South Carolina Law Review

Volume 55
Issue 3 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 7

Spring 2004

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Recommended Citation
Eckard, Michael Oliver (2004) "The United States Supreme Court's Indecision in Green Tree Financial Corporation v. Bazzle: A Class Act," *South Carolina Law Review*: Vol. 55 : Iss. 3 , Article 7.
Available at: https://scholarcommons.sc.edu/sclr/vol55/iss3/7

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The United States Supreme Court's Indecision in *Green Tree Financial Corporation v. Bazzle*: A Class Act

I. INTRODUCTION

For several years, practitioners have questioned whether the Federal Arbitration Act (FAA) permits class arbitration where a contract's arbitration clause is arguably silent on the issue.[1] Far from resolving this question, the United States Supreme Court in *Green Tree Financial Corp. v. Bazzle*[2] indicated how divided the Court is on the propriety of class arbitrations under arbitration agreements, as well as the roles of the trial court and arbitrator in determining whether a class should be certified.[3] Justice Breyer's plurality opinion indicated that the arbitrator, not the court, should determine whether a particular arbitration agreement permits class arbitration.[4] Chief Justice Rehnquist, on the other hand, argued in his dissenting opinion that the courts should interpret the contract between the parties to determine the availability of class procedures.[5]

Green Tree leaves many questions unanswered with respect to class arbitrations. After *Green Tree*, courts have felt compelled to submit the question of whether a particular arbitration agreement permits class arbitration to an arbitrator.[6] Part II of this paper recounts the facts and procedural history of *Green Tree* and *Lackey v. Green Tree Financial Corp.*[7] Part III examines the Supreme

1. *See* Robert P. Davis et al., Green Tree Fin. Corp. v. Bazzle*: The Uncertain Fate of Class Arbitration*, 3 MEALEY'S LITIGATION REPORT: CLASS ACTIONS, July 17, 2003, at 1 (explaining that many practitioners hoped *Green Tree* would answer the question of whether the Federal Arbitration Act permits class arbitrations under agreements that do not address class arbitrations).

2. 123 S. Ct. 2402 (2003).

3. *Compare Green Tree*, 123 S. Ct. at 2408 (Breyer, J.) (holding that the arbitrator should make the initial determination of whether an agreement permits class arbitration), *with Green Tree*, 123 S. Ct. at 2408 (Stevens, J., concurring and dissenting in part) (arguing that it is proper for the Supreme Court of South Carolina to declare, as a matter of state law, that class arbitration is permitted under agreements that do not expressly forbid the practice) *and with Green Tree*, 123 S. Ct. 2402 (Rehnquist, C.J., dissenting) (arguing that state substantive law does apply to the inquiry, but that the *Green Tree* contracts were so unambiguous in prohibiting class arbitration by its terms that the FAA enforces the agreement and the Supreme Court of South Carolina was in error in determining the contracts to be silent on the issue).

4. *Green Tree*, 123 S. Ct. at 2408.

5. *Id.* at 2409 (Rehnquist, C.J., dissenting).

6. *See, e.g.*, Pedcor Mgmt. Co., Welfare Benefit Plan v. Nations Pers. of Tex., 343 F.3d 355, 359 (5th Cir. 2003) (stating that "[t]he clarity of *Green Tree*'s holding—that arbitrators are supposed to decide whether an arbitration agreement forbids or allows class arbitration—leaves [the court] to decide only whether the instant case is sufficiently analogous to *Green Tree* to come within its rule").

7. 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998).

Published by Scholar Commons, 2004

Court of South Carolina's analysis in *Bazzle v. Green Tree Financial Corp.*,[8] to include the court's application of state substantive law to the arbitration agreement. Part IV evaluates the various opinions in the United States Supreme Court's resolution of *Green Tree*. Finally, Part V illustrates the future challenges in class arbitrations in the wake of *Green Tree*, including the extent to which state substantive law continues to control the interpretation of arbitration agreements.

II. FACTS AND PROCEDURAL HISTORY

Green Tree arose from contract disputes between defendant Green Tree Financial Corporation (Green Tree), a consumer credit lender, and its customers.[9] In 1997, plaintiffs Lynn and Burt Bazzle filed an action in South Carolina state court complaining that Green Tree failed to provide its customers with a disclosure form required under South Carolina law, thereby entitling the Bazzles to damages.[10] The Bazzles sought class certification for their claims.[11] In response, Green Tree sought to stay the court proceedings and compel arbitration pursuant to the arbitration clause in the Bazzles' loan agreement.[12] The trial court certified the class and at the same time ordered arbitration.[13]

The contract between Green Tree and the Bazzles contained the following arbitration clause:

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

8. 351 S.C. 244, 569 S.E.2d 349 (2002).
9. *Green Tree*, 123 S. Ct. at 2404.
10. *Id.* at 2405.
11. *Id.*
12. *Id.*
13. *Id.*

money damages, declaratory relief, and injunctive relief.[14]

Pursuant to the arbitration clause and the trial court's order compelling arbitration, Green Tree selected an arbitrator with the Bazzles' consent.[15] The arbitrator administered the proceedings as a class arbitration and ultimately awarded the class plaintiffs $10,935,000 in damages.[16] Upon the trial court's confirmation of the arbitrator's award, Green Tree appealed to the South Carolina Court of Appeals claiming, *inter alia*, that class arbitration was legally impermissible under the parties' agreement.[17]

Earlier, another set of plaintiffs, the Lackeys and the Buggses, had filed a similar lawsuit against Green Tree in South Carolina.[18] Like the Bazzles, the *Lackey* plaintiffs moved to certify a class, and Green Tree responded with a motion to compel arbitration.[19] Ultimately, the parties in the *Lackey* suit chose the same arbitrator as was selected for the Bazzles.[20] In *Lackey*, however, it was the arbitrator who certified a class.[21] After the arbitrator entered an award for the *Lackey* plaintiffs, Green Tree appealed to the South Carolina Court of Appeals claiming, as with their appeal from the *Bazzle* judgment, that arbitration was impermissible under the relevant arbitration clause.[22]

The Supreme Court of South Carolina consolidated Green Tree's appeals from both the *Bazzle* and *Lackey* judgments and withdrew the two cases from the court of appeals.[23] After recognizing that "[t]he United States Supreme Court had not addressed the FAA's impact on class-wide arbitration,"[24] the court held that under South Carolina law, "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."[25] Applying this holding, the court determined that the arbitration clauses at issue were silent as to class arbitration and, thus, class arbitration was permissible under the agreements.[26] The United States Supreme Court subsequently

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14. *Id.* at 2405 (omissions in original).
15. Green Tree Fin. Corp. v. Bazzle, 123 S. Ct. 2402, 2405 (2003).
16. *Id.*
17. *Id.*
18. Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 393, 498 S.E.2d 898, 901 (Ct. App. 1998).
19. *Id.*
20. *Green Tree*, 123 S. Ct. at 2406.
21. *Id.* at 2406. Of some significance, at least in the eyes of the United States Supreme Court, is the fact that the arbitrator certified the *Lackey* class after the state circuit court certified the *Bazzle* class. *Id.* at 2405–06.
22. *Id.*
23. Bazzle v. Green Tree Fin. Corp., 351 S.C. 244, 249, 569 S.E.2d 349, 351 (2002), *vacated by* 123 S. Ct. 2402 (2003).
24. *Id.* at 257, 569 S.E.2d at 356.
25. *Id.* at 266, 569 S.E.2d at 360.
26. *Id.* at 267, 569 S.E.2d at 361.

granted certiorari "to consider whether [the South Carolina Supreme Court's] holding is consistent with the Federal Arbitration Act."[27] In a plurality opinion, the Court vacated the opinion of the state supreme court and remanded the matter for the arbitrator to make his own independent determination of whether class arbitration is permissible under the parties' contracts.[28] By vacating the Supreme Court of South Carolina's opinion and remanding the matter to the arbitrator, the United States Supreme Court failed to reach the main issues presented on appeal.[29]

III. THE SOUTH CAROLINA SUPREME COURT'S ANALYSIS

On appeal to the Supreme Court of South Carolina, Green Tree argued that the trial court and arbitrator did not adhere to the terms of the arbitration agreement when they permitted the cases to proceed as class arbitrations.[30] Green Tree argued that the certification of a class in each of the proceedings below violated the Federal Arbitration Act[31] in that the express terms of the arbitration agreement did not contemplate class arbitration.[32] The Bazzles and Lackeys argued that, far from prohibiting class arbitrations, the arbitration agreements were silent on the issue, and therefore, the FAA was not violated where the terms of the agreement were not violated.[33]

The Supreme Court of South Carolina began its analysis from the proposition that in cases where an arbitration agreement is silent on the issue of class arbitration, the United States Supreme Court has not issued any "binding precedent that [the South Carolina Supreme Court] is obligated [to] follow."[34] The court noted that it had not previously considered whether class-wide arbitration may be

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27. Green Tree Fin. Corp. v. Bazzle, 123 S. Ct. 2402, 2406 (2003).

28. *Id.* at 2408.

29. *See id.* (holding that the arbitrator must first interpret the parties' contract to determine whether it permits class arbitration).

30. Bazzle v. Green Tree Fin. Corp., 351 S.C. 244, 257, 569 S.E.2d 349, 355 (2002), *vacated by* 123 S. Ct. 2402 (2003).

31. 9 U.S.C. §§ 1–307 (2000) (providing 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 contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2).

32. *Bazzle* 351 S.C. at 257, 569 S.E.2d at 355.

33. *Green Tree*, 123 S. Ct. at 2406.

34. *Bazzle*, 351 S.C. at 257, 569 S.E.2d at 356. The Supreme Court of South Carolina noted that the United States Supreme Court had the opportunity to address how the FAA views class arbitration where the contract between the parties is silent on the issue in the matter of *Southland Corp. v. Keating*, 465 U.S. 1 (1984). The Court in *Southland* ultimately declined to address the FAA issue, as did the Court in *Green Tree. Id.*

ordered where the agreement is silent on the issue[35] and thus proceeded to review the approaches other jurisdictions had taken under similar circumstances.[36] The court recognized two distinct approaches: the "Seventh Circuit Approach," followed by many federal courts, and the "California Approach."[37]

Under the "Seventh Circuit Approach," several federal courts have held that permitting class arbitration would not be in "accordance with the terms" of an arbitration agreement that is silent on the issue of class proceedings.[38] Perhaps revealing the court's true concern with arbitration agreements under the FAA, the state supreme court noted that the federal courts prohibiting class arbitration failed to consider whether the arbitration agreement was adhesive and thus not a negotiated term warranting strict enforcement.[39]

Under the "California Approach," courts have permitted class-wide arbitrations where the arbitration agreement is found to be adhesive.[40] In *Keating v. Superior Court*,[41] the California Supreme Court gave considerable weight to the policy interests behind class proceedings, and reasoned with respect to class arbitration: "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."[42]

The Supreme Court of South Carolina also noted that California's courts have held that section 4 of the FAA "contemplated a petition before a district court and application of the federal rules of civil procedure."[43] Thus the FAA does not preempt a state procedure that furthers "the effectuation of the federal law's objectives" of enforcing arbitration.[44]

Turning to South Carolina law, the state supreme court reaffirmed the notion that "general principles of state law apply to arbitration clauses governed by the

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35. *Id.* at 262, 569 S.E.2d at 358.

36. *Id.* at 258–61, 569 S.E.2d at 356–58.

37. *Id.* at 257, 569 S.E.2d at 356.

38. *Id.* at 258, 569 S.E.2d at 356 (citing Champ v. Siegel Trading Co., Inc., 55 F.3d 269 (7th Cir. 1995); McCarthy v. Providential Corp., No. C94-0627 FMS, 1994 WL 387852 (N.D. Cal. July 19, 1994); Gammaro v. Thorp Consumer Disc. Co., 828 F. Supp. 63 (D. Minn. 1993)).

39. *Bazzle*, 351 S.C. at 259, 569 S.E.2d at 356.

40. Bazzle v. Green Tree Fin. Corp., 351 S.C. 249, 259, 569 S.E.2d 349, 357 (2002), *vacated by* 123 S. Ct. 2402 (2003) (citing Keating v. Superior Court, 645 P.2d 1192 (1982), *rev'd in part on other grounds by* Southland Corp. v. Keating, 465 U.S. 1 (1984)).

41. 645 P.2d 1192 (1982).

42. *Keating*, 645 P.2d at 1207.

43. *Bazzle*, 351 S.C. at 261, 569 S.E.2d at 358.

44. *Id.* at 261, 569 S.E.2d at 358 (citations omitted).

FAA."[45] The court noted that class arbitration is not prohibited by any state statutes or case law,[46] and that the court "strongly favors arbitration."[47] The Supreme Court of South Carolina chose to side with the California courts and reasoned with respect to the Green Tree contracts that the arbitration clauses were indeed silent on class arbitration.[48] Further, in such circumstances, class arbitration may be ordered "if it would serve efficiency and equity, and would not result in prejudice."[49] According to the court, such principles of state law provide an adequate and independent state ground upon which to order arbitration under the FAA.[50]

IV. THE UNITED STATES SUPREME COURT'S ANALYSIS

On appeal to the United States Supreme Court, the core issue was whether the FAA prohibits class arbitration where the arbitration agreement does not address the issue.[51] As a preliminary matter, Green Tree persisted in arguing that their contracts were not silent on the issue of class arbitration.[52] It is at this point that the Court failed to fulfill the hopes of those who looked to *Green Tree* to decide whether the FAA permits class arbitration under an agreement that does not specifically prohibit class arbitration.[53] The Court instead disagreed with the South Carolina courts' determinations that the contracts were silent on the issue of class arbitration.[54] Yet even in this decision, the Court found difficulty in reaching consensus.

The Chief Justice, joined by Justices O'Connor and Kennedy, dissented on the ground that they interpreted the arbitration agreements to preclude class arbitration.[55] The dissenting plurality concluded that the determination of whether class arbitration is permitted is one for the courts as a matter of contract

45. *Id.* at 262, 569 S.E.2d at 358 (quoting Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001) (citations omitted)).

46. *Bazzle*, 351 S.C. at 265, 569 S.E.2d at 360.

47. *Id.*

48. *Id.* at 263, 569 S.E.2d 349, 359.

49. *Id.* at 266, 569 S.E.2d at 360.

50. *Id.* at 265, 569 S.E.2d at 360.

51. Green Tree Fin. Corp. v. Bazzle, 123 S. Ct. 2402, 2404 (2003).

52. *Id.* at 2406.

53. Interestingly, many practitioners expected the United States Supreme Court to grant certiorari in *W. Va.* ex rel. *Dunlap v. Berger* 567 S.E.2d 265 (W. Va. 2002), *cert. denied*, 537 U.S. 1087 (2002). In *Berger*, the West Virginia Supreme Court of Appeals held adhesive contract provisions that "impose unreasonably burdensome costs upon or . . . have a substantial deterrent effect upon a person seeking to enforce and vindicate rights . . . or to obtain statutory or common-law relief and remedies . . . under state law that exists for the benefit and protection of the public are unconscionable." *Id.* at 282. The United States Supreme Court declined certiorari on the issue of whether the Federal Arbitration Act preempted West Virginia's substantive law as applied in the state court's ruling. *Berger*, 537 U.S. 1087.

54. *Green Tree*, 123 S. Ct. at 2408.

55. *Id.* at 2410–11.

interpretation,[56] and that the Supreme Court of South Carolina erred by not giving effect to the terms "us," "you," "we," and "this contract" in determining whether the agreement precluded class arbitration.[57] The Chief Justice concluded that "the FAA does not prohibit parties from choosing to proceed on a class-wide basis," but that in *Green Tree*, "the parties simply did not so choose."[58]

Justice Breyer, joined in his plurality opinion by Justices Scalia, Souter, and Ginsberg, found the language of the arbitration agreements more ambiguous than in the Chief Justice's reading.[59] Under Justice Breyer's analysis, the permissibility of class arbitration cannot be decided by the literal terms of the *Green Tree* contracts.[60] While Justice Breyer's plurality agreed that state law, not federal law, normally governs such contract interpretation issues,[61] the plurality found that the very question of whether the contracts forbid class arbitration constituted a "dispute[], claim[], or controvers[y] arising from or relating to [the Green Tree] contract."[62] The contracts thus required the submission of this dispute to arbitration.[63]

Justice Breyer concluded that the question of whether the arbitration agreement itself forbids class arbitration is not the type of question that is appropriate for a court to answer in its role as gatekeeper.[64] "Rather the relevant question . . . is what *kind of arbitration proceeding* the parties agreed to. That question does not concern a state statute or judicial procedures."[65] Justice Breyer thus thought the question of what kind of arbitration proceeding the parties agreed to was subject to arbitration itself as a dispute arising under the parties' contract. Under the assumption that the arbitrator did not make an independent[66] interpretation of the contract to determine if the arbitration clause precluded class proceedings,[67] Justice Breyer's plurality, joined by Justice Stevens, thought it necessary to remand the matter to the arbitrator before addressing any of the other issues on appeal.[68]

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56. *Id.* at 2409.
57. *Id.* at 2410.
58. Green Tree Fin. Corp. v. Bazzle, 123 S. Ct. 2402, 2411 (2003).
59. *Id.* at 2406.
60. *Id.*
61. *Id.*
62. *Id.* at 2407.
63. *Id.*
64. Green Tree Fin. Corp. v. Bazzle, 123 S. Ct. 2402, 2407 (2003).
65. *Id.* (emphasis in original)
66. Arguably, the arbitrator had made an independent finding, confirmed by the orders of the state circuit court, that the arbitration clauses were silent on the issue of class arbitration. The plurality opinion of the Court, however, reasoned that the arbitrator's decision was tainted because the arbitrator was already aware of the state circuit court's position on the permissibility of class arbitration under the contract.
67. *Green Tree*, 123 S. Ct. at 2408.
68. *Id.*

Ultimately, Justice Stevens' opinion gave Justice Breyer's plurality opinion enough votes to vacate the Supreme Court of South Carolina's decision and to remand the matter to the arbitrator.[69] Yet, Justice Stevens' opinion only concurred with Justice Breyer's opinion to the extent that Justice Stevens wanted a "controlling judgment of the Court."[70] Justice Stevens reasoned, however, that nothing in the FAA prevents the South Carolina courts from determining that class arbitrations are permissible as a matter of state law where the arbitration agreement does not prohibit them, and that the *Green Tree* agreements were silent on the issue.[71]

Justice Stevens only went so far as to say, "*[a]rguably* the interpretation of the parties' agreement should have been made in the first instance by the arbitrator, rather than the court."[72] Justice Stevens reasoned that "[b]ecause the decision to conduct a class-action arbitration was correct as a matter of law, and because [Green Tree] has merely challenged the merits of that decision without claiming that it was made by the wrong decisionmaker," remanding the case was unnecessary.[73]

V. CLASS ARBITRATION LAW, POST-*GREEN TREE*

The "core" issue on appeal in *Green Tree*—whether the FAA permits class arbitration where the agreements are silent on the matter—is still unclear. Even less certain, in light of the Court's divided opinions in *Green Tree*, is whether the FAA permits a state court to refuse to enforce an arbitration clause prohibiting class arbitration on the grounds that the state's contract law holds such an agreement to be adhesive and unconscionable. As a practical matter, the United States Supreme Court's opinion has two significant effects on South Carolina's arbitration law and on companies drafting contracts under this law.[74]

First, in terms of arbitration law, it seems clear that the only precedent set by *Green Tree* is that state courts are deprived of any gatekeeper role that they may have previously enjoyed with respect to whether a particular arbitration agreement is silent on class arbitration.[75] Though lower courts have had few opportunities since the June 23, 2003, opinion to consider its effect, the United States Court of Appeals for the Fifth Circuit interpreted the *Green Tree* opinion in *Pedcor*

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69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 2408 (emphasis added).
73. Green Tree Fin. Corp. v. Bazzle, 123 S. Ct. 2402, 2408 (2003).
74. Though the effects of the *Green Tree* opinion are discussed with a particular view towards South Carolina practice, the holding of *Green Tree* will bear the same effects in every American jurisdiction where the contract in dispute falls under the FAA.
75. *See Green Tree*, 123 S. Ct. at 2408–09.

Management Co., Inc. Welfare Benefit Plan v. Nations Personnel of Texas.[76]

In *Pedcor*, various employer self-funded Employee Retirement Income Security Act (ERISA) plans brought suit against North American Indemnity (NAI) for breach of reinsurance contracts with the plans.[77] Each of the reinsurance contracts contained an arbitration clause that required "any dispute between the parties hereto in connection with the Agreement [to] be submitted to arbitration."[78] The arbitration agreement did not contain any express provisions regarding class arbitration.[79] After denying NAI's motion to dismiss the suit, the trial court issued an order certifying a class in the action.[80] Pedcor appealed the certification order, arguing that the court erred in permitting class arbitration under the contracts.[81]

The *Pedcor* court concluded[82] that "whether the district court applied the correct legal standards or abused its discretion are pretermitted by recent Supreme Court precedent."[83] After recognizing that the outcome of *Green Tree* was a plurality opinion, the *Pedcor* court decided to "look to 'that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[84] In so doing, the *Pedcor* court viewed Justice Stevens' opinion in *Green Tree* as concurring only to the extent that an arbitrator "should be the first one[] to interpret the parties' agreement."[85] The *Pedcor* court stated that the rationale of Justice Breyer's opinion, as supported by Justice Stevens, "substantially guide[d]" its decision to vacate the certification order and remand the case to the district court either to proceed with the action as filed or to have an arbitrator decide whether to certify a class.[86]

Turning to the narrowest grounds on which Justice Stevens concurred in Justice Breyer's opinion, as the Fifth Circuit did in *Pedcor*, the only binding precedent that

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76. 343 F.3d 355 (5th Cir. 2003).

77. *Id.* at 357.

78. *Id.* (internal quotations omitted).

79. *Id.*

80. *Id.*

81. *Id.*

82. Interestingly, the *Pedcor* court was critical of the United States Supreme Court's analysis in *Green Tree*. Specifically, the *Pedcor* court noted that "even if the South Carolina court's holding is 'flawed on its own terms,' it is unclear why the [United States Supreme Court] would explore this issue if its ultimate conclusion was that a court, regardless of whether its interpretation of the law is right or wrong, is simply the wrong decision-maker." Pedcor Mgmt. Co., Inc. Welfare Benefit Plan v. Nations Pers. of Tex., 343 F.3d 355, 360 (5th Cir. 2003). The *Pedcor* court seemed unclear as to the proper role of a trial court in interpreting whether arbitration agreements forbid class arbitration after *Green Tree*. The court ultimately concluded that "it should not be necessary for a court to decide initially whether an arbitration agreement clearly forbids class arbitration." *Id.*

83. *Id.* at 358.

84. *Id.* (quoting Campbell v. St. Tammany Parish Sch. Bd., 64 F.3d 184, 189 (5th Cir. 1995) (internal citations omitted)).

85. *Pedcor*, 343 F.3d at 359.

86. *Id.* at 395, 363.

resulted from *Green Tree* is that trial courts must submit to arbitration the question of whether arbitration as a class is permitted under any given contract.

The second effect of *Green Tree* will likely manifest in the drafting of future arbitration agreements. In drafting arbitration agreements into their contracts, *Green Tree* should cause larger companies to reconsider whether their agreements should remain silent on class arbitrations. Commentators have already begun to predict that, in light of the Court's divided decision, attorneys will begin to expressly prohibit class arbitration in all of their contracts.[87] Such a practice seems inevitable in light of the fact that the Supreme Court of South Carolina has ruled that absent express prohibition, class arbitration is to be permitted,[88] while the United States Supreme Court was too divided in its opinion to declare the FAA's position on the state law one way or the other.[89]

In the now vacated state opinion, the Supreme Court of South Carolina discouraged the practice of expressly precluding class arbitration, stating, "[a]lthough this present case does not raise this question, we note that preclusion of class-wide or consolidated arbitration in an adhesion contract, even if explicit, undermines principles favoring expeditious and equitable case disposition absent demonstrated prejudice to the drafter of the adhesive contract."[90] Assuming *Green Tree* and its progeny prompt more companies to expressly prohibit class arbitrations in their contracts, the question becomes to what extent the FAA will permit South Carolina and like-minded states to invalidate the arbitration agreements that state laws deem adhesive, thereby allowing normal class action procedures to be invoked. This question is less clear in the wake of the divided opinions of *Green Tree*.

A recent Illinois case[91] raises these concerns. If considered on appeal, *Hutcherson* may force the United States Supreme Court to clarify the FAA's role in state arbitration proceedings. In *Hutcherson*, the court considered the enforceability of a credit card company's inclusion of an arbitration clause in its amended credit card agreement.[92] The plaintiffs brought a class action against the defendant credit card company and affiliates, and the defendants moved to stay the proceedings and compel arbitration.[93] The trial court denied the motion, and the defendants appealed to the Illinois Court of Appeals for the First District, Third Division.[94]

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87. Davis et al., *supra* note 1, at 6–7.

88. Bazzle v. Green Tree Fin. Corp., 351 S.C. 244, 266, 569 S.E.2d 349, 360, 363 (2002), *vacated by* 123 S. Ct. 2402 (2003).

89. Green Tree Fin. Corp. v. Bazzle, 123 S. Ct. 2402, 2407 (2003).

90. *Bazzle*, 351 S.C. at 266 n.21, 569 S.E.2d at 360 n.21.

91. Hutcherson v. Sears Roebuck & Co., 793 N.E.2d 886 (Ill. App. Ct. 2003).

92. *Id.* at 887–88.

93. *Id.* at 888.

94. *Id.*

On appeal, the plaintiffs argued that the amendment to their agreement, adding an arbitration clause, was "unenforceable because it [was] both procedurally and substantively unconscionable."[95] Though the appellants' arguments related primarily to the process of amending an existing contract to include an arbitration clause, and thus do not correspond directly with *Bazzle*, the *Hutcherson* plaintiffs did argue that their arbitration agreement, which expressly prohibited class arbitration, was substantively unconscionable because the clause "impermissibly bars them from pursuing their rights in a class action."[96]

Applying Arizona law, the Illinois Court of Appeals found that Arizona courts had not addressed this issue, and thus surveyed other jurisdictions. The court began by looking at the cases relied upon by the appellants, including a recent Alabama Supreme Court decision[97] which "held an arbitration agreement precluding class actions . . . unconscionable 'because it is a contract of adhesion that restricts the [plaintiffs] to a forum where the expense of pursuing their claim far exceeds the amount in controversy.'"[98] The court also looked at the opinion in *Szetela v. Discover Bank*,[99] where the California Supreme Court found an arbitration agreement prohibiting class actions substantively unconscionable because, *inter alia*, the clause violated California's public policy of "promot[ing] judicial economy and streamlin[ing] the litigation process in appropriate cases."[100]

Ultimately, the Illinois Court of Appeals examined federal authority under which courts have upheld arbitration agreements prohibiting class arbitration on the grounds that parties may validly contract away rights to class actions.[101] The court distinguished *Hutcherson* from the cases advanced by the appellants on the grounds that the *Hutcherson* contract "provides financial protections to card holders with the burden of costs falling primarily on SNB," and thus the court stated they "do not find the no-class-action provision to be so one-sided or oppressive as to render the agreement unconscionable."[102]

The *Hutcherson* opinion indicates that many jurisdictions find arbitration agreements that deprive litigants of rights to class treatment, without substituting

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95. *Id.* at 891.

96. *Id.* at 894.

97. Leonard v. Terminix Intl. Co., 854 So. 2d 529 (Ala. 2002).

98. Hutcherson v. Sears Roebuck & Co., 793 N.E.2d 886, 894 (Ill. App. Ct. 2003) (quoting *Leonard*, 854 So. 2d at 539).

99. 118 Cal. Rptr. 2d 862 (2002).

100. *Id.* at 868.

101. *Hutcherson*, 793 N.E.2d at 895-96 (citing Snowden v. CheckPoint Check Cashing, 290 F.3d 631, 638-39 (4th Cir. 2002); Lloyd v. MBNA Am. Bank, 27 Fed. Appx. 82, 85 (3d Cir. 2002); Marsh v. First USA Bank, N.A., 103 F. Supp. 2d 909, 924 (N.D. Tex. 2000); Metro E. Ctr. for Conditioning & Health v. Qwest Communications Intl., Inc., 294 F.3d 924, 927 (7th Cir. 2002)).

102. *Hutcherson*, 793 N.E.2d at 896.

other protections in their place, unconscionable and void against public policy.[103] The United States Supreme Court has not yet declared whether the FAA precludes state courts from considering such an analysis. The Supreme Court will eventually be forced to interpret the FAA's effect on applying substantive state contract law to arbitration agreements, particularly in the context of prohibiting class arbitration. Until then, state courts will face the dilemma of whether, and to what extent, they may protect consumers from adhesive arbitration agreements depriving them of their right to class proceedings.

VI. CONCLUSION

The recent United States Supreme Court decision in *Green Tree* did little to clarify the questions and concerns of practitioners with respect to the availability of class proceedings under arbitration agreements that are silent on the issue. The only practical effect of the Court's divided opinion is that questions of whether a contract in fact does permit class proceedings must be submitted in the first instance to the arbitrator. As more companies expressly prohibit class arbitration in their agreements in the wake of *Green Tree*, the Supreme Court of South Carolina must address the concerns raised in note twenty-one of *Bazzle*: Will an adhesive arbitration agreement that forbids class arbitration be void on grounds of South Carolina contract law and public policy, even where the agreement is subject to the FAA?[104]

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103. *See supra* notes 92–95 and accompanying text.

104. Bazzle v. Green Tree Fin. Corp., 351 S.C. 244, 266 n. 21, 569 S.E.2d 349, 360 n.21 (2002), *vacated by* 123 S. Ct. 2402 (2003).