# RECENT DEVELOPMENTS

## *Green Tree Financial Corp. v. Bazzle**

### I. INTRODUCTION

On June 23, 2003, red phones lit up in corporate defense offices across the United States (U.S.). That day, the Supreme Court published its *Green Tree v. Bazzle*[1] opinion, which placed the decision of whether to permit class-wide arbitrations in the hands of arbitrators, rather than the courts.[2] Although the Court's plurality opinion offered a less than resounding answer,[3] the holding resolved a narrow issue that had been debated widely in both federal and state courts.[4]

The decision in *Green Tree* was based on two sources of law: the Federal Arbitration Act (FAA) and a line of Supreme Court decisions regarding arbitration. Although the FAA does not specifically address class arbitration,[5] two of its provisions—§§ 2 and 4—are relevant in this context.[6] Section 2 states that arbitration agreements written in a commercial context "shall be valid, irrevocable, and enforceable" unless the agreement's terms are contractually invalid.[7] Therefore, when construing arbitration agreements, courts must use basic principles of contract law,[8] including interpreting ambiguous terms "in favor of arbitration."[9]

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* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003).

[1] *Id.*

[2] *Id.* at 451–52.

[3] As one author stated, "All plurality decisions have about them a kind of suspect authenticity, rather like an unsigned Picasso." Michael G. Sullivan & A. Camden Lewis, *Class-Wide Arbitration After Green Tree*, 15 S.C. LAW. 20, 22 (2004).

[4] Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349, 356 (S.C. 2002).

[5] *See, e.g.*, New England Energy, Inc. v. Keystone Shipping Co., 855 F.2d 1, 4 (1st Cir. 1988) (stating that "the [FAA] makes no reference to consolidation of arbitrations"). Indeed, after *Green Tree* was decided, the American Arbitration Association (AAA) issued supplementary rules to govern the question of class-wide arbitration disputes. AMERICAN ARBITRATION ASSOCIATION, SUPPLEMENTARY RULES FOR CLASS ARBITRATION (effective Oct. 8, 2003), *available at* http://www.adr.org/sp.asp?id=21936 (last visited Feb. 16, 2005) [hereinafter SUPPLEMENTARY RULES].

[6] *See Green Tree Fin. Corp.*, 539 U.S. at 454; *Bazzle*, 569 S.E.2d at 356.

[7] 9 U.S.C. § 2 (2000).

[8] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (addressing a dispute over the interpretation of a "workout" clause requiring arbitration between investors and an investing company, the Court stated that, if the parties agreed to arbitrate a certain dispute, "courts generally should apply ordinary state-law principles that govern the formation of contracts"); *see also* Howsam v. Dean Witter Reynolds, 537 U.S. 79, 83

Section 4 of the FAA establishes that if the parties have agreed to an arbitration clause, courts may order the parties to arbitrate "in accordance with the terms of the agreement."[10] In the last ten years, the Supreme Court decided two cases that helped define the court system's role in interpreting arbitration agreements and determining if an agreement was formed.[11] In *First Options of Chicago, Inc. v. Kaplan*, the Court grappled with the question of whether the arbitrator or the courts should decide which claims the particular arbitration agreement encompassed.[12] The Court determined that unless the arbitration agreement clearly states that the arbitrator must settle issues of arbitrability, the courts should determine if the parties agreed to arbitrate.[13] *Howsam v. Dean Witter Reynolds* further developed this concept by clarifying the role of courts in determining arbitrability.[14] There, the Court limited the court system's role to deciding issues where the parties to the contract "would likely have expected a court to have decided the gateway matter." This limitation ensured that the arbitration did not include more issues than those to which the parties actually agreed.[15]

However, after the *First Options* and *Howsam* cases, federal and state courts were reaching differing conclusions on the validity of class arbitration.[16] On one side of the debate, the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits determined that class arbitrations could not be initiated unless the agreement permitted such consolidation.[17]

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(2002) (stating that "arbitration is a matter of contract" and the arbitration agreement should be interpreted as such); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) (using contract law to interpret a collective bargaining agreement).

[9] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 626 (1985) (interpreting an arbitration clause governing a dispute between an auto manufacturer and its distributor while considering that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration"); *see also United Steelworkers*, 363 U.S. at 582–83 (stating that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute").

[10] 9 U.S.C. § 4 (2000).

[11] *Howsam*, 537 U.S. at 79; *First Options*, 514 U.S. at 938.

[12] *First Options*, 514 U.S. at 943.

[13] *Id.* at 944–47.

[14] *Howsam*, 537 U.S. at 83.

[15] *Id.* at 83–84.

[16] Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349, 356 (S.C. 2002).

[17] Champ v. Siegel Trading Co., 55 F.3d 269, 274–75, 277 (7th Cir. 1995) (containing a comprehensive list of cases from each of the federal courts listed above and

However, the First Circuit and the Pennsylvania and California Supreme Courts took the opposite view, determining that arbitrations could be consolidated under ambiguous contract provisions.[18] In order to help resolve this split, the Court once again revisited the line between courts and arbitrators in interpreting arbitration clauses.

## II. FACTS AND PROCEDURAL HISTORY

The *Green Tree* case originated from two sets of plaintiffs, (1) Lynn and Burt Bazzle and (2) Daniel Lackey and George and Florine Buggs, both of whom entered into contracts for financial loans with Green Tree Financial Corporation.[19] Each of the contracts contained an arbitration clause reading that, "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."[20] The two sets of plaintiffs filed actions separately in South Carolina state courts. They alleged that Green Tree had failed to provide them with a form statutorily required for loan agreements under South Carolina law.[21]

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deciding that, under a strict interpretation of the arbitration clause, class arbitration should not be permitted when the parties have not explicitly agreed to allow it).

[18] *See* New England Energy, Inc. v. Keystone Shipping Co., 855 F.2d 1, 4–5 (1st Cir. 1988) (determining that class arbitration would be valid in a broadly written arbitration clause because interpreting the contract in this manner did not go directly against its terms and was not preempted by the FAA); Keating v. Superior Court, 645 P.2d 1192, 1207 (Cal. 1982) (determining that a broad arbitration clause should be read to include class arbitration claims because to read it otherwise would force "hundreds or perhaps thousands of individuals asserting claims involving common issues of fact and law to litigate them in separate proceedings against a party with vastly superior resources"); Dickler v. Shearson, 596 A.2d 860, 863–64 (Pa. Super. Ct. 1991) (stating that when an arbitration clause does not expressly state a certain matter, such as the validity of a class-wide arbitration, the state court could substitute its pro-arbitration policies to allow such claims).

[19] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 447–48 (2003). The first set of plaintiffs, the Bazzles, entered into a contract with Green Tree for a home improvement loan in 1995. *Id.* The second set of plaintiffs, Lackey and the Buggses, entered into nearly identical contracts with Green Tree for loans and security agreements to purchase mobile homes. *Id.* at 448.

[20] *Id.*

[21] *Id.* at 448–49; *see also* S.C. CODE ANN. § 37-10-102 (Law. Co-op. 2002). This section of the South Carolina Code requires that creditors obtaining loans for consumer purposes that are "secured in whole or in part by a lien on real estate" must obtain the names of the debtor's attorney and the insurance agent the debtor chooses to provide flood and hazard insurance for the property. *Id.* This statute was written to protect

In 1997, the Bazzles requested that the court certify their claims as a class action, which Green Tree countered by enjoining the action and filing a motion to compel arbitration.[22] The district court certified the class and ordered the parties to arbitrate.[23] An arbitrator was selected according to the contract terms and awarded the class nearly $11 million in damages and attorney fees.[24] Meanwhile, Lackey and the Buggses had been pursuing a similar claim and asked a second district court judge to certify their claims as a class action.[25] Although the trial court ruled that the arbitration clause was unenforceable, an appellate court overruled this decision, sending the case to arbitration.[26] The parties chose an arbitrator who, based on the prior decision in the Bazzles' case, certified the class of plaintiffs and eventually awarded them over $9 million in damages and attorney fees.[27]

In both cases, after the trial court upheld the arbitrator's decision, Green Tree filed a motion with the South Carolina Court of Appeals arguing against the validity of class arbitration.[28] The Supreme Court of South Carolina withdrew the cases from the appellate court, consolidated them, and ultimately ruled that because the contracts did not address class arbitration, the class certifications were permissible.[29] Green Tree then filed a petition for certiorari to the Supreme Court, which was granted to answer the question of "whether an arbitration may proceed as a class action in the absence of specific language in the arbitration agreement permitting class treatment in arbitration."[30]

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consumers "against unfair practices by some suppliers of consumer credit." S.C. CODE ANN. § 37-1-102(d) (Law. Co-op. 1976). The South Carolina Supreme Court also stated that the intent of the statute was to "protect borrowers by requiring in the credit application clear and prominent disclosure of the information necessary" for the debtor's choice of legal counsel and insurance agent. Davis v. Nations Credit Fin. Servs. Corp., 484 S.E.2d 471, 472 (S.C. 1997).

[22] *Green Tree Fin. Corp.*, 539 U.S. at 449.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 450.

[30] Joint Appendix, *Green Tree Fin. Corp.*, 539 U.S. 444, *petition for cert. filed*, 2002 U.S. Briefs 634, *15 (U.S. Oct. 23, 2002) (No. 02-634).

## III. COURT'S HOLDING AND REASONING

The Court's decision in *Green Tree* was divided into three main opinions: the plurality written by Justice Breyer, Justice Stevens' concurring opinion, and the dissent by Chief Justice Rehnquist.[31] The Justices were divided on two main issues. The first question addressed the contractual interpretation of the arbitration clause. The second issue involved differentiating between state and federal law in arbitration disputes.

### A. *Plurality Opinion*

The plurality opinion looked to the language of the arbitration clause, and, reading the phrase "selected by us with consent of you" broadly, determined that the contract language did not definitively forbid class arbitration.[32] Justice Breyer then examined the clause's broad grant of authority to the arbitrator, which permitted the arbitrator to resolve "all disputes, claims, or controversies arising from or relating to this contract."[33] The plurality also reiterated that, typically, courts are only to decide certain "gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy."[34] Given this language, the plurality saw the issue in *Green Tree* as falling out of the narrow scope of issues to be decided by the courts. Instead, the plurality determined that the question in *Green Tree* addressed a procedural quandary of what type of arbitration should occur—an issue the Court felt was better left for arbitrators to decide.[35] Applying this reasoning to the plaintiffs' cases, Justice Breyer remanded the case to the arbitrator to determine whether or not the contracts in question permitted class arbitration.[36]

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[31] Justice Thomas also wrote a dissent stating that the FAA does not apply to state courts and that the South Carolina Supreme Court's decision should be upheld. *Green Tree Fin. Corp.*, 539 U.S. at 460.

[32] *Id.* at 451.

[33] *Id.*

[34] *Id.* at 452.

[35] *Id.* at 452–53.

[36] *Id.* at 454.

## B. *Concurring Opinion*

In his concurring opinion, Justice Stevens addressed three distinct issues. First, he determined that the FAA did not expressly prohibit class action arbitrations.[37] Second, he pointed out that the contract should be interpreted using South Carolina law because the arbitration stipulated as such.[38] Finally, Justice Stevens noted that Green Tree only challenged the merits of the case without calling into question the role of the arbitrator.[39] Given these three views, Justice Stevens stated that he would have simply affirmed the ruling of the South Carolina Supreme Court on an interpretation of South Carolina contract law that did not conflict with the FAA.[40] However, instead of strictly following this line of reasoning, Justice Stevens created a plurality by concurring with Justice Breyer "because Justice Breyer's opinion expresses a view of the case close to [Stevens'] own."[41]

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[37] *Id.* at 454–55.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* In making this determination, Justice Stevens cited an equally contentious case decided by the Supreme Court in 1945. Screws v. United States, 325 U.S. 91 (1945). In that case, the Supreme Court was examining the convictions of three police officers accused of beating a man to death after arresting him for allegedly stealing a tire. *Id.* at 92–93. The case was brought before the Court to determine whether the trial of the officers on federal grounds was permissible. *Id.* at 107. The Court's decision was splintered, rendering a total of four opinions. *Id.* at 134. Four justices determined that the officers' federal trial was permissible, but ordered a retrial on the grounds of incorrect jury instructions. *Id.* at 106–07. A dissenting opinion by Justice Murphy argued that the case should not be remanded for jury trial, but should be upheld on the original federal conviction. *Id.* at 137–38. A second dissenting opinion argued that the officers should not be tried in the federal system. *Id.* at 138–39. Finally, in the opinion cited by Justice Stevens, Justice Rutledge determined that, although he essentially agreed with Justice Murphy's dissent, deciding this way would create a "stalemate [which] should not prevail for any reason, however compelling, in a criminal cause or, if avoidable, in any other." *Id.* at 134. Therefore, Justice Rutledge created a plurality that upheld the legality of the federal trial and permitted the retrial to occur in the federal system. *Id.* at 134. Justice Stevens's position in *Green Tree* was similar to that of Justice Rutledge. In *Green Tree*, Stevens essentially agreed with the determination that the arbitration clause should allow for class-wide arbitrations, but would have allowed the state law interpretation to stand instead of imposing federal law. *Green Tree Fin. Corp.*, 539 U.S. at 455.

### C. *Dissent*

The dissent, written by Chief Justice Rehnquist, argued that class certification questions in arbitration should be determined by courts instead of the arbitrator.[42] The Chief Justice reasoned that determining who arbitrates a dispute is similar to the gateway decision of what is to be submitted to the arbitrator. Therefore, this issue should be decided by the courts.[43] The Chief Justice then adopted a narrow reading of the contract language, stating that the language of the contract is "quite clear that petitioner must select, and each buyer must agree to, a particular arbitrator for disputes between the petitioner and that specific buyer."[44] The Chief Justice argued that class action arbitration could not be reconciled with this provision because class arbitration would not allow each party, and specifically the petitioner, to choose different arbitrators for different cases.[45] Therefore, the Chief Justice rejected the South Carolina Supreme Court's decision to allow class arbitration because this determination was contrary to the agreement's express terms and therefore violated the policy of the FAA.[46]

## IV. IMPACT OF THE COURT'S HOLDING

The Supreme Court's decision in *Green Tree* is wide-reaching and could have a significant impact on corporate arbitration agreements.[47] Its effects will most likely touch four main groups—defendants, arbitrators, plaintiffs, and courts—in vastly different ways.

### A. *Impact on Defendants*

Arguably, the most significant impact of the *Green Tree* decision will fall on corporations hoping to avoid class-action arbitration.[48] In recent

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[42] *Green Tree Fin. Corp.*, 539 U.S. at 455.

[43] *Id.* at 456.

[44] *Id.* at 459.

[45] *Id.*

[46] *Id.* at 459–60.

[47] Peter J. Kreher & Pat D. Robinson III, *Substance, Process, and the Future of Class Arbitration*, 9 HARV. NEGOT. L. REV. 409, 421 (2004); Brooks R. Burdette & Michael E. Swartz, *Employment Law: 'Green Tree' Creates New Concern for Arbitration Clause Drafters*, July 31, 2003, N.Y. L.J., at 5.

[48] Corporations have various incentives to avoid seeking class action arbitration. *See, e.g.*, Glenn A. Danas, Comment, *The Interstate Class Action Jurisdiction Act of 1999: Another Congressional Attempt to Federalize State Law*, 49 EMORY L.J. 1305,

years, corporations have been turning more frequently to arbitration clauses for a variety of reasons, including increased confidentiality and the historic inability of plaintiffs to band together through class-action arbitrations.[49] However, under *Green Tree*, a corporation's choice to enforce an arguably ambiguous arbitration agreement could result in class arbitration.[50]

Corporate counsel's immediate response to *Green Tree* will most likely be an attempt to structure a "class-proof" arbitration clause by explicitly forbidding class arbitrations.[51] However, some courts have hinted or determined that state unconscionability law may not permit such blanket clauses.[52] Indeed, in *Green Tree*, the South Carolina Supreme Court stated in a footnote that "preclusion of class-wide or consolidated arbitration in an adhesion contract, even if explicit, undermines principles favoring

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1305 (2000) (implying that, without class actions, corporations can use a divide and conquer method by using procedural rules to make individual cases uneconomical); Charles Silver, *We're Scared to Death: Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1357–58 (2003) (stating that some courts believe class actions allow "plaintiffs with weak claims to threaten an entire industry with bankruptcy" by banding together and creating a huge incentive for the corporation to settle). However, some corporations may prefer class-action claims, as this type of lawsuit has "significantly reduced industry's costs of collections, litigation, damage exposure, and settlements." Duncan A. MacDonald, *Letter to the Editor: A Different View On* Green Tree *Arbitration Ruling*, AM. BANKER, July 11, 2003, at 8. For an interesting study on class action cases, see Thomas E. Willging et al., Symposium, *The Institute of Judicial Administration Research Conference on Class Actions: Class Actions and the Rulemaking Process: An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74 (1996).

[49] Robert Alexander Schwartz, Note, *Can Arbitration Do More for Consumers? The TILA Class Action Reconsidered*, 78 N.Y.U. L. REV. 809, 809–10 (2003) (stating that "[b]usinesses have become enamored of arbitration clauses" because they believe that arbitration is a "faster, cheaper, and more predictable method of resolving a dispute than the typical lawsuit in the public courts"). Recently, one author stated that, in "cars, fixed loan, and retail products, arbitration provisions appear in at least 500 million consumer agreements." MacDonald, *supra* note 48, at 8.

[50] Sullivan & Lewis, *supra* note 3, at 25.

[51] Paul W. Taylor, *The Future of Class Action Arbitration: This Year's* 'Green Tree' *Decision Means that Unambiguous Drafting is Needed to Forestall Proceedings*, NAT'L L.J., Nov. 17, 2003, at 23; *see also* Rene M. Johnson & Samuel Estreicher, *Supreme Court Vacates Classwide Awards: Whether the Agreement Authorizes Arbitration of Class Claims is for the Arbitrator*, N.J. L.J., Sept. 29, 2003 (reviewing the possibility of blanket arbitration clauses and what defenses could be posed against them).

[52] Johnson & Estreicher, *supra* note 51. For an excellent discussion on a California line of cases grappling with this decision and a projection of how the United States Supreme Court will likely decide this issue, see Kreher & Robinson, *supra* note 47, at 425–27.

expeditious and equitable case disposition absent demonstrated prejudice to the drafter of the adhesive contract."[53]

However, some authors have suggested that corporations wishing to avoid class-action arbitrations may have more options than simply writing a blanket ban into their arbitration clauses.[54] Instead, corporations could modify their current arbitration clauses to make class arbitration less appealing to plaintiffs.[55] For example, if a company's current arbitration clause calls for parties to split the arbitration fees, the company could modify its clause to provide that if plaintiffs choose to bring a class-action arbitration, the plaintiffs must bear the entire cost of the arbitration.[56] Another option for defendants is to create an arbitration clause that limits the arbitrator's power.[57] For example, a New York federal district court recently addressed an arbitration agreement that provided for the arbitrator to decide "'any controversy or claim arising out of or relating to tax and tax related services' rendered by the Ernst & Young Defendants to the Individual Plaintiffs."[58] The district court determined that this agreement allowed the court, not the arbitrator, to interpret any procedural or forum-based issues arising from the arbitration agreement.[59]

Regardless of the exact steps taken, though, one post-*Green Tree* guarantee is that arbitration clauses will remain on the radar of corporate counsel.

### B. *Impact on Arbitrators*

The *Green Tree* decision will also have a tremendous effect on arbitrators. Before *Green Tree*, arbitrators could rely on courts to determine complex issues of class certification, including "concerns about due process rights for the unrepresented class members, the logistics of certifying a class, and . . . discovery."[60] However, the *Green Tree* decision seems to place

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[53] Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349, 360 n.21 (S.C. 2002); *see also* Sullivan & Lewis, *supra* note 3, at 24–25 (discussing the implications this footnote may have on future cases involving class-wide arbitration).

[54] Craig R. Tractenberg, *Class Actions Brought Against Franchisors in Arbitration Cases*, LEGAL INTELLIGENCER, Oct. 22, 2003, at 5.

[55] *Id.*

[56] *Id.*

[57] Camferdam v. Ernst & Young Int'l, Inc., 2004 U.S. Dist. LEXIS 9092, at *4–7 (S.D.N.Y. 2004).

[58] *Id.* at *6.

[59] *Id.* at *6–7.

[60] Kreher & Robinson, *supra* note 47, at 422.

many of these fairly complex legal issues—including the issue of interpreting a contract to determine if it implicitly contains an arbitration agreement—in the hands of arbitrators, who may or may not have formal legal training.[61]

In order to buffer this effect, the American Arbitration Association (AAA) has created guidelines to deal with the issues stemming from *Green Tree*.[62] These supplementary rules provide that arbitrators must first answer the threshold question of whether the arbitration clause can be construed to allow class action arbitration.[63] After making this determination, the rules stipulate that the arbitrator must then decide whether to certify the class.[64] This portion of the rule is similar to the certification of class action procedure in Federal Rule of Civil Procedure 23, including requiring "notice to the class and opportunity to object to any settlement or dismissal."[65] One unique aspect of the AAA's guidelines is that the guidelines require a thirty-day stay period after arbitrators' major decisions in order for the parties to challenge the outcome in a court.[66] However, because arbitrators' determinations are rarely overturned by courts "absent fraud, corruption or mistake," these stipulations may not have any overwhelming affect.[67]

Although the AAA provides guidance for certain disputes falling under its jurisdiction, these rules do not cover every dispute or every arbitrator.[68] Therefore, in the years following *Green Tree*, confusion may exist among

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[61] For example, in abnormally complex cases, the AAA requires that arbitrators have 15 years of "senior level business experience *or* legal practice" and undergo training on a variety of issues in ADR. AAA, *Fact Sheet: Enhanced Arbitrator Selection Process for Large Complex Cases*, in RULES AND PROCEDURES FACTS SHEETS, *available at* http://www.adr.org/upload/LIVESITE/Rules_Procedures/Fact_Sheets/ArbSelec.pdf (last visited Sept. 22, 2004) (emphasis added). The NASD requires arbitrators to have "at least five years of business or professional experience . . . [and] at least two years of college-level credits" along with a four-hour course. NASD, *Frequently Asked Questions about Becoming a NASD Arbitrator*, in RECRUITMENT, *available at* http://www.nasdadr.com/arbitrator_faqs.asp#experience (last modified May 19, 2004).

[62] SUPPLEMENTARY RULES, *supra* note 5. For a discussion of the AAA's rules, see *Arbitration of Class Action Litigation to Rise*, CONSUMER FIN. SERVICES L. REP., Apr. 9, 2004; Tractenberg, *supra* note 54; Burdette & Swartz, *supra* note 47.

[63] SUPPLEMENTARY RULES, *supra* note 5, at R. 3.

[64] *Id.* at R. 4.

[65] Tractenberg, *supra* note 54.

[66] *Id.*

[67] *Id.*; *see also* Norman S. Posner, *Arbitration: Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 BROOK. L. REV. 471, 471–72 (1988) (discussing the standards courts must use to review arbitrator awards).

[68] Tractenberg, *supra* note 54.

arbitrators on how to interpret an ambiguous contract clause concerning arbitration and how to certify classes.

### C. *Impact on Plaintiffs*

A third group that will be affected by the *Green Tree* decision is plaintiffs, both in consumer rights litigation and beyond.[69] For consumer rights litigation, the *Green Tree* decision creates the possibility for a new forum-shopping strategy that could ensure consumers' right to class-wide arbitration.[70] With this strategy, an attorney could have several claimants file individual arbitration claims with several arbitrators in hopes that at least one of them will certify the class.[71] The successful plaintiffs could then, along with the rest of the class, consolidate the claims into the certified class-action arbitration, which may be well worth the initial costs of filing multiple arbitration claims.[72] This possibility has the effect of "virtually guaranteeing that all future multiple-claimant arbitrations will eventually be certified for class arbitration"—an effect that may or may not have been intended by the Court.[73]

A second question for plaintiffs and their attorneys is whether the *Green Tree* decision extends to arbitration agreements in other contexts, particularly employees wishing to file discrimination cases against employers.[74] Pre-*Green Tree*, arbitration clauses mandating arbitration for the settlement of discrimination claims in the workplace had been met with varying success.[75] However, after *Green Tree*, plaintiffs' lawyers in the employment context have more solid ground on which to stand when bringing previously unsuccessful class arbitration claims, especially when considered "in the light of the statutory purposes of the federal anti-discrimination statues" that may prohibit employers from blanket bans of class arbitrations.[76]

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[69] Merrick T. Rossein, *Supreme Court Hands Arbitrators the Keys to the Class Action*, EMP. L. STRATEGIST, Dec. 16, 2003, at 1; Taylor, *supra* note 51.

[70] Taylor, *supra* note 51.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] Rossein, *supra* note 69, at 1.

[75] *Id.*

[76] *Id.*

### D. *Impact on Courts*

The *Green Tree* decision also will have a significant impact on how courts interpret arbitration clauses. In one of the first post-*Green Tree* decisions, the Fifth Circuit addressed an arbitration clause governed by Texas law.[77] In that case, the Fifth Circuit determined that because Texas arbitration law inherently included the FAA, the *Green Tree* decision effectively overruled the Fifth Circuit's prior decision that the court, and not arbitrators, should make the determination of whether or not to consolidate arbitration.[78] If the reasoning of the Fifth Circuit is mirrored elsewhere, courts may yet have a role to play in class arbitration proceedings by deciding whether the arbitration clause is governed strictly by state law or if the FAA is implicitly included in all such agreements.[79]

Under *Green Tree*, courts also retain their role of determining whether certain provisions in the arbitration agreement are gateway issues to be decided by the courts.[80] For example, a post-*Green Tree* federal district court case addressed this very issue when determining whether the court or the arbitrator should decide the meaning of the forum-selection portion of the arbitration clause.[81] The court there ultimately determined that this issue was one that courts could decide based on ensuring that the arbitration proceeded "according to the terms of the agreement."[82] This case may indicate that courts have a choice of whether to apply their duties under *Green Tree* narrowly, therefore keeping the courts involved in arbitration cases.

## V. CONCLUSION

Like many Supreme Court decisions, the *Green Tree* opinion seems to create more questions than it answers. Although the Court did come down with a firm ruling about who should determine whether to permit class-action

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[77] Pedcor Mgmt. Co. Welfare Benefit Plan v. Nation's Personnel of Tex., Inc., 343 F.3d 355, 361 (5th Cir. 2003).

[78] *Id.* at 361–62.

[79] Latham & Watkins, *Class Action Arbitration: The* Green Tree *Decision and Other Recent Developments*, CLIENT ALERT, Sept. 23, 2003, at 3 (reviewing the implications of the Fifth Circuit's decision), *available at* http://www.lw.com/resource/Publications/_pdf/pub815.pdf.

[80] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452 (2003).

[81] Richard C. Young & Co. v. Leventhal, 298 F. Supp. 2d 160, 167–68 (D. Mass. 2003).

[82] *Id.* at 174.

arbitrations, the decision also left several issues open, including how more limited arbitration clauses will be interpreted, the role that state law will play in future arbitration agreements, and the adjustments that will be made by plaintiffs, arbitrators, courts, and defendants. With this myriad of questions, one thing remains certain—further litigation.

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