CLASS LITIGATION AND ARBITRATION

Steven L. Nicholas

Unless and until the Federal Arbitration Act is amended, mandatory arbitration for claims against business is here to stay. Creative lawyers have been looking for ways to use the arbitration system to the advantage of allegedly injured consumers, and have had some success in asserting classwide theories of recovery.

Prior to 2003, federal courts generally held that the court could not order classwide arbitration absent a provision in the arbitration clause or incorporated rules authorizing the remedy. *See, e.g., Champ v. Seigel Trading Co.*, 55 F.3d 2631 (7th Cir. 1995); *Stein v. Geonerco, Inc.*, 105 Wash.App., 41 17 P. 3d 1266 (2001).

The Eleventh Circuit had not expressly ruled on the issue, but had expressed skepticism.

> On the other hand, the two federal courts that have addressed this issue have held that classwide arbitration is available only if that remedy is expressly provided for in the parties' arbitration agreement. *See, e.g., Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) ("[S]ection 4 of the FAA forbids federal judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter."); *Gammaro v. Thorp Consumer Discount Co.*, 828 F. Supp. 673, 674 (D. Minn. 1993) (refusing to order classwide arbitration of TILA claims where the "arbitration agreement makes no provision for class treatment of disputes" (footnote omitted)). We have not yet spoken to the precise issue, but in *Protective Life Insurance Corp. v. Lincoln National Life Insurance Corp.*, 873 F.2d 281 (11th Cir. 1989), we held that arbitrations may be consolidated only when the arbitration agreement so provides. The reasoning of our *Protective Life*

> decision may dictate that we join the Seventh Circuit and the District Court of Minnesota in holding that classwide relief may not be insisted upon in an arbitration proceeding if the agreement is silent on the subject of that type of remedy. Or maybe not. We have no occasion to decide that today, because Randolph did not properly preserve the issue of whether classwide relief is available in the arbitration proceeding itself.

Randolph v. Green Tree Financial Corp., 244 F.3d 814 (11th Cir. 2001).

The Alabama Supreme Court followed the reasoning of *Champ*, and concluded class actions could not be brought in arbitration if the arbitration agreement did not authorize consolidation. *Med Center Cars, Inc. v. Smith*, 727 So. 2d 9 (Ala. 1998).

> Although there are benefits to class-wide arbitration, such as efficient resolution of common claims and judicial economy, no persuasive authority permitting class-wide arbitration exists at this time.
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> Although the plaintiffs' contentions are practically appealing, after reviewing the authorities we conclude that to require class-wide arbitration would alter the agreements of the parties, whose arbitration agreements do not provide for class-wide arbitration.

Id. at 20.

The interest in, and possibility of, class action arbitrations was renewed following the United States Supreme Court decision in *Greentree Financial Co. v. Bazzle*, 123 S. Ct. 2402 (2003), where the Court impliedly recognized the viability of classwide arbitrations. In a plurality opinion, the Court ruled that the question of whether the parties' agreement

allowed for class actions was for the arbitrator, not the court, to decide in the first instance. In doing so, the Court gave no indication that arbitrators lacked the authority to hear and decide class actions.

The plurality stated that the issue was for the arbitrator because the arbitration clause in question contained "sweeping language" committing all disputes between the parties to arbitration and granting the arbitrator "all powers" provided by the law and the contract. *Bazzle*, 123 S. Ct. at 2406. The Court went on to observe that courts assume that the parties intended courts, not arbitrators, to decide certain "gateway" matters such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy. *Bazzle*, 123 S. Ct. at 2409. The Court found that the question presented by the particular appeal was not a gateway issue because "[t]he relevant question here is what kind of arbitration proceeding the parties agreed to. That question . . . concerns contract interpretation and arbitration procedures. Arbitrators are well suited to answer the question." *Id.*

In *Bazzle*, the respondent plaintiff had secured loans from Greentree. The loan documents included a mandatory arbitration agreement. Greentree allegedly failed to provide certain documentation required by South Carolina law, and the plaintiffs commenced two separate court actions on behalf of themselves and other proposed class members. Greentree moved to compel arbitration. In one case, the court certified the class and compelled arbitration of the class claims. In the second case, arbitration was compelled

on appeal. In both cases, the same arbitrator conducted classwide arbitrations and found for the plaintiffs in the class. In doing so, the arbitrator awarded nearly $11 million in damages in the first case and $9 million in the second.

On appeal, the South Carolina Supreme Court affirmed. The South Carolina Supreme Court reasoned that classwide arbitration was appropriate, even if the relevant arbitration provision was silent, where equity and efficiency would be served and the parties would not be prejudiced as a result. The court was concerned that the plaintiff class would be denied any way to seek relief if they were required to arbitrate their small individual claims.

The United States Supreme Court vacated the judgment. Four justices, with a fifth concurring in the judgment, ruled that whether the arbitration provision, which was silent on the question of classwide arbitration, allowed for classwide arbitration was for the arbitrator to decide in the first instance. The opinion noted that the arbitration clause was broad and submitted to the arbitrator all disputes relating to the loan agreement. The Supreme Court concluded that whether the loan agreement authorized class claims did not concern the validity of the arbitration agreement itself, or whether it applied to the plaintiff's claims, which were questions of the court. Rather, the Supreme Court considered the question of contract interpretation and arbitration procedures. Importantly, the United States Supreme Court did not say that an arbitrator is without power to render and decide class claims.

The *Bazzle* opinion was decided on June 23, 2003, and on July 11, 2004, the American Arbitration Association responded by issuing a "Policy on Class Arbitration."

> [T]he American Arbitration Association will administer demands for class arbitration if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims. Disputes over the availability of such relief and arbitrator's jurisdiction will be forwarded to the appointed arbitrators for determination . . . . The Association is not currently accepting for administration demands for class arbitration where the underlying agreement prohibits class claims, consolidation or joinder, unless an order of a court directs the parties to the underlying dispute to an arbitrator or to the Association. The arbitability of class arbitration where the parties' agreement precludes such relief is a developing area of the law, and the Association awaits further guidance from the courts on this issue.

The policy appears on the AAA's website, www.adr.org.

On October 8, 2003, the AAA adopted Supplementary Rules of Class Arbitration which also appear on the AAA website. Then, on February 18, 2005, AAA issued the following commentary to its policy on class arbitrations:

> It has been the practice of the American Arbitration Association since its Supplementary Rules for Class Arbitration were first enacted to require a party seeking to bring a class arbitration under an agreement that on its face prohibits class actions to first seek court guidance as to whether a class arbitration may be brought under such an agreement . . . . The Association's determination not to administer class arbitration where the underlying arbitration agreement explicitly precludes class procedures was made

> because the law on the enforceability of class action waivers was unsettled; . . . . Courts in different states and different federal circuits have reached differing conclusions concerning the preclusion of class actions by agreement and "gateway" issues generally. However, the courts that have confronted the question have generally concluded that the decision as to whether an agreement that prohibits class actions is enforceable is one for the courts to make, not the arbitrator.

Again, this policy is found at the AAA website.

Under the AAA rules, an arbitrator must initially determine whether the arbitration agreement permits class-wide arbitration. If an arbitrator so rules, then the arbitrator is required to stay the arbitration for thirty days in order to allow the parties to obtain a court review.

When an arbitration clause is "silent" as to whether class action procedures are available in arbitration, that is, there is no express prohibition against or sanction of class action arbitration, the *Bazzle* opinion commends the issue of classwide arbitration to the arbitrator. AAA arbitrators are ordering classwide arbitration and, consistent with the AAA policy that such orders be stayed for thirty days pending court review, at least two courts have permitted classwide arbitration to proceed. *Rollins, Inc. v. Garrett*, 2005 WL 2149293 (M.D. Fla.), *aff'd Rollins, Inc. v. Garrett*, 2006 WL 1024166 (11th Cir.) (motion for injunction to stay arbitration proceedings following Partial Final Clause Construction Award was denied); *Long John Silver's Restaurant v. Cole*, 409 F. Supp. 2d 682 (D. S.C. 2006) (motion to vacate arbitrator's class certification was denied applying the very narrow

standard for review of the arbitrator's award). The AAA website lists numerous cases that are being administered under the Supplementary Rules for Class Arbitrations. According to the AAA website, there are over 120 pending classwide arbitrations. The site permits review of details of each, including the demand for arbitration, Class Construction Awards and Class Determinations. Therefore under current law, if the arbitration agreement is silent, and particularly if it incorporates the AAA rules, the plaintiff has a good shot of moving forward on a class wide basis.

Therefore, it is fairly settled that when an arbitration clause is silent as to the ability to conduct a class action arbitration, there is no impediment. As Judge Steele recently held:

> The law is exceedingly clear that arbitrators, and not courts, decide contract interpretation and procedural issues relating to the method and manner of the arbitration proceedings.

Patriot Mfg., Inc. v. Dixon, Civil Action No. 050321, March 15, 2007.

However, one court allowed a potential attack on a proposed class arbitration based on a venue selection in the arbitration clause. In *Redman Home Builders Co. v. Lewis*, 573 F. Supp. 2d 1299, 1311 (S.D. Ala. 1007), Judge Dubose held that an effort to stop a class arbitration based on such a clause at least stated a claim, relying on *Sterling Fin. Investment Group, Inc. v. Hammer*, 393 F.3d 1223, 1225 (11th Cir. 2004).

The Alabama Supreme Court in *Ex parte Johnson*, 2008 WL 2068077 (May 16, 2008), rejected that approach. ". . . [w]e conclude that *Sterling Financial* is distinguishable and that the reasoning of *Lewis* is not persuasive." *Id.* at *11.

Johnson involved proposed class arbitrations filed with the American Arbitration Association. The defendant mobile home manufacturers filed declaratory judgment actions seeking to prevent them from proceeding with the arbitrations on a classwide basis. The petitioners in *Johnson* included Redman Homes. The trial court granted the declaratory relief and stayed the arbitration proceedings.

The proposed class representative sought a writ of mandamus from the Alabama Supreme Court maintaining that the district court lacked jurisdiction to enter the declaratory relief. The homeowners contended that because the contracts incorporated the rules of the AAA, the trial court did not have jurisdiction to decide the arbitability of the cases, because the question of arbitability, and the manner in which the arbitration would be conducted, was before the arbitrator.

The *Johnson* court agreed in the context of the case presented because the plain language of the agreement unquestionably showed that the parties agreed to arbitrate the issue of arbitability.

The interesting part of the *Johnson* opinion is that it does not address *Med Center Cars*, nor the argument that Alabama contract law does not allow classwide arbitration. Thus, it is unclear if the decision in *Johnson* is limited to those cases where the rules of the AAA have been adopted, or the rules of a similar organization exist. Surprisingly, the *Johnson* opinion does not even cite to *Bazzle*.

The import of *Johnson*, *Lewis*, and *Dixon* is that if the arbitration clause at issue is silent as to the availability of class arbitration, it is most likely that there is no impediment to proceeding on a class basis.

Impact of Class Arbitration Waivers

An additional battleground has developed on whether the drafters of arbitration agreements can prevent class actions by specifically excluding them from the arbitration agreement. The trend of the decisions has been to disallow such restrictive clauses, particularly when there are statutory rights involved, or other provisions of the clause seek to insulate the defendant from specific conduct. The proper question is who gets to decide that issue.

Generally speaking, class action prohibitions are not *per se* unenforceable. Post-*Bazzle* courts have enforced express class action waiver clauses in arbitration agreements against claims of unconscionability. *See, e.g., Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004) (upholding the validity of an express class action waiver alleged to be unconscionable under Louisiana law); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294 (5th Cir. 2004) (upholding the validity of an express class action waiver alleged to be unconscionable under Texas law); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553 (7th Cir. 2003).

For example, the Fourth Circuit rejected a challenge to a class action prohibition in the arbitration agreement on the grounds of unconscionability in a Fair Labor Standards Act case. *Atkins v. Labor Ready, Inc.*, 303 F.3d 496 (4th Cir. 2002). In *Atkins*, the court found no support that the FSLA made the class actions unwaivable, or that the prohibition would defeat the strong congressional preference for an arbitrable forum. Similarly, in *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir.), *cert denied* 537 U.S. 1087 (2002), the court rejected the argument that a bar against class arbitrations was unconscionable given the small amount of damages involved, where the applicable statute provides for the recovery of attorneys fees by the prevailing party.

Several of the early cases on this subject concluded that since arbitration is a matter of contract, usual state rules precluding enforcement of an unconscionable provisions apply. Based on state law, claims of unconscionability have not fared well in the Eleventh Circuit. In *Jenkins v. First American Cash Advance*, 400 F.3d 868 (11th Cir. 2005), the plaintiff brought a class action against two banks, raising state law claims challenging payday loan agreements. The defendant removed, and requested a stay of the proceedings to compel arbitration. The trial court refused to compel arbitration, and the payday lender appealed to the Eleventh Circuit. The plaintiff's claim in *Jenkins* was not that the Court should allow for classwide arbitration, but rather that the court should refuse to enforce the arbitration agreement because its enforcement would be unconscionable. The plaintiff in *Jenkins* wanted to pursue his class action in court, not in arbitration. The Eleventh Circuit reversed

the district court's finding that the arbitration agreement did not have to be enforced because it was unconscionable. Noting that the court had earlier held in *Randolph v. Greentree Finance Corp.*, 244 F.3d 814, 819 (11th Cir. 2001), that "a contractual provision to arbitrate TILA claims is enforceable even if it precludes a plaintiff from utilizing class action procedures in vindicating statutory rights."

Similarly, in *Caley v. Gulfstream Airspace Corp.*, 428 F.3d 1359 (11th Cir. 2005), a group of employees brought class claims against their employer under the Fair Labor Standards Act. A second group brought a class claim under the Age and Discrimination Employment Act, as well as under ERISA. The trial court granted the employer's motion to compel arbitration and to dismiss, and the employees appealed. Again, the plaintiff attempted to argue that the arbitration agreement contained in the employer's dispute resolution policy was not binding because it was unconscionable, in part because of a class action waiver. Citing *Randolph*, the court disagreed that the bar against class actions was unconscionable.

Other cases upholding class waiver clauses include: *Blaz v. Belfer*, 368 F.3d 501, 504 (5th Cir. 2004); *Livingston v. Associates Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003); *Burden v. Check Into Cash*, 267 F.3d 483, 492 (6th Cir. 2001); *Johnson v. West Suburban Bank*, 225 F.3d 366, 369 (3th Cir. 2000); *Bischoff v. Direct TV, Inc.*, 180 F. Supp. 2d 1097, 1108 (C.D. Cal. 2002); *Strand v. US Bank Nat'l Assoc.*, 693 N.W. 2d 918, 926 (N.D. 2005); *Ranieri v. Bell Atlantic Mobile*, 308 A.D. 2d 353, 759 N.Y.S. 2d 448, 449 (N.Y. App. Div.

2003); *Edelist v. MBNA American Bank*, 790 A.2d 1249, 1260 (Del. Super. Ct. 2001); *Gras v. Associates First Capital Corp.*, 346 N.J. Super. 42, 786 A.2d 886, 892 (2001); *Pyburn v. Bill Heard Chevrolet*, 63 S.W. 3d 351, 363 (10 Ct. App. 2001); *Raines v. Foundation Health System Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001).

In *Guitierrez v. State Line Nissan, Inc.*, 2008 WL 3155896 (W.D. Mo. Aug. 8, 2008), the federal district court in the Western District of Missouri rejected an attempt to invalidate an entire arbitration clause because it contained a class action waiver. The court found that Missouri state courts had reviewed the waivers of class actions and arbitration agreements and held that the prohibition of class action, alone, is not sufficient to render the whole arbitration clause unconscionable. It is unclear whether the court was allowing the arbitrator to make a decision regarding classwide treatment. Likewise, in *Bass v. Carmax Auto Superstores, Inc.*, 2008 WL 2705506 (W.D. Mo. July 9, 2008), the Western District of Missouri concluded that a class action waiver in an automobile purchase contract was not unconscionable because it found the clause did not insulate the defendant from claims. The court was motivated by the fact that the clause required the defendant to pay the costs of arbitration, and there were no limits on the claimant's ability to obtain relief.

However, a number of federal and state courts have ruled that it is unconscionable for an employer to bar class actions in its arbitration agreements. The California Supreme Court began the discussion in *Keating v. Southland Corp.*, 31 Cal. 3d 584 (1982), *reversed on other grounds*, 465 U.S. 1 (1984), where it recognized the power of a court to order class

arbitration, but questioned whether arbitration of class claims would prejudice the interests of the parties. Following the court's decision in *Keating*, California courts have increasingly held that class arbitrations are possible, and have struck down arbitration agreements that preclude class claims. *See Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003) (bar against class claims in arbitration agreement unconscionable); *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1101 (2002); *Discover Bank v. The Superior Court*, 36 Cal. 4th 148 (2005).

Courts outside of California have followed the California court's lead and have begun striking down restrictive arbitration agreements on the grounds of unconscionability, particularly where certain aspects are present. In *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006), the First Circuit joined the California Supreme Court in striking down a class action banning an arbitration clause as unconscionable. The claim brought by the plaintiff class in *Kristian* was under the United States anti-trust laws. The court concluded that the arbitration clause which was inserted in the customer's billing was enforceable, but that the limitation on classwide arbitrations stood to block the enforcement of important statutory rights held by the class. Thus, the court concluded that the restriction on classwide arbitration could be severed from the remainder of the arbitration clause, and that a classwide arbitration could proceed.

In *Mohammed v. County Bank*, 912 A.2d 88 (N.J. 2006), the New Jersey Supreme Court conducted a similar analysis in invalidating such a clause. In *Mohammed*, the court concluded that the presence of the class arbitration waiver in the arbitration agreement,

which was a contract of adhesion, rendered the agreement unconscionable as a matter of New Jersey contract law. The effect of the class arbitration bar precluded any realistic challenge to the substance of the loan contract's terms and pursuant to the statutory rights asserted by the plaintiff and the class. Because class action waivers reduce the possibility of finding competent counsel to advance a cause of action, as a practical matter, they can result in shielding defendants from liability for failing to comply with the laws of the State of New Jersey, the court found. The public interest concerns recognized by the court overrode the defendant's right to seek and enforce the class arbitration bar in the agreement. As the court did in *Kristian*, the New Jersey Supreme Court determined that the unconscionable class arbitration waivers and the arbitration agreement were severable. Once they were removed, the rest of the arbitration agreement was enforceable.

In *Kinkel v. Cingular Wireless LLC*, 857 N.E. 2d 250, (Ill.2006), the Illinois Supreme Court entered the fray and discussed many of the outstanding cases on the subject. In an attempt to harmonize them, that court said:

> If there is a pattern in these cases it is this: a class action waiver will not be found unconscionable if the plaintiff had a meaningful opportunity to reject the contract term or if the agreement containing the waiver is not burdened by other features limiting the ability of plaintiff to obtain a remedy for the particular claim being asserted in a cost-effective manner.

The *Kinkel* court concluded as follows:

> In sum, we hold that under the circumstances of this case, the waiver on class actions is unconscionable because it is

> contained in a contract of adhesion that fails to inform the customer of the cost to her of arbitration, and does not provide a cost-effective mechanism for individual customers to obtain a remedy for the specific injury allege in either a judicial or an arbitral forum.

Alabama law is consistent with a finding of unconscionability for small claims where the waiver serves to insulate the Defendant from liability. *See Leonard v. Terminix Int'l.*, 854 So. 2d 529 (Ala. 2002). Under *Leonard*, the Alabama Supreme Court determined that an arbitration clause could be unconscionable where its effect was to prevent classwide resolution of small claims.

The Eleventh Circuit came in line with other courts dealing with class action waivers in *Dale v. Comcast Corp.*, 498 F.3d 1216 (11th Cir. 2007). The court found that the class action waiver in that case was unconscionable under a "totality of the facts and circumstances" test. The court was largely motivated by the fact that there was no ability for the plaintiffs to obtain an attorneys fee award if they were successful in the action. That fact allowed the court to distinguish the earlier cases from the Eleventh Circuit where class action waivers were found enforceable.

The plaintiffs in *Dale* alleged that the defendant cable company collected excessive franchise fees from its subscribers. On an individual basis, the alleged overcharge was only estimated to be about $10 per customer for the four-year period in question. Under the Eleventh Circuit's analysis, the unavailability of fees combined with the relatively small recovery in each individual case was enough to provide effective insulation for the defendant

for its alleged wrongdoing. Therefore, if the class action waiver were enforced, the defendant would be able to "engage in unchecked market behavior that may be unlawful." *But see, Honig v. Comcast of Georgia I, LLC*, 537 F. Supp. 2d 1277 (N.D. Ga. 2008).

It is fairly apparent the likelihood of success in enforcing a class waiver depends on two factors. One is the probability the clause will prevent the redress of wrongs. The second is the forum. One device to attempt to overcome findings of unconscionability is to specify a choice of law which is favorable to a finding that the waiver is not unconscionable. However, such an attempt was rejected by the Washington Supreme Court this summer in *McKee v. AT&T Corp.*, 2007 WL 3932188 (Aug. 28, 2008). The Washington Supreme Court had previously declared class action waivers to be substantively unconscionable in *Scott v. Cingular Wireless*, 160 Wash. 2d 843, 161 P.3d 1000 (2007). In *Scott*, the Washington Supreme Court declared the class action waiver and arbitration agreement were substantively unconscionable, relying on the facts that the claims at issue were very small, but in the aggregate there was a large sum of money involved. The court found that without class action suits, the public's ability to act as private attorneys general would be eviscerated.

In *McKee*, the court found the same small amount in controversy on each individual claim was present. Even though the agreement allowed for small claim court actions, the Washington Supreme Court found that the availability of such claims was not practicable for

individuals to pursue. The court was not troubled by the fact that the agreement contained a New York choice of law.

In *McKee*, the Washington Supreme Court specifically held that while New York would likely enforce the class action waiver, New York public policy was strong enough to reject the choice of law provision of the contract because the choice of New York law would be unconscionable in and of itself as conflicting with Washington's fundamental public policy favoring the availability of class action relief. *Id.* at *8.

Also this summer, the New Mexico Supreme Court invalidated an arbitration agreement containing a class action waiver. In *Fisher v. Dell Computer Corp.*, 144 N.M. 464, 188 P.3d 1215 (2008), the New Mexico Supreme Court held that contractual prohibitions on class actions for small consumer claims are contrary to New Mexico's fundamental public policy and therefore unenforceable. The court held that New Mexico public policy strongly supports the resolution of consumer claims and that as a practical matter preventing class actions for small consumer claims would prevent consumers from obtaining any relief through the cost of individually litigating such claims. The court viewed class actions not merely as a procedural tool, but rather as a "gatekeeper to relief when the cost of bringing a single claim is greater than the damages alleged." The court also found that applying Texas law would be contrary to New Mexico's public policy. As a result, it applied New Mexico's law, under which it found the class action ban to be unconscionable and therefore unenforceable.

Dell Computer chose Texas law undoubtedly because of the manner in which class action waivers should have been addressed there. Unlike in the New Mexico Supreme Court, which saw the class action mechanism as a substantive right, a Texas appellate court construed the class action mechanism as a procedural right only that may "not be construed to enlarge or diminish any substantive rights or obligations of the parties to a civil action." *Auto Nation USA Corp. v. Leroy*, 105 S.W. 3d 190 (Tex. App. 2003); *see also Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294 (5th Cir. 2004) (applying Texas law). The *Auto Nation* court noted that the Texas Supreme Court had made clear that the FAA was part of the substantive law of Texas and enforced the arbitration clause as written.

The choice of law technique found better success in the New Jersey federal courts in *Davis v. Dell, Inc.*, 2008 WL 3843837 (D. N.J. Aug. 15, 2008). In that case, the court was faced with the identical contract and choice of law provision as presented in *Fisher*. The federal district court had little problem applying Texas law as it was compared to New Jersey law, because it found that New Jersey did not hold the class action waivers were necessarily unenforceable. In effect, the court conducted an analysis to conclude that the class action waiver clause, in and of itself, was not unconscionable under New Jersey law, hence applying Texas laws to uphold the waiver was likewise not unconscionable.

The opinion in *Fisher* highlights another interesting issue regarding class action waivers. The *Fisher* court refused to enforce the arbitration clause at all. It found that the class action waiver could not be severed, rendering the entire clause invalid. This was the

same result reached by the Alabama Supreme Court in *Leonard*, and by at least one California court. *Klussman v. Cross-Country Bank*, 134 Cal. App. 4th 1283, 1300 (2005). Most courts have followed the view stated by the First Circuit Court of Appeals in *Kristian* and have held the clauses to be severable and enforced the arbitration clause without the class action waiver.

So who gets to decide if the clause is invalid. In *Discover Bank v. Cook*, 2005 WL 1514034 (M.D. Ala. June 27, 2005), Judge Fuller held that the decision as to whether the class action waiver in an arbitration agreement was for the court or the arbitrator was for the court and, citing to *Randolph*, concluded that such a waiver was enforceable under claims brought under the Fair Credit Billing Act. *See also Gibson v. Cross Country Bank*, 354 F. Supp. 2d 1278 (M.D. Ala. 2005). In *Freeman v. Capital One Bank*, 2008 WL 2661990 (E.D. Va. 2008), the arbitration clause at issue stated that the validity and enforcement of the class action statement was a question of the court and not the arbitrator. Under those circumstances, the court held that the enforcement of the class action waiver was a question of arbitrability, which under *Howsam v. Dean Witter Reynolds*, 357 U.S. 79, 83-84 (2005), was the type of dispute that the parties would expect the court to decide. The court then held the class action waiver was enforceable under Fourth Circuit precedent.

Amount In Controversy Issue and Federal Jurisdiction

In any business litigation, one of the central threshold issues is the selection of a forum. In conducting an analysis regarding forum selection, removability has to be a primary issue. The Eleventh Circuit has provided the plaintiff with greater ability to defeat removability in its decision in *Lowery v. Alabama Power Co.*, 483 F.3d 1184 (11th Cir. 2007), *cert denied* 128 S. Ct. 2877 (2008).

It has long been the law that when jurisdiction is based on a claim for indeterminate damages, the party seeking to invoke federal jurisdiction bears the burden of proving by a preponderance of the evidence that the claim on which it is basing jurisdiction meets a jurisdictional minimum. *Federated Mut. Ins. Co. v. McKinnon Motors, LLC*, 329 F.3d 805, 807 (11th Cir. 2003). In meeting that burden, courts have traditionally allowed the plaintiff to prove the amount in controversy was met through various means, including citing to other similar cases and the results therein or conducting post-removal discovery, including requests for admissions, in an attempt to force the plaintiff into a concession that the jurisdictional limit was met.

All of those techniques were eliminated by the Eleventh Circuit.

In *Lowery*, the court held that:

> [W]e conclude that the removal-remand scheme set forth in 28 U.S.C. §§ 1446(b) and 1146(c) requires that a court review the propriety of removal on the basis of the removing documents. If the jurisdictional amount is either stated clearly on the face of the documents before the court, or readily deducible from them, then the court has jurisdiction. If not, the court must remand. Under this approach,

> jurisdiction is either evident from the removing documents or remand is appropriate. Significantly, if a defendant can only carry the burden of establishing jurisdiction under these circumstances, then the defendant could have satisfied a far higher burden than a preponderance of the evidence. Regardless, our precedent compels us to continue forcing the square peg into a round hole.

483 F.3d at 1211 (footnote omitted).

The court went on to discuss if it would be inappropriate to allow limited jurisdictional discovery. For a removing defendant to seek post-removal discovery, the court found, was in essence an admission that it lacked evidence to establish jurisdiction at the time of removal. The court concluded that a court should not participate on a one-sided subversion of the rules, and that the proper course was to remand.

The impact of *Lowery* is that the defendant must wait for some amendment to the pleading, or "other paper," to establish the proper amount in controversy before removing. The types of other paper that may be used to establish jurisdiction include responses to request for admissions, settlement offers, interrogatory responses, deposition testimony, demand letters, and emails estimating damages. *See Movie Gallery US, LLC v. Smith*, 2008 WL 4104071 (M.D. Ala. Sept. 5, 2008). Until the other paper evidence arrives, the defendant may not remove. It is clear under *Lowery* that evidence regarding other cases need not be enough to establish jurisdiction. *Lowery*, 43 F.3d at 1220-21.

The district courts have taken the mandate of *Lowery* literally. *See Dukes v. AIG Cas. Co.*, 2008 WL 4182832 (S.D. Ala. Sept. 8, 2008) (other verdict evidence rejected);

Yates v. Medtronic, Inc., 2008 WL 4016599 (S.D. Ala. Aug. 26, 2008) (J. Dubose) ("In accordance with *Lowery*, therefore, this court looks solely to the plaintiff's complaint and the notice of removal to assess the propriety of removal."); *Cox v. Triad Isotopes, Inc.*, 2008 WL 2959845 (S.D. Ala. July 29, 2008) (J. Cassady) ("*Lowery* can be read in no other manner than to disallow post-removal discovery for the purposes of establishing jurisdiction in diversity cases."); *Sinard v. Ford Motor Co.*, 554 F. Supp. 2d 1276 (M.D. Ala. 2008) (J. Fuller) (removal possible after *Lowery* only if some paper establishes jurisdiction).

The impact of *Lowery* can best be summed up by Judge Dubose's statement in *Constant v. Int'l House of Pancakes, Inc.*, 487 F. Supp. 2d 1308 (S.D. Ala. 2007), where the court remanded a slip-and-fall case due to the defendant's failure to establish the jurisdictional amount by specific evidence. The court stated,

> . . . the day of the knee-jerk removal of diversity tort cases from state to federal court within the three states comprising the Eleventh Circuit came to an end on April 11, 2007, when *Lowery* . . . was decided.

Id. at 1308-09.

The court's analysis in *Lowery* is not uniformly accepted by other circuits. For example, in *Spivey v. Virtrue, Inc.*, 528 F.3d 982 (7th Cir. 2008), the Seventh Circuit found that the removing party, as the proponent of federal jurisdiction, bears the burden of describing how the controversy meets the jurisdictional threshold. However, the court held that it was a pleading requirement, not a demand for proof. "Discovery and trial come later."

The Seventh Circuit held that once the proponent of federal jurisdiction has explained plausibly how the states exceed the amount in controversy, then the case belongs in federal court unless and until it is legally impossible for the plaintiff to recover that much.

Of course, unless and until the United States Supreme Court decides to resolve the issue, the rule in *Lowery* will continue to be applied in this circuit.

Of course, even after *Lowery*, the jurisdictional amount may still be apparent from the face of the complaint. *Williams v. Best Buy Co.*, 269 F.3d 1316, 1319 (11th Cir. 2001). However, that task may be tougher than you think. *See Matthews v. Doyle*, slip op. CV-08-0100 (S.D. Ala. March 13, 2008) (claim by mother for death of fetus in car accident).