Consumer Arbitration in the United States Supreme Court

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GREENTREE FINANCIAL CORPORATION V. RANDOLPH

I. INTRODUCTION

The subject of this article is consumer arbitration pursuant to a pre-dispute contract provision, with a primary focus on the important recent decision of the United States Supreme Court in *Green Tree Financial Corporation v. Randolph*, 121 S. Ct. 513 (2000). The *Randolph* case raised, but did not satisfactorily resolve, two important consumer arbitration issues: (1) the payment of fees and costs associated with arbitration; and (2) the availability of class action proceedings when a consumer contract calls for arbitration. Ironically, the primary reason that the Supreme Court granted certiorari in *Randolph* was to resolve a narrow procedural issue related to the timing of appeals from intelocutory district court orders sending disputes to arbitration. Before addressing the three issues presented by the *Randolph* case, some background discussion about consumer arbitration law and practice is necessary.

A decade ago consumer arbitration hardly existed. Today it is found everywhere. Contracts between consumers and purveyors of goods and services now commonly require that disputes "arising from or relating to" (the standard broad form arbitration language) a transaction must be resolved through binding arbitration. Examples of such provisions abound. Purchasers of Gateway computers are required to arbitrate any disputes and to do so in Chicago, under South Dakota law. The Bank of America and many other depository institutions mandate arbitration for disputes with their account customers. Have you ever read the rules of contests sponsored by McDonald's? — they specify the use of

arbitration to settle all disputes related to the contest. Disputes between broker-dealers and their customers are always subject to arbitration under a detailed set of rules adopted by the National Association of Securities Dealers (NASD) and the stock exchanges. Agreements between patients and health care organizations (both payors and providers) increasingly include arbitration provisions.

Arbitration traditionally has been used to resolve commercial disputes — often between firms in the same trade or industry. Although the institution of commercial arbitration arose in the context of transactions between merchants — parties with expertise and real bargaining power—the Federal Arbitration Act (FAA), 9 U.S.C. ss 1-16, is not so limited. The FAA governs any written arbitration agreement in a maritime transaction or a contract evidencing a transaction involving commerce. Such an agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." This statutory approach is well established: the FAA was enacted in 1925.

During the 1990s, mandatory pre-dispute arbitration terms became a common feature of contracts between merchants and their customers. The trend toward increasing use of form arbitration provisions in consumer adhesion contracts has not yet run its course. (A parallel development has taken place in contracts between employers and individual employees — i.e., outside the collective bargaining context.) The dramatic increase in the use of mandatory pre-dispute arbitration in consumer contracts naturally has produced considerable litigation. It is, after all, the American way to settle many important issues through adjudication, rather than through legislation or administrative action.

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A large number of consumer arbitration disputes have come before the state and federal courts in recent years. [The FAA does not create a federal cause of action so many cases that arise under the FAA can be heard only in state courts — federal jurisdiction must be based on diversity of citizenship plus a minimum amount in controversy.] The state courts have frequently applied their state arbitration instead of the FAA, even when it was clear that the underlying contract evidenced a transaction involving interstate commerce, and even though the Supreme Court has expressly ruled that in enacting the FAA Congress utilized the full reach of its power under the Commerce Clause. *Allied-Bruce Terminex Companies, Inc. v. Dobson*, 513 U.S. 265 (1995) (hereinafter, Dobson). Furthermore, the intention of the parties with regard to an interstate transaction is immaterial. Instead, the proper test is commerce in fact: the FAA governs transactions that in fact involve interstate commerce, even if the parties did not contemplate an interstate commerce connection. [The provisions of the Uniform Arbitration Act (UAA) — adopted in most states, including Texas — generally parallel those in the FAA, so application of the wrong body of law usually does not affect the outcome of consumer arbitration cases.]

Dobson was the first consumer arbitration case decided by the Supreme Court, and the Court applied the general language of the FAA to consumer situations without hesitation. As for consumer protection, the states are welcome to pursue this goal under general contract principles. What states may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The FAA makes any such state policy unlawful, because otherwise a state would place arbitration clauses on an unequal footing, directly contrary to the Act's language and Congress's intent.

Dobson and other Supreme Court decisions clearly established the presumptive adequacy of arbitration to adjudicate even statutory consumer (and employment) claims – even if the basis for arbitration was a contract of adhesion. Furthermore, as Justice Ginsburg noted in her dissenting opinion in *Randolph*, the party resisting arbitration must also bear "the burden of establishing the inadequacy of the arbitral forum for adjudication of claims of a particular genre." In practice, this burden is almost impossible to satisfy.

The state of the law relating to consumer arbitration before *Randolph* was described in the following way by Professor Sternlight, a vociferous opponent of enforcing mandatory arbitration terms in contracts of adhesion:

> Despite the arguments of this author and many others, in case after case most federal and state courts have found that arbitration may be compelled based on clauses contained in small writing and inconspicuous location in form contracts, in flyers contained in mailings with bills or other statements, in packaging that arrives with a computer, and in medical consent or HMO forms or contracts. Companies in most jurisdictions can feel comfortable that if they use a form contract to impose arbitration on their customers or patients, a court will not refuse to enforce the clause on that ground alone.

Jean Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 William & Mary L. Rev. 1, 55-57 (2000).

With direct attacks on consumer arbitration foreclosed, an indirect (anyway, different) approach is required if consumer arbitration is to be limited. The two most likely subjects of such an attack through the courts are the potentially large fees for arbitration and bringing cases as class actions. Both approaches were tried in Larketta Randolph's law suit against Green Tree Financial.

II. LARKETTA RANDOLPH'S LAW SUIT

The consumer transaction that gave rise to the *Randolph* case decision is a common one. Larketta

Randolph purchased a mobile home from a builder/ owner. (Often there is also a dealer in the picture.) Buyers of mobile homes typically are persons of moderate means. Green Tree provided financing for the sale transaction. As with other real estate transactions, the sale and financing closing consisted of a single signing ceremony that involved a blizzard of forms and other paperwork.

The transaction documents specify that the buyer is paying a number of charges, which are itemized in the forms. All of these charged are mandatory, and none are subject to negotiation. One of these charges was for a Vendor's Single Interest Insurance, which protects the seller against the costs associated with repossession in the event of default by the buyer.

Randolph brought suit asserting that the cost of the (mandatory) insurance was a finance charge, thus triggering Truth in Lending Act (TILA) disclosure requirements, and that the failure to disclose the cost of insurance as a finance charge violated TILA. In addition, Randolph alleged the arbitration provision violated the Equal Credit Opportunity Act (ECOA) by conditioning the extension of credit on the foregoing of right to judicial remedies under TILA. Randolph brought the suit as a class action, on behalf of similarly situated persons.

The contract between Green Tree and Randolph specified that all disputes between the parties would be settled by arbitration — by one arbitrator, under the FAA. (The contract was silent about the costs associated with arbitration, and the cost burdens that might be borne by Randolph.) Based on the arbitration provision in the parties' contract, Green Tree asked the court to issue an order directing that Ms. Randolph's dispute be decided by arbitration. With regard to whether the district court retained jurisdiction over the mater, as federal trial courts commonly do in arbitration actions, Green Tree was agnostic: it wanted arbitration and did not care whether the district court dismissed the action or retained jurisdiction. It shortly became apparent that failing to request that the district court to retain jurisdiction, which request certainly would have been granted, was a serious tactical error. The order issued by the district court directed the following:

a. the dispute was ordered to arbitration;
b. class action certification was denied; and
c. the law suit was dismissed.

Randolph thereupon sought reconsideration on the ground that she lacked the resources to arbitrate, and would have to forego her claims. This request was denied, setting the stage for an appeal.

The case then moved to the 11th circuit court of appeals. The first question for the court was whether a circuit court of appeals (CCA) has jurisdiction to hear an appeal from an interlocutory arbitration order by a federal district court. The court answered this procedural question in the affirmative, which allowed it to proceed to consider the arbitration fees issue.

Randolph argued that the absence of a restriction on the fees associated with arbitration, because the arbitration term was silent on this topic, meant that the arbitration agreement failed to provide minimum assurance that she could vindicate her statutory TILA rights in arbitration. The objective of this argument was not simply to obtain clarification about the fees associated with arbitration, or even a limitation thereon, but to provide an avenue for Randolph to pursue her claim in court – in a class action, before a jury – rather than through arbitration. The 11th circuit accepted the arbitration costs argument, and therefore sent the case back to the district court for a trial.

This disposition of the appeal made it unnecessary for the 11th circuit to address Randolph's class action theory – that the specific TILA provision for class actions was inconsistent with requiring arbitration of her claim. (Of course, Randolph still would have to obtain class certification of her case, not a simple matter.)

The Supreme Court agreed to review the *Randolph* decision mainly on the procedural issue, but also on the arbitration fees question. Supreme Court cases commonly generate a number of amicus briefs, and *Randolph* was no exception. Among those filing in support of *Randolph* were Public Citizen, Illinois Consumer Justice Council, National Consumer Law Center, Consumers Union, and Trial Lawyers for Public Justice. In support of Green Tree were American Bankers Association, American Financial Services Association, Manufactured Housing Institute, and U.S. Chamber of Commerce. Two arbitration organizations, American Arbitration Association and National Arbitration Forum, filed in support of arbitration generally but not on behalf of either party.

These briefs uniformly focused on the arbitration fees issues, and several also addressed the use of class actions in TILA claims – including whether an arbitration class action was a possibility. Strikingly, the amicus briefs said almost nothing about the procedural issue, even those filed by providers of arbitration services.

The Supreme Court unanimously affirmed the 11th circuit decision on the procedural issue, but reversed the arbitration fees determination by a 5-4 vote. The class action was not discussed. With the suspense of how the case comes out eliminated, we can turn to an examination of the three arbitration issues raised by the *Randolph* case, including but not limited to the views of the United States Supreme Court.

III. THE PROCEDURAL ISSUE

The first question addressed by the Supreme Court was whether the FAA allowed an immediate appeal to a CCA of a district court order to arbitrate, or whether the arbitration must proceed — with court resolution of any remaining issues awaiting an appeal after the arbitration is complete. Several CCA panels had addressed this question, with inconsistent results.

The availability of interlocutory appeals is a common issue in the judicial context. The dominant approach, subject to some exceptions, is that once jurisdiction is established further objections must await the completion of the trial. After all, the alternative is interminable delays due to multiple interlocutory appeals. The efficiency benefits of this

approach are easily demonstrated. To the extent one is concerned about justice and fairness to weaker/poorer parties, they benefit from quick and efficient final decisions.

To appreciate the procedural issue faced by the courts, it is necessary to consult the text of section 16 of the FAA. Section 16(a)(1) allows a party to appeal an order denying an arbitration order. At the same time, section 16(b)(2) specifies that an appeal may not be taken from an interlocutory order directing arbitration to proceed. These two provisions, with the intentional absence of symmetry, evidence the clear tilt by Congress in favor of arbitration.

If this was the only relevant statutory language, the CCA clearly lacked authority to hear Randolph's appeal. Of course, the matter is not so simple, else it would not have received the attention of the Supreme Court. There is another relevant provision, section 16(a)(3), which states than an appeal may be taken from a final decision with respect to an arbitration proceeding arising under the FAA.

The Supreme Court could have read the "final decision" provision as stating a general truism that did not override the specific provisions about interlocutory appeals; it did not do so. Instead, the Court read the language literally as allowing an appeal in this case because the trial court had rendered a final decision when it dismissed the underlying action

The Supreme Court relied on the well-established meaning of final decision, which outside the arbitration context, ends the litigation, and that is clearly what happened here. Since the district court in *Randolph* disposed of all the issues before it and dismissed the case, this is as final as an action could be. The Supreme Court declined to read "final action" as referring only to post-arbitration proceedings rather than undermining the central distinction drawn by Congress between pro-arbitration and anti-arbitration district court decisions. The Court also rejected the distinction drawn by the majority of CCAs between "embedded" and "indpendent" proceedings.

Previously, the majority of CCAs responded to district court arbitration orders by distinguishing between "embedded" proceedings, where the request for arbitration was accompanied by other claims for relief, and "independent" proceedings, where arbitration is the only issue before the court. The *Randolph* case, with its TILA, arbitration fees and class action claims, clearly was an "embedded" proceeding. The purpose behind the distinction between independent and embedded proceedings, a distinction certainly not suggested let alone required by the FAA, was to focus on the entirety of the issues presented to a court rather than just the question of arbitrability.

The Supreme Court rejected the embedded v. independent approach — and did so unanimously — in favor of a bright line rule that final is final is final. The Court noted that there was no evidence that Congress intended to use "final" in a sense different from the standard litigation approach, a sort of plain meaning rule approach.

The difficulty with the Court's initially appealing approach is revealed by considering a case identical to *Randolph*, except that the district court retained jurisdiction over the case. The district court unquestionably had the power to retain jurisdiction — and doing so for purposes of subsequent vacatur or confirmation of the ensuing arbitration award is the usual approach. The district court almost certainly would have retained jurisdiction had Green Tree — the prevailing party, after all — asked the court to do so.

Surely, no rational system would have the right of immediate appeal turn on the discretionary action of the district court. Yet this is precisely the result the Supreme Court not merely countenanced but required:

> Had the district court entered a stay instead of dismissal in this case, that order would not be appealable. The question whether the District Court should have taken that course is not before us and we do not address it.

This admission was not even deemed to be sufficiently important to be placed in the text of the opinion, instead being relegated to a footnote. The Supreme Court was apparently supremely untroubled by its approach, and the confusion it is likely to cause for the district courts and CCAs around the country.

The unwillingness of the Court to discuss the impact of its approach does not require that we also put our heads in the sand. Since the Supreme Court says that form not substance determines what happens under section 16, it would seem that standards are needed to determine when U.S. district courts should retain jurisdiction over disputes sent to arbitration, and when they should relinquish such jurisdiction by dismissing the underlying dispute. A number of possibilities can be suggested:

1. Exercise of discretion by each district court judge;
2. Uniform rule by each district court judge;
   a. District court always retains jurisdiction;
   b. District court never retains jurisdiction.
3. Local federal district court rules (district uniformity);
4. Rule decreed by federal courts of appeals (circuit uniformity);
5. Honor request of prevailing party in district court;
6. Some form of random choice; or
7. Federal legislation amending section 16 of the FAA.

Of course, the Supreme Court could provide a definitive answer to the quandary (I almost said quagmire) it has created, but at best such a response will be years down the road.

Perhaps the best answer is for the district court to retain jurisdiction in all instances, or at the behest of the prevailing party. A failure of counsel for the prevailing party when a district court orders arbitration probably would constitute malpractice. In addition to promoting the goals of certainty and consistency, this approach has the further virtue of judicial economy, by returning any action to vacate or confirm the subsequent arbitration award to the one court that already has some familiarity with the matter.

IV. THE ARBITRATION FEES ISSUE

The Supreme Court next turned to the costs associated with arbitration. Here the justices split 5-4, with Chief Justice Rehnquist writing for the majority and Justice Ginsberg writing for the dissent. The contract between Green Tree and Randolph was silent about the allocation of costs associated with arbitration. (As a matter of strategy, one might think that a contract that imposed substantial costs on the consumer, particularly up-front costs, would have made a better vehicle for presenting the consumer theory.)

The majority opinion began by stating several propositions that are clearly established by recent Supreme Court arbitration decisions:

1. Arbitration agreements are enforced save upon such grounds as exist at law or in equity for the revocation of any contract.
2. Generalized attacks on arbitration as a method of resolving disputes have been emphatically rejected.
3. Statutory claims are arbitrable unless Congress has evinced an intention to preclude the waiver of a judicial forum when adopting the statute. Such an intention normally would appear with some specificity in the text of the statute or the legislative history.

Each of these approaches favors the use of arbitration.

Randolph sought to avoid arbitration by alleging that she faced the risk of being required to bear prohibitive costs to participate in arbitration, thereby effectively depriving her of statutory TILA rights. Randolph asserted that she could not pay the costs of this arbitration. However the majority responded that assertions of prohibitively high costs did not provide a basis for concluding that Randolph would in fact incur such costs if the parties proceeded to arbitration.

The Court did recognize that high forum costs could preclude a claimant from effectively vindicating her statutory rights. However, the record in *Randolph* does not show that this will occur — hardly surprising, since the only issue considered by the trial court was whether the dispute was arbitrable. Silence regarding costs was deemed insufficient and too speculative a basis to render invalid an otherwise enforceable arbitration agreement.

The Court could have stopped there, but it went on to place the burden of proof on the party that claims arbitration to be prohibitively expensive. That is, the consumer bears the burden of proving the likelihood of incurring such costs. The risk that a consumer might be "saddled with prohibitive costs is too speculative to justify" invalidating the arbitration agreement. The Court justified this conclusion in the following manner:

1. To do otherwise would undermine the liberal federal policy favoring arbitration agreements.
2. Prior decisions establish that the party seeking to avoid arbitration bears the burden of demonstrating that Congress intended to bar arbitration of a statutory claim.
3. "Similarly, where a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs."

The Court left for another day the matter of how detailed the showing of likely prohibitive expense must be to make out a prima facie case. In practice such a showing is likely to be all but impossible to make.

The four dissenting Justices would not have decided on behalf of Randolph on the arbitration fees issue, but instead wanted to remand the matter for closer consideration of the accessibility of the arbitral forum's "to Randolph." Thus the Supreme Court was unanimous in rejecting the decision of the 11th circuit. If on remand the district court found the arbitration fees to be reasonable, the arbitration could proceed. Therefore, the dissent reasoned, "the Court has reached out prematurely to resolve the matter in the lender's favor."

Justice Ginsburg's dissenting opinion envisioned a different and broader approach to arbitration fees from that taken by the majority, based on general principle of contract law. Where a term of a contract is missing, a court should "supply a term that comports with community standards of fairness and policy." Restatement (Second) of Contracts, sec. 204, comment d. Where there is a standard practice on arbitration fees and charges, that practice should be used. The schedule of charges used by leading providers of arbitration services is an obvious source of relevant data. The AAA's Consumer Arbitration Rules provide that consumers in small claims arbitration will pay a maximum of $125 for a (telephone) arbitration proceeding — with no up-front filing fee. According to the court, the maximum charge imposed by the National Arbitration Forum for similar services is $175.

THE CONTRACT BETWEEN GREEN TREE AND RANDOLPH WAS SILENT ABOUT THE ALLOCATION OF COSTS ASSOCIATED WITH ARBITRATION.

The dissent also noted the doctrine of *contra proferentum*, which directs that courts, in choosing among the reasonable interpretations of a contract term, interpret the term against the drafting party. Restatement (Second) of Contracts, sec. 206. The principle is not in doubt, but the arbitration provision in *Randolph* was not ambiguous, just incomplete. Presumably, the point is to boost the approach of favoring the weaker rather than the stronger party, in contrast to the opposite approach taken by the Supreme Court majority.

The burden of producing evidence about the reasonableness of arbitration fees should be placed on the merchant rather than the consumer. Green Tree (like other merchants) has superior information

about and experience with arbitration fees compared to Randolph (and other consumers).

In response to the prior Supreme Court decisions holding that statutory disputes are arbitrable, absent a demonstrated contrary intent by Congress (with the burden of proof being on the party that opposes arbitration), the dissent responded that these cases only determined the "adequacy" of the arbitral forum. They did not consider, let alone decide, whether the arbitral forum is "accessible" to the party resisting arbitration. The dissent quoted Judge Harry Edwards often cited statement that:

> The Supreme Court has endorsed a system of arbitration in which employees [and consumers] are not required to pay for the arbitrator assigned to hear their statutory claims. There is no reason to think that the Court would have approved arbitration in the absence of this arrangement. Indeed, we are unaware of any situation in American Jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her or his case."

Cole v. Burns International Security Services, 105 F.3d 1465, 1483 (D.C. Cir. 1997). After *Randolph*, there is every reason to conclude that the Supreme Court does not accept, and perhaps has flatly rejected, Judge Edwards's view of the Court's arbitration jurisprudence.

Even in courts that have recognized that large arbitration fees can be unconscionable, the consequence of *Randolph* is that the policy does not kick in until after an arbitration proceeding — when it is too late. For example, in *Lyster v. Ryan's Family Steak Houses, Inc.*, 2001 WL 102392 (8th Cir.), the claimant's excessive fees argument was dismissed because Lyster had failed to establish undue harshness in the arbitration agreement. Silence about the costs of arbitration, as in *Randolph*, provided an insufficient basis to challenge arbitration. The 8th circuit cited *Randolph* for the proposition that "the possibility of such party incurring prohibitive costs is too speculative to invalidate an arbitration agreement." The *Lyster* court also cited the Supreme Court's statement that a party seeking to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive bears the burden of showing the likelihood of incurring such costs. For a similar result in a banking case, see *Bank One v. Coates*, 125 F.Supp.2d 819 (2001).

The *Randolph* dissent closed by noting that the majority recognizes that excessive fees can make arbitration effectively unavailable to consumers, but requires them to wait until after the arbitration proceeding to raise the fees issue. Thus, the true issue is merely one of the timing of judicial consideration of *Randolph*'s excessive fees assertions: "the issue reduces to when, not whether, she can be spared from payment of excessive costs." However, post-arbitration relief often comes too late, and in some instances it will not be available because the impecunious consumer was never able to bring the action.

Arbitration agreements may call for cost shifting, which is excellent for the prevailing consumer, but a calamity for a consumer that loses in arbitration. This approach is a serious problem for consumers, because the possibility of having to bear the costs of both parties to the arbitration acts in terroram to prevent the bringing of claims. In the absence of fee shifting, the consumer may bear arbitration costs that render even a successful claim an exercise in futility. This trap means the only effective recourse for consumers with modest sized claims often is through a class action, and we now turn to that option.

V. THE CLASS ACTION ISSUE

The Supreme Court, like the 11th Circuit, declined to address the argument that the absence of class action relief in arbitration made the agreement unenforceable. The Court noted that *Randolph* did not contend that TILA evinces an intention to preclude a waiver of judicial remedies, so it seems clear what the Court would do regarding class actions. After all, arbitration provisions waive the constitutional right to a trial by jury, so it must be true, a fortiori, that a party to a contract can waive class action rights — assuming that such rights exist, itself a dubious proposition. The Court has previously placed the burden of proof on the party opposing arbitration to show that Congress expressly intended to prohibit arbitration. Absent reasonably specific statutory language or legislative history, such an effort is certain to fail. Since the legislative history of TILA is silent on the topic of arbitration, the default position is arbitration, even when a claim is brought as a class action.

Since *Randolph* was argued to the Supreme Court, two CCAs have decided cases presenting the class action and arbitration question, and both ordered arbitration. Both cases raised TILA claims. *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000) was the first court of appeals decision to consider the arbitrability of TILA class action claims, and to reject the anti-arbitration arguments. The 3d Circuit opinion authored by Chief Justice Becker, a widely respected jurist, concluded that while TILA specifically provided for 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 by a class action ... is a procedural one that arises from the Federal Rules of Civil Procedure. See Rule 23.

Johnson was decided before *Randolph*, a fact noted by the dissent in *Randolph*, but not by the majority opinion.

The second case, *Bowen v. First Family Financial Services*, 233 F.3d 1331 (11th Cir. 2000) (hereinafter, Bowen), merits closer attention for two reasons: (1) because the underlying legal claims parallel those raised in *Randolph*; and (2) because Judge Carnes, the author of the Bowen opinion, also wrote the *Randolph* decision that was reversed by the Supreme Court. The plaintiffs in Bowen were borrowers who brought a class action against their

lender based on TILA and ECOA. The loan agreement contained an arbitration provision that governed the claims raised by the suit.

The district court ruled, as a matter of law, that the arbitration provision did not violate the ECOA, and that the arbitration agreement was enforceable under the FAA. Bowen alleged that acceptance of the arbitration provision was not negotiable, and a condition of receiving a loan. This assertion was assumed to be true for summary judgment purposes, and it surely was also true in fact.

Bowen's legal theory was that requiring prospective borrowers to sign an arbitration agreement violated the ECOA by conditioning the extension of credit on the customer agreeing to forego the right to judicial remedies under TILA. The ECOA makes it unlawful for any creditor to discriminate against any applicant with respect to any aspect of a credit transaction because the applicant has exercised a right under TILA. The bridge between the two statutes is that TILA gives consumers a non-waivable right to litigate claims arising thereunder. The court of appeals, however, rejected the proposition that such a right exists. TILA creates substantive rights and provides judicial remedies, but it does not follow that Congress therefore created a non-waivable right to judicial redress. And, absent a right to exercise, there is no claim under the ECOA.

The demise of the ECOA claim left Bowen with the impossible task of demonstrating that Congress intended in TILA to provide a non-waivable right to a judicial forum. Such an intention will not be lightly inferred; instead, it must be deducible from the text or legislative history of the statute. Further, the Supreme Court has made it clear that the burden of proof rests with the party seeking to show that Congress intended to prohibit the enforcement of arbitration agreements.

Arbitration does not change substantive rights, but only resolves them in a different forum. As the Supreme Court has put the matter, in an oft-quoted statement:

> By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits their resolution to an arbitral rather than a judicial forum. ... And so long as the prospective litigant effectively may vindicate its cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

Even though individual disputes arising under TILA are subject to arbitration, Bowen pointed to the class action remedy provided under TILA, and that class relief can be granted only by courts and not by arbitrators.

Providing for class actions, however, is not the same thing as an absolute right to make use of that tool. Although the legislative history of TILA shows that Congress thought class actions were an important means of achieving compliance with TILA, it is silent about arbitration. Since Congress did not think about the use of arbitration for TILA claims, it could not have intended to confer upon individuals a non-waivable right to pursue a class action.

The private attorneys general approach did not assist plaintiffs either. After all, the Supreme Court has enforced arbitration agreements for claims arising under the Securities Acts of 1933 and 1934, antitrust statutes, and the Racketeer Influenced Corrupt Organizations Act (civil RICO). And, this very approach was rejected by the Supreme Court in its Gilmer decision, in the context of the Age Discrimination in Employment Act (ADEA).

In summary, it appears clear that TILA and other statutory claims are arbitrable, notwithstanding that this approach eliminates the possibility of pursuing a claim as a class action. Can there be class actions in arbitration, or is the very idea of class arbitration an arbitration class action is an oxymoron? If the suggestion is that class arbitration would proceed without judicial participation and oversight, then it is indeed a contradiction in terms. If, however, the judiciary is open to class arbitration, then it can happen. If the process becomes a reality, arbitration organizations will be glad to provide the necessary administrative services – for an appropriate fee.

IN SUMMARY, IT APPEARS CLEAR THAT TILA AND OTHER STATUTORY CLAIMS ARE ARBITRABLE, NOTWITHSTANDING THAT THIS APPROACH ELIMINATES THE POSSIBILITY OF PURSUING A CLAIM AS A CLASS ACTION.

Even it class arbitration is possible, such a process will necessarily involve continuing interaction between judges and arbitrators, with neither clearly in charge of the process. The proceeding will, at best, be legalistic, complicated, and time-consuming — thereby undermining the major benefits commonly attributed to arbitration.

There are a few known instances of arbitral class actions and all are from state courts in California and Pennsylvania. An arbitral class action would require substantial judicial participation and oversights with regard to such issues as:

— Certification of the class;
— Choice of the arbitrators;
— Notice to class members; and
— Protecting the interests of absent class members.

In addition, the informality that is a central feature of arbitration – no record of the proceedings, proceedings that ignore the rules of evidence and civil procedure – would make meaningful judicial review difficult if not impossible. For much more on this topic (126 pages to be precise), see Professor Sternlight's article at 42 WILLIAM & MARY L. REV. 1 (2000). She concludes that class proceedings are best brought in a judicial forum, but she does prefer arbitral class actions to no class actions at all.

VI. CONCLUSION

The arbitration jurisprudence emanating from the United States Supreme Court over the last decade, culminating with the *Randolph* decision, is uniformly receptive to the arbitration of consumer (and most other) disputes. Conversely, the Court has turned away consumer challenges to the enforcement of pre-dispute arbitration provisions in contracts of adhesion. In these circumstances, arbitration provisions in consumer contracts are sure to become ever more common.

Is there any hope for opponents of mandatory consumer arbitration? To the extent that a judicial forum is sought, the chances of success are unlikely. The occasional state court will hold an arbitration provision to be unconscionable, or use offer and acceptance principles to rule that the consumer never agreed (in writing) to arbitration. In extreme circumstances, the excessive arbitration costs argument will prevail. However, opposition to distant forum provisions for arbitration is unlikely to succeed, because the Supreme Court has enforced such contract provisions in the context of consumer litigation. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (Washington state resident who was passenger on cruise departing from and returning to Los Angeles required to bring suit in Florida).

Another avenue for changing law is through the enactment of new legislation. At the state level, the likelihood of success in enacting a statute that limited consumer arbitration would vary dramatically from state to state. The options for enforceable state consumer arbitration legislation are quite limited, because the FAA preempts inconsistent state law.

Meaningful consumer arbitration legislation would have to come from Congress, by altering the FAA. Proposals to that effect carry titles like the Consumer Fairness Act of 1999 (H.R. 2259) and the Consumer Credit Fair Dispute Resolution Act of 2000 (S. 192). There are also a number of academic proposals. Writing a draft statute, and even finding a Congressional sponsor is easy; mustering the political will to enact such a statute is quite another matter. The FAA is a short and general statute that has remained essentially unchanged since its initial enactment in 1925. The likelihood that Congress will adopt legislation that limits the scope of consumer arbitration is extremely modest.

The expanding use of arbitration in the consumer and other contexts is one of the leading developments on the American legal scene in recent years. The *Randolph* case is only the latest in a series of arbitration decisions by the United State Supreme Court that have been, without exception, favorable to arbitration.

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