IN THE

Indiana Supreme Court

Supreme Court Case No. 22S-PL-305

Cliff Decker and Wendy Decker, Individually and on Behalf of all others Similarly Situated,
Appellants,

–v–

Star Financial Group, Inc.,
Appellee.

Argued: November 3, 2022 | Decided: March 21, 2023

Appeal from the Allen Superior Court
No. 02D02-2103-PL-116
The Honorable Craig J. Bobay, Judge

On Petition to Transfer from the Indiana Court of Appeals
21A-PL-2191

Opinion by Justice Slaughter

Chief Justice Rush and Justices Massa and Molter concur.
Justice Goff concurs in the judgment with separate opinion.

Slaughter, Justice.

Plaintiffs, Cliff and Wendy Decker, have a checking account with Star Financial Bank, a wholly owned subsidiary of defendant, Star Financial Group, Inc. The Deckers, on behalf of themselves and others similarly situated, filed a class-action complaint alleging the Bank collected improper overdraft fees. Before the Deckers sued, the Bank added an arbitration and no-class-action addendum to the terms and conditions of the Deckers' account agreement. After the Deckers sued, the Bank cited the addendum and responded with a motion to compel arbitration, which the trial court granted. We hold that the account agreement's change-of-terms clause did not allow the Bank to add the addendum. We reverse and remand.

I

A

When the Deckers opened their checking account, they assented to an account agreement that detailed the terms and conditions of their relationship with the Bank. Of relevance here, the account agreement stated:

> **(10) Amendments and Termination.** We may change any term of this agreement. Rules governing changes in interest rates are provided separately in the Truth-in-Savings disclosure or in another document. For other changes, we will give you reasonable notice in writing or by any other method permitted by law. . . . Reasonable notice depends on the circumstances . . . . If we have notified you of a change in any term of your account and you continue to have your account after the effective date of the change, you have agreed to the new term(s).

The account agreement did not mention arbitration, class actions, or dispute resolution at all.

In October 2019, the Bank assessed the Deckers a $37 overdraft fee, which the Deckers argued was improper because their account was not

overdrawn. In June 2020, the Deckers' counsel reached out to the Bank's general counsel to discuss its fee practices. In August 2020, the Bank sent the Deckers an email that included their monthly bank statement. The Deckers are e-statement customers, meaning they directed the Bank to "send them their checking account statements and other notices and disclosures relating to the terms and conditions of their checking account via email." The fourteen-page monthly statement contained: (1) ten pages detailing the prior month's transactions; (2) one page of fees; (3) one page of check images; and (4) a two-page addendum to their account agreement providing that claims against the Bank were subject to arbitration and could be brought only in a customer's individual capacity. The addendum noted that it would become effective within ten days if the Deckers retained their account with the Bank. The monthly statement did not summarize the agreement's revised terms and conditions; it merely included the addendum at the end of the statement. The Deckers did not see or review the addendum, and they did not close their account with the Bank.

B

The Deckers later filed a class-action complaint against the Bank alleging improper overdraft fees. The Bank responded with a motion to compel arbitration based on the addendum. After a hearing, the trial court granted the Bank's motion to compel arbitration and dismissed the Deckers' complaint. The Deckers appealed, and the court of appeals reversed and remanded for further proceedings. *Decker v. Star Fin. Grp., Inc.*, 187 N.E.3d 937 (Ind. Ct. App. 2022). The Bank then sought transfer, which we granted, 194 N.E.3d 594 (Ind. 2022), thus vacating the appellate opinion, Ind. Appellate Rule 58(A).

II

A

Indiana has a strong policy favoring arbitration agreements. *MPACT Constr. Grp., LLC v. Superior Concrete Constructors, Inc.*, 802 N.E.2d 901, 905 (Ind. 2004) (citing *Ind. CPA Soc'y v. GoMembers, Inc.*, 777 N.E.2d 747, 750 (Ind. Ct. App. 2002)). But our policy favoring arbitration comes with a key

qualification. A party cannot be required to submit to arbitration unless it has agreed to do so. *Id.* at 906 (citing *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986)). Whether parties agreed to arbitrate a dispute is a matter of contract interpretation. *Ibid.* (citing *AGCO Corp. v. Anglin*, 216 F.3d 589, 593 (7th Cir. 2000)). "The goal of contract interpretation is to ascertain and give effect to the parties' intent as reasonably manifested by the language of the agreement." *Reuille v. E.E. Brandenberger Constr., Inc.*, 888 N.E.2d 770, 771 (Ind. 2008) (citing *First Fed. Sav. Bank of Ind. v. Key Mkts., Inc.*, 559 N.E.2d 600, 603 (Ind. 1990)). "[I]f the language is clear and unambiguous, it must be given its plain and ordinary meaning." *Ibid.* (brackets in original) (quoting *Cabanaw v. Cabanaw*, 648 N.E.2d 694, 697 (Ind. Ct. App. 1995)).

We review questions of contract interpretation de novo. *Lake Imaging, LLC v. Franciscan All., Inc.*, 182 N.E.3d 203, 206 (Ind. 2022) (citing *Schwartz v. Heeter*, 994 N.E.2d 1102, 1105 (Ind. 2013)). And we do not defer to a trial court's decision on a motion to compel arbitration but likewise review it anew. *Doe v. Carmel Operator, LLC*, 160 N.E.3d 518, 521 (Ind. 2021) (citing *Med. Realty Assocs., LLC v. D.A. Dodd, Inc.*, 928 N.E.2d 871, 874 (Ind. Ct. App. 2010)).

B

The Deckers raise three arguments on appeal: (1) the Bank buried notice of the addendum at the end of their monthly statement and thus did not provide the contractually required reasonable notice; (2) the account agreement's change-of-terms clause did not allow the Bank to add the addendum; and (3) the continued use of their checking account did not manifest their assent to the addendum.

For us to affirm the trial court's judgment of dismissal, the Bank must run the table on all three of the Deckers' arguments. In contrast, the Deckers need win only one of their arguments for us to resolve the appeal in their favor. Without expressing any opinion on the merits of the Deckers' first and third arguments, we hold that the specific language of the account agreement's change-of-terms clause did not permit the Bank to add the addendum. Thus, the addendum was not a valid amendment to the account agreement.

The agreement's operative provision is Section 10, which allows the Bank to "change any term of this agreement." The Bank proceeded here as if the account agreement's change-of-terms clause gave it a blank check to amend the agreement any way it saw fit to fend off threatened litigation. But Section 10—which the Bank itself wrote—is not so elastic. This section does not say the Bank can change the agreement however it wants. If the Bank wanted such flexibility, it might have given itself the power to "change this agreement" as desired. Instead, the section is more limited in scope. It limits the Bank to changing "any term of this agreement." Words matter. The difference between a far-reaching power to amend "**this** agreement" and the narrower power to amend "**any term** of this agreement" makes all the difference on this record. The latter—which governs here—limits the Bank to modifying the terms that existed in the original account agreement. Relevant here, the original agreement contained neither a general dispute-resolution provision nor a specific arbitration or no-class-action provision. Thus, there was not "any term" of that agreement the Bank could "change" to effectuate the result it sought here through its addendum. Because the original account agreement did not mention dispute resolution generally or arbitration or class action specifically, Section 10 did not permit the Bank to add such provisions by amendment. To conclude otherwise would violate Section 10.

Case authority from elsewhere recognizes this key distinction. In *Badie v. Bank of America*, the California Court of Appeal held that a change-of-terms clause allowing the bank to "change any term" of the original banking agreement did not permit the bank to add an arbitration clause when the original agreement did not mention arbitration. 79 Cal. Rptr. 2d 273, 277, 289 (Ct. App. 1998). The court reasoned that "whether the change of terms provision permitted the Bank to add the ADR clause . . . depend[ed] principally on what the parties intended by the word 'term[]'". *Id.* at 285. The court used standard rules of contract interpretation to conclude that the change-of-terms clause was ambiguous because it was reasonably susceptible to multiple interpretations. *Id.* at 287. From this conclusion, the court construed the language against the bank, which drafted the agreement, and concluded that "the parties did not intend that the change of terms provision should permit the Bank to

add new contract terms that differ **in kind** from the terms and conditions included in the original agreement[].” *Id.* at 289 (emphasis in original).

Here, following the reasoning of the *Badie* court, we agree that our case likewise turns on “what the parties intended by the word ‘term[]’”. *Id.* at 285. But, unlike the *Badie* court, we conclude that the plain text of the change-of-terms clause allows us to resolve this case without resorting to an ambiguity analysis. In focusing on the word “term”, we must also give effect to the modifier “any”. The agreement did not define “any”; thus, we give the term its plain meaning. *Reuille*, 888 N.E.2d at 771 (quoting *Cabanaw,* 648 N.E.2d at 697). Using “any” shows that the agreement did not allow the Bank to add new terms that differed in kind from those included in the original account agreement. Instead, Section 10 allowed the Bank merely to change a specific kind of term by amendment—namely, only those terms existing in the original account agreement. Because the original account agreement had no general dispute-resolution provision or specific arbitration or class-action provisions, the Bank could not add such provisions by amendment. Thus, the addendum was not a valid amendment to the account agreement.

Our concurring colleague would hold that Sections 2 and 10 of the parties’ agreement independently authorize the Bank’s addendum. As for Section 2, he believes the Bank need only send customers a document “pertaining” to their account to establish a new agreement. We respectfully disagree. Section 2 says that the agreement, “along with any other documents we [the Bank] give you [the customer] pertaining to your account(s), is a contract that establishes rules which control your account(s) with us.” This provision is the vehicle by which the Bank can add or incorporate other documents to the agreement. But this provision alone is not sufficient to change the terms and conditions of their agreement. Here, the Bank did not even purport to rely on Section 2 to change its agreement with the Deckers. In its notice to the Deckers, the Bank relied on Section 10, citing the provision’s reasonable-notice requirement, and labeled the addendum as an “amendment” to the agreement: “PURSUANT TO **SECTION 10** OF YOUR ACCOUNT AGREEMENT . . . REGARDING REASONABLE NOTICE FOR ANY **AMENDMENT** TO YOUR ACCOUNT AGREEMENT, THIS

ADDENDUM SHALL BE EFFECTIVE TEN (10) DAYS FROM THE DATE OF MAILING OR ELECTRONIC NOTIFICATION OF THIS ADDENDUM." (Emphasis added). It is noteworthy that the only section for amending the account agreement is Section 10, titled "Amendments and Termination." In contrast, the word "amendment" never appears in Section 2. Thus, because the Bank relied on Section 10 to add the addendum, that section governs whether this amendment is valid.

As for Section 10, we have already explained why its first sentence—entitling the Bank to "change any term" of this agreement—does not authorize the addendum here. The concurrence relies instead on Section 10's last sentence: "If we have notified you of a change in any term of your account and you continue to have your account after the effective date of the change, you have agreed to the new term(s)." This provision does not mean the Bank can add whatever "new term(s)" it wishes to the parties' agreement without limitation. Such an interpretation has things backward. The phrase "new term(s)" is not the predicate but the conclusion. If the changed term is authorized (see Section 10's opening sentence) and the customer does not close the account (see its closing sentence), then the changed term becomes a "new term" in the updated agreement. That is a far cry from saying that any "new term" is fair game and is necessarily a valid addition to an updated agreement.

Given our dispositive conclusion that the agreement's change-of-terms clause did not allow the Bank to add the addendum, we do not consider whether the Deckers received reasonable notice of the addendum or whether their continued use of their checking account manifested their assent to the addendum.

* * *

For these reasons, we reverse the trial court's judgment and remand for further proceedings consistent with our opinion.

Rush, C.J., and Massa and Molter, JJ., concur.
Goff, J., concurs in the judgment with separate opinion.

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Goff, J., concurring in the judgment.

I agree with the Court that the Deckers are not bound by the arbitration addendum to their account agreement. But I reach that conclusion for a different reason. In my view, the agreement—taken as a whole—permits the addition of an arbitration addendum. But, given the lack of reasonable opportunity to reject the addendum, the Deckers did not, as I see it, assent to a change in terms.

I. The agreement, when read in full, permits the addition of an arbitration addendum.

The Court concludes that, because the account agreement's amendment clause (Section 10) limits the Bank to modifying the agreement's **existing** terms, and because the original agreement contained neither an arbitration clause nor a class-action provision, the Bank acted beyond its contractual authority and "the addendum was not a valid amendment to the account agreement." *Ante*, at 4–6. This conclusion, in my view, overlooks other pertinent terms of the agreement and rests on an overly narrow definition of "change."

To begin with, Section 2 identifies the principal document, "**along with any other documents**" a customer receives "pertaining to [the] account(s), [a]s **a contract** that establishes rules which control [the] account(s)." App. Vol. 2, p. 53 (emphasis added). Rather than operating as a mere "vehicle" which the Bank may use for amending the agreement under Section 10, as the Court proposes, *ante*, at 6, Section 2 acknowledges that **additional terms** may form part of the contract. And because the arbitration addendum unquestionably amounted to a document "pertaining to" a customer's account, it may become part of the "contract that establishes rules which control" that account (upon the customer's assent), the terms of which are then subject to further amendment under Section 10.

Second, and independently, Section 10 itself stipulates that notification "of a change in any term," and the customer's continued use of the

account "after the effective date of the change," constitute the customer's assent "to the **new terms**" of the agreement. App. Vol. 2, p. 57 (emphasis added). This language, in my view, clearly contemplates the addition of novel terms by modification of the agreement's existing terms.

In short, when we "read all of the contractual provisions as a whole" and avoid "focusing on isolated [words or] phrases," the agreement here permits the addition of an arbitration addendum. *See DeHaan v. DeHaan*, 572 N.E.2d 1315, 1320, 1322 (Ind. Ct. App. 1991).

II. The Deckers did not assent to the addendum by failing to close their account within ten days.

An arbitration agreement, as with a typical contract, requires "offer, acceptance of the offer and consideration." *Reitenour v. M/I Homes of Indiana, L.P.*, 176 N.E.3d 505, 511 (Ind. Ct. App. 2021) (internal citation and quotation marks omitted). A party's assent "may be expressed by acts which manifest acceptance." *DiMizio v. Romo*, 756 N.E.2d 1018, 1022 (Ind. Ct. App. 2001) (internal citation and quotation marks omitted). And, in certain circumstances, a party's silence or inaction may likewise constitute assent. *Mueller v. Karns*, 873 N.E.2d 652, 657–58 (Ind. Ct. App. 2007).

The Restatement (Second) of Contracts recognizes a party's silence or inaction as acceptance in only three exceptional circumstances: (1) when the offeree takes the benefit of the offered services with reasonable opportunity to reject; (2) when the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction and the offeree intends to accept the offer by remaining silent; or (3) when, because of previous dealings, it is reasonable that the offeree should notify the offeror if he does not intend to accept. Restatement (Second) of Contracts § 69(1) (Am. L. Inst. 1981).

While this Court has never applied section 69 of the Restatement, our Court of Appeals has relied on it when analyzing issues of contractual assent by silence or inaction, *see, e.g.*, *Mueller*, 873 N.E.2d at 657–58, and

the Bank itself considers it a part of "Indiana law," Appellee's Br. at 39.[1] More importantly, adopting section 69, in the absence of statutory authority to the contrary, would, in my view, promote consistency in contracting practices among businesses and instill a greater sense of fairness among consumers in carrying out their contractual obligations, ultimately reducing the need for judicial intervention.

Applying section 69 here, the Bank insists that (1) the Deckers "agreed to accept the benefits" of the Bank's services by "continuing to use their checking account just as they had before the Arbitration Addendum went into effect," and (2) the Bank "specifically told the Deckers that their silence or inaction would manifest their assent to the Arbitration Addendum." *Id.*

I find this argument unpersuasive.

To begin with, the "mere fact that an offeror states that silence will constitute acceptance does not deprive the offeree of his privilege to remain silent without accepting." Restatement (Second) of Contracts § 69 cmt. c. The "case for acceptance is strongest" under the Restatement "when the reliance is definite and substantial or when the intent to accept is objectively manifested though not communicated to the offeror." *Id.* And while an offeree's "intent to accept is manifested only by silent inaction," an "offeror who has invited such an acceptance cannot complain of the resulting uncertainty in his position." *Id.*

Here, the Deckers did nothing to show a "definite and substantial" reliance on the addendum, and, in my view, their short-term maintenance of the account—a mere preservation of the status quo—fails to show an objective manifestation of intent to accept the new terms. *See id. Cf. Meyer v. Nat. City Bank*, 903 N.E.2d 974, 976 (Ind. Ct. App. 2009) (holding that a customer assented to a credit card agreement where the agreement

[1] The Bank, nevertheless, apparently disapproves of reliance on the commentary to section 69. *See* Appellee's Br. at 39 n.17.

expressly stated that use of the card constituted acceptance and the customer in fact used the credit card).

Second, and more importantly, the "mere receipt of an unsolicited offer does not impair the offeree's freedom of action or inaction or impose on him any duty to speak." Restatement (Second) of Contracts § 69 cmt. a. Rather, there must be a "**reasonable opportunity to reject**" the offer. *Id.* § 69(1) (emphasis added). And the "existence of a reasonable opportunity to reject" necessarily "requires affording the consumer a **reasonable time period** in which to exercise such rejection." Restatement of Consumer Contracts § 3 cmt. 4 (Am. L. Inst., Tent. Draft 2019) (emphasis added).[2] What's more, an opportunity to reject (or to terminate, which effectively is what the agreement here calls for) "is reasonable if it does not impose unreasonable cost, loss of value, or personal burden on the consumer." *Id.* cmt. 6. Rejection or termination "is not feasible or practicable" if, for example, it "would impose a significant loss of value acquired by the consumer prior to the proposed modification; would force the consumer to incur a significant financial or other burden to enter a substitute contract; would squander a substantial investment in the relationship; or would undermine the consumer's reasonable, forward-looking expectation from the relationship." *Id.*

Here, Section 12 of the agreement required the Deckers to review their August 2020 account statement with accompanying addendum within "**30 days** from when the statement [was] first sent or made available to" them. App. Vol. 2, p. 58 (emphasis added). Requiring the Deckers to close their checking account within **ten days** of receiving that account statement clearly conflicts with Section 12, depriving the Deckers of a "reasonable

[2] The Restatement of Consumer Contracts is only a revised tentative draft. But this Court has relied on working drafts by similarly respected organizations for their authoritative exposition of the law. *See, e.g.*, *Merrill v. Wimmer*, 481 N.E.2d 1294, 1298–99 n.2 (Ind. 1985) (citing as persuasive authority the Restatement (Second) of Property (Donative Transfers), as well as a "proposed draft" on the same subject by the National Conference of Commissioners on Uniform State Laws).

opportunity to reject" the offer.[3] *Cf. Mueller*, 873 N.E.2d at 658 (holding that silence did not constitute acceptance where, among other things, offeror did not provide offeree a clear and timely mechanism for rejecting his services and offeror had performed all services by the time he sent the letter notifying him of terms). What's more, closing the account on such short notice not only forces customers to change banks, but it also potentially exposes them to financial liability from, for example, fees incurred for missed automatic payments to vendors or utilities.

Conclusion

In sum, I agree with the Court that the Deckers are not bound by the arbitration addendum to their account agreement. However, I reach that conclusion not because the agreement prohibits the Bank from adding new terms but, rather, because the Deckers' failure to close the account within ten days did not, in my view, constitute assent to the addendum.

[3] To be sure, the agreement specifies that the customer "agree[s] that the time you have to examine [the] statement and report to [the Bank] will depend on the circumstances." App. Vol. 2, p. 58. But there's nothing to suggest what those various circumstances would be, either in the agreement or in the August 2020 email notice.