UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:09-MD-02036-JLK

IN RE: CHECKING ACCOUNT OVERDRAFT LITIGATION

MDL No. 2036

THIS DOCUMENT RELATES TO: FOUTH TRANCHE ACTION

Shane Swift v. BancorpSouth, Inc.
N.D. Fla. Case No. 1:10-cv-00090-SPM
S.D. Fla. Case No. 1:10-cv-23872-JLK

APPENDIX I

PLAINTIFF'S PROPOSED TRIAL PLAN FOR TRIAL OF CLASS CLAIMS

TABLE OF CONTENTS

PAGE

I. INTRODUCTION

Plaintiff submits this trial plan in support of his motion for class certification. The plan provides a roadmap to aid the Court in assessing how a single trial can be conducted against BancorpSouth Bank ("BancorpSouth") on behalf of multiple classes under federal law and three state's laws in an efficient and manageable manner.[1] Because discovery is not yet complete, this plan is necessarily preliminary. Plaintiff may suggest changes to this plan (and reserves the right to do so) in advance of trial in light of the completion of discovery, reports from experts, any changes in the law, orders arising from motions for summary judgment, or later addition of class representatives. At this time, discovery conducted to date demonstrates that trial of this action on a class-wide basis presents no unduly challenging manageability issues.

BancorpSouth used uniform form contracts for all Class members. Class members nationwide were forced to accept BancorpSouth's contract terms on a "take-it-or-leave-it" basis. There was no opportunity to negotiate the terms, and no material variations among them. Similarly, BancorpSouth's own witnesses and documents demonstrate that BancorpSouth applied its overdraft policies uniformly to all Class members. And BancorpSouth's witnesses and documents will demonstrate BancorpSouth's unlawful scheme to defraud customers out of hundreds-of-millions of dollars in overdraft fees. For these reasons, certification of the Class will not present any insuperable manageability issues. Rather, certification will enable a fair and efficient resolution of claims uniform to thousands of BancorpSouth customers.

[1]While Rule 23 does not require submission of a trial plan, "[a]n increasing number of courts require a party requesting class certification to present a 'trial plan' that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof." Fed. R. Civ. P. 23, Advisory Committee Note (2003 amendments). The Eleventh Circuit does not require trial plans but recommends that plaintiffs present feasible trial plans in support of class certification. *See Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1279 n.20 (11th Cir. 2009).

At this time, Plaintiff envisions a single trial comprised of the following steps. First, Plaintiff will present his case-in-chief, submitting common evidence of BancorpSouth's wrongdoing, class-wide injury and total damages. Second, the burden shifts to BancorpSouth, and it presents whatever defenses it wishes to advance. Plaintiff will then present his rebuttal case. The Court will then enter a verdict based on Special Verdict Forms that take into account the minor variations among state laws.

Plaintiff anticipates that trial of this action will take nine days. In a similar case, *Gutierrez v. Wells Fargo Bank, N.A.*, Case No. 07-05923 WHA (N.D. Cal.), tried before U.S. District Judge William Alsup in the Northern District of California, plaintiffs put on their case in five days and the defendant in four. The total number of trial days was nine. There is no reason to believe that the trial against BancorpSouth here will take any longer. In this trial, like in *Gutierrez,* Plaintiff will present his case through a handful of BancorpSouth's own witnesses and documents, and through Plaintiff's expert Arthur Olson – the same expert qualified by Judge Alsup in *Gutierrez*. Because BancorpSouth's policies were uniform across all Class members during the entire Class Period, presentation of evidence demonstrating BancorpSouth's conduct will not be overly complex.

If a verdict for the Plaintiff results, judgment in a total, single monetary sum will be entered on behalf of the Class. A post-judgment administrative proceeding will follow, in which BancorpSouth's data will be used to distribute checks to each individual Class member based on Art Olsen's calculations and the applicable statutes of limitations. This will be done systematically and without requiring Class members to submit proofs of claim. The Court will be asked to approve this final allocation of damages, which will be of no concern to

BancorpSouth.[2] On the other hand, if a verdict is returned for BancorpSouth, judgment dismissing the action with prejudice would be entered.

II. PRESENTATION OF COMMON PROOF FOR EACH CAUSE OF ACTION

For all of their causes of action, Plaintiff will rely on common proof derived directly from BancorpSouth's own witnesses and documents, and from Plaintiff's expert, to prove his claims. Below is an evidentiary outline demonstrating how this case will be tried as a class action.

A. Plaintiff Will Prove with Common Evidence that BancorpSouth Breached the Covenant of Good Faith and Fair Dealing

As this Court noted in its omnibus ruling denying the first tranche defendants' motion to dismiss, all states recognize an implied covenant of good faith and fair dealing in every contract.[3] Further, "when one party is given discretion to act under a contract, said discretion must be exercised in good faith." Dkt. No. 305 at 19. Plaintiff will prove with evidence common to all Class members that BancorpSouth did not act in good faith when it exercised discretion under its account agreements with Class members. Evidence adduced so far in discovery demonstrates that proof of Plaintiff's claim is found in BancorpSouth's own documents and witness testimony.

For example, BancorpSouth's account agreements are standardized form contracts that are remarkably uniform across the eight states in which BancorpSouth did retail business during the Class Period. *See* Ex. 4-17 (account agreements spanning the class period). The account agreements were given to customers when they opened an account and/or during the time that

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[2]It is very common for courts to have follow-on proceedings regarding damages allocation, even if they involve individualized damage proceedings (which will not be necessary here). *See, e.g., Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 306 (5th Cir. 2003); 3 CONTE & NEWBERG, NEWBERG ON CLASS ACTIONS, § 9:53 at 429-30 (4th ed. 2002) (collecting cases); 7B CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE § 1781 (2d ed. 1986).

[3]Certain states recognize a claim for breach of the covenant of good faith and fair dealing as a separate and independent claim from breach of contract, while other states treat breach of the covenant of good faith and fair dealing as a species of breach of contract.

they maintained their accounts and were available in all BancorpSouth branch offices. Upon implementing high-to-low posting in January 2003, and continuing throughout the Class Period, the boilerplate form contracts BancorpSouth provided to its retail banking customers, on a non-negotiable "take-it-or-leave it" basis, were many pages long, with small type, and contained similarly vague and misleading disclosures that purported to reserve discretion to BancorpSouth regarding its high-to-low sequencing and overdraft fee practices. *See, e.g.*, Ex. 7 (2007 account agreement).

In all of BancorpSouth's agreements, the reordering of debit transactions is discretionary. *See, e.g.*, Ex. 4 (one form of the 2007 account agreement); Ex. 8 (one form of the 2008 account agreement); Ex. 11 (one form of the 2009 account agreement). Nothing in these uniform agreements permitted BancorpSouth to manipulate the reordering of debit card transactions solely to create overdrafts that would not otherwise exist, to charge overdraft fees when there are sufficient funds in the account, or to reorder the posting of debits over a period of days irrespective of when the transaction occurred. BancorpSouth's conduct in doing so violated the implied covenant of good faith and fair dealing.

In addition to uniform account agreements, other evidence of BancorpSouth's breach will be common and uniform, given that BancorpSouth uniformly re-sequenced transactions using a formulaic, automated system and posted debits from highest to lowest for all Class members.[4] The bank employed a secret "Overdraft Matrix Limit" for Class members in order to authorize

[4]Plaintiff's common proof will include internal documents and the testimony of BancorpSouth employee, Jeffrey Jaggers. Ex. 1 at 142:2-14 (noting that posting priority change to high-to-low did not vary between consumers within the consumer checking account group—everybody got the same treatment); Ex. 2 at 11.

transactions and charge overdraft fees;[5] and provided unclear balance information to all Class members.

Common evidence will also be introduced to demonstrate that BancorpSouth failed to clearly disclose the circumstances under which it would charge overdraft fees,[6] and that BancorpSouth is well aware of the adverse impact that its scheme had on Plaintiff and the Class – indeed, the fundamental purpose for changing its posting order to high-to-low, based upon the recommendations of its consultant EPG was that it would generate millions of dollars more annually.[7]

B. Plaintiffs Will Prove with Common Evidence that BancorpSouth's Overdraft Practices are Substantively and Procedurally Unconscionable

In denying Defendants' motions to dismiss, the Court ruled that Plaintiffs sufficiently pled the following elements of *procedural* unconscionability: (i) there is a tremendous disparity in sophistication and bargaining power between Plaintiffs and defendants; (ii) the deposit agreements were contracts of adhesion – that is, Plaintiffs and Class members were not presented with an option to negotiate the terms, and those terms were set out in voluminous boilerplate language; and (iii) Plaintiffs and Class members were denied any meaningful opportunity to opt out of the so-called "overdraft protection" programs. Dkt. No. 305 at 28-29; *see also* Dkt. No.

[5]*See* Ex. 1 at Depo. Exhibit 6 (BancorpSouth admonished employees that the "Matrix Overdraft Limit itself **should not** be disclosed to the customer. Because the limit will fluctuate with account age and activity, disclosure may cause confusion. This is an internal process and should be transparent [sic] to the customer.").

[6]Plaintiff's common proof will include BancorpSouth Deposit Account Terms & Conditions and Account Information Statements, failing to disclose the bank's uniform high-to-low posting order (Ex. 4 to 17) and internal documents reflecting customer, as well as employee, confusion about posting orders (*e.g.*, Ex. 21 (reflecting bank personnel's knowledge of "embarrassing" shortcomings of the bank's Online Banking system with completing fund transfer initiated online, tracking account balances, and understanding the account balances) and Ex. 22 (reflecting employee confusion as to what the actual posting priority is).

[7]*See* Ex. 3 and 24 (projecting $3.5 million of additional revenue annually for the bank based on high-to-low posting").

1305 at 2 (holding that BancorpSouth "failed to state any new grounds for this Court to vary from its earlier Order Ruling on Omnibus Motions (DE #305)").

The Court also ruled that Plaintiffs sufficiently pled the following elements of *substantive* unconscionability: (i) no reasonable person would have agreed to allow the banks to post debits in a manner designed solely to maximize the number of overdraft fees; and (ii) the amount of overdraft fees is unconscionably excessive because the fees are not reasonably related to the costs or risks associated with providing overdraft protection. Dkt. No. 305 at 30-31; *see also* Dkt. No. 1305 at 2 (holding that BancorpSouth "failed to state any new grounds for this Court to vary from its earlier Order Ruling on Omnibus Motions (DE #305)).

Plaintiff will prove the foregoing elements with common evidence, which will include evidence of BancorpSouth's financial resources and sophistication in devising the overdraft fee program;[8] the form contracts with boilerplate language that BancorpSouth provided to all of its retail banking customers;[9] BancorpSouth's common failure to provide Plaintiff and Class members with any meaningful opportunity to negotiate or change the terms of their deposit agreements[10] or to opt out of the bank's overdraft payment service;[11] and consumer and employee confusion and complaints regarding the substantive unfairness of the terms of BancorpSouth's overdraft scheme.[12]

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[8]For example, BancorpSouth documents demonstrate that it made a conscious decision based upon consultation with EPG to implement the high-to-low posting order in order to extract millions of dollars from overdraft fees. Ex. 1 at 141:7-12; 144:22-146:4 ("the whole engagement [with third party consultant EPG] was for revenue enhancement").

[9]*See, e.g.*, Ex. 4 to 17 (account agreements applicable during Class period).

[10]Ex. 1 at 179:1-180:24; 202:10-22 (BancorpSouth's account agreements were uniform across all states and were not negotiable for any retail customers).

[11]The bank's internal procedures required high level bank approval to approve a customer's opt out request. *See* Ex. 25 (BXS Swift H-006443) (requiring regional president and bank president signatures required).

[12]*See, e.g.*, 21, 22, 23, and 33.

C. Plaintiff Will Prove With Common Evidence that BancorpSouth Has Been Unjustly Enriched

Plaintiff will also use common evidence to prove his unjust enrichment claims. First, Plaintiff will demonstrate that he and the Class members conferred a benefit on BancorpSouth which was unjust – paying excessive overdraft fees.[13] This evidence will include the declaration and testimony of Plaintiffs' expert, Arthur Olsen, which is based on a detailed analysis of BancorpSouth's overdraft transaction data for the Class. *See, e.g.*, Olsen Decl., ¶¶ 37-47; *see also Gutierrez v. Wells Fargo Bank, N.A.*, 730 F.Supp.2d 1080, 1104 (N.D. Cal. 2010). It will also include evidence that BancorpSouth specifically recognized that overdraft fee revenue (*i.e.*, the benefit conferred) would increase as a result of the scheme.[14] Thus, Plaintiff can show with common evidence that BancorpSouth appreciated that benefit.

Second, Plaintiff will show that BancorpSouth's retention of that benefit is unjust. That evidence will include evidence that BancorpSouth knowingly devised the scheme in order to increase revenue at the expense of the Class;[15] and evidence that BancorpSouth recognized that high to low would generate far more overdraft fees for customers.[16]

D. Plaintiffs Will Prove with Common Evidence that BancorpSouth Violated the Arkansas Deceptive Trade Practices Act

Plaintiffs seek to certify a class for BancorpSouth's violations of the Arkansas Deceptive Trade Practices Act, Ark. Code Ann. §4-88-101, *et seq*. (the "ADTPA"). The ADTPA prohibits unconscionable, false, or deceptive acts or practices in business, commerce, or trade. *See* Ex. D.

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[13]In fact, BancorpSouth's combined overdraft abd NSF fee revenue increased from around $35 million in 2002 to over $48 million in 2003, a 36% increase in the first year after implementing high-to-low posting. *See* Ex. 18.

[14]*See supra* n.7.

[15]*See id*.

[16]*See supra* n.7.

Using evidence common to Plaintiff and all Class members – much of which overlaps with the evidence that will be used to establish BancorpSouth's other violations, as discussed above – Plaintiff will demonstrate that BancorpSouth violated the ADTPA. That evidence will include the following: BancorpSouth uniformly re-sequenced transactions and posted debits from highest to lowest for all Class members;[17] employed a secret "Overdraft Matrix Limit" to Class members in order to charge overdraft fees;[18] provided inaccurate balance information to all Class members;[19] failed to disclose the circumstances under which it would charge overdraft fees in its uniform account agreements;[20] was well aware of the adverse impact that its scheme had on Plaintiffs and the Class;[21] and failed to provide Plaintiffs and Class members with any meaningful opportunity to opt out of the overdraft practice.[22] Additional common proof will consist of evidence of BancorpSouth's financial resources and sophistication in devising the overdraft fee program;[23] and consumer complaints regarding the unfairness of the overdraft scheme.[24]

E. Plaintiff Will Prove with Common Evidence Causation and Amount of Damages

Plaintiff will demonstrate causation through, *inter alia*, documents and testimony from BancorpSouth showing that the injury to Class members in the form of the payment of overdraft fees was foreseeable and an intended consequence of its scheme, including internal documents

[17] *See supra* n.4.
[18] *See supra* n.5.
[19] *See supra* n.6.
[20] *See supra* n.6.
[21] *See supra* n.7.
[22] *See supra* n.11.
[23] BancorpSouth documents demonstrate it made a conscious decision based upon consultation with EPG to implement the high-to-low posting order in order to extract millions more revenue from its customers.
[24] *See supra* n.12.

admitting to the overdraft scheme's impact on the Class and the benefit of the scheme to BancorpSouth.[25]

With the assistance of his expert, Arthur Olsen, who was previously qualified as an expert in *Gutierrez*, Plaintiff will use common proof to demonstrate injury to Class members and calculate total damages for the Class without the need to resort to information collected from individual Class members. In our increasingly complex society where mass marketing of financial services can lead to widespread harm, the potential difficulty of adjudicating mass claims can be enormously simplified through the use of modern information management technology used by large corporate defendants such as BancorpSouth. BancorpSouth's sophisticated systems contemporaneously recorded and then stored all debit transactions during the Class Period. This common evidence will be mined to (i) identify the BancorpSouth customers who were assessed additional overdraft fees due to BancorpSouth's high-to-low posting order as compared with an alternative posting order in which, for example, debit card transactions are posted in chronological order based on authorization date and time (that, is identify the Class members), and (ii) calculate the amount of the additional overdraft charges that each Class member was charged during the Class Period. *See* Olsen Decl., ¶ 46.

III. APPLYING MULTI-STATE LAW

When seeking certification of a class for which the laws of several states potentially apply, the plaintiff bears the burden of demonstrating a suitable and realistic plan for trial of the class claims and must submit an extensive analysis showing that there are no material variations among the law of the states for which certification of a class is sought. *Klay v. Humana, Inc.*,

[25] *See, e.g.*, Ex. 3 and 24 (touting $3.5 million benefit of switching to high-to-low and reducing posting from 4 to 2 buckets). *See also* Ex. 18 (demonstrating the annual combined overdraft and NSF fee income between 2003 and 2010 following the implementation of high-to-low posting for all transactions which would debit accounts).

382 F.3d 1241, 1262 (11th Cir. 2004).[26] "[I]f applicable state laws can be sorted into a small number of groups, each containing materially identical legal standards, then certification of subclasses embracing each of the dominant legal standards can be appropriate." *Id.*[27]

Common issues of law and fact will remain the predominant focus of this litigation, notwithstanding the potential application of multiple states' laws. The extensive analysis embodied in this Trial Plan and in the surveys attached hereto demonstrate that applying the laws of the several states to Plaintiff's claims here does not present any difficult manageability issues. For all of the claims, the applicable state laws can be grouped into a total of five subclasses sharing materially identical legal standards. Plaintiff will present evidence of all of these elements through uniform proof derived from BancorpSouth's documents, BancorpSouth's witnesses, or Plaintiff's expert, as described more particularly above. Plaintiff seeking to represent each subclass reside in one of the states belonging to that subclass; or reside in states with legal claims that have elements that overlap those in the subclass, thus, he may represent Class members residing in those other states included in the subclass. *See* MANUAL FOR COMPLEX LITIGATION §§21.23, 22.754 (4th ed. 2004) (describing use of subclasses to take account of differences amongst the various states' laws and representation for each subclass); *Wooden v. Board of Regents of Univ. Sys. of Georgia*, 247 F.3d 1262, 1287-88 (11th Cir. 2001) (explaining that one class representative must have standing for each subclass).

Plaintiff proposes that at the conclusion of evidence, the fact finder be provided special verdict forms that take into account these minor variations among state laws. Proposed Special

[26] In a later decision, the Eleventh Circuit declined to explain precisely what "extensive" specifically means other than to say it must be "more than perfunctory." *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc*., 601 F.3d 1159, 1180 (11th Cir. 2010).

[27] In *Klay*, although the court reversed certification of claims for breach of contract and unjust enrichment, the court recognized that state law claims "based on a principle of law that is uniform among the states" can form a "realistic possibility" of certification. *Id.* at 1261.

Verdict Forms are attached as Exhibit E. As these proposed forms demonstrate, the differences that do exist among state laws can readily be taken into account through the use of discrete subclasses, thus ensuring careful adherence to legal requirements and mitigating any manageability issues. Indeed, the Court has already endorsed this approach in its previous order certifying subclasses against Union Bank, finding that "[t]he proposed special verdict forms and supporting surveys of law submitted by Plaintiffs with their Trial Plan illustrate that the variations among the potentially applicable state laws are not material and can be managed to permit a fair and efficient adjudication by the fact finder at trial." *Larsen v. Union Bank, N.A.*, 275 F.R.D. 666, 2011 U.S. Dist. LEXIS 83273, *65-66 (S.D. Fla. July 25, 2011).

A. The Breach of the Implied Covenant of Good Faith and Fair Dealing Subclass is Manageable

The common law implies the duty of good faith and fair dealing in every contract in terms of performance and enforcement. *See* RESTATEMENT (2D) OF CONTRACTS §205 (1981) (the "RESTATEMENT OF CONTRACTS"). In other words, each party to a contract has a duty to refrain from doing anything to unfairly interfere with the rights of any other party to receive the benefits of the contract. *Id*. As this Court has already found, good faith and fair dealing includes exercising one's discretion in carrying out the contract in good faith. Dkt. No. 305 at 19.

The law of good faith and fair dealing is largely uniform. Forty-nine jurisdictions either directly cite or paraphrase the RESTATEMENT OF CONTRACTS as to the implied covenant of good faith and fair dealing. *See* Exhibit A at 1. Some states treat the implied covenant of good faith and fair dealing as a separate cause of action. *Id.* For those that do not, the good faith and fair dealing claims are subject to the elements of that state's breach of contract claims. *Id.*

Plaintiffs has grouped the states together into a subclass for which materially identical legal standards apply as follows:[28]

Good Faith and Fair Dealing Breach Subclass No. 1. This subclass treats the implied covenant claims as part of the breach of contract claims. The states included are Alabama, Arkansas, Florida, Mississippi, and Tennessee. The common elements that must be proven to establish a breach of the duty of good faith and fair dealing in these states are: (i) a valid contract; (ii) the defendant breached the contract by unfairly interfering with the plaintiff's rights to receive benefits under the contract; and (iii) resulting damages. The proposed representative of this subclass is Plaintiff, Shane Swift, whose home state is Arkansas. *See* Exhibit A; Exhibit E.

B. The Unjust Enrichment Subclass is Manageable

The law of unjust enrichment is largely uniform. Most states have simply adopted a variation of the definition of unjust enrichment in RESTATEMENT (FIRST) OF RESTITUTION §1, which provides that a party may be required to make restitution if she is unjustly enriched at the expense of another.

Plaintiff has grouped the states together into a subclass for which materially identical legal standards apply as follows:[29]

[28] Plaintiff is not currently seeking to certify claims for breach of contract and violation of the implied covenant of good faith and fair dealing based on the laws of the states of Louisiana or Missouri, both states where Bancorp South does business. This is because, at present, no named class representative can represent subclasses comprised of these states. Plaintiff hereby reserves the right to amend to add potential class representatives for these states.

[29] Plaintiff is not currently seeking to certify claims for unjust enrichment based on the laws of the states of Florida, Tennessee, Louisiana, Alabama, Texas or Missouri, all states where Bancorp South does business. There is no named class representative who can currently serve in that position. This is because, at present, no named class representative can represent subclasses comprised of these states. Plaintiff hereby reserves the right to amend to add potential class representatives for these states.

Unjust Enrichment Subclass No. 1. These states follow the definition of unjust enrichment in RESTATEMENT (FIRST) OF RESTITUTION §1. The states included are Arkansas and Mississippi. The common elements that must be proven to establish unjust enrichment in these states are: (i) the plaintiff conferred a benefit; (ii) the defendant accepted or retained that benefit; (iii) under circumstances that would be unjust for the defendant to retain the benefit. The proposed representative of this subclass is Plaintiff. *See* Exhibit B; Exhibit F.

C. The Two Unconscionability Subclasses are Manageable

The law of unconscionability is substantially uniform across all states. All of the states, with the exception of Louisiana, have adopted statutes that are the same or substantially identical to Uniform Commercial Code ("U.C.C.") §2-302, which provides:

> (1) If the court as a matter of law finds the contract or any term of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result.
>
> (2) If it is claimed or appears to the court that the contract or any term thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

U.C.C. §2-302 (2011).

Plaintiff has grouped the states together into two subclasses for which materially identical legal standards apply as follows:

Unconscionability Subclass No. 1. The states in the subclass, which comprise the majority of states, require both substantive and procedural unconscionability. These states are: Alabama, Arkansas, Florida, Louisiana, Tennessee, and Texas. The proposed representative of this subclass is Plaintiff. *See* Exhibit C at 2-7; Exhibit G.

Unconscionability Subclass No. 2. The states in this subclass require only substantive *or* procedural unconscionability. *See* Exhibit C at 8-10; Exhibit G. These states are Mississippi and Missouri. The proposed representatives of this subclass are the representatives of Subclass No. 1. If the Subclass No. 1 representatives prove both substantive and procedural unconscionability, they have necessarily proved the claims of Subclass 2. The fact finder will be asked to state on the verdict form whether both procedural and substantive unconscionability are proven. *See* Exhibit F. If the answer to one inquiry or both is "yes," the Subclass 2 claims are proved. Either way, Plaintiff the Subclass No. 1 representatives, who have to prove both elements, are adequate representatives for Subclass No. 2.

D. The Arkansas Deceptive Trade Practices Act Subclass is Manageable

The Court has ruled that plaintiffs may only assert a state statutory claim if a named plaintiff resides in that state. Dkt. No. 305 at 40. Accordingly, Plaintiff does not propose state unfair and deceptive trade practices act groupings and instead seek to certify single-state subclasses represented by Plaintiff who resides in his how state of Arkansas.

The applicable statute is as follows: ARK. CODE ANN. § 4-88-107(a)(10). The elements required to prove a violation of each of these state statutes are set forth in Exhibit D; *see also* Exhibit H.

IV. CONCLUSION

Plaintiff's Trial Plan demonstrates that all of Plaintiff's claims can be efficiently tried on a class-wide basis.

Dated: December 20, 2011.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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IN RE: CHECKING ACCOUNT OVERDRAFT LITIGATION

MDL No. 2036

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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EXHIBIT A

BANK OVERDRAFT MDL 2036
BREACH OF CONTRACT & IMPLIED COVENANT OF GOOD FAITH & FAIR DEALING

I. INTRODUCTION

Every contract imposes a duty of good faith and fair dealing in its performance and in its enforcement. *See Restatement (Second) of Contracts* §205 (1981) ("*Restatement*"). Below is a survey related to the proposed subclass for the breach of contract and implied covenant of good faith and fair dealing class claims. The second table represent those states in which BancorpSouth does business that apply a three- element test for breach of contract claims, where the implied covenant does not supply a separate cause of action.[1]

GOOD FAITH AND FAIR DEALING SUBCLASS #1 **IMPLIED COVENANT NOT A SEPARATE CAUSE OF ACTION AND BREACH OF CONTRACT HAS THREE ELEMENTS: (1) A valid contract; (2) Defendant's breach; and (3) Resulting damages**	
States	Alabama, Arkansas, Florida, Mississippi, Tennessee
Class Representative	Shane Swift
	Elements of Breach of Implied Covenant of Good Faith & Fair Dealing
Alabama	There is an implied covenant of good faith and fair dealing that neither party shall do anything that will have the effect of destroying or injuring the rights of the other party to receive the fruits of the contract. *Shoney's LLC v. MAC East, LLC*, 27 So. 3d 1216, 1220 n.5 (Ala. 2009). Besides forbidding attempts to prevent the other party from getting the consideration for which he bargained through breach or use of technical provisions contained in the contract, the principle of good faith and fair dealing forbids attempts by the actor to get more for himself than the other party reasonably contemplated giving him at the time the contractual relationship was entered into, absent good cause. For example, an employment contract specifically required satisfactory performance;

[1] Plaintiffs are not currently seeking to certify claims for breach of contract and violation of the implied covenant of good faith and fair dealing based on the laws of the states of Louisiana or Missouri, both states where Bancorp South does business. There is no named class representative who can currently serve in that position. Plaintiffs hereby reserve the right to amend to add potential class representatives for these states.

BANK OVERDRAFT MDL 2036
BREACH OF CONTRACT & IMPLIED COVENANT OF GOOD FAITH & FAIR DEALING

	an employee was discharged for nonperformance even though the employer was aware that the employee was physically unable to perform. *Hoffman-La Roche, Inc. v. Campbell*, 512 So. 2d 725, 738 (Ala. 1987). Bad faith is not actionable unless there is an identifiable breach of specific contractual terms. In other words, if there is no identifiable breach in the performance of the specific terms, then there is no contractual cause of action for breach of an implied duty of good faith. *Lake Martin/Alabama Power Licensee Ass'n v. Alabama Power Co., Inc.*, 601 So. 2d 942, 945 (Ala. 1992).
	Elements of Breach of Contract
Alabama	To succeed in a breach-of-contract action, a claimant must prove a material breach of the contract. *Abernant Fire Dept. v. Rhodes*, 21 So. 3d 739 (Ala. Civ. App. 2009). A material breach of a contract is one that touches the fundamental purposes of the contract and defeats the object of the parties in making the contract. *Stockton v. CKPD Dev. Co., LLC*, 936 So. 2d 1065, 1078 (Ala. Civ. App. 2005).
	Elements of Breach of Implied Covenant of Good Faith & Fair Dealing
Arkansas	Every contract imposes an obligation of good faith in its performance of enforcement. Good faith means honesty in fact in the conduct or transaction concerned. *Country Corner Food & Drug v. First State Bank and Trust Co.*, 966 S.W.2d 894, 899 (Ark. 1998). "A party has an implied obligation not to do anything that would prevent, hinder, or delay performance." *Cantrell-Waind & Assocs., Inc. v. Guillaume Motorsports, Inc.*, 968 S.W.2d 72, 74 (Ark. Ct. App. 1998); *Arkansas Resaerch Med. Testing, LLC v. Osborne*, No. 10-750, 2011 Ark. 158, at *7-*8 (Apr. 14, 2011) (observing that Arkansas does not recognize a separate cause of action for duty of good faith and fair dealing).
	Elements of Breach of Contract
Arkansas	"'A person may be liable for breach of contract if the complaining party can prove the existence of an agreement, breach of the agreement, and resulting damages.'" *Ultracuts Ltd. v. Wal-Mart Stores, Inc.*, 33 S.W.3d 128, 133-34 (Ark. 2000); *Foreman Sch. Dist. No. 25 v. Steele*, 61 S.W.3d 801, 807 (Ark. 2001) (citation omitted). Generally, to state a cause of action for breach of contract, the complaint need only assert the existence of a valid enforceable contract between the plaintiff and defendant, the obligation of defendant thereunder, a violation by the defendant, and damages resulting to plaintiff from the breach. *Perry v. Baptist Health*, 189 S.W.3d 54, 58 (Ark. 2004).

BANK OVERDRAFT MDL 2036
BREACH OF CONTRACT & IMPLIED COVENANT OF GOOD FAITH & FAIR DEALING

	Elements of Breach of Implied Covenant of Good Faith & Fair Dealing
Florida	The covenant is intended to protect the reasonable expectations of the parties in light of their express agreement. *Ins. Concepts & Design, Inc. v. Healthplan Servs.*, 785 So. 2d 1232, 1234 (Fla. Dist. Ct. App. 2001). The doctrine of implied covenant of good faith cannot be used to vary the terms of an express contract. A duty of good faith must relate to performance of an express term of the contract and is not an abstract and independent term of a contract. It must be anchored to the performance of an express contractual obligation. There can be no cause of action for a breach of the implied covenant absent breach of an express term of the contract. *Flagship Resort Dev. Corp. v. Interval Int'l, Inc.*, 28 So. 3d 915, 924 (Fla. Dist. Ct. App. 2010). A claim for breach of the implied covenant of good faith and fair dealing cannot be maintained under Florida law absent an allegation that an express term of the contract was breached. *Ins. Concepts & Design*, 785 So. 2d at 1234.
	Elements of Breach of Contract
Florida	A contract action requires three elements: (1) a valid contract; (2) a material breach; and (3) damages. *Friedman v. New York Life Ins. Co.*, 985 So. 2d 56, 58 (Fla. Dist. Ct. App. 2008). To constitute a vital or material breach, a defendant's nonperformance of a contract must be such as to go to the essence of the contract; it must be the type of breach that would discharge the injured party from further contractual duty on his part but a defendant's failure to perform some minor part of his contractual duty cannot be classified as a material or vital breach. *Atlanta Jet v. Liberty Aircraft Servs., LLC*, 866 So. 2d 148, 150 (Fla. Dist. Ct. App. 2004). A material breach by one party may be considered a discharge of the other party's obligations there under. A party to a contract is not entitled to specific performance where that party did not perform its obligations under the clear terms of the contract. *Nacoochee Corp. v. Pickett*, 948 So. 2d 26, 30 (Fla. Dist. Ct. App. 2006).
	Elements of Breach of Implied Covenant of Good Faith & Fair Dealing
Mississippi	The implied covenant of good faith and fair dealing holds that neither party will do anything which injures the right of the other to receive the benefits of the agreement. *Cothern v. Vickers, Inc.*, 759 So. 2d 1241, 1248 (Miss. 2000). The duty of good faith and fair dealing is based on fundamental notions of fairness, and its scope necessarily varies according to the nature of the agreement. Some conduct, such as subterfuge and evasion, clearly violates the duty. However, the duty may not only proscribe undesirable conduct, but may require affirmative action as well. A party may thus be under a duty not only to refrain from hindering or preventing the occurrence of conditions of his own duty or the performance of the other party's duty, but also to take some affirmative steps to cooperate in achieving these goals. Good faith is the faithfulness of an agreed purpose between two parties, a purpose which is consistent with justified expectations of the other party. The breach of

BANK OVERDRAFT MDL 2036
BREACH OF CONTRACT & IMPLIED COVENANT OF GOOD FAITH & FAIR DEALING

	good faith is bad faith characterized by some conduct which violates standards of decency, fairness or reasonableness. *Cenac v. Murry*, 609 So. 2d 1257, 1272 (Miss. 1992). The implied covenant operates only where there is already an existing contract. *Cothern*, 759 So. 2d at 1248.
	Elements of Breach of Contract
Mississippi	The elements of a breach of contract claim are: (1) the existence of a valid and binding contract; (2) mutual obligations that the defendant has broken, or breached; and (3) plaintiff has been damaged monetarily thereby. *Warwick v. Matheney*, 603 So. 2d 330, 336 (Miss. 1992).
	Elements of Breach of Implied Covenant of Good Faith & Fair Dealing
Tennessee	A claim based on the implied covenant of good faith and fair dealing is not a stand alone claim; rather, it is part of an overall breach of contract claim. While every contract contains an implied covenant of good faith and fair dealing, there must be a contract to contain the covenant. *Jones v. LeMoyne-Owen Coll.*, 308 S.W.3d 894, 908 (Tenn. Ct. App. 2009).
	Elements of Breach of Contract
Tennessee	Under Tennessee law, the basic elements of a breach of contract case must include: (1) the existence of a contract; (2) breach of the contract; and (3) damages which flow from the breach. *Thomas v. Lytle*, 104 F. Supp. 2d 906 (M.D. Tenn. 2000), *aff'd*, 52 Fed. Appx. 671 (6th Cir. 2002).

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EXHIBIT B

BANK OVERDRAFT MDL 2036
UNJUST ENRICHMENT SUBCLASSES
I. OVERVIEW

Below is a related to the proposed subclass for unjust enrichment[1]. The table sets forth those states in which BancorpSouth does business and that use the *Restatement's*[2] definition of unjust enrichment.

UNJUST ENRICHMENT SUBCLASS #1: **BASIC RESTATEMENT DEFINITION** **(1) Plaintiff conferred a benefit on Defendant; (2) Defendant accepts/retains benefit; (3) under circumstances it would be unjust for Defendant to retain the benefit.**	
States	Arkansas, Mississippi
Class Representative	Shane Swift
Case Law	
Arkansas	According to Restatement of Restitution §1, a person who has been unjustly enriched at the expense of another is required to make restitution to the other. *Frigillana v. Frigillana*, 584 S.W.2d 30, 35 (Ark. 1979). For unjust enrichment, a party must have received something of value, to which he or she is not entitled and which he or she must restore. Furthermore, "[a]n action based upon the doctrine of unjust enrichment is maintainable where one person has received money or its equivalent under such circumstances that, in equity and good conscience, he or she ought not to retain." *Id.* at 30. Unjust enrichment is an equitable doctrine. It is the principle that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or

[1] Plaintiffs are not currently seeking to certify claims for unjust enrichment based on the laws of the states of Florida, Tennessee, Louisiana, Alabama, Texas or Missouri, all states where Bancorp South does business. There is no named class representative who can currently serve in that position. Plaintiffs hereby reserve the right to amend to add potential class representatives for these states.

[2] *Restatement (1st) Restitution* §1 (1937) ("*Restatement (1st) Restitution*").

BANK OVERDRAFT MDL 2036
UNJUST ENRICHMENT SUBCLASSES

	frustration of law or opposition to public policy, either directly or indirectly. *R.K. Enters., LLC v. Pro-Comp Mgmt., Inc.*, 272 S.W.3d 85, 89 (Ark. 2008).
Mississippi	The theory of restitution is founded on the unjust enrichment of one at the expense of another. *Powell v. Campbell*, 912 So. 2d 978, 982 (Miss. 2005) (citing *Fourth Davis Island Land Co. v. Parker*, 469 So.2d 516, 254 (Miss. 1985). Unjust enrichment only applies to situations where there is no legal contract and "the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another. *Powell*, 912 So. Sd. At 982 (citation omitted); *Restatement (1st) Restitution* §1). An unjust enrichment action is based on a promise, which is implied in law, that one will pay a person what he is entitled to according to "equity and good conscience." Thus, the action is based on the equitable principle "that a person shall not be allowed to enrich himself unjustly at the expense of another." It is an obligation created by law in the absence of any agreement; therefore, it is an implied in law contract. *Id. 1704 21st Ave., Ltd. v. City of Gulfport*, 988 So. 2d 412, 416 (Miss. Ct. App. 2008).

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EXHIBIT C

BANK OVERDRAFT MDL 2036
UNCONSCIONABILITY SUBCLASSES

I. OVERVIEW

All of the states, with the exception of Louisiana, have adopted statutes that are the same or substantially identical to Uniform Commercial Code ("U.C.C.") §2-302, which provides:

> (1) If the court as a matter of law finds the contract or any term of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result.
>
> (2) If it is claimed or appears to the court that the contract or any term thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

U.C.C. §2-302 (2011).

Below are two tables representing the two unconscionability subclasses. The first table sets forth those states in which BancorpSouth does business and that require a showing of both procedural and substantive unconscionability. The second table s lays out those states in which BancorpSouth does business that require either procedural or substantive unconscionability.

BANK OVERDRAFT MDL 2036
UNCONSCIONABILITY SUBCLASSES

UNCONSCIONABILITY SUBCLASS #1: ELEMENTS OF AN UNCONSCIONABILITY CLAIM: Both Procedurally and Substantively Unconscionable (1) Contract clauses are so one-sided as to be unconscionable at the time the contract was made if the clause is oppressive or leads to unfair surprise; and (2) unequal bargaining and contract of adhesion or other elements of procedural unconscionability	
States	Alabama, Arkansas, Florida, Louisiana, Tennessee, Texas
Class Representatives	Shane Swift
Both Elements Required	
Alabama	**ALA. CODE § 7-2-302 (2011)** "(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination." **STATUTORY NOTES TO ALA. CODE § 7-2-302** "The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise (Cf. *Campbell Soup Co. v. Wentz,* 172 F.2d 80 (3d Cir. 1948)), and not of disturbance of allocation

BANK OVERDRAFT MDL 2036
UNCONSCIONABILITY SUBCLASSES

	of risks because of superior bargaining power." *See also* U.C.C. §2-302, cmt. 1. **CASELAW** Plaintiffs must show both procedural and substantive unconscionability. *Blue Cross Blue Shield of Alabama v. Rigas*, 923 So.2d 1077, 1086 (Ala. 2005). The court considers whether one party was unsophisticated and/or uneducated; whether there was an absence of meaningful choice on one party's part; whether the contractual terms are unreasonably favorable to one party; whether there was unequal bargaining power among the parties; and whether there were oppressive, one-sided, or patently unfair terms in the contract. *Id*. (quoting *Layne v. Ganer*, 612 So. 2d 404, 408 (Ala. 1992)). Courts reduced the *Layne* test to two elements: (1) terms are grossly favorable to a party with (2) overwhelming bargaining power. Substantive unconscionability relates to the substantive contract terms themselves and whether they are unreasonably favorable to the more powerful party so as to impair the integrity of the bargaining process or otherwise contravene the public interest or public policy; terms (usually of an adhesionary or boilerplate nature) that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law, fine-print terms or provisions that seek to negate the reasonable expectations of the nondrafting party, or unreasonably and unexpectedly harsh terms having to do with price or other central aspects of the transaction. Procedural unconscionability deals with procedural deficiencies in the contract formation process, such as deception or a refusal to bargain over contract terms, often analyzed in terms of whether the imposed-upon party had meaningful choice about whether and how to enter into the transaction. *Leeman v. Cook's Pest Control, Inc.*, 902 So. 2d 641, 645 (Ala. 2004).
Arkansas	**A.C.A. § 4-2-302 (2011)** 4-2-302. Unconscionable contract or clause. (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

BANK OVERDRAFT MDL 2036
UNCONSCIONABILITY SUBCLASSES

	(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination. **CASELAW** "A determination of unconscionability, under the code or otherwise, appears to be a mixed question of law and fact. See Restatement (Second) of Contracts § 208 comment f. On appeal we will review the totality of the circumstances, see Arkansas Nat'l Life Ins. Co. v. Durbin, 3 Ark. App. 170, 623 S.W.2d 548 (1981), but will reverse the trial court's decision only if it is clearly erroneous. Ark. R. Civ. P. 52. In Durbin we said that in determining whether a provision was unconscionable, "[t]wo important considerations are whether there is a gross inequality of bargaining power between the parties to the contract and whether the aggrieved party [***6] was made aware of and comprehended the provision in question." Associated Press v. Southern Arkansas Radio Co., 34 Ark. App. 211, 214 (Ark. Ct. App. 1991)
Florida	**FLA. STAT. ANN. § 672.302 (2011)** "(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination." **STATUTORY NOTES TO FLA. STAT. ANN. § 672.302** The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise (Cf.

BANK OVERDRAFT MDL 2036
UNCONSCIONABILITY SUBCLASSES

	Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948)), and not of disturbance of allocation of risks because of superior bargaining power. *See also* U.C.C. §2-302, cmt. 1. **CASELAW** To succeed on an unconscionability claim, there must be a showing of both procedural and substantive unconscionability. *Woebse v. Health Care & Ret. Corp. of Am.*, 977 So. 2d 630, 632 (Fla. Dist. Ct. App. 2008); *Bland v. Health Care & Ret. Corp. of Am.*, 927 So. 2d 252, 257 (Fla. Dist. Ct. App. 2006). Procedural unconscionability concerns the manner in which the contract is entered, whereas substantive unconscionability looks to whether the contractual terms are unreasonable and unfair. "Most courts take a 'balancing approach' to the unconscionability question, and to tip the scales in favor of unconscionability, most courts seem to require a certain quantum of procedural plus a certain quantum of substantive unconscionability. The amount of either may vary . . . the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019, 1025 (Fla. Dist. Ct. App. 2005).
Louisiana	**CASELAW** Louisiana does not use the terms procedural and substantive but recognizes that both must be present to succeed in bringing an unconscionability claim. An unconscionable contract or term is lacking the free consent that the Louisiana Civil Code requires of all contracts. To be invalidated, a provision must possess features of both adhesionary formation and unduly harsh substance. *Lafleur v. Law Offices of Anthony G. Buzbee, P.C.*, 960 So. 2d 105, 112 (La. Ct. App. 2007).
Tennessee	**TENN. CODE ANN. § 47-2-302 (2011)** "(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. (2) When it is claimed or appears to the court that the contract or any clause thereof may be

BANK OVERDRAFT MDL 2036
UNCONSCIONABILITY SUBCLASSES

	unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination." **STATUTORY NOTES TO TENN. CODE ANN. § 47-2-302** The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise (Cf. *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948)), and not of disturbance of allocation of risks because of superior bargaining power. *See also* U.C.C. §2-302, cmt. 1. **CASELAW** Tennessee does not use the terms procedural and substantive but recognizes that both must be present to succeed in bringing an unconscionability claim. Contract may be unconscionable if the provisions are so one-sided [substantively unconscionable] that the contracting party is denied an opportunity for a meaningful choice [procedurally unconscionable]. *Owens v. Nat'l Health Corp.*, 263 S.W.3d 876, 889 (Tenn. 2007).
Texas	**TEX. BUS. & COM. CODE ANN. § 2.302 (2010)** "(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. (b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination." **STATUTORY NOTES TO TEX. BUS. & COM. CODE ANN. § 2.302** The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be

	unconscionable under the circumstances existing at the time of the making of the contract. Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise (Cf. *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948)), and not of disturbance of allocation of risks because of superior bargaining power. *See also* U.C.C. §2-302, cmt. 1. **CASELAW** Unconscionability includes two aspects (1) procedural unconscionability, which refers to the circumstances surrounding the adoption of the arbitration provision, and (2) substantive unconscionability, which refers to the fairness of the arbitration provision itself. *In re Halliburton Co.*, 80 S.W.3d 566, 571 (Tex. 2002). The party asserting unconscionability bears the burden of proving both procedural and substantive unconscionability. *In re Green Tree Servicing LLC*, 275 S.W.3d 592, 603 (Tex. Ct. App. 2008).

BANK OVERDRAFT MDL 2036
UNCONSCIONABILITY SUBCLASSES

UNCONSCIONABILITY SUBCLASS #2: ELEMENTS OF AN UNCONSCIONABILITY CLAIM: Either Procedurally or Substantively Unconscionable	
States	Mississippi, Missouri
Class Representative	Shane Swift
Either is Sufficient	
Mississippi	**MISS. CODE. ANN. § 75-2-302 (2010)** "(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination." **STATUTORY NOTES TO MISS. CODE. ANN. § 75-2-302** The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise (Cf. *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 3d Cir. 1948)), and not of disturbance of allocation of risks because of superior bargaining power. *See also* 3 MS Prac. Encyclopedia MS Law § 21:54.

BANK OVERDRAFT MDL 2036
UNCONSCIONABILITY SUBCLASSES

	CASELAW The courts have recognized two types of unconscionability, procedural and substantive. Procedural unconscionability may be proved by showing a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract terms. Substantive unconscionability may be proven by showing the terms of the arbitration agreement to be oppressive. Substantively unconscionable clauses have been held to include waiver of choice of forum and waiver of certain remedies. *EquiFirst Corp. v. Jackson*, 920 So. 2d 458, 463 (Miss. 2006). A contract will be found unconscionable if one or the other is shown, a party need not prove both. *East Ford, Inc. v. Taylor*, 826 So. 2d 709, 717 (Miss. 2002).
Missouri	**MO. ANN. STAT. § 400.2-302 (2011)** "(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination." **STATUTORY NOTES TO MO. ANN. STAT. § 400.2-302** The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise (Cf. *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948)), and not of disturbance of allocation of risks because of superior bargaining power. *See also* U.C.C. §2-302, cmt. 1. **CASELAW**

BANK OVERDRAFT MDL 2036
UNCONSCIONABILITY SUBCLASSES

	There are procedural and substantive aspects to unconscionability. There are cases in which a contract provision is sufficiently unfair to warrant a finding of unconscionability on substantive grounds alone. Missouri law does not require the party claiming unconscionability to prove both procedural and substantive unconscionability. Under Missouri law, unconscionability can be procedural, substantive or a combination of both. *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18, 22 (Mo. 2010).

EXHIBIT D

REVIEW OF STATE UNFAIR AND DECEPTIVE TRADE PRACTICE ACTS

I. ARKANSAS

A. Relevant Prohibitions

The Arkansas Deceptive Trade Practices Act ("DTPA") prohibits "[d]eceptive and unconscionable trade practices," which include but are not limited to a list of enumerated items, including "(8) Knowingly taking advantage of a consumer who is reasonably unable to protect his or her interest because of (B) Ignorance," and "(10) Engaging in any other unconscionable, false, or deceptive act or practice in business, commerce, or trade." ARK. CODE ANN. § 4-88-107(a)(10).

"An 'unconscionable' act is an act that 'affront[s] the sense of justice, decency, or reasonableness.'" *Baptist Health v. Murphy*, 226 S.W. 3d 800, 811 & n.6 (Ark. 2006). The DTPA does not define "business," "commerce," or "trade."

Although Arkansas courts have not construed the meaning of "deceptive," the DTPA is to be liberally construed to protect consumers. *State ex rel. Bryant v. R&A Inv. Co.*, 985 S.W.2d 299, 302-03 (Ark. 1999). There is no scienter or intent to deceive requirement associated with § 4-88-107(a)(10).

The DTPA also prohibits the following when utilized in connection with the sale or advertisement of any goods: "(1) The act, use, or employment by any person of any deception, fraud, or false pretense; or (2) The concealment, suppression, or omission of any material fact with intent that others rely upon the concealment, suppression, or omission." ARK. CODE ANN. § 4-88-108. "Goods" means "any tangible property, coupons, or certificates, whether bought or leased." ARK. CODE ANN. § 4-88-102(4). "Person" includes a corporation. ARK. CODE ANN. § 4-88-102(5).

B. Causation/Damages

Any person who suffers actual damage or injury as a result of violating the DTPA may recover actual damages and reasonable attorneys' fees. ARK. CODE ANN § 4-88-113(f). Plaintiffs must prove actual damages, as opposed to any ascertainable loss. *Wallis v. Ford Motor Co.*, 208 S.W.3d 153, 161 (Ark. 2005).

An elder or disabled person who suffers damage or injury as a result of a DTPA violation may recover punitive damages. ARK. CODE ANN. § 4-88-204. An "elder person" means a person who is 60 years of age or older. ARK. CODE ANN. § 4-88-201(a).

Arkansas courts have applied "two measures of damages for common-law fraud: (1) the benefit-of-the-bargain measure (the difference in value of the property as represented and the property's actual value at the time of the purchase) and (2) the out-of-pocket measure (the difference between the price paid for the property and the property's actual value when received)." *Wallis*, 208 S.W. 3d at 155. Benefit of the bargain damages may be awarded in fraud cases "where a party proves that the product received is not what was bargained for; that is, the product received in fact manifests that it is different from that which was promised." *Id.* at 156 (finding that the fraud and ADTPA action was not cognizable where plaintiff's only alleged injury is the diminution in value of the product, as plaintiff has not proved actual damage or injury).[1]

C. Statute Of Limitations

The applicable statute of limitations is found at ARK. CODE ANN. § 4-88-115: "Any civil action brought to enforce the provisions of this chapter may be brought . . . during a period of five (5) years commencing on the date of the occurrence of the violation or the date upon which

[1] A standard for calculating damages under DTPA is not enumerated in the statute or related case law.

the cause of action arises." Arkansas recognizes the discovery rule, which provides that a cause of action does not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only that he has been injured but also that his injury may have been caused by the defendant's conduct. *State v. Diamond Lakes Oil Co.*, 347 Ark. 618, 624, 66 S.W.3d 613 (2002) (citations omitted).

D. Notice Requirements

No notice is required prior to bringing a claim under the DTPA.