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Only the Rich Can Afford a Remedy: The Unconscionable Enforcement of Arbitration Provisions against the Indigent

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Overstreet v. Contigroup Cos., Inc.[1]

I. INTRODUCTION

In *Overstreet v. Contigroup Cos., Inc.*,[2] the Fifth Circuit Court of Appeals held that neither economic disadvantage nor undisclosed arbitration fees may form the basis for striking down an arbitration provision on the grounds of unconscionability.[3] While the Supreme Court and the Federal Arbitration Act (FAA) expressly authorize the use of the doctrine of unconscionability to invalidate arbitration provisions, courts are sharply divided on its proper application.[4] The difficult juxtaposition of the Supreme Court's interpretation of the FAA as a "liberal federal policy favoring arbitration" and the traditional application of unconscionability as a means of policing unfair contracts has produced a significant amount of disagreement and confusion among the states.[5] This Note addresses the Fifth Circuit's application of the doctrine of unconscionability under Georgia law and argues that the court not only misapplied Georgia law but rendered a holding that both disregards the foundational public policy behind the doctrine of unconscionability and does violence to the fundamental right to due process of law.

II. FACTS & HOLDING

For twenty-seven years, Appellee Gertrude Overstreet ("Overstreet") owned and operated a chicken farm in Mississippi.[6] In 1976 she entered into a contractual relationship with Appellants Contigroup Companies, Inc. and Wayne Farms, LLC ("Contigroup").[7] The agreement provided that Contigroup would supply Overstreet with baby chickens, feed, and medication.[8] In exchange, Overstreet would raise, care for, and deliver mature chickens to Contigroup in accordance with a strict set of guidelines.[9] Throughout their relationship, Overstreet and Con-

1. 462 F.3d 409 (5th Cir. 2006).
2. *Id.*
3. *Id.* at 413.
4. *See* 9 U.S.C. §§ 2-4 (2000); Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687 (1996). *Compare* Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669 (Cal. 2000), *with* Results Oriented, Inc. v. Crawford, 538 S.E.2d 73 (Ga. Ct. App. 2000), *aff'd*, 548 S.E.2d 342 (Ga. 2001).
5. *See generally* Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004).
6. *Overstreet*, 462 F.3d at 410.
7. *Id.*
8. *Id.*
9. *Id.*

tigroup entered into and performed numerous contracts, the most recent of which was executed on February 14, 2001 ("the Contract").[10] The Contract contained an arbitration clause ("the Clause") which required any dispute between the parties, whether related to the Contract or otherwise, to be settled by arbitration.[11] The Clause required the parties to share equally in the cost of procuring a three arbiter panel.[12] In addition, the Clause barred both parties from recovering exemplary, punitive, or consequential damages.[13]

On April 13, 2001, two months after executing the Contract, Overstreet sold her farm and sent a letter to Contigroup informing them that she would no longer be raising chickens.[14] Three years later, Overstreet filed suit against Contrigroup in Mississippi state court.[15] In her complaint, Oversteet alleged, among other things, that Contigroup fraudulently or negligently induced her assent to the Contract and that Contrigroup wrongfully terminated the Contract.[16] Overstreet asserted, "Some time after Mrs. Overstreet and [Contigroup] signed the Contract, [Contigroup] terminated their relationship."[17] Contigroup argued that the Contract had been fully performed by Overstreet when she delivered her final flock of chickens on April 12, 2001 or, in the alternative, the letter submitted by Overstreet on April 13, 2001 constituted an anticipatory repudiation of the contract.[18] Contigroup removed the action to the District Court for the Southern District of Mississippi and filed a motion to stay the proceedings and a motion to compel arbitration.[19] Overstreet, arguing against these motions, claimed that the waiver of exemplary, punitive, and consequential damages rendered the arbitration clause unconscionable.[20]

The district court held that the arbitration provision was unconscionable as applied to Overstreet because Overstreet had become desperately poor.[21] The court determined that because the Clause required the parties to split the cost of the procedure equally, enforcement of the Clause would cost Overstreet between $27,500 and $29,000.[22] The court held that, because of her financial situation, Overstreet's portion of the arbitration costs coupled with the waiver of all exemplary, punitive, and consequential damages rendered the Clause substantively unconscionable.[23]

The Fifth Circuit for the United States Court of Appeals reversed and remanded, holding that, under Georgia law, unconscionability analysis is confined to the circumstances surrounding the formation of the contract, and therefore, a

10. *Id.*
11. *Id.*
12. *Id.* at 411.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*; Brief of Respondent-Appellee at 6, Overstreet v. Contigroup Cos. Inc., 462 F.3d 409 (5th Cir. 2006) (No. 05-60953).
18. *See* Reply Brief of Petitioner-Appellant at 5-6, Overstreet v. Contigroup Cos. Inc., 462 F.3d 409 (5th Cir. 2006) (No. 05-60953).
19. *Overstreet*, 462 F.3d at 411.
20. *Id.* at 412 n.2.
21. *Id.* at 412.
22. *Id.*
23. *Id.* at 412 & n.2.

claimant's financial condition at the time litigation has commenced may not form the basis for a finding of unconscionability.[24]

III. LEGAL BACKGROUND

Parties choose to resolve their disputes through arbitration for a variety of reasons. For example, parties typically expect that arbitration will be less expensive and result in a faster adjudication of the dispute than traditional litigation.[25] The decision to resolve a future dispute through arbitration is manifested in a contractual relationship between the parties wishing to utilize an arbitration system.[26] Congress and the courts, through the enactment and interpretation of the FAA, have taken special care to protect the expectation interests of parties who assent to a binding arbitration provision by adhering to a "liberal federal policy favoring arbitration."[27] Congress enacted the FAA to address, among other things, ubiquitous judicial hostility toward arbitration.[28] The United States Supreme Court stated in *Allied-Bruce Terminix Cos., Inc. v. Dobson*[29] that the FAA was meant to place arbitration agreements "upon the same footing as other contracts."[30] 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."[31]

A. The Traditional Doctrine of Unconscionability

Over the past century, courts have become increasingly willing to strike down arbitration provisions by using the equitable doctrine of unconscionability.[32] The doctrine of unconscionability is a defense to the enforcement of a contract that existed in English Common Law before the founding of the United States.[33] The traditional description of an unconscionable agreement is found in *Hume v. U.S.*[34] In *Hume*, the U.S. Supreme Court described an unconscionable agreement as,

24. *Id.* at 412-13 (The court noted, with emphasis, that Georgia courts have shown clear disfavor for claims of unconscionability based on arbitration costs and economic disadvantage).

25. Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 432 (1988) (setting out different expectations of arbitration in the United States).

26. *See generally* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002).

27. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983); 9 U.S.C. § 4 (2000).

28. Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How The California Courts Are Circumventing The Federal Arbitration Act*, 3 Hastings Bus. L.J. 39, 41 (citing H.R. REP. NO. 68-96, at 2 (1924)); *See also* Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. Disp. Resol. 61, 63 (2005); *See also* EEOC v. Waffle House, Inc., 534 U.S. 279 (2002).

29. 513 U.S. 265 (1995).

30. *Id.* at 270-71. *See also* Broome, *supra* note 28, at 41 (citing H.R. Rep. No. 68-96, at 1 (1924)).

31. 9 U.S.C. § 2 (2000).

32. Broome, *supra* note 28, at 41. *See also* Mullis v. Speight Seed Farms, Inc., 505 S.E.2d 818 (Ga. Ct. App. 1998).

33. Chesterfield v. Janssen, (1750) 28 Eng. Rep. 82, 100 (Ch.).

34. 132 U.S. 406 (1889).

"such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."[35]

The doctrine of unconscionability has been expressly adopted by the Uniform Commercial Code (UCC) and by the State of Georgia as an appropriate means for the revocation or limitation of a contractual provision.[36] Traditional unconscionability analysis requires a finding of both procedural unconscionability, which "addresses the process of making of the contract,"[37] and substantive unconscionability, which is the extent to which "an unfair or unreasonably harsh contractual term benefits the drafting party at the other party's expense."[38] Occasionally courts have revoked a contract provision on the grounds that it was unconscionable solely for substantive reasons.[39] When conducting an unconscionability analysis, courts are restricted to examining the circumstances surrounding the formation of the contract.[40]

B. Liberal Use of Unconscionability in Arbitration Enforcement

The application of the doctrine of unconscionability to arbitration provisions has differed dramatically among jurisdictions.[41] A series of United States Supreme Court cases, beginning with *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*,[42] have reinvigorated and reasserted the "liberal federal policy favoring arbitration."[43] For example, in 1984 the U.S. Supreme Court extended the reach of the FAA and sent a clear message that agreements to arbitrate were to be respected by the States when it held, in *Southland Corp. v. Keating*,[44] that the FAA applies in state court.[45]

Many jurisdictions, including Georgia, have taken notice of the U.S. Supreme Court's strong pro-arbitration policy choice and have become reluctant to invalidate arbitration agreements on unconscionability grounds as well as other traditional grounds for contract revocation. California, however, has created what appears to be a parallel body of unconscionability jurisprudence to address the

35. 8 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 18.1 (4th ed. 1998) (quoting *Hume*. 132 U.S. at 415).

36. U.C.C. § 2-302(1) (2006); GA. CODE ANN. § 11-2-302(1) (2007).

37. 7 ARTHUR L. CORBIN & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 29.1, at 378 (rev. ed. 2002).

38. 8 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 18.10 (4th ed. 1998).

39. Gutierrez v. Autowest Inc., 7 Cal. Rptr. 3d 267, 276-79 (Cal. Ct. App. 2003); Maxwell v. Fidelity Fin. Servs., Inc., 907 P.2d 51, 89 (Ariz. 1995).

40. U.C.C. § 2-302 official cmt. 1 (2004); Results Oriented, Inc. v. Crawford, 538 S.E.2d 73, 79 (Ga. Ct. App. 2000).

41. *Compare Gutierrez*, 7 Cal. Rptr. 3d at 274-86 (striking down an arbitration provision upon showing by opponent that it lacked the financial means to initiate arbitration because the provision failed to provide a procedure for administration fee mitigation), *and* Mullis v. Speight Seed Farms, 505 S.E.2d 818, 821-22 (Ga. Ct. App. 1998) (striking down an arbitration provision which, if enforced, would have rendered opponent without a remedy), *with Results Oriented, Inc.*, 538 S.E.2d at 441 (rejecting a challenge of unconscionability based on "economic disadvantage" of attacking party).

42. 460 U.S. 1 (1983).

43. *Id.* at 24-25.

44. 465 U.S. 1 (1984).

45. *Id.* at 10.

doctrine of unconscionability as it is applied to arbitration provisions.[46] California Courts continue to painstakingly address and distinguish U.S. Supreme Court decisions without reversal.[47] As a result, California has become a battleground in which hundreds of lawsuits have challenged arbitration provisions on the grounds that they are unconscionable.[48]

While hundreds of California cases expand and justify the use of unconscionability to strike down arbitration provisions, two cases are particularly illustrative. In *Armendariz v. Foundation Health Psychcare Services, Inc.*,[49] the California Supreme Court clearly expressed its willingness to use the doctrine of unconscionability to strike down arbitration provisions.[50] In *Armendariz*, the court struck down a mandatory arbitration provision contained in an employment contract.[51] First, the court indicated that the employment contract was clearly adhesive, thus procedurally unconscionable.[52] Next, the court reasoned that the arbitration provision was substantively unconscionable because the provision, which allowed the employer the option to arbitrate any dispute against an employee but required an employee to arbitrate any dispute against the employer, lacked a "modicum of bilaterality" with no corresponding "business reality."[53] The court continued by holding that any arbitration agreement which affected public rights must meet several minimum requirements to be enforceable.[54] These minimum requirements included, among other things, that the arbitration provision contain no limitation of available remedies.[55]

Three years later, the California Court of Appeals for the First District, in *Gutierrez v. Autowest Inc.*,[56] applied *Armendariz* to invalidate an arbitration provision contained in an automobile lease.[57] In *Gutierrez*, the plaintiffs successfully argued that an arbitration provision which required them to pay a portion of the initial arbitration administration fees was unconscionable because the mandatory fees exceeded their ability to pay.[58] Under California law, an unconscionability analysis may only consider the circumstances in existence at the time of contract formation.[59] After taking notice of this rule, the *Gutierrez* court struck down the arbitration provision reasoning that the imposition of a substantial arbitration fee without a corresponding procedure for waiver or reduction was substantively unconscionable.[60]

46. Broome, *supra* note 28, at 44-50.
47. *See generally* Gutierrez v. Autowest Inc., 7 Cal. Rptr. 3d 267, 273-279 (Cal. Ct. App. 2003).
48. Broome, *supra* note 28, at 44.
49. 6 P.3d 669 (Cal. 2000).
50. *Id.* at 690-94.
51. *Id.* at 692-94.
52. *Id.* at 690.
53. *Id.* at 690-92.
54. *Id.* at 674.
55. *Id.* at 674, 682-83.
56. 7 Cal. Rptr. 3d 267 (Cal. Ct. App. 2003).
57. *Id.* at 271-86.
58. *Id.* at 277.
59. *Id.* at 278.
60. *Id.* at 278-79.

C. Unconscionability Under Georgia Law

The Georgia Court of Appeals has defined an unconscionable contract as "abhorrent to good morals and conscience.[61] It is an agreement that no sane person not acting under a delusion would make and that no honest person would take advantage of."[62] It is well established under Georgia law that unconscionability is analyzed by looking to "the circumstances existing at the time the contract was made, rather than those existing . . . later."[63]

Georgia courts have only recently begun to erect guideposts for determining whether a provision is unconscionable.[64] In 1996, the Georgia Supreme Court adopted the traditional procedural-substantive analysis of unconscionability.[65] In so doing, the court cited with approval authority from three jurisdictions, including California.[66] In describing the factors that give rise to substantive unconscionability, the court "focused on matters such as the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and similar public policy concerns."[67]

Since 1996, the doctrine of unconscionability, as applied to arbitration provisions, has been shaped and influenced primarily by the Georgia Commercial Code in cases involving disputes arising under a contract for the sale of goods. The Georgia Commercial Code expressly provides for the use of unconscionability when analyzing the terms of a contract.[68] In 1998, the Georgia Court of Appeals, in *Mullis v. Speight Seed Farms, Inc.*,[69] struck down a contract provision on the grounds that it was unconscionable because it left the opponent without a remedy.[70] The Georgia Supreme Court denied certiorari.[71] In *Mullis*, a tobacco farmer initiated litigation seeking damages for allegedly defective tobacco seeds when tobacco seeds he had purchased failed to germinate.[72] The defendant seed company moved for summary judgment claiming damages should be limited to the purchase price of the seeds pursuant to the sales contract.[73] The limitation of liability provision stated that the defendant's liability "for breach of any warranty with respect to such seeds shall be limited to the purchase price."[74] The Georgia Court of Appeals held that the limitation of remedy was unconscionable because it left the claimant without a remedy.[75] In so holding, the court relied on the Georgia Commercial Code,[76] and distinguished *NEC Technologies v. Nelson*,[77] which held

61. Results Oriented, Inc. v. Crawford, 538 S.E.2d 73, 80 (Ga. Ct. App. 1999) (quoting F.N. Roberts Pest Control Co. v. McDonald, 208 S.E.2d 13, 16 (Ga. Ct. App. 1974)).
62. *Id.* (quoting W.J. Cooney, P.C. v. Rowland, 524 S.E.2d 730, 732 (Ga. Ct. App. 1999)).
63. *Id.* at 79; W.J. Cooney, P.C., 524 S.E.2d at 733.
64. NEC Techs. v. Nelson, 478 S.E.2d 769, 771 (Ga. 1996).
65. *Id.* at 772.
66. *Id.* at 771-72.
67. *Id.* at 772.
68. GA. CODE ANN. § 11-2-302(1) (2006).
69. 505 S.E.2d 818 (Ga. Ct. App. 1998).
70. *Id.* at 822.
71. *Id., cert. denied*, 1999 Ga. LEXIS 37 (Ga. 1999) (No. A98A1023).
72. *Id.* at 818.
73. *Id.* at 819.
74. *Id.*
75. *Id.* at 821-22.
76. *See* GA. CODE ANN. §§ 11-2-302(1), 11-2-719 (1998).

that a limitation of remedy provision should be upheld as valid.[78] In support of its holding, the court cited to numerous decisions across a variety of jurisdictions for the proposition that a limitation of remedy that leaves the non-breaching party without a remedy is unconscionable.[79]

The extent to which Georgia courts will rely on precedent from this line of cases in deciding controversies that fall outside of the Georgia Commercial Code has yet to be determined. Whether Georgia will join California and indulge in the liberal use of the doctrine of unconscionability to strike down agreements to arbitrate, or whether Georgia will adhere to a strict reading of United States Supreme Court precedent supporting a liberal policy favoring arbitration, is still unsettled. The Georgia Court of Appeals' decision in *Results Oriented, Inc. v. Crawford*,[80] holding that lack of sophistication or economic disadvantage does not amount to unconscionability, suggests a desire to limit the use of unconscionability as a means of striking down agreements to arbitrate.[81]

In *Results Oriented Inc.*, a mobile home owner brought a claim against the manufacturer and retailer of his mobile home alleging defects in design and construction of the unit.[82] The retailer moved to compel arbitration pursuant to a provision in the purchase contract.[83] The mobile home owner resisted the motion to compel arbitration on the grounds that the arbitration provision was unconscionable.[84] The trial court held the clause unconscionable on the grounds that the fees and costs of arbitration as compared to the filing fees in the appropriate State court rendered the clause unconscionable.[85] The Georgia Court of Appeals rejected this argument holding that a "lack of sophistication or economic disadvantage of one attacking arbitration will not amount to unconscionability."[86] The Georgia Supreme Court relied almost exclusively on Alabama Supreme Court precedent, evidencing an acceptance of guiding public policy determinations made by Alabama.[87]

IV. INSTANT DECISION

In the instant case, the Fifth Circuit was asked to review the lower court's denial of a motion to compel arbitration; the lower court based its decision on the grounds that the arbitration provision was unconscionable and, thus, unenforcea-

77. 478 S.E.2d 769 (Ga. 1996).
78. *Id.* at 774.
79. *Mullis*, 505 S.E.2d at 821 (citing Lutz Farms v. Asgrow Seed Co., 948 F.2d 638 (10th Cir. 1991); Hanson v. Funk Seeds Intl., 373 N.W.2d 30 (S.D. 1985); Durham v. Ciba-Geigy Corp., 315 N.W.2d 696 (S.D.1982); Mallory v. Conida Warehouses, 350 N.W.2d 825 (Mich. Ct. App. 1984)).
80. 538 S.E.2d 73 (Ga. Ct. App. 2000), *aff'd*, 548 S.E.2d 342 (Ga. 2001).
81. *Id.* at 81.
82. *Id.* at 75.
83. *Id.* at 81.
84. *Id.*
85. *Id.* at 79.
86. *Id.* at 81.
87. *Id.* (citing Green Tree Fin. Corp. of Ala. v. Wampler, 749 So. 2d 409 (Ala. 1990); Premiere Chevrolet v. Headrick, 748 So. 2d 891 (Ala. 1999); Commercial Credit Corp. v. Leggett, 744 So. 2d 890 (Ala. 1999); Ex parte Smith, 736 So. 2d 604 (Ala. 1999); Ex parte Parker, 730 So. 2d 168 (Ala. 1999); Rhode v. E & T Investments, 6 F. Supp. 2d 1322 (M.D. Ala. 1998); Southern Energy Homes, Inc. v. Ard, 772 So. 2d 1131 (Ala. 2000)).

ble.[88] The instant court first stated that, when examining whether an arbitration provision may be struck down on grounds of unconscionability, or any other ground that may exist at law or equity for the revocation of a contract, a court must be cognizant of both state law and the federal policy favoring arbitration.[89] Initially, the court noted that the contract contained a Georgia choice of law provision requiring an analysis of unconscionability to be conducted under Georgia law, not Mississippi law, as the district court had argued.[90] In determining the issue of unconscionability, the court found that Georgia law requires an unconscionability analysis to be limited to the circumstances that existed at the time of contract formation.[91] In addition, the court recognized that the Georgia Supreme Court has looked with disfavor upon claims of unconscionability based on arbitration costs and economic disadvantage.[92]

Next, the court moved to the issue of unconscionability under Georgia law.[93] It cited the Georgia Court of Appeals, which stated in *Results Oriented Inc. v. Crawford*,[94] that a determination of unconscionability must be made after analyzing the "circumstances existing at the time the contract was made, rather than those existing . . . later."[95] The court noted that, even if Overstreet's financial condition did give rise to a claim of unconscionability, the record lacked any evidence of her financial condition at the time the contract was entered into.[96] Instead, the record indicated that Overstreet presented evidence of her financial condition at the time litigation was commenced.[97] The court held, as a matter of Georgia law, that a finding of unconscionability based on an analysis of the conditions present at the time of litigation rather than the time of contract formation was reversible error.[98]

The court next addressed the question of whether Overstreet had carried her burden of proving that the arbitration provision was unconscionable, rendering the instant dispute not arbitrable.[99] The court explained that a party opposing a motion to compel arbitration bears the burden of proving that the dispute is not arbitrable.[100]

First, the court addressed Overstreet's argument that the waiver of exemplary, punitive, and consequential damages rendered the arbitration provision unconscionable.[101] The court noted in response that, under Georgia law, a waiver of exemplary, punitive, and consequential damages does not, by itself, constitute unconscionability.[102] The court explained that, while Georgia law does state that a waiver of consequential damages in a personal injury case constitutes per se un-

88. Overstreet v. Contigroup Cos., Inc.,462 F.3d 409, 411 (5th Cir. 2006).
89. *Id.* at 412.
90. *Id.* at 411.
91. *Id.* at 412.
92. *Id.* at 412-13.
93. *Id.*
94. 538 S.E.2d 73 (Ga. Ct. App. 2000).
95. *Overstreet*, 462 F.3d at 412 (quoting *Results Oriented, Inc.*, 538 S.E.2d at 79).
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 412 n.2.
102. *Id.* at 412 n.2.

conscionability, the same waiver in a commercial contract setting will not constitute per se unconscionability.[103] The court further noted that even if Georgia law were undecided on this issue, the FAA and its express federal policy favoring arbitration require courts to resolve all doubts concerning arbitrability in favor of arbitration.[104]

Next, the court addressed the argument that the requisite arbitration fees, in light of Overstreet's financial condition, rendered the arbitration provision unconscionable.[105] The court first noted that Georgia courts had viewed similar arguments with "great skepticism."[106] The court, again quoting the Georgia Court of Appeals' decision in *Results Oriented Inc. v. Crawford*, concluded that under Georgia law,"'undisclosed arbitration fees [cannot] be the basis for unconscionability,'" and that "'economic disadvantage of one attacking arbitration will not amount to unconscionability.'"[107]

In summary, the court concluded that the district court not only engaged in an incorrect analysis of unconscionability under Georgia law, but a correct analysis would have resulted in a finding that Overstreet had failed to carry her burden of proving that the arbitration provision was unconscionable.[108]

V. COMMENT

In *Overstreet*, the Fifth Circuit was asked to reverse a lower court's holding that an arbitration provision was unconscionable.[109] The court rejected the procedure by which the lower court conducted its unconscionability analysis,[110] and upon de novo review of the substantive claim of unconscionability found that the arbitration provision was enforceable under Georgia law.[111] In so doing, the court not only misapplied Georgia Law but rendered a holding that both disregards the foundational public policy behind the doctrine of unconscionability and does violence to the fundamental right to due process of law.

The fundamental difference between the instant case and *Results Oriented Inc.*, the case cited by the Fifth Circuit in support of its decision to enforce the instant arbitration provision, is that, in the instant case, the enforcement of the arbitration provision left the claimant without a remedy.[112] In the instant case, enforcement of the arbitration provision would require the claimant to pay more than $27,000 as a precondition to access the arbitration process.[113] The instant claimant was so destitute that a $27,000 initiation fee without an opportunity to mitigate that requirement would bar her from any and all binding dispute resolu-

103. *Id.* at 412 n.2. *See also* GA. CODE ANN. § 11-2-719(3) (2002); NEC Techs, Inc., v. Nelson., 478 S.E.2d 769, 771 (Ga. 1996).
104. *Overstreet*, 462 F.3d at 412 n.2 (citing Inv. Partners, L.P. v. Glamour Shots Licensing, Inc., 298 F.3d 314, 316 (5th Cir. 2002)).
105. *Id.* at 412.
106. *Id.* at 412-13.
107. *Id.* at 413 (quoting Results Oriented, Inc. v. Crawford, 538 S.E.2d 73, 79 (Ga. Ct. App. 2000)).
108. *Id.* at 411-13.
109. *Id.* at 410.
110. *Id.* at 412.
111. *Id.* at 413.
112. *Compare Overstreet*, 462 F.3d at 411-13, *with Results Oriented, Inc.*, 538 S.E.2d at 79-81.
113. *Overstreet*, 462 F.3d at 412.

tion procedures.[114] The instant claimant was not directed to arbitrate but was left without an opportunity to seek a remedy for the alleged breach of contract and effectively had her claim dismissed for failure to qualify financially.

The claimant in *Results Oriented Inc.* was a consumer who, in opposing a motion to compel arbitration, argued that the difference between the fees and costs of arbitration allocated to him as compared to the filing fees in state court rendered the arbitration provision unconscionable.[115] While the allocation of fees in *Results Oriented Inc.* did produce a significantly higher barrier to entry for the claimant compared to that of litigation, no evidence suggested that the claimant was unable to bear his portion of the fees.[116] In essence, the instant case is distinguishable from *Results Oriented Inc.* because the claimant in *Results Oriented Inc.* was disadvantaged by the financial hurdle, but that hurdle was not so high that it operated to effectively bar him from arbitration all together. The Fifth Circuit attempts to hide behind the federal policy favoring arbitration but, as the California Court of Appeals for the First District stated so eloquently, "Whatever preference for arbitration might exist, it is not served by an adhesive agreement that effectively blocks every forum for redress of disputes, including arbitration itself."[117]

By relying on *Results Oriented Inc.* in the instant case, the Fifth Circuit misapplied Georgia law in concluding the arbitration provision was enforceable. Rather than applying the case of *Results Oriented, Inc.*, the instant court should have relied on *Mullis*. Although *Mullis* does not involve an arbitration provision, but rather a limitation of remedy in a contract for the sale of goods, that distinction should be of no consequence given the U.S. Supreme Court's direction to place arbitration agreements "'upon the same footing as other contracts.'"[118] The application of the doctrine of unconscionability in situations where one party is left without a remedy is unquestionably accepted as a proper contract revocation technique in Georgia.[119] While Georgia courts have not had occasion to apply the holding of *Mullis* to a contract outside the scope of the Georgia Commercial Code, other courts have had such an opportunity and have applied cases analogous to *Mullis* in deciding cases involving a service contract such as the instant case.[120]

The Alabama Supreme Court, in *Leonard v. Terminix Int'l Co.*,[121] was asked to apply holdings similar to *Mullis* and did so by stating, "From a public-policy standpoint, we can discern no difference between a contract for the sale of goods . . . and a contract for services, such as this one."[122] In *Leonard*, the opponent of an arbitration provision argued that enforcement of an arbitration provision which contained a mandatory arbitration fee and a prohibition against class arbitration was unconscionable because it left him without a remedy.[123] The *Leonard* court

114. *Id.*
115. *Results Oriented, Inc.*, 538 S.E.2d at 79.
116. *Id.* at 80.
117. Gutierrez v. Autowest, Inc., 7 Cal. Rptr. 3d 267, 277 (Ca. Ct. App. 2003).
118. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 271 (1995) (quoting Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Standford Jr. Univ., 489 U.S. 468, 474 (1989)).
119. Mullis v. Speight, 505 S.E.2d 818, 822 (Ga. Ct. App. 1998).
120. *See* Leonard v. Terminix Int'l Co., 854 So. 2d 529 (Ala. 2002).
121. *Id.*
122. *Id.* at 534.
123. *Id.* at 535.

speaks directly to proponents of the logic endorsed by the Fifth Circuit in the instant case by stating, "Thus, the 'repackaging' actually occurs in the dissenting opinion with its reliance upon cases holding that economic hardship to a person of limited resources does not render an arbitration agreement unconscionable. Such authority does not foreclose a contention that an arbitration clause is unconscionable because economic feasibility precludes presentation of the claim."[124]

The Georgia Legislature agrees with the reasoning in *Leonard* that when a clause effectively renders a claimant without a remedy, that clause is unconscionable. This agreement is manifested in the official purpose statements accompanying sections 11-2-302 and 11-2-719 of the Georgia Commercial Code.[125] Section 11-2-302 expressly provides for the use of the doctrine of unconscionability as a means of striking down a contract.[126] The official purpose in section 11-2-302 states, "The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power."[127] The official purpose of section 11-2-719 of the Georgia Commercial Code states, "[I]t is of the very essence of a sales contract that at least minimum adequate remedies be available."[128] Nothing could be more representative of "unfair surprise" than a circumstance in which the application of an arbitration provision leaves a claimant without a remedy. It is difficult to imagine a circumstance in which a party would willingly engage in a contract which removed all binding remedies in the event of a breach. In fact, it is difficult to suppose a more illustrative example of unfair surprise than one in which a party to a contract finds them self unable to enforce it. Any indulgence in this outcome most certainly frustrates the reasonable expectations of the parties, a concept that lies at the heart of the law of contracts. The Alabama Supreme Court has identified and addressed the precise factors that distinguish the instant case from *Results Oriented Inc.* It is this distinction that makes the Georgia Supreme Court's holding in *Results Oriented Inc.* inapplicable and the Georgia Appellate Court's holding in *Mullis* the appropriate governing law. However, the Fifth Circuit failed to note the existence of such factors in the instant decision, and thus mistakenly applied the inapposite case of *Results Oriented Inc.*[129]

Finding an arbitration provision unconscionable because enforcement would leave the opposing party without a remedy is a quintessential circumstance in which application of the doctrine of unconscionability is proper. The U.S. Supreme Court has indicated that there is a need to regulate arbitration to ensure that the substantive claims of a party may be properly vindicated in arbitration.[130] This has been demonstrated most clearly in circumstances in which an arbitration provision purports to limit a claimant's ability to seek relief by way of class arbitration while requiring that same claimant to pay a mandatory fee to initiate arbitra-

124. *Id.* at 537.
125. *See* GA. CODE ANN. §§ 11-2-302, 11-2-719 (2002).
126. GA. CODE ANN. § 11-2-302 (2002).
127. *Id.*
128. GA. CODE ANN. § 11-2-719 (2002).
129. Overstreet v. Contigroup Companies, Inc., 462 F.3d 409, 412-13 (5th Cir. 2006).
130. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 637 (1985) (indicating an arbitration clause should be enforced even if it means the arbitration of a statutory claim, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum...").

tion.[131] Courts have viewed such arbitration agreements as unconscionable because they operate to insulate the proponent from liability up to the amount of the mandatory arbitration fee.[132] Seen from the opposing party's perspective, such arbitration agreements remove all binding remedies up to the amount of the mandatory arbitration fees. When the proponent breaches the contract to a lesser extent than the mandatory arbitration fee, the opponent is left without a remedy. Acceptance of this substantive result leaves unanswered the question of how to produce it by conducting an unconscionability analysis based upon the circumstances in existence at the time of contract formation.

The court in the instant case attacks the lower court's unconscionability analysis by stating that an unconscionability analysis must be conducted at the time of contract formation.[133] California courts agree with this proposition.[134] In *Gutierrez*, the California Court of Appeals for the First District provided a framework for conducting an unconscionability analysis based on the circumstances in existence at the time of contract formation.[135] In *Gutierrez*, the court stated that an arbitration clause is unconscionable at the time of contract formation if, "Despite the potential for the imposition of a substantial administrative fee, there is no effective procedure for a consumer to obtain a fee waiver or reduction."[136] This test provides an appropriate framework for an unconscionability analysis which the Fifth Circuit properly stated was lacking in the lower court decision but failed to conduct in the instant case.[137] Had this test been applied in the instant case, the fact that the arbitration provision failed to provided a mechanism for minimizing the up front arbitration fees in the event one party was unable to pay them would have supported a determination of unconscionability.

When the enforcement of an arbitration provision fails to direct the parties to arbitrate, but instead acts as a dismissal of the substantive claim, the claimant's fundament rights to due process are offended. The public policy surrounding the fundamental right to due process of law as provided in the United States and Georgia Constitutions guarantees that every person for any injury done to him shall be given a meaningful opportunity to be heard.[138]

It does not necessarily follow that the instant case represents an unconstitutional usurpation of Ms. Overstreet's fundamental right to due process, but the articulated policy of the Due Process Clause does suggest that her rights have been offended if not completely usurped. In a country so dedicated to the fundamental rights of due process and equal protection under the law, it smacks of injustice to acquiesce in a result that bars a citizen for lack of financial resources—a circumstance clearly not contemplated at the time Ms. Overstreet assented to the

131. Leonard v. Terminix Int'l Co., 854 So. 2d 529, 536 (Ala. 2002) (citing Keating v. Superior Court of Alameda County, 654 P.2d 1192, 1207 (Cal. 1982); Southland Corp. v. Keating, 465 U.S. 1 (1984); Ting v. AT&T, 182 F. Supp. 2d 902 (N.D. Cal. 2002)).
132. *Id.*
133. *Overstreet*, 462 F.3d at 412.
134. *See* Gutierrez v. Autowest, Inc., 7 Cal. Rptr. 3d 267 (Cal. Ct. App. 2003).
135. *Id.* at 278.
136. *Id.*
137. *Overstreet*, 462 F.3d at 412.
138. Boddie v. Conn., 401 U.S. 371, 377 (1971) ("[A]bsent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.").

arbitration provision—from seeking vindication for an alleged wrong done to her. If our system of government is to stand as a check against oppression and a protector of its citizens, how can the courts condone an activity that denies a citizen legal protection for failure to qualify financially? To stand on such grounds as freedom to contract and blindly adhere to the mechanical application of its rules would suggest a reprioritization of rights that is itself unconscionable.

VI. CONCLUSION

In the instant case, the Fifth Circuit incorrectly interpreted Georgia law and failed to apply the doctrine of unconscionability to protect the claimant's right to a resolution of her substantive dispute. An arbitration provision, drafted by its proponent, that leaves a claimant without a remedy is oppressive and undoubtedly defeats the expectations of the non-drafting party. It is incomprehensible to conclude that Ms. Overstreet, an elderly chicken farmer without legal training, actually bargained for the instant arbitration provision, much less expected its operation to preclude her from any and all binding dispute resolution procedures in the event of a Contigroup breach. If an arbitration provision that effectively bars the poor from legal redress is not seen as "an agreement that no sane person not acting under a delusion would make and that no honest person would take advantage of," then the rich truly are the only ones who can afford a remedy.

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