After a bench trial, the district court awarded Talley $10,000 in compensatory damages, plus $20,000 in attorneys' fees.
HOLDING: Affirmed.
REASONING: Although the Department of Agriculture asserted sovereign immunity, insisting that the federal government was not intended to be included within the definition of "persons" within the Fair Credit Reporting Act, the court agreed with Talley that the Department was liable for its violations.
The Department insisted that the Fair Credit Reporting Act did not supply the authorization that would allow for government liability under the Act. The court rejected this notion, reasoning that the law was clear enough as to its intentions and waived sovereign immunity for damages under the Act.

In the alternative, the court noted that the Tucker Act, general legislation waiving sovereign immunity and allowing for money damages for any civil action or claim against the United States based on any act of Congress, supplied the necessary authorization. The court held that only money damages, and no other form of relief, is allowed under the Tucker Act and does not include or allow punitive damages unless specifically authorized by the Tucker Act. The court concluded that the Tucker Act only requires the fair inference that the statute requires the United States to pay for the harm it inflicts. Accordingly, the Department was liable to Talley for its violations of the Act.

ARBITRATION

COMPUTER MAKER CAN'T ENFORCE ARBITRATION CLAUSE

Omstead v. Dell, Inc., 594 F.3d 1081 (9th Cir. 2010)

FACTS: Plaintiffs Omstead, Malloy, and Smith ("Plaintiffs") brought a class action suit in California against Dell, Inc. ("Dell") for the selling of defective notebook computers. At the time of purchase, Plaintiffs were required to accept a written agreement titled "U.S. Terms and Conditions of Sale" ("Agreement"). The Agreement contained a binding arbitration clause and disallowed any Dell customers from consolidating their grievances against Dell into a class action lawsuit. The district court granted Dell's motion to stay proceedings and compel individual arbitration pursuant to the Agreement. Plaintiffs appealed, arguing that they cannot arbitrate their claims individually because it was not economically feasible, and because the arbitration forum of Texas, mandated by the Agreement, was biased against California consumers.

Under the Federal Arbitration Act, a written arbitration provision is valid and enforceable unless an applicable contract defense, such as unconscionability, renders it unenforceable.

HOLDING: Reversed.
REASONING: The court found that the district court erred when it granted Dell's motion to stay proceedings and compel arbitration. Under the Federal Arbitration Act, a written arbitration provision is valid and enforceable unless an applicable contract defense, such as unconscionability, renders it unenforceable. Whether an arbitration provision is unconscionable is governed by state contract law.

The Agreement contains Texas as the forum which governs under a choice-of-law provision. Plaintiffs argued that the choice-of-law provision is unenforceable, and therefore California law applies. The court agreed with Plaintiffs that California law applied to the Agreement rather than Texas law. The court found that California had a materially greater interest in applying its law because the class consisted solely of California residents asserting violations of California consumer protection laws for goods shipped to the state.

After determining that California law applied to the Agreement, the court found the arbitration provision unconscionable because of the class action waiver, and therefore unenforceable. Under California law, class action waivers are unconscionable if (1) the waiver is found in a consumer contract of adhesion (2) the approximate purchase price was a small enough sum to prevent consumers from pursuing their individual claims, and (3) there are allegations that the party with the superior bargaining powers has carried out a scheme to deliberately cheat a large number of consumers out of individually small sums of money. Because Dell's class action waiver and its defective product meet California's test for unconscionability, the court held the arbitration clause unenforceable.

ARBITRATION CLAUSE DESIGNATING NAF AS ARBITRATOR IS NOT ENFORCEABLE

Ranzy v. Extra Cash of Tex., Inc., 2010 U. S. Dist. LEXIS 22551 (S. D. Tex. Mar. 11, 2010)

FACTS: Plaintiff Cheryl Ranzy took out a payday loan from defendant Extra Cash of Texas, Inc. ("Extra Cash"). Ranzy signed a promissory note ("Note") and a Credit Services Organization Agreement ("Arbitration Agreement") for the loan, in which she agreed to arbitrate all claims against Extra Cash under the procedures of the National Arbitration Forum ("NAF"). When unable to repay her loan, Extra Cash began employing aggressive means of seeking repayment. Ranzy sued Extra Cash, alleging various violations of the Federal Debt Collection Practices Act, among others, and requested an injunction against defendants, prevent-

ing them from engaging in any further illegal lending and collection activities. Based upon the arbitration clause included in both the Note and Arbitration Agreement, Extra Cash asked the court to compel arbitration and to stay the action pending the outcome of the arbitration. Ranzy contended, however, that the Arbitration Agreement is not enforceable because performance is now impossible since NAF no longer arbitrates consumer matters.

HOLDING: Motion to compel arbitration denied.

REASONING: The court noted that since Ranzy signed both the Note and the Arbitration Agreement, under the Federal Arbitration Act ("FAA"), there was a prima facie valid agreement to arbitrate. Ranzy, however, contended that the arbitration provision was invalid because of impossibility of performance. Ranzy argued that because the arbitration provision specifically named NAF as the sole arbitrator, and because NAF no longer handles consumer arbitrations, the arbitration provision is impossible to perform. Extra Cash contended, however, that the fact NAF is no longer an available forum in which to arbitrate Ranzy's claims does not make the Arbitration Agreement invalid. Instead, § 5 of the FAA provides a mechanism for the court to appoint an arbitrator in this situation.

The court stated that it need not determine whether §5 is applicable when a chosen arbitrator becomes unavailable because NAF was clearly an integral part of the arbitration provision. The court held that the plain language of the arbitration provision in both the Note and the Arbitration Agreement explicitly states that all disputes "shall be resolved ... by and under the Code of Procedure of the [NAF]." Additionally, "all claims *shall be filed* at any NAF office," or on the NAF web site. The court held that this was mandatory, not permissive, language and evinced a specific intent of the parties to arbitrate before NAF. In light of the plain meaning of the arbitration provision, the court held that it could not appoint another arbitrator, and denied Extra Cash's motion to compel arbitration.

ARBITRATION BAN ON CLASS ACTION IS VALID

Wince v. Easterbrooke Cellular Corp., 681 F. Supp. 2d 688 (N.D. W. Va. 2010)

FACTS: Plaintiff Wince became an AT&T Mobility ("ATTM"). ATTM customer in March 2008, when he activated two cellular phone lines with ATTM. During that transaction, Wince accepted the terms of ATTM's wireless service agreement by signing his name on an electronic signature-capture device. This service agreement expressly incorporated the "binding arbitration clause" of "AT&T's current Terms and Conditions Booklet...." More than a year later, on April 15, 2009, Wince purchased an iPhone for use on a new telephone line in his account with ATTM. Again, during that transaction, Wince accepted the then-current terms of ATTM's service agreement by signing his name on an electronic signature-capture device. Similarly, this service agreement also expressly incorporated the "binding arbitration clause" in "AT&T's current Terms of Service Booklet...." Plaintiff Loftis became an ATTM customer on June 17, 2008, after she purchased a wireless phone and activated it for use with ATTM's GoPhone service, i.e., ATTM's prepaid or "pay as you go" wireless service. When she obtained GoPhone service at an ATTM retail store, Loftis would have received a then-current GoPhone User Guide, which included ATTM's then-current GoPhone Terms of Service. Those GoPhone service terms include an arbitration clause. Plaintiff White at no time became an ATTM customer. As a result, Plaintiff White's claims are not the subject of this motion or this Court's ruling thereupon. Accordingly, this case involves only the ATTM arbitration agreements of Plaintiffs Wince and Loftis. Plaintiffs brought a putative class action containing breach of contract and West Virginia Consumer Credit and Protection Act ("WVCCPA") claims against, *inter alia,* several AT&T entities, including ATTM. The defendants filed a motion to compel arbitration.

HOLDING: Granted.

REASONING: Plaintiffs, Wince and Loftis disputed the enforceability of the arbitration provision under general principles of contract law. Specifically, Plaintiffs challenged the arbitration clause as unconscionable, a generally applicable contract defense. Plaintiffs cited as the "most troubling unconscionability" the provision prohibiting the option to bring a class action. The court held that under West Virginia law, unconscionability requires both "gross inadequacy in bargaining power," and "terms unreasonably favorable to the stronger party." The court noted that a litigant who complains that he was forced to enter into a fair agreement will find no relief on grounds of unconscionability. For this reason, the court focused on the second element of unconscionability, i.e., whether the class action restriction is an unfair term.

Plaintiffs cited as the "most troubling unconscionability" the provision prohibiting the option to bring a class action.

Plaintiffs argued that the class action restriction was an unfair term. In so arguing, they relied upon *State ex rel. Dunlap v. Berger,* 211 W.Va. 549, 567 S.E.2d 265 (2002). *Dunlap* involved an alleged deceptive and illegal loan packing scheme. Dunlap was illegally charged $1.48 for credit life insurance and $6.96 for property insurance. Dunlap instituted an action alleging state statutory and common-law claims. He sought certification of a class of similarly situated aggrieved former employees. The circuit court compelled arbitration pursuant to the parties' form agreement executed at the time of Dunlap's purchase. The Supreme Court of Appeals of West Virginia reversed the circuit court, finding the provision prohibiting class action relief "clearly unconscionable." The *Dunlap* court emphasized that Dunlap's case involved "precisely the sort of smalldollar/high volume (alleged) illegality that class action claims and remedies are effective at addressing." *Id.* at 562, 567 S.E.2d 265.

The court was not persuaded by Plaintiff's argument. The court stated that most important for the *Dunlap* court was wheth-

er a particular arbitration provision represented the type of "exculpatory provision ... that if applied would prohibit or substantially limit a person from enforcing and vindicating [his] rights...." *See Dunlap,* 567 S.E.2d at 275. Next, in finding that the class action restriction was such a provision, the *Dunlap* court emphasized the "small dollar" nature of the plaintiff's claim to illustrate that putative class members would have no incentive to bring a small claim on an individual basis. *See Id.* at 562, 567 S.E.2d 265.

The court held that in the case before it, however, each putative class member has incentive to bring his or her claim, regardless of whether classified as "high" or "small" dollar. The court reasoned that this incentive was provided by several provisions of the ATTM arbitration clause. First, the court found that with limited exceptions, ATTM has committed to pay all of the costs of arbitration whether a customer wins or loses. Second, the court found that if a customer prevails in arbitration, he or she may obtain the same remedies-including compensatory, punitive, and statutory damages; injunctive and declaratory relief; and attorneys' fees-that are available in court. Finally, the court found that if the arbitrator awards the customer an amount greater than ATTM's last settlement offer, ATTM must pay him $10,000.00, plus double attorneys' fees. In light of these remaining incentives, the court held that the class action restriction couldn't be deemed unfair. Accordingly, the plaintiffs' defense of unconscionability based upon that provision failed pursuant to West Virginia law, and especially a narrow reading of *Dunlap.*

Moreover, the court held that even if a broader reading of *Dunlap* was applicable, the FAA preempts *Dunlap* to the extent it would invalidate plaintiffs' waiver of the right to pursue class action relief. The court reasoned that a rule imposing heightened requirements on "agreements not to go to court" necessarily imposes heightened requirements on "agreements to go to arbitration." Because the FAA requires arbitration agreements to be on the same legal footing as "any contract," such a rule would be preempted by the FAA as it applied to prevent the enforcement of otherwise valid agreements to arbitrate. Thus, the court found plaintiffs' argument that the arbitration clause was unconscionable without merit.

CAR DEALER CAN'T ENFORCE ARBITRATION CLAUSE

Partain v. Upstate Auto. Group, 689 S.E.2d 602 (S.C. 2010)

FACTS: Petitioner Amos Keith Partain ("Petitioner") brought an action against Upstate Automotive Group ("Upstate Auto") alleging that Upstate Auto used "bait and switch" sales tactics in violation of South Carolina's Unfair Trade Practices Act. Petitioner came to the conclusion that the truck he purchased from Upstate Auto was not in fact the same vehicle he had negotiated to buy from Upstate Auto. Upstate Auto moved to dismiss Petitioner's claim based on an arbitration agreement at the time of purchase. The circuit court denied Upstate Auto's motion. Upstate Auto appealed and the Court of Appeals reversed. Petitioner filed petition for writ of certiorari.

HOLDING: Reversed.

REASONING: The determination of whether a claim is subject to arbitration is subject to de novo review. Petitioner raised the following issues on certiorari: (1) whether Petitioner's claim fell within the scope of the arbitration agreement; and (2) whether the Court of Appeals erred in holding that Upstate Auto's conduct does not constitute "illegal and outrageous acts" unforeseeable to a reasonable consumer in the context of normal business dealings.

Even if Petitioner's claim was encompassed by the terms of the arbitration clause, the clause did not apply because of illegal and fraudulent acts unforeseeable to a reasonable consumer.

The court noted that the policy of the United States and South Carolina is to favor arbitration of disputes. A claim falls within the scope of an arbitration clause if it is encompassed by the language of the clause or if a "significant relationship" exists between the claim and the contract. The court found that Petitioner's claim was encompassed by the language of the arbitration clause, and, therefore, did not reach the "significant relationship" question.

However, the court held that even if Petitioner's claim was encompassed by the terms of the arbitration clause, the clause did not apply because of illegal and fraudulent acts unforeseeable to a reasonable consumer in the context of normal business dealings. Relying on precedent and policy, the court refused to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer. The court reasoned that arbitrations are matters of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. As Petitioner could not have foreseen that Upstate Auto would substitute another vehicle in lieu of the truck the Petitioner had agreed to purchase, the Petitioner, in signing the arbitration clause, cannot be held to have agreed to arbitration of claims arising from the allegedly fraudulent conduct. Consequently, Petitioner could not have intended to submit the dispute to arbitration, so the court of appeals' decision was reversed.

OPT OUT PROVISION SAVES ARBITRATION CLASS ACTION WAIVER

Clerk v. ACE Cash Exp., Inc., 2010 U. S. Dist. LEXIS 7978 (E.D. Pa. Jan. 29, 2010)

FACTS: Plaintiff Yukon Clerk commenced an action to certify a putative class action complaint against ACE Cash Express, Inc ("ACE"). The complaint alleged that each member of the class had received a payday loan from ACE at an interest rate higher than the maximum permitted by state law. ACE responded that each borrower had signed an arbitration agreement waiving a jury trial and compelling individual arbitration in the case of a dis-

pute. The agreement provided for a procedural means of rejecting the agreement, or opting out, which ACE argued that Clerk failed to exercise. In addition, the agreement specifically stated that the mandatory arbitration required by the agreement was to be on an individual basis and not certifiable as a class. ACE filed a Motion to Compel Individual Arbitration and Stay Litigation, which Clerk contested on the basis that, *inter alia*, the arbitration agreement was unconscionable.

HOLDING: Granted.

REASONING: A party challenging an arbitration provision as unconscionable must prove, *inter alia*, that the arbitration clause is procedurally unconscionable in order for it to be found unenforceable. With regards to procedural unconscionability, Clerk argued that she had no meaningful choice in accepting its terms, because it was drafted entirely by ACE without any involvement by her, and because Clerk was not a sophisticated consumer while ACE, on the other hand, was a multimillion-dollar company in a superior bargaining position. The court disagreed, noting that the arbitration agreement gave Clerk the explicit right to reject the entire arbitration agreement within thirty days of entering into it, without any adverse effect on the terms of her loan. As such, the court granted ACE's Motion to Compel Individual Arbitration and Stay Litigation.

NON-PARTY CAN COMPEL ARBITRATION IN SEXUAL HARASSMENT CASE

Ragone v. Atlantic Video, 595 F.3d 115 (2nd Cir. 2010)

FACTS: Rita Ragone brought an employment discrimination action against her employer, Atlantic Video ("AVI"), alleging that she was terminated in retaliation for complaining about sexual harassment. Ragone's employment with AVI was subject to an arbitration agreement ("Agreement") which stated that "any and all claims or controversies" arising out of Ragone's employment was to be resolved through binding arbitration.

Ragone was hired by AVI as a make-up artist for one of AVI's clients, ESPN. Ragone alleges that almost immediately after she started her employment with AVI to provide her services to ESPN, she became a victim of sexual harassment. Ragone complained unsuccessfully to both AVI and ESPN management to put an end to the sexual harassment. ESPN is not a signatory to the Agreement.

The district court held that ESPN's status as a non-signatory did not preclude Ragone from being compelled to arbitrate her claims against ESPN. Parties to an arbitration agreement may be compelled to arbitrate their claims against a non-signatory if these claims are sufficiently intertwined with her claims against the signatory. In this case, the district court found that Ragone's claims of sexual harassment and retaliation against AVI and ESPN rely on concerted actions of both defendants and are therefore substantially intertwined.

HOLDING: Affirmed.

REASONING: As a general rule, arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which it has not agreed to submit. Despite the general rule, the court notes the common law principles of contract law may allow non-signatories to enforce an arbitration agreement, including equitable estoppel.

This compulsion to arbitrate arises when the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.

Under equitable estoppel, a non-signatory may compel a signatory to an arbitration agreement to arbitrate a dispute. This compulsion to arbitrate arises when the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed. Additionally, the "intertwined" factual issues must have a relationship among the parties of a nature that justifies a conclusion that the party which agreed to arbitration should be estopped from denying an obligation to arbitrate a similar dispute with a non-signatory party.

The court agreed with the district court that the relationship between Ragone, AVI, and ESPN supports the application of equitable estoppel. ESPN was essentially Ragone's "co-employer" because she was hired by AVI to provide make-up services to ESPN. Further, Ragone was also required to follow the instructions and directives of ESPN supervisors. The court found the dispute between Ragone and ESPN is so factually intertwined with the dispute between Ragone and AVI that it was, in fact, the same dispute: whether or not Ragone was sexually harassed. The close working relationship between Ragone and ESPN allows ESPN to avail itself under the theory of equitable estoppel to the arbitration agreement between Ragone and AVI. Accordingly, the district court's holding that Ragone is properly estopped from avoiding arbitration with ESPN was affirmed.