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## The Unanswered Question From *Green Tree Financial Corp. v. Randolph*: How Much Is Too Much Before The Costs Of Arbitration Become A Barrier To Due Process?

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## COMMENTS

### **The Unanswered Question from *Green Tree Financial Corp. v. Randolph*: How Much is Too Much Before the Costs of Arbitration Become a Barrier to Due Process?**

#### I. INTRODUCTION.

The use of mandatory arbitration provisions in consumer contracts by corporations has experienced a tremendous rise in popularity.<sup>1</sup> The rise in growth is usually attributed to the assumption that businesses favor the lower costs of arbitration, passing the cost savings onto consumers.<sup>2</sup> Arbitration proponents also advocate the process “as a faster, less expensive procedure, [that] may enable employees to bring claims that would not be litigated because of the cost of going to court.”<sup>3</sup>

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1. See, e.g., *Knepp v. Credit Acceptance Corp.*, 229 B.R. 821, 828 (Bankr. N.D. Ala. 1999) (“The use of arbitration clauses in form contracts is undergoing an explosive expansion.”). Similarly, general use of arbitration to resolve disputes has recently surged in popularity. The American Arbitration Association (AAA) estimates that it has administered approximately 1,693,431 cases since its founding in 1926 (one year after the enactment of the Federal Arbitration Act (FAA)), with 448,723 of those cases being filed between 1994 and 1999. Brief of Amicus Curiae of the American Arbitration Association at 2, *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000) (No. 99-1235). AAA also estimates that the number of arbitration cases it administered increased from 62,423 cases in 1995 to 140,188 cases in 1999. *Id.* at 8-9 (“These figures bear witness to a dramatic surge in the popularity of arbitration as a means of resolving disputes in the United States.”).

2. See, e.g., Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 90-91 (2001). The author hypothesizes the following possible explanations that a business may assert regarding the potential cost savings of arbitration: (1) the lack of juries may reduce the likelihood of high damages awards against the corporation; (2) the company may experience less adverse publicity due to the confidential nature of arbitration; (3) the national uniform set of arbitral procedures allows an interstate business to save costs it would normally encounter adapting to different rules in different states; (4) “arbitration’s finality (near absence of appellate review) saves businesses the costs of appeals;” (5) arbitration may eliminate the possibility of class action suits against the corporation; (6) arbitration can deter claims against businesses by requiring consumer-plaintiffs to pay the costs of arbitration; and (7) “arbitration can reduce the amount of discovery available to consumer-plaintiffs, thus reducing the amount of time and money businesses must spend on the discovery process and also making it harder for consumers to prove their claims.” *Id.* at 90 (footnotes and quotations omitted).

3. See, e.g., Martin H. Malin, *Privatizing Justice—But By How Much? Questions Gilmer Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589, 597 (2001) (citing Roberto Corrada,

Recent court cases provide support that perhaps there is not necessarily such a savings.<sup>4</sup> Further, these cases suggest that when a consumer actually brings a claim against a corporation, forced arbitration clauses may end up costing the consumer more than if they had litigated the matter.

This Casenote will first discuss the history of the Federal Arbitration Act (FAA), and will then proceed to a brief look at *Gilmer v. Interstate/Johnson Lane Corp.*<sup>5</sup> Although *Gilmer* did not include a complaint about arbitration costs, the *Gilmer* Court delineated some basic principles underlying the enforceability of arbitration contracts and procedures.<sup>6</sup> These basic principles lay the groundwork for the other cases discussed within this Casenote. Next, the Casenote will analyze the decisions of various circuits since the *Gilmer* decision concerning whether fee-shifting or fee-splitting clauses in mandatory arbitration agreements are enforceable, culminating with the United States Supreme Court's decision in *Green Tree Financial Corp.—Alabama v. Randolph*.<sup>7</sup>

*Green Tree* provided an excellent opportunity for the Supreme Court to address the growing concern that the costs of arbitration may be interfering with a consumer's due process protections, an opportunity the Court failed to seize.<sup>8</sup> Lastly, this Casenote will conclude that *any* amount charged by an arbitrator is too much if the costs are forced on a prospective plaintiff, and that either one of two changes is necessary to deal with this growing problem: (1) the courts should follow the lead taken by the court in *Cole v. Burns International Security Services*,<sup>9</sup> and hold that any mandatory fee-shifting or fee-splitting clause that is silent as to costs should be construed against the business, forcing the business to shoulder the costs of arbitration; or (2) Congress should amend the

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*Claiming Private Law for the Left: Exploring Gilmer's Impact and Legacy*, 73 DENV. U. L. REV. 1051, 1051-52 (1996) ("Employer advocates routinely make this point."); Catherine Hagen, *Remarks at the Proceedings of the 1997 Annual Meeting Association of American Law Schools Sections on Employment Discrimination Law and Alternative Dispute Resolution* (Jan. 7, 1997), 1 EMPLOYEE RTS. & EMP. POL'Y J. 269, 278 (1997); Martin J. Oppenheimer & Cameron Johnstone, *Mandatory Arbitration Agreements Are an Effective Alternative to Employment Litigation*, DISP. RESOL. J., Fall 1997, at 19, 22).

4. See, e.g., *Knepp*, 229 B.R. at 828 ("Our legal system allows the weakest members of our society a means to file a complaint . . . and an opportunity to be heard. Arbitration, however, requires an initial payment of a minimum of \$500.00 to more than \$7,000 and daily costs of hundreds of dollars with no guaranteed due process . . .").

5. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

6. See, e.g., *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1467-68 (D.C. Cir. 1997).

7. *Green Tree Fin. Corp.—Alabama v. Randolph*, 531 U.S. 79 (2000).

8. See, e.g., Malin, *supra* note 3, at 619 ("[T]he Court in *Green Tree* totally failed to consider the systematic effects of the agreement's silence concerning the costs of arbitration.").

9. *Cole*, 105 F.3d at 1468.

FAA, perhaps by incorporating some of the policies of the American Arbitration Association's Consumer Arbitration Rules,<sup>10</sup> thereby making the FAA more plaintiff-friendly.

### A. *The Federal Arbitration Act.*

One of the goals of the Federal Arbitration Act is to "mov[e] the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."<sup>11</sup> Originally enacted in 1925, the FAA was reenacted and codified in 1947 as Title IX of the United States Code.<sup>12</sup> One of the main purposes of the FAA "was to reverse the long-standing judicial hostility to arbitration agreements that has existed at English common law and had been adopted by American courts,"<sup>13</sup> "and to place arbitration agreements upon the same footing as other contracts."<sup>14</sup>

The Supreme Court has noted that the FAA's "primary substantive provision" is Section 2, which states that "a written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>15</sup> Section

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10. See *supra* text accompanying notes 148-54.

11. *Green Tree Fin. Corp.*, 531 U.S. at 85-86 (footnote omitted) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1980)).

12. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). See also Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 644-73 (1996) (outlining and analyzing the policy, purpose, and scope of the FAA from its enactment in 1925 through 1996).

13. See Shelly Smith, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV., 1191, 1196 n.36 (2001) (quoting *Gilmer*, 500 U.S. at 25). The article quotes the following language from an FAA congressional report:

[T]he courts [have] felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule [that arbitration agreements should not be strictly enforced] and recognized its illogical nature and the injustice which results from it. The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.

*Id.* at 1196 (quoting *Kulukundis Shipping Co., S/A v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942) ("explaining in detail the traditional judicial attitude toward the arbitration of disputes")).

14. *Gilmer*, 500 U.S. at 24 (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974)). The Supreme Court has held that "arbitration is simply a matter of contract between the parties." *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F. Supp. 2d 958, 962 (W.D.Va. 2000) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)).

15. *Gilmer*, 500 U.S. at 24-25 (quoting 9 U.S.C. § 2). Section 1 of the FAA provides in part that "nothing herein contained shall apply to contracts of employment of seamen, railroad

3 of the FAA provides for stays of proceedings in federal courts when an issue in the proceeding is referable to arbitration; and Section 4 provides for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement.<sup>16</sup> The Supreme Court has also noted that these provisions of the FAA “manifest a ‘liberal federal policy favoring arbitration agreements.’”<sup>17</sup>

Notwithstanding the enactment of the FAA, the Supreme Court “was initially hesitant to force arbitration of a statutory claim when a pre-dispute arbitration agreement was at issue.”<sup>18</sup> The Court elucidated its reluctance in *Alexander v. Gardner-Denver Co.*<sup>19</sup> by delineating the following faults with the arbitration system: (1) “arbitrators may lack the specialized competence the courts possess to hear, understand, and appreciate constitutional and statutory issues;”<sup>20</sup> (2) the “informality of arbitral procedure . . . makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts;”<sup>21</sup> (3) “arbitrators are not required to issue written opinions when making their decisions;”<sup>22</sup> and (4) “an imbalance of power is present in arbitrations due to ‘the union’s exclusive control over the manner and extent to which an individual grievance is presented.’”<sup>23</sup>

After the *Alexander* decision in 1974, little doubt remained that federal statutory disputes would be resolved solely in a judicial forum.<sup>24</sup>

employees, or any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1 (2001).

16. *Gilmer*, 500 U.S. at 25.

17. *Id.* (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1980)). *Cf.* Sternlight, *supra* note 12, at 711-12 (footnotes omitted) (“The Court should abandon its unjustified preference for arbitration and replace it with a policy of acceptance of arbitration voluntarily agreed to by contracting parties . . . [and, if not,] Congress must act quickly to prevent companies from using arbitration as a tool of oppression, rather than to achieve justice.”).

18. See Glen R. Fagan, Cole v. Burns: *Mandatory Arbitration of Employment-Based Statutory Claims Gains Momentum*, 15 GA. ST. U. L. REV. 499, 501 (1998) (citing Christine K. Biretta, *Prudential Insurance Company of America v. Lai: The Beginning of the End for Mandatory Arbitration?*, 49 RUTGERS L. REV. 595, 608-13 (1997) (discussing the history of pre-dispute arbitration agreements and the Supreme Court’s growing acceptance of these agreements even when statutory claims are at issue)); see also Julian J. Moore, *Arbitral Review (or Lack Thereof): Examining the Procedural Fairness of Arbitrating Statutory Claims*, 100 COLUM. L. REV. 1572, 1575 (2000) (explaining, *inter alia*, “the Supreme Court’s initial reluctance to allow individual statutory claims to be resolved by arbitration”).

19. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). In voicing its displeasure with arbitration as a means of resolving statutory claims, the Court stated that “[a]rbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII.” Moore, *supra* note 18, at 1576 (quoting *Alexander*, 415 U.S. at 56).

20. Moore, *supra* note 18, at 1576 (citing *Alexander*, 415 U.S. at 57).

21. *Id.* (quoting *Alexander*, 415 U.S. at 57-58).

22. *Id.* (citing *Alexander*, 415 U.S. at 58).

23. *Id.* (quoting *Alexander*, 415 U.S. at 58 n.19).

24. *Id.* at 1577 (footnote omitted).

The Supreme Court's view essentially remained unchanged until 1985 when the Court, "[i]n a radical departure from prior case law, . . . ruled that 'the congressional policy manifested in the [FAA] . . . requires courts liberally to construe the scope of arbitration agreements covered by [the] Act.'"<sup>25</sup> This holding laid the groundwork for the Court's current deference to arbitration agreements and paved the way for the Court's later holding in *Gilmer*.

B. *Gilmer v. Interstate/Johnson Lane Corporation*.

In *Gilmer*, the United States Supreme Court addressed whether a claim under the Age Discrimination in Employment Act (ADEA)<sup>26</sup> could be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application.<sup>27</sup> Interstate/Johnson Lane Corporation ("Interstate") hired Gilmer as a Manager of Financial Services in May 1981, and required Gilmer to register as a securities representative with several stock exchanges.<sup>28</sup> Gilmer's registration application required, *inter alia*, that Gilmer "'arbitrate any dispute, claim or controversy' arising between him and Interstate 'that is required to be arbitrated under the rules, constitutions or by-laws of the organizations'" with which he registered, including the New York Stock Exchange (NYSE).<sup>29</sup>

Gilmer was sixty-two years old when Interstate terminated his employment in 1987.<sup>30</sup> As a result, Gilmer brought suit under the ADEA alleging that Interstate had wrongfully discharged him due to his age.<sup>31</sup> In response to Gilmer's complaint, Interstate filed a motion to compel arbitration of the ADEA claim, relying upon the arbitration clause in Gilmer's registration application, as well as the FAA.<sup>32</sup> The district court denied Interstate's motion, *inter alia*, on the ground that "Congress intended to protect ADEA claimants from the waiver of a

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25. *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (holding that an arbitration agreement that fell under the auspices of antitrust laws was enforceable)).

26. 29 U.S.C. § 621 (2001).

27. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

28. *Id.* (citation omitted).

29. *Id.* (citation omitted). The relevant rule in *Gilmer* was NYSE Rule 347, which provided for arbitration of "[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative." *Id.* (citation omitted).

30. *Id.*

31. *Id.* at 23-24 (Gilmer brought suit in the United States District Court for the Western District of North Carolina.).

32. *Id.* at 24.

judicial forum.”<sup>33</sup> The Court of Appeals for the Fourth Circuit reversed, finding “nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements.”<sup>34</sup> The Supreme Court granted certiorari to resolve the conflict among the various circuits regarding the arbitrability of ADEA claims.<sup>35</sup>

Following a brief discussion of the history and purpose underlying the FAA, the Court stated that statutory claims may be the subject of an arbitration agreement and are therefore enforceable under the FAA.<sup>36</sup> The Court stated that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”<sup>37</sup> The Court recognized, however, that arbitration may not be appropriate for all statutory claims, and that “[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”<sup>38</sup>

Gilmer agreed with the Court that neither the text of the ADEA nor its legislative history explicitly shows that Congress intended to preclude a waiver of a judicial remedy for ADEA claims, but argued, however, “that compulsory arbitration of ADEA claims pursuant to arbitration agreements would be inconsistent with the statutory framework and purposes of the ADEA.”<sup>39</sup> After reviewing the history and purposes underlying the ADEA, the Court held that federal statutory claims, particularly claims under the ADEA, may be subject to mandatory arbitration agreements.<sup>40</sup> The Court pointed out that “the mere involvement of an administrative agency in the enforcement of a

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33. *Id.* (citation omitted) (basing its decision on the Supreme Court’s holding in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 (1974)).

34. *Id.* (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 197 (4th Cir. 1990)).

35. *Id.* (footnote omitted). Prior to the *Gilmer* case, “every circuit court of appeals to consider the issue, except for one, had held that pre-dispute agreements to arbitrate statutory employment claims were unenforceable.” Malin, *supra* note 3, at 589 (citing *Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104 (5th Cir. 1990), *vacated*, by 500 U.S. 930 (1991); *Utley v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989); *Nicholson v. CPC Int’l, Inc.*, 877 F.2d 221 (3d Cir. 1989); *Swenson v. Mgmt. Recruiters Int’l, Inc.*, 858 F.2d 1304 (8th Cir. 1988); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544 (10th Cir. 1988); *Johnson v. Univ. of Wisconsin-Milwaukee*, 783 F.2d 591 (7th Cir. 1986); *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 197 (4th Cir. 1990) (*Gilmer* is the only circuit court holding enforceable a pre-dispute agreement to arbitrate a statutory claim)).

36. *Gilmer*, 500 U.S. at 26.

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

38. *Id.* (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 628).

39. *Id.* at 26-27.

40. *Id.* at 27-35.

statute is not sufficient to preclude arbitration.”<sup>41</sup>

It should be noted, however, that the Court reached this conclusion after an analysis of the arbitration agreement at issue in light of the NYSE arbitration rules.<sup>42</sup> Gilmer attacked the adequacy of the arbitration procedures on the following grounds: (1) arbitration panels will be biased;<sup>43</sup> (2) “the discovery allowed in arbitration is more limited than in the federal courts, which . . . will make it difficult to prove discrimination;”<sup>44</sup> (3) arbitrators often do not issue written opinions, resulting “in a lack of public knowledge of employers’ discriminatory policies, an inability to obtain effective appellate review, and a stifling of the development of the law;”<sup>45</sup> (4) the “procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions;”<sup>46</sup> and (5) there will often be unequal bargaining power between the employer and employee.<sup>47</sup>

The Court addressed each of these contentions in turn and found that the NYSE arbitration rules addressed and remedied each of Gilmer’s concerns. As to the alleged potential bias of the arbitrator, the Court found that the rules “provide protections against biased panels.”<sup>48</sup> Concerning the allegation of limited discovery, the Court found that “[a]lthough those procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party ‘trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.’”<sup>49</sup> Next, the Court found that the NYSE rules overcome Gilmer’s argument because they “require that all arbitration awards be in writing, and that the awards contain the names of the parties, a summary of the issues in controversy, and a description of the

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41. *Id.* at 28-29 (pointing out that the Court has previously held that claims brought under the Securities Exchange Act of 1934 and the Securities Act of 1933 may be subject to compulsory arbitration notwithstanding the fact that both statutes are heavily regulated by the Securities Exchange Commission) (citing *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989)).

42. *Id.* at 30-32.

43. *Id.* at 30.

44. *Id.* at 31.

45. *Id.*

46. *Id.* at 32.

47. *Id.* at 32-33.

48. *Id.* at 30. The Court pointed out that the rules require that “the parties be informed of the employment histories of the arbitrators, and that they be allowed to make further inquiries into the arbitrators’ backgrounds . . . [and] the arbitrators are required to disclose ‘any circumstances which might preclude [them] from rendering an objective and impartial determination.’” *Id.* (citations omitted).

49. *Id.* at 31 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). The Court also pointed out that “an important counterweight to the reduced discovery in NYSE arbitration is that arbitrators are not bound by the rules of evidence.” *Id.* (citation omitted).



award issued,” and that such decisions are made available to the public.<sup>50</sup> The Court also held, contrary to Gilmer’s allegation, that the NYSE rules provide for collective proceedings and allow the arbitrator the power to grant equitable relief.<sup>51</sup> Finally, the Court held that there was no indication in the case that “Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application . . . [and that] this claim of unequal bargaining power is best left for resolution in specific cases.”<sup>52</sup>

The impact of the Court’s analysis may ultimately be minimal and the holding may be read narrowly as applying solely to arbitration claims brought under the NYSE arbitration rules. The *Gilmer* holding may be an anomaly in the realm of mandatory arbitration agreements given the breadth and complexity of the NYSE arbitration rules and the sophistication of the parties involved in the agreements. The holding, if applied generally to forced arbitration clauses in employment contracts, may create problems in future cases wherein the parties are not as sophisticated, or where the governing arbitration rules do not provide the myriad protections offered by the NYSE arbitration rules. The uncertainty as to whether the *Gilmer* decision should be applied as a bright-line rule, or on a case-by-case basis to protect the needs of a particular individual, is reflected in various subsequent decisions.

## II. HOW VARIOUS COURTS HAVE ADDRESSED THE ISSUE OF FEE-SPLITTING ARBITRATION CLAUSES IN LIGHT OF *GILMER*.

### A. *Rulings Against Fee-Splitting or Fee-Shifting Arbitration Clauses.*

#### 1. *COLE V. BURNS INTERNATIONAL SECURITY SERVICES.*

In *Cole*, the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit Court”) addressed whether an employer can condition an employee’s employment on acceptance of an arbitration agreement that requires the employee to arbitrate all disputes, while also requiring the employee to pay all or part of the arbitrators’ fees.<sup>53</sup>

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50. *Id.* at 31-32 (citations omitted).

51. *Id.* at 32 (citations omitted).

52. *Id.* at 33.

53. *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1483 (D.C. Cir. 1997). Though the arbitration agreement did not explicitly address the payment of the arbitrators’ fees, the court resolved the ambiguity in the contract against the employer (the drafter of the agreement). *Id.* at 1468 (footnote omitted). The court stated that “[i]t is well understood that, where a contract is unclear on a point, an interpretation that makes the contract lawful is preferred to one that renders it unlawful.” *Id.* at 1485 (citing 1010 Potomac Assoc. v. Grocery Mfrs. of Am., Inc., 485 A.2d 199, 205 (D.C. 1984) (explaining that a contract “must be interpreted as a whole, giving a reasonable, lawful, and effective meaning to all its terms”) (emphasis in original); see also *Vicki Bagley Realty, Inc. v. Laufer*, 482 A.2d 359, 366 (D.C. 1984) (same); RESTATEMENT OF

The court held that an employee could not be required to pay arbitrators' fees to pursue his discrimination claims because the fees would discourage such an action and prevent the employee from vindicating his statutory rights.<sup>54</sup>

The parties in *Cole* stipulated that the cost of an arbitrator would range from \$500 to \$1,000 or more a day.<sup>55</sup> The D.C. Circuit Court stated that "[e]ven if an employee is not required to pay any portion of an arbitrator's fee, arbitration . . . is hardly inexpensive," pointing out that under a plan by the American Arbitration Association (AAA), an employee could be required to pay a filing fee of \$500.00, administrative fees of \$150.00 per day, room rental fees, court reporter fees, and attorneys' fees if the individual employs an attorney.<sup>56</sup> The court stated that it would be unacceptable for certain plaintiffs "to pay arbitrators' fees, because such fees are unlike anything that [they] would have to pay to pursue [their] statutory claims in court."<sup>57</sup> The court concluded that "where arbitration has been imposed by the employer and occurs only at the option of the employer—arbitrators' fees should be borne solely by the employer."<sup>58</sup>

The *Cole* Court based its holding on *Gilmer*, wherein "the Supreme Court endorsed a system of arbitration in which employees are not required to pay for the arbitrator assigned to hear their statutory

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CONTRACTS § 236 (1925)). The court also pointed out that "[i]t is also accepted that ambiguous provisions are construed against the drafter of the contract, in this case, Burns." *Cole*, 105 F.3d at 1486. (citation omitted).

54. *Cole*, 105 F.3d at 1483-84. The court "use[d] the term 'arbitrators' fees' to include not only the arbitrator's honorarium, but also the arbitrator's expenses and any other costs associated with the arbitrator's services." *Id.* at 1484 n.15.

55. *Id.* at 1480 (footnote omitted). The court cited the following in accepting the figures stipulated by the parties: (1) information provided by AAA, which cited \$700 per day as the average arbitrator's fee; (2) a JAMS/Endispute estimated rate for an arbitrator of an average of \$400 per hour; (3) a Wall Street Journal article stating that fees of \$500 or \$600 per hour are not uncommon; (4) the CPR Institute for Dispute Resolution's estimate that arbitrators' fees run between \$250 and \$350 per hour. *Id.* at 1480 n.8 (citations omitted).

56. *Id.* at 1484 n.12. The court acknowledged that parties appearing in federal court may also be required to assume the cost of filing fees and other administrative expenses, and opined that any such costs of that sort relative to arbitration would not be "problematic." *Id.* at 1484 (footnote omitted).

57. *Id.* at 1484 (footnote omitted). The court quoted a corporate director of industrial relations at Northrop explaining why Northrop pays the costs of an arbitrator: "[W]e bear the cost of the arbitration for the very practical reason that most of the employees who seek arbitration of their grievances simply couldn't afford it if we did not." *Id.* (footnote omitted) (citing DAVID W. EWING, JUSTICE ON THE JOB: RESOLVING GRIEVANCES IN THE NONUNION WORKPLACE 291 (1989)).

58. *Id.* at 1485. The court also stated that "an employee can never be required, as a condition of employment, to pay an arbitrator's compensation in order to secure the resolution of statutory claims under Title VII (any more than an employee can be made to pay a judge's salary)." *Id.* at 1468.

claims.”<sup>59</sup> The D.C. Circuit Court opined that the *Gilmer* Court would not have ruled the way it did in the absence of the provision requiring the employer to pay for the arbitrator’s fees.<sup>60</sup> The *Cole* Court noted an “unaware[ness] 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. Under *Gilmer*, arbitration is supposed to be a reasonable substitute for a judicial forum.”<sup>61</sup> The court concluded that “it would undermine Congress’s intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court.”<sup>62</sup>

2. *SHANKLE V. B-G MAINTENANCE MANAGEMENT OF COLORADO, INC.*

Similarly, the Tenth Circuit in *Shankle* found unenforceable an arbitration agreement that required an employee to pay for one-half of the arbitrator’s fees.<sup>63</sup> The parties in *Shankle* had submitted their claims to the Judicial Arbiter Group, Inc., which detailed the costs of the proposed arbitration as follows: “the arbiter charges \$250.00 per each hour of arbiter time and travel time at \$125.00 per hour, and where appropriate, \$45.00 for each hour of paralegal support time.”<sup>64</sup> The court estimated that arbitration would have cost the employee between \$1,875.00 and \$5,000.00 to resolve his claims.<sup>65</sup>

In reaching a decision, the court stated that the agreement placed the plaintiff “between the proverbial rock and a hard place, [as the agreement] prohibited use of the judicial forum, where a litigant is not required to pay for a judge’s services, and the prohibitive cost substantially limited use of the arbitral forum.”<sup>66</sup> The Tenth Circuit additionally

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59. *Id.* at 1484.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Shankle v. B-G Maint. Mgmt. Of Colo., Inc.*, 163 F.3d 1230, 1234-35 (10th Cir. 1999) (holding that a mandatory arbitration agreement, which is entered into by an employee as a condition of continued employment, and which requires the employee to pay a portion of the arbitrator’s fees, is unenforceable under the FAA).

64. *Id.* at 1232. The Judicial Arbiter Group, Inc. also required the parties to pay a \$6,000.00 deposit. *Id.*

65. *Id.* at 1234 (footnote omitted) (citing *Cole v. Burns International Security Services*, 105 F.3d 1465, 1480 n.8 (D.C. Cir. 1997), for the proposition that, in estimating the total costs of arbitration for the employee, the typical employment case averages between fifteen to forty hours of arbitration time).

66. *Id.* at 1235 (citation omitted) (noting that the clause required the plaintiff “to agree to mandatory arbitration as a term of continued employment, yet failed to provide an accessible forum in which he could resolve his statutory rights”).

stated that “an arbitration agreement that prohibits use of the judicial forum as a means of resolving statutory claims must also provide for an effective and accessible alternative forum.”<sup>67</sup>

3. *JONES V. FUJITSU NETWORK COMMUNICATIONS, INC.*

In *Jones*, the United States District Court for the Northern District of Texas held unenforceable a fee-splitting provision of an arbitration policy contained in an employee’s employment agreement.<sup>68</sup> The plaintiff, alleging a violation of the Family Medical Leave Act (FMLA), had agreed to the modified arbitration policy in his employment agreement as a condition of continued employment with the defendant.<sup>69</sup> The policy required the plaintiff to pay one-half of the arbitrator’s fee, the court reporter’s fee, the fee for the arbitrator’s copy of the transcript, and facility costs.<sup>70</sup> The plaintiff argued that if the arbitration lasted an “average” length of time, he would have to pay between \$1,875 and \$7,000 to resolve his FMLA claim, an amount he was unable to afford.<sup>71</sup> The employer argued that the arbitrator could essentially shift the fees by awarding the employee the costs of arbitration if the employee was successful on the merits.<sup>72</sup> The court found that Jones, a former worker in Rockwell’s shipping department, could not afford such costs.<sup>73</sup>

The court noted that the arbitration policy prohibited the plaintiff from using the judicial forum, while at the same time, the prohibitive arbitration costs substantially limited the plaintiff’s use of the arbitral forum.<sup>74</sup> Consequently, the court held unenforceable the fee-splitting provision of the policy because the provision “failed to provide an accessible alternative for Plaintiff to present his statutory claims,” noting

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67. *Id.* at 1234 (footnote omitted). Noting, however, that “[t]he arbitral forum, in most cases, is such an alternative.” *Id.* at 1234 n.3 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26-33 (1991); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1487 (10th Cir. 1994) (“concluding that Title VII claims are subject to compulsory arbitration”)).

68. *Jones v. Fujitsu Network Communications, Inc.*, 81 F. Supp. 2d 688, 693 (N.D. Tex. 1999).

69. *Id.* at 689. The plaintiff alleged that he was terminated by the defendant after requesting a medical leave of absence. *Id.*

70. *Id.* at 693.

71. *Id.* (footnote omitted). The court relied on *Cole v. Burns International Security Services*, for the verification of plaintiff’s claim, stating, “CPR Institute for Dispute Resolution estimates that arbitrators’ fees of \$250-\$350 per hour and 15-40 hours of arbitrator time in a typical employment case [would result in] total arbitrators’ fees of \$3,750 to \$14,000.” *Id.* at 693 n.4 (quoting *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1480 n.8 (D.C. Cir. 1997)).

72. *Id.* at 693.

73. *Id.*

74. *Id.* The court, relying on *Shankle*, refuted the argument stating, “it is unlikely that an employee will risk advancing those fees to access the arbitral forum when faced with a mere possibility of being reimbursed.” *Id.* (citing *Shankle v. B-G Maint. Mgmt. Of Colo., Inc.*, 163 F.3d 1230, 1235 n.4 (10th Cir. 1999)).

"that if employees are required to pay arbitral fees in addition to the administrative costs and attorney fees . . . many employees will be unable to pursue statutory claims."<sup>75</sup>

B. *Courts that Have Held Fee-Splitting Clauses Enforceable.*

1. *WILLIAMS V. CIGNA FINANCIAL ADVISORS, INC.*

The Fifth Circuit addressed the issue of a fee-splitting clause in *Williams*, and refused to follow the conclusion reached by the D.C. Circuit Court in *Cole*.<sup>76</sup> Cigna hired Williams as a registered representative in 1987 and required that Williams register with the National Association of Securities Dealers (NASD) as a condition of his employment.<sup>77</sup> In the process, Williams signed a form which provided that "any dispute, claim or controversy that may arise between me and my firm . . . is required to be arbitrated under the rules, constitutions, or by-laws of the organization with which I register."<sup>78</sup> In 1993, Williams was discharged and he subsequently filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging that Cigna discriminated against him in violation of the ADEA.<sup>79</sup> Cigna prevailed at arbitration and on appeal in the district court, whereupon Williams appealed to the Fifth Circuit.<sup>80</sup>

On appeal, Williams argued, *inter alia*, that the arbitrators' order that he pay one-half of the forum fees, \$3,150,<sup>81</sup> is contrary to public policy, relying on the D.C. Circuit Court's interpretation of *Gilmer* "as holding implicitly that as a matter of law ADEA claimants may not be forced to pay any part of arbitrators' fees and expenses."<sup>82</sup> The Fifth

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75. *Id.* (citing *Cole*, 105 F.3d at 1484) (concluding that "such result clearly undermines the deterrent function of the FMLA").

76. *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752, 763 (5th Cir. 1999).

77. *Id.* at 755.

78. *Id.* The form was a Uniform Application for Securities Industry Registration or Transfer (U-4 Form). *Id.*

79. *Id.* In 1993, Williams, at the age of sixty-three, had the lowest sales of similarly situated agents, and owed Cigna \$29,613 for advances and a loan. *Id.* Williams was given the option of either: (1) reducing his debt in the amount of \$18,000 to remain an active agent; (2) retiring; or (3) face termination. *Id.* Williams refused to retire and would not accept any of the other options offered. *Id.*

80. *Id.* at 756-57 (citation omitted). Williams obtained a right to sue letter from the EEOC and brought suit against Cigna in state court. *Id.* at 756. Cigna removed the case to federal court and obtained a stay pending arbitration. *Id.* The district court denied William's claims and awarded Cigna \$18,945 on its counterclaim. *Id.* at 756-57.

81. Pursuant to the NASD Code of Arbitration Procedure, Williams was required to pay a \$500 non-refundable filing fee and a \$1,500 hearing session deposit prior to the arbitration hearing. *Id.* at 764. In addition, the forum fees were assessed at a rate of \$1,500 per hour for four hours, plus \$300 for each pre-hearing conference, totaling costs of \$6,300—half of which was assessed to Williams. *Id.*

82. *Id.* at 763 (citing *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1483-86 (D.C. Cir.

Circuit Court disagreed with the D.C. Circuit Court's interpretation, stating, "*Gilmer* does not so clearly imply that no part of arbitral forum fees may ever be assessed against federal anti-discrimination claimants, although it plainly indicates that an arbitral cost allocation scheme may not be used to prevent effective vindication of federal statutory claims."<sup>83</sup> The court further stated that, in fact, *Gilmer* didn't address the question "whether an arbitration forum that requires an ADEA claimant to pay all or part of the arbitrators' compensation can be an adequate substitute for a judicial forum."<sup>84</sup>

The court held that Williams did not show that the arbitrators' order "prevented him from having a full opportunity to vindicate his claims effectively or prevented the arbitration proceedings from affording him an adequate substitute for a federal judicial forum."<sup>85</sup> The court affirmed the district court's decision upholding the arbitrators' award, concluding that the evidence in the case did not show that the costs were prohibitively expensive to Williams, nor that the prospect of incurring such costs "hampered or discouraged" him from bringing his claim.<sup>86</sup> Finally, the Fifth Circuit pointed out that the instant case did "not call upon [the court] to address the serious question of whether the legislative intent of employees' anti-discrimination statutes in general is undermined by the effects of mandatory arbitration and arbitrators' fees."<sup>87</sup>

## 2. *BRADFORD V. ROCKWELL SEMICONDUCTOR SYSTEMS, INC.*

In *Bradford*, the Fourth Circuit held unenforceable a mandatory employment agreement that contained a fee-splitting provision.<sup>88</sup> The employment agreement contained an arbitration clause that provided in pertinent part: "To ensure that the Arbitrator is not biased in any way in favor of one party because that party is paying all or most of the Arbitration fees and costs, the parties shall share equally the fees and costs of

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1997); accord *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1235 (10th Cir. 1999)).

83. *Id.* (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)).

84. *Id.* at 764. The court observed that although *Gilmer* did not include a complaint about arbitration costs, the *Gilmer* Court delineated some of the basic principles underlying the enforceability of arbitration contracts and procedures. *Id.* (citations omitted).

85. *Id.*

86. *Id.* at 764-65 ("Williams testified that . . . his 'income so far this year is excess of six figures.'").

87. *Id.* (basing the conclusion on the fact that employment discrimination claims arising after January 1, 1999 may be filed in state or federal court because of NASD's rule change abolishing mandatory arbitration of statutory employment discrimination claims). *Id.*

88. *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 559 (4th Cir. 2001). Bradford brought suit alleging that he was discriminated against on the basis of his age and was wrongfully terminated as a result. *Id.* at 551.

the Arbitrator.”<sup>89</sup> Bradford argued that such clauses “render arbitration agreements unenforceable as a matter of law because, by requiring employees to pay part or all of the arbitration costs, such provisions deter employees who have been victims of discrimination from pursuing their rights, thus undermining the remedial and deterrent purposes of the federal anti-discrimination statutes.”<sup>90</sup> Bradford requested that the court adopt a per se rule that all arbitration agreements containing fee-splitting provisions are unenforceable, based not on a particular plaintiff’s actual deterrence, but rather on the overall deterrent effects.<sup>91</sup>

The Fourth Circuit noted that “some courts have concluded that fee-splitting provisions render arbitration agreements unenforceable because the cost of fee splitting deters or prevents employees from vindicating their statutory rights in arbitral forums.”<sup>92</sup> The court then pointed out that other courts, however, have declined to hold arbitration agreements unenforceable merely because they contain fee-splitting provisions.<sup>93</sup> After acknowledging the conflicting holdings as to the “extent to which fee splitting automatically renders an arbitration agreement unenforceable even absent any showing of individual hardship or deterrence,” the court concluded that it “is undisputed that fee splitting can render an arbitration agreement unenforceable where the arbitration fees and costs are so prohibitive as to effectively deny the employee access to the arbitral forum.”<sup>94</sup>

The court then focused its analysis on whether it should apply a case-by-case methodology to determine if a fee-splitting clause is unenforceable, or whether it should adopt a broad per se rule against all fee-

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89. *Id.* at 551. The agreement also contained a provision that each party was to pay for its own costs and attorney’s fees. *Id.*

90. *Id.* at 552 (footnote omitted) (Bradford brought suit under the Age Discrimination in Employment Act.).

91. *Id.* This request was most likely in response to the district court’s earlier conclusion “that Bradford had failed to meet his burden of demonstrating that the arbitration agreement was unenforceable against him because he had failed to offer any competent evidence that fee splitting would cause him financial hardship.” *Id.* (footnote omitted) (“The district court assumed for the purpose of its analysis that a proper showing of financial hardship could render an arbitration agreement unenforceable.”).

92. *Id.* at 553 (citing *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998); *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1483-85 (D.C. Cir. 1997)).

93. *Id.* (citing *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752, 763-64 (5th Cir. 1999); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 15-16 (1st Cir. 1999) (“refusing to invalidate arbitration scheme simply because of the possibility that the arbitrator would charge the plaintiffs a forum fee ‘which may be as high as \$3,000 per day and tens of thousands of dollars per case,’ because, among other reasons, ‘arbitration is often far more affordable to plaintiffs and defendants alike than is pursuing a claim in court’”); *Koveleskie v. SBC Capital Mkts, Inc.*, 167 F.3d 361, 366 (7th Cir. 1999) (same); *Arakawa v. Japan Network Group*, 56 F. Supp. 2d 349, 354-55 (S.D.N.Y. 1999) (same) (footnote omitted)).

94. *Id.* at 553-54 (citing *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79 (2000)).

splitting provisions (as argued by Bradford).<sup>95</sup> Relying on the reasoning of *Williams v. Cigna Financial Advisors, Inc.*,<sup>96</sup> and *Green Tree Financial Corp.*, the court concluded that a case-by case basis is more appropriate, holding that “the crucial inquiry . . . is whether the particular claimant has an adequate and accessible substitute forum in which to resolve his statutory rights,” and that a fee-splitting provision does not necessarily deprive a claimant of such a forum.<sup>97</sup>

### III. *GREEN TREE FINANCIAL CORP.—ALABAMA V. RANDOLPH.*

#### A. *Factual Background.*

Larketta Randolph brought suit against Green Tree Financial Corporation—Alabama and Green Tree Financial Corporation (collectively, “Green Tree”), which financed the purchase of her mobile home.<sup>98</sup> Randolph alleged that Green Tree’s financing documents violated the Truth in Lending Act (TILA),<sup>99</sup> that its mandatory arbitration requirement<sup>100</sup> violated the Equal Credit Opportunity Act,<sup>101</sup> and that TILA precludes the arbitration of disputes arising under that legislation.<sup>102</sup>

Randolph’s action arose from her purchase of a mobile home from

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95. *Id.* at 554. (noting that Bradford’s argument rested primarily upon the D.C. Circuit Court’s decision in *Cole*).

96. *See Williams*, 197 F.3d at 764 (“focusing upon the inability to pay; whether the forum fees created a prohibitive expense; whether Williams had a full opportunity to vindicate his claims; and whether the forum fees prevented the arbitral forum from providing an adequate substitute for the judicial forum”).

97. *Bradford*, 238 F.3d at 556-59.

98. *Randolph v. Green Tree Fin. Corp.—Ala.*, 178 F.3d 1149, 1150 (11th Cir. 1999).

99. Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* (2001).

100. The arbitration provision provided in pertinent part:

All disputes, claims or controversies arising from or relating to this Contract or the relationships which result from this Contract, or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration . . . . This arbitration Contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C.A. Section 1 . . . . The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration, except as provided herein. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY ASSIGNEE (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort and property disputes will be subject to binding arbitration in accord with this Contract.

*Randolph v. Green Tree Fin. Corp.*, 991 F. Supp. 1410, 1413 n.1 (M.D. Ala. 1997).

101. 15 U.S.C. §§ 1691-1691(f) (2001).

102. *Randolph*, 178 F.3d at 1150-51.



Better Cents Home Builders, Inc., on January 25, 1994.<sup>103</sup> The purchase was financed through Green Tree Financial Corp.—Alabama, a wholly-owned subsidiary of Green Tree Financial Corporation.<sup>104</sup> The financing documents required Randolph to obtain “vendor’s single interest” insurance, which protects a vendor or lienholder against the costs of repossession in the event of default.<sup>105</sup> There was a fifteen dollar charge for this insurance, but the documents did not list the amount as a finance charge in its Truth in Lending Act disclosure.<sup>106</sup>

### B. *The District Court Decision.*

Randolph brought suit in the United States District Court for the Middle District of Alabama in January, 1996, alleging that Green Tree violated TILA by failing to include vendor’s single interest insurance in its TILA disclosure, and violated the Equal Credit Opportunity Act by requiring arbitration of all claims.<sup>107</sup> Additionally, Randolph sought class certification for all individuals who had entered into similar agreements with Green Tree.<sup>108</sup> Green Tree, in lieu of an answer, moved to compel Randolph to arbitrate her complaint pursuant to the arbitration clause in her financing contract.<sup>109</sup> Green Tree also moved to stay the action pending arbitration or, in the alternative, to dismiss the action.<sup>110</sup> The district court ordered the parties to proceed to arbitration, declined to certify a class, and dismissed the action with prejudice.<sup>111</sup>

### C. *The Decision of the Court of Appeals.*

Randolph appealed to the Eleventh Circuit Court of Appeals, and Green Tree moved to dismiss the appeal for lack of jurisdiction.<sup>112</sup> Green Tree argued that the Court of Appeals lacked jurisdiction on the ground that the district court’s order was not appealable as a “final decision.”<sup>113</sup> The Eleventh Circuit held that it had jurisdiction to review the district court’s order under 9 U.S.C. § 16(a)(3) of the Federal Arbitration Act, which allows appeal from “a final decision with respect to an arbitration that is subject to this title.”<sup>114</sup>

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103. *Id.* at 1151.

104. *Id.*

105. *Id.*

106. Randolph v. Green Tree Fin. Corp., 991 F. Supp. 1410, 1415 (M.D. Ala. 1997).

107. *Id.* at 1413.

108. *Id.* at 1413-14.

109. *Id.* at 1414.

110. *Id.*

111. *Id.* at 1414, 1424.

112. Randolph v. Green Tree Fin. Corp.—Alabama, 178 F.3d 1149, 1152 (11th Cir. 1999).

113. *Id.* at 1153.

114. *Id.* at 1152-57. The Court determined that an appealable “final decision” under 9 U.S.C.

The Eleventh Circuit next addressed whether the arbitration clause in the retail installment agreement signed by Randolph was enforceable.<sup>115</sup> The court, acknowledging the strong federal policy favoring arbitration, held the clause unenforceable because it failed to provide the minimum guarantees required to ensure that Randolph could vindicate her statutory rights under TILA.<sup>116</sup> The court stated that “some procedural flaws present such barriers to a would-be litigant’s exercise of his or her statutory rights that they render an arbitration clause unenforceable.”<sup>117</sup> The court reasoned that “[w]hen an arbitration clause has provisions that defeat the remedial purpose of [a] statute, . . . the arbitration clause is not enforceable.”<sup>118</sup> Specifically, the court felt that “forcing a plaintiff to bear the brunt of ‘hefty’ arbitration costs and ‘steep filing fees’ constitutes ‘a legitimate basis for a conclusion that the [arbitration] clause does not comport with statutory policy.’”<sup>119</sup>

The court stated that the clause in the Green Tree contract “raises serious concerns with respect to filing fees, arbitrators’ costs and other arbitration expenses,” as the clause failed to: (1) mention anything about the payment of filing fees or apportionment of arbitration costs; (2) assign initial responsibility for filing fees or costs; (3) provide for a waiver in cases of financial hardship; and (4) say whether consumers would nonetheless be saddled with fees and costs in excess of any award if they prevailed.<sup>120</sup> The court also stated that the clause was inadequate because it failed to provide whether AAA rules would apply to the proceeding, whether some other set of rules apply, or whether the parties were free to negotiate their own set of rules.<sup>121</sup> Consequently, the court held that the arbitration agreement’s silence regarding the aforementioned issues rendered the clause unenforceable “because it fails to provide the minimum guarantees required to ensure that Randolph’s ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrators’ fees, or other high costs of arbitration.”<sup>122</sup> Therefore, the court reversed the district court’s order and remanded the case for

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§ 16(a)(3) is one that effectively dismisses all the claims pending by issuing an order compelling arbitration. *Id.* at 1156. The court found that “the district court’s dismissal of Randolph’s action with prejudice left it with ‘nothing . . . to do but execute the judgment,’” and therefore was within the definition of a “final decision” under the FAA. *Id.* at 1156-57 (quoting *Morewitz v. W. of Eng. Ship Owners Mut. Prot. & Indem. Ass’n (Lux.)*, 62 F.3d 1356, 1361 (11th Cir. 1995)).

115. *Id.* at 1157.

116. *Id.*

117. *Id.*

118. *Id.* (quoting *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (citation omitted)).

119. *Id.* (quoting *Paladino*, 134 F.3d at 1062) (citation omitted).

120. *Id.* at 1158.

121. *Id.*

122. *Id.*

further proceedings consistent with its opinion.<sup>123</sup>

#### D. *The Supreme Court Decision.*

The Supreme Court granted Green Tree's writ of certiorari and heard oral argument on October 3, 2000.<sup>124</sup> As to the first issue, the Court held that where the district court orders parties to proceed to arbitration and dismisses the claims before it, that decision is "final" within the meaning of § 16(a)(3), and therefore appealable.<sup>125</sup>

The Court next addressed "whether Randolph's agreement to arbitrate is unenforceable because it says nothing about the costs of arbitration, and thus fails to provide her protection from potentially substantial costs of pursuing her federal statutory claims in the arbitral forum."<sup>126</sup> The Court acknowledged that the Federal Arbitration Act's purpose is "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts."<sup>127</sup> Further, the Court stated that it has "recognized that federal statutory claims can be appropriately resolved through arbitration, and [that it has] enforced agreements to arbitrate that involve such claims."<sup>128</sup> The Court also pointed out that it has "rejected generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.'"<sup>129</sup> Finally, "claims arising under a statute designed to further important social policies may be arbitrated because 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,' the statute serves its functions."<sup>130</sup>

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123. *Id.* at 1159.

124. *Green Tree Fin. Corp.—Alabama v. Randolph*, 531 U.S. 79 (2000).

125. *Id.* at 89. *Green Tree* argued that the phrase "final decision" did not include "an order compelling arbitration and dismissing the other claims in an action, when that order occurs in an 'embedded' proceeding," such as the instant situation. *Id.* at 87 (citing Brief for Petitioner at 26). The court distinguished "embedded" proceedings from "independent" proceedings by stating that "embedded" proceedings are "those actions involving both a request for arbitration and other claims for relief," whereas "[i]ndependent' proceedings, by contrast, are actions in which a request to order arbitration is the sole issue before the court." *Id.* at 87.

126. *Id.* at 89.

127. *Id.* (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (holding that "a claim under the Age Discrimination in Employment Act . . . can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application"). *Gilmer*, 500 U.S. at 23.

128. *Randolph*, 531 U.S. at 89 (citing *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (Securities Act of 1933); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Sherman Act)).

129. *Id.* at 89-90 (quoting *Rodriguez de Quijas*, 490 U.S. at 481).

130. *Id.* at 90 (quoting *Gilmer*, 500 U.S. at 28).

In determining whether the statutory claims at issue may be arbitrated, the Court looked to whether the parties had agreed to submit their claims to arbitration and “whether Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”<sup>131</sup> The Court found that the parties had clearly agreed to arbitrate all claims relating to their contract, and that Randolph did not argue that TILA evinces an intention to preclude a waiver of judicial remedies.<sup>132</sup> The Court stated that Randolph’s contention was that the silence of the arbitration agreement with respect to costs and fees created a “risk” that she would be required to bear prohibitive arbitration costs if she pursued her claims in an arbitral forum, thereby making her “unable to vindicate her statutory rights in arbitration.”<sup>133</sup> Randolph argued, *inter alia*, that “[c]osts are virtually unique in their power to discourage parties from exercising their rights.”<sup>134</sup> The Court acknowledged that although the existence of large arbitration costs could possibly preclude a claimant from effectively vindicating her statutory rights in the arbitral forum, the record here, however, failed to show that Randolph would bear such costs if she went to arbitration.<sup>135</sup>

The Court ruled that while the record revealed the arbitration agreement’s silence as to the cost of arbitration, that silence alone was insufficient to render the agreement unenforceable.<sup>136</sup> Additionally, “[t]he ‘risk’ that Randolph may be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement,”<sup>137</sup> and an invalidation “on that basis would undermine the ‘liberal federal policy favoring arbitration agreements.’”<sup>138</sup> The Court concluded that where a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, as in the instant situation, that party bears the burden of showing the likelihood of such costs.<sup>139</sup> The Court, however, refused to address “[h]ow detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence.”<sup>140</sup> In a five to four majority, the

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131. *Id.* (citing *Gilmer*, 500 U.S. at 26; *Mitsubishi Motors Corp.*, 473 U.S. at 628).

132. *Id.*

133. *Id.*

134. Brief for Respondent at 31, *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000) (No. 99-1235).

135. *Randolph*, 531 U.S. at 90. The Court pointed out that the record “contains hardly any information on the matter.” *Id.* (footnote omitted).

136. *Id.* at 91.

137. *Id.*

138. *Id.* (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1980)).

139. *Id.* at 92.

140. *Id.* (stating that it was not necessary to address the issue, “for in this case neither during

Court held that the court of appeals erred in deciding that the arbitration agreement's silence with respect to costs and fees rendered it unenforceable.<sup>141</sup>

Justice Ginsburg's dissent pointed out that "[i]n these circumstances, it is hardly clear that Randolph should bear the burden of demonstrating up front the arbitral forum's inaccessibility, or that she should be required to submit to arbitration without knowing how much it will cost her."<sup>142</sup> Ginsburg stated that the Court should vacate and remand the case for further consideration of the accessibility of the arbitral forum to Randolph.<sup>143</sup>

#### IV. THE AMERICAN ARBITRATION ASSOCIATION.

AAA, a not-for-profit, public service organization, is the largest provider of dispute resolution services in the world.<sup>144</sup> AAA filed an amicus curiae brief in *Green Tree* addressing whether Randolph's agreement to arbitrate was unenforceable because it said nothing about the costs of arbitration, thereby possibly failing to protect her from the potentially substantial costs of pursuing her federal statutory claims in the arbitral forum.<sup>145</sup> AAA sympathized with the Eleventh Circuit's concern that the consumer's "ability to vindicate her statutory rights [could] be undone by steep filing fees, steep arbitrators' fees or other high costs of arbitration,"<sup>146</sup> but felt that the Court "gave insufficient weight to the national policy favoring the enforcement of arbitral agreements."<sup>147</sup>

In 1997, AAA made an attempt to deal with the growing concerns over the high costs of arbitration, such as those expressed by the Eleventh Circuit, by convening a National Consumer Disputes Advisory

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discovery nor when the case was presented on the merits was there any timely showing at all on the point").

141. *Id.* at 92 (footnote omitted).

142. *Id.* at 96 (Ginsburg, J., dissenting).

143. *Id.* at 97 (Ginsburg, J., dissenting).

144. Brief of Amicus Curiae of the American Arbitration Association at 2, *Green Tree Financial Corp.—Alabama v. Randolph*, 531 U.S. 79 (2000) (No. 99-1235).

145. *Id.* at 3. The AAA interpreted the decision of the Eleventh Circuit as "to assume that arbitration is somehow second class justice, or at least that it imposes substantially greater hardships on litigants that those they face when they pursue litigation in a judicial forum," and responded "that justice is not diminished in properly conducted arbitration proceedings." *Id.* at 5.

146. *Id.* at 6. (citing *Pet. App. 18a.*) (stating that "[h]igh filing and arbitrator fees can certainly present a problem in cases involving relatively small claims").

147. *Id.* at 7 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

Committee (the "Committee").<sup>148</sup> In April 1998, the Committee published *A Due Process Protocol for the Mediation and Arbitration of Consumer Disputes*<sup>149</sup> (the "Protocol") that in part, addressed the question of costs.<sup>150</sup> One of the cost provisions states: "Consumer ADR Agreements should make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction."<sup>151</sup>

Subsequent to the publishing of the Protocol, AAA adopted a set of rules implementing the work of the Committee, known as AAA's Arbitration Rules for the Resolution of Consumer-Related Disputes (the "Consumer Arbitration Rules").<sup>152</sup> Additionally, AAA "decided, as a matter of internal policy, that all consumer disputes to be administered by the AAA involving claims for less than \$10,000 will be processed under the Consumer Arbitration Rules, regardless of the rules, terms and conditions reflected in a pre-dispute clause."<sup>153</sup> Furthermore, AAA's Consumer Arbitration Rules do not require a consumer filing fee, limit the consumer's share of the arbitrator's fees to \$125, and require that the business party pay all other fees and costs.<sup>154</sup>

Addressing whether the silent arbitration clause in *Green Tree* was enforceable, AAA argued that the Eleventh Circuit should have followed the lead of the D.C. Circuit Court in *Cole* and treated the silence in the arbitration agreement as an ambiguity to be construed against Green Tree (the drafter of the agreement), thereby requiring Green Tree to pay all the arbitration costs.<sup>155</sup> AAA contended that this approach would not

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148. *Id.* at 3. ("The Advisory Committee included persons affiliated with consumer groups, such as Consumers Union and the American Association of Retired Persons, state government consumer-protection professionals, representatives of businesses that deal directly with consumers, academics, and dispute resolution professionals.").

149. *Id.* at 3-4 (stressing "the importance of a fundamentally fair process, access to information, independence and impartiality of both the arbitrator and the administering organization, availability of a full range of remedies, a reasonable location for the hearing, and reasonable time limits").

150. *Id.* at 4. The principle concerning costs is as follows: "[P]roviders of goods and services should develop ADR programs which entail reasonable cost to Consumers based on the circumstances of the dispute, including, among other things, the size and nature of the claim, the nature of goods or services provided, and the ability of the Consumer to pay." *Id.* (citation omitted).

151. *Id.* (citations omitted).

152. *Id.*

153. *Id.*

154. *Id.* at 15-16. Noting that a filing fee of \$150 is required to file a case in federal court, citing 28 U.S.C. § 1914(a) (2000). *Id.* at 16 n.13.

155. *Id.* at 19 (citations omitted). AAA acknowledged that the arbitration agreement was flawed because the clause failed "to specify the rules to be applied, the place of arbitration, or (failing designation of a set of rules that would do so) how the expenses of the arbitration are to be paid," but noted, however, that such deficiencies "may be supplied by subsequent agreement of the parties or, in the absence of such agreement, by the arbitrator once appointed or by a

have conflicted with the remedial and deterrent purposes of either TILA or the Equal Credit Act, and that it "would have enabled Respondent to vindicate her statutory rights in the agreed forum."<sup>156</sup> AAA urged the Supreme Court to construe the Green Tree agreement to make its enforcement lawful, arguing that such a result is dictated by principles of contract law.<sup>157</sup> AAA further argued that contract law requires such an interpretation, particularly where, as here, the ambiguity in the arbitration agreement "is susceptible to one interpretation that will bring it into conflict with the statute under which a claim is brought, and to another interpretation that will reconcile the purpose of that statute with the mandate of the Federal Arbitration Act . . . ."<sup>158</sup>

## V. CONCLUSION.

The Supreme Court erred in advancing a case-by-case approach to whether a plaintiff is able to afford the costs of arbitration. It seems incongruous that the Court has adopted a methodology wherein a claimant has to litigate to prove that he or she cannot afford to arbitrate. A more suitable approach would follow the holding of *Cole*, which opined that an employer should carry the burden of paying for arbitrators' fees in a mandatory arbitration agreement. At a minimum, Congress should amend the FAA to incorporate the procedures currently utilized by AAA in its Consumer Arbitration Rules. Although the Consumer Arbitration Rules adopted by AAA apply only to consumer transactions, Congress could expand and adopt the rules making them applicable to *any* and all disputes concerning a pre-arbitration clause between an individual and a business. A potential claimant would then have the option of: (1) taking the case to small claims court, bypassing arbitration completely, or if that is not applicable; (2) proceeding to arbitration knowing that their cost of arbitration will be limited to \$125 (which is less expensive than the costs of filing a claim in federal court).<sup>159</sup> The costs of arbitration would then be shouldered by the party most able to afford such costs, i.e., the business, which is also reaping the supposed benefits of arbitrating rather than litigating. This approach would offer a bright-line solution to the current controversies, thereby taking the matter out of the

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supervising court." *Id.* at 12 (citing *Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 711, 716 (7th Cir. 1987) (footnote omitted) ("holding that arbitration provision which stated only that 'disputes under this transaction shall be arbitrated' was not too vague to be enforced, because the court was able to supply 'such implementing details as who the arbitrators would be, where arbitration would take place, and what procedures would govern'")).

156. *Id.* at 20 (footnotes and citations omitted).

157. *Id.* at 21.

158. *Id.*

159. *See supra* note 154.

hands of the courts, while protecting consumers in the process. Either method would uphold the Supreme Court's current liberal policy favoring arbitration agreements while also allowing claimants to vindicate their statutory rights.

In the aftermath of *Green Tree*, the question remains whether courts will continue to follow the liberal federal policy favoring arbitration agreements. The decision also raises the question of whether the cumulative cost savings of arbitration to businesses will outweigh the sometimes prohibitive costs to the individual. If not, and if the courts perform the analysis on a case-by-case basis, as the *Green Tree* holding suggests, it will likely lead to a high degree of uncertainty among potential plaintiffs. This uncertainty could result in *more* litigation, an ironic result given the policy considerations favoring arbitration. The goal of arbitration as a less expensive, quicker alternative to the judicial forum is not furthered if plaintiffs are forced to litigate whether or not they are able to arbitrate. *Green Tree* seems to have once again opened the door to allowing courts to disfavor arbitration if they, on a case-by-case basis, decide that the benefits of overall cost-savings to businesses are outweighed by the prohibitive costs to particular plaintiffs.

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\* J.D. 2003, University of Miami School of Law. I would like to thank my wife, Hilary—without her support I would not be where I am today.