

2001

Supreme Court Defines Final Decisions Relating to Arbitration Decisions and Ducks the More Important Costs Issue - Green Tree Financial Corp. - Alabama v. Randolph, The

Franklin D. Romines II.

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Franklin D. Romines II., *Supreme Court Defines Final Decisions Relating to Arbitration Decisions and Ducks the More Important Costs Issue - Green Tree Financial Corp. - Alabama v. Randolph, The*, 2001 J. Disp. Resol. (2001)

Available at: <https://scholarship.law.missouri.edu/jdr/vol2001/iss2/7>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

The Supreme Court Defines “Final Decisions” Relating to Arbitration Decisions and Ducks the More Important “Costs” Issue

*Green Tree Financial Corp. - Alabama v. Randolph*¹

I. INTRODUCTION

The United States Supreme Court in *Green Tree Financial Corp. - Alabama v. Randolph* dealt with two arbitration issues of varying import. The less controversial issue involved defining the term ‘final decision’ in the context of arbitration proceedings.² The second major issue in the case provided the Court an opportunity to analyze cost assignments in arbitration agreements that were silent on the issue.³ This issue has generated considerable policy disagreement among the circuits.

II. FACTS AND HOLDING

Larketta Randolph (“Randolph”) purchased a mobile home from Better Cents Home Builders, Inc., in Opelika, Alabama.⁴ Randolph financed her purchase through Green Tree Financial Corporation (“Green Tree”) and its subsidiary.⁵ Green Tree’s Manufactured Home Retail Installment Contract and Security Agreement required Randolph to buy Vendor’s Single Interest insurance to protect Green Tree against repossession costs in the event of default.⁶ The agreement also provided that all contractually-related disputes, “whether arising under case or statutory law, would be resolved by binding arbitration.”⁷

Randolph later sued Green Tree, “alleging that they [had] violated the Truth In Lending Act (TILA) . . . by failing to disclose as a finance charge the Vendor’s Single Interest Insurance requirement.”⁸ Before trial, Randolph amended her complaint adding a claim that Green Tree had violated the Equal Credit Opportunity Act by requiring her to arbitrate statutory causes of action.⁹ Green Tree responded by filing a motion requesting the court to compel arbitration, stay the action, or to dismiss Randolph’s claims.¹⁰ The district court “granted [Green Tree’s] motion to compel arbitration, denied the motion to stay, and dismissed Randolph’s claims with

1. 531 U.S. 79 (2000).

2. *Id.* at 79-80.

3. *Id.* at 80-81.

4. *Id.* at 82.

5. *Id.*

6. *Id.*

7. *Id.* at 82-83.

8. *Id.* at 83. See TILA, 15 U.S.C. § 1601 (1994).

9. *Green Tree*, 531 U.S. 83. See *Equal Credit Opportunity Act*, 15 U.S.C. §§ 1691-1691(f) (1994).

10. *Id.*

prejudice.”¹¹ Randolph responded by requesting reconsideration, asserting a lack of resources to arbitrate, which she claimed would require her to forgo her claims against Green Tree.¹² The District Court denied her motion for reconsideration.¹³

The Eleventh Circuit Court of Appeals held the lower court’s actions constituted a “final decision,” satisfying its jurisdictional requirement for review.¹⁴ In reaching its decision, the appellate court relied on section sixteen of the Federal Arbitration Act (“FAA”) which governs appeals.¹⁵ Section sixteen of the FAA allows appeal from “a final decision with respect to an arbitration that is subject to this title.”¹⁶ The court determined that a final order subject to appeal under the FAA is one that disposed of all the issues framed in a particular case.¹⁷ The court of appeals found that the district court’s decision left nothing to be done, aside from execution of the court’s order, and therefore that it fell within the FAA definition of a final order.¹⁸

After establishing jurisdiction, the court of appeals confronted the assignment of arbitration costs issue.¹⁹ The court held that the parties’ arbitration agreement “failed to provide the minimum guarantees that [Randolph] could vindicate her statutory rights under TILA.”²⁰ A critical factor in the court’s determination was that “the agreement was silent with respect to payment of filing fees, arbitrators’ costs, and other arbitration expenses.”²¹ Based on this fact, the court held the parties’ agreement posed a risk that Randolph’s “ability to vindicate her statutory rights would be undone by ‘steep’ arbitration costs, and therefore was unenforceable.”²²

The United States Supreme Court granted certiorari and affirmed in part and reversed in part.²³ The Court held that when a district court orders parties to proceed to arbitration and dismisses all claims it is a final decision under section 16(a)(3) of the FAA.²⁴ The Court also held that parties seeking to avoid arbitration due to prohibitive costs shoulder the burden of proving “the likelihood of incurring such costs.”²⁵

III. LEGAL HISTORY

To reach the decision concerning the impact of cost assignments in arbitration agreements silent on the topic, the Court was forced to first deal with the issue of reviewability, specifically, whether orders by district courts compelling arbitration can be appealed as ‘final decisions’ under section 16(a)(3) of the FAA.²⁶ The Court

11. *Id.*

12. *Id.* at 83-84.

13. *Id.* at 84.

14. *Id.*

15. *Id.*

16. *F.A.A.*, 9 U.S.C. § 16(a)(3) (1994).

17. *Green Tree*, 531 U.S. at 84.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 89.

25. *Id.* at 92.

26. *Id.* at 85-89.

then turned to the controversial issue of whether arbitration agreements, which are silent as to assignment of costs, are unenforceable.²⁷

A. 'Final decisions' for appeal in the arbitration context

Section sixteen of the FAA specifically governs appellate review of arbitration orders.²⁸ Before analyzing the section explicitly, one is confronted with the framework elucidated by the Court in *Moses v. Mercury Constr. Corp.*,²⁹ which recognized the policy goal of the FAA to "move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."³⁰ The appellate review section of the FAA begins by listing several situations involving arbitration-related decisions by lower courts that are appealable.³¹ Subsection (a)(1) generally permits immediate appeal of orders hostile to arbitration, and it is expanded by subsection (a)(2), which allows appeal whether an order is final or interlocutory so long as it satisfies the arbitration-hostility notion embodied by subsection (a)(1).³²

However, subsection (a)(3) specifically preserves the right to appeal "a final decision with respect to an arbitration . . ."³³ The third subsection, unlike its two predecessors, does not discriminate between decisions favorable and hostile to arbitration.³⁴ Thus, the Court has found the meaningful question in this area to be whether a decision regarding arbitration is 'final.'³⁵ The long-standing definition of 'final decision' in other legal contexts is a decision that "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment."³⁶ The FAA does not define 'final decision' for its purposes; however, courts have, on prior occasion, thereby applied to the term its well-established meaning.³⁷ While the FAA permits parties to arbitration agreements to bring a separate proceeding in a district court to enter judgement on an arbitration award once it is made, the Court on two prior occasions indicated, but did not hold, that the existence of such a remedy does not vitiate the finality of district courts' disposition of cases on the merits coupled with orders compelling arbitration.³⁸

Another important factor to appellate courts in determining the finality of arbitration-related decisions is whether the claim for arbitration is "embedded" in an action involving other claims for relief or is "independent," constituting the sole

27. *Id.* at 89-92.

28. *See* 9 U.S.C. § 16.

29. 460 U.S. 1 (1983).

30. *Id.* at 22.

31. 9 U.S.C. § 16.

32. *See id.* at §§ 16(a)(1)-(a)(2)..

33. *Id.* at § 16(a)(3).

34. *Id.*

35. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994); *Evans v. U.S.*, 504 U.S. 255, 259-60 (1992).

36. *Digital*, 511 U.S. at 867.

37. *Evans*, 504 U.S. at 259-60.

38. *See Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 431 (1956) (explaining that had the district court dismissed all claims in an action, its decision would be final and appealable); *Catlin v. U.S.*, 324 U.S.229, 236 (noting that had a motion to dismiss been entered "clearly there would have been an end of the litigation and appeal would lie . . ."). These cases were not decided under the FAA, but the court uses analogous reasoning when analyzing the finality issue under the FAA.

issue before a court.³⁹ Jurisdictions that emphasize the importance of the distinction between “embedded” and “independent” proceedings have held that orders compelling arbitration in “independent” proceedings are final and reviewable, while the same orders in “embedded” proceedings are not (even if the district court dismisses the remaining claims).⁴⁰

B. The Impact of Arbitration Agreements That Are Silent Regarding Cost Assignments

The bedrock principle governing any analysis concerning silence in arbitration agreement as to particular terms is the principle set forth in section two of the FAA. Section two 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 contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁴¹ Another principle paramount in this area stated by the Court is that it is the purpose of the FAA “to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts.”⁴²

Citing the importance of the usual validity of arbitration agreements as well as the necessity of combating judicial hostility, the Court has recognized that federal statutory claims can be appropriately resolved through arbitration.⁴³ By doing so, the Court has rejected generalized attacks on arbitration resting on the “suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.”⁴⁴ The Court in *Mitsubishi* expressly approved the arbitrability of statutory rights “so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum”⁴⁵

The Court undertakes a two-part test in determining whether statutory claims may be vindicated in arbitral forums.⁴⁶ First, the Court asks whether parties agreed to

39. *Seacoast Motors of Salisbury, Inc., v. Chrysler Corp.*, 143 F.3d 626, 628-29 (1st Cir. 1998); *Altman Nursing, Inc., v. Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir. 1996); *Napleton v. Gen. Motors Corp.*, 138 F.3d 1209, 1212 (7th Cir. 1998); *Gammara v. Thorp Consumer Disc. Co.*, 15 F.3d 93, 95 (8th Cir. 1994); *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1244 (9th Cir. 1997). While all of these cases were abrogated by *Green Tree*, they illustrate the point that this issue was traditionally important. See also *Arnold v. Arnold Corp—Printed Communs. for Bus.*, 920 F.2d 1269, 1276 (6th Cir. 1990) (order compelling arbitration in an “embedded” proceeding treated as a final judgment when the district court dismissed the action in deference to arbitration and had nothing left to do but execute the judgement); *Armijo v. Prudential Ins. Co. of America*, 72 F.3d 793, 797 (10th Cir. 1995).

40. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

41. 9 U.S.C. § 2 (1994).

42. *Gilmer*, 500 U.S. at 24.

43. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (Securities Act of 1933); *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987) (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Sherman Act).

44. *Rodriguez*, 490 U.S. at 481.

45. *Mitsubishi*, 473 U.S. at 637.

46. *Mitsubishi*, 473 U.S. at 626-28. For a clear articulation of this test, see *Gilmer*, 500 U.S. at 26.

submit their claims to arbitration.⁴⁷ Second, whether Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.⁴⁸

In analyzing the second prong of the test, the Court often refers to the “liberal federal policy favoring arbitration agreements,” as justification for rarely invalidating agreements that are silent on issues such as assignment of arbitration costs.⁴⁹ The designation of burdens of proof with regard to costs also favors enforcement of arbitration agreements at common law.⁵⁰ The Court has repeatedly made clear that the party seeking to avoid arbitration bears the burden of establishing that Congress intended to preclude arbitration of the statutory claim at issue.⁵¹

IV. INSTANT DECISION

A. *The Majority’s approach*

The majority in *Green Tree* dealt first with the jurisdictional question.⁵² Following the lead of the court of appeals, the Court began with an analysis of FAA section sixteen, which governs appeals.⁵³ The Court acknowledged that section sixteen allows appeal from decisions hostile to arbitration, but does not authorize immediate appeal from decisions favoring the use of arbitration.⁵⁴ However, the Court reached its decision by relying on the ‘final decision’ catch-all contained in subsection (a)(3).⁵⁵ According to the Court, “the term ‘final decision’ has a well-developed and longstanding meaning.”⁵⁶ The Court said that since the FAA did not supply a definition for the term it should be accorded its well-established meaning.⁵⁷ Because the district court’s order compelled arbitration and dismissed Randolph’s claims with prejudice (leaving only execution of the judgment), the Court held the order disposed of the entire case on the merits and that it was thus a “final judgement” for purposes of appeal.⁵⁸ The Court also acknowledged the FAA allows parties to arbitration agreements to bring separate proceedings to district courts to enter judgement, vacate, or modify arbitration awards, but said the existence of that remedy “does not vitiate the finality of the district court’s resolution of the claims in the instant proceeding.”⁵⁹ Citing precedent indicating similar results, the Court then ruled conclusively that the [d]istrict [c]ourt’s order was “a final decision with

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

48. *Id.*

49. *Moses*, 460 U.S. at 24.

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

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

52. *Green Tree*, 531 U.S. at 84-90.

53. *Id.* (referring to 9 U.S.C. § 16).

54. *Id.* at 86.

55. *Id.* See 9 U.S.C. § 16(a)(3).

56. A final decision “ends the litigation on the merits and leaves nothing more for the court to do but execute the judgement.” *Id.* (quoting *Digital Equip. Corp.*, 511 U.S. at 867).

57. *Id.* (citing *Evans*, 504 U.S. at 259-60).

58. *Id.* at 86-87.

59. *Id.* at 86 (citing 9 U.S.C. § 9-11).

respect to an arbitration within the meaning of section 16(a)(3)” and that the appeal was timely.⁶⁰

The Court then discussed the independent/embedded debate among appellate courts.⁶¹ Green Tree argued that the distinction (and impact on reviewability) between cases where an arbitration request was the sole claim as opposed to one of several claims for relief, was firmly established at the time of section sixteen’s enactment, and that the section’s silence evidenced a congressional intent to incorporate the distinction into the FAA.⁶² The Court disagreed, citing cases demonstrating a lack of uniformity of opinion on decisional finality at the time of section sixteen’s enactment as reason for applying the well-established meaning of ‘final decision.’⁶³ Finally, the Court held that when a district court orders parties to proceed to arbitration and dismisses all claims before it, the decision is final under section 16(a)(3), and therefore appealable.⁶⁴

After establishing jurisdiction, the Court turned to the question of enforceability of arbitration agreements that do not explicitly provide protection from potentially substantial costs for parties pursuing statutory claims in arbitral forums.⁶⁵ The Court, following precedent, stated that “so long as the prospective litigant may vindicate [his or her] statutory cause of action in the arbitral forum” even important statutory rights (like TILA) may be arbitrated.⁶⁶

The Court reemphasized that “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’” would not be recognized, and that arbitration opponents must invalidate the forum’s applicability under their test.⁶⁷ In *Green Tree*, the Court stated it was undisputed that the parties agreed to arbitrate their disputes relating to their contract, including all claims involving statutory rights.⁶⁸ In regard to the second part of the Court’s test, Randolph did not argue that TILA evidenced a congressional intent to preclude a waiver of judicial remedies.⁶⁹ Instead, Randolph argued that the arbitration agreement’s silence with respect to costs created a “risk” that “she [would] be required to bear prohibitive arbitration costs if she pursue[d] her statutory rights in an arbitral forum,” thus forcing her to forego her claims against Green Tree.⁷⁰

The Court acknowledged that “the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in an arbitral forum,” but said that the record failed to show that Randolph would bear such costs if she took her claims to arbitration.⁷¹ Relying on

60. *Id.* at 86-87 (citing *Mackey*, 351 U.S. at 431; *Catlin* 324 U.S. at 236).

61. *Id.* at 87-89.

62. *Id.* at 88-89.

63. *Id.* at 88 nn. 3, 5. See generally Charles Alan Wright, A.R. Miller & E.H. Cooper, *Federal Practice and Procedure* vol. 15B § 3914.17 (3d ed., West Publ. Co. 1992).

64. *Green Tree*, 531 U.S. at 79.

65. *Id.* at 89.

66. *Id.* at 90 (quoting *Gilmer*, 500 U.S. at 28).

67. *Id.* at 89-90 (quoting *Rodriguez*, 490 U.S. at 481).

68. *Id.* at 90-91.

69. *Id.*

70. *Id.* at 90.

71. *Id.*

the court of appeal's statement that "we lack . . . information about how claimants fare under Green Tree's arbitration clause,"⁷² the Court said the record revealed only silence on the subject and that such silence alone was "plainly insufficient to render it unenforceable."⁷³ Finally, the Court held that "the 'risk' that Randolph [would] be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement."⁷⁴

The Court said invalidating the arbitration agreement at issue without proof that the cost allocation would actually preclude Randolph's statutory rights would undermine the long-accepted "liberal federal policy favoring arbitration agreements."⁷⁵ The Court, with this policy in mind, held that when a party seeks to invalidate an arbitration agreement due to inaccessibility, that party bears the burden of showing the likelihood of incurring such costs.⁷⁶ The Court stated flatly that Randolph, the party in this case who bore the burden, had not satisfied the burden.⁷⁷ However, the Court found it unnecessary to address the detail necessary to satisfy the arbitration opponent's *prima facie* burden.⁷⁸ Randolph did not make a timely showing of any evidence as to either excessive costs, or the likelihood of such costs, and the Court thereby reversed the court of appeal's decision to invalidate the arbitration order due to potentially-excessive costs precluding Randolph's statutory rights, and remanded the case with instructions to proceed with arbitration.⁷⁹

B. Dissent Concerning Arbitral Accessibility

Justice Ginsburg, who was joined by three other Justices, concurred in part, and dissented in part from the majority's decision.⁸⁰ The dissenters concurred with the majority on the 'final decision' issue, but would have vacated the court of appeal's decision dealing with cost allocation with instructions for the court to more closely consider the arbitral forum's accessibility.⁸¹

The dissent criticized the majority opinion for attempting to blend two inquiries (*adequacy* and *accessibility* of arbitral forums regarding statutory claims) into one issue.⁸² Citing *Gilmer* and *Shearson* as precedent, the dissent acknowledged that parties resisting arbitration bear the "burden of establishing the inadequacy of an arbitral forum for adjudications of claims of a particular genre."⁸³ However, the dissent disagreed with the majority's notion that the *prima facie* burden regarding accessibility should be allocated identically to the burden required of opposing

72. *Id.* at 90-91 (quoting *Green Tree*, 178 F.3d 1149, 1158 (11th Cir. 1999)).

73. *Id.* at 91 n. 6.

74. *Id.* at 91.

75. *Id.* (quoting *Moses*, 460 U.S. at 24).

76. *Id.* at 92.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* (Ginsburg, Stevens, Souter, & Breyer, JJ., dissenting).

81. *Id.* at 92-3.

82. *Id.* at 93-4.

83. *Id.* at 94. See *Gilmer*, 500 U.S. 20; *McMahon*, 482 U.S. 220.

parties to demonstrate adequacy of the arbitral forum as a means of adjudicating statutory rights.⁸⁴

The dissent cites the adhesive nature of take-it-or-leave-it contracts, as well as the fact that past courts examining the adequacy issue did not also consider the 'accessability' issue as reason for caution in assigning burdens to consumers such as Randolph.⁸⁵ The dissent buttressed the point by citing the District of Columbia Court of Appeals which commented on *Gilmer*:

[I]n *Gilmer*, the Supreme Court endorsed a system of arbitration in which employees are not required to pay for the arbitrator assigned to hear their statutory claims. There is no reason to think that the Court would have approved arbitration in the absence of this arrangement. Indeed, we are unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of a judge assigned to hear her or his case.⁸⁶

The dissent reiterated that the form contract at issue provided no indication of which arbitration rules were applicable, nor whether Randolph would be required to pay all or a portion of the costs of arbitrating.⁸⁷ The dissent implicitly relied on the doctrine of *contra proferentem*, stating that Green Tree, as drafter of the contract, could have filled such a void by indicating its choice of arbitration rules within the agreement.⁸⁸ While it may follow that Green Tree would have elected rules which would not have precluded Randolph's statutory rights, the dissent argued that there "[was] no reliable indication in the record that Randolph's claim [would] be arbitrated under any consumer-protective fee arrangement."⁸⁹ Further, the dissent also cited Green Tree's repeat player status as a rationale for assigning it the burden of proving that the arbitral forum it chooses would not preclude Randolph's statutory rights.⁹⁰

Should the burden of accessibility be assigned Green Tree, the dissent argued the case ought to be remanded for clarification of their practices.⁹¹ If in fact the arbitral forum was financially accessible it would render the case moot.⁹² The dissent saw

84. *Green Tree*, 531 U.S. at 94 (Ginsburg, Stevens, Souter, & Breyer, JJ. dissenting).

85. *Id.* See *Gilmer*, 500 U.S. at 26 (age discrimination claims are amenable to arbitration); *McMahon*, 482 U.S. at 220 (claims under Racketeer Influenced and Corrupt Organization Act and Securities Exchange Act are amenable to arbitration).

86. *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1484 (D.C. App. 1997).

87. *Green Tree*, 531 U.S. at 94-5 (Ginsburg, Stevens, Souter, & Breyer, JJ. dissenting).

88. *Id.* The Court referred to Restatement (Second) of Contracts, which states, "[i]n choosing among the reasonable meanings of . . . [an] agreement or a term thereof, that meaning is generally preferred which operates against the [drafting] party . . ." *Id.* at 96 (quoting Restatement (Second) of Contracts § 206 (1979)).

89. *Id.* at 95.

90. *Id.* at 96 (citing 9 Wigmore on Evidence § 2486 (J. Chadbourn rev. ed. 1981)) (where fairness so requires, burden of proof of a particular fact may be assigned to "party who presumably has peculiar means of knowledge" of the fact). *Id.*

91. *Id.*

92. *Id.*

such an approach as superior to either writing a term into the parties contract⁹³ or leaving cost allocations initially to each arbitrator as the majority chose to do.⁹⁴ In sum, the dissent said, the majority's opinion does not prevent Randolph from returning to court, post-arbitration, should she incur prohibitive cost allocations.⁹⁵ Thus, the issue according to the dissent is *when*, not *whether*, she may be spared from paying excessive costs.⁹⁶ The time parameters for appeal settled by the majority serve neither certainty nor judicial economy according to the dissent.⁹⁷ Four Supreme Court Justices would have remanded to the court of appeals with *Green Tree* bearing the burden of proving that assignment of arbitration costs between the parties would not preclude Randolph's statutory rights before approving of an order compelling arbitration.⁹⁸

V. COMMENT

The Court in *Green Tree* chose to deal with one problem, which has generated some variance among the circuits, while *inviting* a future split/fragmentation on an arguably more-important issue.

The entire Court was in favor of assigning the common law meaning to the term 'final decision.'⁹⁹ The catch-all in section 16(a)(3) of the FAA clearly provides an avenue for such a decision.¹⁰⁰ The strongest counter argument, that at the time of the 1988 amendments to the section a different meaning was attributed to the term, is quickly discredited by examining timely case law.¹⁰¹ The later emergence of an alleged consensus notwithstanding, it is clearly within the Court's province to assign the long-accepted and widely-recognized meaning of final decision to its inclusion in the FAA.

However, it is perplexing at best to attempt to grapple with the Court's decision on the key costs issue raised by *Green Tree*. The idea behind accepting certiorari in such cases is to settle disputes among the circuits on arguable questions. The Court did so by ruling conclusively on the appeal issue.¹⁰² However, the Court not only failed to eradicate future dispute over accessibility of arbitral forums, but seemingly evidenced an intent to invite such disagreements among the circuits. In one breath the majority states, "the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum."¹⁰³ However, by bootstrapping onto prior cases authorizing the

93. *Id.* See *Cole*, 105 F.3d at 1485 (interpreting a form contract to require the employer "to pay all of the arbitrator's fees necessary for a full and fair resolution of [the discharged employee's] statutory claims").

94. *Green Tree*, 531 U.S. at 96 (Ginsburg, Stevens, Souter, & Breyer, JJ. dissenting).

95. *Id.* at 97.

96. *Id.*

97. *Id.*

98. *Id.* at 92.

99. *Green Tree*, 531 U.S. at 81.

100. 9 U.S.C. § 16(a)(3). Appeal may be taken from "a final decision with respect to an arbitration that is subject to this title." *Id.*

101. See *Gilmer*, 500 U.S. at 28..

102. *Green Tree*, 531 U.S. at 81.

103. *Id.* at 90.

arbitrability of statutory claims,¹⁰⁴ the Court held that plaintiffs in Randolph's position should also shoulder the burden of proving that prohibitive costs of an arbitral forum will preclude their statutory rights.¹⁰⁵ As the dissent is quick to point out, the two analyses are distinct and it does not follow that the assignment of burdens in proving arbitrability should mirror those of proving accessibility.¹⁰⁶ In fact, careful analysis bears out the need for a different assignment of burdens in the two distinct situations.

First, as the dissent discusses, the contract is adhesive, and thus when silent should be construed against the drafter.¹⁰⁷ Green Tree had every opportunity to render the entire issue moot by declaring in its arbitration clause that it would utilize arbitral rules similar to those used by American Arbitration Association, which are not likely to be deemed cost prohibitive.¹⁰⁸ If they chose not to do so, reason does not counsel that other parties (consumers) should bear the costs of Green Tree's decision.

Second, Green Tree's repeat player status also counsels against assigning consumers the burden of proving that the arbitral forum the company chooses will not bear prohibitive costs for consumers.¹⁰⁹ Green Tree likely has superior information concerning consumers' arbitral costs due to their familiarity with prior arbitrations and their ability to select arbitral rules.

It hardly seems equitable in such a situation to assign the burden of proving prohibitive costs upon consumers. As the dissent stated in *Green Tree*, Green Tree had more exposure to the arbitration process and its costs and was therefore in a better position to know which rules it had selected in the past and possibly the costs associated with past arbitration proceedings.¹¹⁰

Fairness, as well as judicial efficiency, would benefit from companies being assigned the burden of proving financial accessibility in similar cases. As Justice Ginsburg makes clear in her dissent, the majority's opinion "does not prevent Randolph from returning to court, post-arbitration, if she then has a complaint about cost allocation."¹¹¹ In essence, the conservative majority has decided not only to delay what it acknowledges is a potentially valid claim,¹¹² but has inequitably assigned the burden of establishing the accessibility of arbitration to the party least equipped to handle such an assignment.¹¹³

104. See *Gilmer*, 500 U.S. 20; *Moses*, 460 U.S. 1.

105. *Id.* at 92-3 (Ginsburg, Stevens, Souter, & Breyer, JJ. dissenting).

106. *Id.* at 94.

107. *Id.* at 94-5.

108. *Id.* Under AAA's Consumer arbitration rules, consumers incur no filing fees and pay only \$125 of arbitrator's total fees with all other costs assigned to the business party; National Arbitration Forum provisions limit consumer costs to between \$49 and \$175; National Consumer Disputes Advisory Committee, *Consumer Due Process Protocol*, Principle 6 & Comment (Apr. 17, 1998) available at <<http://www.adr.org/education/education/consumer-protocol.html>> (National Consumer Disputes Advisory Committee protocols recommend that consumer costs be limited to a reasonable amount).

109. *Green Tree*, 531 U.S. at 96 (Ginsburg, Stevens, Souter, & Breyer, JJ. dissenting).

110. *Id.* at 97.

111. *Id.*

112. The Court implied that if Randolph had been able to meet the prohibitive costs burden, the issue might have been handled differently. See *id.* at 91, 93.

113. See *id.* at 93-4 (Ginsburg, Stevens, Souter, & Breyer, JJ. dissenting) (Ginsburg argued about possible inequalities of such a burden and how it is inconsistent with precedent).

Worse yet, the Court expressly refused to provide lower courts a scintilla of guidance as to what constitutes prohibitive costs in the arbitral context. By doing so, the Court has invited division among lower courts as to what constitutes inaccessibility. As the 5-4 conservative majority in this case indicates, different justices, depending on their particular political persuasion, may reach strikingly different results in regard to what constitutes prohibitive costs which preclude statutory rights.

While the particular facts of *Green Tree* may not have been conducive to laying out definitive rules governing arbitral accessibility,¹¹⁴ the Court could have enhanced the utility of its opinion by providing at least some structure for later analysis. The Court could have chosen a number of avenues in this regard. Even short of holding that the drafter, which created the problem by its silence regarding cost allocation in the first place, bear the burden of proving accessibility, the court could have mandated that a certain percentage of costs must be born by those favoring arbitration, or imposed a maximum dollar value above which an arbitral forum could be deemed *prima facie* inaccessible.

Instead of opting for a creative solution, the Court elected to promote uncertainty and judicial inefficiency in an area which will require future consideration after a probable split among the circuit's regarding the definition of "inaccessibility."

VI. CONCLUSION

In *Green Tree*, the Supreme Court resolved a dispute among the circuits regarding the definition of 'final decision' in the arbitration context by granting the term of art its well-established meaning. In regard to the second major issue raised by the case, the Court acknowledged that arbitral costs could potentially preclude an individual from vindicating her or his statutory rights. However, without providing needed guidance as to when such costs may invalidate arbitration agreements, the court simply assigned arbitration opponents the burden of proving that the forum's cost will preclude enforcement of their individual statutory rights. While the first element of the decision will promote uniformity among the circuits, uncertainty and unfairness will likely be the result of the Court's decision to sidestep the important issue of arbitral accessibility regarding statutory claims.

FRANKLIN D. ROMINES II

114. *Id.* at 90-1.

