

AT WHAT COSTS?: WHEN CONSUMERS CANNOT AFFORD THE COSTS OF ARBITRATION IN ALABAMA

I. INTRODUCTION

During election season in Alabama, the roadsides of the state are decorated with signs touting citizens to "elect," "keep" and "vote for" various candidates. No pine tree or telephone pole seems to escape its destiny as a platform for political pontification. Some of the most visible and plentiful placards in the last state-wide election, rather than supporting a political candidate, promoted or derided arbitration.¹

The issues that have arisen in Alabama concerning arbitration in the consumer context are myriad: unconscionability, mutuality, post-contract notification, fraud as a defense, applicability in Magnuson-Moss disputes, non-signatory challenges, arbitration of arbitrability, and the effects on class actions.² While it recognizes the numerous issues and challenges that can be raised in examining arbitration in the consumer credit context,³ this Comment focuses on a single issue as to arbitration provisions: who pays the costs of arbitration.

After a brief synopsis of the arbitration drama in Alabama, the "who pays" question will be examined in light of a recent United States Supreme Court decision, *Green Tree Financial Corp.-Alabama v. Randolph*.⁴ Next, Alabama Supreme Court cases that address costs will be considered. These decisions will be compared with those of other jurisdictions both pre- and post-*Green Tree*. This Comment suggests that the strict interpretation that the Alabama Supreme Court has followed as to cost-preclusive arbitration provisions runs afoul of federal

1. See F.M. Haston, III, *Arbitration in Alabama—Of Road Signs and Reality*, 62 ALA. LAW. 63, 64-69 (Jan. 2001); Matthew C. McDonald & Kirkland E. Reid, *Arbitration Opponents Barking Up Wrong Branch*, 62 ALA. LAW. 56, 67-61 (Jan. 2001); Thomas J. Methvin, *Alabama—The Arbitration State*, 62 ALA. LAW. 48, 49-54 (Jan. 2001).

2. See Haston, *supra* note 1, at 63-69; Methvin, *supra* note 1, at 49-53.

3. The Alabama Supreme Court heard thirty-four cases dealing with arbitration in 1998, fifty-two in 1999 and sixty-eight in 2000. Telephone Interview with Judy Keegan, Director, Alabama Center for Dispute Resolution (Mar. 27, 2001); see also Haston, *supra* note 1, at 63.

4. 531 U.S. 79 (2000).

statutory and constitutional rights. Finally, action short of federal appellate intervention to limit cost-prohibitive arbitration agreements is suggested.

II. BACKGROUND: HALCYON DAYS AND ARBITRATION IS HERE TO STAY

Whether one believes the rhetoric that "arbitration is a license to steal" or "trial lawyers win—enough said," the fact that a method of alternative dispute resolution could attract so much attention and become an issue of general political discourse is rather unusual, to say the least.⁵ To tell the entire story of how arbitration came to be such a major issue in Alabama, or discuss all of the issues that have arisen surrounding arbitration in Alabama is beyond the scope of this Comment. However, a brief history is important to understand the climate that has made arbitration worthy of so much attention in Alabama.

The "halcyon days"⁶ of huge plaintiff verdicts in the early 1990s that earned Alabama the designation "tort hell" were ended by *BMW of North America, Inc. v. Gore*,⁷ tort reform, arbitration, and a political shift in the Alabama Supreme Court.⁸ Beyond the rhetoric of the reasons that led to—or the appropriateness of—the shift in the litigation climate of Alabama, pro- and anti-arbitration advocates agree that arbitration contracts now permeate consumer transactions in Alabama.⁹ It is almost impossible to purchase a new car or mobile home or to get a small loan without being subject to a form contract containing an arbitration provision.¹⁰

Despite its widespread use, arbitration is a relatively new creature in Alabama. According to state statutory law, pre-dispute arbitration clauses in consumer contracts are per se illegal.¹¹ Alabama courts historically interpreted the scope of the Federal Arbitration Act (FAA)¹² in a relatively limited fashion. In *Allied-Bruce Terminix Cos. v. Dobson*¹³ the United States Supreme Court, in overruling the Alabama Supreme Court, broadly interpreted the FAA.¹⁴ The majority of the Court stated

5. See Haston, *supra* note 1, at 63-69; Methvin, *supra* note 1, at 49-54.

6. Attorney William Utsey, Address at the Alabama Public Interest Institute (Mar. 7, 2001).

7. 517 U.S. 559 (1996).

8. See Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 656-61 (1999); McDonald & Reid, *supra* note 1, at 61.

9. See McDonald & Reid, *supra* note 1, at 67; Methvin, *supra* note 1, at 49.

10. See Methvin, *supra* note 1, at 49.

11. ALA. CODE § 8-1-41(3) (1993).

12. 9 U.S.C. §§ 1-16 (1994).

13. 513 U.S. 265 (1995).

14. *Allied-Bruce*, 513 U.S. at 273. Interestingly, congressional testimony from the passage

that the FAA's language of "involving" interstate commerce did not create a "statutory niche" in which state courts could apply state anti-arbitration law and policy and, thus, the FAA pre-empted the Alabama statute.¹⁵ The Court interpreted the language of the FAA as "signal[ing] an intent to exercise Congress' commerce power to the full."¹⁶ The Court said that the power of Congress to legislate under the Commerce Clause had long been held to be plenary.¹⁷ Therefore, any contract that evinces a relation to channels of, instrumentalities of, or a substantial relation to interstate commerce¹⁸ is enforceable in Alabama.¹⁹ Although mandated by federal law, courts still must apply *state* law in interpreting the contract and the arbitration provision itself.²⁰ Alabama's history of weak consumer protection laws,²¹ combined with endemic poverty, a poorly educated, often illiterate, populous and a history of juries doling out huge punitive damage awards that businesses want to avoid, have created an incubator in which arbitration has thrived in consumer contracts.²²

III. ARBITRATION IN THE CONSUMER CONTEXT: A FEW BASIC ISSUES

Although the consumer waives the Seventh Amendment right to a

of the FAA indicates that the statute was meant to apply only to business-to-business transactions. See Methvin, *supra* note 1, at 50-51.

15. *Allied-Bruce*, 513 U.S. at 272-73.

16. *Id.* at 277.

17. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824).

18. See *United States v. Lopez*, 514 U.S. 549, 558 (1995).

19. *Allied-Bruce*, 513 U.S. at 272-73. Several recent Alabama cases, however, have declined to find any element of interstate commerce present in the contract and thus declined to enforce the arbitration provision therein. See *Tefco Fin. Co. v. Green*, 793 So. 2d 755 (Ala. 2001) (finding no evidence of interstate commerce in a used car sale and assignment all occurring in one Alabama county); *Sisters of the Visitation v. Cochran Plastering Co.*, 775 So. 2d 759 (Ala. 2000) (finding no showing of interstate commerce in a contract for construction work to be done on a monastery chapel); see also *Ex parte Learakos*, No.1000244, 2001 WL 792787 (Ala. July 13, 2001) (declining in three cases to enforce an arbitration agreement where there was no proven element of interstate commerce in transactions involving Alabama real estate and Alabama parties); *Brown v. Dewitt, Inc.*, No.1991967, 2001 WL 729284 (Ala. June 29, 2001); *Huntley v. Regions Bank*, Nos. 1992205, 1992266, 2001 WL 729288 (Ala. June 29, 2001) (declining to enforce an arbitration agreement because the defendant failed to prove interstate element in a transaction between an Alabama resident and an Alabama corporation); *Ex parte Ephraim*, No. 1000284, 2001 WL 632942 (Ala. June 8, 2001) (declining to enforce an arbitration agreement in an employment contract because the employer failed to prove interstate commerce between the Alabama resident and Alabama corporation); *Am. Gen. Fin., Inc. v. Morton*, No.1991999, 2001 WL 564276 (Ala. May 25, 2001).

20. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

21. See Gene A. Marsh, *A Practitioner's Guide to the New Alabama Mini-Code*, 48 ALA. L. REV. 957, 964 (1997). In fact, the term "mini-code" is derisive, reflecting the stripped down version of the Uniform Consumer Credit Code that was adopted by the state legislature. *Id.* at 967-68.

22. See *id.* at 963-67; Methvin, *supra* note 1, at 49.

jury trial by signing an arbitration provision, basic contract laws still apply.²³ As long as the right is "knowingly and willingly waived" the arbitration provision is valid.²⁴ Consumer advocates argue that this standard is unfair in the consumer context, where boilerplate adhesion contracts require submitting all claims to arbitration.²⁵

Due process considerations also are implicated when state and federal statutory rights are granted, but the arbitral forum is inaccessible because of costs.²⁶ Proponents of arbitration argue that when private parties choose alternative dispute resolution they should be able to use whatever set of rules that they agree to without implicating due process.²⁷ The weakness of this argument is two-fold. First, in a consumer context there is no negotiation of procedural rules or even arbitration itself, which is presented on an adhesionary take-it-or-leave-it basis.²⁸ Second, the Supreme Court requires that the arbitral forum allow the claimant to vindicate her rights.²⁹ Although the Supreme Court has rejected arguments that arbitration is "unfair," inaccessibility to arbitration because of steep fees is anathema to the Constitution's notions of due process.³⁰

Claims arising under state law, both under common law and by statute, are subject to arbitration even if the state law, as is the case in

23. The Seventh Amendment's right to a trial by jury only applies in federal courts and can be waived. See JOHN E. NOWAK & RONALD R. ROTUNDA, CONSTITUTIONAL LAW § 13.8, at 585 nn.10-11 (6th ed. 2000). Although the Seventh Amendment has not been incorporated, most state constitutions also provide this right. For example, the Alabama Constitution provides "[T]he right of trial by jury shall remain inviolate." ALA. CONST. art. I, § 12; see also *Sydner v. Consecro Fin. Servicing Corp.*, 252 F.3d 302, 307 (4th Cir. 2001) ("Nor does the fact that the appellees waived their right to a jury trial require the court to evaluate the agreement to arbitrate under a more demanding standard.").

24. Vicki Zick, Comment, *Reshaping the Constitution to Meet the Practical Needs of the Day: The Judicial Preference for Binding Arbitration*, 82 MARQ. L. REV. 247, 271-73 (1998); see also Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 50 (1997).

25. See David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 60-61 (1997). Consumer contracts with arbitration provisions are offered on a take it or leave it adhesionary basis which means that consumers are not given a "freedom to contract" versus "freedom from contract" when consenting to arbitration. Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069, 1073 (1998).

26. See NOWAK & ROTUNDA, *supra* note 23, § 13.8, at 585 ("The essential guarantee of the due process clause is that of fairness."); Sternlight, *supra* note 24, at 80.

27. Zick, *supra* note 24, at 276.

28. See Speidel, *supra* note 25, at 1073.

29. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

30. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-32 (1991). The Court in *Gilmer*, declined to portray arbitration as biased, stated that arbitration procedure is not bound to the rules of evidence or discovery of the federal courts, and stated that limited judicial review is sufficient. *Gilmer*, 500 U.S. at 30-32.

Alabama, precludes arbitration.³¹ The Supreme Court has consistently reaffirmed that state laws prohibiting arbitration are preempted even as to state claims.³² The intent of the state to create and maintain rights for its citizens and provide them with meaningful judicial review of their claims is preempted by the Supreme Court's broad interpretation of the FAA.³³

Federally created statutory claims can be arbitrated because, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."³⁴ However, when litigants cannot statutorily enforce their rights due to costs and filing fees, the arbitral forum itself precludes the plaintiff from effectively vindicating his or her rights.³⁵ Congress has granted consumers a plethora of statutory rights in such legislation as the Federal Truth in Lending Act and through the authorization of Federal Trade Commission Rules and Regulations.³⁶

IV. SOME NEW GUIDANCE FROM THE SUPREME COURT: *GREEN TREE FINANCIAL CORP.-ALABAMA V. RANDOLPH*

The Supreme Court recently addressed the cost allocation issue in consumer contracts containing arbitration provisions in a case arising in Alabama, *Green Tree Financial Corp.-Alabama v. Randolph*.³⁷ The plaintiff, Larketta Randolph, purchased a mobile home in Opelika, Alabama and financed it through Green Tree Financial Corporation (Green Tree).³⁸ Randolph sued Green Tree because it failed to disclose as a finance charge, non-voluntary vendor's single interest insurance³⁹ as required by the Federal Truth in Lending Act⁴⁰ ("TILA").⁴¹ The contract

31. *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1307 (2001).

32. See, e.g., *Circuit City Stores*, 121 S. Ct. 1306-17; *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265 (1995); *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

33. See *Allied-Bruce*, 513 U.S. at 284-85 (Scalia, J., dissenting).

34. *Mitsubishi*, 473 U.S. at 637.

35. See *infra* Parts VIII, IX. Even if the claim is arbitrated, arbitration poses difficulty for the consumer pursuing his or her statutory claim because of arbitral procedures that limit the discovery of documents and requests for admission of the authenticity of documents and because of a lack of qualified arbitrators to hear complex statutory claims. Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 314-15 (1995).

36. See GENE A. MARSH, *CONSUMER PROTECTION LAW IN A NUTSHELL* 6-11 (3d ed. 1999).

37. 531 U.S. 79 (2000).

38. *Green Tree*, 531 U.S. at 82.

39. A vendor's single interest insurance pays the creditor or assignee for the costs of repossession if the consumer defaults on a secured transaction. *Id.*

40. 15 U.S.C. §§ 1601-1667 (1994 & Supp. V 1999). For an introduction to TILA in the consumer credit context, see MARSH, *supra* note 36, at 137-218.

41. *Green Tree*, 531 U.S. at 83.

for the purchase of the home contained an arbitration provision.⁴² The district court held that the arbitration provision required Randolph to submit her claims to arbitration and dismissed the case.⁴³ The Supreme Court addressed two issues in its opinion: (1) was the dismissal of the suit a final decision under the FAA which would make the decision appealable,⁴⁴ and (2) whether an arbitration provision that is silent as to costs is unenforceable.⁴⁵

While agreeing with the Eleventh Circuit that the dismissal of the suit constituted a "final decision,"⁴⁶ the Supreme Court reversed the appellate court as to the "who pays" issue.⁴⁷ The Eleventh Circuit had determined that, because the arbitration provision was silent as to who would bear the costs of the arbitration, it was per se unenforceable since it prevented the plaintiff from enforcing her statutory rights under TILA.⁴⁸ The majority of the Supreme Court applied a two-part test to determine if Randolph's statutory claim under TILA was subject to arbitration. First, both parties must have agreed to submit the claim to arbitration.⁴⁹ Second, the Court looked to Congressional intent and found that Congress did not intend to bar TILA claims from arbitration.⁵⁰

The Court rejected Randolph's assertions that the agreement should not be enforced because the contract was silent as to costs and that the possible costs of arbitration could preclude Randolph, a person of modest means, from vindicating her statutory rights.⁵¹ The majority stated

42. *Id.* at 82-83.

43. *Id.*

44. *Id.* at 84-89.

45. Because the Eleventh Circuit had not addressed Randolph's claim that the agreement was unenforceable because it prohibited her TILA claim from being treated as a class action, the Supreme Court declined to decide the issue. *See id.* at 92 n.7. Preclusion of class action treatment is as significant in this claim as it is in other statutory violation claims. Randolph was one of many Green Tree customers whose \$15 premium was not included as a finance charge. Individually, the claim may be small but when multiplied by the total number of customers overcharged, these \$15 omissions added up to substantial amounts. *See MARSH, supra* note 36, at 29-30. On remand, the Eleventh Circuit held that the arbitration provision was enforceable even though it precluded class actions. *Randolph v. Green Tree Fin. Corp.-Ala.*, 244 F.3d 814, 818-19 (11th Cir. 2001).

46. However, the Court noted that had the district court stayed the proceedings rather than dismissing the case, the order would not have been appealable. *Green Tree*, 531 U.S. at 87 n.2.

47. *Id.* at 89, 92.

48. *Id.*; *Randolph v. Green Tree Fin. Corp.-Ala.*, 178 F.3d 1149, 1158 (11th Cir. 1999).

49. The Court said that it was "undisputed" that the parties agreed to arbitrate all claims relating to the contract. *Green Tree*, 531 U.S. at 90. However, it is questionable whether it can be said that Randolph knowingly submitted her claim to arbitration. *See discussion infra* note 111. Randolph as a consumer certainly had less power than Green Tree, the nation's largest mobile home financier. However, the Court was applying Alabama law which has been unfavorable to consumers seeking to invalidate arbitration provisions on these grounds. *See discussion infra* Part V.

50. *Green Tree*, 531 U.S. at 90.

51. *Id.* at 92.

that Randolph had failed to show in the record that she would be forced to bear prohibitive costs if arbitration was compelled, merely because the agreement was silent as to costs.⁵² The Court said Randolph, who bore the burden of proof,⁵³ failed to demonstrate that the contract should not be interpreted in favor of the arbitration provision.⁵⁴ Although Randolph did not make the necessary showing, Chief Justice Rehnquist, writing for the majority, recognized that "[i]t may well be that the existence of large arbitration costs *could* preclude a litigant such as Randolph from effectively vindicating her federal statutory rights."⁵⁵

In dissent, Justice Ginsberg determined that the case was not ripe for the determination of whether the arbitration was "financially inaccessible" to Randolph.⁵⁶ The dissent proposed that the majority failed to break down the second prong of its inquiry into the following two sub-parts: 1) Is the arbitral forum adequate to address the claims? 2) Is the forum accessible?⁵⁷ In analyzing the first part of the inquiry, the dissent noted that previous precedent held that the "party resisting arbitration bears the burden of establishing the inadequacy of the arbitral forum for adjudication of claims of a particular genre."⁵⁸ However, the dissent noted that this does not mean that the party should also bear the burden of proof as to cost.⁵⁹ Justice Ginsberg also quoted from the District of Columbia Circuit's decision in *Cole v. Burns*,⁶⁰ which distinguished non-negotiable provisions with arbitration clauses where the employer pays from those where the "beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her or his case."⁶¹ The dissent voiced concerns that the contract did not specify rules or cost allocation.⁶² Justice Ginsberg concluded that the Court should have remanded for clarification of the costs issues; if Green Tree were to bear the costs, there would be no issue, but if Randolph could prove that the costs were excessive, the issue of cost prohibition could have been resolved by the Court.⁶³

52. *Id.*

53. *Id.* (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

54. *Green Tree*, 531 U.S. at 92 (citation omitted).

55. *Id.* at 90 (emphasis added).

56. *Id.* at 93.

57. *Id.*

58. *Id.* at 94 (citing *Gilmer*, 500 U.S. at 26).

59. *Green Tree*, 531 U.S. at 94.

60. 105 F.3d 1465 (D.C. Cir. 1997).

61. *Green Tree*, 531 U.S. at 94 (quoting *Cole*, 105 F.3d at 1484).

62. *Id.* at 95-96.

63. *See id.* The dissent also comments that nothing in the majority opinion would prevent Randolph from seeking judicial review of her desire to pursue the claim as a class action. *Id.* at 97 n.4.

V. HOW ALABAMA HAS TREATED THE COSTS QUESTION

Since arbitration provisions are interpreted in accordance with general state contract law, the results are not uniform among states. Alabama has enforced arbitration provisions that other states have refused to enforce.⁶⁴ The Alabama Supreme Court has consistently rejected arguments to invalidate arbitration agreements on the basis of financial hardship.⁶⁵ Because financial hardship is not a defense to performance of a contract, when an arbitration provision includes cost-allocation that requires the plaintiff to pay, no matter how high the cost, the issue is foreclosed by previous decisions and general Alabama contract law.⁶⁶

The seminal case as to enforcement of arbitration provisions that require the plaintiff to bear costs that ultimately preclude him or her from vindicating his or her rights is *Ex parte Dan Tucker Auto Sales, Inc.*⁶⁷ In *Ex parte Dan Tucker Auto Sales*, the plaintiff, a minister of "limited means," sued the defendant as a result of its sale of a used automobile to him.⁶⁸ The circuit court enforced the arbitration agreement but required the defendant to pay the filing fee because of the plaintiff's financial hardship.⁶⁹ The Supreme Court of Alabama issued a writ of mandamus requiring the plaintiff to pay.⁷⁰ The arbitration provision specifically adopted the rules of the American Arbitration Association (AAA), which required the initiating party to pay.⁷¹ The court said that the plaintiff's financial hardship "alone should not permit this Court to substitute different meanings for the terms used by the par-

64. See Methvin, *supra* note 1; see also sources cited *infra* note 111. The long established rule in Alabama is that, if a document is signed, the signee is deemed to have read and understood the provisions of the contract as written, even if the salesperson has told him it says something else. *Mitchell Nissan, Inc. v. Foster*, 775 So. 2d 138, 140 (Ala. 2000). If a person cannot read, the person has a duty to have someone else read the contract to him. *Id.* How this general principal of Alabama contract law operates in arbitration situations is perhaps best illustrated by the case of *Johnnie's Homes, Inc. v. Holt*, in which the Alabama Supreme Court explained that under Alabama law there is no duty to "disclose, or explain, an arbitration clause to a buyer." 790 So. 2d 956, 960 (Ala. 2001). See also *Green Tree Fin. Corp. of Ala. v. Vinton* 753 So. 2d 497, 502 (Ala. 1999) (citing *Patrick Home Ctr., Inc. v. Karr*, 730 So. 2d 1171, 1174 (Ala. 1999) and *Jim Burke Auto., Inc. v. Murphy*, 739 So. 2d 1084, 1087 (Ala. 1999)). Following previous Alabama precedent, the question of whether the plaintiff was bound to arbitration was a question the Alabama Supreme Court said must be decided by an arbitrator, not a court. *Johnnie's Homes*, 790 So. 2d at 963 (citing *Anniston Lincoln Mercury Dodge v. Conner*, 720 So. 2d 898, 900-02 (Ala. 1998)). Additionally, the court decided that the plaintiff's allegation that the contract was adhesionary was without merit. *Id.* at 964 (citing *Southern Energy Homes, Inc. v. Gary*, 774 So. 2d 521, 529 (Ala. 2000)).

65. See *infra* text accompanying notes 67-106.

66. See, e.g., *Ex parte Dan Tucker Auto Sales, Inc.*, 718 So. 2d 33, 37 (Ala. 1998).

67. 718 So. 2d 33 (Ala. 1998).

68. *Ex parte Dan Tucker Auto Sales*, 718 So. 2d at 39. In an affidavit, the plaintiff stated the minimum amount required to file was \$1,500 and that his yearly income was \$19,000. *Id.* at 39.

69. *Id.* at 34.

70. *Id.* at 38.

71. The court found that the plaintiff was the initiating party. *Id.* at 38.

ties.”⁷² The decision articulated the rule that poverty alone is never an adequate defense to the enforcement of an arbitration agreement in Alabama.⁷³

The *Ex parte Dan Tucker Auto Sales* rule was also followed where a contract mandated arbitration for violations of Alabama’s consumer credit laws and required the plaintiffs to pay for arbitration costs.⁷⁴ In *First Family Financial Services, Inc. v. Rogers*,⁷⁵ plaintiffs claimed breach of contract, fraud, and violations of the Alabama Mini-Code⁷⁶ arising out of loans made by a finance company.⁷⁷ Plaintiffs argued, inter alia, that they did not understand the terms of the provision and that they could not afford to arbitrate under the terms of the arbitration provision contained in the loan documents.⁷⁸ The arbitration provision provided that the consumers had to pay an initial filing fee of up to \$125 and pay for the cost of the arbitrator as determined by the arbitrator if the proceeding lasted more than one day.⁷⁹ The court rejected the plaintiff’s claim of lack of understanding and stated that the document was “clear” and “[t]here is no evidence that the plaintiffs could not have understood what they were signing [had they] read the document.”⁸⁰ The opinion also dismissed the concern that the plaintiffs were “denied the opportunity to read the document or that they were otherwise tricked into signing it.”⁸¹ The court reiterated basic Alabama contract law that, when an adult signs a contract, she is bound to the terms of the contract, including arbitration provisions.⁸² Citing *Ex parte Dan Tucker Auto Sales*, the court stated that financial hardship does not allow the court to change the terms of the agreement.⁸³ The decision also suggested that plaintiffs could have pursued administrative remedies under the rules of the AAA that governed the agreement and that the AAA had the discretion to defer or reduce fees.⁸⁴ The cost allocation provision was not unreasonable per se and, “even if the plaintiffs do incur a hardship in paying the costs,” the court left the financial concerns of the plaintiffs as a matter that should be addressed by an arbi-

72. *Ex parte Dan Tucker Auto Sales*, 718 So. 2d at 37.

73. *Id.* A concurring justice justified his opinion by saying that “because my vote overrules a minister’s plea of financial hardship” he had to explain his decision or be subject to charges of “hypocrisy or insensitivity.” *Id.* at 41 (Lyons, J., concurring).

74. *First Family Fin. Servs., Inc. v. Rogers*, 736 So. 2d 553, 558-60 (Ala. 1999).

75. 736 So. 2d 553 (Ala. 1999).

76. ALA. CODE. §§ 5-19-1 to -32 (1996).

77. *First Family*, 736 So. 2d at 554.

78. *Id.* at 558.

79. *Id.* at 556.

80. *Id.* at 558.

81. *Id.*

82. *First Family*, 736 So. 2d at 558-59; see also sources cited *supra* note 64.

83. *First Family*, 736 So. 2d at 559.

84. *Id.*

trator.⁸⁵

Green Tree Financial Corp. v. Wampler is yet another example of the Alabama Supreme Court addressing the issue of cost-allocation provisions in consumer credit sales transactions.⁸⁶ A retired couple whose sole income was Social Security benefits responded to an advertisement offering mobile homes for sale with no-money down and payments of \$99 a month.⁸⁷ The plaintiffs were told that they were not eligible for the advertised plan but could get another no-money down plan and that the sales clerk would help the husband get a job.⁸⁸ Plaintiffs claimed that, although they signed the documents which assigned the installment sales contract to Green Tree, the salesperson manipulated the documents so that they could not read them and did not give them a copy of the documents.⁸⁹ The sales contract signed by the plaintiffs included an arbitration provision.⁹⁰

After deciding that the arbitrator should decide the issue of arbitrability because of the breadth of the arbitration provision, the court considered, *inter alia*, if the contract was unconscionable because of the costs the plaintiffs would have to bear in order to pursue their claims.⁹¹ When dealing with the unconscionability of arbitration provisions, general contract law applies, and the party asserting unconscionability bears the burden of proof.⁹² The court said that the issue of the plaintiffs' limited financial resources was presented in light of the purchase of the home rather than the arbitration provision itself, and silence in the contract was not enough for it to assume the worst for the plaintiffs—that they could not pursue their claim.⁹³ Noting the *Ex Parte Dan Tucker Auto Sales* rule that general contract law does not allow poverty to "excuse performance," the court likewise declined to allow it as a defense to enforcing an arbitration provision.⁹⁴ It should be noted that, in order to deal with adverse, pre-*Green Tree* federal precedent, the court specifically pointed out that the plaintiffs were not pursuing a federally created statutory cause of action.⁹⁵ Thus, the court decided the decision looking solely at the FAA and Alabama contract law since the plaintiffs were pursuing a common law cause of action and state statu-

85. *Id.*

86. 749 So. 2d 409 (Ala. 1999).

87. *Wampler*, 749 So. 2d at 411.

88. *Id.*

89. *Id.* at 412.

90. *Id.* at 411-12.

91. *Id.* at 414-15.

92. *Wampler*, 749 So. 2d at 415.

93. *Id.* at 415.

94. *Id.* at 416.

95. *Id.*

tory violations under the Alabama consumer credit code.⁹⁶

The Alabama Supreme Court continues to enforce cost-prohibitive arbitration provisions post-*Green Tree*, even where the plaintiff shows that the cost allocation provision precludes bringing a claim. In *Johnnie's Homes, Inc. v. Holt*, the plaintiff, who was illiterate, and his wife, who had a seventh or eighth grade education, bought a mobile home.⁹⁷ Plaintiff, Melvin Holt,⁹⁸ said he believed the salesperson's representations about the contract.⁹⁹ His wife stated that the salesperson told them the documents they signed were a standard contract and showed them only the page of the contract that contained the price.¹⁰⁰ Furthermore, the salesperson "gave them no choice as to what papers" to sign in order to buy their home.¹⁰¹ The court explained that, under Alabama law, there is no duty to "disclose, or explain, an arbitration clause to a buyer."¹⁰²

Following previous Alabama precedent, the question of whether the plaintiff was bound to arbitration was a question the Alabama Supreme Court said must be decided by an arbitrator, not a court.¹⁰³ The court also determined the arbitration provision was not unconscionable and decided that the plaintiffs' defense that the contract was adhesiary was without merit.¹⁰⁴ The Alabama Supreme Court reiterated the *Ex Parte Dan Tucker Auto Sales* rule that arguments of financial hardship are without merit.¹⁰⁵ The evidence that Melvin Holt would have had to pay a \$2,000 arbitration fee to have claims arbitrated and that he made a showing of his limited financial capacity "standing alone—is not enough to persuade us to rule in Melvin's favor without some other showing that the arbitration provision is unconscionable."¹⁰⁶ The Ala-

96. *Id.* at 412.

97. 790 So. 2d 956, 957 (Ala. 2001).

98. Mr. Holt was referred to by the court as "Melvin." *Johnnie's Homes*, 790 So. 2d at 957.

99. *Id.*

100. *Id.* at 957-58.

101. *Id.*

102. *Id.* at 960 (citations omitted).

103. *Johnnie's Homes*, 792 So. 2d at 961-62 (citing *Anniston Lincoln Mercury Dodge v. Conner*, 720 So. 2d 898 (Ala.1998)).

104. *Id.* at 964.

105. *Id.* at 964-65 (citing *Wampler*, 749 So. 2d at 416; *Ex parte Dan Tucker Auto Sales, Inc.*, 718 So. 2d.33, 37 (Ala. 1998)).

106. *Id.* at 965. Currently, the test of unconscionability in Alabama consumer contracts is in a state of flux. *American General Finance, Inc. v. Branch* articulated a new test for unconscionability: "1) terms that are grossly favorable to a party that has 2) overwhelming bargaining power." 793 So. 2d 738, 748 (Ala. 2000). This test is a modified version of the test found in *Layne v. Garner*, 612 So. 2d 404, 408 (Ala. 1992). In addressing grossly favorable terms, the court looked towards several indicia of unconscionability including: 1) the breadth of the provision, 2) requiring arbitrability to be decided by an arbitrator, 3) one-sidedness (i.e., only giving the lender the right to try an action and placing a limit on the punitive damages that can be awarded by the arbitrator). *Branch*, 793 So. 2d at 748-49. The court distinguished previous cases because they had no express limit recoverable under their provisions. *Id.* at 749-50. The court

bama Supreme Court effectively precluded the plaintiff from pursuing his claim of statutory violations because he could not pay for arbitration.

In *Cavalier Manufacturing, Inc. v. Jackson*, the Alabama Supreme Court again refused to let arguments of financial hardship preclude the enforcement of a consumer arbitration provision.¹⁰⁷ Once again, the court reiterated its mantra-like rule that poverty does not excuse performance of an arbitration provision.¹⁰⁸ After its declaration of the general rule, the court dealt with the costs presented in the record.¹⁰⁹ It stated that the information provided in the record below, that the plaintiff was disabled and receiving unemployment benefits, and the approximate costs given in the brief were not sufficient to show more than a "speculative" risk which did not justify failing to enforce the arbitration provision.¹¹⁰

VI. WHILE ELSEWHERE . . .

Many state and federal courts did not follow Alabama's pattern of enthusiastically enforcing arbitration provisions prior to *Green Tree*.¹¹¹

held that as to the grossly unfavorable prong, the contract "limit[ed] not only the right to a specific forum, but the right to a remedy itself." *Id.* at 750. As to the second prong, the court noted that at the time of the making of the loan, one of the plaintiffs was in a market where it was virtually impossible to seek the type of financing she purchased without signing an arbitration provision. *Id.* at 750-51.

Since this decision, the makeup of the supreme court has changed significantly and only three of the justices in the five-to-four majority are still on the court. If the *American General* test survives and is consistently applied, many of the arbitration contracts previously enforced in Alabama could be held invalid. This outcome is unlikely, though, since the 2000 judicial elections put an eight-to-one Republican majority on the court.

For a discussion of how campaign contributions from pro-business groups and trial lawyers correlate with decisions by justices on the Alabama Supreme Court, see Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 684 (1999) ("Justices . . . whose campaigns are funded by business are nearly all Republicans and favor arbitration. There is a strong correlation between a justice's source of campaign funds and how that justice votes in arbitration cases.").

107. No. 10000391, 2001 WL 367600, at *3 (Ala. Apr. 13, 2001).

108. *Cavalier*, 2001 WL 367600, at *3.

109. *Id.*

110. *Id.* (citing *Green Tree*, 531 U.S. at 91).

111. Other states have applied their state contract law in a more consumer-friendly fashion to arbitration provisions in general. Under Louisiana law, the arbitration provisions in cellular phone customers' contracts were held to be unenforceable because the contracts were adhesionary. *Sutton's Steel and Supply, Inc. v. BellSouth Mobility, Inc.*, 776 So. 2d 589, 597 (La. App. 3 Cir. 2000). The terms of the provision were also sharp and one-sided. See *Sutton's Steel*, 776 So. 2d at 596-97. In California, courts have refused to enforce arbitration provisions that lack meaningful choice and that are one-sided. See *Pinedo v. Premium Tobacco, Inc.*, 102 Cal. Rptr. 2d 435 (2000). "Given the disadvantages that may exist for plaintiffs arbitrating disputes, it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee" but not place the same restrictions on itself. *Pinedo*, 102 Cal. Rptr. 2d at 439. In *Williams v. AETNA Finance Co.*, the Ohio Supreme Court refused to compel arbitration of a claim between a borrower and a home equity lender. 700 N.E.2d 859, 866-67 (Ohio 1998). The

In *Cole v. Burns International Security Services, Inc.*,¹¹² the Chief Judge of the District of Columbia Circuit, Harry Edwards, noted that "[a]t a minimum, statutory rights include both a substantive protection and access to a neutral forum in which to enforce those protections."¹¹³ The court went on to say that: "[W]e are unaware of any situation . . . 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"¹¹⁴ Other circuits have explicitly accepted the District of Columbia Circuit's reasoning in *Cole*.¹¹⁵ For example the Eleventh Circuit, in *Paladino v. Avnet Computer Technologies, Inc.*,¹¹⁶ found an arbitration provision that required the payment of "steep" filing fees to be invalid because it "deprives an employee of any . . . meaningful relief, while imposing high costs on the employee, undermin[ing]" the public policy behind the statutory rights the claimant sought to enforce.¹¹⁷ Although rejecting *Cole*, and enforcing the particular cost-allocation provision in question, the Fifth Circuit, in *Williams v. Cigna Financial Advisors, Inc.*,¹¹⁸ still recognized that "an arbitral cost allocation scheme may not be used to prevent effective vindication of federal statutory claims."¹¹⁹

Many state courts also required reasonable costs to enforce consumer arbitration provisions pre-*Green Tree*. For example, in California, an arbitration clause in an employment contract was held to be procedurally and substantively unconscionable because the contract,

court refused to uphold the provision because of the adhesionary nature of the contract and the expensive costs to arbitrate a relatively small claim. *Williams*, 700 N.E.2d at 866-67. In the court's view "there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration." *Id.* at 867. Under Michigan law, an arbitration provision is unconscionable if the product or service cannot be obtained without signing the arbitration provision. See *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087 (W.D. Mich. 2000).

112. 105 F.3d 1465, 1482 (D.C. Cir. 1997). The District of Columbia Circuit more recently recognized that employees' redress options could be severely limited by arbitration agreements and that some advocates "abhor arbitration precisely because it often adversely affects redress options." *Bailey v. Fed. Nat'l Mortgage Ass'n*, 209 F.3d 740, 745 (D.C. Cir. 2000).

113. *Cole*, 105 F.3d at 1482. The court in *Cole* held that the costs of the arbitrator had to be paid by the employer even though the contract stated the conduct of the proceedings follow AAA rules because the rules do not require allocation of fees. *Id.* at 1480-81, 1483.

114. *Id.* 1484. The court in *Cole* enforced the contract, reading into the contract implied terms that required the employer to pay for the arbitration. *Id.* at 1485.

115. See, e.g., *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230 (10th Cir. 1999); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998).

116. 134 F.3d 1054 (11th Cir. 1998). According to the Eleventh Circuit, although overruled on the point that the arbitration agreement was unenforceable because it did not require the employer to bear the costs of arbitration, "[t]he Court's decision in *Green Tree* does not cast doubt on the continuing vitality of the primary holding in *Paladino*." *Perez v. Globe Airport Sec. Servs., Inc.*, 253 F.3d 1280, 1287 (11th Cir. 2001).

117. *Paladino*, 134 F.3d at 1062.

118. 197 F.3d 752 (5th Cir. 1999).

119. *Williams*, 197 F.3d at 763 (citing *Gilmer*, 500 U.S. at 28). The First Circuit also interpreted *Gilmer* narrowly as to costs in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999), as did the Seventh Circuit in *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir. 1999).

among other things, required the employee to bear "unreasonable costs and arbitration fees"¹²⁰ and was adhesive.¹²¹ Likewise, the Ohio Supreme Court declined to enforce an arbitration provision in a termite contract where the plaintiff, to claim the treble damages available under the state consumer protection statute, would have to pay at least \$2,000.¹²² The court held the provision unconscionable because "[s]uch exorbitant filing fees, 'agreed to' unknowingly, would prevent a consumer of limited resources from having an impartial . . . review [of] his or her complaint against a business-savvy commercial entity."¹²³

Since *Green Tree* was decided, federal appellate and district courts have sought to apply its reasoning in cases where costs were raised as a ground to invalidate an arbitration provision. In *Bradford v. Rockwell Semiconductor Systems, Inc.*, the Fourth Circuit discussed the type of test that should be applied when determining if the cost-allocation provision in an arbitration provision precludes enforcement of the provision.¹²⁴ The court interpreted *Green Tree* as "suggest[ing] that some showing of individualized prohibitive expense would be necessary to invalidate an arbitration agreement on the ground that [the] fee splitting would be prohibitively expensive," though noting that *Green Tree* did not specifically decide the issue.¹²⁵ The Fourth Circuit focused on the individualized plaintiff's costs and, thus, the individualized deterrent effect rather than creating a per se rule.¹²⁶ In fashioning a case-by-case analysis to determine cost-preclusion, the Fourth Circuit articulated a test in which the claimant's expected costs of arbitration and ability to pay those costs are "measured against a baseline" of the claimant's costs to pursue the claim in court and the ability to pay those costs.¹²⁷ The Fourth Circuit also required consideration of the fee-shifting aspects of the arbitration, including shifting based on inability to pay.¹²⁸ The court noted that *Green Tree* required more than a speculative risk that the plaintiff could not arbitrate his or her claims due to financial

120. *Shubin v. William Lyon Homes, Inc.*, 101 Cal. Rptr. 2d 390, 399 (Cal. App. 2000).

121. *Shubin*, 101 Cal. Rptr. 2d at 402 (stating that "few employees are in a position to refuse a job because of an arbitration requirement").

122. *Myers v. Terminex Int'l Co.*, 697 N.E.2d 277 (Ohio 1998). The actual value of the initial contract was \$1,300. *Myers*, 697 N.E.2d at 278. The plaintiff estimated her actual damages to her home at \$41,000, which would have required her to pay an unrefundable filing fee of \$2,000 under the rules that she was required to arbitrate according to the terms of the contract. *Id.* at 278, 280. If the plaintiff sought the punitive damages she claimed in court, her American Arbitration Association (AAA) fee could have been \$7,000. *Id.* at 280.

123. *Id.* at 281. There was no dispute that the contract contained the arbitration provision nor that it clearly stated that the consumer would have to arbitrate under AAA rules. *Id.* at 280.

124. 238 F.3d 549 (4th Cir. 2001). The court rejected the District of Columbia Circuit's case-by-case analysis outlined in *Cole*. See *Bradford*, 238 F.3d at 555-57.

125. *Id.* at 557.

126. *Id.*

127. *Id.* at 556 n.5.

128. *Id.*

hardship.¹²⁹ Like the plaintiff in *Green Tree*, the claimant in *Bradford* did not prove that the costs of arbitration precluded his claim.¹³⁰

The two courts of appeals that have addressed whether an arbitration agreement that is cost preclusive under *Green Tree* can be cured of its invalidity by the other party agreeing to pay costs have come to different conclusions. The Fourth Circuit chose to enforce an arbitration agreement that one party claimed was unconscionable as to costs when the other party agreed to pay the fee in the entirety.¹³¹ The Eleventh Circuit, approaching the issue from a contract perspective, reached a different result. Although the Eleventh Circuit found the arbitration provision in *Perez v. Globe Airport Security Services, Inc.* invalid for other reasons, it discussed the defendant's offer to modify the arbitration provision and pay the prohibitively expensive costs and held that a court only need consider the agreement as written.¹³²

District courts are also grappling with the application of the Supreme Court's limited guidance regarding cost allocation provisions in *Green Tree*. The Eastern District of Pennsylvania rejected a per se rule in cases where the arbitration provision required the losing party to pay for the arbitration.¹³³ However, in *Giordano v. Pep Boys-Manny, Moe & Jack, Inc.*, the Eastern District of Pennsylvania also rejected a requirement of extensive and specific proof of cost-prohibitiveness.¹³⁴ The court found that an arbitration agreement requiring an employee to pay both daily costs and half of a \$2,000 filing fee to be cost prohibitive and unenforceable as to an employee who made \$400 dollars per week.¹³⁵ Although the employee had not made explicit showings, the court said that this was not a case in the "gray area" where difficult determinations needed to be made, and that "nothing in *Green Tree* requires courts to undertake detailed analyses of the household budgets of low-level employees to conclude that arbitration costs in the thousands of dollars deter the vindication of employees' claims in arbitral fora."¹³⁶ Likewise, in *Geiger v. Ryan's Family Steak Houses, Inc.*¹³⁷ the District Court for the Southern District of Indiana found an arbitration

129. *Bradford*, 238 F.3d at 556 n.5.

130. *Bradford* was not a person of modest means and pursued arbitration before filing his case in court. He made over \$165,000 per year and had arbitrated the dispute. *Id.* at 556, 558 nn.5-7. He subsequently filed in district court, raising the issue of costs only as a defense. *Id.*

131. *Sydor v. Conesco Fin. Servicing Corp.*, 252 F.3d 302, 306 (4th Cir. 2001).

132. 253 F.3d 1280, 1284 n.2 (11th Cir. 2001).

133. *Goodman v. ESPE America, Inc.*, No. 00-CV-862, 2001 WL64749, at *3 (E.D. Pa. Jan. 19, 2001). The court distinguished *Goodman*, who had been president of the company and received an \$80,000 severance package, from plaintiffs of modest means and low-level employees. *Id.* at *4.

134. No. CIV. A. 99-1281, 2001 WL 484360, at *5 (E.D. Pa. Mar. 29, 2001).

135. *Giordano*, 2001 WL 484360, at *6.

136. *Id.*

137. 134 F. Supp. 2d 985 (S.D. Ind. 2001)

provision to be cost-prohibitive when the agreement called for the aggrieved employee to pay, at a minimum, half of a \$2,000 filing fee because the price tag could potentially prohibit those who were wronged from vindicating their statutory rights.¹³⁸

A federal district court in Alabama took a different approach to addressing the plaintiff's concerns of access to justice when presented with a similar situation to those in *Giordano* and *Geiger*. The Middle District of Alabama, in *Boyd v. Town of Hayneville*, held that generic information about the costs of the arbitration and the income of the employee were not sufficient as the costs were merely "anticipated."¹³⁹ Although recognizing that the costs could place the plaintiff in a "precarious position," the court, instead of striking the provision, held that, if the plaintiff was actually assessed the fees, judicial review would be available for the arbitrator's decision.¹⁴⁰ The Northern District of Illinois also found that generic information about the costs of arbitration to be insufficient to find an arbitration provision invalid.¹⁴¹ The court's solution was to allow limited discovery so that the plaintiff could obtain the specific information.¹⁴²

VII. ANALYSIS

What type of showing will be required in the consumer credit context to invalidate a consumer arbitration agreement due to costs borne by the consumer is an open issue. It remains to be determined if courts will see *Green Tree* as requiring very specific factual showings in all cases where consumers assert unconscionability due to costs or as only rejecting a per se rule that contracts silent as to costs are unenforceable. No matter which standard is applied, the Alabama Supreme Court's enforcement of arbitration claims against poor plaintiffs violates the *Mitsubishi* requirement of availability of an arbitral forum that will adequately allow a plaintiff to vindicate his or her statutory and constitutional claims.¹⁴³

Green Tree v. Randolph raises serious questions concerning the continued validity of the *Dan Tucker* rule. If the Alabama Supreme Court continues to ignore consumers who show that costs prohibited them from seeking redress, the Alabama Supreme Court could be running afoul of due process considerations in the cost allocation area.

138. *Geiger*, 134 F. Supp. 2d at 997.

139. 144 F. Supp. 2d 1271, 1280 (M.D. Ala. 2001).

140. *Boyd*, 144 F. Supp. 2d at 1280.

141. *Livingston v. Associates Finance, Inc.*, No. 01 C 1659, 2001 WL 709465, at *2 (N.D. Ill. June 25, 2001).

142. *Livingston*, 2001 WL 709465, at *2.

143. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

Although the due process standard for effective waiver of rights requires only a minimal showing, it would not be without precedent for the United States Supreme Court to undo the work of the Alabama Supreme Court. In fact, the line of precedent by which Alabama descended into the depths of "tort hell" resulted in a dramatic overruling of punitive damages in *BMW of North America, Inc. v. Gore*.¹⁴⁴ In *BMW*, the Court determined that an Alabama punitive damage award was so "grossly excessive" that it "transcend[ed] the constitutional limit" of economic due process.¹⁴⁵ Although punitive damage claims, like consumer contracts, are governed by state law, the Supreme Court still found that the punitive damages did not relate to "legitimate" objectives and, thus, were an arbitrary due process violation.¹⁴⁶

The "[e]lementary notions of fairness enshrined in our constitutional jurisprudence"¹⁴⁷ that the Court spoke of in *BMW* could be implicated when a person is precluded from having a forum in which to have his or her grievances addressed. An arbitration agreement precludes the plaintiff from addressing his or her claim in court, and the plaintiff's poverty can preclude him or her from having access to the arbitral forum.¹⁴⁸ This catch-22 can leave Alabama plaintiffs without a venue for redress.¹⁴⁹

The Alabama Supreme Court's decision to continually turn a blind eye to showings of preclusive arbitration costs seems to run afoul of the Supreme Court's decision in *Green Tree*. Cases where a concrete showing of cost-prohibitive arbitration provisions were made, such as in *Ex parte Dan Tucker Auto Sales, First Family, Wampler and Johnnie's Homes*, are illustrative of the Alabama Supreme Court's policy of enforcing cost-prohibitive consumer arbitration provisions. It may be appropriate for the United States Supreme Court to step in and say enough—due process means something—just as it did in *BMW of North America, Inc. v. Gore*.

144. See McDonald & Reid, *supra* note 1, at 67; *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

145. *BMW*, 517 U.S. at 585-86.

146. *Id.* at 568, 585-86.

147. *Id.* at 574.

148. State courts provide low filing fees, plaintiffs can proceed *pro se*, and attorneys are available on a contingent fee basis. Filing fees for civil claims in Alabama are under \$150. ALA. CODE § 12-19-71 (Supp. 2001).

149. For example, one could not say that a plaintiff such as Mr. Holt in *Johnnie's Homes*, financially unable to pay for arbitration, could effectively vindicate his state statutory rights and common law causes of action. *Johnnie's Homes, Inc. v. Holt*, 790 So. 2d 956, 964-65 (Ala. 2001).

VIII. OTHER SOLUTIONS AND CONSIDERATIONS

Obviously, one simple solution for sellers of consumer goods and creditors who wish to use pre-dispute arbitration agreements would be to expressly provide in arbitration provisions that they are responsible for the costs of arbitration. However, some critics argue that "fee-splitting-equals-neutrality."¹⁵⁰ Unfortunately, when a claimant cannot afford to pay the arbitrator's fees, he is totally precluded from bringing his claim, a greater harm than the appearance of neutrality from splitting costs.¹⁵¹ But when one party foots the bill, questions of fairness of the arbitral forum, which is already criticized as "pro-business," arise.¹⁵² Consumer advocates criticize arbitrators as economically dependent on creditors, who the arbitrators see time-after-time in disputes in contrast with the consumer who will appear in only one dispute.¹⁵³ The Tenth Circuit, in dealing with the issue of fairness, said that arbitrators do not care who pays "so long as they are paid for their services" and noted that professional standards and ethical obligations promote neutrality.¹⁵⁴ A solution proposed by Judge Harry Edwards to "ensure that an arbitral forum is neutral, fair, and legitimate is to allow meaningful judicial review."¹⁵⁵

Many contracts stipulate the use of rules promulgated by one of the major arbitration organizations. These organizations could also be a catalyst for change. For example, the American Arbitration Association (AAA), the nation's oldest and largest arbitration body has recognized concerns for consumers and issued Consumer Due Process Protocols and Consumer Arbitration Rules.¹⁵⁶ The consumer arbitration rules require only a \$125 fee to file and provide more simplified procedures for arbitration.¹⁵⁷ However, the consumer rules actually apply to very few

150. See Harry T. Edwards, *Where Are We Headed with Mandatory Arbitration of Statutory Claims in Employment?* 16 GA. ST. U. L. REV. 293, 302 (1999). Judge Edwards is the Chief Judge of the United States Court of Appeals of the District of Columbia Circuit and an expert in the area of arbitration. *Id.* at 293.

151. See *id.*

152. David A. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 60-61 (1997).

153. JONATHON SHELDON & DANIEL A. EDELMAN, CONSUMER CLASS ACTIONS: § 2.7.5 at 49 (1999).

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

155. Edwards, *supra* note 150, at 302.

156. See American Arbitration Association, Home Page, at <http://www.adr.org> (last visited Nov. 11, 2001); American Arbitration Association, Consumer Due Process Protocol, at http://www.adr.org/education/education/consumer_protocol.html (last visited Nov. 11, 2001); American Arbitration Association, Arbitration Rules for the Resolution of Consumer-Related Disputes, at http://www.adr.org/rules/commercial/consumer_disputes.html (effective Mar. 15, 2001).

157. American Arbitration Association, Arbitration Rules for the Resolution of Consumer-Related Disputes, at http://www.adr.org/rules/commercial/consumer_disputes.html (effective

consumer transactions with arbitration provisions because the consumer rules are limited to claims of under \$10,000.¹⁵⁸ Consumers with claims of more than \$10,000 have to arbitrate under the commercial rules, where the minimum non-refundable pre-paid filing fee is \$750 and the minimum cost for arbitration by a three-judge panel is \$3,750.¹⁵⁹ By setting such an unrealistically low claim ceiling for the consumer rules, the AAA rules provide little protection for consumers buying such items as cars and mobile homes.¹⁶⁰ Another problem of organizations creating rules that protect consumers is that, if a business is no longer amenable to the rules of the arbitration organization, the business can simply change the terms of the arbitration agreement to reflect any rules under which it wishes to arbitrate.

In addition to possible constitutional limits and practical measures that could be taken by businesses wishing to use arbitration in the consumer context, federal and state lawmakers could also address the issues raised by the "who pays" question in arbitration. The Supreme Court has held that the FAA pre-empts even state legislative efforts to inform consumers of arbitration provisions.¹⁶¹ Any state consumer protection provisions aimed specifically at arbitration are invalid.¹⁶² Arbitration provisions can be invalidated, however, by regulations that generally apply to consumer transactions. General consumer protection measures could address such issues as unenforceable adhesionary contracts, notice, and duties to disclose terms in all consumer contracts.¹⁶³ In Alabama specifically, basic consumer protection legislation is neces-

Mar. 15, 2001).

158. *Id.*

159. American Arbitration Association, Commercial Dispute Resolution Procedures (Including Mediation and Arbitration Rules), Commercial Arbitration Rules, at <http://www.adr.org/rules/commerical/AAA235-0900.htm> (effective Sept. 1, 2001).

160. Telephone Interview with Judy Keegan, Director, Alabama Center for Dispute Resolution (Mar. 27, 2001).

161. See *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996). In *Doctor's Associates*, the Supreme Court held that a Montana state statute, which required notice that a contract is subject to arbitration be placed on the first page of the contract in underlined capital letters, was pre-empted by the FAA because the statutory requirement did not apply to any contract but only to contracts which were subject to arbitration. 517 U.S. at 684. The Montana statute made any contract that did not put the arbitration notice on the first page of the contract in capital letters and underlined unenforceable. *Id.* The Court stated that Montana's front page disclosure was a special notice provision that was not applicable to contracts generally, and the FAA pre-empted the state notice requirement. *Id.* at 687. However, the Court did suggest in footnote three that an alternative argument for upholding the statute was that "[u]nexpected provisions in adhesion contracts must be conspicuous." *Id.* This argument could render such notice requirements enforceable, but the Montana Supreme Court could not interpret the statute as a generally applicable law. *Id.* The Court also reminded the state supreme court that it could not deem contracts unconscionable in a judicial decision that the legislature could not do so by statute. *Doctor's Assocs.*, 517 U.S. at 684.

162. *Id.* at 687.

163. *Id.* at 687 n.3.

sary and probably the best way to eliminate arbitration issues as well as other issues that have plagued consumers in this state. Alabama "ha[s] incredibly underfunded regulatory structures in the state, and . . . very weak consumer protection laws. [Alabama's] Deceptive Trade Practices act is a toothless wonder."¹⁶⁴

Congress could also enact federal arbitration legislation that would protect consumers. Federal legislation could be passed that would limit the scope of the FAA when applied to consumer credit contracts.¹⁶⁵ For example, like TILA disclosures, arbitration disclosures could apply to consumer contracts of less than \$25,000 and home purchases.¹⁶⁶ However, there are drawbacks to written disclosures. Too many disclosures can lead to "disclosure pollution." As demonstrated by Alabama case law, the mere fact that a disclosure is in a document does not mean that the consumer has read or understood the contract.¹⁶⁷ The consumer who is barraged by paperwork with pages of disclosures he or she does not understand or cannot read may not know he or she is consenting to binding arbitration or even what arbitration means. By limiting the operation of the FAA to business contracts or large non-adhesionary consumer contracts where the arbitration provision is a part of the "bargain," consumers would be protected from having to waive their constitutional rights in order to buy consumer products.

IX. CONCLUSION

Since *Green Tree v. Randolph*, the Alabama Supreme Court has continued to enforce cost-prohibitive cost allocation provisions in consumer contracts. The extent to which *Green Tree* will be used by federal and state courts to invalidate prohibitive cost allocation agreements remains to be seen, as does the type of showing a plaintiff must make to show that a cost allocation provision is invalid. Cost-prohibitive cost

164. Elaine Witt, *Car Buyers Locked Into Arbitration Contracts*, BIRMINGHAM POST-HERALD, Dec. 2, 2000, at E1 (quoting law professor and consumer law expert Gene Marsh).

165. In the 107th Congress, several bills were introduced to limit the FAA. See Truth in Lending Modernization Act of 2001, H.R. 1054, 107th Cong. § 6 (2001) (amending the TILA so that arbitration provisions cannot deny the consumer his or her rights under the statute); Predatory Lending Consumer Protection Act of 2001, H.R. 1051, 107th Cong. § 2 (2001) (prohibiting pre-dispute arbitration agreements in high cost mortgages); Civil Rights Procedures Protection Act of 2001, S. 163, 107th Cong. (2001); H.R. 815, 107th Cong. (2001) (amending the FAA to prohibit employers from requiring companies "to arbitrate a dispute as a condition of employment.").

166. 15 U.S.C. § 1603(3) (1994). "Home" includes homes, trailers, condos—any extension of credit secured by real or personal property that is primarily used as the dwelling place of the consumer. 12 C.F.R. § 226.2(a)(19) (2001). The American Arbitration Association Due Process Protocol Comments to Principle 11 also suggest an arbitration disclosure box. American Arbitration Association, Consumer Due Process Protocol, at http://www.adr.org/education/education/consumer_protocol.html (last visited Nov. 11, 2001).

167. See, e.g., *Johnnie's Homes, Inc. v. Holt*, 790 So. 2d 956, 957-63 (Ala. 2001).

allocation provisions prevent claimants from effectively redressing their claims. The purpose of arbitration is not to preclude a person from bringing claims but to provide an alternate forum for redress. However, until the Alabama Supreme Court's current stance towards costs in arbitration provisions is changed by the court itself, state or federal regulations, or a ruling by the Supreme Court, arbitration provisions in consumer contracts in Alabama can continue to effectively preclude consumers from asserting claims.

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