

AMERICAN ARBITRATION ASSOCIATION

Class Action and Commercial Tribunal

LAVERNE JONES, MARY RAWLINGS,
STACEY NESS, KERRY NESS,
individually and on behalf of all others
similarly situated,

 Claimants,

 vs.

GENUS CREDIT MANAGEMENT CORP.,
f/k/a NATIONAL CREDIT COUNSELING
SERVICES AND INCHARGE INSTITUTE OF
AMERICA INC.
and
AMERICAN FINANCIAL SOLUTIONS AND
NORTH SEATTLE COMMUNITY COLLEGE
FOUNDATION
and
AMERIX CORPORATION, 3C
INCORPORATED d/b/a/ CAREONE CREDIT
COUNSELING, BERNARD DANCEL,
ASCENT ONE CORPORATION,
FREEDOMPOINT CORPORATION AND
FREEDOMPOINT FINANCIAL
CORPORATION

 Respondents.

11 181 00295 05

PARTIAL FINAL CLAUSE CONSTRUCTION AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the three arbitration agreements entered into in 1998 and 1999 by the Claimants and one or more of

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the named Respondents¹, and having been duly sworn, and after consideration of the contentions and proofs submitted by the parties, and pursuant to Rule 3 of the American Arbitration Association's Supplementary Rules for Class Arbitrations (hereafter "the Supplementary Rules"), do hereby issue the following AWARD:

The Issue:

The issue is whether a class arbitration may be allowed under the following arbitration clause, found in the agreements entered into between the Claimants and Respondents:

Any dispute between us that cannot be amicably resolved, and all claims or controversies arising out of this Agreement, shall be settled solely and exclusively by binding arbitration in the City of Columbia, Maryland, administered by, and under the Commercial Arbitration Rules then prevailing of, the American Arbitration Association (it being expressly acknowledged that you will not participate in any class action lawsuit in connection with any such dispute, claim or controversy, either as a representative plaintiff or as a member of a putative class), and judgment upon the award rendered by the arbitrator(s) may be entered and enforced in any court of competent jurisdiction. [Underlining added.]

The more particularized issue is whether the underlined parenthetical phrase in the above clause precludes class arbitrations.

The Effect of Judge Motz's Rulings on the Civil Action Preceding this Arbitration:

This dispute did not arrive at the American Arbitration Association *tabula rasa*. It was first brought as a civil action in the United States District Court for the District of Maryland and

¹ For purposes of simplifying this Award and without prejudging any relationships between Claimants and the named Respondents, or among the named Respondents, all Respondents will herein be collectively identified as "Respondents."

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dismissed by Judge Motz of that court on January 31, 2005. (Declaration of G. Oliver Koppell in Support of Claim Construction Award Permitting Class Arbitration (hereafter "Koppell Declaration") at Tab 1.) Judge Motz held the arbitration clause of Claimants' agreements was valid and thus their claims could only be heard in arbitration. He further held that, if the Court of Appeals reversed him and the case could proceed in court, he would strike the class action allegations of the complaint, i.e., he would uphold the consumers' waiver of the right to bring a class action in court. The parties disagree as to the effect of Judge Motz's rulings on this arbitration.

Indeed, the parties sought further clarification from Judge Motz after he issued his January 31, 2005 ruling. He responded by letter dated February 24, 2005, declaring that "it was my intention that the AAA itself should decide whether the arbitration should be of class-wide claims or only the individual claims asserted by the plaintiffs." (Koppell Declaration at Tab 2.)

Relevant at this point is Rule 1 (c) of the Supplementary Rules promulgated by the AAA on October 8, 2003. Rule 1(c) provides:

Whenever a court has, by order, addressed and resolved any matter that would otherwise be decided by an arbitrator under these Supplementary Rules, the arbitrator shall follow the order of the court.

Based on my reading of Judge Motz's ruling of January 31, 2005 and his subsequent letter of February 24, 2005, I conclude that he has, by order, addressed and resolved certain limited aspects of the matter before me, and I must *pro tanto* follow his order pursuant to the requirements of Supplementary Rule 1 (c).

Judge Motz held that, under Maryland law (applicable both to this arbitration and to the civil action before Judge Motz) the arbitration clause is procedurally unconscionable. He found

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the clause to be part of a contract of adhesion, drafted unilaterally by Respondents and presented on a “take it or leave it basis” to Claimants. However, Judge Motz also ruled that the Claimants had to establish both procedural and substantive unconscionability, and they failed to prove the latter. He then upheld the requirement that the parties were required to submit all disputes between them to arbitration. And he held the waiver of class action proceedings in court was valid.

Those rulings fall within Rule 1(c) of the Supplementary Rules and thus, to the extent they may be relevant to the issues, are binding in this arbitration. However, even if they were not and this Arbitrator were free to rule as he sees fit, he would reach the same result.

Accordingly, the Claimants’ assertions of unconscionability are rejected. The parenthetical clause barring “class action lawsuits” applies at least to court proceedings and constitutes a valid waiver of the right to proceed as a class in court. I agree with Respondents that nothing in Judge Motz’s rulings expressly holds that Claimants are entitled to bring a class arbitration.² Nor does he preclude such an arbitration, as he also made clear in his letter.

Is the Clause “Silent” on the Question of Class Arbitration?

The core question in this phase of this arbitration is to determine what, if anything, the arbitral clause at issue says about class arbitrations. Both sides say the language of the clause is clear. Claimants say it is clearly “silent”, using that term as a standard set by the Supreme Court in *Green Tree Financial Corp. v Bazzle*, 539 U.S. 444 (2003). Respondents say that the clause is

² While Claimants make some intriguing arguments construing Judge Motz’s ruling to have affirmatively ruled that they were entitled to bring a class arbitration, his letter of February 24, 2005 destroys that position. Judge Motz leaves no ambiguity that he intended that “the AAA itself should decide whether the arbitration be of class-wide claims....” (Koppell Declaration at Tab 2.) However, as noted below, an inference may be drawn from that ruling that supports Claimants’ construction of the arbitral clause.

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not silent and clearly rejects class arbitrations *sub nom* “class action lawsuit.” What is clear is that the clause language is unclear, that it cannot be reconciled entirely with either side’s views, and that a balanced reading of the arbitral clause is required to determine if it is “silent”, speaking clearly, or – perhaps - mumbling incoherently.

Does the Arbitral Clause Allow Class Arbitrations?

The test under *Bazzle* is whether the arbitral clause allows class arbitrations.³ The arbitral clause in this instance provides for mandatory arbitration for all disputes between the parties. The parenthetical phrase within the clause bars any “class action lawsuit” but does not expressly refer to “class arbitrations.” The unknown drafter⁴ of the arbitral clause obviously inserted the parenthetical clause in order to preclude some form of class proceeding, and our task is to define the extent of that preclusion.

In so doing, we need to address whether the language of the arbitral clause and, in particular, the parenthetical phrase, is ambiguous. If ambiguous, the ambiguities will be construed against the drafter under the rule of *contra preferentem* and because of the procedural unconscionability noted above.

The Respondents contend that there are no ambiguities and the rule is inapplicable. They make four arguments: First: the parenthetical phrase must be construed in the context of the broader agreement in the arbitral clause that all disputes go to arbitration. Thus, the preclusive language should apply to class arbitrations. Second: disputes between the parties can only be

³ While the parties argue extensively differently nuanced constructions of the plurality, concurring and dissenting opinions in *Bazzle*, the simpler standard set forth here is sufficient unto this day.

⁴ Respondents have offered no evidence concerning the language at issue.

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resolved by arbitration. It follows that the term “class action lawsuit” applies to arbitrations or the parenthetical clause is meaningless. To construe the parenthetical phrase to apply to law suits that can’t be brought makes no sense and violates the Maryland rules on contract interpretation. Third: the clear and single intent expressed in the clause was to bar aggregation of claims, i.e., class actions. And Fourth: reference to lexicons shows the term “lawsuit” can be defined to include arbitrations as well as court actions. I treat these four arguments *seriatim*.

First: The contextual argument supports the suggested result but does not mandate a preclusion. Judge Motz applied the parenthetical phrase to the lawsuit before him and, at Respondents’ urging, barred Claimants from proceeding with a class action lawsuit in his court. But Judge Motz read the clause as leaving open for an arbitrator to decide if a class arbitration could be allowed under the agreement. We further note that the term “plaintiff” in the arbitral clause is more suggestive of in court litigation than arbitration, again raising ambiguity. Respondents did not proffer any evidence to aid in construing the terminology so we can only go by the language before us. Additionally, the fact that the drafter used the term “arbitration” earlier in the clause but chose not to do so in the parenthetical phrase suggests that a differentiation between the two terms was intended, such that the context is at best ambiguous. In sum, the term “class action lawsuit” is susceptible of more than one reasonable definition, is ambiguous, and shall therefore be construed adversely to Respondents.

Second: construing the parenthetical phrase as limited to court litigation does not necessarily make the language meaningless. A reasonable interpretation of the phrase is that a “belt and suspender” precautionary protection against in-court lawsuits was intended. As noted extensively in the hearing on September 7, 2005, the drafter was most likely to have been

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concerned with in-court law suits, both individual actions and – of particular concern - class actions, and was seeking to preclude such judicial proceedings. Also as noted in that hearing, there were other possibilities that might have arisen where a drafter might well have believed the clause would have effect and not be meaningless. (Examples are found at Transcript at pp. 26-28, 51-53, 110-111) It need not be meaningless to be cautious and wear both a belt and suspenders.

Third: the language was explicitly written to prevent class action lawsuits from being brought in court (as was argued successfully before Judge Motz). However, as noted, the language is ambiguous as to whether the drafter intended to prevent both in court and arbitral arbitrations. As counsel candidly conceded at hearing, Respondents' case would be stronger if the drafter had used the term "class arbitration". (Transcript at p.53.) The legal literature shows that corporations were concerned about court-based class actions in 1998 and 1999, with little if any comment and decision discussing the risks of class arbitrations. It is reasonable to believe the drafter, however inartfully, sought to ensure consumers were expressly waiving class action rights in the courts. It is unlikely that the language was drafted to apply to class arbitrations. Finding ambiguity, in view of the doctrine of *contra preferentem*, I am unwilling to stretch the language. The language will be construed adversely to the Respondents.

Fourth: Respondents' Briefs contend that the term "lawsuit" can include arbitrations⁵. They cite Black's Law Dictionary for a definition of "law suit" that includes arbitrations. But other references abound where the term "class action lawsuit" means a proceeding in a court

⁵ At the September 7 Hearing, Respondents made clear they were not contending that the term "lawsuit" should be defined in the clause as being limited to arbitrations. Rather, they argued "lawsuit" could include arbitrations as well as court actions. (Tr. at 90.) If that were true, then Judge Motz's ruling would have decided the issue before us, i.e., all class proceedings in court or before an arbitrator, were barred. But he explicitly said he was not deciding whether a class arbitration could be maintained under the arbitral clause at issue.

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before a presiding judge, as distinguished from an arbitration. (E.g., 28 U.S.C. Sections 1711⁶; 28 U.S.C. Section 651, et seq.; American Heritage Dictionary.) While the term “lawsuit” may refer to arbitrations as well as court actions, it more frequently does not do so. Words are to be construed when possible so as to give them their normal meaning. Again, the ambiguity will be construed against Respondents.

Respondents have raised an additional point on contract construction that should be dealt with. As noted above, the arbitral clause requires *all* disputes, claims and controversies arising out of the contract be arbitrated. No such disputes, claims or controversies could be filed in court and so the term “class action lawsuit” can logically only apply to arbitrations. This construction is buttressed because the term “class action lawsuit” is included within “such” disputes that must be arbitrated. Therefore, Respondents assert, to give the terms “class action lawsuit” and “such” their proper meaning, they must apply to arbitrations. Claimants do not directly respond to this argument because they say the language of the clause, properly read, does not lead them there. (Claimants’ Memorandum at pp. 10-13.)

Respondents did express a clear purpose to forego all courtroom remedies in favor of arbitration. All “such” disputes, claims and controversies must go to arbitration. But when the arbitral language is applied to class proceedings, it is ambiguous. Respondents’ interpretation is not the only one possible.

Respondents argued to Judge Motz (and persuaded him) that the clause applies to court based class actions. (Koppell Declaration at Tab 1, page 1.) That is a ruling binding on this

⁶ Section 1711 provides in pertinent part; “The term “class action” means any civil action filed in a district court of the United States....”

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Arbitrator under Rule 1(c) of the Supplementary Rules. Even if it were not, however, this Arbitrator independently reaches the same result. So far as the record before me indicates, Respondents never argued to Judge Motz that the parenthetical exclusion also applied to proceedings in arbitration, even though they were arguing that the case should be sent to arbitration. Now they argue in this arbitration that the term “lawsuit” in the clause includes both court-based class actions and arbitrations of the claims. (Respondents’ Memorandum at p. 2 et seq.; Transcript at pp. 89-90.) But on page 6 and in footnote 7 of his January 31 Memorandum, Judge Motz appears to break out the prescriptive language into two, distinct elements: one element being that all disputes must be arbitrated, and the other is that no class action law suits may be filed in court. While this construction, first advanced by Claimants at the oral argument (Transcript at pp. 14-20), does not leap off the pages, it does appear to be an equally reasonable construction of the arbitral clause. That construction, combined with the other reasons set forth herein, is sufficient to rebut Respondents’ construction.

Finally, we note again, that had the intended result been to bar class arbitrations, the drafters could have said so directly by using the term “*arbitrations*” in lieu of “*class action lawsuits*.” The ambiguity lies at the foot of the drafter.

The AAA Commercial Rules Are Not Substantive

Claimants contend that, by adopting the AAA Commercial Rules in the arbitral clause, “Genus evinces its approval of class arbitration.” (Claimants’ Memorandum at p. 16.) Respondents effectively demolish this argument by pointing out the language of Rule 3 of the Supplementary Rules:

In construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any

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other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.

Claimants cite two prior AAA Clause Construction Awards, only one of which appears to support their position, *Goldstein, Clause Construction Award, AAA Case No. 11 160 02760 03*.

To the extent that Award can be read to establish that submission to the Supplementary Rules is a factor in favor of permitting an arbitration to proceed on a class basis, this Arbitrator disagrees.

Claimants contention is rejected.

Precluding Class Arbitrations Would Not Be Unconscionable.

Since this Award does not interpret the arbitral clause as precluding class arbitrations, the point is moot. However, since the Supplementary Rules provide for judicial review of this Partial Final Award, I note that, had I to decide the unconscionability issue, I would not find the arbitral clause substantively unconscionable. The reasons are set out in Respondents' two memoranda and in Judge Motz's ruling of January 31, 2005.

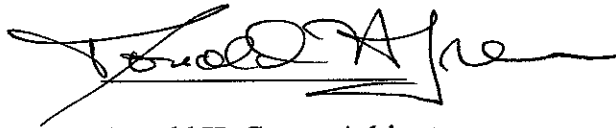
Conclusion

For the reasons set forth above, this dispute may proceed as a class arbitration. Pursuant to the Supplementary Rules, the Arbitrator retains jurisdiction but stays any further proceedings for thirty (30) days from the date of this Partial Final Award to permit any party to appeal.

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Each party shall notify the American Arbitration Association as soon as it has determined whether such an appeal will be pursued. If no timely appeal is filed, the Case Manager is requested to arrange a case management conference to determine the procedures leading into the second phase of this arbitration.

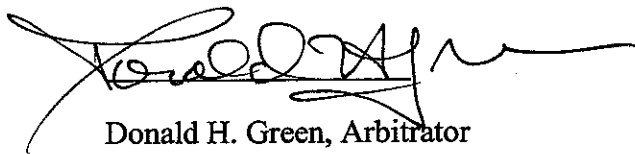
Date: 13 Oct 2005

A handwritten signature in black ink, appearing to read 'Donald H. Green', written over a horizontal line.

Donald H. Green, Arbitrator

I, Donald H. Green, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Partial Final Clause Construction Award.

Date: 13 Oct 2005

A handwritten signature in black ink, appearing to read 'Donald H. Green', written over a horizontal line.

Donald H. Green, Arbitrator