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which is included in the Terms of Pre-Qualified Offer section of the Invitation, made clear that the fixed APR was not permanent. The court found that a question of material fact existed as to whether the company made misleading statements in the mailing and failed to disclose the information required under the TILA “clearly and conspicuously.”

## CARDHOLDER AGREEMENT ALLOWING COMPANY TO CHANGE ANY TERM OF THE AGREEMENT ONLY AUTHORIZED CHANGES RELATING TO SUBJECTS ALREADY ADDRESSED IN THE ORIGINAL AGREEMENT

Sears Roebuck and Co. v. Avery, 593 S.E. 2d 424 (N.C. App. Ct. 2004).

**FACTS:** Ms. Barbara Avery opened a credit card account with Sears Roebuck and Co. (“Sears”). The cardholder agreement did not reference arbitration or any other dispute resolution procedure, but it contained a “Change of Terms” provision which provided that Sears could change any term or part of the agreement, with written notice to the consumer. Later, Sears amended the agreement by sending the cardholders written notice. The amendments included the addition of an “Arbitration” provision. If no written disputes were submitted, Sears considered the amendments accepted by its customers.

Avery’s account became delinquent and Sears filed suit against Avery to collect the outstanding balance. Avery filed a counterclaim alleging that the interest rate on the credit card violated state law. Sears made a motion to compel arbitration regarding Avery’s counterclaim. The trial court

denied the motion to compel arbitration because the parties did not mutually assent to the arbitration provision in the amended-provision notice. Sears appealed the motion.

**HOLDING:** Affirmed.

**REASONING:** When addressing whether the “Change of Terms” provision in the original contract between Sears and Avery allowed Sears to add the arbitration clause to its agreement by simply mailing notice of the addition to its cardholders, the court first emphasized the fact that both parties must consent to a valid enforceable arbitration provision.

A “Change of Terms” provision allowing the drafter unilateral right to change, add, or modify the terms of a contract without

limitation, is not consistent with the requirement of good faith implied in all contracts of adhesion. In fact, a “Change of Terms” provision would only comport with implied good faith and objective reasonableness if used to add new or modified terms related to subjects already addressed in some fashion in the original agreement. Further, the addition of the arbitration provision was not within the reasonable expectation of the cardholder. Because the original contract between Sears and Avery lacked any dispute resolution procedure, it precluded Sears’ right to add an arbitration clause, given that the term was not contemplated in the original agreement.

**The addition of the arbitration provision was not within the reasonable expectation of the cardholder.**

## ARBITRATION

### AN OUT-OF-STATE ATTORNEY’S PARTICIPATION IN AN ARBITRATION PROCEEDING DOESN’T CONSTITUTE THE UNAUTHORIZED PRACTICE OF LAW

Colmar v. Fremantlemedia North Am., Inc., 801 N.E.2d 1017 (Ill. App. Ct. 2003).

**FACTS:** Plaintiff, Colmar, Ltd. was a Delaware corporation that produced and owned motion pictures. Defendant Fremantlemedia North America, Inc. (“FMNA”) was also a Delaware corporation based in California. In 1994, Colmar and FMNA entered into a license agreement whereby Colmar licensed a film to FMNA. The contract contained an arbitration clause, which provided that the parties would submit any disputes to arbitration under the rules of the American Arbitration Association (“AAA”).

Colmar eventually became dissatisfied because of FMNA’s lack of aggressive marketing of the film and requested arbitration. FMNA was represented by a California based attorney, Peter J. Anderson, who was not licensed to practice in Illinois where one of the meetings took place. The arbitrator eventually found that FMNA was not liable. The trial court confirmed the arbitration award and denied Colmar’s request

to vacate. Colmar filed a second arbitration complaint against FMNA. This second arbitration was held in Chicago and FMNA was again represented by Anderson. The second arbitrator denied Colmar’s claims and ordered that the contract be deemed terminated. Colmar filed suit in an Illinois district court seeking to vacate the second arbitration because FMNA was represented in both arbitrations by an attorney who was not licensed to practice law in Illinois. FMNA answered that the representation was permitted under the rules of AAA. The trial court granted FMNA’s countermotion to dismiss and affirmed the second arbitrator’s award. Colmar appealed arguing that the trial court erred by not vacating the second arbitration award because FMNA was represented by an out-of-state attorney.

**HOLDING:** Affirmed.

**REASONING:** The representation of out-of-state counsel took place during arbitration rather than in a court of law. Anderson’s representation thus had no effect on the arbitration award. No Illinois court has found that an out-of-state attorney’s participation in arbitration proceedings constitutes the unauthorized practice of law in Illinois. Under the AAA’s “Commercial Dispute Resolution Procedure and Commercial Arbitration Rules” any party may be represented by an “au-

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thorized representative.” Also, Anderson’s activities were authorized since they related to his regular representation of the FMNA in California and involved issues that were not specific to Illinois law. Furthermore, the American Bar Association has proposed a rule that permits an out-of-state attorney to represent a party in an alternative dispute resolution case. Although the model rule has not been passed in Illinois at this point, it still reflects the modern trend of the law of multi-jurisdictional practice. Colmar also failed to allege that he was harmed by Anderson’s conduct. The court declined to overrule the decision of the lower court, noting that an attorney’s out-of-state involvement in an arbitration proceeding does not constitute the unauthorized practice of law.

## CONSUMER CLASS ACTION AGAINST A NATIONAL TAX PREPARER WAS NOT BARRED BY AN ARBITRATION CLAUSE IN A LOAN APPLICATION

McNulty v. H & R Block, Inc. 843 A.2d 1267 (Pa. Super. 2004).

**FACTS:** McNulty and Erzar (“Plaintiffs”) went to H & R Block (“Block”) on separate occasions to have their taxes completed. Plaintiffs alleged they were required to pay an e-filing fee as part of their standard tax preparation. Plaintiffs brought a class action suit alleging that Block deceptively stated that the e-filing fee was a necessary and required component of standard tax preparation, when in fact it cost Block next to nothing to file electronically, as compared to filing traditional paper returns.

Block filed preliminary objections to the complaint claiming that an arbitration provision in a separate contract with Household Bank required the claims to be arbitrated individually and not tried in court as a class action. The arbitration provision was found in a Refund Anticipation Loan (“RAL”) agreement. A RAL is a short term, high, interest loan that is secured by the anticipated tax refund. To utilize this service the taxpayer must have signed a separate contract with Household Bank, which made it clear that Block had no other connection to the loan, and specifically denied Block status as a fiduciary or agent. The contract also contained an arbitration clause that included Block as a beneficiary to the clause and stated that arbitration applied to “any disputes regarding relationships of the parties, past, present or future.” This statement guaranteed that all claims regarding the loan be heard together.

The trial court denied the objection and concluded that the electronic filing fee was a separate transaction from the loan and the arbitration clause found in the loan contract did not apply. Block appealed.

**HOLDING:** Affirmed.

**REASONING:** The court stated that in examining the circumstances of the contract in question, the arbitration clause appeared in the loan application, not the tax preparation contract. The language of the arbitration clause referred to the “documents,” being defined as the RAL application, not any contract or document prepared by Block. A customer did not need to complete the RAL application to obtain the tax preparation services and incur the e-filing fee. The court pointed out that Block had no direct connection to the RAL applica-

tion and Block did not need to have actually even prepared the tax forms in question for the RAL to be valid. Block was merely a third party beneficiary to the arbitration clause of the RAL application and did not have independent rights to enforce the clause for a contract it was not a party to and for an issue that was not covered by the contract. The court held that the trial judge did not abuse her discretion in finding that the electronic filing fee was separate and distinct from the loan application and therefore not covered by the arbitration provision.

## ARBITRATION CLAUSE REQUIRED ARBITRATION OF ALL CLAIMS, INCLUDING FAIR HOUSING ACT VIOLATIONS & INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

*In re First Texas Homes, Inc.*, 120 S.W.3d 868 (Tex. 2003).

**FACTS:** April and Cornell Greene contracted to purchase a home to be built by First Texas Homes, Inc. (“First Texas”). The contract required all disputes between the parties to be submitted to binding arbitration governed by the Federal Arbitration Act (“FAA”). In the contract, the term “dispute” was defined as “all claims, demands, disputes, controversies, and differences that may arise between the parties...of whatever kind or nature.” Nevertheless, the Greenes sued First Texas for construction defects. They alleged breach of contract, breach of warrant, fraud, negligence, violations of the Texas Deceptive Trade Practices Act, violations of the Texas and federal Fair Housing Acts, and intentional infliction of emotional distress. As violations of the Fair Housing Acts, the Greenes alleged that First Texas discriminated against them because of their race.

First Texas moved to compel arbitration pursuant to the FAA. The trial court granted the motion for all pleaded claims, except for portions of Plaintiffs’ claims for violation of the federal and state fair housing acts and intentional infliction of emotional distress. First Texas petitioned the court of appeals for mandamus relief directing the trial court to order all claims to arbitration. The court of appeals denied the petition without explanation. First Texas then petitioned the Supreme Court of Texas for mandamus relief, which was granted.

**HOLDING:** Remanded.

**REASONING:** The Court agreed with First Texas that all of the Greenes’ alleged violations, including those of state and federal fair housing acts and of intentional infliction of emotional distress are well within the very broad arbitration clause in the parties’ agreement. The court recognized that whether claims are arbitrable under the FAA must be determined under federal law and that the Court was “obliged to resolve any doubts about this issue in favor of arbitration.”

In *Prudential Securities Inc. v. Marshall*, 909 S.W.2d 896, 899 (Tex. 1995), the Court held that alleged defamatory statements fell within the parties’ employment agreement to arbitrate “any dispute, claim or controversy that [arose] between [them].” In the present case, the Court held that the parties’ agreement to arbitrate “[a]ll disputes between [them],” was equally broad. Furthermore, the Court explained that the Greenes offered no reason why “all” did not mean all. The

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agreement specified arbitration for disputes “arising out of the Agreement or other action performed ... by [First Texas].” The Greenes’ claims of discriminatory and derogatory conduct by First Texas were all directly related to First Texas’s construction of their home and refusal to fix alleged defects. Also, the arbitration clause was not limited to conduct occurring prior to execution of the contract. The court remanded the case with instructions to vacate and compel arbitration of all claims.

## THE INABILITY TO READ AND UNDERSTAND AN ARBITRATION AGREEMENT DOES NOT RENDER THE AGREEMENT UNCONSCIONABLE OR OTHERWISE UNENFORCEABLE

Washington Mut. Fin. Group v. Bailey 364 F.3d 260 (5th Cir. 2004).

**FACTS:** Washington Mutual Finance Group, LLC (“WM Finance”) provided loans for several illiterate consumers (“Borrowers”). In the same transaction, the Borrowers also purchased several types of insurance from American Bankers Life Assurance Company of Florida. Each Borrower signed an agreement to arbitrate any disputes they might have with WM Finance.

Later, when a dispute arose, the Borrowers did not seek arbitration but rather sued WM Finance, primarily alleging that they were sold and charged for insurance that they did not need or want. The Borrowers also claimed the arbitration agreement was unenforceable because their illiteracy prevented them from understanding it. WM Finance brought an action under the Federal Arbitration Act (“FAA”) seeking an order staying the state actions and compelling the Borrowers to arbitrate their disputes. The district court found that the Borrowers’ illiteracy and WM Finance’s failure to specifically inform them that they were signing arbitration agreements rendered the arbitration agreements procedurally unconscionable and therefore unenforceable.

**HOLDING:** Reversed.

**REASONING:** “The FAA expresses a strong national policy favoring arbitration of disputes, and all doubts concerning the arbitrability of claims should be resolved in favor of arbitration.” *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 471 (5th Cir. 2002). Under Mississippi contract law, which governs Mississippi arbitration agreements, a contract can be unconscionable procedurally and/or substantively. *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 725 (Miss. 2002). The Borrowers attacked the formation of the agreement to arbitrate as opposed to the substance of the agreement. Procedural unconscionability may be evidenced by, “a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract terms.” *Id.* The Borrowers signed the arbitration agreements without coercion and the legal language of the agreements and bargaining powers of the parties was not in dispute. The Mississippi Supreme Court has held as a matter of law that an individual’s inability to understand a contract because of his or her illiteracy is not a sufficient basis for concluding a contract is unenforceable. *Mixon v. Sovereign Camp*, 125 So. 413, 415 (Miss. 1930). A person is charged with knowing the contents of any document that he executes. *Russell*, 826 So. 2d at 726. Therefore, “[a] person cannot avoid a written contract which he has entered into on the ground that he did not read it or have it read to him.” *J.R. Watkins Co. v. Runnels*, 172 So. 2d 567, 571 (Miss. 1965). A person who cannot read has a duty to find someone to read the contract to him. *Dixon v. First Family Fin. Servs. Inc.*, 2003 WL 21788959, at \*3 (S.D. Miss. 2003). Accordingly, under Mississippi law, the inability to read and understand the arbitration agreement does not render the agreement unconscionable or otherwise unenforceable in the absence of other factors.

## MISCELLANEOUS

### SECTION 3 OF THE RESTATEMENT (3d) OF TORTS GENERALLY DOES NOT APPLY TO USED PRODUCTS

Ford Motor Co. v. Ridgway, \_\_\_ S.W.3d \_\_\_ (Tex. 2004).

**FACTS:** In July 1997, Jack Ridgway suffered second-degree burns to twenty percent of his body when his two-year-old, Ford F-150 pick-up truck caught fire. Ridgway was the third owner of the vehicle. Previous owners brought the truck in for repairs multiple times to Red McCombs Ford of San Antonio. At the time of the accident the truck had accumulated 54,792 miles. An expert Ridgway hired to inspect the truck after the accident concluded that the suspected cause of the fire was the electrical system in the engine compartment and opined that a malfunction of the electrical system in the engine compartment caused the fire. The expert, however, declined to eliminate all portions of the fuel system as a possible

cause of the accident and conceded that the actual cause of the fire had not been determined. Although the expert suggested that further investigation might have yielded a more definitive conclusion, particularly if the vehicle were disassembled, Ridgway made no motion for further testing and did not complain that the trial court failed to allow adequate time for or sufficient scope of discovery.

Ridgway sued McCombs and Ford Motor Company alleging, among other things, products liability and negligence. After Ridgway nonsuited McCombs, the trial court granted Ford’s motion for summary judgment because Ridgway did not produce specific evidence of a manufacturing defect. A divided court of appeals affirmed the trial court’s judgment on Ridgway’s negligence claim, but reversed on the products liability claim. Ford appealed the appellate court’s decision on the products liability claim.

**HOLDING:** Reversed.

**REASONING:** Ridgway argued section 3 of the Third Re-