



## NORTH CAROLINA BANKING INSTITUTE

Volume 4 | Issue 1

Article 13

2000

# Randolph v. Green Tree Financial Corp.: Are Consumer Arbitration Agreements That Are Silent as to the Apportionment of Arbitral Expenses Enforceable

Matthew C. Bouchard

Follow this and additional works at: <http://scholarship.law.unc.edu/ncbi>

 Part of the [Banking and Finance Law Commons](#)

### Recommended Citation

Matthew C. Bouchard, *Randolph v. Green Tree Financial Corp.: Are Consumer Arbitration Agreements That Are Silent as to the Apportionment of Arbitral Expenses Enforceable*, 4 N.C. BANKING INST. 319 (2000).

Available at: <http://scholarship.law.unc.edu/ncbi/vol4/iss1/13>

This Comments is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Banking Institute by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

## ***Randolph v. Green Tree Financial Corp.*: Are Consumer Arbitration Agreements That Are Silent As To The Apportionment Of Arbitral Expenses Enforceable?**

### I. INTRODUCTION

It is often said that aggrieved parties deserve to have their day in court. Unfortunately, the resolution of many civil suits takes far longer than a day and costs far more than a day's worth of attorney's fees.<sup>1</sup> Arbitration has emerged as a cost-effective alternative to the uncertainty associated with time-intensive litigation,<sup>2</sup> and courts have shown an increased willingness to enforce mandatory arbitration provisions in contracts of adhesion.<sup>3</sup>

---

1. Former President George Bush once quipped:

[M]ost good lawyers know that the civil justice system is out of control. In the past 20 years the number of civil lawsuits filed in federal courts has more than doubled and today the average case takes almost a year to be resolved. In the past year alone, the number of cases pending for up to three years increased by nearly 15%. That means you can file a suit, have time to enroll in law school, study three years, graduate, pass the bar and then represent yourself in the court the day the decision is handed down.

*Why ADR?*, DISPUTE RESOLUTION ALTERNATIVES SUPERCOURSE 485, 486 (Ellis R. Mirsky chmn., 1993).

2. See John M. Flynt, *A Solution to Force-Placed Insurance Litigation for Lenders: Disclosure and Arbitration*, 26 CUMB. L. REV. 537, 572 (1995-1996). See also Stephen A. Hochman, *ADR Options for Banks and Other Lenders*, R182 ALI-ABA 59, 63 (1994). Hochman suggests nine advantages of arbitration over litigation: (1) it offers a quicker way to resolve disputes; (2) it saves litigation costs; (3) it avoids the uncertainty associated with judicial outcomes; (4) it allows for more flexible remedies; (5) it avoids substantial diversion of a client's energies; (6) it reduces business uncertainty; (7) it helps preserve business relationships; (8) it permits confidentiality; and (9) it avoids the risk of adverse judicial precedent. See *id.*

3. See generally *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (requiring a consumer who sued a termite exterminator for breach of contract to arbitrate his claim); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (requiring an employee who had signed an arbitration agreement in connection with registering as a securities representative to arbitrate his age discrimination claim). An "adhesion contract" is a "[s]tandardized contract form offered to consumers of goods and services on essentially 'take it or leave it' basis without affording con-

Mandatory binding arbitration is a relatively new concept in the financial services industry,<sup>4</sup> and though banks have been slow to explore the arbitral option,<sup>5</sup> the use of arbitration agreements in consumer loan transactions is likely to increase.<sup>6</sup> In turn, many consumer advocates who oppose arbitration clauses in adhesion contracts, arguing that they are intrinsically coercive, are likely to challenge this growing alternative dispute resolution practice.<sup>7</sup>

In *Randolph v. Green Tree Financial Corp.*, the purchaser of a mobile home financed by Green Tree successfully challenged the validity of an arbitration agreement that was included in the finance documents.<sup>8</sup> The Court of Appeals for the Eleventh Circuit held that the arbitration clause was unenforceable because it failed to provide the minimum guarantees required to ensure that the plaintiff could vindicate her statutory rights unencumbered by steep filing fees, steep arbitrators' fees, or other significant costs of arbitration.<sup>9</sup> This Note will explore the facts and holding of *Randolph* in Part II.<sup>10</sup> Part III will examine the relevant background law, including pertinent statutory provisions and

---

sumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract." BLACK'S LAW DICTIONARY 40 (6th ed. 1990).

4. See Flynt, *supra* note 2, at 581.

5. See Dwight Golann, *Consumer Litigation in the Age of Combat Banking*, 45 BUS. LAW. 1761, 1775 (1990).

6. See Anne Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331, 333 (Winter 1996). Brafford contends, "Many consumer disputes, which often involve simple factual issues, can be resolved quickly and relatively cheaply through arbitration. Increasingly, businesses have been taking advantage of arbitration's efficiency . . . arbitration clauses may soon dominate consumer banking contracts." *Id.*

7. See *id.* Some plaintiff's attorneys are becoming increasingly concerned about the fundamental fairness of the arbitration process, and have begun gathering evidence to determine if arbitration firms are in fact neutral. According to Barry A. Ragsdale, a partner with Ivey & Ragsdale in Jasper, Alabama, "I don't think merely the fact that banks and financial institutions or employers win 80 percent of the time means the process is unfair, but I do think it bears some scrutiny on that basis." See R. Christian Bruce, *Consumer Credit: Neutrality of Arbitrators Needs Scrutiny, Attorney Says, Calling for More Discovery*, BNA BANKING REP., Aug. 23, 1999, at 303. See also Patricia Sturdervant & Dwight Golann, *Should Binding Arbitration Clauses Be Prohibited in Consumer Contracts?*, DISP. RESOL. MAG. 4 (Summer 1994) (discussing whether pre-dispute, binding arbitration clauses in consumer contracts of adhesion are inappropriate).

8. See *Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149 (11th Cir. 1999).

9. See *id.* at 1158.

10. See *infra* notes 14-50 and accompanying text.

case holdings.<sup>11</sup> Part IV will provide an analysis of the Eleventh Circuit's opinion in *Randolph* and address conflicting, but arguably distinguishable, decisions from other circuits.<sup>12</sup> Finally, this Note will conclude that the holding in *Randolph*, although limited in scope, raises a red flag to lenders who must exercise greater care in the drafting of arbitration agreements to ensure their enforceability and effectiveness.<sup>13</sup>

## II. STATEMENT OF THE CASE

*Randolph v. Green Tree Financial Corp.* concerns the enforceability, in the context of a consumer finance agreement, of an arbitration provision that is silent as to the apportionment of filing fees, arbitrators' fees, and other significant costs of arbitration.<sup>14</sup> Plaintiff Larketta Randolph sued Green Tree Financial Corporation and Green Tree Financial Corp. -- Alabama (collectively, "Green Tree"), alleging that Green Tree's financing documents violated the Truth in Lending Act ("TILA"),<sup>15</sup> that the mandatory arbitration requirement violated the Equal Credit Opportunity Act,<sup>16</sup> and that the TILA precludes arbitration of disputes arising under the legislation.<sup>17</sup>

Ms. Randolph's complaint arose from her purchase of a mobile home from Better Cents Home Builders, Inc., in Opelika, Alabama, on January 25, 1994.<sup>18</sup> She financed this purchase through Green Tree Financial Corp. -- Alabama, a wholly-owned subsidiary of Green Tree Financial Corporation.<sup>19</sup> The financing documents required her to purchase "vendor's single interest" insurance, which protects a vendor against the costs of repossession in the event of borrower default, but the TILA disclosure

---

11. See *infra* notes 51-97 and accompanying text.

12. See *infra* notes 98-123 and accompanying text.

13. See *infra* notes 124-133 and accompanying text.

14. See *Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149, 1158 (11th Cir. 1999).

15. See 15 U.S.C. §§ 1601-1667e (1994 & Supp. I 1995).

16. See 15 U.S.C. §§ 1691-1691f (1994).

17. See *Randolph*, 178 F.3d at 1150-1151.

18. See *id.* at 1151.

19. See *id.*

statement failed to mention this requirement.<sup>20</sup> In addition to bringing the instant action,<sup>21</sup> Ms. Randolph sought certification of a class of individuals who had entered into similar agreements with Green Tree.<sup>22</sup> In response, Green True moved to compel Ms. Randolph to arbitrate her complaint pursuant to the arbitration agreement in the finance contract.<sup>23</sup>

---

20. *Id.* The plaintiff alleged that requiring such insurance would impose an extra charge in the approximate amount of \$15.00 a year, a violation of the TILA because it was not disclosed. See *Randolph v. Green Tree Fin. Corp.*, 991 F.Supp. 1410, 1415 (M.D. Ala. 1997), *reh'g denied* 991 F.Supp. 1410, 1425-1426 (M.D. Ala. 1998), *rev'd* 178 F.3d 1149 (11th Cir. 1999).

21. The plaintiff's complaint asserted that: (1) "Green Tree is a creditor within the meaning of TILA;" (2) "The notes and security instruments signed by plaintiff and borrowers for the purchase of mobile homes were extensions of credit subject to TILA;" (3) "The requirement that insurance policies contain provisions covering Green Tree's possible repossession expenses are credit charges as defined by TILA and occur annually when each policy is renewed;" and (4) "No TILA disclosures were given by Green Tree." See *Randolph*, 991 F.Supp. at 1415 n.5 (quoting Pl.'s Am. Compl. at 21-23).

22. See *Randolph*, 178 F.3d at 1152.

23. See *id.* at 1151. The arbitration agreement reads, in pertinent part:

17. ARBITRATION: All disputes, claims, or controversies arising from or relating to this Contract or the relationships which result from the Contract, or the validity of this arbitration clause or the entire Contract, shall be resolved by binding arbitration by one arbitrator selected by Assignee with consent of Buyer(s). This arbitration Contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration, except as provided herein. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY ASSIGNEE (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes will be subject to binding arbitration in accord with this Contract. The parties agree and understand that the arbitrator shall have all powers provided by the law and the Contract ... [including] money damages, declaratory relief, and injunctive relief. Notwithstanding anything hereunto the contrary, Assignee retains an option to use judicial or non-judicial [sic.] relief to enforce a security agreement relating to the Manufactured Home secured in a transaction underlying this arbitration agreement, to enforce the monetary obligation secured

### A. *The District Court*

In determining whether to compel arbitration, the district court first considered whether enforcement of the arbitration provision was statutorily barred.<sup>24</sup> A two-prong test guided the court's inquiry: first, the court had to determine whether the agreement to arbitrate encompassed the statutory issues; second, the court had to consider "whether legal constraints external to the Parties' agreement foreclosed the arbitration of those claims."<sup>25</sup>

With respect to the first prong, the court held that the provisions of the arbitration agreement were sufficiently broad to encompass the plaintiff's TILA, Equal Credit Opportunity Act (ECOA), and other claims, despite her argument that the provision itself failed to mention the applicable statutes.<sup>26</sup> Turning to the second prong, the court established that in order for Ms. Randolph to prevail, she would have to rebut a presumption in favor of arbitration by demonstrating that Congress intended to preclude waiver of judicial remedies for the statutory rights at issue.<sup>27</sup> Because the plaintiff failed to present any evidence from

---

by the Manufactured Home or to foreclose on the Manufactured Home.... The initiation and maintenance of an action for judicial relief in a court [on the foregoing terms] shall not constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this Contract, including the filing of a counterclaim in a suit brought by Assignee pursuant to this provision.

*Id.* Note that the arbitration agreement is silent as to (1) the apportionment of arbitration fees and (2) what rules govern the apportionment of such fees.

24. See *Randolph*, 991 F.Supp. at 1416.

25. *Id.* (relying on *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985)).

26. See *id.*

27. See *id.* The court quoted from *Mitsubishi*, which held that claims arising under the Sherman Act, 15 U.S.C.A. §§ 1-7 may be submitted to arbitration:

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deductible from text or

the text of the TILA or its legislative history indicating such an intention, and because she failed to establish an inherent conflict between arbitration and the purposes of the TILA, the court held that she failed to meet her burden of showing why the arbitration provision should not be enforced.<sup>28</sup> The court thus held that the enforcement of the provision was not statutorily barred.<sup>29</sup>

Next, the court considered whether or not the arbitration provision was supported by consideration and whether or not the plaintiff knowingly consented to arbitration.<sup>30</sup> In support of her contention that the arbitration provision lacked consideration, the plaintiff argued that since Green Tree was not required to arbitrate, the provision was unenforceable for lack of mutuality of obligation.<sup>31</sup> In holding that ample consideration existed to support enforcement of the provision, the court noted that Alabama state law, applicable in the instant action, does not require mutuality in arbitration provisions.<sup>32</sup> Turning to the issue of consent, the court held that the plaintiff's failure to read what she signed did not insulate Ms. Randolph from her contractual obligations, including the agreement to arbitrate.<sup>33</sup> Therefore her argument that she did not knowingly and voluntarily consent to

---

legislative history.

*See id.* (quoting *Mitsubishi*, 473 U.S. at 628, 105 S. Ct. at 3354).

28. *See Randolph*, 991 F.Supp. at 1417.

29. *See id.* at 1415.

30. *See id.* at 1421-1423.

31. *See id.* at 1421.

32. *See id.* at 1422. Here the court relied on *Marcrum v. Embry*, 282 So.2d 49 (Ala. 1973), which held, in pertinent part:

[M]utuality in a contract does not mean equal rights under the contract, or that each party is entitled to the same rights or covenants under the contract. So long as there is a valuable consideration moving from one side to the other, or there are binding promises on the part of each party to the other, there is adequate consideration for a valid contract.

*Marcrum*, 282 So.2d at 51. The Fourth Circuit has also held that strict mutuality of obligation is not required to enforce an arbitration clause. *See Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373, 378 (4th Cir. 1998) (holding that a mutual promise to arbitrate constitutes sufficient consideration to enforce an arbitration agreement).

33. *See Randolph*, 991 F.Supp. at 1423. Here the court relied on *Coleman v. Prudential Bache Sec., Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986), (holding that "absent a showing of fraud or mental incompetence, a person who signs a contract cannot avoid her obligations under it by showing that she did not read what she signed").

the agreement to arbitrate failed.<sup>34</sup>

Based on these statutory and contractual considerations, the court dismissed the plaintiff's claims with prejudice, declined her petition for class certification, and compelled her to submit her claims to binding arbitration pursuant to the arbitration provision in the finance contract.<sup>35</sup> The district court later denied the plaintiff's subsequent motion for reconsideration.<sup>36</sup>

### B. *The Court of Appeals*

Ms. Randolph appealed to the Eleventh Circuit Court of Appeals, and Green Tree moved to dismiss the appeal for lack of jurisdiction.<sup>37</sup> Green Tree argued that the court of appeals lacked jurisdiction because the district court's ruling was not a "final decision."<sup>38</sup> Green Tree drew a distinction between "embedded" proceedings, in which the arbitration issue arises as part of a broader action dealing with other issues, and "independent" proceedings, where the motion to compel arbitration is the only issue before the court.<sup>39</sup> Since the plaintiff's action alleged a substantive violation of the TILA as well as raising the arbitration question, Green Tree argued that the instant proceeding was "embedded," and relied on opinions from several other circuits which have held that orders compelling arbitration in "embedded" proceedings must be treated as interlocutory and non-appealable, not as "final decisions."<sup>40</sup> In this question of first im-

---

34. See *Randolph*, 991 F.Supp. at 1423.

35. See *id.* at 1424-1425.

36. See *id.* at 1425-1426.

37. See *Randolph*, 178 F.3d at 1152.

38. *Id.* at 1153. Appeals from a distinct court's order are permissible when there is "a final decision with respect to an arbitration that is subject to this title." 9 U.S.C. § 16(a)(3) (1994).

39. *Randolph*, 178 F.3d at 1153.

40. *Id.* For circuit holdings concurring with *Green Tree* on the jurisdictional issue, see *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 135-136 (3d Cir. 1998) (holding that if the arbitrability issue arises in an embedded proceeding, the district court order cannot be considered a final order subject to immediate appeal); *Seacoast Motors of Salisbury, Inc. v. Chrysler Corp.*, 143 F.3d 626, 628 (1st Cir. 1998) (holding that "[t]he general rule governing what constitutes a final decision under section 16 is that an order compelling arbitration is not final, and therefore not im-



pression for the Eleventh Circuit,<sup>41</sup> the court of appeals refused to recognize the “embedded/independent” distinction and held that the order compelling arbitration was an appealable final decision.<sup>42</sup>

The court then turned to the question of the enforceability of the arbitration clause, holding that since the clause failed to provide the minimum guarantees required to ensure that Ms. Randolph could vindicate her statutory rights under the TILA, the clause was unenforceable.<sup>43</sup> First, the court conceded a strong federal policy toward arbitration.<sup>44</sup> However, the court then cited precedent that held that some procedural flaws erect such barriers to a would-be litigant’s exercise of her statutory rights that they render the arbitration clause unenforceable.<sup>45</sup> The court held that forcing the plaintiff to bear the brunt of “hefty” arbitration costs and “steep filing fees” presents such barriers.<sup>46</sup> The court then stated that the clause in the instant action: (1) said nothing about the payment of filing fees or the apportionment of

---

mediately reviewable, if the arbitrality issue is ‘embedded’[.]”). *But compare* *Armijo v. Prudential Insurance Co. of America*, 72 F.3d 793, 797 (10th Cir. 1995) (treating district court’s dismissal of the plaintiff’s remaining claims as an appealable final decision); *Arnold v. Arnold Corp. – Printed Communications for Business*, 920 F.2d 1269 (6th Cir. 1990) (holding that the court had jurisdiction over an order compelling arbitration in an embedded proceeding, relying on the fact that the district court had entered final judgment and had “nothing left . . . to do but execute the judgment”).

41. *See Randolph*, 178 F.3d at 1154.

42. *Id.* at 1156-1157. The Fourth Circuit recognizes the “embedded/independent” distinction. *See Jones v. Wells Fargo Guard Servs.*, No. 98-2704, 1999 U.S. App. LEXIS 8265, at \*2 (4th Cir. Apr. 29, 1999); *Pisgah Contractors, Inc. v. Rosen*, 117 F.3d 133, 136 (4th Cir. 1997).

43. *See Randolph*, 178 F.3d at 1158.

44. *See id.* at 1157.

45. *See id.* The court relied on *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998), discussed *infra* notes 73-82 and accompanying text.

46. *Randolph*, 178 F.3d at 1158. By way of example, the American Arbitration Association (AAA) charges a filing fee based on the amount of the claim or counterclaim, ranging from \$500 on claims below \$10,000 to a negotiated amount for claims in excess of \$5 million. The case filing or set-up fee is \$150 per party. Additionally, the parties are charged a fee based on the number of hours of mediator time. The hourly fee is for the compensation of both the mediator and the AAA and varies according to region. The expenses of the AAA and the mediator, if any, are generally borne equally by the parties, who may vary this arrangement by agreement. *See American Arbitration Association, Commercial Dispute Resolution Procedures* (visited Dec. 30, 1999)

<[http://www.adr.org/rules/commercial/commercial\\_rules.html](http://www.adr.org/rules/commercial/commercial_rules.html)>.

other costs of arbitration; (2) failed to assign initial responsibility for filing fees or arbitrators' costs; (3) provided no waiver in cases of financial hardship; (4) was silent as to whether consumers, should they prevail, would be saddled with fees and costs in excess of any award; and (5) failed to designate what set of rules would apply, which would have offered some guidance as to the apportionment of fees.<sup>47</sup> Based on these five considerations, the court declined to enforce Green Tree's arbitration clause, reversed the district court's decision, and remanded the case for further proceedings consistent with its opinion.<sup>48</sup> Because it resolved the case on these bases, the court deferred addressing the question of whether the TILA precludes arbitration in all cases where rights are asserted under the Act.<sup>49</sup> Green Tree petitioned the U.S. Supreme Court for a writ of certiorari in January 2000.<sup>50</sup>

### III. BACKGROUND LAW

Arbitration is a process that permits would-be litigants to voluntarily submit their legal dispute to a private, neutral third-party for a resolution as binding as a judgment on the merits.<sup>51</sup> It differs from mediation because the arbitrator's decision is final, binding the parties to the award that results from the process and providing for court enforcement of the decision.<sup>52</sup> Its major advantage over litigation is flexibility, permitting the parties to tai-

---

47. See *Randolph*, 178 F.3d. at 1158.

48. See *id.* at 1159.

49. See *id.* The issue of whether the TILA precludes arbitration in all cases where rights are asserted under the Act is discussed *infra* notes 87-97 and accompanying text.

50. See Telephone Interview with C. Knox McLaney III, Counsel for Larketta Randolph (Jan. 24, 2000) [hereinafter Telephone Interview: McLaney].

51. See Flynt, *supra* note 2, at 569 (quoting Henry C. Strickland et. al., *Modern Arbitration for Alabama: A Concept Whose Time Has Come*, 25 *Cumb. L. Rev.* 59, 60 n.2 (1994)). Flynt outlines the course a typical arbitration follows: "(1) the disputing parties elect to have an arbitrator decide the dispute; (2) the parties select an arbitrator; (3) the arbitrator accepts written arguments and hears the dispute; (4) the arbitrator makes a binding decision; and (5) the arbitrator's decision is as final and enforceable as a judgment." *Id.*

52. See *id.* at 570.

lor the process to their dispute.<sup>53</sup> Since most arbitration decisions are private, they decrease the level of attention that lawsuits generate, allowing the disputing parties to settle the controversy quietly without engaging in costly, time-consuming and uncertain litigation.<sup>54</sup>

#### A. *The Federal Arbitration Act: History and Effect*

The Federal Arbitration Act (FAA) governs whether statutory claims under federal law can be subject to arbitration.<sup>55</sup> The Federal Arbitration Act (FAA) was enacted in 1925,<sup>56</sup> and the legislation was reenacted and codified in 1947 as Title IX of the United States Code.<sup>57</sup> "Its purpose was to reverse the long-standing judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts[.]"<sup>58</sup> Congress sought to put an agreement to arbitrate "upon the same footing as other contracts, where it belongs."<sup>59</sup> Section 2 of the FAA states that arbitration agreements, "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>60</sup> Section 3 authorizes federal district courts, upon application of a party, to stay proceedings regarding "any issue referable to arbitration under an agreement in writing for such arbitration . . . until such arbitration has been had in accordance with the terms of the agreement."<sup>61</sup> Section 4 grants federal district courts the

---

53. *See id.* at 570; *see also* Hochman, *supra* note 2, at 61.

54. *See* Flynt, *supra* note 2, at 570-571.

55. *See* Josh R. Lubin, Note, *The Legality of Mandatory Arbitration Clauses in Individual Employment Contracts*, 66 GEO. WASH. L. REV. 1031, 1032 (1997).

56. *See* Brafford, *supra* note 6, at 334.

57. *See* *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1470 (D.C. Cir. 1997).

58. *Id.* (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1651 (1991)). For an introductory account of the ancient roots of modern arbitration, including treatment of the subject during ancient tribal, Roman Empire, and medieval times, *see* Michael A. Landrum and Dean A. Trongard, *Judicial Morphallaxis: Mandatory Arbitration and Statutory Rights*, 24 WM. MITCHELL LAW REVIEW 345, 352-354 (1998).

59. Brafford, *supra* note 6, at 334 (quoting H.R. REP. NO. 68-96, at 1 (1924)).

60. 9 U.S.C. § 2 (1994).

61. *See id.* at § 3.

power to compel arbitration "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue."<sup>62</sup> "These provisions manifest a 'liberal federal policy favoring arbitration agreements.'"<sup>63</sup>

The 1985 Supreme Court decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* firmly established the highest court's support for the arbitration of federal statutory claims.<sup>64</sup>

The Court ruled in *Mitsubishi* that once a party has made an agreement to arbitrate, the party should be held to it, unless that party can show that "Congress itself has evinced an intention to preclude waiver of judicial remedies for the statutory rights at issue."<sup>65</sup> The burden is on the party opposed to arbitration to show that Congress intended to preclude a waiver of judicial remedies, an intention that can be found, if it all, in the statute's text, its legislative history, or an "inherent conflict" between arbitration and the underlying purpose of the statute.<sup>66</sup> Throughout such an inquiry, however, all "questions of arbitral-

---

62. *See id.* at § 4.

63. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

64. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). *See Brafford, supra* note 6, at 339-342, for a detailed treatment of the case. The following excerpt provides the context for the Supreme Court's historic decision:

Mitsubishi and Soler had entered into a distributorship agreement which contained an arbitration clause binding the parties to arbitrate all disputes in Japan. When an antitrust dispute arose, Soler challenged its arbitrality on two grounds. First, Soler argued that its arbitration clause did not cover the antitrust dispute because "as a matter of law a court may not construe an arbitration agreement to encompass claims arising out of statutes designed to protect a class to which the party resisting arbitration belongs unless [that party] has expressly agreed to arbitrate those claims." Second, Soler argued that even if the arbitration clause covered antitrust disputes, as a matter of law, antitrust disputes are unsuitable for arbitration.

*Id.* at 340 (quoting *Mitsubishi*, 473 U.S. at 625).

65. *Mitsubishi*, 473 U.S. at 628. The Court added, "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.*

66. *See Gilmer*, 500 U.S. at 26 (citing *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987)).

ity must be addressed with a healthy regard for the federal policy favoring arbitration."<sup>67</sup>

B. *The FAA and Contracts of Adhesion*

Perhaps the most significant legacy left by the *Mitsubishi* Court is the case's lingering effect on arbitration provisions found in consumer contracts of adhesion.<sup>68</sup> In *Gilmer v. Interstate/Johnson Lane Corporation*, the Supreme Court held that "a claim under the Age Discrimination in Employment Act of 1967 (ADEA)<sup>69</sup> . . . can be subjected to compulsory arbitration pursuant to an arbitration agreement contained in a securities registration application."<sup>70</sup> The *Gilmer* Court rejected the arguments that arbitration procedures in general are inadequate to resolve conflicts and that arbitration agreements should be invalidated because the contracting relationship involved unequal bargaining power.<sup>71</sup> Relying heavily on *Mitsubishi*, the Supreme Court stated, "So long as the prospective litigant effectively may vindicate [his or her] statutory causes of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."<sup>72</sup>

C. *Arbitration and the Apportionment of Arbitral Fees*

Consumer contentions that arbitration clauses are uncon-

---

67. *Id.* (quoting *Moses H. Cone*, 460 U.S. at 24).

68. See Brafford, *supra* note 6, at 342.

69. 29 U.S.C. §§ 621-634 (1994).

70. *Gilmer*, 500 U.S. at 23. Robert Gilmer was required by his employment with Interstate/Johnson Lane (IJL) Corporation to register as a securities representative with several stock exchanges, including the New York Stock Exchange (NYSE). See *id.* His registration application, entitled "Uniform Application for Securities Industry Registration or Transfer," required that Gilmer submit to arbitration any dispute, claim or controversy arising between him and his employer. See *id.* Gilmer, terminated in 1987 at the age of 62, brought suit in federal court alleging that IJL discharged him in violation of the Age Discrimination in Employment Act of 1967 (ADEA). See *id.* at 23-24.

71. See *id.* at 29-34.

72. *Id.* at 28 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637).

scionable because they impose an unreasonable financial burden, and therefore effectively deny consumers an affordable forum, have been made with increasing frequency in the past three years.<sup>73</sup> In *Paladino v. Avnet Computer Technologies*, the Eleventh Circuit conceded that "arbitration may bring hardships for litigants along with potential efficiency," but some "inherent weaknesses" in the procedural apparatus of an arbitration "should not make an arbitration clause unenforceable."<sup>74</sup> Nevertheless, the court held in *Paladino* that "[w]hen an arbitration clause has provisions that defeat the remedial purpose of the statute, . . . the arbitration clause is not enforceable."<sup>75</sup> The plaintiff in *Paladino* was fired by the defendant, Avnet, and filed a lawsuit after securing a right to sue letter from the Equal Employment Opportunity Commission.<sup>76</sup> When the plaintiff refused to arbitrate the claim, Avnet moved for a stay and to compel arbitration pursuant to the Title IX legislation.<sup>77</sup> The Eleventh Circuit court held that because the defendant may be liable for at least half of the hefty cost of arbitration and must, according to the American Arbitration Association rules that the clause adopts, pay steep filing fees,<sup>78</sup> such costs do not comport with the statutory policy of providing the plaintiff with a forum in which to vindicate his rights.<sup>79</sup> The court concluded that an arbitration agreement which "deprives an employee of any hope of meaningful relief, while imposing high costs on the employee . . . is not enforceable."<sup>80</sup>

The concerns expressed by the court in *Paladino* comport with recent decisions from two other federal circuits. In *Shankle*

---

73. See *Shankle v. B-G Maintenance Mgmt. of Colorado, Inc.*, 163 F.3d 1230 (10th Cir. 1999); *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998); *Cole v. Burns Int'l. Sec. Servs., Inc.*, 105 F.3d 1465 (D.C. Cir. 1997).

74. *Paladino*, 134 F.3d at 1062.

75. *Id.*

76. See *id.* at 1056.

77. See *id.* at 1060. The statutory authority Avnet cited in its motion was 9 U.S.C. §§ 3-4 (1994).

78. In this case, \$2000. See *Paladino*, 134 F.3d at 1062. See also *supra* note 46 for a discussion of the AAA's filing fee schedule.

79. See *Paladino* at 1062.

80. *Id.*

*v. B-G Maintenance Management of Colorado, Inc.*, the Tenth Circuit Court of Appeals concluded that a "fee-splitting" provision of an arbitration agreement substantially limited an employee's use of the arbitral forum and therefore rendered the arbitration agreement unenforceable.<sup>81</sup> In *Cole v. Burns International Security Services, Inc.*, the D.C. Circuit Court of Appeals required the employer to bear the sole costs of an arbitrator's fees where the arbitration was imposed by the employer, but declined to address whether an arbitrator's refusal to waive filing and other administrative fees could preclude enforcement of the arbitration agreement.<sup>82</sup>

#### D. Arbitration of Consumer Finance Agreements

In *Badie v. Bank of America*, the Appellate Department of the California Superior Court upheld Bank of America's arbitration clause, ruling that even though the contracts between the bank and its credit card customers were contracts of adhesion, the bank's modification to add an arbitration clause was not unconscionable because both the clause and its provisions were within the reasonable expectations of the customers.<sup>83</sup> The decision suggests that courts will be unwilling to strike down arbitration clauses in consumer finance transactions simply because they are contained in adhesion contracts.<sup>84</sup> The case also suggests that

---

81. 163 F.3d 1230, 1234-1235 (10th Cir. 1999). The court, citing to *Gilmer*, added:

[A]rbitration of statutory claims works because potential litigants have an adequate forum in which to resolve their statutory claims and because the broader social purposes behind the statute are adhered to. This supposition falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights. Accordingly, an arbitration agreement that prohibits the use of the judicial forum as a means for resolving statutory claims must also provide for an effective and accessible alternative forum.

*Id.* at 1234.

82. See *Cole v. Burns Int'l. Sec. Servs., Inc.*, 105 F.3d 1465, 1484-85 (D.C. Cir. 1997).

83. See *Badie v. Bank of Am.*, No. 944916, 1994 WL 660730, at \*1 (Cal. Super. Aug. 18, 1994).

84. See *Brafford*, *supra* note 6, at 347.

consumers "will have to allege more than the presence of an arbitration agreement in an adhesion contract to avoid dismissal."<sup>85</sup> Though *Badie* was considered a high-priority case in the financial services industry, it was ordered unpublished, leaving many lenders to speculate as to its weight.<sup>86</sup>

E. *Arbitrality and Class Certification of Claims Arising Under the TILA*

Congress passed the Truth in Lending Act (TILA)<sup>87</sup> in 1968 to promote uniformity in the disclosure of credit terms.<sup>88</sup> Only a handful of U.S. District Court cases have addressed the question of whether or not the TILA precludes arbitration of disputes arising under the legislation, and none has answered the question affirmatively.<sup>89</sup> The issue is likely to garner increased attention in the federal courts in the next several years.<sup>90</sup>

In *Sagal v. First USA Bank*, the U.S. District Court in Delaware refused to carve out an exception to the FAA that would

---

85. *Id.* at 348.

86. *See id.* In fact, the California Court of Appeal later held that because the Bank's procedure for implementing the arbitration provision did not result in an unambiguous and unequivocal waiver by cardholders of their constitutional right to a jury trial, the arbitration did not become part of the cardholder agreement and could not be enforced against the cardholders. *See Badie v. Bank of America*, 79 Cal. Rptr. 2d 273, 291 (1998).

87. 15 U.S.C. §§ 1601-1667e (1994 & Supp. I 1995).

88. The Act clearly states its purpose in § 1601:

The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of [Truth in Lending] to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

*Id.*

89. *See Thompson v. Ill. Title Loans, Inc.*, No. 99-C-3952, 2000 WL 45493, at \*1 (N.D. Ill. Jan. 11, 2000); *Sagal v. First USA Bank, N.A.*, 69 F.Supp.2d 627, 632 (D. Del. 1999); *Lopez v. Plaza Finance Co.*, No. 95-C-7567, 1996 WL 210073, at \*1 (N.D. Ill. Apr. 25, 1996).

90. *See Telephone Interview: McLaney, supra note 50.*



preclude TILA claims from the arbitral forum.<sup>91</sup> The court relied on *Moses H. Cone and McMahon* in finding that, "in light of the liberal federal policy favoring arbitration agreements," the burden was on the plaintiff to show that Congress intended to make an exception to the FAA by "preclud[ing] a waiver of judicial remedies" arising out of the TILA.<sup>92</sup> The plaintiff in *Sagal* failed to reach this burden.<sup>93</sup>

The plaintiff in *Sagal* also failed to demonstrate an inherent right to class action certification as a way to enforce the TILA, though the court conceded the usefulness of class actions in that regard.<sup>94</sup> The court could not find a "congressional command" to preserve class action suits at the expense of the FAA.<sup>95</sup> The court relied in part on *Lopez v. Plaza Finance Co.*, where the U.S. District Court held that the TILA does not establish a statutory right to certify a class.<sup>96</sup> The court in *Lopez* relied on *Champ v. Siegel Trading Co.*, which held that "[w]here an enforceable arbitration clause allows only for individual arbitration, a class will not be certified."<sup>97</sup>

---

91. See *Sagal* at 632.

92. *Id.* at 631 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) and *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226-227 (1987)).

93. See *id.* at 632.

94. See *id.*

95. *Id.* The court held that although 15 U.S.C. § 1640(a) (1994) expressly provides for a recovery cap of \$500,000 on TILA class action claims, nothing in either the statutory language or the legislative history provided for a statutory right to bring class actions. See *id.*

96. See *Lopez*, 1996 WL 210073, at \*3.

97. *Id.* (citing *Champ v. Siegel Trading Co.*, 55 F.3d 269, 276-277 (7th Cir. 1995). See also *Sanders v. Robinson Humphrey/American Express, Inc.*, 634 F.Supp. 1048 (N.D. Ga. 1986), *aff'd*, *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 725 n.5 (11th Cir. 1987) (holding that the right to arbitration is contractual and therefore substantive, and thus can not be overridden by class action certification). It should be noted, however, that *Champ* involved a suit arising under the Commodity Exchange Act and RICO, not the TILA. See *Champ*, 55 F.3d at 271.

## IV. ANALYSIS

A. *How Deadly is Silence? Prospective v. Retrospective "Minimum Guarantees" Test*

*Randolph* stands for the proposition that arbitration agreements in consumer finance transactions that are silent as to the apportionment of arbitral fees and costs are unenforceable.<sup>98</sup> The test for enforceability established by the court is whether or not the arbitration agreement presents such high barriers to the alternative forum so as to deny the plaintiff the opportunity to vindicate her statutory rights.<sup>99</sup> It was Green Tree's silence as to the apportionment of arbitral fees and costs that created such a barrier in *Randolph*; the mere specter that such expenses would be prohibitive, even in the absence of a clear record establishing such expenses, was enough to spook the Eleventh Circuit into striking down the validity of the arbitration agreement.<sup>100</sup> Thus the court has articulated a prospective "minimum guarantees" test for the enforceability of an arbitration clause in consumer finance agreements, where the mere possibility that a consumer may be required to pay steep arbitration fees and costs, and therefore may be deterred from vindicating her statutory rights in the arbitral form, is sufficient to invalidate the clause.<sup>101</sup>

The First, Second and Seventh Circuits, however, have rejected this prospective "minimum guarantees" test in favor of a retrospective one: a challenge to arbitrator fees should not be made unless such expenses have actually been imposed on a claimant.<sup>102</sup> The mere fact that a consumer faces the possibility of being charged arbitration fees, including sharing the arbitrator's

---

98. See *Randolph*, 178 F.3d at 1158.

99. See *id.*

100. See *id.*

101. The phrase "prospective 'minimum guarantees' test" has been created by the author as a shorthand way of referring to the test established by *Randolph*.

102. See *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 15-16 (1st Cir. 1999); *Arakawa v. Japan Network Group*, 56 F.Supp.2d 349, 354 (S.D.N.Y. 1999); *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 366 (7th Cir. 1999). Each case deals with arbitration clauses in the employment contract context.

compensation if directed to do so by the arbitrator, does not make the agreement to arbitrate unenforceable as a matter of law.<sup>103</sup> Fee-splitting arrangements are only contrary to a plaintiff's ability to vindicate her statutory rights if the fees are so great, and the plaintiff's financial situation so dire, that the imposition of fees would make the plaintiff unable to, or would substantially deter plaintiff from seeking to, enforce her rights.<sup>104</sup> Because the arbitral panel may not require the plaintiff to pay fees, and because judicial review is available to the plaintiff after arbitration if she believes excessive fees have been levied against her, the mere possibility that the consumer will have to pay these fees is not sufficient to invalidate an arbitration clause.<sup>105</sup>

### B. *Silence Can Be Golden*

In *Harris v. Green Tree Financial Corporation*, decided and filed only nine days after the Eleventh Circuit's decision in *Randolph*, the Third Circuit Court of Appeals upheld an arbitration agreement, appearing in a consumer loan transaction virtually identical to the one in *Randolph*, that was also silent as the apportionment of arbitral fees.<sup>106</sup> The plaintiffs in *Harris*<sup>107</sup> brought suit against Green Tree and others under the Racketeer Influenced and Corrupt Organizations Act ("RICO"),<sup>108</sup> alleging they were the victims of a fraudulent home improvement scheme.<sup>109</sup> Like the *Randolphs*, the *Harris*es sought certification of a class of all others similarly situated.<sup>110</sup>

Utilizing a conventional mutuality and unconscionability analysis under contract law, the Third Circuit held that the arbi-

---

103. See *Arakawa*, 56 F.Supp.2d at 354.

104. See *id.* at 355.

105. See *Lagatree v. Luce*, 74 Cal.App.4th 1105, 1135 (1999).

106. See *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 184 (3d Cir. 1999). For the complete text of the arbitration provision, see 183 F.3d at 177-178.

107. Charles Harris, Christine Harris, Willie Davis, and Nora Wilson (collectively, the "Harris"es"). See *id.* at 176.

108. 18 U.S.C. §§ 1961-1968 (1994).

109. See *Harris*, 183 F.3d at 176.

110. See *id.* at 173.

tration clause was not “so unreasonably favorable to Green Tree as to make the clause . . . unconscionable.”<sup>111</sup> The court held that: (1) mutuality is not a requirement of a valid arbitration clause as long as the requirement of consideration is met;<sup>112</sup> (2) the clause was not procedurally unconscionable even though it appeared on the back of the relevant standard form contract;<sup>113</sup> and (3) the clause was not substantively unconscionable even though it allowed Green Tree, but not the plaintiffs, the right to litigate disputes, and even though Green Tree did not have to obtain the consent of the plaintiffs in selecting the arbitrator.<sup>114</sup>

Given the similarities in *Randolph* and *Harris* -- the common corporate defendant, the substantial similarity between the arbitration clauses in question, the negligible passage of time between which the decisions were filed -- the sharp differences between the two holdings are particularly shocking, at least at first blush. There are, however, at least four potential explanations for the contradictory outcomes in *Randolph* and *Harris*:

1. *Harris* was argued over eight months before *Randolph* was decided, and therefore the plaintiffs in *Harris* were unable to utilize the *Randolph* holding as persuasive authority;<sup>115</sup>
2. The plaintiffs in *Harris* never argued that arbitral expenses chilled their ability to pursue their statutory rights;<sup>116</sup>
3. Instead, the Harrisses relied exclusively on traditional mutuality and unconscionability

---

111. *Id.* at 184.

112. *See id.* at 180-181.

113. *See id.* at 182-183.

114. *See id.* at 183-184.

115. *Randolph* was decided and filed on June 22, 1999. *Harris* was argued on September 17, 1998. Filed nine days after *Randolph* on July 1, 1999, *Harris* makes no reference to the Eleventh Circuit's decision in *Randolph*.

116. Electronic correspondence from Alan S. Kaplinsky, Counsel for Green Tree Financial Corp. in *Harris* (Jan. 24, 2000) (on file with the author).

arguments, which were predictably unpersuasive;<sup>117</sup>

4. The plaintiff in *Randolph*, unlike those in *Harris*, could benefit from the *Paladino* holding, binding precedent in the Eleventh Circuit that arguably made it easier for the Randolphs to persuade the court that the specter of steep fees and costs prevented them from vindicating their statutory rights.

In light of these considerations, is it possible to envision a different outcome in *Harris* had the plaintiff been able to argue *Randolph*? The answer, of course, would turn on the Third Circuit's acceptance or rejection of the prospective "minimum guarantees" test embraced by the Eleventh Circuit, but rejected by three other circuits. Assuming, *arguendo*, that the Third District were to adopt the Eleventh Circuit's prospective test, it is possible that Green Tree's arbitration clause, substantially similar to the provision at issue in *Randolph*, would be subject to a successful attack, and silence would not be so "golden" after all.

C. *Beyond Consumers -- Should Lenders Be Worried About Commercial Contracts?*

Does the holding in *Randolph* apply beyond the consumer and employment contracts context? The decision itself suggests "no," explicitly distinguishing its holding from earlier cases involving commercial entities.<sup>118</sup> In making this determination the

---

117. For example, the Third Circuit stated in *Harris* that, "[o]ur finding . . . that mutuality is not a requirement of a requirement of a valid arbitration clause is consistent with that of most other federal courts that have considered this issue," and proceeded to cite precedents from several of the Circuits. *Harris*, 183 F.3d at 180. The superior tactic, implied by *Randolph*, is not to attack the arbitration clause on the general grounds of unconscionability, but rather on the grounds that the clause prevents the plaintiff from vindicating specific statutory rights. See *Randolph*, 178 F.3d at 1159.

118. See *Randolph*, 178 F.3d at 1158-1159.

court cited two Second Circuit decisions, *Doctor's Associates, Inc. v. Stuart* and *Doctor's Associates, Inc. v. Hamilton*, which both upheld the validity of arbitration clauses in franchisee agreements.<sup>119</sup> Both *Doctor's Associates* cases involved Subway sandwich shop franchisees who opposed the franchisor's arbitration agreement on the grounds of excessive arbitral expenses.<sup>120</sup> In *Stuart*, the Second Circuit held that the defendants were on notice that they were "liable for their own costs in the arbitration proceeding" and that they could have inquired about the typical fees charged by the American Arbitration Association prior to signing the franchisee agreement.<sup>121</sup> The court in *Hamilton* relied on *Stuart* in ruling that the arbitration agreement was enforceable even where plaintiff's estimated total costs of arbitration were between \$28,000 and \$32,000.<sup>122</sup> Underlying these decisions is the assumption that commercial entities have relatively equal bargaining power and can effectively negotiate with each other before obligating themselves to resolve disputes in the arbitral forum.<sup>123</sup> Such freedom of contract obviates the need to extend judicial protections enjoyed by consumers and employees to commercial entities.

## V. CONCLUSION

How is *Randolph* likely to affect the use of mandatory, binding arbitration in the consumer finance agreement context? The answer may depend on whether lenders consider the arbitral glass half-empty or half-full. Pessimists might interpret the Eleventh Circuit's ruling as a powerful new arrow in the quiver of consumers intent on evading arbitration and may question the

---

119. See *Doctor's Assoc., Inc. v. Hamilton*, 150 F.3d 157 (2nd Cir. 1998); *Doctor's Assoc., Inc. v. Stuart*, 85 F.3d 975 (2nd Cir. 1996);

120. See *Hamilton*, 150 F.3d at 163; *Stuart*, 85 F.3d at 980.

121. *Stuart*, 85 F.3d at 981. The court so held despite receiving evidence that the AAA charges as much as \$5,000 for filing and administration fees in Connecticut. See *id.* at 980.

122. See *Hamilton*, 150 F.3d at 163-164.

123. See EDWARD BRUNET & CHARLES B. CRAVER, ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE 333 (1997).

wisdom of including arbitration clauses that seem to spawn as much litigation as they seek to avoid. Optimists, however, recognize the limited nature of the *Randolph* holding, particularly on such specific facts: not only was Green Tree's arbitration clause silent as to the apportionment of fees, it also failed to direct the court to a set of rules that may have cured the agreement's silence. In light of the unwillingness of other courts to adopt the Eleventh Circuit's prospective "minimum guarantees" test, the *Randolph* holding may be interpreted as no more than a red flag to lenders, alerting them to the importance of careful arbitration clause drafting that is mindful of consumers' ability to pay arbitral expenses. In other words, though silence can be deadly, it can also be cured.

Thus, *Randolph* provides lenders, and the legal practitioners who represent them, with a fresh incentive to review the arbitration clauses they are using (or considering using) in consumer finance agreements. Practitioners should present their clients with a menu of arbitration clause options, pointing out the advantages and disadvantages of each.

#### A. *Maintain Silence as to the Apportionment of Fees and Costs*

In light of *Harris*, and coupled with the unwillingness of several courts to adopt the prospective "minimum guarantees" test adopted by the Eleventh Circuit, it may be tempting to interpret *Randolph* as an anomaly that presents no long-term threat to the viability of arbitration provisions that are silent as to the apportionment of arbitral expenses. Indeed, a growing body of case law demonstrates that several courts are unsympathetic toward consumers who allege an inability to pay arbitration costs.<sup>124</sup>

---

124. These decisions do not necessarily pertain to arbitration clauses that are silent as to the apportionment of fees, however. See *First Family Fin. Servs. Inc. v. Rogers*, 736 So.2d 553, 559-560 (Ala. 1999) (holding that the plaintiff, confronted with an arbitration provision that did apportion arbitral expenses, presented insufficient evidence of financial hardship to render an arbitration clause unenforceable); *Universal Underwriters Life Ins. Co. v. Dutton*, 736 So.2d 564, 569-570 (Ala. 1999) (holding that, with respect to an arbitration clause that referenced the commercial rules of the American Arbitration Association as controlling, the trial court erred in

This strategy, however, fails to appreciate that the fundamental purpose of an arbitration is to avoid litigation entirely. As long as arbitration clauses remain silent as to the apportionment of arbitral expenses, consumers will rely on *Randolph* at least long enough to litigate the arbitration clause enforceability issue, thus defeating the purpose for including such clauses in finance agreements in the first place.

*B. Make Arbitration Either Voluntary or Non-binding*

One way to ensure that arbitration does not prevent a consumer from vindicating statutory rights in an affordable forum is to make arbitration a voluntary, as opposed to a mandatory, process. By way of example, the National Association of Securities Dealers gives its employees a choice to have their civil rights claims heard either in the judicial or the arbitral forum.<sup>125</sup> Voluntary arbitration programs, however, can suffer from underutilization, which may affect their ability to be a cost-effective alternative to litigation.<sup>126</sup>

Lenders may also consider making arbitration non-binding, permitting consumers to seek a judicial remedy when dissatisfied with the arbitral one.<sup>127</sup> The argument is that if the

---

shifting the burden of paying the arbitration filing fee from the consumer to the defendant auto dealer); *Wirdzek v. Monetary Mgmt. of Cal., Inc.*, No. CV-F-99-5415-REC-LJO, 1999 U.S. Dist. LEXIS 8455 (E.D. Cal. May 25, 1999). In *Wirdzek*, the U.S. District Court for the Eastern District of California found no unconscionability in an arbitration clause, silent as to the apportionment of fees, which may have resulted in the plaintiff's administrative costs exceeding the worth of the claim -- approximately \$500.00. See *Wirdzek* at \*6. *Wirdzek* is distinguishable from *Randolph*, however, in that the underlying cause of action was a state contractual claim, governed by Pennsylvania substantive law. See *id.* at \*2-3. Thus, unlike *Randolph*, no conflict existed between the federal policies favoring arbitration and providing plaintiffs with an affordable forum in which to vindicate their statutory rights.

125. See *Lubin*, *supra* note 55, at 1039. Alan Kaplinsky, an attorney with Ballard Spahr Andrews & Ingersoll LLP in Philadelphia, PA argues, "I believe very strongly is should not be mandatory; it should be elective. You should give either the consumer or the company the right to elect arbitration." *Bruce*, *supra* note 7, at 303.

126. See *Brafford*, *supra* note 6, at 360. See also *Schaefer v. Allstate Ins. Co.*, 590 N.E.2d 1242, 1246 (Ohio 1992) (holding that non-binding arbitration is an oxymoron, and a contract providing for such arbitration is unenforceable).

127. For a detailed treatment, see Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10



arbitrator's decision were not final, the arbitration procedure would seem more legitimate to the average consumer, who would likely not have the stamina to pursue a judicial remedy even if dissatisfied with the arbitral decision.<sup>128</sup> Financial institutions ultimately may not be attracted to the lack of finality inherent in non-binding arbitration, especially since such a proposal would leave them exposed to class action claims, punitive damages, or both.<sup>129</sup>

C. *Utilize Increased Care in the Drafting of Arbitration Provisions.*

Green Tree may have avoided a finding that its arbitration clause was unenforceable in *Randolph* if it had taken more care in the drafting of the clause.<sup>130</sup> Careful drafting, mindful of the costs consumers may incur in the arbitral forum, would include either an express provision apportioning costs, or an explicit reference that the American Arbitration Association's (or some other national arbitration organization's) rules control, or both.<sup>131</sup> Consider the following model:

---

OHIO ST. J. ON DISP. RESOL. 267, 340 (1995).

128. *See id.*

129. *See id.*

130. The language employed by the Eleventh Circuit in the *Randolph dictum* suggests as much:

The arbitration clause in this case raises serious concerns with respect to filing fees, arbitrators' costs and other arbitration expenses that may curtail or bar a plaintiff's access to the arbitral form, and thus falls within our holding in *Paladino*. This clause says nothing about the payment of filing fees or the apportionment of the costs of arbitration. It neither assigns an initial responsibility for filing fees or arbitrators' costs, nor provides for a waiver in cases of financial hardship. It does not say whether consumers, if they prevail, will nonetheless be saddled with fees and costs in excess of any award. It does not say whether the rules of the American Arbitration Association, which provide at least some guidelines concerning filing fees and arbitration costs, apply to the proceedings, whether some other set of rules applies, or whether the parties must negotiate their own set of rules.

*Randolph*, 178 F.3d at 1158.

131. *See* Alan S. Kaplinsky and Mark J. Levin, *Anatomy of an Arbitration Clause: Drafting and Implementation Issues Which Should Be Considered By a Consumer Lender* (visited Oct. 15, 1999) <<http://www.abanet.org/buslaw/mo/pr...-cl/programs/ann99/arbitration.asp>>.

**COSTS OF ARBITRATION:** If you start arbitration, you agree to pay the initial filing fee required by the American Arbitration Association up to a maximum of \$125. We agree to pay for the filing fee and any deposit required by the American Arbitration Association in excess of \$125. After the American Arbitration Association receives a Demand For Arbitration, it will bill us for the excess. We also agree to pay the costs of the arbitration proceeding up to a maximum of one day (eight hours) of hearings. If we start arbitration, we will pay the filing fee, required deposit, and costs of one day of hearings. There may be other costs during the arbitration, such as attorney's fees, expenses of travel to the arbitration, and the costs of the arbitration proceeding that go beyond one day of hearings. The Commercial Arbitration Rules determine who will pay those fees.<sup>132</sup>

The model clause addresses several of the shortcomings of the Green Tree arbitration clause in *Randolph*: (1) obviously, it is not silent as to the payment of arbitral expenses; (2) it assigns initial responsibility for filing fees; (3) it provides for one day of hearings at the expense of the lender (alternatively, consider including a waiver in cases of financial hardship, a determination to be made by the arbitrator); (4) and it references the American Arbitration Association's rules as controlling.<sup>133</sup> Though it is un-

---

132. *First Family Fin. Servs., Inc. v. Rogers*, 736 So.2d 553, 556 (Ala. 1999). The "Commercial Arbitration Rules" mentioned in the clause refer to the American Arbitration Association's rules governing commercial disputes, *supra* note 46. Most importantly, R-51 of the Commercial Arbitration Rules provides that the AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees. Additionally, R-52 provides that all other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties. *See supra* note 46.

133. One of these rules allows the AAA to reduce or defer the fee in the event of extreme economic hardship. *See Budnitz, supra* note 127, at 280 n.111. According

clear whether such language would have saved the arbitration clause in *Randolph*, it would have certainly made it more difficult for the plaintiff to allege that the arbitral forum presented such obstacles as to deter her from vindicating her statutory rights.

*Randolph v. Green Tree Financial Corp.* is not the death-knell for mandatory binding arbitration of consumer finance agreements. The case should serve, however, to alert lenders and others in the financial services industry to one court's willingness to extend protections to consumers that may not apply to commercial interests. As such, consumer lenders and the practitioners who represent them should review the arbitration clauses they currently use in order to reduce the likelihood that unfortunate drafting shortcomings will result in protracted litigation of clause enforceability.

MATTHEW C. BOUCHARD

---

to Budnitz, setting out the provision on fees in the finance agreement, rather than silently incorporating the AAA rules in the arbitration clause, has three advantages: (1) it eliminates the issue from being subject to changes in AAA rules; (2) it eliminates the issue of which AAA rules apply – rules in force at the time of execution, or rules in force at the time of dispute; and (3) it alerts the consumers to the fee issue, which otherwise may not occur to them, therefore providing adequate protection against “failure-to-disclose” allegations. *See id.*