LITIGATION

WAGING WAR AGAINST BINDING ARBITRATION: WILL TRIAL LAWYERS WIN THE BATTLE?

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INTRODUCTION

We all likely consume goods or services subject to standard contracts with vendors, contracts that we often do not even bother to read before we sign. Only when a problem with the vendor – or the provided goods or services – arises do we even pull the contract out (if we can find it) to peruse the promises and obligations therein. At that point, many find out for the first time that their expectations are not coterminous with the promises contained in the contract. Others will find that the vendor is in fact not living up to its obligations. In that situation, the solution is often easy – bring the problem to the attention of the vendor and reach a mutually acceptable solution. Yet, sometimes that fails to work. What then?

In a room full of lawyers, a likely answer is "sue," and depending on the lawyers, the claims, and the potential defendant, some might say, "bring a class action." And, bringing class actions is what trial lawyers are doing with astounding frequency. Partly in a defensive response to the onslaught of class action cases, businesses began inserting arbitration clauses in their consumer contracts to avoid the costs and risks associated with litigation, particularly, class actions.

Consumers (or more accurately, trial lawyers) are waging war against business to void these arbitration agreements.[1] Plaintiff's lawyers (now known euphemistically as "trial lawyers") have gone so far as to say that the use of a binding arbitration system is nothing other than an attack on America's civil jury system.[2] With sights set on large fees, the trial lawyers hope to avoid the arbitration process and to pull businesses into court to defend against claims, preferably in a class action, or at a minimum have the arbitration proceed as a class action.[3]

There are generally one of two types of binding arbitration agreements at issue: those that prohibit all class action mechanisms or those that are silent regarding whether class action procedures may be imposed on arbitration. As to the first, trial lawyers seek to invalidate agreements that specifically prohibit class-wide arbitration on the grounds that they are unconscionable.[4] In declaring the class-wide arbitration bar unconscionable, courts have not been striking down the entire arbitration clause – just the part that requires the arbitration to proceed on an individual rather than class-wide basis. The courts have rewritten agreements to allow arbitration but to impose class action procedures. This is the same result many courts have reached with agreements that are silent as to whether class claims may be brought.

MIXED RESULTS

Under the Federal Arbitration Act, 9 U.S.C. 1 *et seq.* ("FAA"),[5] arbitration agreements are to be enforced, according to their terms, "save upon such grounds as exist at law or in equity for the revocation of any contract."[6] The arguments made in support of imposing class action mechanisms on otherwise silent arbitration clauses and in negating agreements that prohibit class actions overlap. In particular, courts say that the policies underlying class actions must trump those underlying arbitration to ensure an even playing field for dispute resolution between consumers and business.[7]

Primarily, courts conclude that if a claim is small in amount or the allegedly aggrieved party is impecunious, there is no incentive for the aggrieved to bring an action and/or no economic incentive for an attorney to assist.[8] "When the class action prohibition operates entirely to deprive claimants of a viable forum in either litigation or arbitration for their claims, that prohibition alone ought to be sufficient to render the clause unconscionable."[9] In other words "the resolution of individual claims through arbitration is no adequate substitute for the resolution of group claims in a class action."[10]

Federal and state courts, however, generally are split on their approach to the question when the agreement is silent. Federal courts, relying on the express provisions of the FAA, almost exclusively have found that silence in the arbitration agreement does not equal consent to class arbitration.[11] On the flip side, many state courts will allow class action procedures to be imposed on silent agreements and also will strike a class action prohibition contained in an otherwise valid arbitration clause.[12]

The United States Court of Appeals for the Seventh Circuit's decision in *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995), is the leading federal case for the proposition that federal courts lack authority to order class action arbitration where the agreement does not provide for class claims to be brought. The court relied primarily on previous cases finding that federal courts lack authority to order consolidated arbitration if the agreement did not specifically provide for it.[13] Invocation of the consolidated and class action procedures were based, in part, on Federal Rule of Civil Procedure 81(a)(3), which states generally that the Federal Rules of Civil Procedure, including Rules 23 and 42, apply to "proceedings under Title 9, U.S.C., relating to arbitration . . . to the extent that matters of procedure are not provided for in those statutes." The Seventh Circuit rejected an interpretation of Rule 81(a)(3) that would condone consolidation of proceedings or class-wide proceedings, stating

> [f]irst of all, Rule 81(a)(3) says that the Federal Rules will fill in only those procedural gaps left open by the FAA. But as explained above, section 4 of the FAA requires that we enforce an arbitration agreement according to its terms. Such terms conceivably could consist of consolidated or even class arbitration. The parties here did not include in their agreement an express term providing for class arbitration. Thus, one could say that through the proper application of 9 U.S.C. § 4 the FAA has already provided the type of procedure to be followed in this case, namely, non-class-action arbitration.

Id. at 276.[14] Moreover, and correctly so, the court ruled that Rule 81(a)(3) applied to only judicial proceedings under Title 9, not the underlying arbitration.[15]

Finally, the court rejected the argument that "various inefficiencies and inequities will result from denying [plaintiffs] the opportunity to pursue arbitration on a class basis against these defendants."[16] Recognizing that individual arbitration may not be as efficient, the court nevertheless turned back to the agreement and to the Supreme Court's pronouncement that "we must rigorously enforce the parties' agreement as they wrote it, 'even if the result is "piece-meal" litigation'."[17]

On the state court side, in *Keating v. Superior Court*, 31 Cal. 3d 584 (1982), the California Supreme Court concluded that if "an arbitration clause may be used to insulate the drafter of an adhesive contract from any form of a class proceeding, effectively foreclosing many individual claims, it may well be oppressive and may defeat the expectations of the nondrafting party."[18] Even the lone dissent on the class action issue concluded that

> where an arbitration clause in an adhesion contract would allow the stronger party to evade responsibility for its acts, such a clause may, under those facts, be found oppressive and the clause invalidated. In instances where an arbitration clause would effectively deny relief to the weaker party in an adhesion contract, relief under settled principles of law would potentially be available.

Keating, 31 Cal. 3d at 626 (Richardson, J., dissenting in part).[19]

The *Keating* court also looked to authorities generally allowing consolidated arbitration under federal and state rules.[20] Reasoning that because consolidated arbitration proceedings could force a party into an arbitration

> with a party with whom he has no agreement, before an arbitrator he had no voice in selecting and by a procedure he did not agree to . . . . *an order for class wide arbitration in an adhesion context would call for considerably less intrusion upon the contractual aspects of the relationship.*

Id. at 612 (emphasis added). Rejecting the Supreme Court's admonition that courts are to "rigorously enforce agreements to arbitrate,"[21] the court remarked, "[i]f the alternative in a case of this sort is to force hundreds of individual[s] . . . each to litigate its cause with [defendant] in a separate arbitral forum, then the prospect of class-wide arbitration, for all of its difficulties, may offer a better, more efficient and fairer solution."[22]

The concern, expressed by the dissent in *Keating* and raised many times over, is the high cost of arbitration, with some filing fees starting at nearly $2,000 plus the expense of daily arbitrator fees.[23] Where the arbitration clauses do not provide that the business will pay the costs of arbitration, courts believe consumers will not initiate arbitration. "[I]t is apparent that in a number of situations, large arbitration costs will preclude class members from effectively vindicating their legal rights."[24]

THE ISSUE REACHES THE SUPREME COURT

While the issue has been percolating over the last two decades, it has risen to the Supreme Court several times. In *Southland Corp. v. Keating*, 465 U.S. 1 (1984),[25] the Supreme Court declined to address the issue because the petitioner had not argued below that "if state law required class-action procedures, it would conflict with the federal Act and thus violate the Supremacy Clause."[26]

Several years later, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Supreme Court avoided the issue rather than addressing it directly:

> It is also argued that arbitration procedures cannot adequately further the purposes of the ADEA, because they do not provide for . . . class actions. . . . The NYSE rules also provide for collective proceedings. *Id.* . . . But "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 241 (CA3 1989) (Becker, J., dissenting). Finally, it should be remembered that arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief.

Id. at 32.

And, as recently as December 2000, the Supreme Court was presented with the issue once again in *Green Tree Fin. Corp.–AL v. Randolph*, 531 U.S. 79 (2000) ("*Green Tree I*"), where respondent argued that the arbitration agreement was unenforceable, in part,[27] because it denied her the ability to prosecute her claims and the claims of others as a class action, which would have been allowed by statute (Truth In Lending Act) had she been able to proceed in court.[28] Reciting the Supreme Court pronouncements regarding the purposes underlying the class action mechanism,[29] respondent contended that "*arbitration agreements should not be enforced absent express provision for class actions*."[30] Yet, the Supreme Court did not rule on the issue because it was not raised below.[31]

Nevertheless, the issue appears again in a case in which the Supreme Court recently granted certiorari – *Green Tree Fin. Inc. v. Bazzle*, 123 S. Ct. 817 (cert. granted, Jan. 10, 2003) ("*Green Tree II*"). In this case, the Court will

review the South Carolina Supreme Court's decision[32] that an arbitration agreement governed by the FAA allowed arbitration of class claims, despite the agreement's apparent silence.[33] The court rejected the *Champ* approach – under which the FAA weighed the policy of enforcing arbitration agreements as weightier than potential efficiencies that might be had in a class action – and adopted the *Keating* approach – which favored efficiency over the strict enforcement of the agreement as written. The South Carolina Supreme Court spent little time discussing *Champ*, dismissing it out of hand because it "failed to discuss whether the arbitration agreement was one of adhesion or was truly *negotiated* by the parties, and failed to discuss the differences between consolidation and class-action on a practical level."[34] The court remarked that "'[a]s a matter of pure contract interpretation it is striking, and rather odd, that so many courts have interpreted silence in arbitration agreements to foreclose rather than permit arbitral class actions.'"[35]

The South Carolina Supreme Court instead adopted the reasoning of *Keating* and a later California Court of Appeals case, *Blue Cross v. Superior Court.*, 67 Cal. App. 4th 42 (Cal. App. 1998), *cert. denied*, 527 U.S. 1003 (1999), which held that Section 4 of the FAA did not preempt contrary state law. The South Carolina Supreme Court thus concluded that a court may, in its discretion, order class-wide arbitration where the agreement is silent "if it would serve efficiency and equity, and would not result in prejudice." [36]

Thus, in *Green Tree II*, the Supreme Court will directly confront the question whether the FAA "prohibits class action procedures from being superimposed onto an arbitration agreement that does not provide for class action arbitration."[37] In other words, do the concerns of "efficiency" and "equity" trump the policies embodied in Sections 2 and 4 of the FAA to force parties to arbitrate in accordance with the terms of their agreement?

THE POLICIES SUPPORTING CLASS ACTIONS SHOULD GIVE WAY TO THOSE FAVORING ARBITRATION

Class action mechanisms are creatures of procedure[38] just as arbitration agreements are creatures of contract. Rights to bring class action claims are not substantive or inalienable rights, and, accordingly should not overcome the parties' agreement. If the parties either failed to provide for a particular mechanism in the initial agreement or did not consent to the procedure later, then it should not be used.[39]

By favoring "efficiency" over the parties' agreement, the court sweeps aside the parties' legitimate expectations. It is these expectations that Congress in part sought to protect in enacting the FAA. Moreover, in allowing "efficiency" to trump the parties' agreement, courts reveal hostility to arbitration (on the parties' terms) because it lacks the procedural comforts of litigation. That hostility is exactly the type of problem the FAA was intended to overcome.[40] Hence, mere preference for efficiency should not allow courts to write rules for arbitration or to rewrite arbitration agreements. In contravention of the clear language of 9 U.S.C. § 4, courts are not revoking the contract but rewriting the agreement. In sum, concluding that class action procedures may be superimposed on silent arbitration agreements or deciding that a clause barring a class action is unenforceable "cannot be reconciled with this Court's decisions which make clear that concerns regarding efficiency and economy are subsidiary to enforcement of the parties' agreement according to its terms,"[41] and cannot be reconciled with the FAA.

THE BATTLE MAY NOT BE OVER

Notwithstanding the issue presented in *Green Tree II*, trial lawyers, who are providing their peers and consumers with the tools to negate arbitration clauses,[42] may not rest until all arbitration clauses in consumer contracts – not just no-class-action clauses – are unenforceable.[43] State courts favoring class actions may assist them in that goal. Finding themselves without the "authority" to order class-wide arbitration, the courts simply may order class action litigation, reasoning that if class actions are not permitted in arbitration then the entire arbitration clause is unconscionable. That will leave the parties in court, with the full panoply of procedural mechanisms available to trial lawyers, including class actions.

Although the unconscionability issue is not presented directly to the Supreme Court in *Green Tree II*, the Court may be able to take significant strides to restoring the enforceability of arbitration clauses in consumer agreements. In particular, by reinforcing that the policies favoring arbitration should outweigh those favoring class actions, the Court may be able to reduce the chance of the trial lawyers' success in this on-going battle.

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Footnotes

[1] Jere Locke Beasley, *The Evils of Binding Arbitration in Consumer Contracts*, at 2, 7 (Nov. 2002), http://www.beasleyallen.com/articles/Evils%20of%20Binding%20Arbitration.pdf (last visited Jan. 29, 2003) ("[C]onsumers and small business owners are in a battle that must be won."); *see also* Jere Locke Beasley, *Arbitration: Public Enemy Number One* (undated), http://www.beasleyallen.com/articles/Arbitration-publicenemy1-ATLA-01-00.pdf (last visited Jan. 30, 2003).

[2] Beasley, *supra note 1*, at 9 ("It is difficult to see how the United States Supreme Court can construe an Act of Congress such as the FAA and apply it beyond its original intent in such a way as to prevent citizens of the United States and the several states from exercising their Constitutional right to litigate in a court of law before a jury. In order to do so, the Court must ignore the Seventh and Tenth Amendments to the U.S. Constitution as well as the state constitutional guarantees of the right to trial by jury."). The trial lawyers also are pushing their agenda in Congress and returning large fee awards to elect politicians and judges opposed to tort reform. *See* Stephen J. Ware, *Arbitration Under Assault: Trial Lawyers Lead the Charge*, Policy Analysis No. 433, , at 6-8 (Cato Institute Apr. 18, 2002); Stephen Moore, *Cause for Trial Bar Celebration*, http://www.cato.org/dailys/12-04-99. html (last visited Feb. 7, 2003).

[3] *See* http://www.milliondollaradvocates.com (last visited Feb. 7, 2003).

[4] Courts assess unconscionability in a two-step analysis: (1) is the manner in which the agreement was obtained unfair (procedural unconscionability), and (2) are the contract terms so one-sided as to "shock the conscience" (substantive unconscionability). *See generally Szetela v. Discover Bank*, 118 Cal. 2d 862, 867 (Ct. App. Div. 3

2002) ("Procedural unconscionability focuses on the manner in which the disputed clause is presented to the party in the weaker bargaining position. . . . Substantive unconscionability addresses the fairness of the term in dispute."); F. Paul Bland, Jr., *Is That Arbitration Clause Unconscionable? PROVE IT!* , The Consumer Advocate No. 4 (Jul.-Aug. 2002), http://www.tlpj.org/News_PDF/fall-02/07-01-02-consumer.advocate.pdf (last visited Jan. 30, 2003) (hereinafter, "Bland"); Mark E. Budnitz, *Developments in Consumer Arbitration Case Law: 1997 – August 2000* (2000), http://law.gsu.edu/mbudnitz/arbsumryjune01.pdf (last visited Jan. 30, 2003) (cataloguing cases).

[5] Title 9, Section 2, provides that pre-dispute arbitration agreements are enforceable according to their terms.

A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id.

[6] *Id.*

[7] *See Szetela*, 118 Cal. Rptr. 2d at 868 (finding clause unconscionable because it would allow the business to avoid many smaller claims – "a 'get out of jail free' card" – "while compromising important consumer rights"); *Mendez v. Palm Harbor Homes, Inc.* 45 P.3d 594, 111 Wash. App. 446 (2002) (concluding that if class action mechanism is only way for a plaintiff to attempt to vindicate rights, then public policy favoring arbitration "must defer to the overriding principle of access to justice"); *see also Ting v. AT&T Corp.*, 182 F. Supp. 2d 902, 930 (N.D. Cal. 2002) ("Case law and public policy embrace the importance of class actions as a vital instrumentality of consumer protection.").

[8] Jean R. Sternlight, *Should an Arbitration Provision Trump the Class Action? No: Permitting companies to skirt class actions through mandatory arbitration would be dangerous and unwise*, ABA Dispute Resolution Mag. at 13 (Spring 2002) (hereinafter, "Sternlight") ("Drafters of these clauses know that if they can eliminate class actions, they can often eliminate claims exposure altogether because individual claims will not be brought.").

[9] *Id*.

[10] *Id.*

[11] *See Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (citing cases); *see also Johnson v. West Suburban Bank*, 225 F.3d 366, 377 N.4 (3rd Cir. 2000); *Howard v. KPMG*, 977 F. Supp. 654, 665, n.7 (S.D.N.Y. 1997), *aff'd* 173 F.3d 844 (2d Cir. 1999); *but see New England Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988).

[12] *See Keating v. Superior Court.*, 645 P.2d 1192, 1208-10 (1982), *rev'd on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984); *see also Blue Cross of Cal. v. Superior Court.*, 67 Cal. App. 4th 42, 62-66 (1998); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991), *appeal denied*, 616 A.2d 984 (Pa. 1992); *but see Discover Bank v. Superior Court*, 105 Cal. App. 4th 326 (2003); *Stein v. Geonerco, Inc.*, 17 P.3d 1266, 1271 (Wash. Ct. App. 2001); *Med Center Cars, Inc. v. Smith*, 727 So.2d 9 (Ala. 1998).

[13] *Champ*, 55 F.3d at 274-75 (citing cases).

[14] In accord with 9 U.S.C. § 2, under Section 4, a party may move in federal court "for an order directing that arbitration proceed ***in a manner provided for in such agreement.***" 9 U.S.C. § 4 (emphasis added).

[15] *Champ*, 55 F.3d at 276.

[16] *Id.* at 277.

[17] *Id.* (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

[18] *Keating*, 31 Cal. 3d at 610.

[19] *See also Mendez*, 45 P.3d at 607, 111 Wash. App. at 469 (contending that the "primary public policy issue at stake [is] high arbitration costs precluding the consumers access to a forum where he or she can vindicate his or her claim").

[20] *Keating*, 31 Cal. 3d at 610-11.

[21] *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 221 (1985).

[22] *Keating, 31 Cal. 3d.* at 613.

[23] *See Mendez*, 45 P.3d at 603-05, 111 Wash. App. at 461-65.

[24] *Ting*, 182 F.Supp.2d at 934. *Cf. Morrison v. Circuit City Stores, Inc.*, Case Nos. 99-4099, 99-5897, 2003 WL 193410 (6th Cir. Jan. 30, 2003) (holding cost-splitting provisions in employment arbitration clause unenforceable).

[25] This case arose out of the same litigation as *Keating v. Superior Court*.

[26] *Southland Corp.*, 465 U.S. at 8.

[27] The primary issue in the case was whether an agreement that was silent as to the allocation of costs of arbitration was enforceable. While the Court began by indicating that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum" the Court found that "silence . . . alone is plainly insufficient to render [an arbitration agreement] unenforceable." 531 U.S. at 91. The Court reasoned that "a party seeking to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive bears the burden of showing the likelihood of incurring such costs." *Id.* at 92. Because respondent did not show how she actually would be subject to unbearable costs, such that mandatory arbitration would prevent her from having a forum in which to resolve the disputes, the Supreme Court did not find the provision unconscionable. The Court concluded that because she did not carry that burden, a finding that the clause was unconscionable "would undermine the 'liberal federal policy favoring arbitration agreements.'" *Id.* at 91 (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

[28] *Green Tree I*, Br. of Resp. at 39 (filed July 24, 2000).

[29] *See Amchem Products, Inc. v. Windsor*, 512 U.S. 591, 617 (1997) ("The policy at the very core of the class action is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."); *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("[M]ost of the plaintiffs would have no realistic day in court if a class action were not available."); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) ("Economic reality dictates that petitioner's suit proceed as a class action or not at all.").

[30] *Green Tree I*, Br. of Resp. at 48 (emphasis added).

[31] *Green Tree I*, 531 U.S. at 92 n. 7.

[32] *Green Tree Fin.Corp. v. Bazzle*, 569 S.E.2d 349, 351 S.C. 244 (2002).

[33] Whether the agreement between Green Tree and Bazzle is silent on the point of class action procedures was disputed at the trial court level. Petitioner Green Tree has continued to argue that "[b]y limiting the arbitrator's authority to address claims or relationships that result from '*this* Contract,' the agreement precludes consolidated or class-wide arbitration of disputes involving *other* contracts." *Green Tree II*, Pet. for Writ of Cert. at 6-7. That argument, however, fell on deaf ears, and the trial court ordered Green Tree to arbitrate the claims as class claims. *Id.* at 7.

[34] *Bazzle*, 569 S.E.2d at 356, 351 S.C. at 249.

[35] *Id.* at 360, 351 S.C. at 265 (quoting Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 83 (Oct. 2000)).

[36] *Id.* at 361, 351 S.C. at 266.

[37] *Green Tree II*, Pet. For Writ of Cert., at i, (filed Oct. 23, 2002) ("Question Presented").

[38] *See* Fed. R. Civ. P. 23. *But see Discover Bank v. Superior Court*, 105 Cal. App. 4th 326, —, 129 Cal. Rptr. 2d 393, 409-10 (2003) (concluding that the issue of whether a class action waiver was enforceable was a matter of substance rather than procedure because it exposed defendant to an increased "scope of potential liability and damages . . . without the ability to seek judicial review of the merits of the arbitrator's decision").

[39] Consumers are not without resources to protect themselves. In an interesting twist, the Alabama Supreme Court recently found that a consumer's addendum to a vendor form contract was effective to eliminate a binding arbitration clause. Terry Carter, *Eating Away at Arbitration*, ABA Journal Ereport (Jan. 10, 2003). The addendum stated in pertinent part:

Cook's [Pest Control] agrees that any prior amendment to the Customer Agreement shall be subject to written consent before arbitration is required. In the event that a dispute arises between Cook's [Pest

Control] and Customer, Cook's [Pest Control] agrees to propose arbitration is [sic] so desired, estimate the cost thereof, and describe the process (venue, selection of arbitrator, etc.). Notwithstanding prior amendments, nothing herein shall limit Customer's right to seek court enforcement (including injunctive or class relief in appropriate cases) nor shall anything herein abrogate Customer's right to trial by jury. Arbitration shall not be required for any prior or future dealings between Cook's [Pest Control] and Customer.

See Cook's Pest Control v. Rebar, No. 1010897, slip op. at 4, (Ala. Dec. 13, 2002). The customer included the addendum in the envelope with their regular payment. The vendor, Cook's Pest Control, cashed the check and then performed a termite inspection. As a result, Cook's had agreed to the new terms. Hence, the plaintiffs were not bound by the arbitration clause. *See Cook's Pest Control v. Rebar*, No. 1010897, slip op. (Ala. Dec. 13, 2002).

[40] *See Discover Bank*, 105 Cal. App. 4th at —, 129 Cal. Rptr. 2d at 410 ("Just as consumers are harmed by the enforcement of an unconscionable class action waiver, defendant companies may be able to prove they will be prejudiced if classwide arbitration is imposed where, even though the arbitration agreement is silent on the subject, the agreement has adopted arbitration rules, such as these of the [American Arbitration Association], that do not provide for classwide arbitration.").

[41] *Green Tree II*, Pet. for Writ of Cert. at 13; *see also Discover Bank*, 105 Cal. App. 4th at —, 129 Cal. Rptr. 2d at 409 (2003) (concluding that "it would defeat the purpose of the FAA, which was enacted primarily to ensure that arbitration agreements are enforced according to their terms . . . to strike the class action waiver from the agreement.").

[42] *See* Bland, *supra* note 5. Mr. Bland also is the co-author of a manual, *Consumer Arbitration Agreements: Enforceability and Other Options*, on how to prove that a "given arbitration clause is unconscionable in a given jurisdiction." *See id.; see also* Rhon Jones, *Defeating Arbitration Agreements Enclosed in the Delivery of Mail Order Products: What Protection Can the UCC Afford Consumers*, http://www.beasleyallen.com/articles/DefeatingArbitration.pdf (last visited Jan. 30, 2003).

[43] *See supra* note 2 (Beasley, *Arbitration: Public Enemy Number One*).