DEVELOPMENTS IN CONSUMER ARBITRATION CASE LAW: 1997-June 2001

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PREFACE AND READERS' GUIDE

The objective of these case summaries is to provide attorneys with an up-to-date review of many of the cases involving consumer arbitration agreements starting with cases decided in 1997. However, this summary does not include all the cases which have been decided since 1997. It contains only those which have come to my attention and which I believe contain discussions, analyses, and holdings which are of interest to those litigating these cases. Many cases appear under more than one topic heading, but I have by no means included all the issues discussed in each case. I have tried to present an objective summary of each case, but have no doubt my summaries to some extent reflect my perspective on consumer arbitration. Note the jurisdiction which decided each case. More cases have been decided by Alabama courts than any other jurisdiction. Some courts in other jurisdictions are influenced by and follow Alabama. Other courts ignore Alabama decisions. The Alabama Supreme Court has overruled some of its prior arbitration decisions. Therefore, before relying on any case in this summary, but especially those from Alabama, make sure you know what the courts have done since the latest revision of this summary.

While I have separated the cases into several topics, the heading "Motions to Compel Arbitration and Related Issues" is a general dumping ground for those cases which do not easily fit within a more specific category. If you cannot find the issue you are looking for in the specific categories, search through "Motions to Compel."

I have occasionally included commercial cases which seem to raise issues similar to those which arise in consumer cases. I have generally not included important cases from other areas, such as employment, solely for lack of time.

I welcome suggestions for ways to improve these summaries. Contact me at lawmeb@langate.gsu.edu.

This document does not provide or constitute legal advice. The summaries should not be relied upon by the reader. The reader should instead use the summaries as a device which may or may not lead the reader to relevant cases. Each case must be read in full and subsequent history (overruling, etc.) considered.

I. Constitutionality of Statutorily Mandated Arbitration

Reed v. Farmers Insurance Group**,** 188 Ill.2d 168, 720 N.E.2d 1052 (1999)

An Illinois statute requires that disputes about uninsured motorist coverage be submitted to arbitration. If the arbitrator's award exceeds a certain amount, the parties can seek a trial de novo. The consumer challenged that aspect of the statute on constitutional grounds because, as other courts have held, it unfavorably structures matters in favor of the insurer. The insurer can reject large arbitration awards, but the insured consumer cannot reject small arbitration awards. The court found no state constitutional infirmities after considering arguments that the provision violated public policy, freedom of contract, due process, equal protection, the prohibition against special legislation, and the right to a jury trial. In regard to the latter, the court found the state constitutional right to a jury trial applies only to actions which exist at common law.

II. Jurisdiction, Venue, and Procedure

Green Tree Financial Corp., v. Randolph, 531 U.S. 79, 121 S. Ct. 513, 148 L.Ed.2d 373 (2000)

In a case where the district court had ordered the parties to proceed to arbitration and dismissed all the claims before the court, the court has made a "final decision" under the FAA and an appeal is allowed. The Court rejected the argument that there was no final decision because the parties are permitted to bring a separate action to enter judgment on an arbitration award or to vacate or modify the award. In addition, the Court refused to make a distinction between "embedded" proceedings which involve both a request to compel arbitration and other claims for relief, and independent proceedings in which the request is the only issue before the court.

Transouth Financial Corp. v. Bell , 149 F.3d 1292 (11th Cir. 1998)

Consumer filed a lawsuit in state court against defendants who included both foreign corporations and an Alabama resident corporation. Persons alleged to be agents of the foreign corporations also were sued. Consumer alleged that defendants engaged in various fraudulent misrepresentations, concealment of material facts, and negligence in hiring agents involved in consumer's loans. Removal to federal court was precluded because there was no complete diversity of citizenship between plaintiff and all the state defendants, and there was no other independent basis for federal jurisdiction. Consequently, the foreign corporations filed an action in federal court seeking orders staying the state court suit and compelling the consumer to arbitrate pursuant to the FAA.

The district court dismissed the federal lawsuit, abstaining for reasons of comity and wise judicial administration. The court also found that the Anti-Injunction Act barred the federal court from litigating the case.

On appeal, the court found the district court had abused its discretion in abstaining. Rather than applying abstention rules directly to the case before it, the court found the facts were materially

indistinguishable from those in *First Franklin Fin. Corp v. McCollum*, 144 F.3d 1362 (11th Cir. 1998). In *First Franklin*, the court found there was no danger of piecemeal litigation because the only issue before the federal court was the arbitrability of the dispute. Second, the state court had not yet ruled on First Franklin's motion to compel arbitration at the time the district decided to abstain. Therefore, nothing had happened in state court to weigh in favor of federal court deferral. Third, the weight of the law was against abstention because the FAA governs motions to compel arbitration. Finally, although the state court had greater ability to provide complete relief, that factor was not sufficient to outweigh the factors against abstention.

The court, however, agreed with the district court and the consumer that the federal Anti-Injunction Act prohibited the district court from enjoining the concurrent state court proceedings. The case involved the application of an exception under the Act which provides that a federal court is not prohibited from enjoining a state court proceeding where an injunction is necessary to aid the federal court's jurisdiction. Following Eleventh Circuit precedent, the court held that this exception can apply in *in personam* actions. However, where there is concurrent jurisdiction arising out of the same transaction, as here, ordinarily neither forum should interfere with the other's jurisdiction. In the present case an injunction was not necessary to prevent the state court from interfering with the federal court's authority to decide the case. No court had found the underlying dispute arbitrable and compelled arbitration. However, if the district court does order arbitration, it might be appropriate to order a stay of the state court proceedings in order to prevent interference with the federal court's ability to rule on the validity of the arbitration proceedings it compelled.

Wells v. Chevy Chase Bank, 363 Md. 232, 768 A.2d 620 (Md. Ct. App. 2001)

A Maryland general appeals statute permits an appeal from an order compelling arbitration. That law is not preempted by the FAA.

III. Effect of Magnuson-Moss and state Lemon laws

Cunningham v. Fleetwood Homes of Georgia, 2001 Westlaw 618262 (11th Cir. 2001)

Manufacturer of mobile home could not use its status as a third-party beneficiary to compel binding arbitration of the consumer's breach of written warranty claims against the manufacturer. The warranty contained no reference to binding arbitration. To compel arbitration under these circumstances "presents an inherent conflict with [Magnuson-Moss'] purpose of providing clear and concise warranties to consumers." In dicta the court opined that "we are inclined to think that" Magnuson-Moss does not render binding arbitration agreements unenforceable. However, the court also stated that they were not deciding that issue in this case.

In re American Homestar of Lancaster, 2001 Westlaw 618173 (Tex. 2001)

Rejecting the FTC's position, the court held that there is no clear congressional intent in Magnuson-Moss to override the FAA policy in favor of arbitration, and consequently the trial court did not abuse its discretion in compelling arbitration.

Pitchford v. Oakwood Mobile Homes, 124 F. Supp. 2d 958 (W.D. Va. 2000)

Arbitration agreement which provided that disputes arising out of warranties were required to be submitted to a third party for binding arbitration violated Magnuson-Moss. This defect in the arbitration agreement could be cured only by "blue penciling," deleting portions of the agreement, which Virginia courts refuse to do. Therefore, the agreement was unenforceable. Severability was not possible because there was no provision which could be treated independently to cure the conflict with Magnuson-Moss.

Raesly v. Grand Housing, 105 F. Supp.2d 562 (S.D. Miss. 2000)

Court refuses to compel arbitration of consumer's claims for breach of express warranties as the transaction is covered by Magnuson-Moss and that Act forbids binding arbitration of express warranty claims.

Southern Energy Homes v. Ard, 772 So.2d 11313 (Ala. 2000)

The court held the Magnuson-Moss Warranty Act did not invalidate arbitration provisions in a written warranty, overruling *Southern Energy Homes, Inc. v. Lee*, 732 So. 2d 994 (Ala. 1999).

Results Oriented v. Crawford, 245 Ga. App. 432, 538 S.E.2d 73 (2000), aff'd on other grounds, 2001 Ga. Lexis 446 (June 11, 2001)

Magnuson-Moss Warranty Act did not preclude manufacturer from arbitrating purchaser's express and implied warranty claims. Court followed *Southern Energy Home v. Ard*.

Southern Energy Homes v. Lee, 732 So.2d 994 (Ala. 1999)

Court held that Magnuson-Moss Act prohibits arbitration clauses in a manufacturer's written warranty and Act supersedes the FAA. The decision follows the reasoning of *Wilson*. See also *Herron v. South Atlantic Manufactured Homes*, 1999 Westlaw 6949 (Ala. 1999)(granting writ of mandamus directing trial court to vacate order compelling arbitration; court citing *Southern Energy*, *Isbell* and *Wilson*.

Wilson v. Waverlee Homes, 954 F. Supp. 1530 (M.D. Ala. 1997); *aff'd without opinion*, 127 F.3d 40 (11th Cir. 1997)

Consumers sued manufacturer of mobile homes for violations of the Magnuson-Moss Act. The manufacturer provided the consumers with a written product warranty which contained no

arbitration provision. There was an arbitration clause in the contract between the dealer and the consumers. The manufacturer sought to "piggyback" on the dealer's arbitration clause. The court held that the arbitration clauses in the contracts before it were unenforceable because they provided for binding arbitration. In regard to written warranties, Magnuson-Moss guarantees consumers a judicial forum with one exception for "informal dispute settlement mechanisms" which are non-binding and are merely a prerequisite to seeking relief in court, not a bar to the judicial forum. The court found support in the text of the Act, its legislative history, and FTC regulations. The court noted that the manufacturer would have violated the Act if its warranty contract with the consumer had contained a binding arbitration clause. And the court opined that allowing the manufacturer to use theories such as third party beneficiary and estoppel to take advantage of the arbitration clause in the contract between the seller and the consumer "would be the complete and utter evisceration" of the Act and lead to collusion between sellers and manufacturers. The court pointed out that it did not have before it the more fundamental issue of whether the FAA and arbitration agreements in general are unenforceable as to all claims based on the Act. See the Boyd case, infra, where the same court further commented on its decision in the instant case.

See also Ex parte Isbell v. Southern Energy Homes, 708 So.2d 571 (Ala. 1997) which in dicta agrees with *Waverlee* on the Magnuson-Moss issue.

Boyd v. Homes of Legend, 981 F. Supp. 1423 (M.D. Ala. 1997)

In *Waverlee*, supra, the nonsignatory manufacturer's right to enforce an arbitration clause in a purchase contract was at issue, and the parties made no attempt to distinguish the treatment of written and non-written warranties under Magnuson-Moss. In contrast, the instant case involved a mobile home dealer who was a signatory to the purchase contract and who did not provide the consumers any written warranty. The issue was whether that dealer could enforce an arbitration clause under Magnuson-Moss. The court held that *Waverlee* did not extend to this case involving only non-written warranties. Therefore, Magnuson-Moss did not preclude the dealer from compelling arbitration of the breach of warranty claims against the dealer. The court reached this conclusion based on the text of the Act, the legislative history, case law involving comparable statutes, and a Federal Trade Commission statement.

The court acknowledged that under *Gilmer*, courts have the obligation not to enforce contracts which result from overwhelming economic power, and that Congress had been particularly concerned with unequal bargaining power when considering Magnuson-Moss. The court found, however, that Congress' intent was to provide statutory protection to alleviate that inequality only in regard to written warranties, not implied warranties which are not the product of the bargaining process, but rather the result of legislative and judicial processes.

The court noted that it was not faced with the difficult situation where the consumer has both written and non-written warranty claims and the issue is whether Magnuson-Moss restricts arbitration of the non-written as well as the written, particularly if both claims were intertwined.

Harrison v. Nissan Motor Corp., 111 F.3d 343 (3rd Cir. 1997)

Consumer requested arbitration pursuant to Pennsylvania's Lemon law. When the defendant never responded, the consumer filed a suit in federal court based on diversity, alleging, among other things, violations of the lemon Law and Magnuson-Moss. Under the Lemon Law, the ADR procedure must comply with Magnuson-Moss' informal mechanism. The court determined that the essence of arbitration is that the parties arbitrate their dispute through to completion. In contrast, under the Lemon Law and Magnuson-Moss, the dissatisfied consumer has the right to go to court. Therefore, the dispute resolution procedure under these laws does not constitute "arbitration" which is governed by the FAA.

IV. Motions to Compel Arbitration and Related Issues

A. Cases Denying Motion to Compel

Tefco Finance Co. v. Green, 2001 Westlaw 259279 (Ala. 2001)

In a case involving a consumer plaintiff who purchased a used car, the Alabama Supreme Court upheld the denial of a motion to compel because the defendants failed to prove the transaction affected interstate commerce. The defendants asserted that the FAA applied because interstate commerce was involved. This was shown by the fact that the car was manufactured outside Alabama and cars can be transported across state lines. The court held that the defendants had the burden of proving the transaction affected interstate commerce, and to meet that burden, they had to show that the contract had substantial effects on interstate commerce. The court noted that a majority of the court had previously rejected a per se rule for determining whether a transaction involved interstate commerce. Here, the defendants presented no evidence indicating how the aggregated effects of the intrastate purchase of a used car affects interstate commerce where the consumer resided in Alabama, the seller and creditor were Alabama businesses, and the sale and financing took place in Alabama.

Wells v. Chevy Chase Bank, 363 Md. 232, 768 A.2d 620 (Md. Ct. App. 2001)

Contract provided that any claim "shall, at the request and expense of the claiming party, be submitted to mediation....If mediation fails...then the Claim shall be determined by binding arbitration." Another clause provided that either party could bring an action in court compelling compliance. The consumers were the claiming party, and they did not request mediation. The court construed the plain language of the agreement as meaning arbitration could not be compelled because the claiming party did not request mediation.

Thermo-Sav v. Bozeman, 782 So.2d 241 (Ala. 2000)

The arbitration provision appeared on the reverse side of a contract which was presented to the consumer attached to a clipboard. The signature line was on the front side. No language on the

front indicated that additional terms appeared on the reverse. The consumer was not aware that there were terms on the reverse side. The seller knew, but did not bring those terms to the consumer's attention. Consequently, the trial court could conclude that the consumer did not agree to be bound and the arbitration clause was unenforceable.

Wood v. Cooper Chevrolet, 102 F. Supp.2d 1345 (N.D. Ala. 2000)

While the *Randolph* case was on appeal to the U.S. Supreme Court, the district court was confronted with a similar situation in which the arbitration agreement was silent on who would bear the costs of arbitration. When the consumer challenged the arbitration provision, the creditor agreed to pay the arbitration fees initially, but stated he would seek reimbursement at the completion of the proceedings. The court found that, given the fact that the costs of arbitration would probably exceed the amount of any recovery under TILA, it would be economically infeasible for the consumers to bring a TILA case if they were forced into arbitration. This would "eviscerate" the purpose of TILA because creditors, aware that consumers would not sue because of these financial realities, would have no incentive to comply with TILA. The court ruled that it would deny the motion to compel unless the creditor agreed to pay the costs of arbitration and its own attorney fees without seeking reimbursement from the consumer. The creditor was not required to pay the consumer's attorney fees unless the arbitration panel were to award those to the consumer.

Southern Energy Homes v. Hennis, 2000 WL 1074048 (Ala. Aug. 4, 2000)

After buying a manufactured home from manufacturer, consumer received a handbook containing manufacturer's express warranty, and a provision requiring arbitration of claims. Holding that the handbook's provision did not establish an arbitration agreement, the court stated that manufacturer had the burden of proving the agreement. Sparse evidence of pages of the handbook relating to the warranty and the arbitration provision were insufficient to show the mutual assent required to constitute an agreement to arbitrate. The court also noted that no proper foundation had been established for the admission of the pages, and that an affidavit by one of defendant's officers claiming to authenticate the evidence was unsworn and incompetent. The court held that even if the evidence was authenticated, it could not establish an agreement because the consumer did not assent, even by ratification by acceptance of the warranty. The court noted, however, that the consumer could not pursue his breach of express warranty claim, as acceptance of the warranty necessitated acceptance of the arbitration clause

Sisters of the Visitation v. Cochran, 2000 WL 264243 (Ala. May 26, 2000)

In a case involving commercial parties, the court held that appellant failed to show that its transaction with appellee substantially affected interstate commerce, and thus, the arbitration provision was not enforceable under the Federal Arbitration Act. Both parties were Alabama residents, and the contract was to performed in Alabama. Although appellee acquired tools and equipment in interstate commerce, this had no substantial effect on interstate commerce because appellee's work became a part of the structure of the chapel and could not be detached and

moved across state lines. The fact that people from out of the state may have visited the chapel later was too tenuous a connection with interstate commerce.

Sandvik v. Advent, 220 F.3d 99 (3d Cir. 2000)

In a case involving commercial parties, the court held that when a party denying the existence of a contract tries to enforce a mandatory arbitration clause contained in that contract, the district court can't compel arbitration without first determining whether a valid arbitration agreement was signed.

Party Yards, Inc. v. Templeton, 751 So. 2d 121 (Fla. App. 5th Dist. 2000)

In a case involving commercial parties, court found, as a matter of law, a usury violation arises under state statutory law, not under an agreement. A claim that a contract is illegal and criminal in nature is not a matter which can be determined by an arbitrator, since an arbitrator cannot order a party to perform an illegal act.

Henderson v. Coral Springs Nissan, Inc., 757 So. 2d 577 (Fla. App. 2000)

Consumer gave car dealer a down payment for a vehicle. Later, the car dealer demanded more money to be applied towards the down payment. When the consumer refused to pay the money, the car dealer unilaterally rescinded the contract and repossessed the vehicle. Consumer filed an action under the Florida Deceptive and Unfair Trade Practices Act. The court held that the trial court erred in granting the car dealer's motion to compel arbitration because there can be no enforceable arbitration clause where a contract was rescinded prior to a motion to compel arbitration. The rescission renders the contract abrogated and of no force and effect from the beginning.

Durney v. First Alliance Mortgage Company v. Forrest, No. H018267 (Cal. App. 1999)

Consumer, an elderly homeowner, filed suit alleging that the loan she received from lender was obtained by fraud. At closing, consumer was given a stack of twenty-seven documents to sign. Consumer alleged that she "was allowed to see only the bottom part of the page," only the part which contained the signature line. Other customers of lender filed declarations that they had similar experiences. The lender contended that the consumer was able to read and understand English, and therefore capable of understanding the one-page arbitration agreement which she signed. The court said the issue was rather whether the signature process prevented the consumer from reading the agreement, and derived her of a reasonable opportunity to discover the existence of the agreement. The court found that lender trained its employees to describe the mediation and arbitration agreement as a fair lending notice. The lender actually concealed the terms of the documents, and the method of presenting the loan documents deceived the consumer as to the nature of what she was signing. Consequently, the contract was void. As a result, the court denied the lender's motion to compel.

Watkins v. Bank of America, No. 816595-8, 74 Banking Rep. (BNA) 509 (Cal. Super., Feb. 32, 2000)

The bank's ADR provision was contained in a booklet provided to the consumer. The bank contended that when the consumer signed the master agreement, he agreed to the terms included in the booklet. The court rejected that argument, noting that the master agreement did not clearly state that the parties would be bound by incorporated documents, and did not specify or identify the writings which were incorporated. The court held the evidence did not prove mutual assent to the terms in the booklet. In addition, the court found the contract was one of adhesion and imposed terms by surprise or oppression.

Baron v. Best Buy, 75 F. Supp.2d 1368 (S.D. Fla. 1999), on appeal to Eleventh Circuit

Consumer alleged seller violated TILA and state law in the sale of credit insurance. The arbitration clause provided that disputes would be arbitrated pursuant to the Code of Procedure of the National Arbitration Forum. Following the *Randolph* case (supra), the court denied the motion to compel because the seller had not shown that the NAF is a neutral, inexpensive, and efficient forum. In addition, the arbitration clause provided that the applicable rules would be whatever rules were in effect at the time a claim was filed. Because NAF had frequently revised its rules, it was unclear what procedures would apply. Adding to the uncertainty over what procedure would be followed was the fact that the arbitrator had almost total discretion to modify the rules. Consequently, enforcing the clause would raise an impermissible barrier to the consumer's enforcement of her statutory rights. Finally, under the agreement each party had to pay their own attorney fees, contrary to the remedial purposes of TILA.

Pitchford v. Oakwood Mobile Homes, 1999 U.S. Dist Lexis 20596 (W.D. Va. 1999)

Court found there was no meeting of the minds and consequently no valid contract where consumer testified there was no discussion about the arbitration agreement or the arbitration process and she did not know what arbitration was; the agreement was merely included in a pile of documents she was told to sign. The defendant testified that he told her that if a dispute arose, arbitration was one of their options. This was contrary to the arbitration agreement which provided that arbitration was the only option except for actions to take or dispose of collateral.

Seifert v. U.S. Home Corp., 1999 Fla. Lexis 2041 (Fl. 1999)

Consumer brought wrongful death action after the air conditioning system installed by the company building the consumer's house transmitted carbon monoxide from the garage into the home, killing consumer's husband. The arbitration clause covered "Any controversy or claim arising under or related to this Agreement." The court held there must be some nexus between the dispute and the contract containing the arbitration clause. The mere fact that the parties were in a contractual relationship is not sufficient. Here, the consumer's complaint was based on tort, the company's negligence, not on contract. The court held tort actions were not contemplated to be within the scope of the arbitration clause. Moreover, the agreement did not mention the

parties' rights if there were personal injuries or death arising from tortious conduct. There was no significant relationship between the tort claim and the contract; none of the allegations in the complaint referred to the sales contract.

Powertel v. Bexley, 743 So.2d 570 (Fla. Ct. App. 1999)

The court denied motion to compel where consumer filed her lawsuit against the defendant before the defendant sent her a pamphlet containing the arbitration agreement as a stuffer in her monthly phone bill. The court held that the arbitration clause could not apply retroactively to the pending lawsuit. The court rejected the defendant's contention that the consumer's failure to object to the arbitration clause is equivalent to a voluntary decision to dismiss a pending lawsuit.

Premiere Chevrolet v. Headrick, 1999 Ala. Lexis 295 (1999)

In a case involving a car lease, the lease did not contain an arbitration clause. The consumer's order did include the clause, but also provided that it was not valid unless it was signed by the lessor, who did not sign it. The lease contained a clause stating that no other agreement between the parties was binding unless it was signed by both parties. The court rejected the lessor's argument that by performing the contract, i.e., delivering the car, it ratified the consumer's order. The court did so because nowhere did the order require the lessor to deliver the car. Finally, the court rejected the lessor's contention that the validity and enforceability of the consumer's order should have been determined by the arbitrator. That rejection was based on the court's finding that the evidence was not clear and unmistakable that the parties agreed that any dispute about arbitrability would be decided by the arbitrator.

Knepp v. Credit Acceptance Corp., 229 B.R. 821 (Bankr. N.D. Ala. 1999)

The court held there was no agreement to arbitrate where the arbitration provision was included in the buyer's order. The buyer's order was not signed by both parties even though it contains the phrase "the undersigned acknowledges and agrees" and two separate lines for signatures. The court concluded that without both signatures there was no agreement to arbitrate. In addition, the buyer's order was not attached to the sales contract or executed contemporaneously, and the sales contract did not refer to the buyer's order. The "separability doctrine" requires considering the arbitration clause as a separate contract. Because the seller never signed the buyer's order, there was a lack of mutuality of assent, and consequently no valid arbitration agreement. Furthermore, the court found there is an inherent conflict between the Bankruptcy Code and the FAA. Debtors in bankruptcy cannot afford arbitration proceedings and money the debtor would have to spend on arbitration will result in less money to fund the debtor's confirmed plan and to pay creditors.

Jones v. Adams Financial Services, 84 Cal. Rptr. 2d 151 (Ct. App. 1999)

Court upheld trial court's denial of motion to compel where evidence showed fraud in the execution of loan documents. The consumer was 79 years old, legally blind, and suffered from

dementia and hypothyroidism. Her income was $819 per month, the loan payments were $531 per month. To counter the lender's argument that the consumer had the opportunity to read the documents and discover they were not what the lender represented, the court pointed out she was prevented from doing so by her physical condition and impairment. The lender argued she had three days to cancel under TILA, and was negligent in not doing so. The court said she had no reason to cancel because the lender had misrepresented the true nature of the documents.

In the Matter of S&R Company of Kingston v. Latona Trucking**,** 159 F.3d 80 (2d Cir. 1998)

In a commercial case, court held that because of the parties' active participation in prior litigation on the merits of the dispute, it was proper for district court, rather than arbitrator, to decide whether parties had waived their right to arbitration. Second, the court here found the parties had waived their right. The court listed the relevant factors as (1) the amount of time between the commencement of litigation and the request for arbitration, (2) the amount of litigation which occurred, and (3) proof the opposing party was prejudiced, including proof the movant took advantage of pretrial discovery which would not have been available in arbitration. Finally, the court refused to enforce the AAA's "no waiver" clause. (See this case in the "Waiver" section.)

Med Center Cars v. Smith**,** 727 So.2d 9 (Ala. 1998)

Consumers, but not seller, signed "buyer's orders" containing arbitration clauses. The seller's name was printed on the buyer's order. The buyer's order also provided that the order was not valid unless accepted by the seller. Relying on prior Alabama law, the court held that the order was not enforceable. The purpose of a signature is to show mutuality and assent; lack of a signature shows lack of mutuality and assent. Although both the consumers and the seller signed a sales contract, that document did not contain an arbitration clause.

AJM Packaging Corp. v. Crossland Construction Co., 962 S.W.2d 906 (Mo. Ct. App. 1998)

This case involved commercial parties, not consumers, but is informative because it illustrates the importance of following trial and evidentiary rules. In addition, the case illustrates that, not only is it vital to draft clear and unambiguous arbitration agreements, but also it is essential that other provisions in the contract do not throw doubt upon the parties' intentions in regard to the arbitration provision.

The court upheld the trial court's denial of a motion to compel arbitration on two grounds. First, the arbitration provision was in a separate document from the standard form agreement containing other terms of the agreement. The attorney for the movant never formally introduced the document containing the arbitration clause into evidence.

Second, even assuming the arbitration agreement had been properly introduced into evidence, the documents also contained a provision stating that reference to arbitration "shall be deleted" and all disputes were to be decided by the courts of Missouri. Since a party who had not agreed

to arbitrate cannot be forced to do so, the court had to decide whether, under contract law, the contract should be construed to show an agreement to arbitrate. Given the ambiguity, the court resorted to the rule that a contract should be construed as a whole, giving effect to every part, in order to determine the true intent of the parties. The court held that the contract could be construed to mean that the parties meant to supplant the arbitration provision. Such a construction gave 'effect' to both provisions at issue by recognizing the arbitration clause, but construing the other provision as the one the parties meant to be binding.

Hurley State Bank v. French, No.97-C-1645-W (N.D. Ala. Sept. 10, 1997).

An arbitration provision was added to the consumer's cardholder agreement after execution of the original credit card agreement through a change in terms procedure. The court denied the petition to compel arbitration, finding that the bank failed to show that the consumer "specifically agreed to arbitrate the issues in this cause...."

Pagter v. First Alliance Mortgage, 1999 Cal. Lexis 2552 (Cal. Super. Ct. Dec. 12, 1997)

The consumers were senior citizens, the husband suffering from end-stage renal disease which necessitated his being connected to a dialysis machine for ten hours each day. The consumers alleged that the defendant's salesman, after spending considerable time convincing them to take out a loan, then rushed them through the execution of the documents, never disclosing that an arbitration agreement was included. The court found that the arbitration agreement "was concealed from the [consumers] through the defendants [sic] fraud." The court denied the defendants petition to compel arbitration.

AllStar Homes v. Waters, 711 So.2d 924 (Ala. 1997)

The arbitration agreement provided that "[a]ll disputes...arising from or relating to...the validity of the arbitration clause...shall be resolved by...arbitration." The dealer argued that under this language the parties agreed to arbitrate the initial issue of arbitrability. The court declared:

"The FAA provides no mechanism whereby the parties may wholly circumvent the court's authority to determine whether the parties have agreed to waive their right to have their disputes heard in a judicial forum. Although the United States Supreme Court has signaled that it is possible for parties to agree to arbitrate at least some issues of arbitrability, it has clearly held that the preliminary decision as to whether there is any such agreement is for the courts to make."

Therefore, the court held it was proper for the trial court to determine whether there was "clear and unmistakable evidence" that the parties had actually voluntarily agreed to submit the issue of arbitrability to the arbitrator, and the related issues of whether the agreement was a contract of adhesion, fraudulently induced, or otherwise revocable. The court also stated that in determining these issues, the trial court is not permitted to entertain a presumption in favor of arbitration.

Fidelity National Title Ins. Co. v. Jericho Management, 1997 Westlaw 564473 (Ala. 1997); rev'd and remanded, 722 So.2d 740 Ala. 1998)

The arbitration clause included the phrase "[u]nless prohibited by applicable law...." Applicable Alabama law prohibited arbitration. The title insurance company argued that the phrase applied equally to the FAA and all other laws, and the FAA preempts state law, thereby prohibiting enforcement of the state law. The court rejected that argument, denying the motion to compel. The court applied traditional rules of construction which required giving meaning and effect to the terms of the contract. Refusing to give effect to state law would render the phrase meaningless. In addition, the court feared that refusing to give effect to the phrase would surprise unsuspecting purchasers of land title policies who would reasonably assume the phrase meant that state law prohibiting predispute arbitration agreements applied.

Ryan Warranty Services v. Welch, 694 So.2d 1271 (Ala. 1997)

The arbitration agreement provided: "In the event of a disagreement between you and us concerning costs, either of us may make a written demand for arbitration." The agreement defined costs as the usual and fair charges for parts and labor. The consumer sued alleging breach of contract, bad faith, and fraud. The court upheld the lower court's finding that the parties intended the clause to be limited only to the issue of costs, and did not require arbitration of the consumer's claims.

B. Grant of Motion to Compel Arbitration

Green Tree Financial Corp. v. Randolph, 531 U.S. 79, 121 S. Ct. 513, 148 L.Ed.2d 373 (2000)

Consumer argued that arbitration agreement was unenforceable because it was silent on the costs of arbitration. The Court held that the record was insufficient to show that the costs would be so high that the consumer would not be able to vindicate her statutory rights in an arbitration forum. Therefore, the risk that costs might be excessive was "too speculative" for the Court to invalidate the agreement. Indeed, there was no evidence of what the costs would be; the record only proved that the agreement was silent on that subject. In fact, the agreement did not even indicate who would conduct the arbitration. The Court acknowledged that "the existence of large arbitration costs could preclude a litigant...from effectively vindicating her federal statutory rights in the arbitral forum." A consumer challenging the agreement on that basis has the burden of "showing the likelihood of incurring such costs." The Court declined to specify how detailed the showing of prohibitive expense must be before the opposing party has the burden of coming forward with evidence to counter the consumer's evidence.

Southern Energy Homes v. Ard, 772 So.2d 1131 (Ala. 2000)

Homeowners sued manufacturer for defective workmanship. Manufacturer's warranty contained an arbitration agreement. Although the lower court denied defendant's motion because

homeowners never signed an agreement to arbitrate, the appeals court reversed and remanded with instructions to grant the motion. No evidence supported homeowners' contention that they did not assent to the arbitration language except the absence of signatures. Homeowners were contractually bound to the arbitration provisions because they accepted the benefits of the warranty containing the arbitration provisions, namely repair work. Because one of homeowners' causes of action was for breach of express warranty, and the only express warranty in evidence was the one with the arbitration provisions, they could not simultaneously claim the benefits of the contract and repudiate its burdens and conditions.

Pridgen v. Greentree, 88 F. Supp.2d 655 (S.D. Miss. 2000)

Consumer financed the purchase of a mobile home by entering into a retail installment contract which included an arbitration clause. The installment contract was later assigned to defendant mobile home financing company. After default and bankruptcy, the consumer filed suit alleging that, in its efforts to collect, defendant harassed and threatened her over the telephone. Defendant moved to dismiss and compel arbitration. The court acknowledged that there was doubt as to whether the consumer's claim for harassment arose out of the installment contract. However, Fifth Circuit law is that all doubts as to the arbitrability of a given dispute should be resolved in favor of arbitration.

Marsh v. First USA, 103 F. Supp. 2d 909 (N.D. Tex. 2000)

Credit card holders failed to establish that the arbitrators would be biased.

Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000)

Consumer took a short-term loan which contained a high rate of interest, required the opening of an account with an irrevocable electronic fund transfer pre-authorization to pay the loan, and a binding arbitration clause. Plaintiff brought suit under the Truth In Lending Act (TILA), and the Electronic Fund Transfer Act (EFTA). The court held that the bank's motion to compel arbitration should have been granted because the consumer had agreed to binding arbitration in the loan agreement, and there was no congressional intent to preclude the enforcement of arbitration clauses in either the TILA or EFTA. Thus, the arbitration clause was effective even though it rendered class actions under TILA or EFTA unavailable. In addition, there was no inherent conflict between arbitration and the goals of TILA or EFTA.

In re: RealNetworks, 2000 WL 631341 (N.D. Ill. May 8, 2000)

Plaintiffs brought a class action against defendant alleging trespass to property and privacy because the defendant's software secretly permitted the defendant to access and intercept the plaintiff's communications and information. While acknowledging that the FAA requires arbitration agreements to be writing, the court rejected the claim that the license agreement did not constitute a writing because it appeared as a "pop-up" agreement with no conspicuous "print" or "save" button. The court described several methods users could employ to print and

store the license. Because the agreement was in fact easily printable and storable, it constituted a written agreement within the meaning of the FAA. See the Electronic Signatures in Global and National Commerce Act, (2000) (validating electronic records as constituting writings when consent is given).

Herrington v. Union Planters Bank, 2000 Westlaw 424232 (S.D. Miss. 2000)

Arbitration clause is enforceable despite its waiver of punitive damages where consumer brought case alleging violations of the Truth in Savings Act.

Lieschke v. Realnetworks, 2000 Westlaw 198424 (N.D. Ill. 2000)

Consumers sued defendant software company based on allegations that, although never disclosed in its agreement with consumers, the company collected information about the usage patterns of those employing the software. Relying on the presumption in favor of arbitration, the court rejected consumer claims that their lawsuit was not covered by the arbitration agreement because it contained the narrower term "arising under" rather than the broader "arising out of" or "relating to." The scope of the arbitration clause could be narrowed by enumerating specific claims subject to arbitration, not by the use of certain general phrases. In addition, the court rejected consumers' claims that the arbitration clause only covered contract claims and the cost of arbitrating the claims of all potential plaintiffs would undermine the purpose behind the FAA.

Thompson v. Skipper Real Estate Co., 727 So.2d 287 (Ala. 1999)

Even though a real estate sale was intrastate in nature, it did have an effect on the provision of services in interstate commerce because the consumers received financing from a company headquartered in another state, their title insurance was from an out-of-state corporation, and their homeowner's insurance was from a state operating out of a third state.

The company did not waive their right to arbitrate even though the company waited until eleven months after the consumers filed a lawsuit to move to arbitrate. Finally, the court ruled, without giving reasons, that the consumers would not suffer substantial prejudice by having the dispute sent to arbitration.

Value Auto Credit v. Talley, 727 So.2d 61 (Ala. 1999)

A minor may disavow the entire contract, but may not disavow only the arbitration provision and ratify the remainder of the contract.

In re Oakwood Mobile Homes, 987 S.W.2d 571 (Tex. 1999)

Company did not waive its right to demand arbitration where the consumers wrote to the company twice requesting arbitration, the company never responded, and the consumers then

filed a lawsuit. The court stated that the burden was not on the company to initiate arbitration or to assist the consumers in starting the process. If the consumers wanted to arbitrate a dispute, the burden was on them to do so.

Nationwide v. Dyer, 969 S.W.2d 518 (Tex. Ct. App. 1998)

Husband and wife purchased a mobile home from Nationwide. Only the husband signed the retail installment contract and an arbitration agreement in the form of an addendum. Reversing the trial court's denial of the creditor's motion to compel, the court held that the wife, as a third party beneficiary, was bound by the arbitration agreement. In addition, because her claims of breach of contract and express warranties were so closely connected to her husband's, she was bound by the arbitration agreement. The court also rejected the wife's claim that the arbitration provision was invalid absent her signature because the mobile home was part of the couple's homestead. Lastly, the court held that the creditor did not waive its right to enforce the arbitration because of any delay on its part. Under Texas law, delay alone is not sufficient to waive such a right. Compare *Sobremonte*, supra.

McCarthy v. Providential Corp., 122 F.3d 1242 (9th Cir. 1997)

Senior citizen homeowners brought action, and district court granted sellers' motion to compel arbitration. The Ninth Circuit dismissed consumers' appeal because an order compelling arbitration is interlocutory, not a final decision. In doing so, the court followed the Eighth Circuit decision in *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93 (8th Cir. 1994). In a dissent, one judge would distinguish the usual case in which the court stays the action pending the outcome of arbitration, from this case, in which the court disposed of all the issues before it along with its order compelling arbitration.

Hill v. Gateway 2000, 105 F.3d 1147 (7th Cir. 1997)

Consumer who ordered computer over the phone is bound by arbitration contract even though contract was not delivered until carton was shipped to consumer's home, where consumer had 30 days to return the computer if consumer did not want to be bound by terms of contract.

V. Waiver

First Family Financial Services v. Jackson, 2000 Westlaw 1763386 (Ala. 2000)

Lender did not waive right to compel by participating as a defendant in a previous class action. Consumer was a member of the class, but in instant lawsuit pursued different claims. In the instant litigation, lender's only action was to move to compel; consequently, lender did not substantially invoke the litigation process before it moved to compel.

Big Valley Home Center v. Mullican,774 So.2d 558 (Ala. 2000)

Seller engaged in two years of extensive pretrial activity before moving to compel arbitration. To grant seller's request at that point would have substantially prejudiced consumer who had incurred substantial time and expense preparing for trial.

First Family Financial Services v. Jackson, 2000 Westlaw 1763386 (Ala. 2000)

Lender had not substantially invoked the litigation process where it participated as a defendant in a prior class action involving a similar, but unrelated issue. Consequently, lender had not waived its right to compel arbitration.

Sedillo v. Cambell, 5 S.W.3d 824 (Tex. App. 1999)

A party does not waive his right to enforce an arbitration clause merely because he takes part in litigation, but he does waive his right to enforce arbitration where he substantially invokes the judicial process to his opponent's detriment. Merely filing bankruptcy does not necessarily amount to a waiver of the right to enforce an arbitration clause, but filing bankruptcy solely to avoid the claims subject to the arbitration clause may constitute waiver where after the bankruptcy case was dismissed, and the party seeking to enforce the arbitration clause filed a counterclaim, requested a jury trial, and paid the jury fee. Even if the party seeking to enforce the arbitration clause did substantially invoke the judicial process, the opposing party must show prejudice in order to avoid arbitration, and mere delay is insufficient unless it caused prejudice. Here, the party opposing arbitration proved she was prejudiced because she had to spend time and incur the expense of retaining counsel to preserve her claims.

Woodall v. Green Tree Financial, 1999 Fla. App. Lexis 9833 (Fla. Ct. App. 1999)

In case involving foreclosure of a note and mortgage, the creditor sought arbitration of the consumer's counterclaim. The creditor had filed a motion for summary judgment, submitted affidavits on the facts underlying the counterclaim, and asserted what it would raise as affirmative defenses. The court held that those actions constituted active participation in the litigation and a waiver of the right to arbitrate.

In the Matter of S&R Company of Kingston v. Latona Trucking, 159 F.3d 80 (2d Cir. 1998)

The court refused to enforce the AAA's "no waiver" clause which was incorporated into the parties' agreement. ("No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.") The court agreed with prior decisions interpreting that clause to do no more than permit the parties to seek provisional remedies or other judicial proceedings without affecting the agreement to arbitrate the underlying dispute.

Sobremonte v. Superior Court of Los Angeles, 61 Cal. App. 4th 980, 72 Cal. Rptr. 2d 43 (1998)

Consumers sued Bank of America National Trust & Savings for improper setoff against their accounts. (One of the consumers' Versatel bank cards was stolen, resulting in an overdraft and the bank's subsequent setoff.) The bank filed a petition to compel arbitration. Consumers opposed the motion on two grounds. They contended that the arbitration was invalid and unenforceable because of lack of sufficient notice and mutual assent. In addition, they claimed the bank waived its right to compel arbitration. Reversing the lower court's decision, the court found for the consumers based on the bank's waiver. The court held that "to properly invoke the right to arbitrate, a party must (1) timely raise the defense and take affirmative steps to implement the process, and (2) participate in conduct consistent with the intent to arbitrate the dispute."

First, the bank unreasonably delayed its demand for arbitration. Although the bank had raised the arbitration issue in its answers to the first and second amended complaints, it did not take "'active steps'" to secure arbitration. The bank had notice from the consumers long before the lawsuit that the consumers intended to pursue their dispute by legal means. After filing their answers, the bank did nothing to pursue their arbitration claim until 10 months after service of the complaint and 6 weeks before trial. During those 10 months, the bank actively litigated the case, expending resources of the court and the parties on various pleadings, court hearings, and discovery. The court inferred that the bank unreasonably delayed their motion to compel arbitration in order to take advantage of the wide discovery available through judicial proceedings. The court relied on *Davis v. Continental Airlines,* 59 Cal. App. 4th 205 (1997).

Crucial to the court's finding of waiver was its determination that the consumers were prejudiced by the bank's delay in seeking arbitration. They were prejudiced by having to spend substantial time and money to prepare for trial under circumstances which suggested that the bank delayed in order to gain the advantages of a judicial forum before demanding arbitration. Moreover, the court referred to the bank's numerous tactics in court to limit its liability and frustrate the consumers' discovery. While arbitration is "the preferred method" of resolving disputes, its advantages of speed and low cost were no longer available to the consumers who had already spent so much time and money on the litigation. Finally, the court rejected the bank's contention that they could not have moved to compel until the case against two nonsignatory defendants had been dismissed.

Thompson v. Skipper Real Estate Co., 729 So.2d 287 (Ala. 1999)

A company did not waive its right to arbitrate even though the company waited until eleven months after the consumers filed a lawsuit to move to arbitrate. Eight of those months were spent battling over the company's effort to change the action to another venue. The court held that this did not amount to substantial involvement in the litigation process which amounted to waiver of the right to arbitrate, and that the defendant had the right to establish in the courts the proper venue for the lawsuit before it moved to compel arbitration. The court pointed out that there would not have been an eleven month delay if the consumers had not opposed the company's motion to transfer the action to another county.

VI. Change in Terms

Union Planters Bank v. Watson, 2000 Westlaw 16841875 (Ala. 2000)

Consumers' bank was merged into Union Planters. Union Planters then mailed to customers of the former bank a new deposit account information booklet which stated that by signing a signature card and using their account at Union Planters, they consented to the arbitration agreement in the booklet. The court pointed out that the consumers had never signed a signature card from Union Planters, and merely using the account after the merger did not constitute an agreement to arbitrate. The court affirmed the lower court's denial of a motion to compel.

Kennedy v. Conseco Finance Corp., 2000 Westlaw 1760943 (N.D. Ill. 2000)

Consumer's initial credit card agreement contained no arbitration provision. The card issuer subsequently sent amended agreements containing an arbitration provision. The consumer alleged she did not remember ever receiving it. The issuer's employee filed a declaration that included a copy of the notice and the changed agreement and the statement that the issuer's records contained no evidence that the notice was returned unopened or undeliverable. Moreover, the consumer continued to use her card. The held that the issuer failed to establish that a proper mailing occurred. In order for a court to adopt the presumption of delivery, the issuer had to present evidence that the notice actually was mailed to the consumer, or proof of the procedures followed in the regular course of operations which give rise to a strong inference that the notice was properly addressed and mailed. The issuer failed to prove either of the above. There was no evidence of procedures to ensure proper addressing and mailing and what the issuer's records showed the consumer's address to be at the time of the mailing. There was no evidence that the issuer's routine practice was to not in its customers' file when mail was returned unopened or undeliverable. Consequently, the court refused to apply the presumption of delivery.

Southtrust v. Williams, 2000 WL 1007064 (Ala. July 21, 2000)

The "signature cards" signed by the customers contained a provision in which they agreed to be bound by the bank's banks rules and regulations. The rules referred to were the bank's internal rules which contained a provision stating that the rules and regulations could be unilaterally changed by the bank and would be binding on the customers "as fully as though expressly assented to by them." The court held that specific assent to the amendments was unnecessary because customers kept their accounts open after receiving the notice. By continuing the business relationship after the addition of the arbitration provision, customers implicitly assented to the addition of the provision. Because federal law prohibited the court from subjecting arbitration provisions to special scrutiny, the trial court erred in denying bank's motion to compel arbitration.

Long v. Fidelity Water Sys., No. C-97-20118 RMW, 2000 WL 989914, (N.D. Cal. May 26,

2000)

Consumers alleged they were sold home water treatment systems through deceptive door-to-door sales practices and that defendants were involved in a financing scheme that did not provide the required credit disclosures to the consumers. In support of their motion to compel arbitration, the defendants relied on the fact that when consumers applied for credit, the application reserved for the creditor the right to change certain terms. The court denied the motion, finding that the reservation could not be construed as explicitly permitting the insertion of an arbitration provision. Moreover, the defendants never obtained any affirmative consent from the consumers regarding incorporation of the arbitration clause as part of the existing contract and cited no case in which a court retroactively applied an arbitration clause that did not clearly and unequivocally apply to existing claims.

Marsh v. First USA, 103 F. Supp.2d 909 (N.D. Tex. 2000)

Credit card holders brought action against bank which issued credit card, alleging violations of Truth in Lending Act (TILA). Bank moved to compel arbitration. The district court held that the evidence was sufficient to raise a presumption that the holders received the insert containing an amendment to their credit card agreement requiring arbitration, and that the holders' mere denial that they received insert did not rebut presumption. Thus, the holders waived their right to jury trial by agreeing to arbitration and were bound by amendment to their agreements. The arbitration provision was not unconscionable.

Herrington v. Union Planters Bank, 2000 Westlaw 424232 (S.D. Miss. 2000)

Consumers are bound by change in terms notice containing arbitration agreement where original signature card for deposit account stated terms could be subsequently amended and consumers continued to use their account after receiving the notice.

Badie v. Bank of America, 79 Cal. Rptr.2d 273 (Cal. Ct. App. 1998), review & request to depublish denied (Cal. Feb. 1999).

Bank of America sent credit card customers bill stuffers informing them that henceforth disputes would be decided by arbitration "or by reference." The original account agreements contained a statement that the bank could change terms or add new terms. The court began its analysis by applying ordinary principles of contract formation and interpretation. Since arbitration is a matter of contract, it was necessary to determine whether both parties had agreed to arbitrate. The trial court had glossed over this issue, assuming the arbitration clause was valid because California law favors arbitration. In ascertaining the intent of the parties, the court was impressed by the fact that although the change in terms provision was broadly worded and contained no limitation, all the terms included in the original agreement pertained to the consumer/creditor relationship. Matters related to dispute resolution were not mentioned. Therefore, nothing in the original agreement alerted consumers of the possibility that the bank might add the arbitration provision. Furthermore, if any uncertainty remained as to the meaning of the contract's terms,

California law requires that they be construed against the party who wrote the contract, especially when it is a contract of adhesion, as here. In addition, California law requires waiver of the right to a jury trial guaranteed under the state's constitution to be unambiguous and unequivocal. The court found the language of the bill stuffer was potentially misleading. Moreover, it was designed to "downplay the true significance" of the arbitration provision and reduce the likelihood consumers would notice, understand, and object to the change in terms.

Hurley State Bank v. French, No.97-C-1645-W (N.D. Ala. Sept. 10, 1997)

Court refused to compel arbitration where arbitration provision was added to consumer's cardholder agreement through a change in terms procedure. The court was influenced by the fact that the consumer had not signed any arbitration agreement. The court held that the bank had failed to show that the consumer "specifically agreed to arbitrate the issues in this case."

Perry v. Beneficial National Bank USA, No. CV 97-218 (Ala. Cir. Ct. May, 19, 1998)

The credit card agreement did not include an arbitration provision. However, that original contract between the consumer and Rhodes Furniture did provide that the agreement could be unilaterally changed at any time as long as the card issuer provided notice to the cardholder. When Beneficial purchased the account, it added the arbitration clause and informed consumers. The court found the change in terms enforceable and granted the motion to compel arbitration. See also Perry, 1998 Westlaw 279174 (Ala. Cir. Ct. May 15, 1998)

Stiles v. Home Cable Concepts, 994 F. Supp. 1410 (M.D. Ala. 1998)

The arbitration provision was added through a change of terms notice. The court rejected the consumer's argument that it was not enforceable because the consumer never signed the arbitration provision. Although Alabama law requires a contract to be signed, it does not require that every provision, including later amendments, be signed. The consumer assented to the contract as a whole, and that contract provided that its terms could be changed unilaterally. Furthermore, Utah law governed the cardholder agreement, and the contract as amended was enforceable under that state's law as well.

VII. McCarren-Ferguson Act

Knepp v. Credit Acceptance Corp., 229 B.R. 821 (Bankr. N.D. Ala. 1999)

Court held the FAA impaired Alabama's insurance statutes.

State of Alabama on the relation of Smith v. DeBellis, No.CV-98-____ (Circuit Ct. Ala.)
Resident of Alabama has sued the Commissioner of the Alabama Insurance Department. The consumer alleges that since Congress has reserved the regulation of insurance to the states, Alabama law, and not the FAA, applies to the business of insurance. Furthermore, the Alabama

Code provides that all contracts of insurance applied for in the state are subject to state law. Therefore, Alabama's anti-arbitration statute applies to insurance contracts. The Complaint further alleges that the Insurance Commissioner violated the anti-arbitration statute when he approved insurance policies containing arbitration clauses. In addition, the Commissioner allegedly has issued guidelines for the approval of arbitration provisions in insurance contracts, but has held no public hearings on the inclusion of arbitration clauses, nor notified any policyholders of his actions. For relief, the consumer requests a court order directing the Department of Insurance to withdraw all arbitration clauses which it has allowed, and ordering the Department and Commissioner to no longer allow arbitration clauses. Finally, the Complaint asks for a declaratory judgment that the arbitration clauses are null and void.

Clayton v. Woodmen of the World Life Ins. Soc., 981 F. Supp. 1447 (M.D. Ala. 1997)

Court held that McCarran-Ferguson does not preclude application of the FAA. Alabama law prohibits the enforceability of pre-dispute arbitration agreements. That law, however, applies to all contracts, not only insurance contracts. The McCarran-Ferguson Act precludes application of the FAA only if the FAA would invalidate, impair, or supersede a state law which regulates the business of insurance. Because the Alabama law applies to all contract disputes, it is not a state statute regulating the business of insurance.

VIII. Mutuality

Showmethemoney Check Cashers v.Williams, 342 Ark. 112, 27 S.W.3d 361 (Ark. 2000)

Arbitration provision was not a valid enforceable agreement under Arkansas law because it lacked mutuality. The consumer was required to submit all disputes to arbitration, while the check casher could proceed immediately to court to collect money owed to it.

American General Finance Co. v. Branch, 2000 Westlaw 1868516 (Ala. 2000)

The court expressed disapproval of finding arbitration agreements unenforceable based on lack of mutuality, but declared that absence of mutuality was still relevant in determining whether an agreement was unconscionable. Lack of mutuality was one factor that, along with others, might be sufficient to prove unconscionability.

Pitchford v. Oakwood Mobile Homes, 1999 U.S. Dist. Lexis 20596 (W.D. Va. 1999)

Court found that arbitration agreement was a separate contract from the Retail Installment Contract. Under the terms of the agreement, the mutual promises which would constitute sufficient consideration would be the party's promise to forego judicial action in exchange for the exclusive arbitration forum. The agreement did permit either party to pursue an action to take and dispose of collateral, including obtaining a writ of attachment. Relying on evidence of

the defendant's conduct in previous cases, the court found that in fact the defendant brought judicial actions, not only to obtain possession of the collateral, but also to win a money judgment, not mentioning to the court that the arbitration agreement precluded the latter. Consequently, the defendant's duty to arbitrate under the agreement was "little more than illusory" and the agreement lacked mutuality.

Harris v. Green Tree Financial Corp., 183 F.3d 173 (3rd Cir. 1999)

Consumers alleged they were victims of deceptive practices in regard to a home improvement financing scheme in which they were fraudulently induced to obtain home equity loans to finance sub-standard repairs. Consumers attacked the arbitration clause as unconscionable and directly contradicting another clause in the contract providing that the borrower could sue to enforce the contract. The court reversed the trial court which had found a lack of mutuality. The Third Circuit ruled that there is no requirement of complete mutuality as a matter of federal law or a requirement of equivalency of obligation. The court read Pennsylvania case law as holding that as long as there is consideration, the mutuality of obligation is present. See *Thompson v. Illinois Title Loans,* 2000 Westlaw 45493 (N.D. Ill. 2000)(under Illinois law, contracts need not be reciprocal).

See Stirlen v. Supercuts, 51 Cal. App. 4th 1519 (Ct. App. 1997)(employment case in which court found agreement "egregiously one-sided" because it was binding only on the employee and required relinquishing punitive damages and relief under state and federal civil rights laws).

Lackey v. Green Tree Financial Corp., 330 S.Caro. 388, 498 S.E.2d 898 (So. Caro. App. 1998)

Court rejected the claim that arbitration agreement was unconscionable because it lacked mutuality of remedy where the lender was allowed to use the judicial forum to foreclose on the collateral. The court held that under the FAA it could not assume that the arbitration forum to which the consumer was confined was less beneficial than the judicial forum unless the consumer could prove he or she had been prejudiced by arbitration.

Goodwin v. Ford Motor Credit Co., 970 F. Supp. 1007 (M.D. Ala. 1997)

Court found the arbitration agreement was not void for lack of mutuality. The court followed a comment in the Restatement of Contracts which stated "the law does not require that the parties have similar remedies in case of breach, and the fact that specific performance or an injunction is not available to one party is not sufficient reason for refusing it to the other party."

IX. Class Actions

Randolph v. Green Tree Financial Corp., 244 F.3d 814 (llth Cir. 2001)

Court rejects consumer's claim that the arbitration agreement was unenforceable because it did

not permit classwide arbitration of her TILA claims. The court relied on its holding in a case involving ECOA claims, *Bowen v. First Family Financial Services*, 233 F.3d 1331 (11th Cir. 2000). The consumer did not carry her burden of showing that Congress intended to create a non-waivable right to bring class actions. In addition, she failed to prove that arbitration is inherently inconsistent with the enforcement provisions of TILA.

Johnson v. West Suburban Bank, 225 F.3d 366, (3d Cir. 2000), cert. denied sub nom. Johnson v. Tele-Cash, 121 S.Ct. 1081(2001)

Arbitration agreement is enforceable even if it makes class action unavailable. There is no irreconcilable conflict between TILA and arbitration because, even if class action relief is precluded, the consumer can still seek statutory damages and attorneys fees as allowed under TILA. Administrative agencies also can enforce TILA regardless of restrictions placed upon consumers by arbitration agreements.

Stein v. Geonerco, 105 Wash. App. 41, 17 P.3d 1266 (2001)

Where arbitration agreement is silent, court will not order classwide arbitration.

Marsh v. First USA, 103 F. Supp. 2d 909 (N.D. Tex. 2000)

TILA did not create statutory right to bring class action.

Herrington v. Union Planters Bank, 2000 Westlaw 424232 (S.D. Miss. 2000)

The Truth in Savings Act does not prohibit waiver of a judicial forum for class actions.

Johnson v. Tele-Cash, 82 F. Supp.2d 264 (D. Del. 1999)

In a class action based on violations of Truth in Lending and the Electronic Funds Transfer Act, the court denied the creditor's motion to stay judicial proceedings pending arbitration. The court found that one of the purposes of Truth in lending was to encourage class actions. Requiring arbitration would allow creditors to insulate themselves against the statutory penalties Congress determined were necessary to provide creditors with meaningful incentives to comply with TILA. The court relied on *Mitsubishi* which required arbitration, but only because the plaintiff in that case could effectively vindicate its statutory cause of action in an arbitral forum. In this case, the court concluded that because there was an inherent conflict between compelling arbitration and the underlying purposes of Truth in Lending, it could not require arbitration. In reaching its decision in regard to the TILA claim, the court relied on legislative history. Such history was lacking in connection with the EFTA claim, but because the statutory language on class actions is the same in both statutes, the court refused to compel arbitration of that claim as well.

Powertel v. Bexley, 743 So.2d 570 (Fla. Ct. App. 1999)

Arbitration clause was found substantively unconscionable, in part, because it removed the company's exposure to any statutory remedy that could be brought as a class action.

Thompson v. Illinois Title Loans, 2000 U.S. District Lexis 232 (N.D. Ill. 2000)

Arbitration agreement is enforceable even though it deprives the consumer of the ability to bring a TILA class action. TILA does not create a substantive right to a class action, it is merely a procedural device that consumers can waive by agreeing to arbitrate their claims.

Carnegie v. H&R Block, 687 N.Y.S.2d 528 (Sup. Ct. 1999)

After consumer filed a class action, but before class certification, defendant revised its loan application to include an arbitration clause which applied to prior disputes (including those alleged in the class action), and which barred class actions except by mutual consent. The court held it was "patently deceptive" to obtain consumer consent to arbitration without informing them the result would be to waive their right to participate in the pending class action. Consequently, the court ruled that the arbitration clause did not preclude class members' participation in the class action unless the class members opted out after receiving notice of the pending action and the arbitration provision.

Blue Cross of California v. Superior Court, 78 Cal. Rptr.2d 779 (Cal. Ct. App. 1998)

Consumers sued Blue Cross for selling and administering health plans which allegedly violate laws related to pre-existing condition and other exclusions. The arbitration agreement between the parties was silent on the issue of classwide arbitration. California case law, however, expressly permits such arbitration. The court held that under these circumstances, an order compelling classwide arbitration does not contradict either the policy behind the FAA and or the terms of the arbitration contract. Furthermore, the California rule is not preempted by section 4 of the FAA. Blue Cross argued that the parties agreed to individual arbitration pursuant to the rules of the AAA. The court opined in dicta that, should a class be certified, a court nevertheless could order classwide arbitration.

Navarro-Rice v. First USA Bank, Civil No. 97009-06901 (Or. Cir. Ct 1998)

The consumer filed a class action alleging the bank's credit card agreement entitled consumers to a fixed rate, but the rate was unilaterally increased to a variable rate over 20%. After the class action was filed, the bank sent customers a notice stating that, unless they closed their accounts by December 30, 1997, their cardholder agreement would be amended to require arbitration. Arbitration under the amendment would cover all claims "now in existence or that may arise in the future." In regard to class actions, claims advanced in those cases would be exempt from the arbitration requirement only if they "have been finally certified as class actions and ...notice of class membership has been given as directed by the court before" the effective date of the

arbitration agreement. Because the class had not been certified as of December 30, 1997, the members of the class were not exempted and were subject to arbitration unless they closed their accounts before the end of the year.

Consumers sought a preliminary injunction to maintain the status quo and protect the class members by prohibiting the bank from enforcing the arbitration agreement with the plaintiff or potential class members in regard to issues raised by the complaint. The court entered an order restraining the bank from enforcing the arbitration provision as to the plaintiff and the potential class.

Bazzle v. Green Tree Financial Corp., No. 97-CP-18-258 (So. Caro. Ct. App. March 16, 1998)

Consumers attacked the arbitration provision because it failed to notify them of their right to select a closing attorney and an insurance broker as required by the state Consumer Protection Code. In addition, the consumers alleged the lender violated state law (and an Attorney General letter) by preparing closing documents without legal counsel. The court certified a consumer class consisting of persons who obtained financing on home improvement contracts secured by real property mortgages from dealers who assigned them to Green Tree. The court also granted the lender's motion to compel arbitration. The court then stated: "In the event a foreclosure action is filed, the prosecution of the foreclosure is hereby stayed. This order applies to all members of plaintiffs' class who elect to be a part of this action."

The lender moved for reconsideration, contending that class arbitration is not authorized either under the agreement or under the FAA. It argued that arbitration and class certification are mutually exclusive unless the agreement permits class arbitration. The lender claimed the agreement did not specifically provide for class arbitration, and an additional term allowing class arbitration should not be implied. The consumer alleged the broad language of the arbitration provision did not restrict class arbitration.

The court denied the motion for reconsideration, holding: "The arbitration provision in the contract...is so broad that one can easily infer that both parties intended to include class arbitration." The court was influenced by its finding that the agreement was ambiguous, the lender drafted the agreement, the consumers had to sign in order to obtain a loan, consumers had no opportunity to negotiate terms, and the lender deals with unsophisticated borrowers.

Med Center Cars v. Smith 727 So.2d 9 (Ala. 1998)

Court refuses to permit classwide arbitration where arbitration agreement did not provide for such arbitration.

Perry v. Beneficial National Bank, No, CV 97-218 (Ala. Cir. Ct. May, 18, 1998)

The court granted a motion to compel arbitration of the case brought by the named plaintiff. The court then went on to state: "The court is unaware of any provision which provides for

arbitration of a class. However, the court is of the opinion that class allegations will not defeat an arbitration. If there is a valid arbitration agreement as to an individual plaintiff that plaintiff would be taken out of the class and would have to submit to arbitration. Consequently, that person could not adequately represent the class." See also Perry, 1998 Westlaw 279174 (Ala. Cir. Ct. May 15, 1998)

X. Unconscionability

A. Cases finding unconscionability

American General Finance Co. v. Branch, 2000 Westlaw 1868516 (Ala. 2000)

The court held the arbitration contract was unconscionable because of the following.1) Terms grossly favorable to creditor: The scope of arbitration was very broad, covering every cause of action which could be brought by or against the creditor, the arbitrator had the authority to determine arbitrability, the creditor could litigate before a jury claims against the consumer up to $10,000, therefore, there was a lack of mutuality of remedy. In addition, the arbitrator could award no more than five times the amount of economic loss. Therefore, the consumer was not only limited to the arbitration forum, unlike the creditor, but his right to a remedy in that forum also was limited. 2) Overwhelming bargaining power: At the time the time the consumer obtained her loans, "the market was virtually closed to consumers seeking comparable financing without agreeing to arbitration provisions." (Actually, the court found that at the time she obtained her first loan, only one lender did not require arbitration; when she obtained the second loan, two lenders did offer loans without requiring arbitration.) The court stated that the consumer is not required to prove that the market was completely closed to consumers seeking loans without arbitration, only that she could obtain such a loan only if she incurred "considerable expenditure of time and resources." In this instance, the consumer had no meaningful choice. A second consumer, however, obtained her loan at a time when the finance companies in her area which required arbitration were still a distinct minority. Therefore, she could not show that she lacked a meaningful choice.

Villa Milano Homeowners Ass'n v. Davorge, 102 Cal. Rptr.2d 1 (Ct. App. 2000)

Arbitration provision was contained in a developer's declaration of covenants, conditions and restrictions. Homeowners and their association sued developer over construction and design defects. Relying on *Armendariz v. Foundation Health Psychcare Services*, 99 Cal. Rptr.2d 745, 6 P.3d 669 (Cal. 2000), the court found procedural unconscionability. The consumers had no meaningful choice because the declaration was drafted years before the consumers purchased their condos. There was surprise because the arbitration clause was on pages 67 and 68 of a 70 page document. There also was substantive unconscionability because the consumers' waiver of their constitutional right to a jury trial was obtained through a stealthy device that is prohibited by public policy as evidenced by various provisions in the California Code of Civil Procedure and regulations pertaining to arbitration clauses in real property sales documentation.

The FastFunding Co., Inc. v. Betts, 758 So.2d 1143 (Fla. Ct. App. 2000)

In a case involving pay day loans, the court affirmed the trial court's holding that the arbitration clause was unenforceable as a contract of adhesion in the context of a consumer lending transaction. The extreme disparity in bargaining power between the parties and the language of the arbitration clause itself would make enforcement of the arbitration clause unconscionable as a matter of public policy. In addition, the court relied on *Party Yards v. Templeton*, 751 So.2d 121 (Fla. Ct. App. 2000) in holding that where a party alleges and offers evidence that a contract violates usury laws, the court must determine the usury question before ordering the parties to arbitration. Only trial courts can determine a contract's legality; a claim that a contract is illegal and criminal in nature is not a matter which can be determined by an arbitrator.

Pitchford v. Oakwood Mobile Homes, 1999 U.S. Dist. Lexis 20596 (W.D. Va. 1999)

Court held arbitration agreement unconscionable where based on AAA fee schedule in effect at time of the arbitration. The amount of fees and costs are "moving targets." The defendant can control them because it can bargain with AAA over how much the consumer must pay. The fees for claims over $200,000 are excessive and the defendant made no arrangements for how he would handle a claim of indigency. There is no way to know the cost at the time the consumer agrees to arbitration because the costs are fixed only at the time of arbitration. Costs of litigating in federal court are not low, but those costs are fixed and there is a procedure for determining indigency. In light of the above, the court concluded that the agreement imposed "an insurmountable economic barrier for vindicating plaintiff's claims."

Powertel v. Bexley, 743 So.2d 570 (Fla. Ct. App. 1999)

Arbitration clause found procedurally unconscionable where it was an adhesion contract drafted unilaterally and sent to consumers as a stuffer in their monthly phone bills. There was no meaningful choice for the consumer because canceling the contract would result in her losing her investment in the equipment she had purchased which could be used only with Powertel's service. Moreover, she would have to obtain new phone numbers. The notice was also defective. The arbitration clause was in a pamphlet which did not indicate it contained anything other than a restatement of the terms and conditions previously agreed to. Agreeing with the trial court that there should be a prominent notice of the arbitration clause, the court assumed many consumer were unaware of the clause. The clause also was substantively unconscionable. It limited the parties to actual damages, thus preventing the consumer from collecting punitive damages. In addition, the consumer was precluded from asserting her UDAP remedies of injunctive and declaratory relief if forced into arbitration. Finally, the clause was substantively unconscionable because it deprived the consumer of the ability to bring a class action. See also Ramirez v. Circuit City Stores, 90 Cal. Rptr.2d 916 (Cal. Ct. App. 1999)(arbitration clause in employment contract unconscionable because it precluded class actions and punitive damages).

Iwen v. U.S. West Direct, 293 Mont. 512, 977 P.2d 989 (1999)

Customer is a lawyer who refused to pay for an ad in the Yellow Pages because the defendant omitted crucial information from the ad. The court held the arbitration agreement was an adhesion contract and unconscionable. The holding of unconscionability was based on the fact that the more powerful party, the defendant, had the unilateral right to go to court for disputes over fees it claimed the customer owed, but the customer had to go to arbitration for all disputes, including disputes over fees which he claimed the defendant owed to him. The agreement consequently lacked mutuality, was one-sided, and contained terms unreasonably favorable to the drafter. The court pointed out it was not requiring that arbitration agreements contain mutual promises giving parties identical rights and obligations, or binding both parties in the same manner. On the other hand, agreements will not be enforced if the disparity in rights is so one-sided and unreasonably favorable to the drafter.

Knepp v. Credit Acceptance Corp., 229 B.R. 821 (Bankr. N.D. Ala. 1999)

The court found an arbitration clause unconscionable by applying the four factors Alabama courts consider in unconscionability cases. First, there was no meaningful choice. The court found that increased use of the clauses in industries such as automobile sales leaves consumers with little choice if they need to buy this type of goods. In addition, the court found the terms unreasonably favorable to one party because they require consumers to abandon their right to the judicial process by means of a standard form contract under circumstances where there is not a knowing, voluntary and informed waiver of legal rights. Third, there was unequal bargaining power and unequal expertise which was particularly crucial since the court found that automobiles are a necessity. Finally, the court found the terms were oppressive for this debtor in bankruptcy. The cost of arbitration is high whereas the judicial process is free. Moreover, this debtor could not afford to pay those costs because all of his disposable income was being spent funding his confirmed Chapter 13 plan.

Arnold v. United Companies Lending Corp. , 204 W. Va. 229 (W. Va. 1998)

A loan broker solicited the elderly consumers for a loan. The arbitration provision stated that the lender could seek judicial fora in order to collect debt or to foreclose, to seek a deficiency judgment or any comparable procedures through which the lender could acquire title to secured property. In finding the provision unconscionable, the court applied the West Virginia Consumer Credit and Protection Act which contains an unconscionability provision similar to the Uniform Consumer Credit Code. The court focused on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternative available to the consumers, and the existence of unfair terms. The court found the relative positions of the parties was "'grossly unequal.'" There was no comparable, meaningful alternative available to the consumers. Furthermore, their bargaining position was inadequate. "Given the nature of this arbitration agreement, combined with the great disparity in bargaining power, one can safely infer that the terms were not bargained for and that allowing such a one-sided agreement to stand would unfairly defeat the [consumers'] legitimate expectations." Finally, the terms of the agreement were "'unreasonably favorable'" to the lender, preserving their right to court access while denying such access to the consumers. The court found this "'is inherently inequitable and

unconscionable because in a way it nullifies all the other provisions of the contract.'"

Williams v. Aetna Finance Co., 83 Ohio St.3d 464, 700 N.E.2d 859 (1998)

ITT Financial Services conspired with a home equity pitchman to defraud consumer by providing pitchman access to loan proceeds so he could further his fraudulent home repair business. Court declared that in essence trial court had found the arbitration clause in the loan agreement the parties executed was unconscionable. Court agreed with that assessment, expressing doubt there was any true agreement to submit to arbitration. The court noted the similarities between the instant case's facts and arbitration agreement and those in Patterson v. ITT Consumer Finance Corp., 18 Cal. Rptr.2d 563 (Cal. App. 1993) in which the court found the arbitration provision unconscionable. In light of the lender's conduct, the court upheld the punitive damages award of $1.5 million even though the consumer was awarded only $15,000 in compensatory damages.

Brower v. Gateway 2000, 246 A.D.2d 246, 676 N.Y.S.2d 569 (1998)

Consumers purchased computers and software by telephone or mail orders. A written agreement containing an arbitration provision was sent to consumers along with the ordered goods. The arbitration clause provided that arbitration would be conducted in accordance with the rules of the International Chamber of Commerce, that the arbitration proceeding would take place in Chicago, and would be decided by a sole arbitrator. The rules of the ICC provided that a consumer with a claim is required to pay an advance fee of $4,000; $2,000 of this fee would not be refunded, even if the consumer prevailed. (The court noted that most Gateway products cost less than $4,000.) The rules applied a "loser pays" requirement in which the consumer would have to pay Gateway's legal fees if the consumer lost the arbitration. All correspondence had to be sent to France. The court rejected the consumer's contention that the arbitration clause was unenforceable as a contract of adhesion. The agreement provided that the consumer could return the goods within 30 days; therefore, if the consumer did not want to be bound by the arbitration clause, he could return the goods and buy the goods elsewhere. The court also relied, in part, on the 30 day return provision in finding there was no procedural unconscionability. However, the court found substantive unconscionability in the excessive costs imposed on consumers which resulted in consumers, as a practical matter, having no available forum. Moreover, the court held that substantive unconscionability alone may be sufficient under New York law. The court therefore vacated the portion of the arbitration agreement which required arbitration before the ICC and remanded the case in order to permit the parties to seek appointment of an arbitrator pursuant to the FAA.

Myers v. Terminex Int'l, 91 Ohio Misc. 2d 41, 697 N.E.2d 277 (Ohio Ct. Comm. Pleas 1998)

The court found unconscionable and unenforceable an arbitration clause because of the amount charged consumers in the form of a nonrefundable filing fee. The amount of the fee was not disclosed to the consumer in the agreement and exceeded the amount she paid on the contract for services. The court found that the clause was "'so one-sided as to oppress or unfairly surprise'"

the consumer.

Hong v. First Alliance Mortgage Co., 1999 Cal. Lexis 2400 (1997)

The court found the arbitration contract was a contract of adhesion. Furthermore, the court found that there was oppression because of the vast inequality of bargaining power which resulted in no negotiation and the absence of meaningful choice. There also was surprise because of the process used in obtaining signatures to the arbitration agreement. The consumers were not afforded a reasonable opportunity to read the agreement and discover the disparity of obligations. The court also noted that the lender had not previously disclosed, much less discussed, the arbitration portion of the "blizzard of documents." The consumers were not given a copy of the arbitration agreement after they signed it. Because the agreement permitted the lender to foreclose judicially or nonjudicially, obtain an injunction against waste, bring actions for a receiver, etc., while denying the consumer the right to judicial remedies for any reason, the court held the terms of the agreement were substantively unconscionable.

B. Cases finding no unconscionability

In re: RealNetworks, 2000 WL 631341 (N.D. Ill. May 8, 2000)

The defendant's arbitration agreement appeared in a pop-up window on a Web page. The court rejected the contention that the arbitration provision was procedurally unconscionable because it was buried in the license. Although the license did not set off the arbitration provision or do anything to draw attention to it (it was among other provisions under the heading "Miscellaneous"), it was in the same size font as the rest of the agreement and was the final provision, rather than being hidden in the middle of the license. In addition, the user had a reasonable opportunity to understand the provision because it could be printed out and the user could review it on the screeen for as long as desired. Moreover, the agreement was not substantively unconscionable, even though it chose a forum which is geographically distant and failed to provide for classwide arbitration. Finally, the court refused to consider whether the costs of arbitration were prohibitive.

Greentree v. Vintson, 753 So.2d 497 (Ala. 1999)

Consumers sued finance company with regard to an installment contract for the sale of a mobile home. Finance company sought to enforce a provision in the contract providing for arbitration of all disputes under the Federal Arbitration Act. The court held that the arbitration provision was enforceable because consumers had notice of the provision even if they did not have actual notice because they did not choose to read it. The provision's language was not ambiguous and contained sufficient information; thus its plain language had to be enforced. The court rejected the consumers' contention that the agreement was unconscionable because they were unsophisticated, the agreement lacked mutuality, and the consumers had no meaningful choice. The court pointed out that one bank doing business with the seller did not require arbitration,

there was no evidence others would have refused to lend if the consumers had objected to arbitration, and no proof the consumers could not have obtained independent financing from a lender who would not have required arbitration. The consumers alleged duress when they signed the installment contract. The court acknowledged that duress can invalidate an arbitration agreement. However, the duress alleged here related to the contract as a whole; therefore, the question of duress had to be resolved in arbitration.

Results Oriented, Inc. v. Crawford, 245 Ga. App. 432, 538 S.E.2d 73 (2000), aff'd 2001 Ga. Lexis 446 (June 11, 2001)

Mobile home retailer, mobile home manufacturer, and lender sought to enforce arbitration agreements contained in sales and installment contracts in dispute with mobile home purchaser. The trial court determined that arbitration clauses were unconscionable. In doing so, the trial court compared the fees and costs of arbitration to filing fees in the local state court. The Court of Appeals reversed, holding that the installment contract was governed by the FAA. On the issue of unconscionability, the court stated that whether a contract is unconscionable depends on the circumstances when the contract was made. When this arbitration agreement was signed, the consumer had no idea of the costs of arbitration; he denied knowledge of the requirement to arbitrate and its costs until afterward. In addition, mere lack of sophistication or economic disadvantage of the plaintiff does not amount to unconscionability. Absent proof of unconscionability, the purchaser was required to submit to arbitration a claim that he was fraudulently induced into entering into installment contract for payment of home. Assuming the consumer had presented evidence that he was aware of the arbitration clause and had shown it

was unconscionable or induced by fraud, the trial court would have had jurisdiction to determine arbitrability of the dispute between purchaser and lender. This was due to a severability clause which created an ambiguity regarding whether a court or arbitrator should determine the arbitrability issue.

Harris v. Green Tree Financial Corp., 183 F.3d 173 (3rd Cir. 1999).

Court found no procedural unconscionability despite arbitration clause being in small print on back of contract and clause not appearing at all in work orders consumers were required to sign. The court held there was no substantive unconscionability despite the fact that only the company could litigate disputes. The court regarded the substantive unconscionability claim as overlapping the consumers' claim there was no mutuality, a claim the court rejected.

Dobbins v. Hawk's Enterprises, 198 F.3d 715 (8th Cir. 1999)

Consumers claimed $50 million in compensatory damages in regard to the mobile home they purchased which was delivered with substantial damage. Based on that damage claim, the consumers would have to pay the AAA $23,000 in filing fees. The consumers never fully pursued the AAA's fee waiver option because they refused to provide the family financial information which the waiver program requires. The district court found the fees so high the consumers were deprived of the arbitral forum. The Eighth Circuit remanded the case, with a direction to the district court to order the consumers to present a reduced demand for damages

since the $50 million claim was disproportionate to the value of the mobile home. In addition, the consumers should seek a waiver or reduction of the fees from the AAA, after submitting personal financial information. The court found this a required step before the court could determine whether the clause was unconscionable. The procedure might still be conscionable even if the entire fee was not waived, provided it was lowered to a reasonable amount.

Green Tree Financial v. Wampler, 1999 Ala. Lexis 233 (1999)

In contrast to Randolph, supra, the court refused to strike down an arbitration clause which was silent on fees in a case where there was no evidence on the record as to what the fees might be and the extent of the financial hardship on the consumers if they had to pay the fees. The court refused to assume the worst in terms of the fees and the possible hardship. In addition, the court pointed out that the case did not involve the effect of financial hardship on the enforcement of a federally created statutory cause of action. See also Thompson v. Illinois Title Loans, 2000 U.S. District Lexis 232 (N.D. Ill. 2000)(consumers did not allege they could not afford the costs of arbitration).

Ex Parte Napier v. Manning, 723 So.2d 49 (Ala. 1998)

Consumer presented evidence that she was 77 years old, never completed high school, had poor eyesight, had difficulty reading, and could not read small print. The court, however, found the consumer had not met its burden of proving unconscionability. The court pointed out that the consumer presented no proof that her request for assistance after she notified defendant she could not see or understand was refused, that she was unable to obtain the product (a mobile home and insurance)from another source without having to sign an arbitration provision, or that arbitration is oppressive or unfair.

Lackey v. Green Tree Financial Corp., 330 S. Caro. 388, 498 S.E.2d 898 (S. Caro. Ct. App. 1998)

The court agreed with the trial court that the arbitration provision was a take-it-or leave-it adhesion contract. While a finding that the contract was adhesive is the beginning point in the analysis, that did not make it unconscionable. Because South Carolina courts have not thoroughly considered unconscionability in the context of arbitration contracts, the court followed *Goodwin v. Ford Motor Credit*. See infra.

The trial court found the arbitration provision unconscionable on three grounds, all of which the court of appeals rejected. The trial court objected to the agreement's failure to inform consumers of their right to have an attorney at the loan closing as required by the state's Consumer Protection Code. The appellate court found it was not clear that this section of the Code applied to the instant transaction. In addition, state case law did not clearly make a contract unenforceable where it prevents a party from consulting a lawyer. Moreover, nothing in the arbitration agreement prevented the consumers from obtaining counsel.

Second, the trial court objected to a clause in the arbitration agreement stating that Green Tree was to select the arbitrator, but the consumer had the right to veto that choice. The trial court opined that the veto was a "'hollow right.'" The court on appeal found the veto power was significant; it meant that if the consumer exercised the veto, under the FAA, the court would select the arbitrator. This process ensured the appointment of a neutral arbitrator.

Third, according to the trial court the contract was unconscionable because it lacked mutuality since the lender could use a judicial forum to foreclose. The court of appeals found there was mutuality of obligation because consideration flowed to each party. There also was mutuality of remedy. Under the agreement, if the lender brought an action in court, any consumer counterclaim was subject to arbitration. The court interpreted the FAA as precluding the court from viewing arbitration as inherently less beneficial than the judicial forum. Therefore, unless the consumers could prove that they would be prejudiced by arbitration, there was no unconscionability due to lack of mutuality of remedy.

Roberson v. The Money Tree, 954 F. Supp. 1519 (M.D. Ala. 1997)

Consumers sued a finance company and two insurance companies for misrepresenting to consumers that they were required to purchase credit insurance as a condition to receiving a loan. On a motion to compel arbitration, the court refused to find the arbitration clause unconscionable. The consumers failed (1) to prove that arbitration deprived them of remedies they would have in a judicial proceeding, (2) to show the arbitration clause was being used to waive the consumers' rights to sue for intentional torts, or (3) to demonstrate that the terms of the clause bore no reasonable relationship to business risks.

See Goodwin v. Ford Motor Credit Co., 970 F. Supp.1007 (M.D. Ala. 1997)(relying on *Roberson*, court finds consumers have not presented proof of unconscionability).

But see Harris v.Green Tree Financial Corp, supra. (arbitration clause unconscionable where only creditor had option to seek judicial relief).

XI. Nonsignatories

Lovejoy v. New South Federal Savings Bank & Vesta Fire Ins. Co., 2000 Westlaw 89854 (Ala. 2000)

When the consumer failed to pay the insurance premiums on his car, the assignee of the retail installment sales contract purchased single interest insurance from Vesta. Consumer subsequently sued the assignee and Vesta. The court held that the arbitration agreement applied only to the parties who signed the agreement and their assigns. Because Vesta was not a signatory, the consumer was not required to arbitrate its claim against Vesta. Moreover, the court pointed out that the consumer was not suing Vesta on the retail installment contract or as the principal, the agent, or a co-conspirator with, the assignee.

MS Dealer Service Corp. v. Franklin, 177 F.3d 942 (11th Cir. 1999)

When buying a vehicle, the consumer signed a buyer's order which contained an arbitration clause. The buyer's order incorporated the retail installment sales contract by reference. The consumer also signed a service contract with the plaintiff, who did not sign the buyer's order. The consumer alleged that the non-signatory party worked in collusion with the seller and Chrysler Credit to defraud her in regard to the service contract. The court held that the consumer was equitably estopped from avoiding arbitration with the nonsignatory. First, the consumer had to rely on the terms of the retail installment sales contract in asserting his claims against the non-signatory. Second, the consumer's claims against the non-signatory were intertwined with the obligations imposed by the buyer's order.

Med Center Cars v. Smith, 727 So.2d 9 (Ala. 1998)

Consumers filed a class action alleging fraud in connection with the financing of automobile extended service contracts as part of the purchase of the automobiles without including the cost of the contracts in the finance charge section of the sales documents. The complaint included allegations of conspiracy against nonsignatories. The nonsignatories claimed that these conspiracy allegations provided the necessary connection and commonality between the signatories and the nonsignatories. The court held that the arbitration clauses were not broad enough to include the claims against the nonsignatories. They were limited to disputes between the buyer and seller only, and the nonsignatories were not sellers under the agreement.

Wilson v. Waverlee Homes, 954 F. Supp. 1530 (M.D. Ala. 1997); *aff'd without opinion*, 127 F.3d 40 (11th Cir. 1997)

Consumers entered into installment sales and financing contracts for the sale of mobile homes which contained arbitration clauses. Consumers sued the manufacturer which was not a party to those contracts. Although acknowledging that there are exceptions, the court found the general rule is that one that is not a party to a contract cannot compel arbitration. Among exceptions are third party beneficiaries where the parties to the contract intended to benefit the third party. In addition, nonsignatories may be bound to arbitration contracts under principles of agency. Where it is the nonsignatory who wants to take advantage of the arbitration contract, equitable estoppel may permit it to do so where the claims against the nonsignatory are intertwined with the underlying contract obligation. Here, the consumers sued under their warranty agreement with the manufacturer. Although the manufacturer and the defendant seller had "common and parallel duties" to the consumer, and could be sued on the same tort theory, that was not enough to invoke equitable estoppel.

Boyd v. Homes of Legend, 981 F. Supp. 1423 (M.D. Ala. 1997)

Manufacturer of mobile homes sought to compel arbitration by relying on arbitration clause in contract between consumer and dealer. The court held that the manufacturer had not proven third party beneficiary status. The manufacturer argued that the phrase "All disputes...relating to

this Contract or the parties thereto...." was broad enough to encompass it. The court rejected this contention, finding that the contract was "expressly and unambiguously" limited to the dealer and the consumer. The court also rejected arguments that there was an agency relationship between the manufacturer and dealer and the manufacturer's reliance on equitable estoppel.

Ex parte Isbell, 708 So.2d 571 (Ala. 1997)

The arbitration clause between the consumer and the mobile home dealer covered "[a]ll disputes, claims or controversies arising from or relating to this Contract or the relationships which result from this contract." The court held that the language was not broad enough to allow the manufacturer to compel arbitration. The court was influenced by another provision which stated that the arbitration clause applied exclusively to buyers, the retailer and the financing institution, all of whom signed the purchase contract. Furthermore, the claims against the manufacturer had nothing to do with the terms and conditions in the contract with the dealer. Finally, the manufacturer was not entitled to rely on equitable estoppel since its warranty stated that it was not liable for any agreement made by the dealer.

Ex Parte Napier v. Manning, 723 So.2d 49 (Ala. 1998)

Consumers purchased mobile home, executing a retail installment contract containing an arbitration provision. In addition, they were required to buy an insurance policy. The court held the arbitration provision was broad enough to cover the consumers' claims against the insurance company. The insurance coverage for potential physical damage to the mobile home was an "indispensable element" of the contract. Without that insurance, Green Tree Financial would have refused to provide financing. In addition, the consumers' claims against the nonsignatory insurance company was intertwined with claims against signatories. The consumers claimed the insurance was forced placed insurance, misrepresentations had been made, and kickbacks were paid. Finally, the consumers alleged there was a conspiracy and the insurance company was part of the conspiracy. The court distinguished the facts from those in *Med Center, supra*.

Roberson v. The Money Tree, 954 F. Supp. 1519 (M.D. Ala. 1997)

Consumers signed an arbitration contract with finance company. Consumers sued both finance company and credit insurance company, alleging persons serving as agents of both companies misrepresented that purchase of credit insurance was a requirement for obtaining a loan. The court held that the nonsignatory insurance company could compel the consumers to resolve the dispute only pursuant to the arbitration clause where the consumers' claims against both defendants were closely intertwined and arose in connection with the same loan transaction. The consumers' complaints implicated all the defendants inseparably.

Goodwin v. Ford Motor Co., 970 F. Supp. 1007 (M.D. Ala. 1997)

The court followed the approach taken in the *Roberson* case. The consumers were equitably estopped from preventing assignee FMMC from enforcing arbitration contracts because the

claims they asserted against the assignee were "inextricably bound up with obligations created by and deriving from the execution" of the installment sales contracts.

Ex parte Dickinson v. Chris Myers Pontiac-Nissan-GMC, 711 So.2d 984 (Ala. 1998)

Consumers, husband and wife, signed a retail installment sales contract when they purchased their automobile. It did not contain an arbitration clause. The Buyer's Order, however, did contain the clause, but only the husband signed that document. The dealer tried to compel the non-signatory wife to arbitrate. The court distinguished cases where a signatory tries to avoid arbitrating with a non-signatory and the issues are intertwined with issues involving the signatories. Since arbitration is "strictly a matter of contract," and the wife never signed the contract, she was not bound. The court did not give weight to the fact the car was to be jointly owned by the husband and wife. A dissenting opinion found the relationship sufficiently close and her claims so intertwined with the underlying contract obligations that the non-signatory should be bound.

Grundstad v. Ritt, 106 F.3d 210 (7th Cir. 1997)

In a commercial case involving a non-competition agreement, the court reversed the district court and held a guarantor was not compelled to arbitrate where the guarantor was not a signatory to the contract containing the arbitration clause. In this case, the guaranty appeared immediately beneath the signature line of the agreement. The guaranty provided that the guarantor guaranteed "all of the provisions of the within Agreement, and especially the performance of Atlantic hereunder." The court held that language, "standing alone, does not unambiguously express [the guarantor's] intent to be personally bound by the arbitration clause within the Agreement. Nowhere within the document does the guaranty even refer to any undertaking by the guarantors to be bound personally to arbitrate disputes. The guaranty simply states that [the guarantors] 'hereby guarantee' the Agreement." The court distinguished cases where the guaranty explicitly incorporates the underlying agreement by reference. A mere reference to the main contract, however, is not sufficient to establish consent.

Prudential Ins. Co. v. Schulte, 133 F.3d 225 (3d Cir. 1998)

Former sales agents for insurance company sued the company for wrongful firing and company moved to compel arbitration based on arbitration provision contained in the applications for registration the sales agents filed with the National Association of Securities Dealers. The court found that it was clear from the text and purpose of the form filed by the sales agents that the parties to the agreement intended to benefit third party non-signatories such as the employer. The court distinguished a case where the non-signatory parent corporation had in effect created for itself an option to accept or reject the arbitration clause. *Dayhoff v. H.J. Heinz Co.*, 86 F.3d 1287 (3d Cir.), cert. denied, 117 S. Ct. 583 (1996).

XII. The Arbitration Proceedings

Montes v. Shearson Lehman Bros., 128 F.3d 1456 (11th Cir. 1997)

In an employment arbitration case, the Eleventh Circuit followed every other circuit except the Fifth, and adopted the "manifest disregard of the law" standard. In doing so, the court was careful to note it interpreted the standard narrowly. An arbitration award would not be vacated merely because the arbitrator made a legal mistake. Rather, manifest disregard required a showing that the arbitrator was conscious of the law and deliberately ignored it. Despite this narrow interpretation, the court's application in the instant case was arguably expansive. Counsel for the employer urged the arbitration panel to ignore the law. There was nothing explicit in the record that demonstrated that the arbitrators were conscious of the law and deliberately ignored it. Rather, the court reasoned as follows:

The arbitrators expressly took note of this plea [of the attorney to ignore the law] in their award when summarizing the parties' arguments. There is nothing in the award or elsewhere in the record to indicate that they did not heed this plea. In the absence of any stated reasons for the decision and in light of the marginal evidence presented to it, we cannot say that this is not what the panel did.

The court further stated, that although arbitrators do not have to state the reasons for their decisions, "there is nothing in the decision itself or anywhere else in the record that refutes the inference that the law was ignored under the circumstances in this case." The court remanded and referred the case to a new arbitration panel.

Halligan v. Piper Jaffray, 148 F.3d 197 (2d Cir. 1998)

In this case brought under the Age Discrimination in Employment Act, the parties both agreed on the applicable law and explained that law to the arbitrators. The court reviewed the evidence and found that the arbitrators either ignored the law or the evidence or both. Although arbitrators are not required to explain their awards, the court would take the absence of an explanation into consideration where it appears the panel manifestly disregarded the law. The absence of a reasoned award reinforced the court's confidence that there was manifest disregard. The court acknowledged that it could remand the case to the arbitrators for a written explanation of their award. The court declined to do so, however, because it found that any explanation "would have strained credulity."

XIII. Judicial Review

Lapine Technology Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997)

Two commercial parties entered into an arbitration agreement. The terms of the agreement illustrate how different such agreements, subject to actual negotiation between sophisticated parties, can be from the adhesion arbitration contracts imposed upon consumers. The arbitration agreement provided that the arbitrators' decisions be based on the evidence presented, the terms

of the agreement between the parties, and California law. The arbitrators were required to state the bases of the award and include detailed findings of fact and conclusions of law. The federal district court could confirm the arbitrator's award by vacating, modifying or correcting it based on any grounds referred to in the FAA, where the arbitrator's findings of fact are not supported by substantial evidence, or where the arbitrator's conclusions of law are erroneous. The court held that judicial review is not confined to the grounds listed in the FAA where the parties, as in this agreement, have contracted for heightened judicial scrutiny. The purpose of the FAA was to enforce arbitration agreements according to the terms the parties agreed to, not to ignore those terms and impose the FAA's grounds.

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