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In recent years, it has become increasingly common for lenders to include arbitration clauses in their consumer financing agreements. While federal law strongly supports the enforceability of arbitration provisions, there are a number of grounds on which their enforceability can be, and has been, challenged. This article summarizes the state of the law on a number of major issues which have arisen in the attempt to use arbitration clauses in consumer financing agreements, focusing on Truth-in-Lending Act claims, including an analysis of the Supreme Court's recent decision in Green Tree Financial Corp. v. Randolph.

In recent years, many financial institutions have begun adding arbitration clauses to their consumer financial agreements, believing arbitration to be a less expensive and friendlier forum than state or federal courts. Among the most important advantages of mandatory arbitration is that it may prevent consumers from converting their individual complaints into class action lawsuits. Despite strong public policies favoring arbitration, however, courts sometimes decline to enforce such agreements, on a variety of grounds: that the arbitration clause is unconscionable, that it conflicts with the fundamental purposes of the Truth in Lending Act or other statutory protections, or that the arbitration procedures specified were too costly

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for the consumer or otherwise unfair.

Many had been looking forward to the Supreme Court's decision in *Green Tree Financial Corp. v. Randolph,*[1] a case concerning the enforceability of an arbitration clause contained in a mobile home financing agreement, as a potential source of guidance on these various issues. Although the decision, issued this past December, addressed only two fairly narrow issues, it nonetheless provides an opportune moment to review the state of the law in this increasingly important area.

FEDERAL ARBITRATION ACT

Historically, courts were highly resistant to arbitration agreements, believing that they improperly deprived the courts of their rightful jurisdiction.[2] To overcome this judicial hostility Congress passed the Federal Arbitration Act in 1925,[3] providing that arbitration clauses were to be treated as binding in the same manner as every other contractual agreement:

> A written provision in...a contract evidencing a transaction involving commerce to settle by arbitration a controversy arising our 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.[4]

The Supreme Court has repeatedly emphasized that the FAA evinces a strong federal policy favoring arbitration agreements and that courts must "rigorously enforce agreements to arbitrate."[5] Moreover, in interpreting an arbitration clause, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration."[6]

Despite the policies favoring arbitration, however, there are grounds on which an arbitration clause may be held unenforceable. As the FAA states, arbitration clauses are valid and enforceable "save upon such grounds as exist at law or in equity" to challenge any contract. Thus, an arbitration clause will

not be enforced where one party has not consented to the provision, or where the clause is unconscionable, or if arbitration poses an inherent conflict with other important public policies.

CONSENT TO ARBITRATION

A threshold inquiry in any attempt to compel arbitration of a claim is whether the other party has in fact consented to arbitration.[7] Courts have split on the evidence that will be adequate to prove consent, however. Some have applied a relatively lenient standard, holding that the consent required to bind a party to an arbitration clause is no greater than that required for any other provision. Thus, an arbitration clause included in the fine print of a contract may be enforceable, even if the consumer never noticed it.[8]

In *Marsh v. First USA Bank,*[9] for example, the court upheld the enforceability of an arbitration clause contained in an amendment to the credit card agreement that had been sent to the consumer as in insert to a monthly statement. Although the card holders alleged that they did not receive notice of the provision, the court held that the evidence showing that the insert had in all probability been mailed was sufficient to raise the presumption that the card holders had received the insert. Affidavits by the card holders alleging that they had not received the insert were insufficient to rebut this presumption absent evidence of irregularities or carelessness in the process of sending the inserts to card holders.[10] Thus, the card holders were presumed to have had notice of the arbitration provision, and it was enforceable against them despite their allegation that they had never seen or been aware of the provision.

Other courts, however, have held that an arbitration clause is not binding on a consumer who has not knowingly agreed to submit to arbitration.[11] Though these courts acknowledge that arbitration clauses may not be singled out for stricter scrutiny than other contract clauses.

UNCONSCIONABILITY

A court always has the option of refusing to enforce a provision that is "unconscionable." Although the law varies from state to state, most states

require a showing of both procedural unconscionability and substantial unconscionability to apply the doctrine.[12]

The procedural unconscionability issue may be relatively easy for plaintiffs to prevail on in many consumer cases. After all, the arbitration clauses at issue are "take it or leave it" propositions for the consumer, and so many courts will consider them to be terms of adhesion.[13]

The question of substantive unconscionability is more difficult, however. There are almost as many statements of the standard for substantive unconscionability as there are cases on the subject, but generally it requires a showing of grossly inequitable terms, of terms so one sided as to be oppressive.[14]

Consumers have sometimes argued that arbitration clauses were not enforceable because they lacked "mutuality"—that is, they did not impose the obligation to arbitrate equally on both sides.[15] Not surprisingly, courts eventually began to reject this claim, noting that, as in other areas of contract, mutuality in any particular term is not required so long as the contract as a whole is supported by consideration.[16] However, the concept of mutuality appears to be retaining at least some vitality under the guise of unconscionability. Courts have most often struck down arbitration clauses as unconscionable where the clause provided different rights for the business and the consumer. Thus, a provision that permitted an insurer to appeal any arbitration award in excess of a given amount, but that did not permit the consumer to appeal if the award was less, has been held unconscionable.[17] A number of decisions in this area are particularly troubling for lenders, who have good reasons for wanting to except certain actions (to enforce a note or foreclose on collateral, for example) from arbitration. Some courts have held that such provisions are unfair and unenforceable because they preserve access to the courts for the lender, but not for the borrower.[18] Other courts, not surprisingly, have rejected these challenges.[19]

ARBITRATION MUST BE FAIR

In practice, the unconscionability analysis often blends into a separate line of argument, that the arbitration provided for by the contract is itself biased or unfair. For an arbitration clause to be enforceable, the arbitration

process must offer an adequate forum for the resolution of the dispute and must not deprive the plaintiff of the ability to vindicate her rights. Thus, courts have been willing to strike down arbitration clauses where the arbitration forum was unduly costly, reasoning that extreme costs effectively deny relief to the complainant.[20] Courts have also denied arbitration where the arbitrator appeared to be biased[21] or the arbitration proceedings did not provide minimal procedural protections.[22]

In *Randolph v. Green Tree Financial Corp.,* Green Tree had financed the plaintiff's purchase of a mobile home. The plaintiff later filed a class action suit under TILA and the Equal Credit Opportunity Act, alleging that the defendant had failed to properly identify certain lender's insurance premiums as a financing cost. The trial court granted Green Tree's motion to compel arbitration, dismissed all other claims, and declined to certify the class. On appeal, the Eleventh Circuit refused to compel the arbitration of TILA claims, holding the arbitration provision unenforceble because it failed to address the payment of filing fees, the apportionment of the costs of arbitration or whether, if the plaintiff prevailed, fees and costs would exceed any award. The Court of Appeals reasoned that the contract "fail[ed] to provide the minimum guaranties required to ensure that [the plaintiff's] ability to vindicate her statutory rights [under the TILA would] not be undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration."[23]

Given the limited damages available to the plaintiff in many TILA suits, particularly if the avenue of a class action has been foreclosed, it is likely that even modest arbitration costs could exceed the possible recovery. In *Wood v. Cooper Chevrolet,* for example, the court refused to order arbitration of a TILA claim under the American Arbitration Association rules, which provide for arbitration costs to be equally shared unless the arbitrator orders otherwise, even though the defendant had agreed to front the arbitration costs. The court reasoned that if a defendant retains the right to seek reimbursement of the costs after the proceeding, this renders TILA claims "economically unfeasable," and "the purpose of the TILA will be eviscerated because potential defendants will have no incentive to abide by its provisions."[24]

If allowed to stand, the reasoning of the Eleventh Circuit in *Green Tree* and of *Cooper Chevrolet* would be troubling for lenders, to say the least.

Cooper Chevrolet does not definitively say that the defendant must surrender the right to seek reimbursement of fees by order of the arbitrator should the defendant prevail, but that is certainly a plausible reading of the case. Under this strict standard, the only way a defendant could enforce an arbitration clause is to agree to pay the fees of arbitration and to forego the right to recover those fees from the plaintiff. Moreover, the court does not address why a plaintiff is harmed by having to pay arbitration costs when the alternative is to file a law suit, a process likely to be as or more expensive.[25]

The Supreme Court's decision in *Green Tree* should provide lenders with at least some comfort on this score. The Court addressed two issues: first, whether the district court's order was a "final order" subject to immediate appeal; and second, whether the failure to deal with the costs of arbitration rendered the clause unenforceable.

On the first question, the Court held that the district court's order compelling arbitration and dismissing all claims was a final order amenable to immediate appeal.[26] This ruling can be seen as a victory for consumers and plaintiffs' attorneys. Under the Federal Arbitration Act, it is clear that an order *denying* arbitration is immediately appealable, so lenders seeking to enforce an arbitration provisions have always had the opportunity to seek review of an adverse ruling.[27]

The Court's holding that an order compelling arbitration and dismissing all other claims is an appealable final order now increases the likelihood that a consumer challenging the enforceability of an arbitration clause will be able to appeal an adverse ruling without first submitting to the arbitration.

On the question of costs, however, the Court's ruling favored arbitrability. Chief Justice Rehnquist, writing for the majority, held the arbitration clause enforceable despite Randolph's allegation that steep arbitration fees might render arbitration inaccessible to her.[28] High fees might be grounds to invalidate an arbitration clause, according to the Court, but the burden rests on the party resisting arbitration to show that it would be unduly expensive, an evidentiary burden that Randolph did not meet.[29] Any other ruling, according to Justice Rehnquist, would "undermine the liberal federal policy favoring arbitration agreements."[30]

As the Court noted, many arbitration services have consumer arbitration provisions or small claims provisions that keep consumer fees to a min-

imum in many cases.[31] The clause in *Green Tree* was silent as to the arbitration provider, but many clauses specify the organization or rules that will govern the arbitration proceeding. An arbitration clause specifying that arbitration will be according to the rules of an organization with reasonable consumer arbitration provisions should preclude a challenge like Randolph's. Indeed, in the wake of *Green Tree,* an arbitration clause that is silent as to the arbitration rules should be valid provided the defendant agree to arbitration in a forum with reasonable provisions governing consumer fees.

It is important to note, however, that the Court did not reject the underlying premise of the Circuit Court's opinion, which is that high arbitration costs may render an arbitration provision unenforceable. Indeed, the Court recognized this point, holding only that Randolph could not prevail by showing that the agreement was silent as to costs; rather, she had to be put on affirmative evidence as the costs to which she would be subjected. This clarification regarding the burden of proof is an important, but partial, victory for lenders.

It is worth noting two issues that the Supreme Court expressly declined to address. First, the Court stated that Randolph had not argued that the Congress intended for the Truth-in-Lending Act to preclude a waiver of judicial remedies, so the Court did not address that question.[32] On a closely related point, the Court also declined to consider whether the arbitration clause could be held unenforceable because arbitration would effectively deny the plaintiff the ability to proceed with her class action claims.[33] It is to this latter issue that we now turn.

ARBITRATION AND CLASS ACTION SUITS

One of the most important potential benefits of binding arbitration is that it may preclude a consumer from filing a class action lawsuit against the defendant. It is not necessarily impossible for an arbitrator to preside over a consolidated or class action proceeding B courts in both California and Pennsylvania have blessed the concept of class action arbitration proceedings.[34] However, federal courts have generally resisted the idea of class action arbitration absent explicit contractual language permitting it, arguing that "[f]or a federal court to read such a term into the parties' agreement would

disrupt the negotiated risk/benefit allocation and direct [the parties] to proceed with a different sort of arbitration."[35]

Moreover, class action arbitrations are precluded by the rules and procedures of many arbitration agencies. If the arbitration clause provides that arbitration will be handled by a particular organization, and that organization's rules do not permit class action arbitrations, then enforcement of the arbitration clause will prevent the consumer from enlarging the suit to encompass an entire class of plaintiffs.

However, if class actions and arbitration are inconsistent, that does not necessarily determine which should prevail in a conflict. In the last two years, courts have split over the enforceability of a mandatory arbitration clause that has the effect of precluding a class action lawsuit.[36] Many of these cases have been fought out in the context of technical Truth in Lending Act claims, where a single plaintiff would be limited to $1,000 in damages, but a class could obtain an award of up to $500,000.[37] Obviously, absent the class action mechanism, few consumers (or plaintiffs' attorneys) would bring suits alleging purely technical violations of TILA.

The argument advanced by plaintiffs in these cases is that class action lawsuits are the primary means of enforcement of the Truth in Lending Act, and that Congress created an explicit right under TILA for plaintiffs to bring class actions. The standard for such a claim, asserting a conflict between the FAA and another statutory right, was set out by the Supreme Court in *Shearson/American Express, Inc. v. McMahon:*

> The [FAA], standing alone, therefore mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the [FAA's] mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent will be deducible from [the statute's] text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes.[38]

Many of the TILA cases have hinged on the court's analysis of the role of class action litigation in TILA's the enforcement scheme. Those courts that have found that Congress expressly granted to plaintiffs the right to bring class action suits have generally concluded that arbitration cannot be ordered, as it deprives the plaintiff of an essential remedy. In *Lozada v. Dale Banker Oldsmobile,* for example, the federal district court declined to order arbitration of TILA claims, reasoning that by precluding class action litigation, "the remedial purposes of TILA are substantially defeated or impaired by arbitration clauses such as the clause in this case."[39]

The district court in *Johnson v. Tele-Cash, Inc.* accepted the same argument, only to be reversed by the Third Circuit, which reasoned that TILA does not create a substantive right to bring a class action and that the class action device is merely procedural.[40] Thus, arbitration may be compelled without depriving the plaintiff of a substantive right or remedy. Moreover, the court held that there is no inherent conflict between arbitration and TILA's statutory scheme. The court rejected the argument that arbitration, by precluding class action suits, would eliminate the incentive for plaintiffs to bring TILA action, noting that a class action does necessarily result in higher awards for the individual plaintiff and that attorneys' fees are available under TILA and can be awarded by an arbitrator.[41]

Regardless of the outcome of this debate, however, plaintiffs will seek ways to maintain class actions in many cases. If the availability of a class action is explicitly provided under another statute (such as state consumer protection laws, for example), then the plaintiff may prevail on the argument that those claims are not arbitrable.[42] Even such a finding, however, will not prevent the court from ordering that arbitrable claims be submitted to arbitration regardless of how intertwined the arbitrable and nonarbitrable claims may be.[43] The result may be an increase in dispute resolution costs, as related matters are handled in parallel proceedings (although the court proceeding will often be stayed pending resolution of the arbitration).[44]

CONCLUSION

There are many pitfalls to be avoided in the drafting of an arbitration clause, and it still unclear precisely what terms may be permitted, and which

may created problems down the road. Lenders must be particularly concerned about those cases which cast doubt on the enforceability of an arbitration clause that retains the lender's right to bring various actions, particular real or personal property foreclosure actions, in court. Provisions that saddle consumers with undue costs, or that forbid the award of attorney's fees to a prevailing consumer, may also be problematic. On the vital question, however, of whether arbitration clauses can shield a lender from consumer class action litigation, the answer appears to be trending towards "yes".

However, until the Supreme Court (or Congress) provides a definitive rule, lenders should consider it a weak shield at best. As long as some districts or circuits are willing to hold that TILA class action suits are not amenable to arbitration, this will be an element in the forum selection decision made by plaintiffs' attorneys, not a bar to class action proceedings.

NOTES

[1] *Green Tree Fin. Corp. v. Randolph,* __ U.S. __, 121 S.Ct. 513, __ L.Ed.2d. __ (2000).

[2] *See,* e.g., *Scherk v. AlbertoCulver Co.,* 417 U.S. 506, 510, n. 4, 94 S.Ct. 2449, 2453, n. 4, 41 L.Ed.2d 270 (1974).

[3] States have their own arbitration law, which may vary from federal law in important respects, but the FAA preempts state law if the underlying transaction involves interstate commerce. *See Alllied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) (holding that the FAA was intended to apply broadly, to the limits of Congress's commerce power); *Southland Corp. v. Keating,* 465 U.S. 1, 15-16, 104 S.Ct. 852, 860-61, 79 L.Ed.2d 1 (1984) (holding that the FAA pre-empts state law). Given the broad scope that has been given to interstate commerce, most consumer financing agreements probably fall within this category. If the parties desire, the arbitration clause itself may provide that it shall be interpreted under the FAA, increasing the chances that federal law will apply.

[4] 9 U.S.C. § 2.

[5] *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 221, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985).

[6] *Mastrobouno v. Shearson Lehman Hutton, Inc., et al.,* 514 U.S. 52, 62, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995), quoting *Volt Information Sciences, Inc. v. Board of*

Trustees, 489 U.S. 468, 476, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).

[7] *See,* e.g., *AT&T Tech., Inc. v. Communications Workers of America,* 475 U.S. 643, 648-49, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986) ("arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration."); *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943,115 S.Ct. 1920, 1924, 131 L.Ed.2d 985 (1995) ("arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration").

[8] *See,* e.g., *Hill v. Gateway 2000, Inc.,* 105 F.3d 1147 (7th Cir.), *cert. denied,* 522 U.S. 808, 118 S.Ct. 47, 139 L.Ed.2d 13 (1997); *Harris v. Green Tree Fin. Corp.,*183 F.3d 173 (3d Cir. 1999).

[9] *Marsh v. First USA Bank,* 103 F.Supp.2d 909 (N.D. Tex. 2000).

[10] 103 F.Supp.2d at 919.

[11] *See,* e.g., *Badie v. Bank of America,* 79 Cal. Rptr.2d 273 (Ct. App. 1998) (credit card arbitration amendment), *rev. denied,* 1999 Cal. LEXIS 1198 (1999); *Hooters of America, Inc. v. Phillips,* 39 F. Supp.2d 582 (D.S.C. 1998) (employment law claims), aff'd, 173 F.3d 933 (4th Cir. 1999).

[12] Even if a transaction involves interstate commerce, and the arbitration clause is therefore to be handled under the FAA, the validity of consent to the arbitration clause is tested under state law according to the same principles that the state uses to test the validity of any other contract provision. *See,* e.g., *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996). The construction and effect of the arbitration clause, however, is a matter of federal law. *See Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 25 n.32, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). If the parties consented to the arbitration provision, then questions going to the validity of the entire contract, such as allegations of fraud, may themselves be subject to determination by the arbitrator. *See Prima Paint Corp v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967).

[13] *See,* e.g., *Williams v. Aetna Fin. Co.,* 83 Ohio St.3d 464, 700 N.E.2d 859 (1998) (reasoning that arbitration agreement in an adhesion contract "necessarily engenders more reservations than an arbitration clause in a different setting, such as in a collective bargaining agreement, a commercial contract between two businesses, or a brokerage agreement"), *cert. denied,* 526 U.S. 1051, 119 S.Ct. 1357, 143 L.Ed.2d 518 (1999); *Iwen v. U.S. W. Direct,* 977 P.2d 989 (Mont. 1999) ("[w]hen determining whether a contract is one of adhesion, we focus on the nature of the contracting process, rather than the parties' relative sizes, resources, or bargaining power. Hence, we have held that contracts of adhesion arise when a standardized form of agreement, usually drafted by the party having superior bargaining power, is pre-

sented to a party, whose choice is either to accept or reject the contract without the opportunity to negotiate its terms." [internal quotes and cites omitted]).

[14] *See,* e.g., *Marsh,* 103 F.Supp.2d at 920 (stating that a claim of unconscionability must show that the contract was "so one sided as to be oppressive");

[15] *See,* e.g., *Hull v. Norcom, Inc.,* 750 F.2d 1547 (11th Cir. 1985) (holding arbitration clause unenforceable for lack of mutuality where one side reserved option to bring majority of its claims to court).

[16] *See,* e.g., *Dorsey v. H.C.P. Sales, Inc.,* 46 F.Supp.2d 804 (N.D. Ill. 1999); *Goodwin v. Ford Motor Credit Co.,* 970 F. Supp. 1007 (M.D. Ala. 1997).

[17] *Worldwide Ins. Group v. Klopp,* 603 A.2d 788 (Del. 1992) .

[18] *See,* e.g., *Iwen v. U.S. W. Direct,* 977 P.2d 989 (Mont. 1999) (invalidating arbitration provision that permitted one party access to court, while limited the other to binding arbitration); *Arnold v. United Companies Lending Corp.* 511 S.E.2d 854 (W. Va. 1998) (holding "that where an arbitration agreement entered into as part of a consumer loan transaction contains a substantial waiver of the borrower's rights, including access to the courts, while preserving the lender's right to a judicial forum, the agreement is unconscionable and, therefore, void and unenforceable as a matter of law.").

[19] *See,* e.g., *Harris v. Green Tree Fin. Corp.,* 183 F.3d 173 (3d Cir. 1999); *Doctor's Associates, Inc. v. Distajo,* 66 F.3d 438 (2d Cir. 1995); *Wilson Elec. Contractors, Inc. v. Minnotte Contracting Corp.,* 878 F.2d 167 (6th Cir. 1989); *Goodwin v. Ford Motor Credit Co.,* 970 F.Supp. 1007 (M.D. Ala. 1997); *Wilson v. Par Builders II, Inc.,* 879 F.Supp. 1187 (M.D. Dla. 1995).

[20] *See,* e.g., *Shankle v. B-G Maintenance Mgmt. of Colorado,* 163 F.3d 1230 (10th Cir. 1999) (arbitration provision on fee splitting unduly limited employee's ability to invoke arbitration and rendered clause unenforceable); *Cole v. Burns Intern'l Sec. Services, Inc.,* 105 F.3d 1465 (D.C. Cir. 1997) (holding that employer cannot require employee to pay any of the costs of arbitration); *Wood v. Cooper Chevrolet, Inc.,* 102 F.Supp.2d 1345 (N.D. Ala. 2000) (discussed infra); *Baron v. Best Buy Co., Inc.,* 75 F.Supp.2d 1368 (S.D.Fla. 1999) (holding that an arbitration provision that requires each party to bear its own legal fees, thereby eliminating the statutory right to seek legal fees after prevailing under a TILA claim, renders arbitration clause unconscionable); but *see Dorsey v. HCP Sales, Inc.,* 46 F.Supp.2d 804, 808 (N.D.Ill. 1999) (arbitration of TILA and state laws claims compelled despite allegedly excessive costs); *Rhode v. E & T Investments, Inc.,* 6 F.Supp.2d 1322, 1328 (M.D. Ala. 1998) (failure to limit costs does not render arbitration clause unconscionable under Alabama law).

[21] *See,* e.g., *Hooters of America, Inc. v. Phillips,* 173 F.3d 933 (4th Cir. 1999); *Cheng-Canindin v. Renaissance Hotel Associates,* 57 Cal. Rptr. 2d 867 (Ct. App. 1996) *rev.*

denied, 1997 Cal. LEXIS 817; *Hudson v. Chicago Teachers Union,* 743 F.2d 1187 (7th Cir. 1984), aff'd, 475 U.S. 292 (1986).

[22] *See,* e.g., *Rembert v. Ryan's Family Steakhouses, Inc.,* 235 Mich.App. 118, 596 N.W.2d 208 (Mich. App. 1999) (to be fair and enforceable, an arbitration agreement must provide for (1) clear notice; (2) right to counsel; (3) reasonable discovery; (4) a fair hearing; and (5) a neutral arbitrator.)

[23] 178 F.3d at 1158.

[24] 102 F.Supp.2d at 1352.

[25] One potential explanation would be that arbitration costs exceed the potential recovery because the arbitration is not a class action, but that in a judicial forum, the plaintiff would be able to bring a class action and so have adequate incentive to cover the costs. Yet in the Cooper Chevrolet case, it was far from clear that a class action was in the offing, so it does not appear that this was the basis for the court's reasoning.

[26] 121 S.Ct. at 519-21. The issue here was whether an order compelling arbitration and dismissing all claims is a final order in an "embedded proceeding" B that is, a suit including both a request for arbitration and other claims for relief. Some Circuit Courts had held that an order compelling arbitration is final in an "independent proceeding" B where no relief beyond the arbitration order is sought B but not in embedded proceedings, even if all other claims are dismissed. *See,* e.g., *Seacoast Motors of Salisbury, Inc., v. Chrysler Corp.* 143 F.3d 626 (1st Cir. 1998); *Altman Nursing, Inc. v. Clay Capital Corp.,* 84 F.3d 769 (5th Cir. 1996); *Gammaro v. Thorp Consumer Discount Co.,* 15 F.3d 93 (8th Cir. 1994).

[27] *See* 9 U.S.C. A. section 16(a)(1)(C): "An appeal may be taken from B (1) an order...(C) denying an application under section 206 of this title to compel arbitration..."

[28] 121 S.Ct. at 522.

[29] *Id.*

[30] *Id.* [internal quotes and citations omitted].

[31] *Id.* at 524. For example, the American Arbitration Association handles consumer cases valued under $10,000 under its Arbitration Rules for the Resolution of ConsumerRelated Disputes, which require no fee from the consumer and limit the consumer's share of the arbitrator's fees to $125. In *Dobbins v. Hawk's Enterprises,* 198 F.3d 715 (8th Cir. 1999), the district court had permitted a TILA suit to continue despite an arbitration clause, on grounds that plaintiff could not afford the AAA's fee determination of $23,000. The Circuit Court reversed, holding that the plaintiff had not fully explored the AAA's fee waiver procedures, and that the fee determination was based on the plaintiff's damage claim of $50 million and would be much less if a "more realistic" damage figure were used. Thus, the court remand-

ed with orders that the plaintiff be ordered to reduce its demand for damages and seek diminution or waiver of the AAA fee.

[32] *Id.* at 522.

[33] The Supreme Court expressly declined to address the issue in *Green Tree v. Randolph,* holding that it did not have to rule on an issue not addressed by the Court of Appeals below. 121 S.Ct. at 523 n.7. As noted in the dissent, however, the issue remains alive on remand. *Id.* at 525 n.4.

[34] *See Blue Cross of Cal. v. Superior Court,* 67 Cal.App.4th 42, 78 Cal.Rptr.2d 779 (1998); *Dickler v. Shearson Lehman, Inc.* 408 Pa. Super. 286, 596 A.2d 860 (1991).

[35] *Champ v. Siegel Trading Co.,* 55 F.3d 269, 275 (7th Cir. 1995) (internal quotes and citation omitted). *See also Randolph v. Green Tree Fin. Corp.,* 991 F.Supp. 1410 (M.D. Ala. 1997) (class will not be certified where arbitration clause does not provide for class-wide arbitration); *Gammaro v. Thorp Consumer Discount Co.,* 828 F. Supp. 673 (D. Minn. 1993), app. dism'd., 15 F.3d 93 (8th Cir. 1994) (refusing to certify class for arbitration of TILA claims); *McCarthy v. Providential Corp.,* 1994 WL 387852 (N.D.Cal. 1994), app. dism'd, 122 F.3d 1242 (9th Cir. 1997); *but see New England Energy, Inc. v. Keystone Shipping Co.,* 855 F.2d 1, 5 (1st Cir.1988), *cert. denied,* 489 U.S. 1077, 109 S.Ct. 1527, 103 L.Ed.2d 832 (1989) (holding that district court may order consolidated arbitration, even though not expressly authorized by parties' agreement, if underlying state law specifically authorizes consolidated arbitration).

[36] Cases refusing to enforce mandatory arbitration that would preclude a class action proceeding include *Lozada v. Dale Baker Oldsmobile, Inc.,* 91 F.Supp.2d 1087 (W.D. Mich. 2000) (TILA claims); *In re Knepp,* 229 B.R. 821 (Bankr. N.D.Ala. 1999); *Powertel, Inc. v. Bexley,* 743 So.2d 570 (Fla. Dist. Ct. App. 1999) (breach of contract and deceptive trade practices claims). Cases enforcing arbitration clauses despite the effect of precluding a class action include *Johnson v. West Suburban Bank,* 225 F.3d 366 (3d Cir. 2000) (TILA and Electronic Funds Transfer Act claims); *Marsh v. First USA Bank, N.A.,* 103 F.Supp.2d 909 (N.D.Tex. 2000) (TILA claims); *Thompson v. Illinois Title Loans, Inc.,* 2000 WL 45493 (N.D. Ill. 2000); and *Sagal v. First USA Bank, N.A.,* 69 F.Supp.2d 627 (D.Del. 1999) (TILA claims).

[37] 15 U.S.C. § 1640(a)(2)(B).

[38] *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220, 226-27, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987) (internal citations and quotation marks omitted).

[39] 91 F.Supp.2d at 1105.

[40] *See,* e.g., *Johnson v. Tele-Cash, Inc.,* 82 F. Supp.2d 264 (D. Del. 1999), rev'd sub nom, *Johnson v. West Suburban Bank,* 225 F.3d 366 (3d Cir. 2000) ("Though the statute clearly contemplates class actions, there are no provisions within the law that create a right to bring them, or evince an intent by Congress that claims initiated as

class actions be exempt from binding arbitration clauses. The "right" to proceed to a class action, insofar as the TILA is concerned, is a procedural one that arises from the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 23."); *see also Wood v. Cooper Chevrolet, Inc.*, 102 F.Supp.2d 1345 (N.D. Ala. 2000) (rejecting the claim that Congress intended to preclude arbitration of TILA claims, but finding the arbitration provision unenforceable on other grounds); *Gammaro v. Thorp Consumer Discount Co.*, 828 F. Supp. 673 (D. Minn. 1993) (holding that a court cannot order class arbitration of TILA claims where the arbitration clause makes no provision for such proceedings, and the arbitration agreement therefore requires dismissal of plaintiff's motion to certify the class), app. dism'd, 15 F.3d 93 (8th Cir. 1994); *Marsh v. First USA Bank, N.A.*, 103 F.Supp.2d 909, 922-24 (N.D. Tex. 2000) (holding that TILA does not create a right to bring a class action proceeding and arbitration is therefore not inconsistent with TILA's statutory scheme); *Thompson v. Illinois Title Loans, Inc.*, 2000 WL 45493 (N.D. Ill. 2000) (same).

41 225 F.3d at 374-75.

[42] *See*, e.g., *Lozada*, 91 F.Supp.2d at 1105 (noting that the right to class recovery is expressly granted by the Michigan Consumer Protection Act).

[43] *See*, e.g., *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) (holding that "that the Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.")

[44] *Cf C. Itoh & Co. (America) v. Jordan International Co.*, 552 F.2d 1228, 1231 (7th Cir.1977) ("[c]onsiderations of judicial economy bear no relation to 'the making and performance of an agreement to arbitrate,' and to permit a district court to deny a stay pending arbitration based on such discretionary considerations would, in our opinion, frustrate the strong federal policy in favor of arbitration which is expressed in the Federal Arbitration Act as interpreted by the Supreme Court").