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## Silent Treatment: Removing the Class Action from the Plaintiff's Toolbox without Ever Saying a Word - *Bazzle v. Green Tree Fin. Corp., The*

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# The Silent Treatment: Removing the Class Action From the Plaintiff's Toolbox Without Ever Saying a Word

*Bazzle v. Green Tree Fin. Corp.*<sup>1</sup>

## I. INTRODUCTION

A motion for class certification is often a pivotal point in a lawsuit, playing a determinative role throughout the course of the litigation. Plaintiffs use the class action as a tool to consolidate common claims against a defendant, bypassing the expensive process of bringing suit individually.<sup>2</sup> Defendants hotly contest certification of the class, seeking to avoid the ramifications of a judgment which reflects the cumulative losses of the multitude.<sup>3</sup> This casenote addresses the effects of allowing an arbitration clause that is silent as to class-wide arbitration to preclude the plaintiffs' option to bring suit as a class, and the South Carolina Supreme Court's decision in *Bazzle* to protect consumers from this restrictive kind of treatment.

## II. FACTS AND HOLDING

In separate class action suits, Lynn and Burt Bazzle<sup>4</sup> and Daniel Lackey<sup>5</sup> sued Green Tree Financial Corporation<sup>6</sup> alleging violations of the attorney and insurance agent preference provision of the South Carolina Consumer Protection Code.<sup>7</sup> After separate arbitration hearings conducted by the same arbitrator, the South Carolina Supreme Court assumed jurisdiction and consolidated the appeals, finding that the cases presented the same issue.

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1. 569 S.E.2d 349 (S.C. 2002), *cert. granted*, 123 S. Ct. 817 (2003).

2. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 29-30 (Oct. 2000) (noting that class actions have been praised for their efficiency in "that they allow issues involving multiple persons or institutions to be resolved more cheaply and expeditiously").

3. See Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, But Who's the Predator? Banks Can Use Arbitration Clauses as a Defense*, 7 Bus. L. Today 24, 25 (May/June 1998) (also indicating that arbitration serves to deter class actions as these types of lawsuits are reduced substantially if consumers have agreed with lenders to arbitrate their disputes).

4. Lynn and Burt Bazzle are private homeowners who contracted with Green Tree Financial Corporation for home improvements financing.

5. Daniel Lackey is an individual mobile home purchaser who entered into a pre-printed installment contract/security agreement with Green Tree for the purchase of a mobile home.

6. Green Tree Financial Corporation is a corporation providing various financial services to consumers nationwide, including home equity loans, manufactured housing loans, and home improvement loans. Conesco Finance Servicing Corp, *Conseco StepUp* <<http://www.gtfc.com>> (accessed Feb. 13, 2003).

7. S.C. Code Ann. §§ 37-10-102, 37-10-105 (2002).

### A. *Bazzle Case*

In 1995, the Bazzles were approached by Patton General Contracting, a non-exclusive Green Tree dealer, to perform home improvements.<sup>8</sup> Patton provided them with a Green Tree financing application; this application did not contain an attorney or insurance agent preference notice.<sup>9</sup> The Bazzles executed a Retail Installment Contract and Security Agreement for \$15,000 on May 20, 1995.<sup>10</sup> Green Tree was identified as the lender on the financing documents, and the Bazzles were directed to return the signed papers to Green Tree.<sup>11</sup> During the course of the contract dealings, neither Green Tree nor its agent presented the Bazzles with an attorney or insurance preference form, and the Bazzles did not employ an attorney to oversee the transaction or closing.<sup>12</sup>

In March of 1997, the Bazzles filed suit in the Dorchester County Court of Common Pleas against Green Tree alleging violations of the attorney and insurance agent preference provisions of the South Carolina Consumer Protection Code.<sup>13</sup> In April, the Bazzles filed to amend the complaint to incorporate class allegations and moved for class certification.<sup>14</sup> Pursuant to the arbitration agreement in the contract, Green Tree filed a Motion for Stay and to Compel Arbitration.<sup>15</sup> On December 5, 1997, the trial court granted class certification; following the ruling, Green Tree pursued and was granted its motion to compel arbitration.<sup>16</sup> In its order compelling arbitration, the trial court stated that the ruling applied to the Bazzles and all who elected to be part of the class action.<sup>17</sup>

In 1998, Green Tree filed several motions in an effort to disband the class. Following the trial court's denial of Green Tree's Motion for Reconsideration of the order certifying the class, the court of appeals dismissed Green Tree's appeal of the issue as interlocutory and denied rehearing on the issue.<sup>18</sup> The South Carolina Supreme Court denied certiorari and remitted the case to the trial court.<sup>19</sup>

In February 1999, the Bazzles filed a Motion to Compel Appointment of an Arbitrator.<sup>20</sup> In May, Green Tree filed a motion to dismiss asserting that the Bazzles were not proper class representatives, because their interests were contrary to those of the class members.<sup>21</sup> On May 20, 1999, the trial court appointed the Honorable Thomas Ervin as arbitrator and declined to hear Green Tree's motion to dismiss.<sup>22</sup> From that point on, the class action proceedings were

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8. *Bazzle*, 569 S.E.2d at 352.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* The South Carolina Consumer Protection Code requires dealers to provide consumers with these forms. S.C. Code Ann. §§ 37-10-102, 37-10-105.

13. *Bazzle*, 569 S.E.2d at 352.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* In a supplemental order, the court ordered the class action arbitration to proceed on an opt-out basis. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

heard and conducted by the arbitrator, without further involvement of the trial court. On July 24, 2000, the arbitrator issued a Final Order and Award, finding Green Tree liable for violating the attorney and insurance preference provisions of the South Carolina Consumer Protection Act.<sup>23</sup> The Bazzle class was awarded \$10,935,000 in damages, \$3,645,500 in attorneys' fees, and \$18,242 in costs.<sup>24</sup> On September 15, 2000, the trial court confirmed the award and denied Green Tree's motions to remand and vacate.<sup>25</sup> Green Tree appealed and the South Carolina Supreme Court assumed jurisdiction from the appellate court to hear the appeal.<sup>26</sup>

### B. Lackey Case

Through a Green Tree dealer, Daniel Lackey and class members entered into preprinted consumer installment contracts and security agreements with Green Tree for the purchase of mobile homes.<sup>27</sup> In each transaction, the consumer completed necessary application materials through a Green Tree dealer.<sup>28</sup> As in *Bazzle*, these applications did not contain an attorney or insurance preference notice and no such form was provided to them at any time during the transaction.<sup>29</sup> As a result, in May 1996, Daniel Lackey and George and Florine Buggs commenced a class action suit against Green Tree in the Barnwell County Court of Common Pleas, alleging the violations of the attorney and insurance preference provisions of the South Carolina Consumer Protection Code.<sup>30</sup>

Green Tree filed its answer, and Lackey subsequently filed a Motion for Class Certification.<sup>31</sup> Green Tree filed a Motion to Stay and to Compel Arbitration.<sup>32</sup> The trial court found that Green Tree's contract was an adhesion contract with an unconscionable arbitration clause and denied the motion to compel.<sup>33</sup> On appeal, the Court of Appeals agreed that the contracts were ones of adhesion, but found the arbitration clause to be conscionable and remanded the case.<sup>34</sup> The parties entered into a Consent Order appointing the Honorable Thomas Ervin as arbitrator following remand.<sup>35</sup>

The arbitrator raised the issue of class arbitration, and in considering the plaintiff's motion for class certification, held a hearing to determine if class action arbitration could proceed under Green Tree's arbitration clause.<sup>36</sup> The parties disputed the substance of Green Tree's arguments at this hearing. The Lackey class claimed that Green Tree wanted the arbitrator to decide that the class action

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23. *Id.*

24. *Id.* at 353.

25. *Id.*

26. *Id.* The South Carolina Supreme Court found that the *Bazzle* case was sufficiently similar to another class action suit, *Lackey*, to consolidate them on appeal. *Id.* at 354.

27. *Id.* at 353.

28. *Id.*

29. *Id.*

30. *Id.* S.C. Code Ann. §§ 37-10-102, 37-10-105.

31. *Bazzle*, 569 S.E.2d at 353.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* Thomas Ervin was also the arbitrator in the *Bazzle* case.

36. *Id.*

could not proceed in arbitration.<sup>37</sup> Green Tree claimed that it challenged the arbitrator's authority to order class action arbitration, basing its contentions on the Federal Arbitration Act.<sup>38</sup> After the hearing, "the arbitrator issued an order permitting class action arbitration and scheduled a class certification hearing."<sup>39</sup>

In September 1998, Green Tree sought a declaratory judgment from the federal district court to enjoin the arbitrator from hearing the issue of class certification.<sup>40</sup> The district court denied the injunction and dismissed the declaratory judgment action for lack of subject matter jurisdiction.<sup>41</sup> At the class certification hearing in November, with Green Tree's counsel present but not participating, the arbitrator found that class certification requirements had been met.<sup>42</sup> Green Tree then petitioned in state court for a Motion to Stay the arbitration proceedings, a declaratory judgment, and a preliminary injunction.<sup>43</sup> The trial court denied the stay, citing lack of jurisdiction to interfere with the arbitration.<sup>44</sup>

At the arbitrator's pre-trial conference, the parties consented to redefine the Lackey class to include all mobile home transactions and moved all home improvement class members into the Bazzle class.<sup>45</sup> In March 2000, the Lackey arbitration took place, with full participation by Green Tree.<sup>46</sup> At the conclusion of the arbitration, the arbitrator ruled that Green Tree had violated the attorney and insurance preference provisions and awarded the plaintiffs \$9,200,000 in damages, \$3,066,666 in attorneys' fees, and \$18,252 in costs.<sup>47</sup> In May, the same arbitrator decided the Bazzle claims and set out a procedure for Green Tree to offset its claims between the two classes.<sup>48</sup> The Lackey class then moved to confirm the award in the trial court.<sup>49</sup> Green Tree filed a Motion to Remand and a Motion to Vacate the award.<sup>50</sup> In December 2001, the trial court confirmed the award and Green Tree appealed.<sup>51</sup>

The South Carolina Supreme Court withdrew the appeal from the South Carolina Court of Appeals and assumed jurisdiction to hear the consolidated *Bazzle* and *Lackey* appeals.<sup>52</sup> Furthermore, the court found that Green Tree did not waive its ability to object to class-wide arbitration by manifesting consent to the class-wide arbitration, because it had vigorously fought certification prior to the arbitration proceedings.<sup>53</sup> The court also held "that class-wide arbitration may be ordered when the arbitration agreement is silent [as to class-wide arbitration] if

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37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 354.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 355.

it would serve efficiency and equity, and would not result in prejudice.”<sup>54</sup> The court upheld the Bazzle and Lackey awards, holding that the arbitrator acted properly regarding the issue of class certification since the law was unsettled at the time of the proceedings.<sup>55</sup>

The United States Supreme Court granted certiorari on January 10, 2003.<sup>56</sup>

### III. LEGAL BACKGROUND

Until recently, class action proceedings and arbitration were mutually exclusive concepts. As the two concepts have merged, federal courts have presented a unified front, agreeing that absent an express agreement allowing class-wide arbitration, the plaintiffs may not proceed as a class in arbitration, but must pursue their claims individually.<sup>57</sup> State courts, on the other hand, are split on the issue.<sup>58</sup> This disagreement is not a surprising result considering that courts have had little guidance from Congress; neither the Federal Arbitration Act (“FAA”)<sup>59</sup> nor the Uniform Arbitration Act (“UAA”)<sup>60</sup> addresses the relationship between the two.<sup>61</sup>

Although the United States Supreme Court had the chance to address the issue of the applicability of the FAA to class actions in *Southland Corp. v. Keating*,<sup>62</sup> it declined to do so, leaving the circuits to their own interpretations.<sup>63</sup> Despite this lack of guidance, the federal courts have addressed the issue with strikingly similar results.

The first federal case to address the issue of class-wide arbitration was *Gammara v. Thorp Consumer Discount Co.*,<sup>64</sup> a suit in which plaintiff brought a class action claim under the Truth in Lending Act alleging that the defendant improperly refused to allow him to rescind a consumer loan.<sup>65</sup> In its decision, the Minnesota District Court focused on the language of Section 4 of the FAA,<sup>66</sup> and

54. *Id.* at 360.

55. *Id.* at 361-62.

56. *Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 817 (2003).

57. *See infra* n. 70 (reflecting the notion that where the arbitration agreement or applicable procedural rules do not permit class action, arbitral class action is not an option).

58. *See Med. Ctr. Cars, Inc. v. Smith*, 727 S.2d 9, 20 (Ala. 1998) (refusing to recognize class-wide arbitration based on its duty to follow the parties’ agreement, which did not expressly allow class-arbitration); *But see Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. 1991) (allowing class-wide arbitration in an action under the FAA, finding that contract language covering “any controversy” was in accord with the state’s public policy favoring arbitration).

59. 9 U.S.C. § 1 et seq. (2000).

60. UAA §§ 1-25, 7 U.L.A. 1 (1997).

61. Sternlight, *supra* n. 2, at 15-16.

62. 465 U.S. 1 (1984).

63. *Id.* at 17.

64. 828 F. Supp. 673 (D. Minn. 1993).

65. *Id.* at 673.

66. *Id.* at 674. The pertinent part of § 4 states:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . [T]he court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . . [T]he court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. § 4. (emphasis added).

held that “the court shall make an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement.*”<sup>67</sup> The court further relied on an analogy to an Eighth Circuit case involving consolidation of arbitration proceedings,<sup>68</sup> and found that despite the differences between consolidation and class certification, the principles were sufficiently similar to apply the same reasoning; absent an express provision allowing class arbitration, parties would be bound to proceed individually.<sup>69</sup>

Since the *Gammaro* decision, federal courts have faced the issue in a number of different contexts, although they have rarely been inclined to address the issue directly. In dicta or footnote commentary, most courts assume that where the arbitration agreement or applicable procedural rules do not permit class action, arbitral class action is not an option.<sup>70</sup>

In *Champ v. Siegel Trading Co.*,<sup>71</sup> the United States Court of Appeals for the Seventh Circuit set forth the standard attitude for arbitration clauses that are silent regarding class actions by drawing an analogy to the consolidation of arbitration proceedings.<sup>72</sup> The Second, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits had previously decided that when the arbitration agreement was silent as to consolidation, “the duty to rigorously enforce arbitration agreements ‘in accordance with the terms thereof’ as set forth in Section 4 of the FAA bars district courts from applying Rule 42(a)”<sup>73</sup> to require consolidated arbitration.”<sup>74</sup>

67. *Gammaro*, 828 F. Supp. at 674.

68. *Baessler v. Continental Grain Co.*, 900 F.2d 1193 (8th Cir. 1990).

69. *Gammaro*, 828 F. Supp. at 674.

70. See *McCarthy*, 1994 WL 387852 at \*8 (citing to *Gammaro* and holding that “the court cannot compel arbitration on a class basis where the agreement did not specifically provide for it”); *Sims v. Unicolor Mortg., Inc.*, 1998 WL 34016832 at \*3 (N.D. Miss. Apr. 27, 1998) (noting in dicta that “the provision prohibiting class action claims does not violate public policy. There is no public policy favoring class actions.”); *Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654, 665 n. 7 (S.D.N.Y. 1997) (stating in a footnote that an employee that agrees to “arbitrate all claims arising out of her employment may not avoid arbitration by pursuing class claims. Such claims must be pursued in non-class arbitration.”); *Application of Deulemar Compagnia Di Navigazione S.p.A. v. M/V Allegra*, 198 F.3d 473, 481-82 (4th Cir. 1999) (endorsing the “in accordance with the terms of the agreement” reasoning set forth in *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1999)); *Johnson v. West Suburban Bank*, 225 F.3d 366, 377 n. 4 (3d Cir. 2000) (stating in a footnote that “[t]his court has never addressed the question whether class actions can be pursued in arbitral forums, though it appears impossible to do so unless the arbitration agreement contemplates such a procedure.”); *Iowa Grain Co. v. Brown*, 171 F.3d 504, 510 (7th Cir. 1999) (affirming the district court’s decision which reasoned in dicta that “the kind of class action contemplated by Fed. R. Civ. P. 23(b) is normally unavailable in arbitration.”).

71. 55 F.3d 269 (7th Cir. 1995).

72. *Id.* at 274.

73. Fed. R. Civ. P. 42(a) (1999) provides that “[w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.”

74. *Champ*, 55 F.3d at 274. See *Govt. of United Kingdom of Great Britain v. Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987); *Am. Centennial Ins. Co. v. Natl. Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991); *Baessler*, 900 F.2d at 1195; *Weyerhaeuser Co. v. W. Seas Ship. Co.*, 743 F.2d 635, 637 (9th Cir. 1984); *Protective Life Ins. Corp. v. Lincoln Natl. Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989). Recently, the Third Circuit echoed the majority view in dicta in *Johnson*, 225 F.3d at 377 n. 4. In contrast, the First Circuit held that where the underlying state arbitration law specifically allows consolidation, silence in the agreement does not prevent it. *New Eng. Energy, Inc. v. Keystone Ship. Co.*, 855 F.2d 1, 5 (1st Cir. 1988).

The Seventh Circuit applied this reasoning to arbitration, finding “no meaningful basis to distinguish between the failure to provide for consolidated arbitration and class arbitration.”<sup>75</sup> The court’s decision has been echoed by numerous courts facing the issue.<sup>76</sup>

State courts differ on the subject of how to treat the issue of class arbitration. Some have found the federal court analogy to consolidation to be persuasive.<sup>77</sup> New Jersey, Maryland, and South Carolina courts have rejected the federal view and hold that consolidation of arbitration proceedings is appropriate where the agreement is silent.<sup>78</sup> The analogy between consolidation and arbitration may foreshadow how courts in the future will treat the issue of class-action arbitration when faced with the issue.<sup>79</sup>

Several state courts have also refused to compel class arbitration. When weighing the options of arbitration and class action, these courts retain the view that arbitration and class actions are incompatible. In an unpublished opinion, a Delaware Chancery Court barred the plaintiff’s unsupported argument for class arbitration, saying that the “contract provides for arbitration under specific and well-established rules that, insofar as this record shows, do not provide for class arbitration.”<sup>80</sup> Another Delaware court compelled arbitration while recognizing it would be the demise of the class claim.<sup>81</sup> In New York, a supreme court decision compelled arbitration of the named-plaintiffs only, thus breaking up the class action.<sup>82</sup>

In 1998, the Alabama Supreme Court refused to recognize class-wide arbitration based on its duty to follow the parties’ agreement, which did not expressly allow class-arbitration.<sup>83</sup> In another case, the court stated that “[a]rbitration agreements cannot be forced into the mold of class-action treatment without defeating the parties’ contractual rights; a rule of civil procedure providing for class actions cannot overcome binding arbitration agreements.”<sup>84</sup>

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75. *Champ*, 55 F.3d at 275.

76. See *Gammara*, 828 F. Supp. at 674 (finding arbitration and consolidation similar enough to apply class action treatment in the same manner).

77. See *In re Cullman Ventures, Inc.*, 682 N.Y.S.2d 391, 395 (App. Div. 1st Dept. 1998); *In re Salvano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 647 N.E.2d 1298, 1301-02 (N.Y. 1995); *Bateman Constr., Inc. v. Haitzuka Bros., Ltd.*, 889 P.2d 58, 64 (Haw. 1995); *Bay County Bldg. Auth. v. Spence Bros.*, 362 N.W.2d 739, 742 (Mich. App. 1984); *Pueblo of Laguna v. Cillessen & Son, Inc.*, 682 P.2d 197, 199-200 (N.M. 1984); *S.K. Barnes, Inc. v. Valiquette*, 597 P.2d 941, 943-44 (Wash. App. 1979); *Consol. P. Engr. v. Greater Anchorage Area Borough Sch. Dist.*, 563 P.2d 252, 255 (Alaska 1977). However, the Revised UAA now allows consolidation of arbitration proceedings. Unif. Arbitration Act § 10(c) (2000).

78. See *Kalman Floor Co. v. Jos. L. Muscarelle, Inc.*, 481 A.2d 553, 562 (N.J. Super. App. Div. 1984), *aff’d*, 486 A.2d 334 (N.J. 1985); *Litton Bionetics, Inc. v. Glen Constr. Co.*, 437 A.2d 208, 220 (Md. 1981); *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 255 S.E.2d 451, 452 (S.C. 1979).

79. It is important to note that the Revised UAA only prohibits the consolidation of arbitration proceedings when the agreement prohibits consolidation. UAA (2000) § 10(c), 7 U.L.A. 1 (Supp. 2002). As states adopt this revised version, the analogy between the class action and consolidation may change to mirror the revision.

80. *Steinberg v. Prudential-Bache Sec.*, 1986 WL 5024 at \*5 (Del. Ch. Apr. 30, 1986).

81. *Leason v. Merrill Lynch, Pierce, Fenner & Smith*, 1984 WL 8232 at \*3 (Del. Ch. Aug. 23, 1984).

82. *Harris v. Shearson Hayden Stone, Inc.*, 441 N.Y.S. 2d 70, 74-76 (App. Div. 1st Dept. 1981).

83. *Med Center Cars, Inc. v. Smith*, 727 S.2d 9, 20 (Ala. 1998).

84. *Ex parte Green Tree Fin. Corp.*, 723 S.2d 6, 10 n. 3 (Ala. 1998).

A Washington appellate court recently joined this school of thought, finding that an arbitration clause was enforceable even though it prevented the plaintiff from bringing a class action.<sup>85</sup> The court held that “[b]ecause the arbitration clause here is silent on class action and [plaintiff] has failed to demonstrate a conflict with statutory provisions, contract law, or due process requirements, we enforce the clause as written.”<sup>86</sup>

There are a few state courts, however, that take the opposite position. In Pennsylvania and Georgia, class arbitration has been treated by the courts with favor. In *Dickler v. Shearson Lehman Hutton, Inc.*,<sup>87</sup> the Pennsylvania Superior Court allowed class-wide arbitration in an action under the FAA, finding that contract language covering “any controversy” was in accord with the state’s public policy favoring arbitration.<sup>88</sup> In two separate suits in the 1970s, the Georgia Supreme Court certified taxpayer classes that proceeded in arbitration.<sup>89</sup>

In California, the courts have taken a decidedly pro-class action stance. In *Keating v. Super. Ct.*,<sup>90</sup> the California Supreme Court recognized the negative implications for the consumer if barred from a class action suit:

If the right to a 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.<sup>91</sup>

In its decision the court discussed a unique California statute which allows consolidation of separate arbitration proceedings under certain circumstances;<sup>92</sup> drawing an analogy to this statute, it allowed class arbitration.<sup>93</sup> On appeal, the United States Supreme Court reversed the *Keating* court, although its opinion did not address the class arbitration issue.

Although California federal courts have noted the inapplicability of its state court reasoning because of its basis in a California state statute,<sup>94</sup> the California Supreme Court recently reaffirmed its stance on class arbitration in *Blue Cross of Cal. v. Super. Ct.*,<sup>95</sup> concluding that a trial court may order classwide arbitration “when the agreement between the parties is silent and state decisional authority

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85. *Stein v. Geonercio, Inc.*, 17 P.3d 1266, 1271 (Wash. App. Div. 1 2001).

86. *Id.*

87. 596 A.2d 860 (Pa. Super. 1991).

88. *Id.* at 866. The court also considered the fact that the arbitration clause was contained in a form contract. *Id.* at 866-67. This policy to favor arbitration was also set forth by the United States Supreme Court in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

89. *Boynton v. Carswell*, 233 S.E.2d 185 (Ga. 1977); *Callaway v. Carswell*, 242 S.E.2d 103 (Ga. 1978). Although these decisions are almost 25 years old, they still stand in Georgia.

90. 645 P.2d 1192 (Cal. 1982), *rev'd in part on other grounds*, *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

91. *Id.* at 1207.

92. *Id.* at 1208; Cal. Civ. Code § 1281.3 (West 1982).

93. *Id.* at 1209.

94. See *McCarthy*, 1994 WL 387852 at \*\*4-5; *Hyundai Am., Inc. v. Meissner & Wurst GmbH & Co.*, 26 F. Supp. 2d 1217, 1219-20 (N.D. Cal. 1998).

95. 78 Cal. Rptr. 2d 779, 794-95 (App. 1999).

specifically provides for such arbitration.”<sup>96</sup> The court went further to say that the FAA “preempts state law only to the extent it stands as an obstacle to the enforcement of contractual agreements to arbitrate.”<sup>97</sup>

#### IV. INSTANT DECISION

The decision in the present case arose out of a dispute between Green Tree Financial Corporation and two separate classes of consumers bringing claims under the South Carolina Consumer Protection Code.<sup>98</sup> Though each class was separately arbitrated and appealed, the South Carolina Supreme Court found that the issues presented on appeal were sufficiently similar to allow it to assume jurisdiction and consolidate the claims.<sup>99</sup> Green Tree appealed the following issues: 1) whether it waived its ability to object to class-wide arbitration by manifesting consent to the class-wide arbitration; 2) whether the arbitrator and trial court had contractual or legal authority to authorize class-wide arbitration; and 3) if so, whether the due process rights of the absent class members were protected.<sup>100</sup>

##### A. Waiver

The first issue the court addressed was whether Green Tree’s manifestation of consent to class-wide arbitration waived its ability to object to it. The court rejected plaintiffs’ contentions, finding that Green Tree vigorously protested class-wide arbitration in both cases before defending itself on the merits.<sup>101</sup> In *Bazzle*, plaintiffs argued that although Green Tree initially objected to class-wide arbitration before the arbitrator, it subsequently waived its objection by its actions.<sup>102</sup> The Lackey class argued that because Green Tree was aware of the class allegations when it moved to compel arbitration, it consented to allowing the arbitrator to make this decision by moving to compel arbitration without insisting that the trial court decide the class certification issue.<sup>103</sup> The court rejected the plaintiffs’ contentions, saying that although Green Tree’s efforts to decertify were unsuccessful, they sufficiently manifested their objection to class-wide arbitration and did not waive the objection by subsequently defending itself during the arbitrations.<sup>104</sup>

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96. *Id.* at 794.

97. *Id.*

98. S.C. Code Ann. §§ 37-10-102, 37-10-105.

99. *Bazzle*, 569 S.E.2d at 354.

100. *Id.*

101. *Id.* at 355.

102. *Id.* The court cites one example of such “consent.” *Id.* The *Bazzle* class claimed that by moving to decertify the class during the arbitration Green Tree manifested consent for the arbitrator to make the decision. *Id.*

103. *Id.*

104. *Id.*

### B. Class-Wide Arbitration

In its appeal, Green Tree argued that the trial court and arbitrator did not enforce the arbitration clause contained in its contract in accordance with the terms, which violated the Federal Arbitration Act.<sup>105</sup> Finding that the United States Supreme Court had not addressed the issue of class-wide arbitration, the court outlined the two current approaches. The first approach, followed by several federal circuits,<sup>106</sup> is based on FAA Section 4 and precludes class-wide arbitration if the arbitration agreement is silent.<sup>107</sup> The second approach, followed in California state courts, permits class-wide arbitration on a case-by-case basis when the agreement is silent.

The court reviewed the first approach with an examination of the leading case, *Champ v. Siegel Trading Co.*<sup>108</sup> In *Champ*, the Seventh Circuit supported its decision to deny class arbitration by drawing an analogy between class-wide arbitration and consolidation.<sup>109</sup> The court applied the rationale of other circuits applying Section 4 of the FAA in consolidation cases and held that if the arbitration agreement is silent as to class arbitration, class-wide arbitration is not provided for by the terms of the agreement and cannot proceed as such.<sup>110</sup> The court noted that *Champ* failed to discuss the differences between class-wide arbitration and consolidation on a practical level and whether an arbitration clause in an adhesion contract should be afforded the same treatment.<sup>111</sup>

The court then discussed the California Supreme Court's approach to class-wide arbitration when the arbitration clause is included in an adhesion contract.<sup>112</sup> Citing *Southland Corp. v. Keating*,<sup>113</sup> the California Supreme Court spelled out the negative implications of denying class certification in arbitration:

[I]f 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.<sup>114</sup>

The *Bazzle* court noted that *Keating* also drew an analogy between class-wide arbitration and consolidation cases, which at that time was allowed by the Second

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105. *Id.* The parties did not dispute that the FAA applied. *Id.* In *Munoz v. Green Tree Fin. Corp.*, 542 S.E.2d 360 (S.C. 2001), the court had previously held that the arbitration clause in Green Tree's contract was governed by the FAA. The arbitration clause at issue in the *Bazzle* and *Lackey* cases was the same as in *Munoz*. *Bazzle*, 569 S.E.2d at 355 n. 9.

106. *Supra* n. 70.

107. 9 U.S.C. § 4.

108. *Champ*, 55 F.3d at 269.

109. *Id.* at 275.

110. *Id.*

111. *Bazzle*, 569 S.E.2d at 356.

112. *Id.* at 356-57.

113. 645 P.2d 1192 (1982).

114. *Bazzle*, 569 S.E.2d at 357 (quoting *Keating*, *rev'd in part on other grounds* in *Southland Corp. v. Keating*, 465 U.S. 1 (1984)).

Circuit.<sup>115</sup> The *Bazzle* court maintained that although the Second Circuit had reversed itself on the issue of consolidation, the logic in *Keating* still applied since *Keating* also distinguished the differences between class-wide arbitration and consolidation.<sup>116</sup>

The court went on to discuss a more recent decision of the California Court of Appeals, which not only upheld the court's ruling in *Keating*, but also expanded the discussion of the applicability of Section 4 of the FAA to the class-wide arbitration rule.<sup>117</sup> In *Blue Cross v. Super. Ct.*,<sup>118</sup> the court held that Section 4 of the FAA does not apply to state courts at all, reasoning that the language of Section 4 contemplated the issue before a district court applying the Federal Rules of Civil Procedure.<sup>119</sup> *Blue Cross* held that the FAA does not preempt state precedent, since following the state precedent of allowing class-wide arbitration would further the FAA's goal of enforcing arbitration agreements.<sup>120</sup>

### C. *Bazzle* and *Lackey*

The court adopted the California approach.<sup>121</sup> In rejecting Green Tree's argument that its contract language limited arbitration to individuals, the court found that the agreement was silent regarding classwide arbitration.<sup>122</sup> Green Tree's first argument was essentially that their arbitration clause providing for arbitration of "disputes, claims, or controversies arising from *this contract*, or the relationships which result from *this contract*" limited arbitration to individual claims because of the "this contract" language.<sup>123</sup> The court found that the agreement was silent and, at best, this language created an ambiguity to be construed against the drafter.<sup>124</sup>

Green Tree also argued that the court was obligated to follow the federal precedent set forth in *Champ*, as mandated by Section 4 of the FAA.<sup>125</sup> The court disagreed, holding that the Fourth Circuit had cited *Champ* in dicta, but had not directly addressed the issue.<sup>126</sup> Furthermore, without a United States Supreme Court ruling on the issue, precedent set by federal circuit courts was not binding on their decision.<sup>127</sup> The court went on to question whether FAA Section 4 applies in state court at all, basing its uncertainty on Section 4's language that "[a] party aggrieved by the alleged failure . . . of another to arbitrate under a written

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115. *Id.* The Second Circuit has since reversed itself on the issue and now holds that ordering consolidation when the arbitration agreement is silent violates § 4 of the FAA. *Id.*

116. *Id.*

117. *Id.* at 358.

118. 78 Cal. Rptr. 2d 779 (1998).

119. *Id.* at 790-91.

120. *Id.* at 793.

121. *Bazzle*, 569 S.E.2d at 360.

122. *Id.* at 359.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 359. The court found that when the arbitration agreement was silent as to class-wide arbitration, it was within the trial court's discretion to base its decision on independent state grounds. *Id.* at 360.

agreement for arbitration may petition a *United States district court*.<sup>128</sup> As noted in *Blue Cross*,<sup>129</sup> the language contemplates enforcement in a federal district court, not state court.<sup>130</sup>

The court further held that regardless of the FAA's impact, Green Tree's omission of any reference to class actions could be construed against them as a matter of contract interpretation under state law.<sup>131</sup> In drawing the analogy to consolidation of claims, the court also found that to prohibit class-wide arbitration would go against the court's prior holdings, since consolidation of claims had been permitted where appropriate.<sup>132</sup> Finding no South Carolina case law or statute prohibiting class-wide arbitration, and a strong policy in favor of arbitration, the court sided with the California courts in *Keating*<sup>133</sup> and *Blue Cross*,<sup>134</sup> holding that "class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice."<sup>135</sup>

The court then discussed the impact of arbitration in the context of mandatory arbitration. The court reasoned that if it "enforced a mandatory, adhesive arbitration clause, but prohibited class actions in arbitration where the agreement is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so in the agreement."<sup>136</sup> Further, if class-wide arbitration was prohibited, those with "nominal individual claims, but significant collective claims, would be left with no avenue for relief and the drafting party with no check on its abuses of the law."<sup>137</sup>

The court then turned its attention to reviewing the conduct of the arbitrator during the Bazzle and Lackey arbitrations. The court noted that while by South Carolina law a trial court has the discretion to certify a class with the appellate standard of review being abuse of discretion,<sup>138</sup> the permissible scope of review for arbitral decisions is not so broad.<sup>139</sup> On the issue of review of an arbitrator's decision, the United States Supreme Court has held that "if an arbitrator acted even *arguably* within the scope of his authority, even a *serious* error on his part does not warrant overturning his decision."<sup>140</sup> The Fourth Circuit's interpretation of Section 10 of the FAA<sup>141</sup> found that for an arbitrator to exceed his power and

128. *Id.* (quoting 9 U.S.C. § 4 (1999)).

129. *Blue Cross*, 78 Cal. Rptr. 2d at 793.

130. *Id.*

131. *Bazzle*, 569 S.E.2d at 360.

132. *Id.*

133. *Keating*, 645 P.2d at 1208-09.

134. *Blue Cross*, 78 Cal. Rptr. 2d at 793.

135. *Bazzle*, 569 S.E.2d at 360.

136. *Id.*

137. *Id.* at 361.

138. *Id.* (citing *Tilley v. Pacesetter Corp.*, 508 S.E.2d 16 (1998)).

139. *Id.*

140. *Id.* (citing *Major League Baseball Players Assoc. v. Garvey*, 532 U.S. 1015 (2001)).

141. 9 U.S.C. § 10 (2002) provides the grounds for vacating an arbitrator's award. An arbitrator's award may only be overturned where "(1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrators; (3) the arbitrators were guilty of misconduct in refusing to postpone a hearing, or in refusing to hear pertinent evidence, or any other misconduct by which parties' rights have been prejudiced; or (4) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." *Id.*

have his decision overturned, he must act with “manifest disregard for the law.”<sup>142</sup> Based upon the limited basis of review set forth by these courts, the South Carolina Supreme Court upheld the awards in the Bazzle and Lackey suits.<sup>143</sup> The court found that since there was no established law for the arbitrator to follow at the time of the arbitrations, the arbitrator did not act with manifest disregard for the law, and there was no basis for overturning the decisions.<sup>144</sup>

#### D. Due Process Concerns

Green Tree and the Amici argued that the due process rights of the absent class members had been violated by the resolution of the dispute as a class-wide arbitration.<sup>145</sup> The plaintiffs, however, claimed that adequate notice had been given so each class member’s rights were protected.<sup>146</sup> The court did not directly address the issue, finding that the issue had not been raised before and could not be raised for the first time on appeal.<sup>147</sup> Notwithstanding, the court indicated that it could find no evidence that the absent class members’ due process rights had been violated, as it found the notice to be in compliance with the standard set by the United States Supreme Court in *Phillips Petroleum Co. v. Shutts*.<sup>148</sup>

### V. COMMENT

With a split between the federal and state courts, and the addition of South Carolina to the list of states following the minority view,<sup>149</sup> the status of class-action arbitration remains unclear. The absence of a union between the class action and arbitration has proven to present an outcome resulting in a less than desirable result for the consumer, and a strategic avenue for businesses to limit their liability through a material omission that some courts will allow. Thus consumers are left at risk of losing one of the tools available to successfully take on big business.

Class action is a useful tool that consumers can use to seek relief where it would not be practical to do so as an individual.<sup>150</sup> For a group of consumers with small individual claims and limited individual resources, a class action suit may present the best option, and possibly the only feasible option, for recovery from a larger, more sophisticated opponent.<sup>151</sup> By pooling resources and consolidating common claims, not only does it become more practical for the consumers to

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142. *Bazzle*, 569 S.E.2d at 361 (citing *Gallus Investments, L.P. v. Pudgie's Famous Chicken, Ltd.*, 134 F.3d 231 (4th Cir. 1998)).

143. *Id.*

144. *Id.*

145. *Id.* at 362.

146. *Id.*

147. *Id.*

148. 472 U.S. 797 (1985) (holding that descriptive notice sent by first-class mail to each class member with an explanation of the right to opt-out fully satisfied due process).

149. The minority view allows class arbitration when the arbitration agreement is silent.

150. Jerold S. Solovy, Patricia Lee Refo & Ruth A. Bahe-Jachna, *Class Action Controversies*, 499 *PLI/Lit* 7, 40 (1994).

151. Kenneth S. Canfield, *Advantages and Disadvantages of Class Actions from a Plaintiff's Lawyer's Perspective*, 28 *SUM Brief* 58, 61 (Summer 1999).

bring suit, but it also makes it easier for a lawyer to expend the time and effort it takes to bring this type of suit successfully.<sup>152</sup> Defendants, on the other hand, commonly oppose the class action, fearing negative publicity, excessive litigation costs, and sky-high punitive damages.<sup>153</sup> The issue of class certification is a pivotal point in the litigation. For consumers, the claim may not be viable if class certification is denied.<sup>154</sup> On the other hand, a grant of class certification may cause defendants to feel pressured into settling for a substantial sum of money, without regard to the validity of the plaintiffs' claims.<sup>155</sup>

Arbitration is a method of alternative dispute resolution that offers parties a chance to avoid the courtroom, yet solve a dispute in a manner that has a binding effect.<sup>156</sup> It is usually quicker, cheaper, and more private than solving the dispute in the courtroom.<sup>157</sup> In 1925, Congress enacted the Federal Arbitration Act to abrogate the traditional hesitancy by courts to enforce arbitration agreements by making arbitration agreements which fall within its scope specifically enforceable.<sup>158</sup> Since the enactment of the FAA, the United States Supreme Court has reinforced this notion and federal courts have followed its lead.<sup>159</sup> Today, courts routinely enforce arbitration agreements, many times without regard to the manner in which the agreement was reached or the relative bargaining power of the parties.<sup>160</sup>

As a result, businesses have devised a way to use the arbitration clause as a shield from the dangers and pitfalls of a class action.<sup>161</sup> Arbitration clauses have increasingly become the favored way to avoid litigation since the potential for class action litigation is significantly reduced if the consumers have agreed to arbitrate their disputes.<sup>162</sup> This avenue of avoidance becomes even more attractive when a majority of courts interpret the FAA to mean that parties must expressly consent to class-wide arbitration or consolidation before it will be allowed to proceed.<sup>163</sup> Behind closed doors, defendants readily concede that "arbitration can be used to deter the filing of a class action suit, or secure dismissal of a class action that was nonetheless brought."<sup>164</sup>

There is concern by some scholars that this use of arbitration will hurt the consumer. When an arbitration clause is freely negotiated between two parties with equal bargaining power, arbitration can be a very fair and effective way to

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152. *Id.*

153. Kaplinsky, *supra* n. 3, at 25.

154. Canfield, *supra* n. 151, at 60.

155. Sternlight, *supra* n. 2, at 7.

156. Janet M. Grossnickle, *Allied-Bruce Terminix Cos. v. Dobson: How the Federal Arbitration Act Will Keep Consumers and Corporations out of the Courtroom*, 36 B.C. L. Rev. 769, 770 (1995).

157. *Id.*

158. *Am. Centennial Ins. Co. v. Natl. Cas. Co.*, 951 F.2d at 108. See also Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 Ala. L. Rev. 789 (2002).

159. *Dean Witter Reynolds*, 470 U.S. at 221.

160. Sternlight, *supra* n. 2, at 55.

161. Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 Fran. L. J. 141 (Spring 1997).

162. Kaplinsky & Levin, *supra* n. 3, at 25.

163. *Id.*

164. Sternlight, *supra* n. 2, at 9.

minimize costs and expedite resolution of a dispute.<sup>165</sup> However, in the consumer arena, it is often the case that the arbitration clause is presented to the consumer on a take it or leave it basis; it is not freely negotiated nor does the consumer have an opportunity to take issue with any of the provisions.<sup>166</sup> The *Bazzle* court recognized this problem, and refused to allow it:

If we enforced a mandatory, adhesive arbitration clause, but prohibited class actions in arbitration where the agreement is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so in the agreement. Following the federal approach risks such a result where arbitration is mandated through an un-negotiated adhesion contract. Under those circumstances, parties with nominal individual claims, but significant collective claims, would be left with no avenue for relief and the drafting party with no check on its abuses of the law.<sup>167</sup>

The Pennsylvania Superior Court reinforced this sentiment in *Dickler v. Shearson, Lehman, Hutton, Inc.*:

Given the three paths down which this litigation can be directed--compelled individual arbitration, class action in a court of law, or compelled classwide arbitration--the last choice best serves the dual interest of respecting and advancing contractually agreed upon arbitration agreements while allowing individuals who believe they have been wronged to have an economically feasible route to get injunctive relief from large institutions employing adhesion contracts.<sup>168</sup>

It appears as though courts will continue to allow businesses to use the silent treatment as a means to preclude class arbitration. The rule of strict adherence to the language of the arbitration clause does not seem to trouble the majority of courts. But in a concurring opinion to the Seventh Circuit decision in *Champ v. Siegel Trading Co.*,<sup>169</sup> Judge Rovner noted that “[c]lass certification is a matter that parties rarely, if ever, speak to in their contracts, even when they have made other provisions for the resolution of potential disputes.”<sup>170</sup> She further opined that:

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165. Grossnickle, *supra* n. 156, at 770-71.

166. See generally *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282 (9th Cir. 1988) (arbitration clause is not invalid simply because it is part of an adhesion contract.); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (inequality of bargaining power alone will not invalidate an arbitration agreement); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173 (3d Cir.1999) (same). But see *Szetala v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (2002).

167. *Bazzle*, 569 S.E.2d 360-61.

168. *Dickler*, 596 A.2d at 867.

169. 55 F.3d 269 (7th Cir. 1995) (holding that unless the agreement expressly allows for class arbitration the court cannot grant class certification. Judge Rovner concurred with the result, reasoning that Fed. R. Civ. P. 23 applied to judicial proceedings related to arbitration, not to the arbitration itself).

170. *Id.* at 277.

[P]ractically speaking, [it is doubtful that] class certification is something that corporate defendants who draft these agreements for their clients to sign would ever consent to in writing; they typically have far more to gain by forcing the unhappy customer to bear the expense of arbitrating individually.<sup>171</sup>

## VI. CONCLUSION

Consumers hope that *Bazzle* signifies a bold resistance to the federal trend. Although the majority of courts that have faced the issue have interpreted Section 4 of the FAA to mean that in the absence of express language, class-wide arbitration is not allowed,<sup>172</sup> *Bazzle* adds yet another voice to the minority seeking to protect the consumer. In *Bazzle* and *Lackey*, the FAA applied but the court chose to side with the position of the California courts.<sup>173</sup> Not only did the court consider the analogy to consolidation of cases, but the court also looked to the agreement itself, found ambiguity, and applied the well-established contract principle of construing ambiguity against the drafter.<sup>174</sup> This approach may offer other courts a way to reason around barring a class from proceeding in arbitration.

Additionally, as states adopt the Revised Uniform Arbitration Act which only bars consolidation of arbitration proceedings when the agreement prohibits it, perhaps the analogy between consolidation and class certification will reflect this change. Thus, the analogy may be drawn to allow consumers to obtain class certification even if the arbitration agreement does not address it,<sup>175</sup> precluding businesses from silently removing the class action from the consumer's arsenal. For the sake of the consumer class action, let's hope so.

ANDREA LOCKRIDGE

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171. *Id.*

172. *See Champ*, 55 F.3d at 275.

173. *Bazzle*, 569 S.E.2d at 360.

174. *Id.* at 359.

175. *See supra* n. 79.