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**EXPANDING THE SCOPE OF THE FEDERAL
ARBITRATION ACT: AN EXAMINATION OF THE
SEVENTH CIRCUIT’S OPINION IN *GREEN V. U.S.
CASH ADVANCE, ILLINOIS, LLC***

CHRISTINE L. MILKOWSKI

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INTRODUCTION

Congress passed the Federal Arbitration Act (FAA) in 1925 in response to judicial hostility towards arbitration agreements.¹ Over three quarters of a century later American courts seem to have outgrown this former sentiment, as the Supreme Court’s recent application of the FAA has ushered in a new era of pro-arbitration jurisprudence.² Although conceding that arbitration is, at heart, a matter of contract law,³ the Court has zealously applied Section 2 of the FAA, which states arbitration agreements shall be “valid, irrevocable and enforceable,”⁴ to favor arbitration over litigation.⁵

¹ Anjanette H. Raymond, *It Is Time the Law Begins to Protect Consumers From Significantly One-Sided Arbitration Clauses within Contracts of Adhesion*, 91 NEB. L. REV. 666, 668 (2013).

² Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT’L ARB. 323, 325 (2011).

³ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

⁴ 9 U.S.C. § 2 (2012).

Writing in the Supreme Court's shadow, in *Green v. U.S. Cash Advance Illinois, LLC*, the Seventh Circuit majority enforced an arbitration agreement in a payday loan between a consumer, Ms. Green and lender, the Loan Machine.⁶ The arbitration agreement identified the National Arbitration Forum ("NAF") as the arbitration forum in the event of a dispute; however, the NAF had stopped accepting consumer arbitrations due to a settlement agreement with the Minnesota Attorney General.⁷ Although the NAF's settlement agreement occurred prior to Ms. Green's loan, the parties never updated the language of the Loan Machine's form arbitration agreement.⁸ The majority engaged in an ad hoc analysis to reach the wrong conclusion – the enforcement of the arbitration agreement despite the unavailability of the NAF.⁹

In its opinion, the majority rejected what is known as the integral part test, which has been used by the Third, Fifth and Eleventh circuits¹⁰ in factually similar situations. The integral part test bars the appointment of a substitute arbitrator if the provision naming the arbitrator was "an integral part of the agreement."¹¹

Judge Hamilton, in dissent, also rejected the integral part test, however, he contended that the unavailability of the arbitration forum renders the arbitration agreement void, allowing the parties to proceed with litigation.¹² He noted the majority's reasoning departed from the contractual foundation of arbitration because the NAF as the parties' exclusive choice of forum, was not available at the time of contracting

⁵ See *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

⁶ *Green v. U.S. Cash Advance Illinois, LLC*, 724 F.3d 787 (7th Cir. 2013).

⁷ *Id.* at 789.

⁸ *Id.* at 797 (Hamilton, J. dissenting).

⁹ *Id.*

¹⁰ *Id.* at 791; see *Khan v. Dell, Inc.*, 669 F. 3d 350, 354-56 (3d Cir. 2012); *Ranzy v. Tijerina*, 393 F. App'x 174, 176 (5th Cir. 2010) (per curiam); *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000).

¹¹ *Khan*, 669 F. 3d at 353.

¹² *Green*, 734 F.3d at 793 (Hamilton, J. dissenting).

and thus the agreement was void.¹³ Judge Hamilton argued that the practical result of the majority approach is that a court may use the FAA to authorize a “wholesale re-write of the parties’ contract”¹⁴ when there had been a mutual mistake as to a material term.

This Comment argues that the Seventh Circuit majority reached the wrong conclusion in *Green*. Part I of this Comment introduces the FAA and the two sections at issue in the case. Part II reviews the Supreme Court’s recent interpretation of the FAA. Part III introduces the problem presented in *Green*, examines the solutions implemented by other circuits, and discusses the *Green* decision. Part IV considers the decision’s impact on the parties and future litigants, and addresses proposed solutions.

I. THE FEDERAL ARBITRATION ACT

A. History

Arbitration is a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.¹⁵ In 1925¹⁶ Congress passed the Federal Arbitration Act, formerly the “United States Arbitration Law,”¹⁷ in response to widespread judicial hostility towards arbitration agreements.¹⁸ The aggression exhibited by United States courts has

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Arbitration Definition*, BLACK’S LAW DICTIONARY (9th ed. 2009), available at Westlaw BLACKS.

¹⁶ Raymond, *supra* note 1, at 668.

¹⁷ Angelina M. Petti, *Judicial Enforcement of Arbitration Agreements: The Stay-Dissmissal Dichotomy of FAA Section 3*, 34 HOFSTRA L. REV. 565, 572 (2005).

¹⁸ Raymond, *supra* note 1, at 668#; see also Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 476 (2006) (noting that although this law was enacted in 1925, American judicial hostility persisted until 1967 when the United States Supreme Court decided *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, when the Court “eliminated any powerful judicial role in supervising arbitration agreements.”).

been linked to the same opposition expressed by English courts.¹⁹ English courts viewed an arbitration agreement as ousting the court of its jurisdiction until England's Arbitration Act of 1889, which provided the country's first set of laws to facilitate arbitration.²⁰ Explanations for American judicial hostility towards such agreements are similar to that of the English – that it would oust the jurisdiction of the court; but also the fear that stronger parties would take advantage of weaker ones.²¹

In the early twentieth century, American judges began to change their minds about the enforceability of arbitration agreements.²² This change culminated in a 1924 New York state court decision, *Red Cross Line v. Atlantic Fruit Co.*,²³ which upheld a New York law compelling arbitration in a dispute involving a maritime contract.²⁴ Julius Cohen, a lawyer who was later the principal drafter of the FAA, wrote that New York law.²⁵ *Red Cross Line* paved the way for Congress to enact a federal arbitration law that recognized arbitration agreements as binding and valid: the Federal Arbitration Act.²⁶

¹⁹ Preston Douglas Wigner, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1499, 1502 (1995).

²⁰ Burton, *supra* note 18, at 474. Additionally, English Judges were paid based on the number of cases they decided, and as a result, felt that arbitration outside of the courtroom infringed upon their livelihood. Wigner, *supra* note 19, at 1502.

²¹ Stephen E. Friedman, *The Lost Controversy Limitation of the Federal Arbitration Act*, 46 U. RICH. L. REV. 1005, 1008 (2012); *see also* Kulukundis Shipping Co., S/A, v. Amtorg Trading Corp., 126 F.2d 978, 982–85 (2d Cir. 1942) (Justice Frank discussing the history of the judicial attitude towards arbitration).

²² John C. Norling, *The Scope of the Federal Arbitration Act's Preemption Power: An Examination of the Import of Saturn Distribution Corp. v. Williams*, 7 OHIO ST. J. ON DISP. RESOL. 139, 140 (1991).

²³ *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924).

²⁴ JON O. SHIMABUKURO, CONG. RES. SERVICE, *THE FEDERAL ARBITRATION ACT: BACKGROUND AND RECENT DEVELOPMENTS* 2 (2003)

²⁵ Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA ST. U. L. REV. 99, 101-02 (2006).

²⁶ SHIMABUKURO, *supra* note 24, at 2.

President Coolidge signed the Federal Arbitration Act into law on February 12, 1925.²⁷ During the Joint Hearings on the FAA, a chairman from the Joint Subcommittee on the Judiciary asked Mr. Cohen why a contract for arbitration had not been enforceable in equity.²⁸ Mr. Cohen stated that “the fundamental reason” for its non-enforceability, was that stronger men would take advantage of the weaker, and that “courts had to come in and protect them.”²⁹ However, Mr. Cohen noted that this concern was dispelled by the regulation of the Federal Government and the general notion that “people are protected today [sic] as never before.”³⁰

As drafted, the FAA was understood by members of Congress to “simply provide for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts.”³¹ Throughout the 1924 Hearing, statements were made that “arbitration saves time, saves trouble, saves money.”³² Thus, the legislative history of the FAA suggests two purposes: to affirm the validity of arbitration agreements as “binding contract provisions in their own right” and to eliminate “costly and time-consuming litigation.”³³

²⁷ *Id.*

²⁸ *Arbitration of Interstate Commercial Disputes: Hearing on S. 1005 and H.R. 646 Before the Subcomm. on the Judiciary, 68th Cong. 14 (1924)* (statement of Julius Henry Cohen, Member, Comm. on Commerce, Trade and Commercial Law of the Am. Bar Ass'n and Gen. Counsel of N.Y. State Chamber of Commerce).

²⁹ *Id.* at 15.

³⁰ *Id.*

³¹ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 124 (2001) (Stevens, J. dissenting) (alteration in original) (citation omitted) (internal quotation marks omitted).

³² *Arbitration of Interstate Commercial Disputes: Hearing on S. 1005 and H.R. 646 Before the Subcomm. on the Judiciary, 68th Cong. 7 (1924)* (statement of Charles L. Bernheimer, Chairman Comm. on Arbitration).

³³ Benjamin D. Tievsky, *The Federal Arbitration Act After Alafabco: A Case Analysis*, 11 CARDOZO J. CONFLICT RESOL. 675, 678 (2010).

B. Text

At the heart of the legal dispute in *Green* was the enforceability of the arbitration clause in a payday loan agreement, which named an unavailable arbitration forum.³⁴ To answer this question, the court looked to Section 2 and Section 5 of the FAA.³⁵

Section 2 evidences Congress's intent to place arbitration agreements "upon the same footing as other contracts, where [they] belong."³⁶ It provides that a written arbitration agreement in a transaction or contract involving commerce is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."³⁷ Thus, Section 2 is a platform for the courts to find that there is a "liberal federal policy favoring arbitration agreements."³⁸

Section 5, on the other hand, is a tool that allows the judiciary to appointment an arbitrator in limited circumstances.³⁹ Those circumstances are: if no method of naming an arbitrator is provided for in the agreement; if there is a method of naming the arbitrator, but a party fails to avail himself of that method; and if for any other reason there is a "lapse" in the naming of an arbitrator.⁴⁰ While Section 5 is the specific tool the *Green* majority used to enforce the arbitration

³⁴ *Green v. U.S. Cash Advance Illinois, LLC*, 724 F.3d 787, 791-93 (7th Cir. 2013).

³⁵ *Id.* at 792-93.

³⁶ SHIMABUKURO, *supra* note 24, at 2 (footnote omitted) (internal quotation marks omitted).

³⁷ 9 U.S.C. § 2 (2012). The complete text of Section 2:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract

³⁸ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 472 U.S. 614, 625 (1985).

³⁹ 9 U.S.C. § 5 (2012).

⁴⁰ *Id.*

clause in the loan agreement, the Seventh Circuit also followed the footsteps of the Supreme Court, which has consistently enforced arbitration agreements using Section 2 of the FAA.

II. THE FAA AND RECENT PRO-ARBITRATION SUPREME COURT DECISIONS

In the years before *Green*, the application of the FAA by the Roberts Court has been pro-arbitration, resulting in a trend of favoring big business over small business, and business over the consumer.⁴¹ In the 2010-2011 term, the Supreme Court decided what has been referred to as an arbitration trilogy.⁴² This triad of cases demonstrates a strong federal policy of vigorously enforcing agreements to arbitrate. Then, in the summer of 2013 the Supreme Court added to the spirit of this trilogy with a fourth decision, *American Express Co. v. Italian Colors Restaurant*.

In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, the first in this series of four decisions, a group of parcel tanker⁴³ customers brought a class action antitrust suit against Stolt-Nielsen, a shipping company, for price fixing.⁴⁴ The parties eventually agreed they must arbitrate their antitrust claim pursuant to the arbitration agreement in their charter contract, but they were unsure whether the arbitration agreement permitted class arbitration.⁴⁵ This question was submitted to a panel of arbitrators, who after hearing argument and evidence concluded that the arbitration clause allowed class arbitration.⁴⁶

⁴¹ See *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011); *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

⁴² *Stipanowich*, *supra* note 2, at 328.

⁴³ Parcel tankers are seagoing vessels with compartments that are separately chartered to customers such as AnimalFeeds, who shipped liquids in small quantities. *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 666 (2010).

⁴⁴ *Id.* at 667.

⁴⁵ *Id.* at 668.

⁴⁶ *Id.* at 668–69.

However, the Supreme Court reversed, and found the arbitration agreement must be enforced according to its terms.⁴⁷

During litigation, AnimalFeeds stipulated the arbitration provision in their charter contract was silent on the issue of class arbitration,⁴⁸ and argued that without express prohibition, class arbitration should be permitted.⁴⁹ As arbitration is a matter of contract, the Court concluded that a party, even a sophisticated business entity, “may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the parties *agreed* to do so.”⁵⁰ Implicit in the Court’s reasoning is a foundation of contract law, which requires a meeting of the minds to establish a valid contract.⁵¹ Thus, the court held that there could be no class-action arbitration when the parties have conceded there was no prior agreement on the matter.⁵² The Court mandated bilateral arbitration.⁵³

Later that year, in the second of the four cases, the Court addressed how a party can challenge the validity of an arbitration agreement. There are two types of validity challenges: one challenges the validity of the arbitration agreement itself and the other challenges the contract as a whole.⁵⁴ If the arbitration agreement itself is challenged and determined to be invalid by the court, it can be severed from the remainder of the contract.⁵⁵ In *Rent-A-Center, West, Inc. v. Jackson*, an employee filed a discrimination suit against his former employer, who responded by filing a motion to compel arbitration pursuant to the employment contract.⁵⁶ The employee argued that the entire employment contract was unconscionable and should not be

⁴⁷ *Id.* at 682.

⁴⁸ *Id.* at 668.

⁴⁹ *Id.* at 672.

⁵⁰ *Id.* at 684 (alteration in original).

⁵¹ Restatement (Second) of Contracts § 17 cmt. c (1981).

⁵² *Id.* at 687; *see also* Stipanowich, *supra* note 2, at 333.

⁵³ *Stolt-Nielsen S.A.*, 559 U.S. at 687.

⁵⁴ *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2778 (2010) (citation omitted).

⁵⁵ *Id.*

⁵⁶ *Id.* at 2775.

enforced.⁵⁷ The Court concluded that because the employee was challenging the contract as a whole, rather than the arbitration agreement itself, this challenge was for the arbitrator to resolve.⁵⁸ Thus, the Court limited its ability to police an overreaching arbitration agreement by empowering arbitrators to determine their own jurisdiction.⁵⁹

In the third case, *AT&T Mobility LLC v. Concepcion* the Court revisited a claim for class arbitration and ruled in a 5-4 opinion that the FAA preempted a state law prohibiting adhesion contracts from disallowing class arbitration.⁶⁰ The plaintiffs had alleged that AT&T engaged in false advertising and fraud by charging a sales tax on “free” phones.⁶¹ The lawsuit, originally filed by the Concepcions, was consolidated as a class action. AT&T then filed a motion to compel arbitration under the Concepcions’ cell phone contract, which stated that class arbitration was waived.⁶²

The District Court and then the Ninth Circuit applied California’s unconscionability doctrine,⁶³ as expressed in the state court decision *Discover Bank v. Superior Court*, to invalidate the class waiver in the Concepcions’ cell phone contract.⁶⁴ The *Discover Bank* doctrine allows any party to a consumer contract of adhesion to demand

⁵⁷ *Id.* at 2779.

⁵⁸ *Id.*

⁵⁹ Stipanowich, *supra* note 2, at 367, 370.

⁶⁰ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

⁶¹ *Id.* at 1744–45.

⁶² *Id.* at 1744.

⁶³ *Id.* at 1746, citing *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005) which held:

[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party ‘from responsibility for [its] own fraud, or willful injury to the person or property of another.’ Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

⁶⁴ *AT&T Mobility LLC*, 131 S. Ct. at 1745.

classwide arbitration *ex post*.⁶⁵ A sharply divided Supreme Court reversed the lower courts' application of the *Discover Bank* doctrine in *AT&T Mobility*, concluding the FAA preempted the doctrine.⁶⁶ The Court stated that this doctrine "interfere[d] with fundamental attributes of arbitration"⁶⁷ and that "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration – its informality – which makes the process slower, more costly, and more likely to generate procedural morass than final judgment."⁶⁸ Thus, according to the Supreme Court, a fundamental attribute of arbitration is the efficient and speedy resolution of disputes, which would be undermined by the *Discover Bank* doctrine.

In the fourth case, *American Express Co. v. Italian Colors Restaurant*, a group of plaintiffs again attempted to defeat an arbitration clause that prohibited class arbitration. However, rather than relying on a state law, like the plaintiffs in *AT&T Mobility*, the plaintiffs in *American Express Co.* argued the individual cost of arbitrating their federal antitrust claims exceeded any potential recovery.⁶⁹ Applying Section 2 of the FAA, the Court began its analysis by reminding the parties that courts must "rigorously enforce" arbitration agreements according to their terms.⁷⁰ The Court concluded that the FAA did not permit it to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a claim exceeded the potential recovery.⁷¹

Thus, in the foregoing cases the Court disempowered an arbitrator to make determinations of class arbitration, compelling bilateral arbitration unless otherwise agreed; over-empowered an arbitrator to

⁶⁵ *Id.* at 1750.

⁶⁶ *Id.* at 1753.

⁶⁷ *Id.* at 1748.

⁶⁸ *Id.* at 1751.

⁶⁹ *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

⁷⁰ *Id.* at 2309 (citation omitted). Particularly interesting is the court's statement that "courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted." *Id.* (emphasis added) (internal quotation marks omitted) (citations omitted).

⁷¹ *Id.* at 2311–12.

determine his own jurisdiction; and expressed a clear disapproval of class arbitration. The Supreme Court came to these three sweeping conclusions using the language of the FAA.

III. GREEN V. U.S. CASH ADVANCE ILLINOIS, LLC

In May 2012, U.S. Cash Advance Illinois, LLC and Title Loan Company (doing business as “the Loan Machine”) offered to roll over \$200 in debt owed by Joyce Green, a senior citizen,⁷² into a payday loan in the amount of \$1,650.⁷³ The new payday loan agreement and its Truth-in-Lending Disclosure Statement stated the loan was subject to a 36% finance charge.⁷⁴ However, Ms. Green discovered that due to other charges described in the loan documents, the actual finance charge exceeded 200% and a bill later provided to her stated the “effective APR” was 200.84%.⁷⁵ In light of these finance charges, Ms. Green brought claims for violations of Truth in Lending Act,⁷⁶ the Illinois Consumer Installment Loan Act,⁷⁷ the Illinois Payday Loan Reform Act,⁷⁸ and the Illinois Consumer Fraud and Deceptive Business Practices Act,⁷⁹ to the Northern District Court of Illinois as a class representative.⁸⁰

The payday loan agreement entered into by Ms. Green in May 2012 contained an arbitration clause, which required that all disputes

⁷² Paul Bland, *Activist Seventh Circuit Panel Helps Out Payday Lender by Re-Writing Arbitration Clause Picking Corrupt Firm*, PUBLIC JUSTICE, (Aug. 2, 2013), <http://publicjustice.net/blog/activist-seventh-circuit-panel-helps-out-payday-lender-by-re-writing-arbitration-clause>.

⁷³ Brief of Appellee at *3, *Green v. U.S. Cash Advance Illinois*, 724 F.3d 787 (7th Cir.) (No. 13-1262).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ 15 U.S.C. § 1601 (2012).

⁷⁷ 205 Ill. Comp. Stat. 670/1 (2012).

⁷⁸ 81 Ill. Comp. Stat. 122/4-10(b) (2005).

⁷⁹ 815 Ill. Comp. Stat. 505/10a (1986).

⁸⁰ Brief of Appellee at *3–4, *Green v. U.S. Cash Advance Illinois*, 724 F.3d 787 (7th Cir.) (No. 13-1262).

between the parties be settled by binding arbitration.⁸¹ The arbitration clause named the NAF as arbitrator.⁸² However, in July 2009, almost three years prior to Ms. Green entering her payday loan agreement, the NAF stopped accepting consumer arbitrations as a condition of its settlement agreement with the Minnesota Attorney General.⁸³ This settlement agreement was a result of a law enforcement investigation, which led to a lawsuit alleging that the NAF was not an impartial venue.⁸⁴ As one commentator put it, “the NAF was a deeply corrupt organization that . . . made . . . promises to lenders that it would favor them over consumers.”⁸⁵

Despite the fact that the NAF stopped accepting consumer arbitration disputes in 2009, the Loan Machine failed to amend its payday loan agreements to reflect this change.⁸⁶ In 2012, these loan agreements still stated that all disputes were to be resolved through

⁸¹ *Green v. U.S. Cash Advance Illinois, LLC*, 724 F. 3d 787, 789 (7th Cir. 2013).

⁸² *Id.* at 788.

⁸³ See Wade Goodwyn, *Arbitration Firm Settles Minnesota Legal Battle*, NPR (July 23, 2009, 6:00 AM), <http://www.npr.org/templates/story/story.php?storyId=106913248>. Guests of the show discussed the NAF settlement, and noted that the arbitration forum conducts hundreds of thousands of consumer arbitrations a year, most of them involving debt collection. The investigation of the Minnesota Attorney General revealed that NAF is 40% owned by a hedge fund, which also owned debt collection agencies, making the NAF a party to the dispute as well as judge and jury. See also Carrick Mollenkamp, Dionne Searcey & Nathan Koppel, *Turmoil in Arbitration Empire Upends Credit-Card Disputes*, WALL ST. J. (Oct. 15, 2009 at 12:01 AM), <http://online.wsj.com/news/articles/SB125548128115183913> (noting that another consumer-debt-arbitration forum, the American Arbitration Association has also stopped hearing consumer debt cases.).

⁸⁴ For a copy of the Minnesota Attorney General’s Complaint, see <http://www.ag.state.mn.us/PDF/PressReleases/SignedFiledComplaintArbitrationCompany.pdf> (last accessed November 7, 2013). For a brief overview of the lawsuit, see *Minnesota Sues a Credit Arbitrator, Citing Bias*, BLOOMBERG BUSINESS WEEK (July 14, 2009), http://www.businessweek.com/bwdaily/dnflash/content/jul2009/db20090714_952766.htm.

⁸⁵ Paul Bland, *supra* note 72.

⁸⁶ *Green*, 724 F. 3d at 788.

“binding arbitration by one arbitrator by and under the Code of Procedure of the National Arbitration Forum.”⁸⁷ In response to Ms. Green’s complaint, and despite the unavailability of the NAF, the Loan Machine moved to compel arbitration, stay proceedings, and dismiss class claims by arguing that Section 5 of the FAA required the court to appoint a substitute arbitrator.⁸⁸ This issue was not novel, as other courts⁸⁹ have faced the question of what to do with an arbitration agreement where the named arbitration forum was unavailable.

⁸⁷ *Id.*

⁸⁸ Brief of Appellee at 4–5, *Green v. U.S. Cash Advance Illinois*, 724 F.3d 787 (7th Cir.) (No. 13-1262). Paragraph 17 of the loan agreement stated:

ARBITRATION: All disputes, claims or controversies between the parties of this Agreement, including all disputes, claims or controversies arising from or relating to this Agreement, no matter by whom or against whom, including the validity of this Agreement and the obligations and scope of the arbitration clause, shall be resolved by binding arbitration by one arbitrator by and under the Code of Procedure of the National Arbitration Forum. This arbitration agreement 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. 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 WOULD HAVE HAD A RIGHT OR OPPORTUNITY TO LITIGATE DISPUTES THROUGH A COURT BUT HAVE AGREED TO RESOLVE DISPUTES THROUGH BINDING ARBITRATION, EXCEPT THAT THE TITLE LENDER MAY CHOOSE AT TITLE LENDER’S SOLDE OPTION TO SEEK COLLECTION OF PAYMENT(S) DUE IN COURT RATHER THAN THROUGH ARBITRATION. 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 A TITLE LENDER. The parties agree and understand that all other laws and actions, including, but not limited to, all contract tort and property disputes will be subject to binding arbitration in accord with this agreement.

⁸⁹ See *Khan v. Dell, Inc.*, 669 F. 3d 350 (3d Cir. 2012); *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217 (11th Cir. 2000); *Ranzy v. Tijerina*, 393 F. App’x 174 (5th Cir. 2010) (per curiam).

A. Prior Circuit Court Decisions

In deciding what to do when the named arbitration forum is unavailable, several circuit courts have analyzed the issue by asking whether the choice of the arbitration forum was an integral part of the arbitration agreement.⁹⁰ Applying this test, the Fifth Circuit found a named forum was integral to the arbitration agreement, and refused to appoint a substitute arbitrator under Section 5 of the FAA.⁹¹ The Third⁹² and Eleventh⁹³ Circuits, on the other hand, have applied this test to similar facts but concluded that a named forum was not integral to the arbitration agreement and invoked Section 5 to appoint a substitute arbitrator.

In *Ranzy v. Tijerina* the Fifth Circuit was confronted with a consumer action against a payday loan company.⁹⁴ Similar to the facts in *Green*, the loan agreement contained an arbitration clause naming the NAF as arbitrator.⁹⁵ After entering the loan agreement but before litigation, the NAF became unavailable,⁹⁶ and as a result the loan company urged the court to use Section 5 of the FAA to appoint a substitute arbitrator.⁹⁷ The court stated, “Section 5 does not . . . permit a district court to circumvent the parties’ designation of an exclusive arbitration forum when the choice of that forum is an integral part of

⁹⁰ A number of state court opinions have also adopted the integral part test, including Illinois, (*Carr v. Gateway, Inc.*, 944 N.E.2d 327 (Ill. 2011)); Virginia, (*Schuling v. Harris*, 747 S.E.2d 833 (Va. 2013)); New Mexico, (*Rivera v. Am. Gen. Fin. Servs., Inc.*, 259 P.3d 803 (N.M. 2011)); South Dakota, (*Wright v. GGNSC Holdings LLC*, 808 N.W.2d 114 (S.D. 2011)); Georgia (*Miller v. GGNSC Atlanta, LLC*, 746 S.E.2d 680 (Ga. Ct. App. 2013)); Indiana, (*Geneva-Roth, Capital, Inc. v. Edwards*, 956 N.E.2d 1195 (Ind. Ct. App. 2011)); Wisconsin, (*Riley v. Extendicare Health Facilities, Inc.* 826 N.W.2d 398 (Wis. Ct. App. 2012)); and Pennsylvania (*Stewart v. GGNSC-Canonsburg, L.P.*, 9 A.3d 215 (Pa. Super. Ct. 2010)).

⁹¹ *Ranzy v. Tijerina*, 393 F. App'x 174, 175 (5th Cir. 2010) (per curiam).

⁹² *Khan v. Dell, Inc.*, 669 F. 3d 350, 354–56 (3d Cir. 2012).

⁹³ *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000).

⁹⁴ *Ranzy*, 393 F. App'x at 175.

⁹⁵ *Id.*

⁹⁶ *Ranzy v. Extra Cash of Texas, Inc.*, CIV.A. H-09-3334, (S.D. Tex. Mar. 11, 2010), *aff'd sub nom*, *Ranzy v. Tijerina*, 393 F. App'x 174 (5th Cir. 2010).

⁹⁷ *Ranzy*, 393 F. App'x at 175.

the agreement to arbitrate, rather than an ancillary logistical concern.”⁹⁸ Thus, the court asked whether the parties had agreed that the NAF was the exclusive forum. Noting the agreement stated the parties “shall” submit all claims to the NAF, the Fifth Circuit found the NAF was the exclusive arbitration forum and due to the NAF’s unavailability, allowed the parties to proceed in litigation.⁹⁹

In reaching this conclusion, the Fifth Circuit relied on a Second Circuit decision, *In re Salomon Inc. Shareholders’ Derivative Litigation*, which is addressed by the *Green* court.¹⁰⁰ The agreement to arbitrate in *Salomon* named the New York Stock Exchange as the forum for dispute resolution.¹⁰¹ Once submitted to the NYSE arbitrator, the NYSE’s rules allowed its Secretary to decide whether to hear a dispute or send the parties to court.¹⁰² There, the Secretary invoked his discretion to decline arbitration.¹⁰³ However, rather than proceed with litigation, the defendants moved the court to appoint a substitute arbitrator under Section 5 of the FAA.¹⁰⁴ The defendants argued that the language of the agreement, which required disputes to be arbitrated by the NYSE and in accordance with its rules, was akin to a choice of law provision that allowed arbitration to proceed in another forum using the NYSE rules.¹⁰⁵ The Second Circuit rejected this argument, and declined to appoint a substitute arbitrator because the parties had contractually agreed that the NYSE and only the NYSE could arbitrate any disputes between them.¹⁰⁶

Like the Fifth Circuit, the Eleventh Circuit considered whether the choice of the NAF as arbitration forum was an integral part of the arbitration agreement.¹⁰⁷ In *Brown v. ITT Consumer Financial Corp.*,

⁹⁸ *Id.* at 176 (citation omitted).

⁹⁹ *Id.* at 176.

¹⁰⁰ *Id.*

¹⁰¹ *In re Salomon Inc. Shareholders’ Derivative Litigation*, 68 F.3d 554, 555 (2d Cir. 1995).

¹⁰² *Id.* at 556.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 555–56.

¹⁰⁵ *Id.* at 558.

¹⁰⁶ *Id.* at 559.

¹⁰⁷ *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000).

the Eleventh Circuit found no evidence that the choice of the NAF as the arbitration forum was an integral part of the agreement to arbitrate disputes.¹⁰⁸ In light of this absence of evidence, the court held the unavailability of the NAF did not destroy the arbitration clause and it affirmed the lower court's appointment of a substitute arbitrator.¹⁰⁹

Similarly, the Third Circuit in *Khan v. Dell, Inc.* applied the integral part test. There, Raheel Ahmad Khan filed a consumer class action for defectively designed computers sold by Dell.¹¹⁰ When Khan purchased his Dell computer, he entered into a clickwrap agreement,¹¹¹ which contained an arbitration provision.¹¹² Like the plaintiffs in *Ranzy* and *Brown*, Khan asserted that the arbitration provision was unenforceable because the NAF, which was the designated arbitration forum, was no longer permitted to conduct consumer arbitrations.¹¹³ Khan further contended that NAF's designation was integral to the agreement.¹¹⁴

The Third Circuit defined the integral part test as the parties having “unambiguously expressed their intent not to arbitrate their disputes in the event that the designated arbitral forum is unavailable.”¹¹⁵ After reviewing the language of the agreement and considering conflicting interpretations of the same or similar agreements by other courts, the Third Circuit determined that the language of the arbitration agreement was ambiguous. In light of the “liberal federal policy in favor of arbitration,” the court used Section 5 of the FAA to appoint a substitute arbitrator.¹¹⁶

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Khan v. Dell, Inc.*, 669 F. 3d 350, 352 (3d Cir. 2012).

¹¹¹ A clickwrap agreement appears on an internet webpage and requires that a user consent to any terms or conditions by clicking on a dialog box on the screen in order to proceed with the internet transaction. *Specht v. Netscape Communs. Corp.*, 306 F.3d 17, 22, n.4 (2d Cir. 2002) (citation omitted).

¹¹² *Khan*, 669 F. 3d at 351.

¹¹³ *Id.* at 353.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 354.

¹¹⁶ *Id.* at 356.

Although ultimately reaching different conclusions, the three circuits that have addressed the issue of what to do when a named arbitration forum is unavailable have agreed that the integral part test was the correct analysis. The District Court in *Green* was no different.

B. The District Court Decision: Application of the Integral Part Test

The district court used Section 2 of the FAA to begin its analysis,¹¹⁷ which provides that written provisions in a contract “to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹¹⁸ Thus, as the Supreme Court has repeatedly done, the district court acknowledged a judicial policy of favoring arbitration. The district court then used the integral part test as the threshold analysis to determine whether Section 5 could be invoked.

The district court used five factors pulled from various federal circuit and district court decisions to determine whether the designation of the NAF was “integral” to the agreement.¹¹⁹ These factors were: 1) whether the language designating the arbitrator is mandatory or permissive; 2) whether the arbitration clause designates a particular arbitrator or merely a particular set of rules to be applied; 3) whether the arbitration agreement contains a ‘severance’ provision or a provision for substitution of the arbitrator; 4) the relative weight in the arbitration agreement given to the designation of the arbitrator versus the requirement that disputes be sent to binding arbitration; and 5) whether the arbitrator was likely to have been chosen because of its unique characteristics.¹²⁰

First, the district court found that the use of the word “shall” favored the designation of the NAF as integral to the arbitration

¹¹⁷ *Green v. U.S. Cash Advance Illinois, LLC*, No. 12 C 8079, 2013 WL 317046, at *2 (N.D. Ill. Jan. 25, 2013), *vacated and remanded*, 724 F.3d 787 (7th Cir. 2013).

¹¹⁸ *Id.* (citing 9 U.S.C. § 2 (2012)).

¹¹⁹ *Id.* at *4.

¹²⁰ *Id.*

agreement.¹²¹ Second, because the agreement states that arbitration be conducted by the NAF as well as under its code of procedure, there is merit in finding that the NAF is an integral part of the agreement.¹²² Third, the district court found that although the loan agreement had a severance clause, a severance statement did not appear in the arbitration agreement itself.¹²³ Therefore, the district court reasoned, the arbitration agreement would not remain valid if the designation of the arbitration forum failed.¹²⁴ Fourth, the plaintiff was required to arbitrate and the Loan Machine had the option to arbitrate or pursue a bench trial, and as such the court found this factor to be neutral.¹²⁵ Lastly, the district court found that the NAF settlement agreement with the Minnesota Attorney General supported the conclusion that the Loan Machine selected the NAF as the arbitration forum because of its pro-business reputation.¹²⁶

Based on this five-factor analysis, the district court concluded that the designation of the NAF was integral to the agreement, and as such the district court could not apply Section 5 of the FAA.¹²⁷ The district court allowed the parties to proceed in litigation.

C. An Interlocutory Appeal to the Seventh Circuit

After the district court found the arbitration clause void, the Loan Machine took an interlocutory appeal to the Seventh Circuit.¹²⁸ On appeal, the Loan Machine argued that the designation of the NAF was an “ancillary logistical concern” and not an integral part of the agreement, and that a substitute arbitrator should be appointed under Section 5 of the FAA.¹²⁹ Green argued that the designation of the NAF

¹²¹ *Id.*

¹²² *Id.* at *5.

¹²³ *Id.* at *6.

¹²⁴ *Id.*

¹²⁵ *Id.* at *7.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Green v. U.S. Cash Advance Illinois, LLC*, 724 F.3d 787 (7th Cir. 2013).

¹²⁹ Brief of Appellee at *3, *Green v. U.S. Cash Advance Illinois*, 724 F.3d 787 (7th Cir.) (No. 13-1262).

was integral to the arbitration agreement; therefore, the arbitration agreement was void and unenforceable.¹³⁰ In the alternative, Green argued the court should strike the arbitration agreement as void because it was a scheme to defraud her, and that NAF's code of procedure allowed Green to proceed in court if the NAF was unavailable.¹³¹

1. Chief Judge Easterbook's Majority Opinion

The majority opinion, written by famously conservative¹³² Judge Easterbook, rejected the integral part test and instead stretched the language of the arbitration agreement to invoke Section 5 of the FAA to appoint a substitute arbitrator.¹³³

First, the majority rejected the integral part test used by the district court and other circuit courts.¹³⁴ The majority called the integral part test an "escape hatch" that came about in the "fashion of a rumor chain."¹³⁵ They traced the origin of this test to a 1990 Northern District of Illinois opinion in which Judge Moran, in dicta, stated that the choice of a particular forum was not "integral" to the parties bargain.¹³⁶ The majority stated the background of the FAA does not authorize such an approach, and because it was not an established rule

¹³⁰ Brief of Appellant at *11–15, *Green v. U.S. Cash Advance Illinois*, 724 F.3d 787 (7th Cir.) (No. 13-1262).

¹³¹ *Id.* at *18–25.

¹³² Mitu Gulati & Veronica Sanchez, *Giants in A World of Pygmies? Testing the Superstar Hypothesis with Judicial Opinions in Casebooks*, 87 IOWA L. REV. 1141, 1207 (2002).

¹³³ *Green*, 724 F.3d at 788–93.

¹³⁴ *Id.* at 792–93.

¹³⁵ *Id.*

¹³⁶ *Id.* at 792. The majority notes that Judge Moran cited to *Nat'l Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 328 (5th Cir. 1987) and asked whether a particular arbitration forum was an "essential part of the parties' bargain." See *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F. Supp. 1359, 1364 (N.D. Ill. 1990). The Fifth Circuit's essential part inquiry in *National Iranian Oil* was grounded in the Restatement (Second) of Contracts § 184, cmt. a, § 185(1) & cmt. B (1981). See *Nat'l Iranian Oil Co.*, 817 F.2d at 333–34.

of law, rejected it.¹³⁷ The majority noted that an integral part test would also hinder the FAA's promotion of arbitration as a fast and economical process because the only way to determine what is integral is through a fact intensive proceeding in front of a district court judge.¹³⁸

The court explored a brief tangent, offering that Section 2 of the FAA could be a possible foundation for the integral part test.¹³⁹ Section 2 states arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."¹⁴⁰ Thus, if a mistake such as naming an unavailable arbitration forum permits revocation of the contract under state law principles, the court, in theory, could declare the contract unenforceable.¹⁴¹ The majority's fleeting reflection abruptly ended when they stated that "[t]he identity of the arbitrator is not so important that the whole contract is vitiated" and continued its analysis on other grounds.¹⁴² The court gave no reason for this cursory conclusion.

Second, the majority attempted to analyze the plain language of the arbitration clause to find that Section 5 of the FAA must be implemented.¹⁴³ They focused on the phrase "shall be resolved by binding arbitration by one arbitrator *by and under the Code of Procedure* of the National Arbitration Forum."¹⁴⁴ Their overly simplistic and again unexplained logic is that this language only calls for the use of the NAF's Code of Procedure, and not for the NAF itself to conduct the arbitration.¹⁴⁵ The majority tried to support its reading by stating the reference to the NAF's Code of Procedure would otherwise be surplusage, and the only reason to refer to the code of

¹³⁷ *Green*, 724 F.3d at 792.

¹³⁸ *Id.* at 792.

¹³⁹ *Id.* at 791.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* Several states have already adopted the integral part test when it comes to arbitration agreements, including Illinois. *See* cases cited *supra* note 90.

¹⁴² *Green*, 724 F.3d at 791–92.

¹⁴³ *Id.* at 789.

¹⁴⁴ *Id.* (alteration in original).

¹⁴⁵ *Id.*

procedure is to create the possibility of using it outside the NAF.¹⁴⁶ This is the precise argument that was considered and rejected by the Second Circuit in *In re Salomon's Shareholders Litigation*.¹⁴⁷

Green argued that the majority's interpretation conflicted with the rules in NAF's Code of Procedure.¹⁴⁸ Rule 1.A, in particular, states "this Code shall be administered only by the National Arbitration Forum or by any entity or individual providing administrative services by agreement with the National Arbitration Forum."¹⁴⁹ The majority retaliated with two other rules of the NAF Code. First, Rule 48.C states, "[i]n the event a court of competent jurisdiction shall find any portion of this Code . . . to be in violation of the law or otherwise unenforceable, that portion shall not be effective."¹⁵⁰ Second, Rule 48.D states, "[i]f Parties are denied the opportunity to arbitrate a dispute, controversy or Claim before the Forum, the Parties may seek legal and other remedies in accord with applicable law."¹⁵¹ Evaluating Rule 1.A in light of Rule 48.C, the majority deduced that Rule 1.A was unenforceable and severable because the NAF had ceased conducting consumer arbitrations.¹⁵² Further, the court found that Section 5 of the FAA is other "applicable law" and properly used as such under Rule 48.D.¹⁵³

The majority supported its determination to appoint a substitute arbitrator with opinions from the Third and Eleventh Circuits. The

¹⁴⁶ *Id.* at 790. The court briefly addresses the potential copyright issue that may arise if another arbitrator uses the NAF's code of procedure. It concludes, and the dissent agrees, that copyright law does not include the right to control how the owner of a copy uses the information it contains. *Id.* at 794–95.

¹⁴⁷ *See supra* Section II(A).

¹⁴⁸ *Green*, 724 F.3d at 789.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 789–90.

¹⁵³ *Id.* at 790.

court did this even though those circuits used the integral part test, which the majority had already rejected.¹⁵⁴

Lastly, the majority likened the arbitration agreement at issue with an arbitration clause devoid of detail, which may state “any disputes arising out of this contract will be arbitrated.”¹⁵⁵ The majority concluded that Section 5 of the FAA would undoubtedly apply to that detail-free clause, and allow the court to supply particulars.¹⁵⁶ However, this argument stretches the imagination after comparing the majority’s imaginary ten-word clause to the extensive 251-word arbitration clause in Ms. Green’s loan agreement.¹⁵⁷

Perhaps understanding its ad hoc reasoning outlined above, the majority completed their opinion with a catch-all statement, that “one thing [is] clear: [the] parties selected private dispute resolution” and “Section 5 allows judges to supply details in order to make arbitration work.”¹⁵⁸ Therefore, the court vacated the district court’s decision and remanded for the district judge to appoint a substitute arbitrator.¹⁵⁹

The majority opinion was devoid of any analysis based in contract principles. However, the dissent considers that arbitration is based on the foundations of contract law, and emphasizes that the fact that the NAF was never available to the parties was a mistake which renders the contract voidable.

2. Judge Hamilton’s Dissent

Judge Hamilton began his dissent by reflecting on the majority’s reasoning as “an extraordinary effort to rescue the payday lender-defendant from its own folly, or perhaps its own fraud.”¹⁶⁰ Judge Hamilton correctly opined that arbitration is a matter of contract, and

¹⁵⁴ *Id.* 790–91 (These opinions are *Khan v. Dell, Inc.*, 669 F.3d 350 (3d Cir. 2012); *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224 (11th Cir. 2012); and *Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217 (11th Cir. 2000)).

¹⁵⁵ *Id.* at 792 (internal quotation marks omitted).

¹⁵⁶ *Id.*

¹⁵⁷ See *supra* note 88 for the complete language of the arbitration clause.

¹⁵⁸ *Green*, 724 F.3d at 793.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 793 (Hamilton, J., dissenting).

reminded his readers that the Supreme Court has reflected, “the FAA’s proarbitration policy does not operate without regard to the wishes of the contracting parties.”¹⁶¹

Judge Hamilton contextualized his dissent by stressing the unique facts of the case.¹⁶² He reminded the reader that the NAF was sued for consumer fraud, and as a result settled the case and announced it would no longer accept consumer cases for arbitration.¹⁶³ Furthermore, the payday loan agreement between Ms. Green and the Loan Machine was a contract of adhesion.¹⁶⁴ After engaging in the legal fiction that Ms. Green “read, understood, and embraced” the arbitration agreement, the dissent framed the issue as: what was the parties’ mutual intention for what would happen to their arbitration agreement if the NAF were not available to perform the arbitration?¹⁶⁵

Like the majority, the dissent analyzed the plain language of the arbitration agreement, focusing on the words “shall be resolved by binding arbitration by one arbitrator by and under the Code of Procedure of the National Arbitration Forum.”¹⁶⁶ Breaking down this clause into several elements, Judge Hamilton concluded that “there was no indication that anyone other than the [NAF] was satisfactory to the parties.”¹⁶⁷ Judge Hamilton also argued that the natural reading of the phrase suggested that the arbitration would be conducted by the NAF and according to the NAF rules.¹⁶⁸

Unlike the majority, which severed the rules of the NAF Code of Procedure that did not support its opinion, Judge Hamilton used the

¹⁶¹ *Id.* (citation omitted) (internal quotation marks omitted).

¹⁶² *Id.* at 794.

¹⁶³ *Id.* The Third Circuit in *Khan*, discussed in Section II(A), framed the integral part test as: did the parties unambiguously express their intent not to arbitrate their disputes in the event the named forum became unavailable? *Khan v. Dell Inc.*, 669 F.3d 350, 354 (3d Cir. 2012). Although the dissent rejects the “integral part” test, perhaps it is only in name as Justice Hamilton’s inquiry is merely another side of the question posed by *Khan*.

¹⁶⁴ *Green*, 724 F.3d at 794.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 794–95.

¹⁶⁷ *Id.* at 794.

¹⁶⁸ *Id.*

Rules in a common sense way to support the natural reading of the arbitration agreement.¹⁶⁹ The dissent found that applying “simple logic” to Rule 1.A meant the terms of the parties’ contract required the application of the NAF’s Code of Procedure.¹⁷⁰

Section 5 of the FAA allows appointment of a substitute arbitrator in three circumstances.¹⁷¹ First, when the agreement does not provide for a method in naming the arbitrator.¹⁷² This does not apply to the agreement between Ms. Green and the Loan Machine because a method was provided.¹⁷³ Second, if a method was provided but a party failed to avail itself of such a method.¹⁷⁴ Again, this does not apply to the facts at hand.¹⁷⁵ Third, if for any other reason there is a lapse in naming the arbitrator.¹⁷⁶ This residuary phrase did fit, thus, whether Section 5 applied depended on what was a “lapse.”¹⁷⁷ The dissent summarily found that there was no correctable “lapse” when the drafters of the agreement named an arbitration forum that was never available.¹⁷⁸

The dissent noted that no other circuit with which the majority agreed has adopted the same reasoning, or has gone through such lengths to “rescue a more deeply flawed” arbitration agreement.¹⁷⁹

The dissent relied on the logic from a Second Circuit case, *In re Salomon Inc. Shareholders’ Derivative Litigation*, to conclude that the arbitration agreement was void.¹⁸⁰ The dissent argued that *Salomon*

¹⁶⁹ *Id.* at 795–96.

¹⁷⁰ *Id.* at 795. Judge Hamilton engages in a brief aside whereby he agrees with the Majority opinion that copyright law does not prevent others from using the Code of procedure. *Id.* However, he does note that trademark law may prevent competitors from using the Code because the NAF branded itself by building a strongly pro-business reputation. *Id.* at 791–92.

¹⁷¹ *Id.* at 796.

¹⁷² *Id.* at 797.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 796.

¹⁸⁰ *Id.* at 797–98.

was on all fours with the instant matter.¹⁸¹ As discussed in Section II(A), under the arbitration agreement in *Salomon*, all disputes were to be conducted by the NYSE and in accordance with their rules.¹⁸² If the NYSE refused to arbitrate a particular dispute, there was no further promise to arbitrate in another forum.¹⁸³ Although neither the *Salomon* nor *Green* arbitration clauses used the word “exclusive” to designate the forum, that was the meaning inferred.¹⁸⁴

Additionally, Rule 48.D allowed the NAF to decline the use of arbitration for any dispute, after which the parties could seek legal and other remedies.¹⁸⁵ The dissent’s understanding of Rule 48.D was in concert with the opinion of the Chief Executive Officer of the NAF. In an interview with National Public Radio just after the July 2009 Minnesota settlement agreement, Chief Executive Officer Mike Kelly stated, “the logical conclusion of this decision is that the consumer cases will all now be brought in court.”¹⁸⁶

Although agreeing with the majority’s criticism of the non-statutory integral part test for deciding when to invoke the court’s Section 5 power, the dissent came to the right conclusion that the NAF was the exclusive forum, and because it was unavailable, the parties should be able to proceed in litigation without being blocked by Section 5 of the FAA.

D. Missed Connections in the Majority Opinion

The majority opinion did not address contract law principles when defining the issues in *Green*. It did not consider whether there was a

¹⁸¹ *Id.* at 798. The majority opinion distinguishes *Salomon* based on the language of the arbitration agreement (which used the word “exclusive”) and that *Salomon* arbitrator had discretion to send the dispute to court.

¹⁸² *Id.* at 797.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 798.

¹⁸⁶ See Wade Goodwyn, *Arbitration Firm Settles Minnesota Legal Battle*, NPR (July 23, 2009, 6:00 AM) <http://www.npr.org/templates/story/story.php?storyId=106913248> (discussing the NAF settlement).

meeting of the minds, even as a legal fiction, or whether there was a mistake in a term of the arbitration agreement.

While on its short digression tethered to contract law, the majority failed to contemplate that the integral part test is analogous to asking whether a term in a contract is material. Inquiring whether the named arbitration forum is integral to the agreement is similar to asking if the identity of the forum was a material term in the agreement. A contract requires mutual assent to all material terms.¹⁸⁷ A material term is a contractual provision, which concerns a significant issue such as subject matter, quantity, quality, duration or type of work to be done.¹⁸⁸

A mutual mistake of a material fact occurs when there has been a meeting of the minds, but both parties are mistaken about the same material fact within the contract. As the Restatement (Second) of Contracts states, where a mutual mistake was made, the contract may be voidable.¹⁸⁹

Simply put, there is a term in the arbitration agreement that was based on a mutual mistake of fact – the availability of the NAF as an arbitration forum. Thus, the fact situation in *Green* was different than the named forum becoming unavailable during the life of the contract, which was the case in *Ranzy*, *Brown* and *Khan*. However, what to do when the NAF was the designated forum in the *Green* arbitration agreement is appropriately addressed by the Third, Fifth and Eleventh circuits which have asked, whether the named arbitration forum was “integral” to the agreement, or, under the terms of contract law, whether the term was material.

¹⁸⁷ *Citadel Grp. Ltd. v. Washington Reg'l Med. Ctr.*, 692 F.3d 580, 589 (7th Cir. 2012).

¹⁸⁸ *Material Term Definition*, BLACK'S LAW DICTIONARY (9th ed. 2009), available at Westlaw BLACKS.

¹⁸⁹ Restatement (Second) of Contracts § 152 (1981).

IV. THE AFTERMATH

A. *Consequences of the Majority Opinion*

The arbitration law created by the Supreme Court and expanded by the Seventh Circuit allows businesses to prey on consumers. As one commentator has stated, “[a]s architecture, the arbitration law made by the Court is a shantytown. It fails to shelter those who most need shelter. And those it is intended to shelter are ill-housed.”¹⁹⁰ The majority’s opinion, which has been called “one of the most anti-consumer”¹⁹¹ decisions of the year, has helped create this shantytown, resulting in immediate repercussions on the parties involved as well as future litigants.

An immediate consequence of this opinion is that it denies Ms. Green her day in court and forecasts she will lose in arbitration. It has been established that the NAF is prejudicial to consumers. Thus requiring a substitute arbitrator to use NAF’s Code of Procedure may translate this prejudice into another forum. One major criticism of arbitration forums like the NAF is that their process inherently favors business over the individual.¹⁹² A display of this inequality can be found in California, where arbitration results are made public, and creditors won 99.8% of the time in NAF cases that were decided by arbitrators on the merits.¹⁹³

¹⁹⁰ Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401 (1996).

¹⁹¹ Paul Bland, *supra* note 72. Paul Bland argued the appeal in *Discover Bank*, discussed in Section II. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005).

¹⁹² See *Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations*, U.S. SENATE COMM. ON THE JUDICIARY (July 23, 2008), <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da13e81c7> (Elizabeth Harholet stating, “I concluded from this experience that the NAF *process* was systematically biased in favor of credit card companies and against debtors.”).

¹⁹³ *Id.*

There are also practical problems that result. The dissent considers the broad power the majority bestowed upon district courts.¹⁹⁴ It opens the door to altering other terms of the arbitration agreement. The designation of an arbitration forum “has wide-ranging substantive implications that may affect, inter alia, the arbitrator-selection process, the law, procedures, and rules that govern the arbitration, the enforcement of the arbitral award, and the cost of the arbitration.”¹⁹⁵

In addition, requiring the district court to appoint a substitute arbitrator in the instant matter is in contravention to the FAA’s purpose of eliminating the costly and time-consuming litigation process. The consumer must first bring a cause of action to the district court so that the court may invoke Section 5 of the FAA to appoint a different arbitrator. Although the majority rejected the integral part test as time consuming and inefficient, the result of their opinion is no better: it adds an extra step in resolving disputes, which results in additional time and costs.

Furthermore, appointing a substitute arbitrator in this situation is in direct opposition to the initial congressional support of the FAA. During the 1924 Joint Hearings, a supporter of the bill stated that the reason for the prior judicial hostility towards arbitration agreements was that stronger parties can prey on weaker ones, but that was no longer a concern at the time the FAA was passed. That worry, however, has arisen again due to the unequal bargaining power of a consumer and payday lender.

B. Proposed Solutions

Mounting arbitration reform efforts have slowly chipped away at the seemingly irrefutable presumption that courts have given to the validity and enforcement of arbitration agreements. The power of state governments to step in and protect consumers has been weakened as a result of *AT&T Mobility LLC v. Concepcion* and thus a state response is inappropriate. However, in the legislative arena, Congress has

¹⁹⁴ *Green v. U.S. Cash Advance Illinois, LLC*, 724 F.3d 787, 800 (7th Cir. 2013) (Hamilton, J., dissenting).

¹⁹⁵ *Id.* (citation omitted) (internal quotation marks omitted).

considered a variety of bills that would invalidate pre-dispute arbitration agreements in consumer contracts. And, in the regularity sphere, the newly created Consumer Financial Protection Bureau may be helpful.

Two recently proposed laws aimed at eliminating contract provisions hidden in fine print that force people to arbitrate rather than go to court and/or participate in class actions¹⁹⁶ are the Arbitration Fairness Act of 2013 and the Consumer Mobile Fairness Act of 2011. The Arbitration Fairness Act of 2013 declares that no pre-dispute arbitration agreement is valid or enforceable if it requires arbitration of an employment, consumer, anti-trust or civil rights dispute.¹⁹⁷ This proposed law has had several predecessors: the Consumer and Employee Arbitration Bill of Rights which gave way to the Arbitration Fairness Act of 2002, followed by the Arbitration Fairness Act of 2007 and then the Arbitration Fairness Act of 2009.¹⁹⁸ The text of the 2013

¹⁹⁶ Mike Sacks, *Arbitration Kickback: Supreme Court's Anti-Consumer Rulings Trigger Democratic Bills*, HUFFINGTON POST (Oct. 20, 2011, 4:09 PM), http://www.huffingtonpost.com/2011/10/20/arbitration-supreme-court-decisions-democratic-bills_n_1022207.html. Sacks notes that the three 2010-2011 Supreme Court decisions have divided the Supreme Court among familiar ideological lines like in abortion, affirmative action or campaign finance cases.

¹⁹⁷ Arbitration Fairness Act of 2013, H.R. 1844, 113th Cong. (2013). At the time of publication, this bill was referred to the Subcommittee on Regulatory Reform, Commercial And Antitrust Law. More information is available at <http://beta.congress.gov/bill/113th/house-bill/1844>. As the sponsor stated in the Bill's introduction:

Too many Americans are forced to give up their rights to have a trial by jury when it comes to these consumer agreements that they sign with these megabusineses. My bill would remedy this by prohibiting any predispute agreement that requires arbitration for claims involving employees, consumers, civil rights, and antitrust. We must protect our constitutional right to a fair trial by a jury of one's peers. I will continue to champion this bill until it is signed into law, and I urge my colleagues to support the Arbitration Fairness Act.

113 Cong. Rec. S1, 2448 (daily ed. May 7, 2013) (statement of Rep. Hank Johnson).

¹⁹⁸ Andrea Doneff, *Arbitration Clauses in Contracts of Adhesion Trap "Sophisticated Parties" Too*, 2010 J. DISP. RESOL. 235, 258 (2010). Although these predecessors were not passed, they did give way to the Franken Amendment to the May 19, 2010 Department of Defense appropriation bill. The Franken Amendment

Act is an amendment to the FAA. It begins with several congressional findings, including: the FAA was not intended to apply to consumer disputes; most consumers have little or no meaningful choice whether to submit their claims to arbitration; and mandatory arbitration undermines public law because there is inadequate transparency and judicial review of arbitrator's decisions.¹⁹⁹ The Act declares that no pre-dispute agreement to arbitrate shall be valid if it requires arbitration of a consumer dispute.²⁰⁰

Similarly, the Consumer Mobile Fairness Act of 2011, which was introduced by a supporter²⁰¹ of the Arbitration Fairness Act, sought to ban pre-dispute arbitration agreements for mobile phone service

“prohibits the use of funds made available by the legislation for any contract in excess of \$1 million unless the defense contractor agrees not to require arbitration of Title VII or tort claims arising out of sexual harassment or assault as a condition of employment.” *Id.*

¹⁹⁹ Arbitration Fairness Act of 2013, H.R. 1844, 113th Cong. (2013). At the time of publication, this bill was referred to the Subcommittee on Regulatory Reform, Commercial And Antitrust Law. More information is available at <http://beta.congress.gov/bill/113th/house-bill/1844>. Section 2 of the Act states,

(1) The Federal Arbitration Act (now enacted as chapter 1 of title 9 of the United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.

(2) A series of decisions by the Supreme Court of the United States have interpreted the Act so that it now extends to consumer disputes and employment disputes, contrary to the intent of Congress.

(3) Most consumers and employees have little or no meaningful choice whether to submit their claims to arbitration. Often, consumers and employees are not even aware that they have given up their rights.

(4) Mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators' decisions.

(5) Arbitration can be an acceptable alternative when consent to the arbitration is truly voluntary, and occurs after the dispute arises.

²⁰⁰ Arbitration Fairness Act of 2013, H.R. 1844, 113th Cong. (2013). At the time of publication, this bill was referred to the Subcommittee on Regulatory Reform, Commercial And Antitrust Law. More information is available at <http://beta.congress.gov/bill/113th/house-bill/1844>.

²⁰¹ Senator Richard Blumenthal introduced the bill on October 4, 2011. Consumer Mobile Fairness Act of 2011, S. 1652, 112th Congress (2011). More information is available at [http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.01652:.](http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.01652:)

contracts.²⁰² Thus, this was a direct result of the *Concepciones* opinion. This bill has had no movement since its introduction.²⁰³

The Consumer Financial Protection Bureau, on the other hand, is a regulatory office conducting a study of consumer arbitration in connection with financial products and services.²⁰⁴ This study is a requirement of Section 1028(a) of the Dodd-Frank Act. Under the Dodd-Frank Act, the Bureau is also authorized to “prohibit or impose conditions or limitations on arbitration agreements relating to a consumer financial product or service, if that prohibition, condition, or limitation is in the public interest and for the protection of consumers.”²⁰⁵ The Bureau has not yet released such a report.

CONCLUSION

The Seventh Circuit opinion in *Green v. US Cash Advance* supports the Supreme Court’s zealous enforcement of arbitration agreements and the “virtually irrebuttable federal preference for arbitration.”²⁰⁶ The majority’s ad hoc analysis, while rejecting the integral part test used by other circuit courts, begs the question – are arbitration agreements binding, valid and enforceable at all costs? Is the intent of the parties no longer a relevant question in contract interpretation? The dissent, although rejecting the integral part test, ultimately arrived at the correct conclusion through sound reasoning. Judge Hamilton used a common sense reading of the arbitration provision to determine the NAF was the exclusive but unavailable forum. As a result, and mindful that this was contract of adhesion, the right result would be to allow litigation.

²⁰² Janet Cooper Alexander, *To Skin A Cat: Qui Tam Actions As A State Legislative Response to Concepcion*, 46 U. MICH. J.L. REFORM 1203, 1212 (2013).

²⁰³ Consumer Mobile Fairness Act of 2011, S. 1652, 112th Congress (2011). More information is available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.01652:>.

²⁰⁴ CONSUMER FINANCIAL PROTECTION BUREAU, <http://www.consumerfinance.gov> (last visited Dec. 28, 2013).

²⁰⁵ 12 U.S.C. § 5518(b) (2012).

²⁰⁶ Alexander, *supra* note 202, at 1204.