AVOIDING ARBITRATION AND PRESERVING THE RIGHT TO TRIAL BY JURY

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I. INTRODUCTION

Arbitration agreements are routinely enforced, and should be, when the parties to the agreement have equal bargaining power and an equal level of sophistication. This is typically the case in commercial transactions among merchants. Such transactions were the ones Congress had in mind when it enacted the Federal Arbitration Act. However, when arbitration clauses are buried in fine print, presented on a "take it or leave it" basis in transactions where bargaining power and sophistication are one-sided, as is typically the case in consumer transactions, then general contract principles require closer scrutiny of the fairness.[1] Arbitration clauses are appearing with greater regularity in consumer transactions.

Under the ruse of efficiency - cheaper and faster results - Corporate America has been pushing the bandwagon of arbitration, and it is crushing consumers caught in its path. Arbitration deprives consumers of the ability to develop legal claims because of the limited discovery available in arbitration. It deprives people of the ability to bring claims as a part of a class because most arbitration associations prohibit class actions - effectively leaving consumers who have relatively small damages without a remedy. It deprives consumers of effective access to courts as it strips away the constitutional right to a trial by jury. Some arbitration associations, such as the National Arbitration Forum, solicit business from big corporations by touting how

[1] Michael D. Donovan "Preserve Judicial Recourse For Consumers: How To Combat Overreaching Arbitration Clauses," 10 Lov.ConsumerL.Rev. 269, 271 (1998).

arbitration will improve the Company's bottom line and keep them from ever facing another consumer class action. Mandatory, predispute arbitration agreements benefit Big Business and, conversely, hurt small businesses and consumers. The legislative history of the Federal Arbitration Act shows it was never intended to apply to consumer transactions. Yet, consumers are being sent to arbitration with alarming frequency.

As the title of this article suggests, the objective here is to discuss legal arguments for avoiding arbitration in favor of a trial by jury. Arbitration provisions are governed by contract principles. Therefore, the logical beginning point is to determine whether there exists an agreement between the parties to arbitrate disputes. This analysis concerns contract formation and includes issues such as consent and whether the parties are signatories or non-signatories.

The second step is to determine whether Alabama's anti-arbitration statute, §8-1-41(3), is preempted by the Federal Arbitration Act. This analysis includes issues such as whether the activity involves interstate commerce and whether the McCarran-Ferguson Act "reverse preempts" the FAA.

The third step is to determine whether the dispute at issue is one that is covered by the arbitration agreement. This analysis requires a close reading of the arbitration agreement itself and consideration of whether intentional torts are subject to arbitration.

The final step is to determine whether a defense to the enforceability of the arbitration agreement is present. This analysis involves the review of defenses to contracts generally, such as unconscionability, fraud in the inducement, illegality and waiver. This step also includes an analysis of federal statutory claims that may preclude enforcement of arbitration provisions, such as the Magnuson-Moss Act and the Truth-In-Lending Act.

Each of these steps will be examined below.

II. STEP ONE: IS THERE A CONTRACT TO ARBITRATE DISPUTES?

In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), the Court found that, as a matter of federal law, arbitration provisions are "separable" from the contract as a whole. *Ibid* at 402. Under general contract principles, a meeting of the minds is a prerequisite for contract formation. *See Ex parte Industrial Technology, Inc.*, 707 So. 2d 234 (Ala. 1997); *Auburn Engineers, Inc. v. Downtown Properties*, #1, 675 So. 2d 415 (Ala. 1996); *Elan Pharmacy, Inc. v. Brinson*, (Ala.Civ.App. 1997). Therefore, a meeting of the minds regarding arbitration should be required.[2]

A. Consent (Meeting of the Minds)

Other jurisdictions have subjected the issue of consent, or a meeting of the minds, to close scrutiny in consumer transactions. For example, in *Badie v. Bank of America*, 67 Cal. App.4th 779, 79 Cal. Reporter 273 (1998), the Court held that credit card customers did not consent to arbitration by merely continuing to use their credit card after receiving a bill stuffer that unilaterally imposed an arbitration provision. The bank in *Badie* argued that the change-of-terms provision in the original customer agreement gave it carte blanche to bind the customers to whatever terms the bank might choose to impose later as long as the customers were given written notice. The *Badie* Court rejected this position noting that the law limits the operation of such change-of-term provisions to changes that were anticipated by the parties

[2] The burden of proof is on the party seeking to compel arbitration to show the existence of an agreement to arbitrate. *E.g., Southern United Fire Ins. Co. v. Knight*, 736 So. 2d 582 (Ala. 1999).

when the contract was entered into. The Court further held:

> [T]he bank's interpretation of the change of terms provision would dispense with the requirement for a clear and unmistakable indication that the customer intended to waive the right to a jury trial. Because we find no unambiguous and unequivocal waiver of that right here, and because the right to select a judicial forum, whether a bench trial or a jury trial, as distinguished from arbitration or some other method of dispute resolution, is a substantial right not likely to be deemed waived [citations omitted], the bank's interpretation of the change of terms provision must be rejected.

67 Cal.App.4th at 806, 79 Cal.Rptr. at 291.

On the other hand, in recent times, the Alabama Supreme Court has found consent to arbitration agreements in some unusual places. For example, in *Ex parte Shelton*, 738 So. 2d 864 (Ala. 1998), the Court found consent to an arbitration agreement based upon the sending of a newsletter by an insurance company to its insured. In *Shelton,* Mae Clark, an elderly lady with limited education, had a Medicare-supplement policy with Blue Cross and Blue Shield ("BCBS"). BCBS sought to unilaterally impose an arbitration provision by sending a newsletter to its insureds. In its newsletter to insureds, BCBS informed the insureds that their policy had been amended to include an arbitration provision and that the insured's continued payment of premiums constituted acceptance of this provision. The Court noted that there was sufficient evidence to create a presumption that Ms. Clark received the materials informing her of the amendment to her contract. The Court left her susceptible to arbitration proceedings.

Similarly, in *Ex parte Rager*, 712 So. 2d 333 (Ala. 1998), the Court held that there was consent to arbitrate based merely on the fact that the policy mailed to the insured contained an arbitration provision. The only agreement signed by the insured was the application which did not mention arbitration. However, the policy later mailed to the insured contained an arbitration

provision and, because the policyholder did not cancel his policy within ten days after its receipt, the Court found that the insured **consented** to arbitration.

Going even further, in *McDougle v. Silvernell*, 738 So. 2d 806 (Ala. 1999), the Court found that the plaintiff consented to the arbitration agreement by signing a document that merely incorporated by reference a separate policy containing an arbitration provision, even though plaintiff never received an arbitration provision at all.

Although the Alabama Supreme Court seems to find consent readily, this is an issue that needs to be diligently pursued on behalf of consumers facing a motion to compel arbitration. If, as indicated in *Prima Paint*, the arbitration agreement is to be treated as a separate agreement, then close scrutiny should be given to its formation, including an evaluation of whether all elements of contract formation are present.

B. Signatory v. Non-Signatory

Although enforceability is essentially a question of contractual interpretation, two conflicting lines of authority exist concerning whether an arbitration provision is enforceable by or against a non-signatory. One line of authority allows the enforcement by or against a non-signatory where claims are founded on and intertwined with facts surrounding the underlying contract that contains arbitration clause, or where the non-signatory is a third-party beneficiary.

In *Ex parte Dyess*, 709 So. 2d 447 (Ala. 1997), the plaintiff's claims of fraud, bad faith and tort of outrage were compelled to arbitration even though he had not signed any agreement with the defendant. The Court held that plaintiff Dyess, as a third-party beneficiary of the uninsured motorist policy between American Hardware and Jack Ingram Motors, was subject to the arbitration provision in the policy because he was seeking coverage under the policy for injuries sustained during a test drive.

For other cases taking a broad view of enforcement as to non-signatories, see the following:

- *Colonial Sales-Lease Rental, Inc. v. Target Auction and Land Co. Inc.*, 735 So. 2d 1161 (Ala. 1999)
- *Infiniti of Mobile, Inc. v. Office*, 727 So. 2d 42 (Ala. 1999) (enforcement against non-signatory third-party beneficiary)
- *Ex parte Napier*, 723 So. 2d 49 (Ala. 1998).

The other line of authority views enforcement more narrowly, looking at whether arbitration provision is specifically limited to the signing parties. For example, in *Crown Pontiac, Inc. v. McCarrell*, 695 So. 2d 615 (Ala. 1997), the Court held that an arbitration clause in a retail buyer's order was not binding although the buyer's order was signed. In this case, the space provided below the arbitration clause, which was part of the buyer's order, was not signed. The Court reasoned that because there was no signature in the space provided under the arbitration clause, there was no indication of consent to arbitrate disputes.

For additional authority for narrow construction of arbitration provisions as to non-signing parties, see the following cases:

- *First Stanley Financial Services, Inc. v. Rogers*, 736 So. 2d 553 (Ala. 1999)
- *Universal Underwriters Life Ins. Co. v. Dutton*, 736 So. 2d 564 (Ala. 1999)
- *Med Center Cars, Inc. v. Smith*, 727 So. 2d 9 (Ala. 1998)
- *Ex parte Isbell*, 708 So. 2d 571 (Ala. 1997)
- *Homes of Legend, Inc. v. Fields*, 1999 WL 1046442 (Ala. Nov. 19, 1999)
- *Ex parte Roberson*, 1999 WL 1025305 (Ala. Nov. 12, 1999)
- *First American Title Insurance Corp. v. Sivernell*, 1999 WL 778506 (Ala. Oct. 1, 1999)

III. STEP TWO: IS STATE LAW AGAINST ARBITRATION PREEMPTED?

In most circumstances Alabama's anti-arbitration statute, §8-1-41(3), is preempted by the FAA. However, if the Federal Arbitration Act is not applicable, then, under Alabama law, a

predispute arbitration agreement cannot be specifically enforced. In determining whether the FAA preempts state law in a given case, consideration should be given to whether the interstate commerce requirement is satisfied and to whether the McCarran-Ferguson Act takes the case out of the scope of FAA preemption.

A. Interstate Commerce

The Federal Arbitration Act provides as follows:

> "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 … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

9 U.S.C. §2 (emphasis added).

If the transaction does not involve interstate commerce, the FAA does not apply and §8-1-41(3) bars enforcement of an arbitration agreement. One question arises: To invoke the application of the FAA, does the transaction only have to "affect" interstate commerce, or must the transaction "substantially affect" interstate commerce? The Alabama Supreme Court recently addressed this issue in *Sisters of the Visitation v. Cochran Plastering Co., Inc.*, 2000 WL 264243 (March 10, 2000 Ala). Sisters of the Visitation, a Catholic religious order, filed a demand for arbitration against a contractor, Cochran, alleging that Cochran negligently damaged decorative paintings on the surface of the chapel's ceiling and walls while attempting to repair cracks in the plaster. Cochran filed an action in circuit court to stop the arbitration proceeding. Cochran argued that the contract did not involve interstate commerce, and therefore the FAA was not applicable. The Supreme Court agreed in a 6-3 decision.

Following the United States Supreme Court's decision in *U. S. v. Lopez*, 514 U.S. 549 115 (S.Ct. 1624) 131 L.Ed. 2d 626 (1995), the Alabama Supreme Court held that activity must "substantially affect" interstate commerce to come within Congress's authority under the Commerce Clause, and thus to be governed by the FAA.

In reaching the conclusion that the repair contract did not substantially affect interstate commerce, the Court considered the following factors:

1. Does the transaction involve a contract solely between two local parties, each of which is unaffiliated with any entity involved in interstate commerce?
2. Are the tools/equipment necessary in performing the contract of significant impact on interstate commerce?
3. How are the costs allocated among the parties for materials and services moving in interstate commerce?
4. Is the work performed under the contract subject to movement across state lines?
5. Does the contract in question substantially impact other related contracts which d have a substantial affect on interstate commerce?

Analyzing these factors, the Court concluded that the activity did not "substantially affect" interstate commerce, and therefore Cochran could not be compelled to arbitrate the dispute with Sisters of the Visitation. Also, it is important to keep in mind that the burden is on the party invoking arbitration to prove that interstate commerce is substantially affected, *Southern United Fire Ins. Co. v. Knight*, 736 So. 2d 582 (Ala. 1999), and that boilerplate language in the arbitration provision to the effect that the parties agree that the transaction involves interstate commerce, without more, fails to satisfy this burden of proof. *Rogers Foundation Repair, Inc. v. Powell*, 1999 WL 1001220 (Nov. 1, 1999).

B. McCarran-Ferguson Act: Arbitration Agreements and Insurance Contracts

While alarming, it is certainly not surprising that most insurance companies have fully embraced binding arbitration and now regularly include an arbitration clause in their insured's policies. Unfortunately, barring modification by the Court or action by the Governor or Legislature, the future appears dim for those fighting arbitration in insurance contracts in Alabama.

The McCarran-Ferguson Act provides as follows: "No Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any State for the purpose of regulating the business of insurance …." 15 U.S.C. §1012(b). Other jurisdictions have held that the McCarran Ferguson Act prevents the FAA from pre-empting state laws that would preclude arbitration agreements in insurance contracts. *See e.g., Mutual Reinsurance Bureau v. Great Plains Mutual Ins. Co., Inc.* 969 F.2d 931 (10th Cir. 1992). However, the Alabama Supreme Court has rejected this argument.

Alabama's anti-arbitration statute, § 8-1-41(3) Ala.Code (1975), is a law of general application and is incorporated into the Alabama Insurance Code via § 27-14-22, Ala.Code (1975), which is an "insurance specific" statute. Section 27-14-22 provides that "all contracts of insurance, the application for which is taken within this state, shall be deemed to have been made within this state and subject to the laws thereof." Accordingly, it would appear that the McCarran-Ferguson Act "reverse preempts" the Federal Arbitration Act and should operate to preclude mandatory binding arbitration in Alabama citizens' insurance policies. Even a cursory review of the legislative history of the FAA indicates that "it is not the intention of this bill to cover insurance contracts." *Allstar Mobile Homes v. Waters*, 711 So. 2d 924 (Ala. 1997) (quoting

67th Cong. 4th Sess. 9-10 (1923)). However, despite this clear language, the Alabama Supreme Court recently ruled by a slim 4-3 vote that the McCarran-Ferguson Act did not, in fact, reverse preempt the FAA. *American Bankers Ins. Co. of Florida v. Crawford,* 1999 WL 553725, (Ala. 1999).

In *Crawford*, the majority concluded that § 8-1-41(3) was not "enacted for the purpose of regulating the business of insurance," but instead is a general statute applying to all Alabama contracts and not merely directed at the insurance industry. *Id*. at 11. Consequently, the Court held the anti-arbitration statute does not fall within the scope of the McCarran-Ferguson Act. The Court further reasoned that § 27-14-22 is a "choice of law" provision, not a specific insurance provision, and as a result cannot, by incorporation, convert the status of § 8-1-41(3) to that of an insurance statute. *Id*. at 12. Ultimately, this interpretation of § 27-14-22 and § 8-1-41(3) precludes application of the McCarran-Ferguson Act to invalidate arbitration clauses found within Alabama insurance contracts.

In a notable dissent joined by Justice Cook and Justice Johnstone, Justice Houston stated that the majority misplaced its focus by concentrating on the issue of § 8-1-41(3), which is obviously a statute of general applicability, while the Court should have questioned the applicability of § 27-14-22, which is, in fact, a part of the Insurance Code and was "enacted for the purpose of regulating insurance." *Id*. at 14. Justice Houston further interpreted this "insurance specific" provision to mean that all insurance contracts applied for in Alabama are controlled by all relevant Alabama laws *including* § 8-1-41(3), because § 8-1-41(3) is relevant to all Alabama contracts including insurance contracts. As a result, § 27-14-22 "provides the bar to the specific performance of arbitration agreements in insurance contracts." *Id*.

It should be noted that in *Crawford*, Justice Lyons recused himself and Justice Kennedy's seat had not yet been filled by the appointment of Justice John England. Therefore, only seven justices decided this case. Application for rehearing was filed in August 1999. In October 1999, Chief Justice Hooper entered an order assigning the Honorable John Patterson for temporary service on the Supreme Court with full authority until final determination of this case since the addition of Justice England could possibly result in a 4-4 decision upon rehearing. Mr. Crawford then objected to this appointment pursuant to Ala. Code § 12-2-14, which appears to give the Governor, not the Chief Justice, the authority to appoint a temporary justice under circumstances present here, but withdrew the objection in December, 1999. On January 28, 2000, the application for rehearing was overruled without opinion.

IV. STEP THREE: IS THE DISPUTE COVERED BY THE ARBITRATION AGREEMENT?

A. Contractual Language

Whether an arbitration provision applies to a particular dispute between the parties is to be determined by examining the contract entered into by the parties. *Old Republic Insurance Co. v. Lanier*, 644 So. 2d 1258, 1260 (Ala. 1994), citing *Drake Bakeries, Inc. v. Local 50*, *American Bakery and Confectionary Workers, Intl.*, 370 U.S. 254, 256 82 S.Ct. 1346, 1348, 8 L.Ed.2d 474 (1962). In *Old Republic*, the Court held that phrases such as "arising hereunder," "arising out of the contract" or "arising under" are more narrow in scope and should be read only to cover disputes relating to the interpretation and performance of the contract itself. On the other hand, a phrase like "arising out of or relating to" should be considered to be a broad arbitration clause. *Old Republic*, 644 So. 2d at 1262. Therefore, careful consideration should be given to the

language of the arbitration clause to determine whether the dispute is one that would fall within the scope of the agreement.

See the following cases for additional treatment of contract language interpretation:

- *Beaver Construction Co., Inc. v. Lakehouse, L.L.C. 742 So. 2d 159* (Ala. 1999) ("the [agreement] does not, on its face, contain an arbitration clause. However, it *repeatedly* references the HUD Form, which in turn, references the AIA Document, which documents provide for arbitration.")

- *Reynolds & Reynolds Co., Inc. v. King Automobiles, Inc.*, 689 So. 2d 1 (Ala. 1996) ("arising out of or relating to" the contract has a broader application than "arising from" the agreement).

B. Intentional Torts

Another issue to consider is whether the arbitration agreement covers intentional torts. In *Carl Gregory Chrysler-Plymouth, Inc. v. Barnes*, 700 So. 2d 1358 (Ala. 1997), the Court held that an arbitration provision, although broad, did not cover a dispute over the intentional tort of a party to a contract when the tort did not concern the negotiations, terms and provisions or any other aspect of the party's contractual dealings. Likewise, in *Ex parte Discount Foods, Inc.*, 711 So. 2d 992 (Ala. 1998), the Court held that the broad arbitration provision could not be construed to encompass intentional torts of the parties that were separate and distinct from the dealings that gave rise to the signing of the contract containing arbitration clause. Explaining the reasoning, the Court noted as follows:

> "To hold otherwise would allow persons signing broad arbitration provisions to commit intentional torts against one another, which torts are outside the scope of their contemplated dealings, without concern that they might have to answer for their actions before a jury of their peers."

Ibid.

However, more recently and without discussing *Ex parte Discount Foods* or *Barnes*, the Court compelled to arbitration plaintiffs' claims of invasion of privacy, outrage, and assault and battery arising out of sexually inappropriate conduct in the workplace. *Ryan's Family Steak Houses, Inc. v. Regelin*, 735 So. 2d 454 (Ala. 1999). In *Regelin*, the arbitration provided that "you agree that employment related disputes between and You and the company shall be resolved through arbitration." Yet, the Court held that this language was sufficient to cover the plaintiff's claims of intentional torts arising out of sexually inappropriate conduct.

Nonetheless, *Discount Foods* and *Barnes* have not been expressly overturned and should be considered in opposing a motion to compel arbitration where intentional tort claims have been raised. Allowing predispute arbitration agreements to apply to intentional wrongful conduct raises troubling public policy concerns.

V. STEP FOUR: IS THERE AN AVAILABLE DEFENSE TO ENFORCEMENT?

A. Contract Defenses

In *Doctors' Associations, Inc. v. Cassarotto*, 517 U.S. 681, 116 S.Ct 1652, 1656, 135 L.Ed.2d 902 (1996), the United States Supreme Court noted that "generally applicable contract defenses, such as fraud, duress, or unconscionability may be applied to invalidate arbitration agreements without contravening §2 [of the Federal Arbitration Act]." Therefore, when facing a motion to compel arbitration, all contract defenses should be reviewed to determine which, if any, are applicable. The most common defenses available in consumer transactions are unconscionability, fraud in the inducement, illegality, and waiver.

1. Unconscionability

Although the Alabama Supreme Court has yet to find an arbitration agreement to be unconscionable, the Court has provided factors it would consider in making a determination of unconscionability. In *Ex parte Dan Tucker Auto Sales, Inc.*, 718 So. 2d 33 (Ala. 1998), Justice Lyons, in his concurring opinion, stated as follows:

> "[U]nconscionability, under general principles of Alabama law, can be reduced to a four-part test: (1) Whether there is an absence of meaning for choice on one party's part; (2) whether the contractual terms are unreasonably favorable to one party; (3) whether there was unequal bargaining power between the parties; and (4) whether the contract contained oppressive, one-sided, or patently unfair terms.
>
> I believe that a showing of financial hardship, lack of choice, and one-sidedness could, in a proper case, lead to a finding of unconscionability and a concommatent holding of unenforceability of an arbitration agreement that would not conflict with governing federal law."

Ibid at 43.

Additionally, factors pertinent to a determination regarding unconscionability are provided in the following cases:

- *Green Tree v. Wampler*, 1999 WL 667292 (Aug. 27, 1999) (Factors material to a determination of unconscionability include the following: "A refusal of [their] request for assistance after [they] had notified someone that [they were] unable to see or to understand; [their] inability to obtain the product made the basis of [the] action from this seller, or from another source, without having to sign an arbitration clause; the oppressiveness or unfairness of the mechanism of arbitration; or the [unfairness] of a discount or other quid pro quo in exchange for [their] accepting an arbitration agreement.") (Citing *Ex parte Napier*, 723 So. 2d at 53.)
- *Patrick Home Center, Inc. v. Karr*, 730 So. 2d 1171 (Ala. 1999) (Lack of mutuality of remedy is one factor to be considered in making a determination of unconscionability).
- *Brilliant Homes v. Lind*, 722 So. 2d 753 (Ala. 1998) (Justice Lyons' concurring opinion) ("Authority of the arbitrator to determine its own authority may itself be indicium of unconscionability.")

Unconscionability is an affirmative defense with broad application. However, the Court has made it clear that a consumer attacking an arbitration agreement on the basis of unconscionability bears a heavy burden and must make a clear evidentiary showing.

2. Fraud in the Inducement

A claim of fraud in the inducement that is directed toward the arbitration clause itself is a matter to be decided by the Court. However, a claim of fraud in the inducement that is directed toward the entire contract is subject to arbitration, provided that the arbitration clause is broad enough to allow issues of arbitrability to be decided by the arbitrator. *Investment Management and Research, Inc. v. Hamilton*, 727 So. 2d 71 (Ala. 1999). See also:

- *Prima Paint Corp. v. Flood & Colquin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18th L.Ed. 2d 1270 (1967).
- *Jack Ingram Motors, Inc. v. Ward*, 1999 WL 1100875 (Dec. 3, 1999).
- *Anniston Lincoln Mercury Dodge v. Connor*, 720 So. 2d 898 (Ala. 1998).

3. Illegal or Void Agreement

It is well settled that a legal object is an essential element of a valid contract. *E.g. Kennedy v. Polar-Bek & Baker Wildwood Partnership*, 682 So. 2d 443, 446 (Ala. 1996); *Shirley v. Lin*, 548 So. 2d 1329, 1332 (Ala. 1989). Moreover, beginning at least 80 years ago, the Alabama Supreme Court has consistently held that contracts made in violation of regulatory statutes enacted for the protection of the public are null, void and unenforceable. *E.g., Derico v. Duncan*, 410 So. 2d 27, 29 (Ala. 1982) (Consumer loan made pursuant to the Mini-Code void because lender not licensed); *Southern Metal Treating Co. v. Goodner*, 125 So. 2d 268, 271 (Ala. 1960); *Bankers & Shippers Insurance Company of New York v. Blackwell*, 51 So. 2d 498, 502 (Ala. 1951); *Bowdoin v. Alabama Chemical Co.*, 201 Ala. 582, 583, 79 So. 4 (1918).

Indeed, the Alabama Supreme Court has specifically held that a contract made without first obtaining a license, under a regulatory statute that requires a license as evidence of qualification and fitness, is itself illegal, void and unenforceable. *E.g.*, *Southern Metal*, 125 So. 2d at 271; *Bowdoin*, 201 Ala. at 583.

If the contract containing the arbitration provision is void, then the arbitration provision is unenforceable. *E.g., Shearson Lehman Brothers, Inc. v. Crisp*, 646 So. 2d 613 (Ala. 1994) (argument that agent who signed contract lacked authority to bind principal); *Camaro Trading Co., Ltd. v. Nissei Sangyo America, Ltd*, 577 So. 2d 1274 (Ala. 1991). For example, in *Camaro Trading*, plaintiff opposed defendant's motion to compel arbitration on the ground that defendant was a foreign corporation that had not qualified to do business in Alabama, and that the contract containing the arbitration provision was therefore void and the arbitration provision itself could not be enforced. The Alabama Supreme Court agreed, finding that an order compelling arbitration in the absence of a valid contract that provides for arbitration would unconstitutionally deny that party its right to access to Alabama's courts, in violation of Article I, §13 of The Alabama Constitution of 1901. *Camaro Trading*, 577 So. 2d at 1275. It bears emphasizing that whether a contract containing an arbitration provision is void (as opposed to merely voidable) is for the court (subject to a demand for jury trial), and not an arbitrator, to decide. *E.g, Nations Banc Investments, Inc. v. Paramore*, 736 So. 2d 589, 592-94 (Ala. 1999); *Shearson Lehman Brothers, Inc.*, 646 So. 2d at 616-18.

4. Waiver

A right to arbitrate a dispute may be waived if a party substantially invokes the litigation process and thereby substantially prejudices the party opposing arbitration. There is no rigid rule

for determining what constitutes a waiver of the right to arbitration, but rather this issue must be resolved on the particular facts of each case. For representative cases, see:

- *Match Maker of Mobile v. Francis*, 1999 WL 1046449.
- *Ex parte Bentford*, 719 So. 2d 778 (Ala. 1998).
- *Companion Life Ins. Co. v. Whitesell Mfg., Inc.*, 670 So. 2d 897 (Ala. 1995).
- *Huntsville Development, Inc. v. Aetna Casualty and Surety Co.*, 632 So. 2d 459 (Ala. 1994).

B. Federal Statutory Claims

Federal statutory claims may preclude arbitration if the arbitration provision would interfere with the remedial purpose of the statute. When a federal statutory claim is involved, careful consideration should be given to the remedies available under the statute and how the arbitration process may limit such remedies. Several examples are provided below.

1. Magnuson-Moss Act

- *Wilson v. Waverly Homes, Inc.*, 954 F.Supp. 1530 (M.D.Ala. 1997), *aff'd* 127 F.3d 40 (11th Cir. 1997) (Binding arbitration clause conflicted with Magnuson-Moss Warranty Act and was, therefore, unenforceable.)
- *Southern Energy Homes, Inc. v. Lee*, 732 So. 2d 994 (Ala. 1999).
- *Boyd v. Homes of Legend, Inc.*, 981 F.Supp. 1423 (M.D.Ala. 1997).

However, in *Homes of Legend, Inc. v. McCullough*, 2000 WL 92255 Ala. (Jan. 28, 2000), the Court held that the plaintiff's Magnuson-Moss claims were subject to mandatory, *non*-binding arbitration. The Court noted that the arbitration provision conflicts with FTC regulations only to the extent that the provision requires **binding** arbitration.

[In Southern Energy v Ard – 6/2/00, per curiam – the Court reversed the *Lee* decision and adopted See's dissent in *Lee.* Mag-Moss doesn't preclude arbitration]

2. Truth-In-Lending Act

- *Randolph v. Green Tree Financial Corp. – Alabama*, 178 F.3d 1149 (11th Cir. 1999) (An arbitration clause that fails to provide minimum guarantees required to insure that a consumer can vindicate statutory rights under the Truth-In-Lending Act is unenforceable.)

3. Title VII

- *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998) (An arbitration that defeats the remedial purpose of the statute is not enforceable.)

VI. CONCLUSION

There has been an explosion of arbitration provisions in consumer transactions. The impact on consumers is devastating. Although difficult in the current legal climate, there are legal arguments available for avoiding arbitration. For the sake of us all as consumers, these must be diligently pursued.