

Arbitrability after *Green Tree v. Bazzle*: Is There Anything Left for the Courts?

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In the summer of 2003, the Supreme Court decided in the plurality of Green Tree v. Bazzle that if an agreement to arbitrate is silent on the issue of the permissibility of class action arbitrations, the arbitrator—and not the court—should decide whether a class action proceeding is appropriate. The effects of this opinion will be twofold. First, the plurality’s discussion of arbitrability almost creates a presumption that an arbitrator, rather than a court, will decide preliminary issues other than contract formation and applicability of arbitration to the dispute at hand. Second, the Court grants sweeping power to the arbitrator to decide whether arbitration is appropriate without giving arbitrators any guidance on how to run a class action arbitration. Unfortunately, this opinion leaves open more questions than it answers, and future courts will have to refine the scope of the arbitrator’s powers and the requirements for class action arbitrations.

I. INTRODUCTION

The Supreme Court’s recent decision in *Green Tree v. Bazzle*¹ is the next in a line of cases giving increasing power to an arbitrator to hear questions of arbitrability, or the question of whether arbitration is appropriate. Courts have long distinguished between questions of “substantive” arbitrability and “procedural” arbitrability. The traditional rule is that the courts decide questions of “substantive” arbitrability, such as questions of contract formation and the scope of an arbitration agreement, and arbitrators decide “procedural” arbitrability issues, which typically relate to defenses and waivers.² The Court, in 2002, broadened the scope of “procedural”

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¹ 123 S. Ct. 2402 (2003).

² This distinction is present in the Court’s decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). In *First Options*, the contract to arbitrate was never signed by one of the parties, so the Court needed to determine whether an agreement to arbitrate actually existed. *Id.* at 941. The Court held that parties typically expect courts to determine some questions, such as formation, because otherwise the parties’ dispute would be resolved through an arbitration that is, in essence, not voluntary. *See id.* at 942–43. The Court did not use the terms “procedural” and “substantive” arbitrability, even though they were commonly known terms of art, and this decision was consistent with these ideas.

arbitrability in *Howsam v. Dean Witter Reynolds, Inc.*³ when it held that the arbitrator, rather than the court, should determine the applicability of any relevant statutes of limitations.⁴ The effect of the Court's decision in *Green Tree v. Bazzle* further enlarges the scope of "procedural" arbitrability questions by holding that the arbitrator should decide whether a contract allows a class action arbitration when the contract is silent on this precise issue.⁵ The black letter law arising from this case is clear; however, the questions that the Court leaves unanswered are troubling.

This Comment will explore both the plurality and dissenting opinions in this case in light of the court opinions leading up to the decision in *Bazzle* to determine if *Bazzle* was correctly decided. It will then discuss the impact of this case on future arbitrations and arbitration clauses, including the impact of leaving crucial questions unanswered in an opinion that is unusually short considering the importance of the decision.

II. PROCEDURAL BACKGROUND

The Supreme Court granted certiorari on two cases from the South Carolina Supreme Court.⁶ Although both sets of plaintiffs signed the same contract with Green Tree Financial, the procedural histories differed.⁷ All of

³ 537 U.S. 79 (2002).

⁴ *Id.* at 86. The Court decided that a statute of limitations defense is similar to any other defense, so the arbitrator was the appropriate decision-maker. *See id.* at 84–85. However, this question becomes a much closer call considering 1) that statutes of limitations are created for courts, and 2) that arbitrators do not necessarily have to follow the law when they are rendering their opinions. Note that in *Howsam*, the Court similarly moves away from the "substantive" and "procedural" language. This shift in language is more striking in *Howsam* than in *First Options* because the issue in *Howsam* was far less "cut and dry" than the issue in *First Options*.

⁵ *Bazzle*, 123 S. Ct. at 2408.

⁶ *Id.* at 2406.

⁷ *Id.* at 2405–06. Lynne and Burt Bazzle entered into a home improvement loan agreement with Green Tree, while Daniel Lackey and George and Florine Buggs entered into mobile home loans and security agreements. The arbitration clause states:

ARBITRATION—All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract . . . shall be resolved by binding arbitration by one arbitrator selected by us with consent of you. This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1 . . . THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO COURT ACTION BY US (AS PROVIDED HEREIN) . . . The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief.

the plaintiffs filed suit against Green Tree alleging non-compliance with South Carolina banking laws.⁸ The first set of plaintiffs, Lynn and Burt Bazzle, requested that the court certify their claims as a class action. The district court first certified the class action and then compelled arbitration; at arbitration, the arbitrators awarded the Bazzle class \$10,935,000 in damages.⁹ Similarly, the other plaintiffs, Daniel Lackey and George and Florine Buggs, also sought certification, but Green Tree moved to compel arbitration.¹⁰ Although the trial court denied the motion to compel, Green Tree won a reversal on interlocutory appeal.¹¹ For these plaintiffs, the *arbitrator* certified the class and ultimately awarded \$9,200,000 in damages.¹² Green Tree appealed on the ground that class action arbitration was legally impermissible.¹³

When the case reached the South Carolina Supreme Court, that court consolidated the proceedings and affirmed the awards, holding that even though the contract was silent on the issue of class action arbitration, the arbitrations were consistent with South Carolina law.¹⁴ The South Carolina Supreme Court upheld the lower courts for three reasons: 1) the ambiguous contract should be construed against Green Tree, the drafter,¹⁵ 2) South Carolina law strongly favors arbitration and there is no South Carolina law that prohibits class-wide arbitration,¹⁶ and 3) repeat players such as Green Tree should not be able to preclude class action arbitrations in their contracts

Id. at 2405.

⁸ *Id.* Specifically, the loan contracts failed to provide the plaintiffs with a “legally required form that would have told them that they had a right to name their own lawyers and insurance agents and would have provided space for them to write in those names.” *Id.*

⁹ *Id.* at 2405. Following the order to compel arbitration, Green Tree, pursuant to the arbitration clause, selected an arbitrator. The arbitrator conducted the class action and rendered an award for the class. *Id.* The award consisted of both statutory damages and attorney fees. *Id.*

¹⁰ *Id.*

¹¹ *Bazzle*, 123 S. Ct. at 2405–06.

¹² *Id.* at 2406. This award consisted of statutory damages and attorney fees. *Id.*

¹³ *Id.*

¹⁴ *Id.* (citing *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 351 (S.C. 2002)).

¹⁵ *Bazzle*, 569 S.E.2d at 359. The contract is ambiguous because it is silent on the issue of class action arbitrations. The court stated, “In our opinion, this language does not limit the arbitration to non-class arbitration. At best, it creates an ambiguity, and should, therefore, be construed against the drafting party, Green Tree.” *Id.*

¹⁶ *Id.* at 360. In 1995, the Seventh Circuit held that class action arbitration is not permitted when a contract is silent on the issue because the Federal Arbitration Act requires the courts to interpret the contracts according to their terms. *Id.* at 356 (citing *Champ v. Siegal Trading Co., Inc.*, 55 F.3d 269 (7th Cir. 1995)). The South Carolina Supreme Court rejects this idea because, *inter alia*, the Supreme Court has never held the section of the FAA relied upon by the Seventh Circuit as being applicable to state courts.

of adhesion.¹⁷ The South Carolina Supreme Court also noted that the lower courts did not abuse their discretion, and, as such, the decisions should stand.¹⁸

The South Carolina Supreme Court did not rule on the issue of arbitrability. Although the court noted that the court certified the Bazzles' case while the arbitrator certified Lackey's case, it did not make a distinction between the two cases on this point. The Supreme Court of the United States granted certiorari to determine if the South Carolina Supreme Court acted consistently with the Federal Arbitration Act.¹⁹

III. THE PLURALITY OPINION

The plurality opinion, written by Justice Breyer, treated this case as one involving simple contract interpretation. After examining the contract language, the plurality stated: "Under the terms of the parties' contracts, the question—whether the agreement forbids class arbitration—is for the arbitrator to decide."²⁰ Essentially, the plurality characterizes the dispute as a loan dispute. By characterizing the dispute in this manner, the plurality assumes that the parties intended the arbitrator to hear this question because the broad arbitration agreement²¹ contained in the contract included all controversies "relating to the contract," even though the agreement to arbitrate is silent on the issue of class action arbitration.²² In other words, because the language of the arbitration agreement was so broad, the agreement covered virtually all arbitrability questions—including the question of who should make this class action determination.²³

The plurality acknowledged that parties to an arbitration agreement do not intend to submit each and every issue to an arbitrator.²⁴ Unless the parties clearly indicate otherwise, some issues are reserved for the courts, and these are the issues that "contracting parties would likely have expected a court" to

¹⁷ *Id.* at 360–61. This argument is similar to an argument based on unconscionability, see *infra* note 61, but it is not couched in exactly the same terms.

¹⁸ *Bazzle*, 569 S.E.2d at 361.

¹⁹ *Bazzle*, 123 S. Ct. at 2404.

²⁰ *Id.* at 2407.

²¹ *Id.* The contract stated that it covers "all disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract." *Id.*

²² *Id.*

²³ *See id.*

²⁴ *Id.* ("In certain limited circumstances, courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter (in the absence of 'clear and unmistakable' evidence to the contrary).") (citing *AT&T Tech., Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986)).

determine.²⁵ The types of issues suitable for the courts are termed “gateway” issues, and they include “whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy.”²⁶ These two categories, however, are admittedly narrow, and the plurality appears to state that unless the case falls within these two categories, the arbitrator will decide any questions under a broad arbitration agreement.

Next, the Court held that the controversy at issue does not fall within the two exceptions so the arbitrator should have heard the issue in the first instance.²⁷ The parties clearly had a valid agreement to arbitrate, so the first exception did not apply. The plurality also held that the parties agreed to arbitrate this particular issue.²⁸ In order to reach this result, the plurality distinguished this case from *First Options of Chicago, Inc. v. Kaplan*.²⁹ The plurality drew this distinction by noting, “Unlike *First Options*, the question is not whether the parties wanted a judge or an arbitrator to decide *whether they agreed to arbitrate a matter*. Rather the relevant question here is what *kind of arbitration proceeding* the parties agreed to.”³⁰ By phrasing the issue in this case as one of a type of arbitration *proceeding*, rather than a type of *dispute*, the plurality easily distinguished this case from *First Options*.

The plurality summarily determined that “[a]rbitrators are well situated to answer” the question of whether this contract would allow for a class

²⁵ *Bazze*, 123 S. Ct. at 2407 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)).

²⁶ *Id.* Note that the plurality defines what types of questions are *not* for the arbitrator and note that they are referred to as exceptions. In his dissent, Chief Justice Rehnquist defines what an arbitrator *can* decide, rather than what the arbitrator *cannot* decide. See *infra* note 41 and accompanying text. One of the fundamental differences between the plurality and the dissent may be whether there should be a presumption that either the arbitrator or the court be the initial decisionmaker.

²⁷ *Id.*

²⁸ *Id.*

²⁹ 514 U.S. 938 (1995). See *supra* note 2 for a description of the facts and holding of *First Options*. As the *Bazze* court noted, this issue is a “gateway” issue, *Bazze*, 123 S. Ct. at 2407, that must be decided before the substance of the dispute can be uncovered. Similarly, this issue of formation should be an issue for the courts because it would be unfair to enforce a contract to arbitrate against a party that may or may not be bound by that very contract.

³⁰ *Bazze*, 123 S. Ct. at 2407 (citations omitted). Presumably, the Court would find that a party would not have agreed to arbitrate the particular dispute in the following example. Parties *X* and *Y* have a contract for *X* to roof *Y*'s house. The contract includes a broad arbitration clause. If *X* runs into *Y*'s car and *Y* sues *X* to recover damages, *X* should not be able to compel arbitration, no matter how broad the roofing arbitration clause is written. The court should be able to hear the issue of whether the roofing contract extended so far as to cover unrelated torts.

action arbitration.³¹ Thus, the plurality vacated the decision of the South Carolina Supreme Court and remanded the cases to arbitration.³² The judgments in the original arbitrations needed to be vacated because of the court's involvement in these cases.³³ If the arbitrators had originally decided the arbitrability issue and the case were one merely challenging the award, the plurality would have presumably upheld the judgments.

IV. JUSTICE STEVEN'S CONCURRING OPINION

Justice Stevens wrote a short concurring opinion focusing on the Federal Arbitration Act (FAA).³⁴ According to Stevens, the decision of the Supreme Court of South Carolina that "class action arbitrations are permissible if not prohibited by the applicable arbitration agreement" is an outcome consistent with the FAA.³⁵ Justice Stevens conceded that the arbitrator probably should have made the initial decision concerning the arbitrability of class action disputes, but found that because the arbitrators heard the merits of the cases, the outcomes were not tainted.³⁶ Because the decision that class action arbitration could be conducted was a legally correct conclusion, the issue of *who* made this decision should not affect the outcome of the case.³⁷ However, Justice Stevens stated that he will concur in this case in order to have a "controlling judgment of the Court" and because the differences between his and Justice Breyer's views are slight.³⁸

V. THE DISSENTING OPINION

Chief Justice Rehnquist dissented in this case, and his dissenting opinion is joined by Justices O'Connor and Kennedy.³⁹ The Chief Justice dissented

³¹ *Id.*

³² *Id.* at 2408.

³³ *Id.*

³⁴ 9 U.S.C. §1-16 (2000).

³⁵ *Bazzle*, 123 S. Ct. at 2409. (Stevens, J., concurring in the judgment and dissenting in part). This argument has a considerable flaw. The FAA was written nearly 100 years ago in an effort to enforce arbitration agreements between merchants. The text of the FAA is short, and there is nothing in the FAA that governs anything other than the guarantee of the enforcement of agreements to arbitrate and a limited right to review. Almost anything that a court could rule is consistent with the FAA because the FAA contains so few provisions.

³⁶ *Id.* (Stevens, J., concurring in the judgment and dissenting in part).

³⁷ *Id.* (Stevens, J., concurring in the judgment and dissenting in part).

³⁸ *Bazzle*, 123 S. Ct. at 2408-09 (Stevens, J., concurring in the judgment and dissenting in part).

³⁹ Justice Thomas also dissented in this case, but he did not join the opinion written by Chief Justice Rehnquist. Justice Thomas believes that the FAA does not apply to state

on two grounds: (1) *First Options* should control this case rather than *Howsam*, and (2) the wording of the contract language implicitly prohibited class action arbitration. Because these cases went to arbitration, the South Carolina Supreme Court effectively coerced the parties into class arbitration. The plurality opinion responds to each of these arguments, which will be addressed in turn.

The Chief Justice noted that courts generally give great deference to the decisions on matters properly before the arbitrator.⁴⁰ However, the presence of an arbitration clause does not necessarily mean that the parties intended a particular dispute to be arbitrated.⁴¹ Under *First Options*, the courts have the ability to hear some questions of arbitrability, and these are questions that the parties “reasonably would have thought a judge, not an arbitrator would decide.”⁴² The *First Options* decision also stated that “one can understand why courts might hesitate to interpret silence or ambiguity on the ‘who should decide arbitrability’ point as giving the arbitrator that power. . . .”⁴³ The Chief Justice reasoned that questions of to *whom* a matter is submitted is “[j]ust as fundamental” to the agreement as the question of *what* is submitted to that decision-maker.⁴⁴ Because both of these questions are fundamental to the agreement to arbitrate, the parties must have intended that the court, rather than the arbitrator, would decide this issue.⁴⁵

The Chief Justice noted the difference between questions of procedural and substantive arbitrability, acknowledging that the arbitrator, rather than the courts, is presumptively permitted to answer so-called “procedural”

court proceedings and that it cannot preempt state law. As a result, the decision of the Supreme Court of South Carolina should have been upheld. *Id.* at 2411 (Thomas, J., dissenting). Despite Justice Thomas’s thoughts to the contrary, the FAA has been applied to state court cases for decades. Despite Justice Thomas’s thoughts to the contrary, the FAA has been applied to state court cases for decades. *See* Jim Moore, *Bad Facts, Good Law—Thoughts on Engall v. Permanente Medical Group*, 26 W. ST. U. L. REV. 135, 139–42 (1998–99). In fact, although the FAA is a federal statute, it does not independently bestow federal jurisdiction on the parties, *see* 9 U.S.C. 1–16 (2003), so the parties must have another reason to enter federal court. If the FAA could not apply to state cases, then Congress would have passed a law with almost no effect if Justice Thomas were correct on this point of law.

⁴⁰ *Bazzle*, 123 S. Ct. at 2409.

⁴¹ *See id.* (“But the decision of *what* to submit to the arbitrator is a matter of contractual agreement by the parties, and the interpretation of that contract is for the court, not for the arbitrator.”).

⁴² *Id.* (citing *First Options*, 514 U.S. at 945). Note, however, that the decision in *First Options* was a much easier case to decide than *Bazzle* because the arbitration agreement in *First Options* was never signed. *See supra* notes 2–4 and accompanying text.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

questions.⁴⁶ He characterized procedural questions as those primarily involving “allegations of waiver, delay, or like defenses to arbitrability,” as was the case in *Howsam*.⁴⁷ The issue of whether a class action arbitration is prohibited is not an allegation of “waiver, delay, or [a] like defense[],” and, as such, it is not a question of procedural arbitrability, but of substantive arbitrability.⁴⁸

The dissent and plurality views differ in the way they characterize what dispute is to be arbitrated. The plurality opinion focuses on the fact that the parties agreed to arbitrate issues relating to their loan contract.⁴⁹ Because the parties clearly agreed to arbitrate issues relating to the loan, and because the issue of class action is an issue relating to the loan, it is appropriate for an arbitrator to hear this claim.⁵⁰ The Chief Justice, however, views the dispute quite differently. For the dissent, the question of *what* can be arbitrated is the class action dispute.⁵¹ The dissenting opinion shifts the focus from whether arbitration is appropriate for a loan dispute to whether arbitration is

⁴⁶ *Bazzle*, 123 S. Ct. at 2410 (“ ‘Procedural’ questions which grow out of the dispute and bear on its final disposition’ are presumptively *not* for the judge, but for an arbitrator, to decide.”) (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)).

⁴⁷ *Id.* Under this characterization of procedural versus substantive arbitrability, the *Howsam* claim of a statute of limitations defense would clearly fall under procedural arbitrability. See *supra* note 4 for more information on *Howsam* and its effect on this case.

Note that the Chief Justice is attempting to define the scope of the arbitrator’s authority while the plurality is attempting to define the scope of the court’s authority. It is not explicitly stated in either opinion that one should be the rule while the other should be the exception to the rule. However, each opinion limits the power of either the court or of the arbitrator in order to arrive at their respective conclusions. See *supra* note 22 for a discussion of the implication of the plurality’s definition of the scope of permissible court questions.

⁴⁸ The Chief Justice does not expressly state that this dispute falls within the category of substantive arbitrability. Instead, he states that the question of class action arbitration is *not* a matter of procedural arbitrability because it does not fall within one of the categories enumerated in *Howsam*. This might be a distinction without a difference, especially as the plurality seems to be moving away from the distinctions between procedural and substantive arbitrability. The plurality opinion does not make this distinction, and this may be for a number of reasons. First, the plurality could wish to eliminate the distinction, thereby eliminating the confusion that arises from making the difficult procedural versus substantive determination. Or, the plurality could be attempting to enlarge the scope of questions suitable for an arbitrator by creating a broad presumption with a few, limited exceptions.

⁴⁹ *Id.* at 2406–08.

⁵⁰ *Id.*

⁵¹ *Id.* at 2409–10. The Chief Justice acknowledges that the parties had a valid arbitration clause covering issues related to the loan.

appropriate for a class action dispute. The Chief Justice can only classify this question as one of substantive arbitrability after making this key distinction.

The dissenting opinion also makes an argument based solely on the contract language. Under the terms of the contract, any disputes “shall be resolved by binding arbitration by one arbitrator selected by us with consent of you.”⁵² Furthermore, the “us” is defined as the bank, and the “you” is defined as the lender of the contract.⁵³ The contract also states that disputes resulting from “this” contract shall be subject to arbitration.⁵⁴ The bank, then, “must select, and each buyer must agree to, a particular arbitrator for disputes between [the bank] and that specific buyer.”⁵⁵ Thus, the contract, while explicitly silent on the issue of class actions, may actually prohibit them because the contract language uses singular nouns, and because unnamed members of the class action would be unable to choose the arbitrator in a class action arbitration.⁵⁶ The plurality quickly rejected this contract interpretation because the unnamed members must have agreed to the selection of the arbitrator by virtue of the fact that they consented to remain part of the class.⁵⁷

In sum, the dissenting opinion presented two reasons why the plurality incorrectly decided that an arbitrator should have decided whether or not a class action arbitration is prohibited under the contract. The first of these reasons, that the parties did not agree to arbitrate class action disputes, is meritorious, but only if the dispute at issue can correctly be characterized as a “class action” dispute rather than a “loan” dispute. The argument based on the language of the contract agreement is shakier because it relies so heavily on semantics and because parties in the future⁵⁸ can so easily work around this opinion by merely changing the definition of the word “you” from the singular to the plural.

VI. THE IMPACT OF *GREEN TREE*

The decision of the Court in *Green Tree* will effect both class action arbitrations and the issue of arbitrability as a whole. The decision will have

⁵² *Bazzle*, 123 S. Ct. at 2410.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 2411.

⁵⁶ *See id.*

⁵⁷ *Bazzle*, 123 S. Ct. at 2406. The plurality opinion makes clear through both its language and its tone that this argument is merely one of semantics. The tone of the plurality suggests that the Chief Justice is grasping at straws in order to make an argument to achieve what he believes is the right result in the case, despite law to the contrary.

⁵⁸ See *infra* notes 59–61 for a discussion on how parties may be able to avoid this decision through more careful drafting.

an immediate effect on how arbitration clauses are worded—especially in the arena of consumer transactions. With respect to class action arbitrations, by placing the initial decision in the hands of the arbitrators, the court system will become completely removed from these cases until, perhaps, a final decision has been made. Furthermore, the Court offers no guidance in how a class action arbitration should be conducted or whether certain procedures are necessary in order to preserve the constitutional rights of unnamed parties.

Perhaps the most troubling aspect of the Court's decision is that the scope of arbitrability questions reserved from the arbitrator to hear on first impression has grown tremendously. The Court not only abandons the distinctions between substantive and procedural arbitrability but also gives arbitrators the power to hear claims that previously could have been considered court issues. Although this decision may be seen as the next logical step in the Court's recent arbitration jurisprudence, the outcome may have given arbitrators more power than any participant ever imagined that they could have.

A. *The Impact on Class Action Arbitrations*

The Court's opinion in *Green Tree* will have a dramatic effect on the enforceability of class action clauses—or lack thereof—in consumer and other contracts. This effect will be seen in three ways. First, the decision will probably be quickly extended to cases involving consolidation as well as class action arbitration.⁵⁹ Second, lawyers and other contract writers will probably become more conscious of the language they use when drafting arbitration agreements to explicitly prohibit class action arbitrations. Finally, the *Green Tree* opinion may result in more class action arbitrations, but it offers no guidance on how the process should be governed and what—if any—safeguards need to be in place to assure fairness to unnamed parties.

At least one court has already extended the holding in *Green Tree* to cases involving the arbitration of consolidated cases, rather than class action arbitration.⁶⁰ The purposes behind both of these processes are similar:

⁵⁹ Both consolidations and class actions are ways in which one proceeding can determine the outcome of a controversy for multiple parties. However, in a consolidation, all of the parties are named parties who have the ability to be present at the arbitration hearing. A class action, by contrast, contains a class of unnamed parties that are represented by carefully chosen named parties. While consolidations can include as many parties as want to participate, they are usually smaller than class actions because each party must actively participate in the process. Note that arbitrators commonly hear consolidated claims, especially under collective bargaining agreements.

⁶⁰ See, e.g., *Pedcor Management Co. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.*, 343 F.3d 355, 363 (5th Cir. 2003) (“To the extent that the issue of

resolving more than one dispute at the same time is more efficient and it can provide an incentive for similarly situated plaintiffs to pool resources and bring otherwise uneconomic lawsuits.⁶¹ If the arbitrator is competent to decide whether or not a class action is appropriate for a particular claim, then he or she should be similarly competent to decide on the appropriateness of consolidation because the processes are similar. By virtue of the fact that each member in a consolidation is represented, either pro se or by counsel, there may be less danger for an arbitrator to decide the appropriateness of the procedure because all of the affected parties are at the bargaining table.⁶²

If the holding of *Green Tree* is interpreted narrowly in the future, individual contract writers may be able to work around the holding. If read narrowly, the *Green Tree* decision merely holds that an arbitrator makes the determination of the appropriateness of class action arbitration if the arbitration clause is silent on the issue.⁶³ Any lawyer who has read this case will now include a provision that either prohibits class or consolidated arbitration proceedings or expressly states that a court is to hear these claims rather than an arbitrator. However, prohibiting class actions explicitly may make arbitration contracts—especially consumer contracts of adhesion—

consolidation in arbitration is analogous to class arbitration, *Green Tree's* holding that arbitrators, not courts, decide whether an agreement provides for class arbitration would appear to overrule [5th Circuit precedent] holding to the contrary.”).

⁶¹ Certainly, there are other reasons why a group of people would want to proceed as a group rather than as a whole. For instance, the presence of more plaintiffs could be used as an intimidation factor or as a way to increase the amount of settlement. *See, e.g.*, In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1299-1300 (7th Cir. 1995) (Judge Posner decertified the class action at issue in order to prevent the possible bankruptcy of a company subject to an especially weak class action claim); *see generally* Charles Silver, “We’re Scared to Death”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) (explaining how plaintiffs in a class action can have the potential to blackmail defendants into either settling or for settling for more than a claim is worth).

The differences between consolidation and class action claims may create different incentives for instituting a group claim. If all of the consolidated claims involve plaintiffs who have their own counsel, then there may be little cost-savings advantage to the arrangement. But, there might still be an intimidation factor or a bargaining chip. *See, e.g.*, Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law*, 2001 J. DISP. RESOL. 1, 13–16 (explaining how the right to a consolidation in arbitration can have the benefits of class-action litigation and how such a process would work under the Revised Uniform Arbitration Act).

⁶² There is a potential for constitutional violations if class action and consolidation arbitration proceedings do not provide participants protections either identical to or similar to the protections guaranteed in Rule 23 of the Federal Rules of Civil Procedure. The danger, however, of violating the due process rights of a party in consolidation is lessened because each party is represented at the arbitration.

⁶³ *Bazzle*, 123 S. Ct. at 2407.

unconscionable.⁶⁴ Thus, *Green Tree* might not have a substantial effect on the issue of class action arbitrations *if* the decision can be avoided by careful drafting without being unconscionable.

Finally, the *Green Tree* decision mandates that arbitrators should decide whether class action arbitration is appropriate under a contract that is silent on the issue, but the Court does not offer any guidance on how to make that decision. The Court merely states that the arbitrator should be capable, but the Court does not delve any deeper into this discussion.⁶⁵ Class action lawsuits are governed by a series of complicated rules and case law.⁶⁶ Lawyers who attempt to represent class action parties must be capable, experienced attorneys.⁶⁷ These rules are necessary in order to preserve the due process rights of unnamed class members who will later be bound by a decision in a procedure in which they did not participate.⁶⁸ It is unclear whether an arbitrator must abide by these rules and whether an arbitrator is even capable of protecting unnamed members of a class action.

For these three reasons, the Court's decision in *Green Tree* may lead to more questions than it answers. Because there have been relatively few class action arbitrations to date, there is no traditional way to conduct such a procedure. If parties cannot contract around the holding in this decision, it is

⁶⁴ There are mixed opinions concerning the conscionability of prohibitions on class actions. Compare *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101 (9th Cir. 2003) (holding that an arbitration agreement prohibiting class action arbitration substantively unconscionable), with *Rosen v. SCIL, LLC*, 799 N.E.2d 488 (Ill. App. Ct. 2003) (holding that a prohibition on class action arbitration does not make a contract unconscionable). The question of conscionability at some point must be addressed; however, it is beyond the scope of this Comment.

However, these courts did not state whether a court could initially entertain a motion for class action certification if the contract clearly stated that a court, rather than an arbitrator, would certify the class. Indeed, a few courts in California have certified classes before an arbitrator made a determination on the merits. See *Blue Cross of California v. Superior Court*, 78 Cal. Rptr. 2d 779 (Cal. Ct. App. 1998) (court certification of a class action arbitration). It is unclear how the *Green Tree* decision will affect these types of cases.

⁶⁵ *Bazzle*, 123 S. Ct. at 2408.

⁶⁶ Class action lawsuits in federal court are governed by Rule 23 of the Federal Rules of Civil Procedure. FED. R. CIV. P. 23. This particular rule contains numerous requirements intended to protect unnamed members of the class. There is also a considerable amount of case law on the issue that is beyond the scope of this Comment.

⁶⁷ See FED. R. CIV. P. 23(a)(4) (“[T]he representative parties will fairly and adequately protect the interests of the class.”). This requirement has been read to include the experience and resources of the parties representing the named parties. A recent amendment to Rule 23 specifically pertains to appointing class counsel. The Rule notes that the court must look at specific factors in determining appropriate counsel including “counsel’s experience in handling class actions, other complex litigation, and claims of the type asserted in the action.” FED. R. CIV. P. 23 (g)(1)(c)(i).

⁶⁸ See generally FED. R. CIV. P. 23.

unclear how an arbitrator will conduct a class action proceeding and what that arbitrator will do to protect the rights of both the represented and unnamed parties.

B. *The Impact on Arbitrability in General*

The Court's decision in *Green Tree* not only affects the future of class action arbitrations but also affects the treatment of questions of arbitrability. Over the past two decades, the Court has increased the scope of appropriate questions for an arbitrator to decide, and this case follows in that tradition. The result of these cases is to dangerously tread on the power of courts to determine some contractual gateway issues.

Prior to *Green Tree*, the Court relied on the distinction between a question of "substantive" and "procedural" arbitrability to determine whether the court or an arbitrator should decide the question. The Court reserved for itself questions of substantive arbitrability, but it allowed arbitrators to entertain questions of procedural arbitrability.⁶⁹ Generally speaking, questions of substantive arbitrability relate to the existence of the arbitration agreement and whether the arbitration agreement should cover a typical type of dispute. The reason that courts should hear these questions is because it is unclear whether or not the parties even agreed to arbitrate or whether they agreed to arbitrate a particular dispute.⁷⁰ The Supreme Court reasons that these are the types of disputes that the parties generally expect the courts to hear, so the courts should hear them.⁷¹ Conversely, questions of procedural arbitrability include defenses to claims that are *properly before an arbitrator*.⁷² Examples of questions of procedural arbitrability include statutes of limitations defenses, issues of waiver, and most other defenses.⁷³

The *Green Tree* plurality, however, appears to have abandoned this dichotomy. The plurality recognizes that courts should hear cases involving formation and that arbitrators should hear issues involving defenses and waivers, but the Court abandons the terms "procedural" and "substantive"

⁶⁹ See *supra* notes 1–5 and accompanying text.

⁷⁰ See *supra* note 2 and accompanying text. It would be fundamentally unfair to allow the arbitrator to determine whether or not the parties even agreed to arbitration. In the United States, litigation is the typical method whereby legal disputes are decided. The alternatives to litigation are generally voluntary. If an arbitrator is to decide whether or not the parties have a valid claim to arbitrate or whether they have agreed to arbitrate a particular claim, the process is no longer voluntary for the person who is challenging the formation of the agreement or the applicability of the agreement to a particular dispute.

⁷¹ See *Bazzle*, 123 S. Ct. at 2407.

⁷² See *Howsam*, 537 U.S. at 85.

⁷³ See *supra* note 4.

arbitrability.⁷⁴ The plurality decision, however, does not appear to merely drop the labels but maintain the distinction.⁷⁵ Instead, the plurality opinion appears to have broadened the scope of the questions suitable for the arbitrator and limited the questions suitable for the courts to merely two types of questions: contract formation and applicability of arbitration to a particular dispute.⁷⁶ The plurality opinion *could have* maintained the previously enumerated distinction by stating that questions of permissibility of class actions are merely procedural arbitrability questions. But it did not. Instead, the tenor of the opinion reads as though all questions with the admittedly narrow exceptions are questions for the arbitrator rather than the courts.⁷⁷ If this is the case—and nothing in the opinion suggests otherwise—then the arbitrators have just been handed considerable power to decide intricate legal issues with which they may not be familiar.⁷⁸ The plurality opinion also acknowledges legal precedent stating that the courts should determine issues that the parties would expect the courts to handle.⁷⁹ Although the Court cites this familiar principle, the plurality does not explain why the parties supposedly intended the arbitrator to hear this case and not the courts. Indeed, in the *Bazzles*' case, the parties approached the *courts* in the first instance to determine the question of class action arbitration. So, it is hard to argue that the parties intended the arbitrator to hear the claim if they initially asked the courts to resolve it. Although the Court states that the

⁷⁴ The plurality opinion does not refer to questions for either the courts or the arbitrator as either “substantive” or “procedural.”

⁷⁵ As noted *supra* in note 2, the *First Options* court also did not use the “substantive” and “procedural” terminology; however, the Court’s opinion fell squarely in line with these commonly held notions. As the Court has answered more difficult questions, as in *Howsam* and in *Bazzle*, the Court begins to blur the distinction between the two.

⁷⁶ 123 S. Ct. at 2407.

⁷⁷ The exception for formation is important, and it is, arguably, something more than a “narrow” exception. However, the plurality opinion refers to the exceptions as “limited circumstances.” *Id.*

⁷⁸ One of the greatest benefits of alternative dispute resolution is the ability for the parties to determine who they want to act as the decision-maker of the dispute. The arbitrator may be chosen on the basis of expertise in the substantive area of the dispute; for example, an engineer may act as an arbitrator in a dispute concerning the collapse of a building. Arbitrators do not have to be lawyers or judges. They do not have to have any certain educational background or any specific type of training. Under *Green Tree v. Bazzle*, arbitrators that are not legally trained may find themselves in a position in which they have to make legal findings. In the *Bazzle* case, if the arbitrators are unfamiliar with the law, they *should* have a difficult time determining if certification is appropriate in a given case because of the magnitude of the claim and the intricacies of the law. As noted above, an unqualified arbitrator may not be able to sufficiently protect the constitutional rights of the participants, *see supra* notes 60–62, but this issue has never been addressed by the Court.

⁷⁹ *Bazzle*, 123 S. Ct. at 2407.

parties' intent will, or should, control, the plurality obviously did not enforce the intent of the Bazzles to take their claim to court. Because of this disregard for the parties' intent, it is doubtful that intent—unless that intent is clearly stated in the contractual language—would control a term that is absent from a contract. Unless the defense is one of those stated above, no amount of unwritten intent is likely to create an issue for the courts, rather than for the arbitrator.

VII. CONCLUSION

The plurality opinion is clearly the next logical step in the line of opinions giving increasing power to arbitrators and removing cases from the court dockets. Although the Court is acting in a consistent manner, it may be overlooking some serious policy considerations to the contrary. This opinion is the next in a line of cases removing the distinction between “procedural” and “substantive” arbitrability, and replacing it with a presumption that the arbitrator will decide most of these questions.

In making this decision, the plurality ignores the issue of *how* to run a class action arbitration, especially in light of the fact that many arbitrators are not experts on the law and not experts on the intricacies of the law governing class actions. Furthermore, the plurality glossed over the issue of the parties' intent to submit the issue of class action arbitration despite the fact that one of the consolidated cases actually did go to court to determine the appropriateness of class action arbitration.

Although this decision may be consistent with the policy of *stare decisis*, it ignores any potential downfalls. While it is possible that those writing contracts may simply become more careful with their language, this opinion leaves open the possibility that any question short of contract formation or applicability of an arbitration clause to a particular claim will become a question for an arbitrator, despite the parties' intent and the history of the courts in solving those particular problems.

