

**AMERICAN ARBITRATION ASSOCIATION**  
**EMPLOYMENT AND CLASS ACTION ARBITRATION TRIBUNALS**

---

In the Matter of the Arbitration between

Marjorie A. Beazury, on behalf of herself  
and all other similarly situated,

v.

AAA Case No. 11 148 02161 04

Arbor Homes, LLC

---

**CLAUSE CONSTRUCTION AWARD OF THE ARBITRATOR**

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named parties, having been duly sworn, and having duly heard the proofs and allegations of the parties, do hereby issue this CLAUSE CONSTRUCTION AWARD, as follows:

**ISSUE PRESENTED**

Does the arbitration clause in the contract executed by the parties permit a class-wide arbitration?

The Clause in the Agreement to be construed reads:

18. ARBITRATION OF DISPUTES. The parties to this Agreement specifically agree that any dispute (whether contract, warranty, tort, statutory or otherwise), including, but not limited to, (a) any and all controversies, disputes or claims arising under, or related to, this Agreement, the Property, or any dealings between the BUYER and SELLER, (b) any controversy, dispute or claim arising by virtue of any representations, promises or warranties alleged to have been made by SELLER or SELLER'S representative; and (c) any personal injury or property damage alleged to have been sustained by BUYER on the property or in the subdivision, shall first be submitted to mediation and, if not settled during mediation, shall thereafter be submitted to binding arbitration as provided by Indiana statute, and not by or in a court of law. All decisions respecting the arbitrability of any dispute shall be decided by the arbitrator.

The mediation shall be conducted before the American Arbitration Association ("AAA") in accordance with the AAA's Commercial or Construction Industry Mediation Rules, as appropriate. If the dispute is not fully resolved by mediation, the dispute shall be submitted to binding arbitration before the AAA in accordance with the Commercial or Construction Industry Arbitration Rules, as appropriate, and judgment upon the award rendered by the arbitrator can be entered in and enforced by any court having jurisdiction over the matter. It is understood and agreed by the parties that in the event the Homeowner's Warranty provided by SELLER does not provide for binding arbitration, a claim under, or covered by, the warranty will be administered as provided in the warranty prior to submission to binding arbitration.

28. GOVERNING LAW. This Agreement shall be governed and interpreted under the Laws of the State of Indiana.

### BACKGROUND

On January 12, 2003, Claimant executed a Purchase Agreement with Respondent for the purchase of a home Respondent built. Claimant utilized a down payment assistance program, the Own Program, to facilitate her purchase. The dispute is over the ultimate purchase price of the home, the amount of repayment to the Own Program, and the amount of processing fees and costs.

### CLAIMANT'S CONTENTIONS

Claimant argues that the Arbitration Agreement permits class arbitration because

#### I

Respondent unilaterally chose the rules that govern the parties' dispute and if it wanted to avoid class arbitration it should have explicitly said so in the contract. Claimant states that instead Arbor Homes either did not consider class arbitrations when it drafted the contract and had no intent to avoid them or it wanted to avoid them but chose not to mention this explicitly, thereby misleading its customers.

#### II

By providing disputes be resolved under AAA's rules -- including its class arbitration rules -- this necessarily subjects Arbor Homes to class arbitration because the AAA Supplementary Rules allow for class arbitration.

Claimant refers to the Commercial Arbitration Rules (effective July 1, 2003) which provide:

Section R-1(A) Agreement by the Parties: "the parties shall be deemed to have made these rules a part of the arbitration agreement . . ." and further that "these rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA.

and the Supplementary Rules for Class Arbitration adopted by American Arbitration Association ("AAA") in response to the ruling in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) (hereinafter referred to as "Bazzle II"), which state:

1. Applicability

- (a) These Supplementary Rules for Class Arbitrations ("Supplementary Rules") shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association ("AAA") where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules. These Supplementary Rules shall also apply whenever a court refers a matter pleaded as a class action to the AAA for administration, or when a party to a pending AAA arbitration asserts new claims on behalf of or against a class or purported class.

III

While no Indiana court has addressed the availability of class-wide arbitrations when the agreement is silent, many highly-persuasive decisions support class-wide relief.

In support of this proposition, Claimant quotes from *Bazzle v. Green Tree Financial Corp.*, 569 S.E.2d 349 (S.C. 2002) (hereinafter "Bazzle I"):

If we enforced a mandatory adhesive arbitration clause, but prohibited class actions in arbitrations where the agreement is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so in the agreement.... Under those circumstances, parties with nominal individual claims, but significant collective claims, would be left with no avenue for relief and the drafting party with no check on its abuses of the law. Further, hearing such claims (involving identical issues against one defendant) individually, in court or before an arbitrator, does not serve the interest of judicial economy.

Claimant also relies on the decision in Keating v. Superior Court of Alameda County, 645 P.2d 1192 (Ca. 1982), 465 U.S. 1. Further, Claimant cites the rationale in Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860 (Pa. Super. 1991) (“Given the three paths down which this litigation can be directed – compelled individual arbitration, class action in a court of law, or compelled class-wide arbitration – the last choice best serves the dual interest of respecting and advancing contractually agreed upon arbitration agreements while allowing individuals who believe they have been wronged to have an economically feasible route to get injunctive relief from large institutions employing adhesion contracts”).

Further, Claimant points out that numerous courts have allowed class arbitration even when an adhesion contract specifically precluded such actions, finding such provisions unconscionable. See, e.g., Ting v. AT&T, 319 F.3d 1126, 1150 (9th Cir. 2003) (upholding district’s court finding of unconscionability of contract that specifically precluded class arbitration); Stetela v. Discover Bank, 9 Cal. App. 4th 1094 (Cal. Ct. App. 2002) (finding a class action ban which negatively impacted the consumer only as being manifestly one-sided and therefore, substantially unconscionable).

### RESPONDENT’S CONTENTIONS

Respondent argues that class-wide arbitration is not permissible under this agreement because:

#### I

Clause construction is controlled by Indiana law and that Claimant has no right to class arbitration because there must be clear language in the agreement that the parties agreed to class arbitration which is absent in this case.

#### II

Under Indiana law which governs this contract, the arbitrator can neither add terms to the contract nor extend the terms of the agreement by construction or implication.

## III

Silence in the arbitration agreement on the issue of class arbitration necessarily means that Claimant cannot satisfy her burden under Indiana law of proving "by clear language," rather than by implication or construction, that the parties' agreement permits class arbitration.

Respondent cites Showboat Marina Casino Partnership v. Town & Blank Construction, 790 N.E.2d 595, for the propositions that: (1) the party seeking to compel arbitration under Indiana law has the burden of demonstrating the existence of an enforceable arbitration agreement; (2) in interpreting these agreements the Courts apply ordinary contract principles; and (3) "[t]he parties are only bound to arbitrate those issues that by clear language they have agreed to arbitrate; arbitration agreements will not be extended by construction or implication."

Respondent argues that if we employ those principles in interpreting the contract it must be determined that Claimant cannot satisfy her burden to show that "by clear language" that the agreement permits class arbitration.

Respondent further argues that Indiana law is well established that a contract's silence on an issue does not render the contract ambiguous or permit a finding of implied terms. In fact, Respondent notes that an Indiana Court of Appeals has held that silence is the simplest way to draft a contract to indicate that the claimed term was not included in the parties' contract. Indiana Glass Co. v. Indiana Mich. Power Co., 692 N.E.2d 886, 887 n.1 (Ind. Ct. App. 1998).

Respondent's answer to Claimant's contention that the AAA Rules require that class arbitration be allowed is that the Supplementary Rules did not exist until October 2003, ten months after the parties entered into this Agreement. Therefore, Respondent states that neither Claimant nor Respondent could have contemplated that AAA could administer a class arbitration and the reference

to the AAA's Commercial Rules of Arbitration cannot serve as evidence of an intent to require class arbitration.

### DECISION

The parties have favored me with extensive briefs on their views and have made oral arguments.

The Agreement provides that it be interpreted under the laws of the State of Indiana. Indiana has not considered whether class-wide arbitrations may be ordered when the agreement is silent. Generally, however, its courts favor arbitration of disputes.

The South Carolina Supreme Court, in Bazzle v. Green Tree Financial Corp., 569 S.E.2d 349 (S.C. 2002) (Bazzle I) and the Supreme Court of the United States in Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003) (Bazzle II) have dramatically changed the landscape in the class-wide arbitration area.

In Bazzle I, the South Carolina Supreme Court ruled as a matter of state law that class action arbitrations are permissible if not prohibited by the applicable arbitration agreement and the agreement is silent on the issue. Bazzle II agrees with this ruling and further pronounced the rule that an arbitrator is the appropriate decision-maker on these issues, not the court. In its decision in Bazzle I, the court noted that several federal circuits have precluded class-wide arbitration when the arbitration agreement is silent, but those decisions were based on the courts' interpretation of Section 4 of the Federal Arbitration Act ("FAA"). This federal approach was first enunciated by the Seventh Circuit in Champ v. Siegel Trading Co., Inc., 55 F.3d 269 (7th Cir. 1995). Representing the opposing view, the California courts have permitted class-wide arbitration on a case-by-case basis when the agreement is silent. The California approach was first enunciated in Keating v. Superior Court, 31 Cal. 3d at 609. The Bazzle I court quoted from Keating, for part of its rationale for the decision:

If the right to a classwide proceeding could be automatically eliminated in relationships governed by adhesion contracts through the inclusion of a provision for arbitration, the potential for undercutting these class action principles, and for chilling the effective protection of interests common to a group, would be substantial. Arbitration proceedings may well provide certain offsetting advantages through savings of time and expense; but, depending upon the nature of the issues and the evidence to be presented, it is at least doubtful that such advantages could compensate for the unfairness inherent in forcing hundreds or perhaps thousands, [sic] of individuals asserting claims involving common issues of fact and law to litigate them in separate proceedings against a party with vastly superior resources.

The Bazzle I court reviewed the other cases addressing the issue, and their rationale for their holdings, and ruled that class-wide arbitration was permitted under the agreement, saying:

In any case, this Court can rely on independent state grounds to permit class-wide arbitration, in the trial court's discretion, where the agreement is silent. First, under general principles of contract interpretation, we construe Green Tree's omission of any reference to class actions against them. "As a matter of pure contract interpretation it is striking, and rather odd, that so many courts have interpreted silence in arbitration agreements to foreclose rather than to permit arbitral class actions.

The court further observed:

Today, we adopt the approach taken by the California courts in *Keating* and *Blue Cross*, and hold that class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice. If we enforced a mandatory, adhesive arbitration clause, but prohibited class actions in arbitration where the agreement is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so in the agreement. (footnote omitted)

The United States Supreme Court in Bazzle II agreed with the rationale in Bazzle I and ruled that the arbitration clause in question did not preclude class arbitration, and thus the FAA did not foreclose class arbitration and the issue was one of state-law contract interpretation.

The court held that the relevant question is what kind of arbitration proceeding the parties agreed to, which does not concern a state statute or judicial procedure, but rather contract interpretation and arbitration procedures.

The general consensus in the judicial opinions before Bazzle I and Bazzle II was that the question of whether a class should be certified was an issue to be determined by the courts and not an arbitrator. Bazzle II changed that, holding that the decision of clause construction as well as class certification under these circumstance is to be made by an arbitrator.

I find that the rationale of Bazzle I is better suited to resolving the issue before me than the cases reviewed by that court to the contrary.

**A. Analysis of Indiana Law**

The Indiana courts have not considered whether class-wide arbitrations may be ordered when the arbitration agreement is silent.

Respondent references a number of Indiana cases that do indeed stand for the proposition that in interpreting a contract the court applies ordinary contract principles. Respondent quotes literally from Showboat Marina arguing that an application of the principles enunciated therein establishes that Claimant must show by "clear language" that the agreement permits class arbitration and that the agreement cannot be "extended by construction or implication."

It is important to point out that this case provides us with additional guidelines. These are:

[w]hen construing arbitration agreements every doubt is to be resolved in favor of arbitration, and the parties are bound to arbitrate all matters not explicitly excluded, that reasonably fit with the language used. (emphasis mine)

As an initial matter, I note that the language used to describe what is to be submitted to arbitration - "The parties - - - specifically agree that any dispute - - - but not limited to, any and all controversies, dispute or claim - - -; and (c) any personal injury- - -" - is all-encompassing and I believe can be construed to permit class arbitration for any matter that reasonably fits within the language used in the agreement.

The word "any," used several times in the agreement to specify what disputes, claims, controversies, dealings, or representations are included, given its plain and ordinary meaning, can be

viewed as synonymous with all, totally, everything, whole, complete, each and every. The submission language could not be more sweeping or all-encompassing.

It certainly is reasonable to conclude that this extremely broad language allows the arbitrator to consider using the procedural mechanism of a class action to resolve disputes.

While I suppose that one can argue that "silence" imparts some measure of ambiguity, I don't believe it is a factor in construing this clause, nor do I agree with Respondent that because the agreement is silent on the issue, class-wide arbitration not included.

Based on the guidelines set out in the Indiana cases, along with the fact that Indiana courts espouse a strong policy of enforcing valid arbitration agreements, I conclude that the arbitration agreement at issue permits class-wide arbitration.

**B. Do the AAA Supplementary Rules on Class Arbitration Require that Class Arbitration Be Allowed?**

Claimant argues that Respondent unilaterally drafted the agreement and chose to require that disputes be submitted to the AAA. It is silent with respect to class-wide arbitrations. Claimant points out that these Commercial Arbitration Rules (Effective July 1, 2003) provide in Section R-1: Agreement of the Parties, that "[t]he parties shall be deemed to have made these rules a part of their arbitration agreement . . ." and further that "[t]hese rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA."

Claimant contends that when this rule is read in conjunction with the Supplementary Rules on Class Arbitration that permit class-wide arbitration, that necessarily binds the parties and rules the issue.

That argument makes a lot of sense and is compelling except for the fact that the Supplementary Rules on Class Arbitration also state:

3. Construction of the Arbitration Clause [paragraph Second]

In construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA Rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.

Therefore, I do not consider these rules and I reject Claimant's argument.

Were it otherwise, there would be no necessity for having a clause construction determination by the arbitrator in any of these cases.

Those arguments made by the parties not addressed by me are deemed rejected.


AWARD

I find the issues in favor of Claimant. I find that the arbitration clause in issue permits class action status consideration.

I deny Claimant's request to assess attorney fees and administrative costs against Respondent.

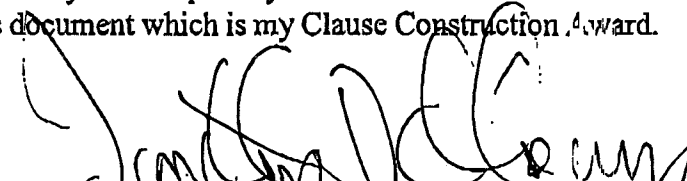
Pursuant to the Supplementary Rules I retain jurisdiction, but stay any further proceedings for 30 days from the date of this Award to give any party an opportunity to appeal this Award.

Each party should notify the AAA as soon as it has determined whether such appeal will be filed. If there is no appeal AAA will arrange a case management conference.

  
\_\_\_\_\_  
Hon. Timothy D. O'Leary (Ret.)

I, Hon. Timothy D. O'Leary (Ret.) do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this document which is my Clause Construction Award.

Date: 1/31/05

  
\_\_\_\_\_  
Hon. Timothy D. O'Leary (Ret.)