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Michael Wax

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Randolph v. Green Tree Financial Corp: Does a Failure to Allocate Arbitration Expenses in a Mandatory Arbitration Clause Prevent Consumers from Vindicating Their Cause of Action

Michael Wax

I. Introduction

It is common knowledge that the courts in our country are flooded with more cases than they can handle. America's court dockets are so backlogged, it may take an individual case seven or more years to reach a courtroom. Congress has recognized this problem of overcrowded dockets and has attempted to find solutions to reduce the load of the courts. One solution has been to encourage disputing parties to use alternative dispute resolution forums in order to provide a more time-effective means for parties to resolve their disputes.¹

Arbitration is one type of alternative dispute resolution encouraged by Congress.² By agreeing to arbitration, the parties submit their disputes to arbitrators, neutral parties whose reasoning and final decisions or awards supplant the judgment of the established judicial tribunals.³ The decisions made by arbitrators can be binding and enforceable in courts.⁴

Congress' stance in favor of arbitration has met much success, as it has become increasingly popular for parties to relinquish their right to have a judicial proceeding and submit their claims to arbitration.⁵ In addition, Congress has also received the support of the courts which have recognized a federal policy favoring arbitration.⁶

As arbitration has become a more acceptable means for resolving disputes, it has become more and more popular for vendors, finance companies, and employers to include mandatory arbitration clauses in their contracts which preclude the use of the judicial system.⁷ Such mandatory arbitration clauses have been the subject of a substantial amount of controversy.⁸ In accordance with the federal policy favoring arbitration, the Supreme Court has held that federal statutory claims can be appropriately resolved through arbitration⁹ and that arbitration does not weaken the protections afforded by the substantive law to would be claimants.¹⁰

Randolph v. Green Tree Financial Corp., decided by the Supreme Court in December 2000, presents one such controversy that has arisen in the growing area of mandatory arbitration.¹¹ The issue presented in *Randolph* was whether a mandatory arbitration clause would be enforceable if it did not allocate the payment of the arbitration expenses between the parties.¹² The case started out in an Eleventh Circuit District Court that found that the clause was enforceable.¹³ On appeal, the Eleventh Circuit Court of Appeals reversed, holding that a mandatory arbitration clause must allocate expenses in a reasonable manner so as not to preclude a customer's use of the forum.¹⁴ In December of 2000, however, the appellate court's decision was overturned by a 5 to 4 Supreme Court decision.¹⁵

These courts are not the only courts that cannot seem to come to a unanimous decision with regards to this issue. The issue is one over which other circuit courts have also struggled.¹⁶ This Note will take a close look at the history of this issue and the arguments presented by both sides of the issue. Specifically, it will focus on the majority and dissenting opinions of the Supreme Court's December 2000 decision in *Randolph* and analyze which side presented a more compelling argument. Finally, this Note will explore the possible effects of the *Randolph* decision on consumers and future mandatory arbitration clauses.

II. Background

In 1925, Congress enacted the Federal Arbitration Act ("FAA") which was re-enacted and codified under Title IV of the United States Code in 1947.¹⁷ The FAA represents Congress' first attempt to encourage the use of the arbitration system.¹⁸ The FAA governs the adjudication of federal statutory claims in an arbitral forum. With regard to contracts that contain mandatory arbitration clauses, the FAA states that "a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."¹⁹ According to the Act, the federal district courts are required to compel arbitration for any case in which there is no issue as to whether the parties have decided contractually to submit claims to an arbitrator.²⁰ The federal district courts are also prohibited by the Act from becoming involved in such a case "until such arbitration has been had in accordance with the agreement."²¹

The Supreme Court has also taken the stance that federal statutory claims can be appropriately resolved through arbitration.²² As a result, the Supreme Court has generally held parties to their agreements to arbitrate. The Court has rejected generalized attacks on arbitration that rest on "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,"²³ as well as attacks that arbitration agreements should be invalidated because of unequal bargaining power between the contracting parties.²⁴

The Supreme Court has, however, provided two loopholes by which a party may avoid enforcement of a mandatory arbitration clause. The first came in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Corp.*, a case which

involved a contract between a car manufacturer and car dealership and a dispute over the mandatory arbitration clause contained in the contract.²⁵ The Court ruled in *Mitsubishi* that a party could avoid enforcement of the arbitration clause by showing that "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."²⁶

A second loophole can be found in the Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*²⁷ In *Gilmer*, the Court held that a claim under the Age Discrimination in Employment Act of 1967 could be subjected to a mandatory arbitration clause.²⁸ The Court stated that "so long as the prospective litigant may effectively vindicate his or her statutory causes of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."²⁹ Thus, if a litigant is unable, for whatever reason, to effectively vindicate his or her statutory causes of action in an arbitration forum, the court should refuse to enforce a mandatory arbitration clause.³⁰

III. *Randolph v. Green Tree Financial Corp.*

In *Randolph v. Green Tree Financial Corp.*, Randolph's complaint arose from her purchase of a mobile home from Better Cents Home Builders, Inc., in Opeika, Alabama in January 1994.³¹ Randolph financed the mobile home through an Alabama corporation called Green Tree Financial Corp. ("Green Tree").³² The financing agreement required Randolph to purchase vendor's single interest insurance, which protects a vendor against the costs of repossession in the event of borrower default.³³ Randolph alleged that the manner in which this was required of her did not conform with Congress' Truth In Lending Act ("TILA") as the TILA disclosure statement failed to mention this requirement.³⁴ Randolph also sought to bring action on behalf of a class of individuals who were also alleging that TILA had been

violated in their transactions with Green Tree.³⁵ In response to the filing of the lawsuit, Green Tree sought to compel Randolph, and each member of her class, to take their complaints to an arbitral forum pursuant to the arbitration clause in the financing contract.³⁶

In January of 1996, the district court was the first to decide on the enforceability of the mandatory arbitration clause.³⁷ The court stated that in order for Randolph to prevail, she would have to rebut the federal presumption in favor of arbitration by demonstrating that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.³⁸ The court found that Randolph did not meet this burden and compelled her to submit to arbitration.³⁹ The court also rejected arguments that the clause lacked consideration since Green Tree was not itself required to arbitrate claims that arose⁴⁰ and that her failure to read the contract rendered it unenforceable.⁴¹

Randolph then appealed to the Eleventh Circuit Court of Appeals.⁴² Despite acknowledging the strong federal policy in favor of arbitration,⁴³ the court reversed the district court's decision, declining to enforce Green Tree's arbitration clause.⁴⁴ The court based its decision on the loophole provided in *Gilmer*, which allows one to escape mandatory arbitration if it appears that the litigant will be unable to effectively vindicate his or her statutory causes of action in an arbitral forum.⁴⁵

The court stated that procedural flaws can present barriers to a litigant's exercise of statutory rights such that they render an arbitration clause unenforceable.⁴⁶ In order to avoid such barriers, the court held that an arbitration clause must provide the "minimum guarantees" required to ensure that a plaintiff can vindicate her statutory rights.⁴⁷ In the court's opinion, these minimum guarantees were not present in *Randolph* since the possibility of bearing the brunt of "hefty" arbitration costs and "steep filing fees" would likely prevent Randolph from arbitration.⁴⁸

IV. The Prospective vs. Retrospective Schools of Thought in Analyzing This Issue

In analyzing arbitration clause enforceability issues, courts commonly begin their analysis by acknowledging *Gilmer*.⁴⁹ Federal circuit courts have a common understanding the federal circuit courts of *Gilmer* and the concept that the Federal Arbitration Act will only "serve its remedial and deterrent function . . . so long as the prospective litigant may effectively vindicate his or her statutory cause of action in the arbitral forum."⁵⁰ Consequently, courts are generally willing to invalidate an arbitration clause if it contains provisions that defeat the remedial purpose of the Act.⁵¹

Several circuit courts have also acknowledged that steep arbitration fees and costs imposed on a plaintiff might violate the *Gilmer* concept and prevent a party from being heard in an arbitration forum.⁵² In *Shankle v. B-G Maintenance Management of Colorado, Inc.*, the Tenth Circuit Court of Appeals concluded that an arbitration agreement's allocation of fees and expenses limited an employee's use of the arbitral forum and rendered the agreement unenforceable.⁵³ In *Cole v. Burns International Security Systems, Inc.*, an employer was required by the D.C. Circuit Court of Appeals to pay all arbitration expenses where arbitration was required by the employer.⁵⁴

While courts generally acknowledge the above mentioned concepts, a split has developed among the circuits as to whether a failure to allocate fees in an arbitration agreement is a serious enough threat to render the clause unenforceable. There are two competing schools of thought that have developed in the federal circuit courts with regards to the issue.

The first school of thought was adopted by the Eleventh Circuit Court of Appeals in *Randolph*. The *Randolph* test for enforceability examines whether or not the arbitration agreement presents such barriers to arbitration so as to deny the plaintiff the opportunity to

vindicate her statutory right.⁵⁵ The issue is evaluated prospectively in an attempt to determine the likelihood that these barriers will deny access to arbitration.⁵⁶ There is no requirement of certainty;⁵⁷ one must only show that they will likely be prevented from having their day in arbitration.⁵⁸ If it appears that the consumer may be required to pay steep arbitration expenses, preventing them from having their case arbitrated, the court will invalidate the clause.⁵⁹

On the other hand, the First, Second, and Seventh Circuits have found that the mere possibility that a plaintiff may be required to pay arbitration fees is not by itself a sufficient reason to invalidate an agreement to arbitrate.⁶⁰ These courts have taken the stance that the issue can only be decided retrospectively.⁶¹ Courts adopting this school of thought will only invalidate a mandatory arbitration clause when the expenses have actually been imposed on a claimant.⁶² A showing of either the claimant's dire financial situation or the steep arbitration expenses imposed on the claimant, or both, are required before the court will invalidate the mandatory arbitration clause.⁶³

It is the belief of these courts that the mere possibility that a claimant will not have her case heard is not enough to invalidate a clause.⁶⁴ These courts want to be certain that the imposition of fees will make the claimant unable to enforce her rights. Therefore, they maintain that the availability of judicial review after arbitration is a sufficient means to insure that a claimant will not be prevented from arbitrating her claim.⁶⁵

V. The Supreme Court's Decision

In December of 2000, of the Supreme Court of the United States took its turn in evaluating whether Green Tree's mandatory arbitration clause should be held enforceable against Randolph.⁶⁶ In a 5 to 4 decision, the Court found the clause to be enforceable upon Randolph,

denying her the use of the judicial forum.⁶⁷ Chief Justice Rehnquist delivered the opinion of the Court and was joined by Justices O'Connor, Scalia, Thomas and Kennedy.⁶⁸

The Court began its decision by recognizing the federal policy in favor of arbitration and acknowledging its *Gilmer* principle that arbitration will only be enforceable if it does not prevent a "litigant from effectively vindicating" his or her cause of action.⁶⁹ The Court continued its analysis by asking whether the parties agreed to submit their claims to arbitration and whether Congress had evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.⁷⁰ Finding both an agreement and no intention by Congress to preclude a waiver, the Court went on to deal with the issue of whether the contract's silence with regards to arbitration fees rendered the mandatory arbitration clause void.⁷¹

The Court started its analysis of this question by admitting "it may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her statutory rights in the arbitral forum."⁷² While noting this possibility, the Court next stated "that the risk that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement."⁷³ In adopting the retrospective school of thought previously discussed, the Court held that a more definitive showing that expenses will prevent access to the arbitral forum must be made in order for Randolph to prevail.⁷⁴

The Court also stated that the burden to make such a showing was on Randolph because she was the party who sought to avoid the arbitration.⁷⁵ In discussing this burden that Randolph was required to meet, the Court stated that the burden cannot be met by a hypothetical showing of what arbitration could possibly cost the plaintiff.⁷⁶ According to the Court, "such unsupported statements provide no basis on which to ascertain the

actual costs and fees to which she would be subject to in arbitration."⁷⁷ Rather, in order to meet the necessary burden, the Court stated that a plaintiff must show that in her particular case, the expenses will prevent her from making it into arbitration.⁷⁸ The Court listed examples of adequate evidence being "information about how claimant's fare under Green Tree's arbitration clause"⁷⁹ or a naming of the arbitration organization that Green Tree uses and the fees that it charges.⁸⁰

The majority opinion concluded by attempting to justify why it placed the burden on the plaintiff to make this showing.⁸¹ The Court discussed two of the arguments made by parties in the past to avoid mandatory arbitration- that a particular case is unsuitable for arbitration and that Congress intended to preclude arbitration.⁸² In these types of cases, the Supreme Court has held that the burden to make the respective showing is always on the party that seeks to avoid arbitration.⁸³ The Court felt that it followed from these decisions, that a party seeking to avoid arbitration because of expenses, should also bear the burden to show the likelihood of incurring such costs.⁸⁴

VI. Analysis

A. The Supreme Court's Decisions in *Gilmer* and *McMahon* Should Not Have Been Used by the Majority to Decide Whether Randolph Bore the Burden of Proof

In his majority opinion, Chief Justice Rehnquist cited the Court's *Gilmer* and *McMahon* decisions, two cases in which the plaintiffs also sought to void mandatory arbitration clauses.⁸⁵ In *Gilmer* and *McMahon*, the Court dealt with the adequacy of the arbitral forum for adjudicating the statutory claims at issue in the cases.⁸⁶ In both cases, the Court held that the party resisting arbitration possessed the burden of proving that the claims at issue were unsuitable for arbitration.⁸⁷ Following these

cases, the majority in *Randolph* held that *Randolph* should also bear the burden in her case.⁸⁸ However, as the dissent pointed out, the *Gilmer* and *McMahon* cases were different types of cases⁸⁹ and it did not logically follow “like the night the day”⁹⁰ that *Gilmer* and *McMahon* should serve as precedent to determine that *Randolph* bore the burden of proof.

In *Gilmer* and *McMahon*, the issue was whether the arbitral forum was adequate to adjudicate the case or if the judicial forum would provide for a more appropriate forum.⁹¹ Therefore, the Court’s focus was on the subject matter of the dispute as well the arbitral forum’s ability to resolve that dispute. In *Randolph*, the issue was whether the forum was accessible to the party resisting arbitration.⁹² In this type of case, the focus is not on what happens once the case reaches arbitration, but rather, whether the plaintiff will be able to reach arbitration.

Not only do these cases address different issues, they require different showings of proof in order for a claimant to meet its burden. In *Gilmer* and *McMahon*, the Court held that in order to prevail, the party attempting to avoid arbitration must show that Congress intended to preclude arbitration when it drafted the respective statutes under which the plaintiffs’ claims arose.⁹³ This showing required going through the legislation as well legislative history such as congressional reports that have been published. As such, this was information that both parties could retrieve by using traditional research tools that are equally available to everyone. Therefore, because this information was readily available, it was not unreasonable to assign the burden to the plaintiffs in *Gilmer* and *McMahon* in lieu of the federal stance favoring arbitration.

In contrast, the information required by the Court to allow *Randolph* to prevail was information that was more accessible to Green Tree than it was to *Randolph*. As the dissent points out, “as a repeat player in the arbitration required by its form contract, Green Tree has

superior information about the cost to consumers of pursuing arbitration."⁹⁴ The majority mentioned certain examples of proof that might provide a realistic projection of what Randolph's expenses would be to arbitrate and therefore enable the Court to find for Randolph. Both examples referred to by the Court were pieces of information either more readily available to Green Tree than Randolph or accessible to Green Tree and not accessible to Randolph at all.

The first example mentioned was a showing of how previous plaintiffs had fared in arbitration with Green Tree. This is information that Green Tree would have possessed in its files and would have most likely only been available to Randolph had Green Tree made it available to her. The second example mentioned by the Court was a naming of the arbitration organization Green Tree uses and how that system usually allocates its expenses. Once again, this is information that Green Tree would possess and would be accessible to Randolph only if Green Tree were to provide her with that information.

B. Where Does This Decision Leave Ms. Randolph and Other Similarly Situated Consumers?

It is ironic that the Court began its decision by acknowledging the *Gilmer* principle that arbitration will only be enforceable so long as it does not prevent a "litigant from effectively vindicating" their cause of action⁹⁵ because the Court's decision does not embrace this principle. The Court does not attempt to discern the position it has placed Randolph and other similarly situated consumers as a result of its decision. If it had, it would have realized that it has placed such consumers in a position where vindicating his or her rights will be extremely difficult, if not impossible.

If the majority's position does not prevent the litigant from effectively vindicating her cause of action, it certainly makes it less likely that vindication will occur.

Effectively, in the aftermath of *Randolph*, a potential litigant in this situation is given the option of either submitting to an arbitration hearing without knowing how much that hearing will cost them or demonstrating, up front, that the costs, if imposed on them, will be prohibitive.⁹⁶

In terms of submitting to arbitration without knowing how much it will cost, consumers will always endure the possibility that they will have to pay for all of the arbitration fees and expenses. The consumer who can risk the possibility of being assessed high arbitration fees will still have her day to vindicate her cause of action. In the end, the arbitrator may have actually assessed an amount to the consumer that was "prohibitively expensive"⁹⁷ to her ability to arbitrate. Under the system that *Randolph* establishes, this consumer can then enter the judicial system and endure years of possible litigation to recover all or part of the arbitration fees and expenses.⁹⁸

While the above consumer's plight is extremely burdensome, the *Randolph* decision will be even more detrimental to the consumer that cannot endure this risk. In the case of a consumer who is not financially endowed, it may be extremely risky for them to submit to arbitration with the possibility that they will be saddled with fees that they cannot afford. In some cases, arbitration has been shown to be extremely expensive. Often arbitrators can charge \$700 to \$800 per hour⁹⁹ and total fees for a plaintiff have been known to reach many thousands of dollars.¹⁰⁰ There can be no doubt that such fees may intimidate such a consumer into foregoing her option to arbitrate. This consumer will be harmed the most by the *Randolph* decision as she will have to live with any harm that the defendant may have caused her.

C. The Option Given by the Supreme Court to Prove Up Front that Arbitration Fees Will be Prohibitively Expensive Is Not an Easy Burden to Meet as Shown in *Randolph*

The second option provided to consumers by the *Randolph* decision is to demonstrate up front, that the costs, if imposed on them, will be prohibitive to their attempt to vindicate their cause of action.¹⁰¹ As mentioned previously, the majority decision listed two types of proof that could have been sufficiently demonstrative of the prohibition - a showing of the fees charged by the arbitration organization that Green Tree uses to hear its cases or a showing of how other plaintiffs had fared under Green Tree's arbitration clause.

It is possible that a company's arbitrator could be a matter of public knowledge. However, in *Randolph*, Green Tree had not designated a particular arbitration association or arbitrator that it used to resolve its disputes or at least they had not informed Randolph of such.¹⁰² As a result, Randolph was prevented from making an argument to show that the fees normally charged by Green Tree's arbitrator, if imposed on her, would be prohibitively expensive.

Without this option, Randolph chose to use the hypothetical situation of arbitrating with a commonly used arbitration association, the American Arbitration Association ("AAA").¹⁰³ She showed the fees and expenses normally charged by AAA for arbitration and explained that she would not be able to pay the expenses.¹⁰⁴ The Court rejected this showing by Randolph because there was no factual showing that the American Arbitration Association would be conducting the arbitration.¹⁰⁵

The second type of proof mentioned by the Court was a showing of how previous plaintiffs had fared under Green Tree's arbitration clause. Unlike the previous method of proof mentioned, this information would

be almost definitely be unavailable to the public. Therefore, a plaintiff would not be able to get this information unless it was given to them. A company like Green Tree most likely would not just hand this information over unless they were compelled to in a situation such as discovery. Unfortunately for Randolph, or a similarly situated plaintiff, there is no discovery in this situation. As a result, Randolph was left with another type of proof that was impossible for her to produce.

What could Randolph have done to make the proper showing of proof? She attempted to demonstrate to the Court how the fees of a prominent arbitration organization would be prohibitively expensive to her. In the eyes of the Court this was insufficient. She simply did not have access to the information that the majority was looking for. While future plaintiffs may have access to the items of proof that the Court requested, *Randolph* demonstrates that this information may not always be easily available to a consumer. As a result, *Randolph* also demonstrates that in a situation where a contract requires mandatory arbitration without allocating arbitration expenses, it is going to be difficult for a plaintiff to show that the costs will be prohibitively expensive until those costs are actually imposed on the plaintiff.

VII. Conclusion

In the aftermath of *Randolph*, it is clear that the Supreme Court is determined to stand behind the federal policy in favor of arbitration. Despite the Court's acknowledgment that it is prepared to invalidate any mandatory arbitration clause that will prevent a claimant from vindicating his or her cause of action, it did not do so in *Randolph*. As the dissent points out, the Court may have been so ready to support the federal policy that it "reached out prematurely to resolve the matter in the lender's favor." In doing so, it may not have truly recog-

nized the effect its decision will have on Randolph and other plaintiffs in her position.

As a result of the Supreme Court's decision, a Randolph-like consumer will be left in a state of uncertainty. Heading into arbitration, a Randolph-like consumer will not only be uncertain as to the result the arbitration will render, but there will also be an uncertainty as to how much the arbitration will cost them.

Those consumers who can risk the possibility of being assessed high arbitration fees will still have their day to vindicate their cause of action. However, for other consumers, who will not be able to risk the possibility of being assessed high arbitration fees, the uncertainty will result in their claim never making it into the arbitral forum. Thus, such consumers will never have the opportunity to vindicate their cause of action.

Endnotes

1. *What Price Justice? (A Survey of the Legal Profession)*, ECONOMIST, July 18, 1992, at 17, stating, Alternative Dispute Resolution ("ADR") "dispenses with formality and cumbersome procedures and aims to settle cases faster than, but just as fairly as, normal courts."

2. 9 U.S.C. § 2 (1994). In 1925, Congress enacted the Federal Arbitration Act ("FAA") and in 1947 re-enacted and codified the act as Title IV of the United States Code.

3. Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law*, 21 HOFSTRA L. REV. 385, 388 n.11 (1992).

4. *Id.* at 389.

5. John M. Flynt, *A Solution to Force-Planned Insurance Litigation for Lenders: Disclosure and Arbitration*, 26 CUMB. L. REV. 537, 572 (1995-1996).

6. *Moses H. Cone Mem'l Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983).

7. Anne Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J.CORP. L. 331, 333. (Winter 1996). Brafford contends, "Increasingly, businesses have been taking advantage of arbitration's efficiency..."
8. Patricia Sturdervant & Dwight Golann, *Should Binding Arbitration Clauses Be Prohibited in Consumer Contracts?*, J. DISP. RESOL. Mag. 4 (Summer 1994) (discussing whether pre-dispute, binding arbitration clauses in consumer contracts of adhesion are inappropriate).
9. *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987).
10. *Rodriquez de Quijas*, 490 U.S. at 481.
11. *Green Tree Financial Corp. v. Randolph*, 121 S. Ct. 513 (2000).
12. *Id.*
13. *Id.*
14. *Randolph v. Green Tree Financial Corp.*, 178 F.3d 1139 (11th Cir. 1999), *rev'd*, *Green Tree Financial Corp. v. Randolph*, 121 S. Ct. 513 (2000).
15. *Green Tree Financial Corp.*, 121 S. Ct. at 513.
16. *Arakawa v. Japan Network Group*, 56 F. Supp. 2d 349, 350 (S.D.N.Y. 1999) (stating, "other circuits have found that the possibility that a plaintiff may be required to pay arbitrator's fees is not, by itself, a sufficient reason to invalidate an agreement to arbitrate").
17. *Cole v. Burns Int'l Sec. Services*, 105 F.3d 1465, 1470 (D.C. Cir. 1997).
18. *Id.* (stating, the purpose of the Federal Arbitration Act "was to reverse the long-standing judicial hostility to arbitration agreements that had existed at English common law and had been adopted by the American courts.").
19. 9 U.S.C. § 2 (1994).
20. *Id.* § 4.
21. *Id.* § 3.

22. *Rodriguez de Quijas v. Searson/American Express, Inc.*, 490 U.S. 477, 481 (1989).

23. *Id.*

24. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

25. *Id.*

26. *Id.* at 628.

27. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

28. *Id.*

29. *Id.* at 28.

30. *Arakawa v. Japan Network Group*, 56 F. Supp. 2d 349, 353 (S.D.N.Y. 1999) (stating that “arbitration agreements that require a Title VII plaintiff to pay all or part of an arbitrator’s fees are unenforceable because they do not provide for a forum where litigants can effectively vindicate their statutory rights”).

31. *Randolph v. Green Tree Financial Corp.*, 178 F.3d 1139, 1151 (11th Cir. 1999).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 1152.

36. *Id.*

37. *Randolph*, 178 F.3d at 1151.

38. *Randolph v. Green Tree Financial Corp.*, 991 F. Supp 1410, 1416 (M.D. Ala. 1997).

39. *Id.* at 1417.

40. *Id.* at 1422.

41. *Id.* at 1423.
42. *Randolph v. Green Tree Financial Corp.*, 178 F.3d 1139, 1151 (11th Cir. 1999).
43. *Id.* at 1157.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Arakawa v. Japan Network Group*, 56 F. Supp. 2d 349, 359 (S.D.N.Y. 1999); *Randolph v. Green Tree Financial Corp.*, 178 F.3d 1139, 1157 (11th Cir. 1999); *Green Tree Financial Corp. v. Randolph*, 121 S. Ct. 513, 521 (2000); *Rosenberg v. Merrill Lynch, Pierce, Fenner, and Smith, Inc.*, 170 F.3d 1, 12 (1st Cir. 1999).
50. *Arakawa v. Japan Network Group*, 56 F. Supp. 2d 349, 359 (S.D.N.Y. 1999); *Randolph v. Green Tree Financial Corp.*, 178 F.3d 1139, 1157 (11th Cir. 1999); *Green Tree Financial Corp. v. Randolph*, 121 S. Ct. 513, 521 (2000); *Rosenberg v. Merrill Lynch, Pierce, Fenner, and Smith, Inc.*, 170 F.3d 1, 12 (1st Cir. 1999).
51. *Arakawa v. Japan Network Group*, 56 F. Supp. 2d 349, 359 (S.D.N.Y. 1999); *Randolph v. Green Tree Financial Corp.*, 178 F.3d 1139, 1157 (11th Cir. 1999); *Green Tree Financial Corp. v. Randolph*, 121 S. Ct. 513, 521 (2000); *Rosenberg v. Merrill Lynch, Pierce, Fenner, and Smith, Inc.*, 170 F.3d 1, 12 (1st Cir. 1999).
52. *Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.3d 1230, 1235 (10th Cir. 1999); *Paladino v. Avnet Computer Technology, Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998).
53. *Shankle*, 163 F.3d at 1235.
54. *Cole v. Burns Int'l Sec. Services*, 105 F.3d 1465, 1488 (D.C. Cir. 1997).
55. *Randolph v. Green Tree Financial Corp.*, 178 F.3d 1139, 1158 (11th Cir. 1999).

56. *See id.*

57. *See id.*

58. *See id.*

59. *See id.*

60. *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 15-16 (1st Cir. 1999); *Arakawa v. Japan Network Group*, 56 F. Supp. 2d 349, 354 (S.D.N.Y. 1999); *Koveleskie v. SBC Capital Markets, Inc.*, 167 F. 3d 361, 366 (7th Cir. 1999).

61. *Rosenberg*, 170 F.3d at 15-16; *Arakawa*, 56 F. Supp. 2d at 354; *Koveleskie*, 167 F. 3d at 366.

62. *Rosenberg*, 170 F.3d at 15-16; *Arakawa*, 56 F. Supp. 2d at 354; *Koveleskie*, 167 F. 3d at 366.

63. *Arakawa*, 56 F. Supp. 2d at 355.

64. *Rosenberg*, 170 F.3d at 15-16; *Arakawa*, 56 F. Supp. 2d at 354; *Koveleskie*, 167 F. 3d at 366.

65. *Lagatree v. Luce*, 74 Cal. App. 4th 1105,1135 (1999).

66. *Green Tree Financial Corp. v. Randolph*, 121 S. Ct. 513, 523 (2000).

67. *Id.*

68. *Id.* at 517.

69. *Id.* at 521.

70. *Id.*

71. *Id.* at 522.

72. *Green Tree Financial Corp. v. Randolph*, 121 S. Ct. 513, 523 (2000).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 535.

79. *Id.* at 522. (citing 11th Circuit Court of Appeals) (stating, “we lack...information about how claimants fare under Green Tree’s Arbitration clause”).

80. *Id.* (stating that Ms. Randolph’s showing of the fees charged by AAA were insufficient because there was no factual showing that AAA would conduct the arbitration).

81. *Id.*

82. *Green Tree Financial Corp. v. Randolph*, 121 S. Ct. 513, 522 (2000).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987).

87. *Gilmer*, 500 U.S. at 26. *McMahon*, 482 U.S. at 227.

88. *Green Tree Financial Corp. v. Randolph*, 121 S. Ct. 513, 535 (2000).

89. *Id.* at 539. (Ginsburg, dissenting).

90. *Id.*

91. *Gilmer*, 500 U.S. at 26.

92. *Green Tree Financial Corp.*, 121 S. Ct. at 535.

93. *Gilmer*, 500 U.S. at 26.

94. *Green Tree Financial Corp.*, 121 S. Ct. at 524. (Ginsburg, dissenting).

95. *Id.*

96. *Id.*

97. *Id.* This a term used in the majority's opinion.

98. *Id.* at 524. (Ginsburg, dissenting, states, "the court's opinion...does not prevent Randolph from returning post-arbitration, if she then has a complaint about cost allocation.").

99. *Id.*

100. *Doctor's Associates, Inc. v. Hamilton*, 150 F.3d. 157, 163 (2d Cir. 1998).

101. *Green Tree Financial Corp. v. Randolph*, 121 S. Ct. 513, 537 (2000).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

