amount to acceptance of the arbitration and no-class action addendum.
- While Land was notified that her silence and inaction would bind her to the addendum, the credit union did not condition her continued use of the accounts on her acceptance of the addendum. The Supreme Court points to various credit card cases in which assent is expressly conditioned on the consumer's continued use of their credit cards.
- The Court of Appeal's decision in *Neal v. Purdue Fed. Credit Union*, 201 N.E.3d 253 (Ind. Ct. App. 2022), was expressly disapproved by the Indiana Supreme Court as it reached the opposite conclusion under a similar set of circumstances. In *Neal*, the member was found to have accepted the arbitration provision by remaining silent and failing to opt-out before the deadline.

Here is what is left to digest after the Indiana Supreme Court decision: Indiana Financial Institutions should continue to provide consumers with reasonable notice, similar to the written notice in *Land*, and offer at least 30 days to opt-out of any Arbitration/Class Action Waiver. Whether silence may constitute acceptance seems to depend on whether there is a "consequence" for opting-out (*e.g.*, forcing consumers to cancel their account(s) with their Financial Institutions). As such, we will continue to monitor new developments and work with the Indiana Bankers Association and other interested parties to gauge what constitutes "acceptance" and to reach a solid and beneficial resolution for Indiana Financial Institutions.