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No. 59821-0-1

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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LESCHI CORP., a Washington corporation,

Appellant.

v.

THE PIER AT LESCHI CONDOMINIUM OWNERS ASSOCIATION, a  
Washington non-profit corporation,

Respondent

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BRIEF OF RESPONDENT THE PIER AT LESCHI CONDOMINIUM  
OWNERS ASSOCIATION

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ORIGINAL

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## I. ISSUES PERTANING TO ASSIGNMENTS OF ERROR

1. Whether the Association is bound by the arbitration clause contained in the "Home Buyers Limited Warranty" such that common law claims are subject to arbitration when only some of the Association's members assented to arbitration.

2. Whether the arbitration scheme contained in the Limited Warranty is enforceable under Washington's Arbitration Act when the Washington Condominium Act ("Condo Act") was revised at the same time to expressly provide for an unwaivable right to judicial review.

3. Whether the Federal Arbitration Act ("FAA") applies to preempt the Condo Act's right of judicial review, thus compelling the Association to arbitrate its Condo Act claims when the Limited Warranty does not evidence a transaction affecting interstate commerce as already decided by this Court in *Marina Cove Condo. Owners Ass'n v. Isabella Estates*, 109 Wn. App. 230, 236, 34 P.3d 870 (2001) and as recently reaffirmed in *Satomi Owners Ass'n v. Satomi, LLC*, --- Wn. App. ---, 159 P.3d 460 (2007).

4. Whether the Association can be required to participate in binding arbitration pursuant to language contained in the Declaration of Condominium that specifically contradicts the Condo Act's provision for judicial enforcement of Condo Act claims.

## II. STATEMENT OF THE CASE

### A. Background

This appeal arises out of a construction defect lawsuit brought by The Pier at Leschi Condominium Homeowners Association (“Association”). CP 3-10. The Pier at Leschi Condominium (“Condominium”) is a 28-unit conversion condominium complex located in the Leschi neighborhood of Seattle. *Id.*; CP 4, 384. Defendant Leschi Corp. is the Condominium Declarant and developer. CP 344-45. Leschi Corp. also acted as the general contractor for renovations to the Condominium. *Id.*

On March 27, 2006, the Association filed its Complaint for Damages to Condominium (“Complaint”) alleging, among other things, breach of the implied and express warranties of the Washington Condominium Act (Chapter 64.34 RCW), breach of the implied warranty of habitability, and violation of the Consumer Protection Act. CP 3-10. The Association’s Complaint was served upon Leschi Corp. on April 24, 2006. CP 460. Five months later, on September 15, 2006, Leschi Corp. filed an arbitration demand pursuant to the newly enacted arbitration statute for construction defect cases, Chapter 64.55 RCW.

On February 7, 2007, Leschi Corp. filed its motion to enforce binding arbitration under the Limited Warranty, which was denied

following oral argument on March 16, 2007. CP 620-22. Leschi Corp. did not move for reconsideration. The Notice of Appeal was filed on April 9, 2007, after which Leschi Corp. moved this Court for a stay of the trial court matter.<sup>1</sup> The stay was granted and an accelerated briefing schedule was set by this Court's clerk.<sup>2</sup> Thus, the Association will not re-address the arguments regarding the stay contained in Appellant's Opening Brief.

**B. The Limited Warranty is the Contract At Issue.**

As the Condominium Declarant, Leschi Corp. was the seller of all units and thus, the author of the sales transaction documents. CP 26. As the drafter of the documents, Leschi Corp. could have included an arbitration clause in each actual purchase and sale agreement ("PSA") or in the numerous other notices provided to prospective purchasers. Instead, it only included it in a document entitled the "Home Buyer's Limited Warranty" ("Limited Warranty"). See CP 386-98. This Limited Warranty was provided to purchasers as an addendum to the POS. CP 381-98.

Other sales documents merely acknowledge the existence of the arbitration scheme contained in the Limited Warranty. In this respect,

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<sup>1</sup> See *Leschi Corp.'s Motion to Stay Trial Court Proceedings*.

<sup>2</sup> See June 20, 2007 from Court Administrator/Clerk Richard D. Johnson.

Appellant Leschi Corp.'s statement of facts is misleading. The PSA does not contain an arbitration scheme. The first *reference* to an arbitration scheme is that contained in an addendum to the PSA:

15. WARRANTIES. Owner acknowledges and agrees: . . . i. That the *limited warranty* provides an Alternative Dispute Resolution process. . . . 31. MEDIATION/ARBITRATION. All disputes involving Seller, Buyer and/or Owners Association shall be resolved by the mediation/arbitration provisions of the *Limited Warranty* . . . .”

CP 358 (emphasis added). This “Standard Addendum to Condominium” refers explicitly to the fact that the Limited Warranty, not the PSA, provides for alternative dispute resolution. Similarly, Defendant quotes the POS’s *acknowledgement* that the Limited Warranty provides for alternative dispute resolution: “The POS also includes a similar provision requiring arbitration: ‘Buyer acknowledges and agrees: . . . . g. that the *Limited Warranty* provides an Alternate Dispute Resolution Process . . . .”<sup>3</sup> Again, these paragraphs, contained in an addendum to the POS merely acknowledge the existence of the arbitration provision in the Limited Warranty. They do not themselves contain an arbitration provision. Only the Limited Warranty itself, provided to owners not as an addendum to the PSA, but as an exhibit to the POS, contains an actual arbitration clause.

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<sup>3</sup> *Brief of Appellant* (“*Opening Brief*”) at p. 15.

CP 386-398. Ultimately, Appellant appears to concede this point when it mentions the repeated “references” to binding arbitration rather than repeated arbitration clauses.<sup>4</sup>

Throughout its brief, Appellant treats the Limited Warranty as synonymous with the PSA, yet, by its own terms, the Limited Warranty is a stand-alone contract. It states:

A. Separation of This LIMITED WARRANTY  
From the Contract Of Sale.

This LIMITED WARRANTY is separate and independent of the contract between YOU and US for the construction and/or sale of YOUR HOME. The provisions of this Limited Warranty shall in no way be restricted or expanded by anything contained in the construction and/or sales contract between YOU and US.

CP 394. For whatever reason, when the document was drafted, the clear and express intent was that it should be a separate contract and be interpreted as such. This is consistent with the fact that arbitration is only referenced, not repeated, in the other sales documents. Thus, the Limited

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<sup>4</sup> *Opening Brief* at pp. 24-25. The statement appears in the context of Appellants’ argument that because of the repeated references, the arbitration clause is not unconscionable. Appellant also states that no evidence has been provided that the clause is subject to contract defenses (*Opening Brief* at p. 29). While the Association *does* contend that the binding arbitration scheme, contained in an adhesion contract which gives all rights of control to the declarant and none to the Association, is unconscionable and subject to other contract defenses, that issue has not yet been reached and is not a subject of this appeal. Only if the clause is enforceable under the Federal Arbitration Act do the terms of the particular arbitration scheme become relevant. Thus, the Association will not respond to those contentions at this time.

Warranty should not be viewed as an addendum dependent upon the other sales documents, but as a stand-alone contract.

**C. Evidence of Interstate Commerce Presented by Appellant Relates to the Construction or Sale of the Units, Not the Warranty.**

The Condominium was originally operated as an apartment building until Leschi Corp. purchased the building and made some renovations. CP 4, 384, 402, 414. In its Opening Brief, Leschi Corp. details the use of out-of-state materials and companies to renovate the Condominium. For the purposes of this appeal, the Association does not dispute that the renovations conducted by Leschi Corp. *as the general contractor* involved use of building and other materials that, at some point, traveled in interstate commerce. As recently held by this Court in *Satomi*,<sup>5</sup> however, and as detailed below, that is simply insufficient to trigger application of the FAA.

**D. Attorneys' Fees May be Awarded to the Prevailing Party.**

Appellant seeks to force the Association to arbitrate its Condo Act claims in derivation of the Condo Act's provision for judicial review. The Condo Act provides for attorneys' fees to the prevailing party.

If a declarant or any other person subject to this chapter fails to comply with any provision hereof or

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<sup>5</sup> *Satomi*, 159 P.2d 460.

any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The court, in an appropriate case, may award reasonable attorney's fees to the prevailing party.

RCW 64.34.455. Thus, if the Association prevails, the Court may award attorneys' fees to the Association pursuant to the Condo Act's fee provision.

Moreover, the purchase and sale agreements between the original owners and Leschi Corp. contain a prevailing party fee provision, though the Association disputes that this particular appeal is "concerning" the purchase and sale agreements:

Attorneys' Fees. If Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses.

CP 353.

### **III. ARGUMENT**

#### **A. Summary of Argument**

The trial court did not err when it ruled that the Association's claims are not subject to arbitration. First, the Association is not bound by the arbitration clause in the Limited Warranty and therefore, the Association is not required to arbitrate its claims.

Second, the Condo Act's specific provision for a right of judicial review, and the fact that it was revised simultaneously with the adoption

of the Revised Uniform Arbitration Act (“RUAA”) to include a particular type of arbitration comprising Chapter 64.55 RCW, demonstrates its supremacy over the general enforcement of arbitration agreements provided for by the new Arbitration Act.

Third, the FAA does not apply to preempt the Condo Act’s right of judicial review in this case because it is indistinguishable from *Marina Cove*<sup>6</sup> and *Satomi*,<sup>7</sup> on the relevant facts. In those cases, the Court held that the FAA did not apply to because the limited warranties insufficiently evidenced interstate commerce. Thus, the decision of the trial court should be affirmed.

Finally, the reference to arbitration in the Condominium Declaration is void because the Condo Act, which trumps declaration provisions, provides for judicial enforcement of its claims.

**B. Leschi Corp. Has Failed to Demonstrate that the Association is Bound by the terms of the Contract Containing the Arbitration Clause.**

Parties must assent to arbitration. Absent an agreement to arbitrate, the claims brought in this action are subject to judicial review. Thus, Appellant has the burden of demonstrating that the Association has agreed to arbitrate certain claims to compel arbitration under the FAA, the

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<sup>6</sup> *Marina Cove*, 109 Wn. App. 230.

<sup>7</sup> *Satomi*, 159 P.3d 460.

party seeking arbitration “must make a threshold showing that a written agreement to arbitrate exists . . .” *Walters v. A.A.A. Waterproofing, Inc.*, 120 Wn. App. 354, 392, 85 P.3d 389 (Div. 1 2004). This Court in *Satomi* recently held that a homeowners association is bound by an arbitration clause in agreements entered into by *all* of its members. The court reasoned that because all original purchasers agreed and promised to bind subsequent purchasers, and because the warranty automatically inured to the benefit of subsequent purchasers, all members of the Association were bound by the agreement to arbitrate.

The present case is distinguishable from *Satomi* in this respect because the documents here required the first purchasers to obtain *consent* from secondary purchasers for the Limited Warranty and its terms to apply. By its terms, subsequent homeowners at the Condominium must *affirmatively agree* to be bound by the Limited Warranty. CP 398. Absent such agreement, it cannot be said that subsequent homeowners agreed to or are bound by the Limited Warranty or its terms. Leschi Corp. has simply provided no evidence that subsequent owners (current members of the Association) agreed to be bound. Thus, not all current members of the Association agreed to arbitrate. Unless it is established that the owners who did agree to be bound were agents of the Association,

the Association cannot be held to terms of contracts entered into by only some of its members.

Moreover, just because the original owners agreed to bind subsequent owners does not mean that they did so. If the original owners failed to bind subsequent purchasers, then Leschi Corp. may have an action against those purchasers, but its remedy is not to enforce against subsequent purchasers arbitration clauses to which they never agreed.

To the extent that Leschi Corp. interprets *Satomi* to hold that principles of standing determined whether subsequent owners were bound, that interpretation is in error. Just because the Association's *standing* to bring the action was derivative (brought in a "representative capacity")<sup>8</sup>, it cannot mean that the Association is therefore bound by *some* of the members' contracts. Because "the Association stands in the shoes of the individual unit owners,"<sup>9</sup> it is subject to defenses available against the owners. But a contractual agreement to arbitrate is not a defense to any claim; it is a contractual clause that must be analyzed separately from the issue of standing to sue. Here, because there is no evidence that subsequent owners agreed to be bound by the Limited Warranty and its arbitration clause, then many of the current owners have a right to judicial

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<sup>8</sup> *Satomi*, 159 P.3d at 464.

<sup>9</sup> *Id.* at 464.

enforcement of their Condo Act claims absent a contrary agreement to arbitrate. Thus, those owners cannot be compelled to arbitrate. As this Court held in *Powell v. Sphere Drake Ins. P.L.C.*, 97 Wn. App. 890, 898, 988 P.2d 12 (1999), “. . . despite the strong policy in favor of arbitration, parties to a dispute will generally not be compelled to arbitrate unless they have agreed to do so.”

The law of agency – not the law of standing to sue – governs whether the Association is bound to the agreements of *some* of its members. “A person who is not a party to an agreement to arbitrate may be bound to such an agreement only by ordinary principles of contract and agency.” *Powell*, 97 Wn. App. at 892 (citing *Thomson-CSF, S.A. v. Am. Arbitration Ass’n*, 64 F.3d 773, 776 (2d Cir. 1995)); see also *Cariaga v. Local No. 1184 Laborers Int’l Union of N. Am.*, 154 F.3d 1072, 1074 (9<sup>th</sup> Cir. 1998) (“Because arbitration is matter of contract, a party will not be required to submit to arbitration unless that party has agreed to do so.”); *Beach Air Conditioning & Heating Inc. v. Sheet Metal Workers Int’l Ass’n Local 102*, 55 F.3d 474, 476 (9<sup>th</sup> Cir. 1995) (Because arbitration is a matter of contract, a party “cannot be required to submit to arbitration any dispute which he has not agreed to so submit.”)

Absent a contractual agreement to arbitrate, the individual unit owners’ Condo Act claims are subject to judicial review. Thus, where

some of the Association's members never agreed to arbitrate, they are entitled to judicial review. Since the Association represents all its members, it cannot be forced to arbitrate absent proof that it, as a separate entity, agreed to arbitrate. Since such evidence is absent here, the Association cannot be compelled to arbitrate any of its claims and the trial court's decision should be affirmed.

**C. The Condo Act's Right to Judicial Enforcement Trumps Washington's Arbitration Act.**

While not highlighted as an issue pertaining to its assignment of error, Appellant does dedicate one paragraph of its 19-page argument regarding federal preemption to an argument that Washington's adoption of the RUAA somehow requires enforcement of the arbitration scheme contained within the Limited Warranty.<sup>10</sup> This is simply not the case.

The Condo Act has always expressly provided for judicial enforcement of its terms.<sup>11</sup> Effective January 1, 2006, the section providing for judicial enforcement was revised to allow a separate arbitration scheme applicable to its claims.<sup>12</sup> The legislature was careful

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<sup>10</sup> *Opening Brief* at pp. 43-44.

<sup>11</sup> From its original enactment to 2004, RCW 64.34.100(2) read as follows: "Any right or obligation declared by this chapter is enforceable by judicial proceeding." In 2004, the statute was revised to read: "Except as otherwise provided in chapter 64.35, any right or obligation declared by this chapter is enforceable by judicial proceeding." 2004 Wash. Legis. Serv. Ch. 201 (S.S.S.B. 5536). In 2005, the statute was revised to its current state. 2005 Wash. Legis. Serv. Ch. 456 (H.B. 1848).

<sup>12</sup> *Id.*

to ensure, however, that the right to judicial review remained so that not just any arbitration scheme would apply:

Except as otherwise provided in RCW 64.55.100 through 64.55.160 or chapter 64.35 RCW, any right or obligation declared by this chapter is enforceable by judicial proceeding. The arbitration proceedings provided for in RCW 64.55.100 through 64.55.160 shall be considered judicial proceedings for the purposes of this chapter.

RCW 64.34.100(2). As a consumer-protective statute, the Condo Act also provides that its terms may not be contracted away: “Except as expressly provided in this chapter, provisions of this chapter may not be varied by agreement, and rights conferred by this chapter may not be waived.”

RCW 64.34.030.

At the same time, Washington adopted the RUAA, Chapter 7.04A RCW, replacing the Washington Arbitration Act previously found at Chapter 7.04 RCW. No case has yet interpreted the new Arbitration Act when it comes into direct conflict with a more specific statutory right to judicial review, but prior case law is applicable. RCW 7.04’s provision for enforcement of arbitration clauses was held inapplicable where “a more specific statutory enactment on arbitration applies.” *Kruger Clinic Orthopedics, LLC v. Regence Blue Shield*, 157 Wn.2d 290, 304, 138 P.3d 936 (2006) (citing *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 894-95, 16 P.3d 617 (2001)). The *Godfrey* court cited Chapter 7.06 RCW

as “[a]n example of a more specific enactment” because it provides for “mandatory civil arbitration of smaller civil cases (where the arbitrator's award may be tried de novo in superior court).” *Godfrey*, 142 Wn.2d at 894 n. 4.

Similarly, RCW 64.34.100(2) provides a more specific statutory enactment on arbitration under the Condo Act – that the claims are subject either to judicial review or the specific arbitration provisions of Chapter 64.55 RCW. Because RCW 64.34.100 provides a more specific statutory enactment on arbitration under the Condo Act, and because provisions of the Condo Act may not be varied by agreement, the simultaneously enacted Arbitration Act must yield to the Condo Act’s express provision for judicial review or arbitration under RCW 64.55. By its express terms, claims under the Condo Act are still entitled to be enforced by judicial review, notwithstanding the more general arbitration act statute in RCW 7.04A. Thus, under state law, the instant claims are not arbitrable under the RUAA.

**D. The Declarant May Not Compel Arbitration Under the FAA Because the Limited Warranty Containing the Arbitration Clause Does Not Evidence Interstate Commerce.**

The Condo Act, as a consumer-protective law, entitles its beneficiaries to judicial review of its claims.<sup>13</sup> “Despite its strong policy

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<sup>13</sup> RCW 64.34.100(2).

favoring arbitration, the legislature created warranty rights in condominium purchasers and provided an exclusively judicial remedy.”<sup>14</sup> Despite the competing policies favoring arbitration, federal law, in the form of the Federal Arbitration Act (9 U.S.C. § 1 *et seq.*), will apply to enforce arbitration agreements between parties only if there is sufficient evidence of interstate commerce to justify preemption. As Appellant quoted in its Opening Brief, “the statutory right to trial applies to the [WCA] statutory warranties unless the statute is preempted by the FAA.”<sup>15</sup> In other words, if the FAA does not apply, the Association cannot be compelled to arbitrate because the Condo Act provides for judicial enforcement of its terms.<sup>16</sup> Appellant has the burden of demonstrating that the FAA applies.

**1. The FAA Only Applies Where the Contract Containing the Arbitration Clause Evidences Interstate Commerce.**

Here, Appellant Leschi Corp. cannot compel the Association to arbitrate its Condo Act claims against it because the FAA only operates to compel arbitration where the contract containing the arbitration clause affects interstate commerce. As in *Marina Cove* and *Satomi*, the Limited Warranty does not affect interstate commerce either specifically or in the aggregate. In fact, this case is in all relevant aspects identical to

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<sup>14</sup> *Satomi*, 159 P.3d at 468-69.

<sup>15</sup> *Opening Brief* at p. 27 (citing *Satomi*, 159 P.3d at 467).

<sup>16</sup> The express provision for judicial enforcement in the Condo Act also clearly trumps the equitable claim of judicial economy made by Appellants. *See Opening Brief* at pp. 26-27.

*Marina Cove* and *Satomi* and therefore, the same result – affirmation of the trial court decision denying arbitration – is warranted.

To compel arbitration under the FAA, Leschi Corp. “must make a threshold showing that a written agreement to arbitrate exists and that the *contract at issue* involves interstate commerce.” *Walters*, 120 Wn. App. at 392 (emphasis added). This can only be done by analyzing the terms of the contract, which are central to this inquiry. *Id.*

Here, the “contract at issue” containing the arbitration clause is the Limited Warranty itself. As described above, Leschi Corp. erroneously claims that the PSA and POS contain an arbitration clause and therefore, anyone who signed the PSA is bound to arbitrate. This is not the case. In fact, the portions cited by Leschi Corp. and attributed to the PSA are, in fact, from the “Standard Addendum to Condominium,” which refers explicitly to the fact that the limited warranty, *not the PSA*, provides for alternative dispute resolution. Similarly, Defendant quotes the POS’s *acknowledgement* that the Limited Warranty provides for alternative dispute resolution. These paragraphs merely acknowledge the existence of the arbitration provision in the Limited Warranty. They are not themselves arbitration provision. Appellants attempt to treat the Limited Warranty as synonymous with the PSA is contradicted by the express terms of the Limited Warranty, which provides for “Separation of This LIMITED WARRANTY From the Contract of Sale.”<sup>17</sup> It further states:

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<sup>17</sup> CP 386-98.

This LIMITED WARRANTY is separate and independent of the contract between YOU and US for the construction and/or sale of YOUR HOME.”<sup>18</sup>

Thus, Defendant must prove that the specific Limited Warranty contract, not Leschi Corp’s general business, construction of the Condominium, or the sales transaction involves interstate commerce. This Court clarified the distinction in *Satomi*:

Where the issue is federal regulation of the business itself – for example, enforcement of the rights of employees to nondiscriminatory and healthy workplaces – the “transaction” involves the internal operation of the business, and its use of materials shipped in interstate commerce is enough to characterize that business as affecting commerce for the purposes of the FAA. Where the issue is a private dispute, however, the analysis must identify the transaction involving interstate commerce.

*Satomi*, 159 P.3d at 468.

The present case, in every relevant aspect, is identical to *Marina Cove* and *Satomi*. In those cases, the court ruled that the arbitration clause contained in the warranty addendum was not enforceable under the FAA because the warranty addendum did not affect interstate commerce.<sup>19</sup> Here, as in *Marina Cove* and *Satomi*, the contract at issue is a limited

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<sup>18</sup> *Id.*

<sup>19</sup> *Marina Cove*, 109 Wn. App. at 244; *Satomi*, 159 P.3d at 469.

warranty provided to condominium purchasers among a series of documents relating to the purchase of a Washington condominium.

While the Court of Appeals determined it needed to “revisit” the *Marina Cove* analysis because of its reliance on the now obsolete “substantially affecting interstate commerce” test,<sup>20</sup> the Court ultimately reached the same conclusion as in *Marina Cove*, applying the more liberal “involving interstate commerce” test enumerated in *Citizen’s Bank v. Alafabco*, 539 U.S. 52, 58, 123 S.Ct. 2037, 126 L.Ed.2d 46 (2003). On practically identical relevant facts as these here, the Court in *Marina Cove* stated:

The contract at issue is a limited warranty offered by a Washington corporation on condominium units located within the state, whose owners all reside in Washington. The only connection to other states involves one buyer, who moved to Washington from another state, and another buyer, who transferred funds from an out-of-state bank account for use as a down payment on one unit purchased. That negligible contact with other states does not constitute a substantial effect on interstate commerce. The FAA does not apply.<sup>21</sup>

As here, the contract at issue is a limited warranty provided as part of a Washington condominium sales transaction. The Court continued:

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<sup>20</sup> *Satomi*, 159 P.3d at 464.

<sup>21</sup> *Marina Cove*, at 243-44.

[T]he Texas Court of Appeals held that a contract between an out-of-state property owner and a Texas contractor to perform repair work on an apartment complex located in Texas was not a transaction substantially affecting interstate commerce and therefore the FAA did not apply. Similarly here, the Marina Cove Condominiums were constructed, marketed and sold solely within the state of Washington.<sup>22</sup>

Even if the holding in *Marina Cove* is completely ignored, this Court essentially affirmed its holding using the more liberal “affects interstate commerce” standard. In *Satomi*, this Court held that the warranty addendum in that case did not evidence interstate commerce for purposes of the FAA for multiple reasons:

First, the transaction represented by the contracts here was a garden variety Washington real estate deal. It involved a Washington Company and Washington residents. No national marketing occurred, no interstate media were used, no out-of-state architects or contractors were involved.<sup>23</sup>

There is simply no relevant evidence in the record to suggest that the transaction here was more unique than the transactions in *Marina Cove* or *Satomi*. In fact, this Court continued review of the *Satomi* appeal in that case after the parties settled at least in part because the exact issues were likely to recur.<sup>24</sup> In its Petition for Review to the Supreme Court, attached as Appendix 4 to Appellant’s Brief, counsel for Declarant Satomi, LLC

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<sup>22</sup> *Id.* at 243-44

<sup>23</sup> *Satomi*, 159 P.3d at 467.

<sup>24</sup> *Id.* at n. 50.

reiterated this Court's holding in *Satomi* that the issues in that appeal were likely to recur and relied upon that as a basis for Supreme Court review.<sup>25</sup> In *Satomi*, Declarants' counsel argued that a decision would, in general, "clarify the issue of whether arbitration clauses in condominium sales contracts are enforceable under the FAA in Washington."<sup>26</sup> Put bluntly, condominium sales transactions in Washington are the same from project project, much of what is required being dictated by statute. The Limited Warranty or ale here is no more unique than the ones in *Marina Cove* and *Satomi*.

The contract at issue here, the Limited Warranty, was provided as part of a condominium sale transaction just as in *Satomi* and *Marina Cove*. Despite *Satomi*'s clear edict that "[t]he origin of the materials is irrelevant to the warranty,"<sup>27</sup> Appellant Leschi Corp. goes to great lengths to describe the multi-state origin of materials incorporated into the condominium. These facts, while not disputed for purposes of this appeal, are completely irrelevant. As the *Satomi* court noted:

While the use of goods shipped in interstate commerce may subject a business to substantive federal regulation, a private contract that is entirely local in subject matter, substantive law, and parties does not acquire an interstate character simply

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<sup>25</sup> *Opening Brief*, Appendix 4, p. 4.

<sup>26</sup> *Id.* at p. 7.

<sup>27</sup> *Satomi*, 159 P.3d at 468.

because a refrigerator or a brick was manufactured in another state. The condominium owners purchased real property, not building materials, goods or services.<sup>28</sup>

In the present case, the real estate purchased is arguably even more local, since the purchasers bought condominiums that had previously existed for years as apartments, and only recently renovated and sold as condominiums. As in other condominium construction defect cases, the Declarant, Leschi Corp., contracted with the original purchasers to convey a fully constructed piece of real property located in Washington state. Leschi Corp. did not sell construction services or individual components. Thus, even if the contract in question were the individual purchase and sale agreements, those agreements do not involve interstate commerce. Therefore, the FAA cannot apply.

**2. The Involvement of Interstate Commerce in the Limited Warranty Here Is Indistinguishable from That in *Marina Cove* and *Satomi*.**

Appellant Leschi Corp. also attempts to distinguish the Limited Warranty in this case from that in *Satomi* by arguing that the sales transactions here were somehow unique, involving one or two out-of-state purchasers, some out-of-state lending and minor federal regulation. But these facts do not distinguish the Limited Warranty transaction from that in *Marina Cove* or *Satomi*, in which the court held that the involvement of

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<sup>28</sup> *Id.* at 468.

interstate commerce was clearly insufficient. First, as detailed above, it is the Limited Warranty that is at issue, not the entire sales transaction.

Second, the fact that a small minority of the buyers at the Condominium may have purchased a unit from another state or used an FHA loan<sup>29</sup> is insufficient to convert the sales of all units into transactions sufficiently involving interstate commerce for the FAA to apply. As the court held in *Marina Cove*, such contact with other states is “negligible”<sup>30</sup> because the court must look at the totality of the contacts with interstate commerce. Notably, two out-of-state cases cited by Appellant in which the court held that the sale was subject to the FAA involved one, not 28 sales.<sup>31</sup> Thus, the court in that case focused on whether that one sale sufficiently evidenced interstate commerce.<sup>32</sup> Here, even if the Court looks at the broad sales transactions as the contracts at issue rather than focusing upon the Limited Warranty itself, the focus must be on whether the totality of the transactions sufficiently evidence interstate commerce or whether the contact is, as *Marina Cove* held, “negligible.”

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<sup>29</sup> As Appellant admits, there is no evidence that any FHA loan was used by purchasers at the Pier. See *Opening Brief* at p. 34. Nor can the court rely upon Appellant’s assumptions that out-of-state purchasers traveled to Washington to view the condo units purchased for investment reasons (*id.* at p. 39) or that they accepted rents via interstate transfer (*id.* at p. 11).

<sup>30</sup> *Marina Cove*, 109 Wn. App. at 243-44.

<sup>31</sup> See *AmSouth Bank v. Dees*, 847 S.2d 923, 936 (Ala. 2002); *Rainwater v. National Home Ins. Co.*, 944 F.2d 190 (4<sup>th</sup> Cir. 1991).

<sup>32</sup> *Id.*

Other extra-jurisdictional cases cited by Appellant in which the court held that the contracts evidenced interstate commerce are distinguishable based upon the contract analyzed. *See, e.g., AmSouth Bank v. Dees*, 847 S.2d 923, 936 (Ala. 2002) (financing contract between mortgagor and out-of-state mortgagee was the contract at issue, funds borrowed were substantial and multiple out-of-state entities were involved in the transaction); *Hedges v. Carrigan*, 117 Cal.App.4<sup>th</sup> 578, 11 Cal.Rptr. 3d 787 (2004) (arbitration agreement was contained within actual purchase and sale agreement, joint escrow instructions and in the deposit receipt, subjecting each contract to review for sufficient interstate contacts).

Neither does the fact that real estate sales are governed in part by federal housing regulations distinguish this case from *Marina Cove* or *Satomi* or making it a “general practice subject to federal control” where the transactions in *Marina Cove* and *Satomi* were not. In fact, all real estate transactions are governed by federal law in the respects referenced by Appellant, which primarily relate to real estate financing. In this case, real estate financing is so removed from the contract containing the arbitration clause – the Limited Warranty – that it cannot be considered. The Limited Warranty does not “evidence interstate commerce” because of federal regulation on financing when financing is one more step removed from the purchase and sale agreements, which is two steps

removed from the Limited Warranty (through the POS and the PSA). Thus, federal regulation of real estate financing does not cloak the Limited Warranty with sufficient evidence of interstate commerce to allow the FAA to apply.

The extent and purpose of the Limited Warranty here is identical to that in *Marina Cove* and *Satomi* and the sales transactions are the same “garden variety Washington real estate deal[s].” Thus, the trial court’s decision upholding judicial review of the Condo Act claims should be affirmed.

Finally, Appellant argues that the mere fact that it contracted with a third party based in Virginia to administer the Limited Warranty converts an otherwise completely local agreement into one sufficiently involving interstate commerce. But PWC’s actual involvement with the process is exaggerated by Leschi Corp. PWC is not a party to the Limited Warranty, nor was it issued by PWC. To the contrary, under the Limited Warranty, the obligations and responsibilities run between Leschi Corp. and those unit owners who are subject to it. The Limited Warranty makes that clear:

WE [Leschi Corp.] have contracted with PWC [Professional Warranty Service Corporation] for certain administrative services relative to this LIMITED WARRANTY. PWC’s sole responsibility is to provide administrative services.

Under no circumstances or conditions is PWC responsible for fulfilling OUR obligations under this LIMITED WARRANTY.<sup>33</sup>

Under the Limited Warranty, Leschi Corp. receives the notice of any claims, has the duty to respond and perform repairs, and bears the ultimate liability.<sup>34</sup> PWC's limited administrative service is only triggered if Leschi Corp. fails to adequately respond and mediation and arbitration becomes necessary. Even then, PWC is only a coordinator of the arbitration. Thus, it can hardly be said that PWC issued the warranty or that its minimal administrative role impacts interstate commerce.

Notably, Appellant has not alleged that PWC has administered or processed even one claim on behalf of the homeowners at the Condominium. In fact, PWC's services with respect to arbitration are largely illusory because the arbitration provision in the Limited Warranty cannot be enforced under Washington law. Thus, it can hardly be said that the administration of an unenforceable arbitration provision rises to the level of involving interstate commerce. PWC's minor role simply cannot convert what would otherwise be a completely local agreement providing warranties between Washington parties into one affecting interstate commerce to the extent that the FAA applies.

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<sup>33</sup> CP 388.

<sup>34</sup> *Id.*

Here, the Limited Warranty relates solely to agreements regarding warranties on 28 Washington homes. The parties to the agreement are the seller (Declarant, Leschi Corp., a Washington corporation formed solely for the purpose of renovating Washington apartment buildings and selling them as condos) and purchasers buying condominium units within the state of Washington. The Limited Warranty is part of a specific agreement pertaining to express warranties as authorized by RCW 64.34.443. While interstate commerce may have been involved with Leschi Corp.'s contracts with others, interstate commerce was not involved in the contract at issue between the Leschi Corp. and the unit purchasers.

The *Satomi* court did not rely solely upon mere examination of the specific language of the limited warranties, but found that the overall transaction for the sale of a condominium was uniquely governed by state law. “Real property has historically been the law of each state. The sale of property including the requirements for and interpretation of purchase agreements, is entirely governed by state law.”<sup>35</sup> *Id.* In this respect, the present case is indistinguishable from *Satomi*. The fact that Leschi Corp as the general contractor (not the seller of condominiums) contracted with

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<sup>35</sup> *Satomi*, 159 P.3d at 467.

subcontractors with some ties to interstate commerce, or that one buyer faxed documents from out of state, does not change this analysis at all.

The *Satomi* court also pointed to the fact that the warranties claimed “arise entirely from state law,” distinguishing *Citizen’s Bank*<sup>36</sup> and *Allied Bruce*<sup>37</sup> based upon the subject matter of the contracts at issue. Here, too, the warranties claimed arise entirely from the Washington Condo Act. Thus, the warranty agreements are not the type of contract that, in general, affect interstate commerce.

### **3. The Limited Warranty Does Not Generally Affect Interstate Commerce in the Aggregate.**

Finally, the Limited Warranty agreement is not enforceable under the FAA because its subject matter is not generally subject to federal control. Arbitration can be compelled under the FAA if the subject matter of the relevant contract generally affects interstate commerce. *See Service Corp. Int’l v. Fulmer*, 883 So.2d 621, 629 (Ala. 2003). In the seminal Supreme Court FAA case, *Citizen’s Bank v. Alafabco*,<sup>38</sup> an appeal from the Alabama Supreme Court, the Court held that a dispute arising out of a debt-restructuring contract containing an arbitration clause was arbitrable under the FAA because the subject of the contract in dispute – debt

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<sup>36</sup> *Citizen’s Bank v. Alafabco*, 539 U.S. 52, 123 S.Ct. 2037, 126 L.Ed.2d 46 (2003).

<sup>37</sup> *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834, 130 L. Ed. 2d 753 (1995).

<sup>38</sup> *Citizen’s Bank v. Alafabco*, 539 U.S. 52, 123 S.Ct. 2037, 126 L.Ed.2d 46 (2003).

restructuring – was “in the aggregate” an economic activity subject to federal control.<sup>39</sup> The Court further held that the subject matter of the contract must bear on interstate commerce in a “substantial way.”<sup>40</sup> This analysis was affirmed by this Court in *Satomi*.<sup>41</sup> In support of its finding that the debt-restructuring agreement affected interstate commerce, the Court cited Alafabco’s business and obtainment of loans throughout the southeastern United States, the fact that the debt-restructuring agreement was secured by out-of-state inventory, and finally, the “magnitude of the impact on interstate commerce caused by the particular economic transactions in which the parties were engaged . . .”<sup>42</sup>

As this court held in *Marina Cove* and affirmed in *Satomi*, a limited warranty provided as part of a condominium sales transaction simply does not share the same attributes as the massive debt-restructuring agreement in *Citizen’s Bank*.<sup>43</sup> In so doing, this Court fully acknowledged that the “involving commerce” language of the FAA means the “full limit of the Congress’ Commerce Clause power.”<sup>44</sup> Still, the court focused upon the contract containing the arbitration clause to properly determine

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<sup>39</sup> *Id.* at 57.

<sup>40</sup> *Id.*

<sup>41</sup> *Satomi*, 159 P.3d at 465, n. 22.

<sup>42</sup> *Citizen’s Bank*, 539 U.S. at 57-58.

<sup>43</sup> *Id.*

<sup>44</sup> *Marina Cove*, 109 Wn. App. at 244.

that the agreement did not, and does not, affect interstate commerce. The Limited Warranty here, as in *Marina Cove*, simply does not rise to the level of an economic activity subject to federal control, the magnitude of which substantially affects interstate commerce.

The *Satomi* court reaffirmed this aspect of *Marina Cove* when it found that the warranty addendum in that case did not affect interstate commerce in the aggregate: “[T]hese transactions have none of the earmarks of an economic activity that in the aggregate would represent a general practice subject to federal control.”<sup>45</sup> The court explained further:

[T]he giving of the warranty is not a transaction involving commerce, because in the aggregate or otherwise, it does not represent a general practice subject to federal control. Whether the condominium declarant violated the warranty is not a dispute involving interstate commerce.<sup>46</sup>

This Court correctly held in both *Marina Cove* and *Satomi*, that condominium sales warranty addendums are not generally subject to federal control and therefore, the FAA does not apply. The same goes for the Limited Warranty here. Thus, the trial court should be affirmed.

In the present case, the Court should reach the same conclusion reached in *Marina Cove* and *Satomi* because the contract at issue is of the same type: a limited warranty regarding Washington real estate sold by a Washington builder in Washington. The terms of all three agreements

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<sup>45</sup> *Satomi*, 159 P.3d at 467-68.

<sup>46</sup> *Id.*

purport to limit Declarant's liability under the Washington Condominium Act and to provide unit purchasers with warranties in lieu of that Act. As decided in *Marina Cove*, and affirmed in *Satomi*, these agreements simply do not involve interstate commerce. Thus, this Court has already ruled that under such circumstances, interstate commerce is not implicated and arbitration cannot be compelled under the FAA. Given the holdings in *Marina Cove* and *Satomi*, the court should affirm the trial court's decision denying arbitration.

**E. The Provision in Pier at Leschi's Condominium Declaration Requiring Binding Arbitration in Derivation of the Condo Act's Right to Judicial Review is Void.**

Leschi Corp. argues that the Association can be required to participate in binding arbitration pursuant to language contained in the Condominium Declaration ("Declaration") that specifically contradicts the Condo Act's provision for judicial enforcement of Condo Act claims.

First, a condominium declaration is not a "contract" between parties that would subject it to FAA control. The declaration is recorded by the land owner, the "declarant," and is the document that actually creates the condominium by subjecting the land to the condominium form of ownership. RCW 64.34.020(15); *See also* 18 Wash. Prac. Series § 12.4, The Declaration. There are no parties to a declaration like there would be to a contract. As an ethereal form of real property ownership,

the condominium requires a comprehensive allocation of rights and responsibilities regarding the use and management of the property. The declaration of covenants, conditions, and restrictions is the document that provides that structure. Its provisions run with the land and as such, a declaration is an equitable servitude, not a contract. *See* 18 Wash. Prac. Series §12.3, Essential Features; 18 Wash. Prac. Series § 12.4, The Declaration. While the Condo Act dictates some of the contents of the Declaration,<sup>47</sup> those terms are not exclusive, as the declaration may contain “any other matters the declarant deems appropriate.”<sup>48</sup> Thus, counsel for the drafters of a declaration are free to include any other language or terms, but that does not mean that such terms are automatically legal or enforceable. That is why the Condo Act is careful to proscribe that its minimum protections are not waivable.<sup>49</sup> Moreover, the Condo Act also specifically provides for supremacy of the Act over provisions of a declaration.<sup>50</sup> When the declaration or any other agreement is in conflict with these provisions, the statute prevails.

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<sup>47</sup> RCW 64.34.216.

<sup>48</sup> RCW 64.34.216(3).

<sup>49</sup> RCW 64.34.030.

<sup>50</sup> RCW 64.34.208(3) provides: “In the event of a conflict between the provisions of the declarations and the bylaws, the declaration prevails except to the extent the declaration is inconsistent with this chapter.”

The arbitration provision contained in the Pier at Leschi Condominium Declaration is just the type of additional term<sup>51</sup> that is void under Washington law because it conflicts with the Condo Act's right to judicial review. RCW 64.34.100(3) provides:

Except as otherwise provided in RCW 64.55.100 through 64.55.160 or Chapter 64.35 RCW, any right or obligation declared by this chapter is enforceable by judicial proceeding. The arbitration proceedings provided for in RCW 64.55.100 through 64.55.160 shall be considered judicial proceedings for the purposes of this chapter.

The foregoing language makes it clear that the Association's claims under the Condo Act are enforceable by judicial proceedings rather than through the arbitration provisions relied upon by Leschi Corp.<sup>52</sup> Thus, the contrary language in the Declaration is void and unenforceable. This is exactly

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<sup>51</sup> Appellant cites RCW 64.34.216(1)(n) relating to restrictions on the "use, occupancy, or alienation of units" as the authority for its inclusion of binding arbitration provisions in the Declaration. The citation does not support the argument. Arbitration of claims relating to construction quality is simply not a restriction on the use, occupancy or alienation *of units*.

<sup>52</sup> While the arbitration provision relied upon by Leschi Corp is invalid because it is not a "judicial proceeding" as that term is defined in RCW 64.34.100, there is one type of arbitration that is specifically allowed - arbitration under RCW 64.55.100 through .160. Public policy does favor arbitration, but the Washington State Legislature has made it clear that the only type of arbitration that is favored for condominium construction defect claims is that provided for under RCW 64.55. The Association does not dispute that RCW 64.55 applies to the Association's claims or that Leschi Corp. had the right to demand arbitration under RCW 64.55.100(1). Presumably, Leschi Corp.'s decision to enforce arbitration through the FAA rather than relying upon its arbitration right under RCW 64.55 is an attempt to bypass, among other things, the requirement that Leschi Corp. pay all of the arbitrator's and mediator's fees. RCW 64.55.140(2). Leschi Corp. is attempting to have its cake and eat it, too - they want to compel arbitration, but not be saddled with the requirements specifically imposed by the Washington Legislature for arbitration of condominium construction claims.

why developer declarants have resorted to dependence upon the Federal Arbitration Act to enforce sales documents with unit owners—because the only relief in this situation is federal preemption. However, such preemption is only available where interstate commerce is sufficiently evidenced by the Limited Warranty. In this case, as in the two previous condominium construction defect cases brought before this Court, there is insufficient interstate commerce involved to implicate the FAA. Thus, the trial court’s decision should be affirmed.

**F. The Association Should Be Awarded its Reasonable Attorneys’ Fees and Costs for Defending This Appeal.**

The Court of Appeals is authorized to award statutory attorneys’ fees and reasonable expenses incurred to a substantially prevailing party. RAP 14.2 and 18.1 together allow the award of fees where authorized by statute or other rule. Here, The Condo Act provides for attorneys’ fees to the prevailing party.<sup>53</sup> Thus, if the Association prevails, the Court may award attorneys’ fees to the Association pursuant to the Condo Act’s fee provision.

Moreover, the purchase and sale agreements between the original owners and Leschi Corp. each contain a prevailing party fee provision,

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<sup>53</sup> RCW 64.34.455.

though the Association disputes that this particular appeal is “concerning” the purchase and sale agreements:

Attorneys’ Fees. If Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys’ fees and expenses.

CP 353, ¶ q.

Pursuant to either source, if the Association prevails on appeal, it should be awarded its reasonable attorneys’ fees and costs for defending this appeal. An award of fees is especially warranted where, as here, the Court has so recently addressed the exact issues presented upon petition of similar parties in order to resolve an issue likely to recur in *Satomi*, and previously in *Marina Cove*. Such an award is appropriate to discourage additional appeals on the same facts as presented in those cases.

An award of fees and costs is also appropriate where Appellant could have taken advantage of the arbitration scheme in RCW 64.55, which was specifically enacted to apply to these types of cases. Instead, Leschi Corp. attempted to bypass that legislative enactment, in preference of the one-sided binding arbitration scheme provided in the Limited Warranty. The legislature certainly did not anticipate that its work in drafting RCW 64.55 could so easily be preempted on the facts stated here and in *Marina Cove* and *Satomi*.

#### IV. CONCLUSION

This is not a case where arbitration is unavailable to Appellant. This is a case where Leschi Corp. is trying to bypass the Washington State Legislature's express intent that condominium construction defect claims be arbitrated under RCW 64.55. The contracts at issue are the Limited Warranties that were allegedly entered into with each original purchaser. Those contracts do not impact interstate commerce and, even if they did, the Association was never a party to the contracts nor did the Association agree to the arbitration provision. The arbitration scheme that Appellant seeks to enforce is not enforceable under the Condo Act, nor under the new Arbitration Act. Nor does federal law preempt the Condo Act because the contract at issue – the Limited Warranty – does not sufficiently impact interstate commerce to justify application of the FAA. Thus, the trial court did not err when it ruled, consistent with *Marina Cove*, and as recently affirmed in *Satomi*, that the Association's claims are not subject to binding arbitration.

For all of the above reasons, the Association respectfully requests that this Court affirm the trial court's order quashing Appellant/Declarant's demand for arbitration.

Respectfully submitted this 31<sup>st</sup> day of August, 2007

BARKER • MARTIN, P. S.

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*For* 

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**C**AmSouth Bank v. Dees  
Ala., 2002.

Supreme Court of Alabama.

AmSOUTH BANK

v.

Leffie Terrell DEES III and Yvette Dees.

1010361.

Oct. 4, 2002.

Mortgagors under home equity line of credit brought action against home equity mortgagee for breach of contract, breach of fiduciary duty, unjust enrichment, fraud, suppression, deceit, negligence, wantonness, and conspiracy, alleging wrongful handling of first-position mortgage loan. The Circuit Court, Mobile County, No. CV-01-2260, James C. Wood, J., denied mortgagee's motion to compel arbitration. Mortgagee appealed. The Supreme Court, Harwood, J., held that: (1) mortgagors were bringing an action "arising out of, in connection with, or relating to" the line of credit, within meaning of arbitration provision of line of credit agreement; (2) the action concerned a transaction with a substantial effect on interstate commerce, as element under Federal Arbitration Act (FAA) for enforcing contractual arbitration clause; (3) arbitration clause was enforceable against mortgagor who did not sign the line of credit agreement; and (4) arbitration clause was not unconscionable.

Reversed and remanded.

See, J., concurred in the result.

Moore, C.J., dissented.

Johnstone, J., filed a dissenting opinion.

West Headnotes  
[1] T  213(1)

25T Alternative Dispute Resolution

25TII Arbitration

25TII(D) Performance, Breach, Enforcement,  
and Contest25Tk204 Remedies and Proceedings for  
Enforcement in General

25Tk213 Review

25Tk213(1) k. In General. Most

Cited Cases

(Formerly 33k23.20 Arbitration)

An appeal is the appropriate method for challenging a trial court's denial of a motion to compel arbitration.

[2] T  213(5)

25T Alternative Dispute Resolution

25TII Arbitration

25TII(D) Performance, Breach, Enforcement,  
and Contest25Tk204 Remedies and Proceedings for  
Enforcement in General

25Tk213 Review

25Tk213(5) k. Scope and Standards  
of Review. Most Cited Cases

(Formerly 33k23.25 Arbitration)

Appellate review of a trial court's refusal to compel arbitration is de novo.

[3] T  117

25T Alternative Dispute Resolution

25TII Arbitration

25TII(A) Nature and Form of Proceeding

25Tk117 k. Preemption. Most Cited Cases

(Formerly 33k2.2 Arbitration)

States 360  18.15

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.15 k. Particular Cases, Preemption  
or Supersession. Most Cited Cases

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Federal Arbitration Act (FAA), which provides for the general validity of contractual arbitration clauses, preempts conflicting Alabama law, including the Alabama statute providing that an agreement to submit a controversy to arbitration cannot be specifically enforced. 9 U.S.C.A. § 2; Code 1975, § 8-1-41(3).

## [4] T ↪ 210

25T Alternative Dispute Resolution

25TII Arbitration

25TII(D) Performance, Breach, Enforcement, and Contest

~~25Tk204 Remedies and Proceedings for~~  
Enforcement in General

25Tk210 k. Evidence. Most Cited

Cases

(Formerly 33k23.10 Arbitration)

The party moving to compel arbitration has the burden of proving that the contract in question evidences a transaction substantially affecting interstate commerce, as element for enforcement of an arbitration clause under the Federal Arbitration Act (FAA). 9 U.S.C.A. § 2.

## [5] T ↪ 143

25T Alternative Dispute Resolution

25TII Arbitration

25TII(B) Agreements to Arbitrate

25Tk142 Disputes and Matters Arbitrable Under Agreement

25Tk143 k. In General. Most Cited

Cases

(Formerly 33k7.5 Arbitration)

"Arising out of," within meaning of contractual arbitration clause referring to disputes or controversies arising out of an agreement, is not intended to cover matters or claims independent of, or collateral to, the contract.

## [6] T ↪ 143

25T Alternative Dispute Resolution

25TII Arbitration

25TII(B) Agreements to Arbitrate

25Tk142 Disputes and Matters Arbitrable Under Agreement

25Tk143 k. In General. Most Cited

Cases

(Formerly 33k7.5 Arbitration)

For purposes of determining whether a dispute arises out of, arises in connection with, or relates to a transaction governed by a contractual arbitration clause, so that the dispute is subject to arbitration, if the dispute has been articulated in a complaint filed to initiate a lawsuit, that statement by the plaintiffs of their claim or claims is essentially determinative.

## [7] T ↪ 143

25T Alternative Dispute Resolution

25TII Arbitration

25TII(B) Agreements to Arbitrate

25Tk142 Disputes and Matters Arbitrable Under Agreement

25Tk143 k. In General. Most Cited

Cases

(Formerly 33k7.5 Arbitration)

Mortgagors' action against mortgagee of home equity line of credit, alleging wrongful handling of first-priority mortgage loan, was an action "arising out of, in connection with, or relating to" the line of credit, within meaning of arbitration provision of line of credit agreement, and, thus, mortgagors' claims for breach of contract, breach of fiduciary duty, unjust enrichment, fraud, suppression, deceit, negligence, wantonness, and conspiracy, relating to handling of first-position mortgage loan, were subject to arbitration; mortgagors alleged that mortgagee purchased the first-position mortgage loan and then wrongfully added the cost of purchasing that mortgage loan to the line of credit indebtedness, which carried a higher interest rate than the first-position mortgage loan.

## [8] Commerce 83 ↪ 80.5

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(I) Civil Remedies

83k80.5 k. Arbitration. Most Cited Cases

Mortgagors' action against mortgagee of home equity line of credit, alleging wrongful handling of first-priority mortgage loan, involved a transaction with substantial effect on interstate commerce, as

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(Cite as: 847 So.2d 923)

element under Federal Arbitration Act (FAA) for enforcing contractual arbitration clause; former holder of first-position mortgage, from whom home equity lender purchased the first mortgage before adding the purchase price to line of credit indebtedness, was out-of-state entity, out-of-state entities issued credit report, property insurance, title insurance, flood data certification, and equity-line account statements, funds moved across state lines, and the loan amount under the line of credit was substantial. 9 U.S.C.A. § 2.

[9] Commerce 83 ⚡80.5

83 Commerce  
83II Application to Particular Subjects and Methods of Regulation

83II(I) Civil Remedies

83k80.5 k. Arbitration. Most Cited Cases

Factors to be considered in determining whether a transaction has had a substantial effect on interstate commerce, as element under Federal Arbitration Act (FAA) for enforcing a contractual arbitration clause, are: (1) citizenship of parties and any affiliation parties have with out-of-state entities; (2) tools and equipment used in performance of contract; (3) allocation of contract price to cost of services and materials involved in performance of contract; (4) subsequent movement of object of contract across state lines; and (5) degree to which contract at issue was separable from other contracts subject to FAA. 9 U.S.C.A. § 2.

[10] Commerce 83 ⚡80.5

83 Commerce  
83II Application to Particular Subjects and Methods of Regulation

83II(I) Civil Remedies

83k80.5 k. Arbitration. Most Cited Cases

Citizenship of parties gave some support to finding that the disputed transaction had substantial effect on interstate commerce, as element under Federal Arbitration Act (FAA) for enforcing contractual arbitration clause; mortgagors under home equity line of credit brought action against home equity lender and former holder of first-position mortgage, relating to home equity lender's purchase of first-position mortgage loan and home equity

lender's conduct in adding the purchase price to the line of credit indebtedness, and former holder of first mortgage was out-of-state entity, though such holder, unlike home equity lender, ultimately dismissed its appeal of trial court's denial of motions to compel arbitration. 9 U.S.C.A. § 2.

[11] Commerce 83 ⚡80.5

83 Commerce  
83II Application to Particular Subjects and Methods of Regulation

83II(I) Civil Remedies

83k80.5 k. Arbitration. Most Cited Cases

The "tools and equipment" factor and the "allocation of cost of services and materials" factor provided strong support for finding that the disputed transaction had substantial effect on interstate commerce, as element under Federal Arbitration Act (FAA) for enforcing contractual arbitration clause; mortgagors under home equity line of credit brought action against home equity lender and former holder of first-position mortgage, relating to home equity lender's purchase of first-position mortgage loan and home equity lender's conduct in adding the purchase price to the line of credit indebtedness, out-of-state entities issued credit report, property insurance, title insurance, flood data certification, and equity-line account statements, and former holder of first-position mortgage was out-of-state entity. 9 U.S.C.A. § 2.

[12] Commerce 83 ⚡80.5

83 Commerce  
83II Application to Particular Subjects and Methods of Regulation

83II(I) Civil Remedies

83k80.5 k. Arbitration. Most Cited Cases

Movement of funds across state lines weighed in favor of finding the disputed transaction had substantial effect on interstate commerce, as element under Federal Arbitration Act (FAA) for enforcing contractual arbitration clause; mortgagors under home equity line of credit brought action against home equity lender and former holder of first-position mortgage, relating to home equity lender's purchase of first-position mortgage loan

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and home equity lender's conduct in adding the purchase price to the line of credit indebtedness, the line of credit, which started at \$15,000 and later extended to \$72,352.20, involved a substantial loan, and former holder of first mortgage was out-of-state entity. 9 U.S.C.A. § 2.

[13] Commerce 83 ⇨80.5

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(I) Civil Remedies

83k80.5 k. Arbitration. Most Cited Cases

Degree of separability from other contracts gave some support to finding that the disputed transaction had substantial effect on interstate commerce, as element under Federal Arbitration Act (FAA) for enforcing contractual arbitration clause; mortgagors under home equity line of credit brought action against home equity lender and former holder of first-position mortgage, relating to home equity lender's purchase of first-position mortgage loan and home equity lender's conduct in adding the purchase price to the line of credit indebtedness, and out-of-state entities issued credit report, property insurance, title insurance, flood data certification, and equity-line account statements. 9 U.S.C.A. § 2.

[14] T ⇨141

25T Alternative Dispute Resolution

25TII Arbitration

25TII(B) Agreements to Arbitrate

25Tk141 k. Persons Affected or Bound.

Most Cited Cases

(Formerly 33k7.3 Arbitration)

Home equity mortgagor who, unlike her spouse, did not sign the line of credit agreement was nevertheless subject to the agreement's arbitration clause; nonsignatory mortgagor asserted claim for breach of contract relating to home equity lender's conduct in purchasing first-position mortgage loan and adding the purchase price to the line of credit indebtedness, and nonsignatory mortgagor could not claim third-party beneficiary status but avoid the contract's arbitration provision.

[15] Appeal and Error 30 ⇨854(1)

30. Appeal and Error.

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k851 Theory and Grounds of Decision of Lower Court

30k854 Reasons for Decision

30k854(1) k. In General. Most

Cited Cases

The appellate court will affirm the trial court if its ruling is correct on any valid ground or rationale, even one rejected or not considered by the trial court.

[16] T ⇨135

25T Alternative Dispute Resolution

25TII Arbitration

25TII(B) Agreements to Arbitrate

25Tk135 k. Modification or Termination. Most Cited Cases

(Formerly 33k6.5 Arbitration)

The conduct of home equity lender, in purchasing the first-position mortgage loan and adding the purchase price to the line of credit indebtedness, did not create a "new" contract without an arbitration clause, which would supplant the home equity line of credit agreement containing an arbitration clause, and, thus, the arbitration clause was enforceable, as to mortgagors' claims that home equity lender wrongfully handled the first mortgage.

[17] Contracts 95 ⇨1

95 Contracts

95I Requisites and Validity

95I(A) Nature and Essentials in General

95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases

Unconscionability is a contract defense that does not apply to actions taken outside the ambit of a contract. Code 1975, § 5-19-16.

[18] Contracts 95 ⇨328(1)

95 Contracts

95VI Actions for Breach

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## 95k328 Defenses

95k328(1) k. In General. Most Cited Cases  
Unconscionability is an affirmative defense, and the party asserting the defense bears the burden of proof. Code 1975, § 5-19-16.  
West CodenotesRecognized as PreemptedCode 1975, § 8-1-41.

\*926 Edward A. Dean and Mary Carol Ladd of Armbrecht Jackson, LLP, Mobile, for appellant.  
James Lynn Perry of Daniell, Upton, Perry & Morris, P.C., Mobile, for appellees.HARWOOD, Justice.

## I. Procedural History

On June 26, 2001, Leffie Terrell Dees III and Yvette Dees sued AmSouth Bank and Countrywide Home Loans, Inc., asserting claims of breach of contract, breach of fiduciary duty, unjust enrichment, fraud, suppression, deceit, negligence, wantonness, and conspiracy, allegedly arising from the wrongful handling of a mortgage loan. On August 23, 2001, AmSouth filed a motion to compel arbitration of the Deeses' claims on the basis that \*927 two agreements between it and them—a “Customer Agreement for Depository Account,” associated with a checking account the Deeses opened on June 11, 1992, and a April 16, 1996, “AmSouth Equity Line of Credit Agreement” —contained arbitration clauses applicable to the dispute.<sup>FN1</sup> On September 10, 2001, the Deeses filed their “Response and Objection to Defendant, AmSouth Bank’s Motion to Compel Arbitration and Defendant, Countrywide Home Loans, Inc.’s Joinder In Same and Motion to Strike” (hereinafter referred to as the “response”).<sup>FN2</sup> On October 12, 2001, the trial court heard oral argument on AmSouth’s motion to compel arbitration and, at the conclusion of the hearing, denied it both orally and by a terse entry on the case action summary stating “October 12, 2001-DENIED.”<sup>FN3</sup> On October 17, 2001, the court entered an order on the case action summary stating that Countrywide’s joinder in seeking to compel arbitration was likewise denied. On November 9, 2001, AmSouth filed a notice of appeal from the denial of its motion.<sup>FN4</sup> We reverse the order denying AmSouth’s motion to compel arbitration and remand the cause.

FN1. Because of our disposition of this case, we do not address AmSouth’s argument relating to the arbitration clause appearing in the Customer Agreement for Depository Account.

FN2. Sometime before September 10, 2001, Countrywide apparently had filed a “Joinder” in AmSouth’s Motion to Compel Arbitration. This is further indicated by the fact that on October 10, 2001, Countrywide also filed a “Joinder” in AmSouth’s brief, stating that it was doing so “in further support of its previously filed Joinder in AmSouth’s Motion to Compel Arbitration.” Nonetheless, the record does not contain a copy of Countrywide’s joinder in AmSouth’s motion to compel arbitration.

FN3. In its brief to this Court, AmSouth states that the hearing related to both its motion and that of Countrywide. The Deeses state in their brief that the hearing related only to AmSouth’s motion. No transcript of the hearing appears in the record and nothing in the record references the scope of the hearing.

FN4. On November 26, 2001, Countrywide filed a notice of appeal; it subsequently filed a motion to dismiss that appeal, which was granted on February 5, 2002.

## II. Factual History

On February 4, 1994, the Deeses mortgaged their home to AmSouth Mortgage Company, Inc., to secure a 20-year loan in the amount of \$55,090 (that mortgage is hereinafter referred to as “the first mortgage”). AmSouth Mortgage is not a party to this action. The mortgage documents provided for an annual interest rate of 7%. Neither the mortgage nor the underlying promissory note contained an arbitration clause. On October 31, 1994, AmSouth Mortgage assigned the mortgage to Countrywide.

On April 16, 1996, Mr. Dees entered into an “

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AmSouth Equity Line of Credit Agreement" (hereinafter referred to as the "credit agreement") in connection with obtaining a \$15,000 line of credit.

Although Mrs. Dees did not sign the credit agreement, she did sign a contemporaneously executed document captioned "Opening an AmSouth Equity Line of Credit Account"; that document identified her as an "account holder." The document stated in its introduction that "[AmSouth has] agreed to establish an open-end account for you ...," and went on to explain her right to cancel the account upon taking certain steps. In describing this particular transaction in their complaint, the Deeses state the following: "On April 16, 1996, the Plaintiffs took out a home equity line of credit with AmSouth. Plaintiffs borrowed money on this line of credit." (Emphasis supplied.) The Deeses were given "special checks" to use to obtain advances from the \*928 line of credit. The credit agreement stated, in pertinent part:

"Section 2: How AmSouth Equity Line of Credit Checking Works. We will give you a supply of Special Checks. You authorize us to use the signatures on this Agreement in order to identify the signatures on your Special Checks. You may use a Special Check from time to time to obtain an Advance under your Account. A Special Check drawn on your account is a loan from us to you from the time it is posted to your Account, and you will owe us for the amount of the Special Check plus the applicable periodic finance charge.... We will be obligated to make Advances to you to pay Special Checks that comply with the terms of this Agreement up to the amount of your credit limit unless one of the events of default described in Section 20 of this Agreement has occurred."

Section 33 of the credit agreement contains an arbitration clause, which states, in pertinent part: "Section 33: Arbitration. [A]ny controversy, claim, dispute, or disagreement arising out of, in connection with, or relating to this Agreement or your Loan shall be settled by arbitration in accordance with the then-current applicable Rules of the American Arbitration Association.... You and we specifically acknowledge and agree that this Agreement evidences, and your Loan is, a 'transaction involving commerce' under the Federal

Arbitration Act, and you and we hereby waive and relinquish any right to claim otherwise."

The line of credit was secured by a second mortgage of the same date on the Deeses' home, signed by both Mr. and Mrs. Dees. The mortgage document did not contain an arbitration clause. The annual interest rate of the line of credit was 1.5% above prime, which, at the time the agreement was executed, translated to an annual interest rate of 9.75%.

Mr. Dees subsequently requested an increase in the line-of-credit limit, and on June 10, 1997, he and Mrs. Dees signed an "Amendment to Adjustable-Rate Line of Credit Mortgage" (hereinafter referred to as the "amended second mortgage"). AmSouth increased the line of credit from \$15,000 to \$20,000. Subsequently, as the Deeses state in their complaint, "[b]y March 2001, .. the Deeses had fallen behind on the Equity Line." On March 13, 2001, AmSouth purchased the Deeses' first mortgage from Countrywide and increased the amount owing under the Deeses' line of credit to \$72,352.20. This amount reflected the addition of \$51,210.74 that AmSouth had paid Countrywide for the assignment of the first mortgage. AmSouth proceeded to charge the Deeses interest based on the higher interest rate applicable to the line of credit, instead of the 7% interest rate of the first mortgage. AmSouth did not seek the approval of the Deeses for that course of action.

### III. Standard of Review

The issue in this case is whether the trial court erred in denying AmSouth's motion to compel arbitration of the Deeses' claims.

[1][2] Our standard of review of the denial of a motion to compel arbitration is settled:

"Our caselaw holds that an appeal is the appropriate method for challenging a trial court's denial of a motion to compel arbitration. See *A.G. Edwards & Sons, Inc. v. Clark*, 558 So.2d 358, 360 (Ala.1990). This Court's review of a trial court's refusal to compel arbitration is *de novo*. See *Ex parte*

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*Warrior Basin Gas Co.*, 512 So.2d 1364, 1368 (Ala.1987)."

\*929 *Crimson Indus., Inc. v. Kirkland*, 736 So.2d 597, 600 (Ala.1999).

#### IV. Requirement of Effect on Interstate Commerce

[3] Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

"A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Section 2 preempts conflicting Alabama law, including in particular Ala.Code 1975, § 8-1-41(3), which states that "[a]n agreement to submit a controversy to arbitration" cannot be specifically enforced.

[4] However, the FAA applies to render enforceable a predispute arbitration agreement only if the contract containing the agreement, or the transaction the contract evidences, "substantially affects interstate commerce." *Sisters of the Visitation v. Cochran Plastering Co.*, 775 So.2d 759, 766 (Ala.2000); accord *Equifirst Corp. v. Ware*, 808 So.2d 1, 4 (Ala.2001). The party moving to compel arbitration has the burden of proving that the contract in question evidences a transaction substantially affecting interstate commerce. *Chesser v. AmSouth Bank*, 846 So.2d 1082 (Ala.2002). Undertaking to carry that burden, AmSouth supported its motion with affidavits from four of its officers: a vice president serving as manager of its equity loan center; a senior vice president serving as wholesale funding manager; a senior vice president serving as manager of electronic banking; and a senior vice president serving as manager of deposit operations. Collectively, those affidavits set forth the following information concerning the effects of the equity-line-of-credit transaction on interstate commerce: FN5

FN5. Information in the affidavits relating solely to the effect on commerce of the Customer Agreement for Depository Account is omitted. See note 1. Although the information presented here is compiled from four affidavits, it is presented sequentially.

"[1.] In connection with its decision on Mr. Dees's application for the Equity Line of Credit, AmSouth obtained a credit bureau report from Equifax, Inc. ('Equifax'). On information and belief, Equifax is a Georgia corporation with its principal place of business in Atlanta, Georgia.

"[2.] For AmSouth to approve the application for the Equity Line of Credit and the credit limit increase on same, AmSouth required proof that the residential real property pledged as security for the loan was insured. Proof of insurance was attached to the original Application and the Application for the Credit Limit Increase, indicating that the real property securing the loan was insured by State Farm Fire and Casualty Company. On information and belief, State Farm is an Illinois corporation with its principal place of business in Bloomington, Illinois.

"[3.] AmSouth purchased a title insurance policy in connection with the Equity Line of Credit Agreement and the Adjustable Rate Line of Credit Mortgage. This title insurance policy was issued by Commonwealth Land Title Insurance Company. On information and belief, Commonwealth is a Pennsylvania corporation with its principal place of business in Philadelphia, Pennsylvania. [The copy of the policy attached as an exhibit to the affidavit in question states that Commonwealth is 'a Pennsylvania corporation.']

\*930 "[4.] In connection with the Dees Equity Line of Credit, AmSouth obtained a flood data certification with respect to the real property securing the loan. This flood data certification was provided by First American Flood Data Services, Inc. On information and belief, First American is a Texas corporation with its principal place of business in Austin, Texas. [The copy of the flood-data certification attached as an exhibit to the affidavit in question lists the address of First American as '11902 Burnet Road, Austin, Texas 78758.']

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"[5.] A substantial portion of the accounting and billing functions for the Dees Equity Line of Credit Account are performed by Total System Services, Inc. ('TSYS'). On information and belief, TSYS is a Georgia corporation with its principal place of business in Columbus, Georgia. The statements for the Dees Equity Line Account are printed and mailed by TSYS in Columbus, Georgia. The computer hardware and software used by TSYS to perform accounting and billing functions for the Dees and other equity line accounts are physically located in Columbus, Georgia.

"[6.] The existence of a prior mortgage(s) and the remaining principal balance on same are important factors in AmSouth's decision regarding whether to loan money to a customer on an equity line of credit. At the time of the application for the Equity Line of Credit, Countrywide was the owner of the First Mortgage on the Dees residence. On information and belief, Countrywide is a New York corporation with its principal place of business in Calabasas, California. Countrywide also has offices in the State of Texas. On his application for the Equity Line of Credit, Mr. Dees listed Countrywide as the owner of the First Mortgage on his house, and gave an address for Countrywide in the State of Texas. [In the 'Assignment of Mortgage' whereby AmSouth Mortgage transferred the first mortgage to Countrywide, the mailing address for Countrywide is stated as '400 Countrywide Way, Simi Valley, Ca. 93065-6298.' In a counterclaim Countrywide filed against the Deeses it identified itself as 'a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business located in California.']

"[7.] AmSouth's equity line of credit portfolio (the 'Equity Lines Portfolio') is composed of the equity lines of credit made available by AmSouth to individual borrowers. The Equity Line of Credit made available by AmSouth to Leffie T. Dees, account number [account number omitted], is included in the Equity Lines Portfolio.

"[8.] The Equity Lines Portfolio is funded in part by retail deposits made at AmSouth branches in all states where AmSouth branches are located. AmSouth has branches in Alabama, Florida, Georgia, Louisiana, Mississippi and Tennessee.

"[9.] The Equity Lines Portfolio is funded in part by

wholesale borrowings by AmSouth. AmSouth makes wholesale borrowings from a number of sources outside the State of Alabama, including, for example, the Federal Home Loan Bank of Atlanta, Georgia ('FHLB of Atlanta').

"[10.] AmSouth periodically pledges portions of the Equity Lines Portfolio to the FHLB of Atlanta as security for wholesale borrowings made by AmSouth from the FHLB of Atlanta. The Dees Equity Line of Credit is among the loans that AmSouth has pledged to the FHLB of Atlanta.

\*931 "[11.] With respect to many types of accounts, AmSouth offers its customers the ability to perform banking transactions electronically. AmSouth customers must apply to use electronic banking.

AmSouth uses one system to process all electronic banking transactions on its customer accounts. AmSouth's electronic banking system may be accessed by telephone, through the Internet, or through a PC Banking dial-up service. Each of these methods requires the use of telephone lines to transmit data. When the PC Banking dial-up service is used, the customer accesses the system using a personal computer and modem to dial a 1-800 telephone number provided by AmSouth.

"[12.] On at least four occasions in the past two years, [preceding September 19, 2001] electronic banking transactions were performed in connection with the Dees Home Equity Line of Credit, Account Number [account number omitted]. For each of these transactions, the customer accessed the AmSouth electronic banking system using PC Banking (i.e., via a personal computer and modem). The customer used telephone lines to perform these transactions.

"[13.] Electronic banking transactions posted to the Dees Home Equity Line Account on September 24, 1999, March 2, 2000, and May 8, 2000. Each of these three transactions represents a withdrawal of funds from the Dees Equity Line Account, and a transfer of those funds to AmSouth checking account number [account number omitted], which checking account is owned by [Mr.] Dees.

"[14.] On May 8, 2002, a fourth electronic banking transaction posted to the Dees Home Equity Line of Credit account ... which was a payment in the amount of \$500.00. This payment to the Dees Home Equity Line of Credit account was made by an electronic transfer of funds from AmSouth

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checking account number [account number omitted], which checking account is owned by [Mr. and Mrs.] Dees and Virginia B. Secrest.”

The Deeses did not object to, or move to strike, any of these assertions, and they did not offer any evidentiary submissions of their own.

*V. The Scope of the Arbitration Clause in the Credit Agreement: Identifying “the Controversy” and “the Transactions.”*

Pursuant to the express language of Section 2 of the Agreement, only a controversy that arises out of the transaction in question can be forced to arbitration.

The Deeses state in their brief that “it is nonsensical to contend that [their] present claims arise out of, are in connection with, or relate to the Equity Line,” i.e., the credit agreement and the transaction it evidenced. The Deeses argue that the “Equity Line was just the vehicle used by AmSouth to wrongfully change the terms of the Dees/AmSouth First Mortgage.” They cite *Koullas v. Ramsey*, 683 So.2d 415, 417 (Ala.1996), for the proposition that “this Court will not stretch the language of a contract to apply to matters that were not contemplated by the parties when they entered the contract.” They then assert that they “could not have contemplated in their wildest dreams the March 2001 manner in which AmSouth would use the Equity Line by increasing the Equity Line principal by \$51,210.74 to purchase the [Deeses] First mortgage from Countrywide.” In *Koullas* the arbitration clause extended only to “disputes between the parties arising under this Agreement,” 683 So.2d at 417 (emphasis omitted); this court \*932 explained the effect of that limitation as follows:

“Where, as here, an arbitration clause refers to disputes or controversies ‘arising under’ an agreement, the clause will apply only to those claims arising under the terms of the agreement, and it will not extend to matters or claims independent of, or merely collateral to, the agreement. *Old Republic Ins. Co. v. Lanier*, 644 So.2d 1258 (Ala.1994). We agree that, in order for a dispute to be characterized as arising out of or relating to the subject matter of the contract, and thus subject to arbitration, it must at the very least raise some issue

that cannot be resolved without a reference to or construction of the contract itself. *Dusold v. Porta-John Corp.*, 167 Ariz. 358, 807 P.2d 526 (Ct.App.1990); *Terminix Int’l Co., L.P. v. Michaels*, 668 So.2d 1013 (Fla.Dist.Ct.App.1996); *Greenwood v. Sherfield*, 895 S.W.2d 169 (Mo.App.1995). If there is no such connection between the claim and the contract, then the claim could not reasonably have been intended to be subject to arbitration within the meaning of a clause that required arbitration only for claims ‘arising out of or related to’ the contract. *Dusold*.”

683 So.2d at 417-18.

Because in *Koullas* this Court was called upon to construe only the phrase “arising under this [a]greement,” observations made in that opinion concerning the construction to be accorded to the different phrase “arising out of or relating to” an agreement were technically dictum. Certainly our caselaw on point as to that latter phrase has distinguished it from the former and has assigned to *Koullas* its proper role as commenting on only the former. For example, in *Ex parte Cupps*, 782 So.2d 772 (Ala.2000), this Court stated in a footnote:

“After making this statement [the statement being the passage from *Koullas* set out above except for its last sentence], the Court in *Koullas* continued: ‘If there is no such connection between the claim and the contract, then the claim could not reasonably have been intended to be subject to arbitration within the meaning of a clause that required arbitration only for claims “arising out of or related to” the contract.’ 683 So.2d at 418.

This particular statement, however, is dictum in that the arbitration clause in that case did not include the language ‘arising out of or related to.’ Thus, while it would appear from this sentence that the term ‘arising out of or related to’ receives the same construction as ‘arising from’ and ‘arising under,’ our cases clearly treat these two classes of terms differently. See *Reynolds & Reynolds Co. [v. King Autos., Inc.]*, 689 So.2d [1] at 2-3 [ (Ala.1996) ].”

782 So.2d at 776-77 n. 1. See also *Birmingham News Co. v. Lynch*, 797 So.2d 440, 444-45 (Ala.2001), summarizing the holding in *Koullas* as

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being that an "arbitration clause referring to disputes or controversies 'arising under' an agreement applies only to those claims arising under the terms of the agreement, and does not extend to matters or claims independent of, or merely collateral to, the agreement."

Subsequent to *Koullas* this Court has also pointed out that

"it is often observed that the words 'relating to' in the arbitration context are given a broad construction. See *Beaver Constr. Co. v. Lakehouse, L.L.C.*, 742 So.2d 159, 165 (Ala.1999); *Reynolds & Reynolds Co. v. King Autos., Inc.*, 689 So.2d 1 (Ala.1996); *Old Republic Ins. Co. v. Lanier*, 644 So.2d 1258 (Ala.1994)."

\*933 *Karl Storz Endoscopy-America, Inc. v. Integrated Med. Sys., Inc.*, 808 So.2d 999, 1013 (Ala.2001). "This Court has held ... that the phrase 'any controversy or claim arising out of or relating to' in arbitration agreements covers a broad range of disputes."

*Vann v. First Community Credit Corp.*, 834 So.2d 751, 754 (Ala.2002). See also *Beaver Constr. Co. v. Lakehouse, L.L.C.*, 742 So.2d 159, 165 (Ala.1999) (" 'relating-to' language has been held to constitute a relatively broad arbitration provision" ).

[5] Likewise, in *Bama's Best Housing, Inc. v. Hodges*, 847 So.2d 300, 303 (Ala.2002), we observed:

"[W]e have held that where a contract signed by the parties contains a valid arbitration clause that applies to claims 'arising out of or relating to' the contract, that clause has a broader application than an arbitration clause that refers only to claims ' arising from' the agreement. See *Reynolds & Reynolds Co. v. King Autos., Inc.*, 689 So.2d 1, 2 (Ala.1996)(citing *Old Republic Ins. Co. v. Lanier*, 644 So.2d 1258 (Ala.1994))."

(Emphasis omitted.) "The 'arising out of' language was not intended to cover matters or claims independent of, or collateral to, the contract." *American Bankers Life Assurance Co. v. Rice Acceptance Co.*, 709 So.2d 1188, 1191 (Ala.1998)

(a three-Justice opinion, with two Justices concurring specially in such a way as to endorse this proposition). See also *Ex parte Discount Foods, Inc.*, 789 So.2d 842, 845 (Ala.2001), and *Ex parte Crisona*, 743 So.2d 452, 456 (Ala.1999).

In *Ex parte Messer*, 797 So.2d 1079, 1082-83 (Ala.2001), we made the following observations about the proper interplay between state-law principles of contract interpretation and federal substantive arbitration law:

" 'When deciding whether the parties agreed to arbitrate a certain matter ..., courts generally ... should apply ordinary state-law principles that govern the formation of contracts. *First Option of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). In applying general Alabama rules of contract interpretation to the language of an arbitration agreement subject to the FAA, this Court must, in accordance with the federal substantive law on arbitration, resolve any ambiguities as to the scope of the arbitration agreement in favor of arbitration. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (Section 2 of the FAA 'create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act ' and 'establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration'). The FAA 'simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms,' and ' parties are generally free to structure their arbitration agreements as they see fit.' *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478-79, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). Accordingly, 'as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability.' "

797 So.2d at 1082.

Where the parties have entered into a single written contract and a dispute thereafter develops between them directly arising out of that contract, the requirement in § 2 of the FAA that there be "a

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controversy thereafter arising out of such contract” \*934 is easily determined to have been satisfied. Likewise, the analysis is fairly straightforward as to the alternative provided by § 2 of “a controversy thereafter arising out of such ... transaction” when the contours of the “transaction evidenced by the contract” are distinct and the dispute that develops can confidently be said to arise out of it.

Where, however, the parties have entered into a succession of contractual dealings, extending over the course of several years and involving various “subtransactions,” identifying the “controversy” (or, to use the phrase in the arbitration clause at issue, the “controversy, claim, dispute, or disagreement”) and determining which, if any, of the contracts it arises out of (or, to use the phrase in the arbitration clause at issue, “arises out of, in connection with, or relates to”), can become problematic. Analyzing the connection and relationship between the subsequently arising controversy and the various earlier contracts and transactions requires first a determination of the nature of the controversy. (Hereinafter we may alternatively substitute “dispute” or “claim” for the FAA’s term “controversy,” given that the parties here use those first two terms in phrasing their arguments.)

[6][7] Identification of the “transaction,” against the backdrop of a series of contracts and dealings, becomes a function of identification of the dispute. Until one knows what the dispute is, one does not have a frame of reference for analyzing the relationship, if any, between it and the parties’ prior transactions and dealings. Where, as here, the dispute has been articulated in a complaint filed to initiate a lawsuit, that statement by the plaintiffs of their claim or claims is essentially determinative, absent an amendment of the complaint or other types of formal submissions altering the statement of the claim or claims. Thus, in the litigation context, the plaintiffs have the opportunity, in the first instance, to define the dispute. They may pursue or forgo available claims as they see fit and select the factual underpinnings they deem pertinent to aver. In this case, the Deeses elected to include within the introductory factual averments of their complaint the following:

“6. On April 16, 1996, the [Deeses] took out a

home equity line of credit with AmSouth. [The Deeses] borrowed money on this line of credit....

“7. After repurchasing the [Deeses]’ mortgage from Countrywide on March 13, 2001, AmSouth rolled the mortgage into the [Deeses]’ equity line of credit. Interest was charged at the higher interest rates and [the Deeses] were charged additional fees and expenses for this transaction.

“....  
“10. Thereafter, on or about June 1, 2001 [the Deeses] received a billing statement on his equity line of credit with AmSouth reflecting two payments of \$51,210.74 leaving his account with a credit of \$29,125.76....”

The Deeses then proceeded to state their claims arising out of those facts in the following counts, which included the following numbered paragraph averments:II. Unlawful Conduct Alleged

“11. As a result of the unlawful conduct of [AmSouth and Countrywide] alleged hereinabove, [the Deeses] have been billed fees, expenses and interest they should not have to pay. The [Deeses]’ credit is also being affected by [AmSouth and Countrywide’s] wrongful conduct.”

III. Breach of Contract

“13. Defendant AmSouth breached its contract with [the Deeses] by wrongfully combining [the Deeses]’ \*935 mortgage loan into his equity line of credit thereby resulting in a higher interest rate and by wrongfully and unlawfully charging fees and expenses to the [Deeses] to complete the transaction. Defendant Countrywide breached its contract with [the Deeses] by charging late fees, late payments and other charges on their mortgage after it sold the mortgage to AmSouth.”

IV. Breach of Fiduciary Duty

“15. Defendant AmSouth breached the fiduciary duty it owed to the [Deeses] by wrongfully combining [the Deeses]’ mortgage loan into their equity line of credit thereby resulting in a higher interest rate and by wrongfully and unlawfully charging fees and expenses to the [Deeses] to complete this transaction. Defendant Countrywide breached the fiduciary duty it owed the [Deeses] by charging late fees, late payments, and other charges on their mortgage after it sold the mortgage to AmSouth.”

V. Unjust Enrichment

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"17. It would be unfair and unjust for [AmSouth and Contrywide] to retain the monies wrongfully collected by them and same should be repaid to the [Deeses]."

#### VI. Fraud/Suppression/Deceit

"20. [AmSouth and Countrywide] conspired without the knowledge, permission and/or consent of the [Deeses] to sell the [Deeses'] loan with AmSouth to Countrywide Home Loans and then instead of charging the [Deeses'] mortgage payments to said mortgage, combined the amount of the mortgage into the [Deeses'] existing line of credit, charged an increased interest rate as well as additional fees and expenses. AmSouth wrongfully suppressed these material facts from the [Deeses] at all times being under an obligation to communicate these material facts to the [Deeses]. The Defendant, AmSouth, concealed these material facts from the [Deeses] with the intent of deceiving and/or misleading the [Deeses]. Thereafter when the [Deeses] discovered this fraud, [AmSouth and Countrywide] sought to undo what they had done and Countrywide apparently purchased the loan back from AmSouth and began billing the [Deeses] and charging additional fees."

#### VII. Negligence

"23. [The defendants engaged in negligent conduct by]

"A. Negligently combining the [Deeses'] mortgage into their equity line of credit."

#### VIII. Wantonness

"26. [The defendants engaged in wanton conduct by]  
"A. Wantonly combining the mortgage into the equity line of credit."

As noted, the Deeses take the position that their claims have nothing to do with the credit agreement or the line-of-credit transaction it set in motion, but rather: "This case is about the Deeses' 20-year, 7% annual interest rate First Mortgage being unilaterally charged by a then Second Mortgage holder's (AmSouth) purchase of the First Mortgage and 'rolling' it into the Deeses' *higher interest* Equity Line."

(Emphasis in original.) AmSouth takes the opposite position, arguing that "[w]hat is disputed in this case is whether AmSouth had the contractual right to combine the First Mortgage and the Equity

Line of Credit, when the Deeses were in default on the Equity Line." AmSouth contends that it had that right.

\*936 Given the broad language of the arbitration clause ("any controversy, claim, dispute, or disagreement arising out of, in connection with, or relating to this Agreement or your Loan ") (emphasis supplied) and the Deeses' expansive statement of their claims in their complaint, we conclude that their dispute with AmSouth does in substantial part arise out of, relate to, and/or has a connection with, the credit agreement and the loan it gave rise to. Not only have the Deeses pleaded ~~claims against AmSouth based on its alleged~~ wrongful "rolling" of the first-mortgage loan into their line-of-credit loan, they have also alleged that AmSouth and Countrywide "conspired" to combine the amount of the first-mortgage indebtedness "into the Plaintiffs' existing line of credit, charg[ing] an increased interest rate as well as additional fees and expenses." We do not view our identification of the transaction to which the dispute relates under the facts of this case as an either/or situation, whereby the dispute can relate exclusively only to either the first-mortgage loan or the line-of-credit loan. The claims put forth by the Deeses relate in part to both of those loans and their contractual underpinnings. Even under the *Koullas* test, which, as noted, is rightly to be employed only with respect to those arbitration provisions that contain simply the basic phrase "arising under this agreement," the dispute presented by the Deeses "raise[s] some issue that cannot be resolved without a reference to or construction of the [credit agreement] itself." 683 So.2d at 418.

#### VI. Effect of Subject Transaction on Interstate Commerce

[8] Having concluded that "the dispute" in this case has a sufficient nexus to the credit agreement and the loan transaction it evidences to be fairly said to arise out of, or in connection with, that transaction, or to relate to it, we now turn to an analysis of whether that agreement and/or transaction had a substantial effect on interstate commerce.

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[9] In *Sisters of the Visitation v. Cochran Plastering Co.*, 775 So.2d 759 (Ala.2000), this Court listed factors to be considered in determining whether a transaction has had a "substantial effect" on interstate commerce. Those factors are: (1) the citizenship of the parties and any affiliation the parties have with out-of-state entities; (2) tools and equipment used in performance of the contract; (3) allocation of the contract price to cost of services and materials involved in performance of the contract; (4) subsequent movement of the object of the contract across state lines; and (5) the degree to which the contract at issue was separable from other contracts that are subject to the FAA. *Id.* at 765-66. In determining whether a transaction affects interstate commerce, the United States Supreme Court directs that we "consider[] the aggregate effects the transaction has on interstate commerce." *Tefco Fin. Co. v. Green*, 793 So.2d 755, 759 (Ala.2001).

1. *Citizenship of the parties and any affiliation they might have with out-of-state entities*

[10] AmSouth does not dispute that the Deeses are Alabama residents, and it admits in its brief to this Court that it is "an Alabama state-chartered bank." However, as previously noted, the Deeses' complaint presents claims against both AmSouth and Countrywide, a foreign corporation, and asserts that various aspects of the transactions underlying their action involved Countrywide. As also noted earlier, the Deeses' complaint alleges breach of contract, breach of fiduciary duty, unjust enrichment, fraud, suppression, negligence, and wantonness by both AmSouth \*937 and Countrywide, stemming from the alleged wrongful handling of the mortgage loan and the line of credit. Importantly, the complaint alleges that a conspiracy between AmSouth and Countrywide to defraud the Deeses in connection with the transaction existed. The Deeses' allegation of a conspiracy between Countrywide and AmSouth will necessitate an analysis of the business dealings between them in the subject transactions. Furthermore, the interrelated nature of the claims asserted against AmSouth and Countrywide in the complaint implicates the entirety of their

relationship. Thus, the citizenship-of-the-parties factor, relating to Countrywide's status, lends some support to an argument that the credit agreement evidences a transaction that substantially affects interstate commerce. It does not matter that Countrywide ultimately dismissed its appeal of the denial of its request for arbitration, because we consider only the record the trial court had before it, and Countrywide was a codefendant in the case at all times during the proceedings below.

2. *Where the tools and equipment used at the project site originated; and*

3. *The intrastate versus interstate allocation of cost of services and materials involved in the project*

[11] Unlike *Sisters of the Visitation*, the transaction in this case does not involve any "tools and equipment." This case involves the use of money and the creation of financial obligations. Although the nature of this case blurs the distinction between the consideration of "tools and equipment" and the "allocation of cost of services and materials" factors, AmSouth has provided evidence showing (1) that in determining whether to extend a line of credit to the Deeses, AmSouth obtained a credit bureau report from Equifax, Inc., a Georgia corporation with its principal place of business in Atlanta, Georgia; (2) that AmSouth required in connection with both the original line of credit and its later increase, proof of property insurance, which was provided in the form of a policy issued by State Farm Fire and Casualty Company, an Illinois corporation; (3) that AmSouth purchased a title insurance policy in connection with the credit agreement, and the amended second mortgage, which was issued by Commonwealth Land Title Insurance Company, a Pennsylvania corporation; (4) that AmSouth relied on proof of the existence of a prior mortgage and a statement of the remaining principal balance owing under it, provided by the Texas office of Countrywide, a New York corporation; (5) that in connection with the line of credit, AmSouth obtained a flood-data certification from First American Flood Data Services, Inc., a Texas corporation with its principal place of business in

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Austin, Texas; and (6) that the Deeses' equity-line statements were printed and mailed to them by TSYS in Columbus, Georgia. We have previously held that the procurement of insurance coverages from out-of-state, as a reasonably necessary aspect of a transaction, is properly to be considered in evaluating that transaction's impact on interstate commerce. *Chesser v. AmSouth Bank, N.A.*, 846 So.2d 1082 (Ala.2002). Our consideration in this case of the "tools and equipment" factor and the "allocation of cost of services and materials" factor provides strong support for the conclusion that the credit agreement evidences a transaction that substantially affects interstate commerce.

#### 4. Subsequent movement across state lines

[12] AmSouth argues that the proceeds of a loan are "intrinsically mobile," and that the equity line of credit, unlike a \*938 first mortgage, can be used to purchase goods and services in interstate commerce. AmSouth further argues that "on at least three occasions in the past two years, [the Deeses] transferred money electronically from the equity line of credit to a checking account ..., from which they could write checks to purchase goods and services in interstate commerce." Although we agree that the proceeds of a loan are mobile, we reiterate our statement in *Alternative Financial Solutions, LLC v. Colburn*, 821 So.2d 981 (Ala.2001), that "[a]lthough we agree that loan proceeds-moneys-are 'mobile,' this language does not stand for the proposition that a loan transaction inherently triggers the FAA." 821 So.2d at 986 (emphasis supplied).

AmSouth asserts that the Deeses used instrumentalities of interstate commerce to perform transactions with respect to the line of credit. In particular, affidavit testimony establishes the following:

"On at least four occasions in the past two years, electronic banking transactions were performed in connection with the Dees Home Equity Line of Credit... For each of these transactions, the customer accessed the AmSouth electronic banking system using PC Banking (i.e., via a personal computer and modem). The customer used

telephone lines to perform these transactions."

Lastly, AmSouth argues that the equity line of credit was a substantial loan, starting at \$15,000, extended to \$20,000, and subsequently expanded to \$72,352.20, in contrast with the loans in *Colburn*, which involved amounts of less than \$300. Additionally, we recognize that AmSouth's purchase of the Deeses' mortgage from Countrywide, an out-of-state corporation, financed by a cash advance of \$51,210.74 from the line of credit, is an aspect of the unfolding transactions that necessarily involved interstate commerce. Our ~~consideration of the size of the funds and their~~ movement across state lines provides further support for a conclusion that the credit agreement evidences a transaction that, in its totality, substantially affected interstate commerce.

#### 5. The degree of separability from other contracts

[13] As previously discussed, the Deeses' equity line of credit is interrelated with other contracts. In *Brown v. Dewitt, Inc.*, 808 So.2d 11 (Ala.2001), we stated:

"As noted by this Court in *Sisters of the Visitation*, the degree of interstate commerce involved in contracts related to the transaction at issue does not determine whether the transaction at issue substantially affects interstate commerce. However, if a finding that the transaction at issue falls outside the reach of the FAA would disrupt the performance of the related contracts or activities that are subject to the FAA, then the degree of interstate commerce involved in those related contracts is to be given greater weight. See *Sisters of the Visitation*, 775 So.2d at 766-67."

808 So.2d at 14. Here, as in *Brown*, there is evidence of the procurement of insurance coverage, but, as previously mentioned, there is the additional evidence of a credit report, a flood-data certificate, and accounting and billing services necessary for creating and maintaining the Deeses' line of credit. Thus, we conclude that this final *Sisters of the Visitation* factor lends some support to a conclusion that the credit agreement evidences a transaction

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that substantially affects interstate commerce.

Giving due consideration to all of these circumstances, we conclude that AmSouth has shown that the aggregate effect of the credit-line transaction substantially involved interstate commerce.

*\*939 VII. AmSouth's Right to Compel Arbitration  
as to Mrs. Dees*

[14] Based on the findings and legal conclusions we have expressed thus far, it is clear that Mr. Dees, as a signatory to the credit agreement, is obligated to arbitrate the claims he has asserted against AmSouth. Whether Mrs. Dees is likewise obligated to submit her claims to arbitration requires further analysis.

[15] As noted, she is not a signatory to the credit agreement, but she was a signatory to an associated document which identified her as an "account holder" as to the line-of-credit account. Also, as previously noted, Mr. and Mrs. Dees allege in their complaint that they took out the line of credit and that they borrowed money on it. Mrs. Dees, along with Mr. Dees, alleges a breach of contract in connection with AmSouth's "wrongfully combining Plaintiffs' mortgage loan into his equity line of credit." The rest of the claims and entitlements to damages are asserted equally on her and his behalf. In their brief to this Court, the Deeses take note of Mrs. Dees's status as a nonsignatory only in passing, as follows:

"On April 16, 1996, the [Deeses] entered into an Equity Line of Credit Agreement ('Equity Line') with AmSouth Bank which provided them with a \$15,000 line of credit.\*

\*Only Leffie Dees, III actually signed the Equity Line of Credit Agreement."

Nonetheless, we are obliged to consider her status because we "will affirm the trial court [as to Mrs. Dees] if its ruling is correct on any valid ground or rationale, even one rejected or not considered by the trial court." *Rogers Found. Repair, Inc. v. Powell*, 748 So.2d 869, 872 (Ala.1999).

We conclude that Mrs. Dees must submit to arbitration her part of the claims she asserts jointly with her husband against AmSouth. The legal principles dictating that result were well stated in *Cook's Pest Control, Inc. v. Boykin*, 807 So.2d 524, 526-27 (Ala.2001):

"The first means by which [Mrs. Dees] could be forced to arbitrate her claims against [AmSouth] would be under a theory that she is a third-party beneficiary to the contract. This Court has on several occasions addressed the issue of when a nonsignatory to a contract can be bound by an arbitration agreement contained therein. In *Georgia Power Co. v. Partin*, 727 So.2d 2 (Ala.1993), an employee sued, alleging negligence, wantonness, and breach of contract against the owner and operators of a loading facility; the trial court refused to enforce an arbitration agreement contained in the contract. This Court stated the general rule that '[i]t is ... clear that a third-party beneficiary cannot accept the benefit of a contract, while avoiding the burdens or limitations of that contract.' 727 So.2d at 5. Because the plaintiff had specifically invoked the contract as a basis for his action, he could not avoid certain elements of the contract. Justice Shores, in her dissent, expressed the implicit holding of that case when she wrote that 'the plaintiffs could have avoided arbitration by not amending their complaint to state a contract claim.' *Id.* at 8.

"This Court had earlier analyzed the issue whether a third-party beneficiary could be compelled to arbitrate, in *Ex parte Dyess*, 709 So.2d 447 (Ala.1997). Because Dyess had sued upon a contract, this Court held that he could not avoid the arbitration clause found therein. We also noted that "[a] party claiming to be a third-party beneficiary of a contract must establish that the \*940 contracting parties intended, upon execution of the contract, to bestow a direct, as opposed to an incidental, benefit upon the third party." *Id.* at 450 (quoting *Weathers Auto Glass, Inc. v. Alfa Mut. Ins. Co.*, 619 So.2d 1328, 1329 (Ala.1993)). See also *Ex parte Stamey*, 776 So.2d 85 (Ala.2000) (holding that the intent of the parties as expressed in the contract determines whether a nonsignatory is a third-party beneficiary).

"....

"We recognize a second exception to the general

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rule that nonsignatories cannot be bound to arbitrate their claims: If a nonsignatory's claims are 'intertwined with' and 'related to' the contract, arbitration can be enforced. See, e.g., *Ex parte Napier*, 723 So.2d 49 (Ala.1998); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753 (11th Cir.1993); *Dunn Constr. Co. v. Sugar Beach Condo. Ass'n, Inc.*, 760 F.Supp. 1479 (S.D.Ala.1991)....

"Our cases recognizing 'intertwining claims' as a basis for compelling arbitration have typically involved arbitration clauses broad enough to embrace intertwined claims ... and allegations of a conspiracy between the nonsignatory and the signatory to the arbitration agreement. See *Ex parte Isbell*, 708 So.2d 571 (Ala.1997)."

As similarly analyzed in *Credit Sales, Inc. v. Crimm*, 815 So.2d 540, 546 (Ala.2001), to the extent that Mrs. Dees "bases her claims on another party's contract with the defendants," she cannot "avoid the operation of the arbitration provision of that contract .... [S]he cannot pick and choose which contract provisions she wishes to have benefit her and reject those she does not wish to have bind her; instead, she must accept or reject the entire contract." If Mrs. Dees were to take the position that she is not a party to, and is not bound by any of the terms of, the credit agreement, then she would have no standing to seek damages for the alleged wrongful increase of the indebtedness owing under that agreement or the increase of the interest rate. She does claim damages for those changes in the credit line established by that agreement, however, and therefore must accept the entire contract.

#### VIII. Unconscionability

[16][17] We address finally the Deeses' argument in their brief to this Court that the trial court's order denying arbitration must be affirmed because the arbitration clause contained in the credit agreement is unenforceable as a matter of law, because, they say, AmSouth's "conduct" was unconscionable. Unconscionability is a contract defense and does not apply to actions taken outside the ambit of a contract. The defense of unconscionability is

codified in Ala.Code 1975, § 5-19-16, which provides:

"With respect to a consumer credit transaction, if the court as a matter of law finds the contract or any provision of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable provision, or it may so limit the application of any unconscionable provision as to avoid any unconscionable result."

See also *Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler*, 825 So.2d 779, 783 (Ala.2002). ("While it is true that a court may rescind a contract, or a portion of a contract, for unconscionability, "[r]escission of a contract for unconscionability is an extraordinary remedy usually reserved for the protection of the unsophisticated and uneducated." ) (quoting *Layne v. Garner*, 612 So.2d 404, 408 (Ala.1992)).

In an attempt to place their unconscionability argument in a contract context, the Deeses contend that AmSouth, by increasing\*941 the amount owing under their line of credit, "unilaterally created a new contract, an Equity Line of Credit for \$72,352.20." They argue that this new, unilateral contract is unenforceable as unconscionable, and "as the contract is unenforceable then any arbitration clause would also be unenforceable." We cannot agree that the credit agreement has been supplanted by a new contract, as opposed to allegedly having been breached by AmSouth by its unilateral increase of the line-of-credit debt. (Of course, nothing we say in this regard reflects any opinion as to the merits of the dispute between the parties.) The Deeses assert in their complaint, and to this Court on appeal, that AmSouth had no authority to do what it did in connection with the way it handled its acquisition of the first mortgage, by allocating its acquisition cost to the line-of-credit indebtedness, whereas AmSouth asserts that its conduct in that regard was in all respects contractually authorized and proper. We have no need to consider the relative merits of those positions, being concerned at this stage only with the issue whether, as to the dispute so framed by the Deeses in their complaint, AmSouth is entitled to compel arbitration. Being

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of the opinion that the credit agreement survived intact the alteration of the indebtedness it evidenced, although the Deeses claim it was thereby breached, we likewise conclude that its arbitration clause survives.

[18] There is an independent, and equally compelling, reason the Deeses cannot take advantage of the alleged "unconscionability": they never raised it as an issue in the trial court. Neither in their response to AmSouth's motion to compel arbitration nor at any other time during the proceedings below, at least insofar as is reflected in the record, did they assert unconscionability as a defense to AmSouth's demand for arbitration.

Unconscionability is an affirmative defense, *Green Tree Fin. Corp. v. Wampler*, 749 So.2d 409, 415 (Ala.1999), and the party asserting the defense bears the burden of proof." *Fleetwood Enters., Inc. v. Bruno*, 784 So.2d 277, 281 (Ala.2000). See also *Conseco Finance v. Murphy*, 841 So.2d 1241 (Ala.2002), and *Vann v. First Community Credit Corp.*, 834 So.2d 751 (Ala.2002). (Of course, the burden to assert a defense shifts to the party opposing a motion to compel arbitration, only after the movant has properly supported the motion.) The Deeses having failed to raise in any way a defense of unconscionability in the trial court, they cannot now present it for the first time on appeal.

#### IX. Conclusion

For the reasons stated above, we reverse the order of the trial court denying AmSouth's motion to compel arbitration and remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

HOUSTON, LYONS, BROWN, WOODALL, and STUART, JJ., concur.

SEE, J., concurs in the result.

MOORE, C.J., and JOHNSTONE, J., dissent.

JOHNSTONE, Justice (dissenting).

I respectfully dissent. The FAA applies only if the particular contract which contains the arbitration agreement substantially affects interstate commerce. 9 U.S.C. § 1 and § 2; *Alafabco, Inc. v. Citizens*

*Bank*, [Ms. 1010703, August 30, 2002] --- So.2d --- (Ala.2002); *Sisters of the Visitation v. Cochran Plastering Co.*, 775 So.2d 759 (Ala.2000); and *Rogers Found. Repair, Inc. v. Powell*, 748 So.2d 869 (Ala.1999). The particular contract in this case is the equity line of credit agreement. For \*942 a substantial effect on interstate commerce, however, the main opinion relies entirely on other distinct contracts and transactions collateral to or even unrelated to the equity line of credit agreement. Therefore, the FAA does not govern this case and does not preempt the Alabama law foreclosing the specific enforcement of arbitration agreements, § 8-1-41(3), Ala.Code 1975.

Ala.,2002.

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Hedges v. Carrigan  
Cal.App. 2 Dist., 2004.Court of Appeal, Second District, Division 5,  
California.Arthur W. HEDGES et al., Plaintiffs and  
Respondents,

v.

Stephen E. CARRIGAN, Defendant and Appellant.  
No. B166248.

April 6, 2004.

Certified for Partial Publication.<sup>FN\*</sup>

FN\* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion, the majority and the concurring opinion, is certified for publication with the exception of the indicated portions of the Discussion (part III).

**Background:** Home purchasers sued sellers and real estate brokers, alleging nondisclosure of defects. The Superior Court, Los Angeles County, No. LC062147, Bert Glennon, Jr., J., denied broker's petition to compel purchasers to arbitrate dispute. Broker appealed.

**Holding:** The Court of Appeal, Turner, P.J., held that United States Arbitration Act preempted compliance with statutory notice and format requirements as condition precedent to enforcement of arbitration clause in real estate contract.

Affirmed.

West Headnotes

[1] Alternative Dispute Resolution 25T ⇌ 114

25T Alternative Dispute Resolution

25TII Arbitration  
25TII(A) Nature and Form of Proceeding  
25Tk114 k. Constitutional and Statutory Provisions and Rules of Court. Most Cited Cases (Formerly 33k2.2 Arbitration)

Alternative Dispute Resolution 25T ⇌ 134(1)

25T Alternative Dispute Resolution  
25TII Arbitration  
25TII(B) Agreements to Arbitrate  
25Tk131 Requisites and Validity  
25Tk134 Validity  
25Tk134(1) k. In General. Most

Cited Cases  
(Formerly 33k6.2 Arbitration)

States 360 ⇌ 18.15

360 States  
360I Political Status and Relations  
360I(B) Federal Supremacy; Preemption  
360k18.15 k. Particular Cases, Preemption or Supersession. Most Cited Cases  
Under United States Arbitration Act, an arbitration contract must be enforced according to its terms subject to state law defenses applicable to all disputes under general contract law principles such as fraud, duress, or unconscionability. 9 U.S.C.A. § 2.

[2] Alternative Dispute Resolution 25T ⇌ 137

25T Alternative Dispute Resolution  
25TII Arbitration  
25TII(B) Agreements to Arbitrate  
25Tk136 Construction  
25Tk137 k. In General. Most Cited Cases  
(Formerly 33k2.2 Arbitration)

States 360 ⇌ 18.15

360 States

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### 360I Political Status and Relations

#### 360I(B) Federal Supremacy; Preemption

360k18.15 k. Particular Cases, Preemption or Supersession. Most Cited Cases

Under United States Arbitration Act, a court may not invalidate an agreement to arbitrate under state laws that are only applicable to arbitration clauses. 9 U.S.C.A. § 2.

### [3] Alternative Dispute Resolution 25T ⇨117

#### 25T Alternative Dispute Resolution

##### 25TII Arbitration

##### 25TIII(A) Nature and Form of Proceeding

25Tk117 k. Preemption. Most Cited Cases  
(Formerly 33k2.2 Arbitration)

### Commerce 83 ⇨80.5

#### 83 Commerce

83II Application to Particular Subjects and Methods of Regulation

##### 83II(I) Civil Remedies

83k80.5 k. Arbitration. Most Cited Cases  
(Formerly 33k2.2 Arbitration)

### States 360 ⇨18.15

#### 360 States

##### 360I Political Status and Relations

##### 360I(B) Federal Supremacy; Preemption

360k18.15 k. Particular Cases, Preemption or Supersession. Most Cited Cases

United States Arbitration Act preempted compliance with statutory notice and format requirements as condition precedent to enforcement of arbitration clause in real estate purchase contract; statutory requirements applied only to arbitration clauses in specified real estate transaction documents, and, as anticipated financing for home purchase involved federal home loan, and transaction documents were promulgated by national organization, contract evidenced transaction "involving commerce" within meaning of federal act. 9 U.S.C.A. § 2; West's Ann.Cal.C.C.P. § 1298.

See 4 *Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 28A; Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter*

*Group 2004) ¶ 5:16 (CAADR Ch. 5-A). West Codenotes Limited on Preemption Grounds West's Ann.Cal.C.C.P. § 1298.*

**\*\*788 \*579** Jones, Bell, Abbott, Fleming & Fitzgerald, Fredrick A. Rafeedie, Los Angeles, and William M. Turner for Defendant and Appellant. Law Offices of Leslie J. Hedges and Leslie J. Hedges, Lynwood, for Plaintiffs and Respondents. **\*580** TURNER, P.J.

## I. INTRODUCTION

Defendant, Stephen E. Carrigan, individually and doing business as National Real Estate Council, appeals from an order denying his petition pursuant to Code of Civil Procedure section 1281.2 <sup>FN1</sup> to compel plaintiffs, Arthur W. Hedges and Dimity Hedges, to arbitrate a dispute. The dispute arose from plaintiffs' purchase of a single family residence from the sellers and defendants, Lane G. Weinman and Cynthia N. Weinman. In the published portion, we discuss whether section 1298 is subject to the limited preemptive effect of the United States Arbitration Act. We affirm.

FN1. All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

## II. BACKGROUND

On September 9, 2002, plaintiffs filed their action on a number of contractual and tort theories against: the Weinmans; Mr. Carrigan, who was plaintiffs' broker; and Todd Olsen Realty and Debbie Schreve, who was the Weinmans' broker. The complaint alleged that defendants failed to disclose several defects in the residence, which plaintiffs discovered after they purchased and occupied the home in September 2000.

On February 7, 2003, Mr. Carrigan filed a petition for an order compelling plaintiffs to mediate and to arbitrate the controversy. (The parties subsequently agreed to mediate the dispute.) The petition to compel alleged that: on January 10, 2003, Mr. Carrigan was served with the summons and

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complaint; by letter dated January 28, 2003, Mr. Carrigan's counsel demanded mediation and arbitration; and plaintiffs have refused his demand. The following are the pertinent facts. Mr. Carrigan acted as plaintiffs' broker in connection with the purchase of the residence. On August 15, 2000, plaintiffs executed a written residential purchase agreement, joint escrow instructions, and deposit receipt which contains an arbitration clause. The August 15, 2000, residential purchase agreement, joint escrow instructions, and deposit receipt was in legal effect an offer to purchase the residence under specified terms. Paragraph 7D of the August 15, 2000, residential purchase agreement, joint escrow instructions, and deposit receipt required that the controversy be arbitrated if agreed to by the parties. Paragraph 7D provides: "BROKERS: Buyer and Seller agree to mediate and arbitrate disputes or claims involving either or both Brokers, provided either or both \*581 Brokers shall have agreed to such mediation or arbitration, prior to or within a reasonable time after the dispute or claim is presented to Brokers. Any election by either or both Brokers to participate in mediation or arbitration shall not result in Brokers being deemed parties to the Agreement." Paragraph 7 of the agreement is entitled "Dispute Resolution" and provides in part: "A. MEDIATION: Buyer and Seller \*\*789 agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to arbitration or court action, subject to paragraphs 17C and D below. Mediation fees, if any shall be divided equally among the parties involved. If, for any dispute or claim to which this paragraph applies, any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney's fees, even if they would otherwise be available to that party in any such action. THIS MEDIATION PROVISION APPLIES WHETHER OR NOT THE ARBITRATION PROVISION IS INITIALED. [¶] B. ARBITRATION OF DISPUTES: Buyer and Seller agree that any dispute or claim in Law or equity arising between them out of this Agreement or any resulting transaction, which is not settled through mediation, shall be decided by neutral, binding

arbitration, including and subject to paragraphs 17C and D below.... NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY. [¶] WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE 'ARBITRATION OF DISPUTES' PROVISION TO NEUTRAL ARBITRATION." Plaintiffs initialed the space as required by paragraph 7D.

On August 17, 2000, the Weinmans, the sellers, made a written counteroffer. On the same date, plaintiffs accepted the Weinmans' written counteroffer. The August 17, 2000, written counteroffer executed by both the Weinmans and plaintiffs was a single document.

\*582 The August 17, 2000, written counteroffer referred to the August 15, 2000, residential purchase agreement, joint escrow instructions, and deposit receipt as follows, "Paragraphs in the purchase contract (offer) which require initials by all parties, but are not initialed by all parties, are excluded from the final agreement unless specifically referenced for inclusion in paragraph 1C of this or another Counter Offer." Paragraph 1C of the August 17, 2000, written counteroffer made no reference to paragraph 7D, the arbitration

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clause, in the August 15, 2000, residential purchase agreement, joint escrow instructions, and deposit receipt. Defendants never initialed paragraph 7D, the arbitration clause, in the August 15, 2000, residential purchase agreement, joint escrow instructions, and deposit receipt.

On March 10, 2003, the trial court denied the petition to compel arbitration. This timely appeal followed. Because this is a case involving enforcement of an arbitration clause, we have treated the case as a preference matter as required by statute.\*\*790 (§ 1291.2; Cal. Rules of Court, rule 19.)

### III. DISCUSSION <sup>FN\*\*</sup>

FN\*\* See footnote \*, *ante*.

Plaintiffs contend the arbitration clause in the August 15, 2000, residential purchase agreement, joint escrow instructions, and deposit receipt is unenforceable because it does not comply with the notice and format provisions required by section 1298.<sup>FN2</sup> Section 1298 imposes various requirements on \*583 arbitration clauses in specified real estate agreements including in part: point size and bolded font specifications; a specific reference to "ARBITRATION OF DISPUTES"; and a warning that certain rights attendant to judicial proceeding are being lost by initialing the agreement to arbitrate. Plaintiffs contend the arbitration clause at issue did not comply with section 1298 and the failure to do so rendered the agreement to arbitrate unenforceable. We need not address the question as to whether the arbitration clause complied with section 1298. Nor need we discuss whether the purported failure to comply with section 1298 invalidates the arbitration clause.

FN2. Section 1298 states in pertinent part:  
“(a) Whenever any contract to convey real property, or contemplated to convey real property in the future, including marketing contracts, deposit receipts, real property sales contracts as defined in Section 2985

of the Civil Code, leases together with options to purchase, or ground leases coupled with improvements, but not including powers of sale contained in deeds of trust or mortgages, contains a provision for binding arbitration of any dispute between the principals in the transaction, the contract shall have that provision clearly titled ‘ARBITRATION OF DISPUTES.’ [¶] If a provision for binding arbitration is included in a printed contract, it shall be set out in at least 8-point bold type or in contrasting red in at least 8-point type, and if the provision is included in a typed contract, it shall be set out in capital letters. [¶] (b) Whenever any contract or agreement between principals and agents in real property sales transactions, including listing agreements, as defined in Section 1086 of the Civil Code, contains a provision requiring binding arbitration of any dispute between the principals and agents in the transaction, the contract or agreement shall have that provision clearly titled ‘ARBITRATION OF DISPUTES.’ [¶] If a provision for binding arbitration is included in a printed contract, it shall be set out in at least 8-point bold type or in contrasting red in at least 8-point type, and if the provision is included in a typed contract, it shall be set out in capital letters. [¶] (c) Immediately before the line or space provided for the parties to indicate their assent or nonassent to the arbitration provision described in subdivision (a) or (b), and immediately following that arbitration provision, the following shall appear: [¶] ‘NOTICE: BY INITIALLING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE “ARBITRATION OF DISPUTES” PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR

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JURY TRIAL. BY INITIALLING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.' 'WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION TO NEUTRAL ARBITRATION.' [¶] If the above provision is included in a printed contract, it shall be set out either in at least 10-point bold type or in contrasting red print in at least 8-point bold type, and if the provision is included in a typed contract, it shall be set out in capital letters."

[1][2] Rather, we conclude that the United States Arbitration Act would \*\*791 preempt a statutory requirement or judicial holding that compliance with section 1298 is a condition precedent to enforcement of an arbitration clause contained in one of the specified contracts. The limited preemptive effect of United States Arbitration Act is based on title 9 United States Code, section 2, which states in pertinent part: "A written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (See *McManus v.*

*CIBC World Markets Corp.* (2003) 109 Cal.App.4th 76, 85, 134 Cal.Rptr.2d 446; *Siegel v. Prudential Ins. Co.* (1998) 67 Cal.App.4th 1270, 1286-1287, 79 Cal.Rptr.2d 726.) Thus, an arbitration contract must be enforced according to its terms subject to state law defenses applicable to all disputes under general contract law principles such as fraud, duress, or unconscionability. \*584( *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902; *Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265, 281, 115 S.Ct. 834, 130 L.Ed.2d 753; *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 407, 410, 58 Cal.Rptr.2d 875, 926 P.2d 1061.) A court may not invalidate an agreement to arbitrate under state laws that are only applicable to arbitration clauses. (*Doctor's Associates, Inc. v. Casarotto, supra*, 517 U.S. at p. 687, 116 S.Ct. 1652; *Allied-Bruce Terminix Cos. v. Dobson, supra*, 513 U.S. at p. 281, 115 S.Ct. 834.) In *Perry v. Thomas* (1987) 482 U.S. 483, 492-493, footnote 9, 107 S.Ct. 2520, 96 L.Ed.2d 426, the United States Supreme Court explained, "A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." (See *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1075, 90 Cal.Rptr.2d 334, 988 P.2d 67.) As Justice Stephen Breyer plainly explained: "What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the [United States Arbitration] Act's language and Congress' intent. See *Volt [Info. Sciences v. Leland Stanford Jr. U.* (1989) ] 489 U.S. [468,] 474 [109 S.Ct. 1248, 103 L.Ed.2d 488]." (*Allied-Bruce Terminix Cos. v. Dobson, supra*, 513 U.S. at p. 281, 115 S.Ct. 834.)

[3] These general principles describing the limited preemptive effect of the United States Arbitration Act control the effect of section 1298 in the present case. In *Doctor's Associates, Inc. v. Casarotto, supra*, 517 U.S. at page 683, 116 S.Ct. 1652, the

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United States Supreme Court examined a Montana law that invalidated any arbitration clause unless “ ‘ [n]otice that [the] contract is subject to arbitration’ ” was “ ‘typed in underlined capital letters on the first page of the contract.’ ” After advertng to the Supreme Court's prior decisions in *Southland Corp. v. Keating* (1984) 465 U.S. 1, 16, 104 S.Ct. 852, 79 L.Ed.2d 1, which held a portion of California's Franchise Investment Law was preempted by the United States Arbitration Act, and *Perry v. Thomas*, 482 U.S. at pages 491-492, 107 S.Ct. 2520, which invalidated on preemption grounds this state's prohibition of \*\*792 arbitration of wage claims, Associate Justice Ruth Bader Ginsburg wrote in *Doctor's Associates*: “Montana's § 27-5-114(4) directly conflicts with § 2 of the [United States Arbitration Act] because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally. The [United States Arbitration Act] thus displaces the Montana statute with respect to arbitration agreements covered by the Act. See 2 I. Macneil, R. Speidel, T. Stipanowich, & G. Shell, *Federal Arbitration Law* § 19.1.1, pp. 19:4-19:5 (1995) (under *Southland* and *Perry*, ‘state legislation requiring greater information or choice in the making of agreements to arbitrate than in other contracts is preempted’).” \*585(*Doctor's Associates, Inc. v. Casarotto, supra*, 517 U.S. at p. 687, 116 S.Ct. 1652, fn. omitted; accord, *Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995) 514 U.S. 52, 58, 115 S.Ct. 1212, 131 L.Ed.2d 76 [9 U.S.C. § 2 preempts New York prohibition against arbitrating punitive damages]; *Allied-Bruce Terminix Cos. v. Dobson, supra*, 513 U.S. at pp. 268-277, 115 S.Ct. 834 [United States Arbitration Act preempts Alabama statute making predispute arbitration agreements unenforceable].) As with the notice requirements in *Doctor's Associates*, section 1298 does to apply generally to contracts. Rather, section 1298 applies *only to arbitration clauses* in specified real estate transaction documents. Under the compulsion of Justice Ginsburg's analysis in *Doctor's Associates*, section 1298, with its font and point size, notification, and warning requirements taken together, cannot be judicially construed to invalidate the arbitration clause at issue without violating the United States Arbitration Act.

One final note is in order concerning the application of the United States Arbitration Act. The limited preemptive effect of the United States Arbitration Act applies only in the case of an arbitration clause in “a contract evidencing a transaction involving commerce.” (9 U.S.C. § 2.) The arbitration clause in the August 15, 2000, residential purchase agreement, joint escrow instructions, and deposit receipt is contained in a “contract evidencing a transaction involving commerce” within the meaning of title 9 United States Code section 2. The United States Supreme Court has explained that the words “involving commerce”: reflect an intent to exercise the Congressional Commerce Clause powers “to the full”; are “broad and ... the functional equivalent of ...” the adjective “ ‘ affecting’ ” interstate commerce; are not to be construed so as to apply only when the parties contemplate the transaction will involve interstate commerce; and require that the United States Arbitration Act apply when a transaction *in fact* “ involve[s]” interstate commerce. (*Allied-Bruce Terminix Cos. v. Dobson, supra*, 513 U.S. at pp. 273-274, 281, 115 S.Ct. 834.) Thus, in *Allied-Bruce*, the Supreme Court held that a contract providing for termite eradication in and repairs to a residence involved interstate commerce and hence was subject to the limited preemptive effect of the United States Arbitration Act. (*Id.* at p. 282, 115 S.Ct. 834.)

The United States Supreme Court later synthesized its holding in *Allied-Bruce* in *Citizens Bank v. Alafabco, Inc.* (2003) 539 U.S. 52, 56, 123 S.Ct. 2037, 2040, 156 L.Ed.2d 46, a case involving an arbitration clause in a debt restructuring agreement, as follows: “We have interpreted the term ‘ involving commerce’ in the [United States Arbitration Act] as the functional equivalent of the more familiar term ‘affecting commerce’-words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power. \*\*793*Allied-Bruce Terminix Cos.*, 513 U.S., at 273-274 [115 S.Ct. 834]. Because the statute provides for ‘the enforcement of arbitration agreements within the full reach of the Commerce Clause,’ *Perry v. Thomas*, 482 U.S. 483, 490, [107 S.Ct. 2520, 96 L.Ed.2d 426] (1987), it is perfectly clear that the [United States Arbitration Act] \*586

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encompasses a wider range of transactions than those actually 'in commerce'-that is, 'within the flow of interstate commerce,' *Allied-Bruce Terminix Cos.*, *supra*, at 273 [115 S.Ct. 834] (internal quotation marks, citation, and emphasis omitted)." The court continued: "Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice ... subject to federal control.' *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 [68 S.Ct. 996, 92 L.Ed. 1328] (1948). See also *Perez v. United States*, 402 U.S. 146, 154 [91 S.Ct. 1357, 28 L.Ed.2d 686] (1971); *Wickard v. Filburn*, 317 U.S. 111, 127-128 [63 S.Ct. 82, 87 L.Ed. 122] (1942). Only that general practice need bear on interstate commerce in a substantial way. *Maryland v. Wirtz*, 392 U.S. 183, 196-197, n. 27 [88 S.Ct. 2017, 20 L.Ed.2d 1020] (1968); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37-38 [57 S.Ct. 615, 81 L.Ed. 893] (1937)." (*Citizens Bank v. Alafabco, Inc.*, *supra*, 539 U.S. at pp. 56-57, 123 S.Ct. at p.2040.)

In the present case, the August 15, 2000, residential purchase agreement, joint escrow instructions, and deposit receipt as well as the accepted August 17, 2000, counteroffer was a contract which evidenced a transaction "involving commerce" within the meaning of title 9 United States Code section 2. The anticipated financing involved the use of a \$213,400 Federal Housing Administration home loan, which is subject to the jurisdiction of the United States Department of Housing and Urban Development headquartered in Washington, D.C. Further, the various copyrighted forms used by the parties and their brokers could only be utilized by members of the National Association of Realtors. These documents included: the August 15, 2000, residential purchase agreement, joint escrow instructions, and deposit receipt; the August 17, 2000, counteroffer; and a real estate transfer disclosure statement, which the Weinmans were alleged to have filled out in a deceptive fashion. In *Citizens Bank v. Alafabco, Inc.*, *supra*, 539 U.S. at pp. 57-58, 123 S.Ct. at p. 2041, the Supreme Court explained the relationship between lending

agreements and commerce: "[W]ere there any residual doubt about the magnitude of the impact on interstate commerce caused by the particular economic transactions in which the parties were engaged, that doubt would dissipate upon consideration of the 'general practice' those transactions represent. *Mandeville Island Farms, supra*, at 236 [68 S.Ct. 996]. No elaborate explanation is needed to make evident the broad impact of commercial lending on the national economy or Congress' power to regulate that activity pursuant to the Commerce Clause. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 38-39 [100 S.Ct. 2009, 64 L.Ed.2d 702] (1980) ('[B]anking and related financial activities are of profound local concern.... Nonetheless, it does not follow that these same activities lack important interstate attributes'); *Perez, supra*, at 154-155 [91 S.Ct. 1357] ('Extortionate credit transactions, though purely intrastate, may in the judgment \*587 of Congress affect interstate commerce')." Given the foregoing language in *Citizens Bank*, the present transaction involves financing, which evidences a transaction in commerce.

\*\*794 No doubt the connection with interstate commerce in this case is not as strong as in others. (*Citizens Bank v. Alafabco, Inc.*, *supra*, 539 U.S. at pp. 56-57, 123 S.Ct. at p. 2040 [interstate entity entered into a debt restructuring agreement]; *Allied-Bruce Terminix Companies, Inc. v. Dobson, supra*, 513 U.S. at p. 282, 115 S.Ct. 834 [supplies to fumigate and repair residential termite damage came from out of the state where the dispute arose]; *Basura v. U.S. Home Corp.* (2002) 98 Cal.App.4th 1205, 120 Cal.Rptr.2d 328 [alleged defective fixtures in construction defect litigation manufactured outside California].) However, the federal financing in this case supervised by an organ of the United States government located in Washington, D.C. plus the use of copyrighted transaction documents promulgated by a national organization which could only be used by its members lead us to the conclude the agreement at issue "evidenc[es] a transaction involving commerce" with the meaning of title 9 United States Code section 2. Hence, there is no merit to plaintiffs' contention that section 1298 requires the arbitration clause be invalidated.

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#### B. Contractual Issues <sup>FN\*\*\*</sup>

FN\*\*\* See footnote \*, *ante*.

#### IV. DISPOSITION

The order denying the petition to compel plaintiffs to arbitrate the controversy is affirmed. Plaintiffs, Arthur W. and Dimity Hedges, are entitled to their costs on appeal from defendant, Stephen E. Carrigan.

I concur: ARMSTRONG, J.MOSK, J., Concurring.  
I concur in the result.

Having held that there was no enforceable arbitration agreement and therefore affirming the trial court's denial of the petition to arbitrate, this court should not have reached the constitutional issue of preemption in order to make substantially inoperative an important state consumer protection law-Code of Civil Procedure section 1298. (See *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 65, 195 P.2d 1 ["[a] court will not \*588 decide a constitutional question unless such construction is absolutely necessary"]; *Kollander Construction, Inc. v. Superior Court* (2002) 98 Cal.App.4th 304, 314, 119 Cal.Rptr.2d 614 ["[w]e are constrained to avoid constitutional questions where other grounds are available and dispositive".])

Moreover, the parties before the trial court did not argue, and the trial court did not rely upon, the preemption doctrine. The parties did not even raise the issue before this court. They only discussed the point after this court advanced the preemption issue. Under those circumstances, the preemption argument should have been deemed waived (i.e., forfeited). (See *Nemarnik v. Los Angeles Kings Hockey Club* (2002) 103 Cal.App.4th 631, 638, fn. 3, 127 Cal.Rptr.2d 10 ["[a] party's failure to raise an issue below and in its opening brief constitutes a waiver"]; *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316, 88 Cal.Rptr.2d 758; *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847, 60 Cal.Rptr.2d 780 [failure to raise issue at trial waives that issue]; *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d

211, 216, fn. 4, 188 Cal.Rptr. 115, 655 P.2d 317 [failure to raise issue on appeal constitutes waiver]; *Locke v. Warner Bros., Inc.* (1997) 57 Cal.App.4th 354, 368, 66 Cal.Rptr.2d 921 [failure to raise \*\*795 issue in opening brief waives issue on appeal].)

That the issue is one of preemption does not preclude the waiver doctrine in this case. A party may waive the application of preemption when the issue concerns whether the choice of federal or state law applies rather than the issue of subject matter jurisdiction. (*Hughes v. Blue Cross of Northern California* (1989) 215 Cal.App.3d 832, 851, 263 Cal.Rptr. 850 (*Hughes*); *Gilchrist v. Jim Slemmons Imports, Inc.* (9th Cir.1986) 803 F.2d 1488, 1497 (*Gilchrist*)).) Here, the issue involves a determination as to which law applies-the Federal Arbitration Act (9 U.S.C. § 1 et seq.) (FAA) or state law provisions applicable to arbitrations. Because the parties failed to present or argue this choice-of-law question before the trial court, the preemption issue was waived. (*Hughes, supra*, 215 Cal.App.3d at p. 851, 263 Cal.Rptr. 850; *Gilchrist, supra*, 803 F.2d at p. 1497.)

I agree with the majority that we need not reach the issue of whether in this case the arbitration agreement complies with California law governing arbitrations because the parties here did not enter into a contract to arbitrate. That is all the more reason why this court should not have opined on preemption.

In determining that the FAA rather than California law governed, this court did not consider the choice-of-law provision in the agreement in issue that \*589 designated California law as controlling. This provision may have an impact on whether or not federal law preempts state law. The California Supreme Court has granted review in *Cronus Investments, Inc. v. Concierge Services, LLC*, review granted July 16, 2003, S116288, in a case involving the impact of a California choice-of-law clause on the application of the FAA. Whether a choice-of-law provision constitutes an agreement to apply California law to determine the enforceability of an arbitration provision may depend on the scope and terms of the arbitration agreement itself. (See *Warren-Guthrie v. Health Net* (2000) 84

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Cal.App.4th 804, 815-816, 101 Cal.Rptr.2d 260 [contract stating “[a]ll Arbitration shall be conducted in accordance with the California Code of Civil Procedure, commencing with Section 1280” did not constitute agreement that enforceability of arbitration agreement would be determined by California law absent “express language indicating that California law shall ... apply for all purposes”]; *Mount Diablo Medical Center v. Health Net of California, Inc.* (2002) 101 Cal.App.4th 711, 724, 124 Cal.Rptr.2d 607 [choice-of-law analysis is a two step inquiry; first, whether choice-of-law clause is broad enough to include state law on the subject of arbitrability; second, whether particular provision of state law in question is contrary to purposes of the FAA]; see also *Volt Information Sciences, Inc. v. Board of Trustees* (1989) 489 U.S. 468, 470, 109 S.Ct. 1248, 103 L.Ed.2d 488; *Mastrobuono v. Shearson Lehman Hutton, Inc.* (1995) 514 U.S. 52, 55-56, 115 S.Ct. 1212, 131 L.Ed.2d 76.)

Another reason to have avoided the preemption issue is that the parties did not establish a factual record sufficient to find preemption. (Compare *Basura v. U.S. Home Corp.* (2002) 98 Cal.App.4th 1205, 1214, 120 Cal.Rptr.2d 328 [evidence of interstate commerce included declarations regarding builder's contracts with out-of-state subcontractors, communications by interstate mail and national advertising] with *Steele v. Collagen Corp.* (1997) 54 Cal.App.4th 1474, 1490, 63 Cal.Rptr.2d 879 [facts insufficient to establish preemption when party made no attempt to establish that its actions fell within ambit of federal statute].) The majority rely on the document in which the buyer checks off a box labeled “FHA” with regard to the financing. But there is no evidence concerning \*\*796 the actual financing and whether there was a loan insured by the Federal Housing Administration. The majority also rely on the form used. The form itself, which is approved by the ‘California Association of Realtors’ and contains that organization's logo, states that the “form is available for use by the entire real estate industry.” The sole reference in the form to a national organization is the statement that only a member of the National Association of Realtors may use the registered mark REALTOR®. Based on this factual record, I find

it difficult to see a sufficient connection between the transaction and interstate commerce so as to result in the FAA preempting state arbitration law in this case.

\*590 The evisceration of state law requires that the issue be necessary to the decision and be based on a more developed record. I concur in the result affirming the trial court's order denying the petition to arbitrate.

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Service Corp. Intern. v. Fulmer  
Ala., 2003.Supreme Court of Alabama.  
SERVICE CORPORATION INTERNATIONAL  
and SCI Alabama Funeral Services, Inc.  
v.  
Blair FULMER.  
1021503.

Dec. 5, 2003.

**Background:** Son brought action against funeral home and funeral services corporation asserting various causes of action arising out of discovery that remains he was presented with were not those of his mother. Defendants moved to compel arbitration. The Jefferson Circuit Court, No. CV-03-297, Robert S. Vance, Jr., J., denied motion to compel arbitration, and defendants appealed.

**Holdings:** The Supreme Court, Houston, J., held that:

- (1) Federal Arbitration Act (FAA) applied to individual contract for funeral services;
- (2) question whether plaintiff had mental capacity to enter into contract was for arbitrator;
- (3) claim that plaintiff was suffering severe emotional distress when he signed contract did not render arbitration clause unconscionable; and
- (4) parent corporation of funeral home could not enforce arbitration agreement.

Affirmed in part, reversed in part, and remanded.

Lyons and Johnstone, JJ., concurred in rationale in part, concurred in judgment, and filed opinions.  
West Headnotes

[1] Commerce 83 ⇨7(2)

83 Commerce

83I Power to Regulate in General

83k2 Constitutional Grant of Power to Congress

83k7 Internal Commerce of States  
83k7(2) Activities Affecting Interstate Commerce. Most Cited Cases

Purely intrastate economic or commercial transactions can be within the reach of Congress if the general practice those transactions represent has, in the aggregate, a substantial effect on interstate commerce.

[2] Commerce 83 ⇨80.5

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(I) Civil Remedies

83k80.5 k. Arbitration. Most Cited Cases  
Economic or commercial transactions, such as the buying and selling of goods or services, contracting for employment, even those that are purely intrastate, are within the reach of the Federal Arbitration Act if the general practice those transactions represent has, in the aggregate, a substantial effect on interstate commerce. 9 U.S.C.A. § 1 et seq.

[3] Courts 106 ⇨97(5)

106 Courts

106II Establishment, Organization, and Procedure

106II(G) Rules of Decision

106k88 Previous Decisions as Controlling or as Precedents

106k97 Decisions of United States Courts as Authority in State Courts

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106k97(5) k. Construction of Federal Constitution, Statutes, and Treaties. Most Cited Cases

Alabama courts have no discretion to depart from the interpretations of the Commerce Clause set forth by the United States Supreme Court. U.S.C.A. Const. Art. 6, cl. 2; U.S.C.A. Const Art. 1, § 8, cl. 3.

[4] Commerce 83 ⇨ 80.5

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(I) Civil Remedies

83k80.5 k. Arbitration. Most Cited Cases

While there can be no per se rule that would preclude a trial court's role in evaluating whether a contract evidences a transaction involving commerce, for purposes of determining applicability of Federal Arbitration Act, a trial court evaluating a contract connected to some economic or commercial activity would rarely, if ever, refuse to compel arbitration on the ground that the transactions lacked involvement in interstate commerce. 9 U.S.C.A. § 1 et seq.

[5] T ⇨ 114

25T Alternative Dispute Resolution

25TII Arbitration

25TII(A) Nature and Form of Proceeding

25Tk114 k. Constitutional and Statutory Provisions and Rules of Court. Most Cited Cases (Formerly 33k2 Arbitration)

Commerce 83 ⇨ 80.5

83 Commerce

83II Application to Particular Subjects and Methods of Regulation

83II(I) Civil Remedies

83k80.5 k. Arbitration. Most Cited Cases

General practice of providing funeral services was within reach of Congress's commerce power, for purposes of determining applicability of Federal Arbitration Act (FAA) to individual contract for funeral services, where funeral services contract was economic in nature, and nationwide aggregate effect of transaction on interstate commerce easily

brought practice of contracting to provide funeral services and associated goods within the reach of Congress through the FAA; moreover, funeral services provided by funeral home were regulated by Federal Trade Commission (FTC) and by Occupational Safety and Health Administration (OSHA). 9 U.S.C.A. § 2.

[6] T ⇨ 134(3)

25T Alternative Dispute Resolution

25TII Arbitration

25TII(B) Agreements to Arbitrate

25Tk131 Requisites and Validity

25Tk134 Validity

25Tk134(3) k. Validity of Assent.

Most Cited Cases

(Formerly 33k6.2 Arbitration)

Plaintiff's claim, in response to motion to compel arbitration by funeral services company in breach-of-contract action, that he was suffering great emotional distress over the loss of his mother and lacked mental capacity to enter into contract for funeral services, and, thus, arbitration clause in contract was unenforceable, was inconsistent with his claim of breach of contract, which asserted existence of valid contract between parties.

[7] T ⇨ 199

25T Alternative Dispute Resolution

25TII Arbitration

25TII(D) Performance, Breach, Enforcement, and Contest

25Tk197 Matters to Be Determined by Court

25Tk199 k. Existence and Validity of Agreement. Most Cited Cases

(Formerly 33k23.13 Arbitration)

Resolution of plaintiff's claim that he lacked mental capacity to enter into contract for provision of funeral services was for arbitrator, not for trial court, in plaintiff's action alleging breach of contract and other claims, where defense was directed at contract as a whole, not just toward arbitration provision.

[8] T ⇨ 199

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25T Alternative Dispute Resolution  
25TII Arbitration  
25TII(D) Performance, Breach, Enforcement,  
and Contest  
25Tk197 Matters to Be Determined by  
Court  
25Tk199 k. Existence and Validity of  
Agreement. Most Cited Cases  
(Formerly 33k23.13 Arbitration)

A challenge to a contract that contains an arbitration clause that concerns the making of a contract in its entirety, rather than just the arbitration agreement itself, is for an arbitrator, rather than a court, to resolve.

[9] T ↪134(3)

25T Alternative Dispute Resolution  
25TII Arbitration  
25TII(B) Agreements to Arbitrate  
25Tk131 Requisites and Validity  
25Tk134 Validity  
25Tk134(3) k. Validity of Assent.  
Most Cited Cases  
(Formerly 33k6.2 Arbitration)

Absent showing that arbitration clause in contract for provision of funeral services was patently unfair, plaintiff's claim that he lacked mental capacity to sign contract due to his great emotional distress over death of his mother did not render arbitration clause unconscionable.

[10] T ↪134(6)

25T Alternative Dispute Resolution  
25TII Arbitration  
25TII(B) Agreements to Arbitrate  
25Tk131 Requisites and Validity  
25Tk134 Validity  
25Tk134(6) k. Unconscionability.

Most Cited Cases  
(Formerly 33k6.2 Arbitration)  
Sellers of goods and services do not have a general duty to test or ensure the mental capabilities of their customers; if the terms of the arbitration provision are not unreasonably favorable and patently unfair, the provision is not unconscionable.

[11] T ↪130

25T Alternative Dispute Resolution  
25TII Arbitration  
25TII(B) Agreements to Arbitrate  
25Tk130 k. In General. Most Cited Cases  
(Formerly 33k6.2 Arbitration)  
Arbitration provisions are to be treated like any other contractual provision.

[12] T ↪134(1)

25T Alternative Dispute Resolution  
25TII Arbitration  
25TII(B) Agreements to Arbitrate  
25Tk131 Requisites and Validity  
~~25Tk134 Validity~~  
25Tk134(1) k. In General. Most  
Cited Cases  
(Formerly 33k6.2 Arbitration)

When a party agrees to an arbitration provision, he generally is deemed to have made a cost/benefit decision to do so, even if he would have wished for more favorable terms.

[13] Jury 230 ↪28(7)

230 Jury  
230II Right to Trial by Jury  
230k27 Waiver of Right  
230k28 In Civil Cases  
230k28(7) k. Submission to  
Arbitration. Most Cited Cases

A party may freely choose to give up his constitutional right to a jury trial by agreeing to accept arbitration even when doing so is required to receive some good or service, and when he has done so he has weighed the costs of not having the good or service and has found those costs to outweigh the value to him, at that time, of the perceived benefit of a future jury trial in the occurrence of a future dispute; in such a situation, he has also factored in and found favorable the benefits of arbitration.

[14] T ↪179

25T Alternative Dispute Resolution  
25TII Arbitration  
25TII(D) Performance, Breach, Enforcement,  
and Contest

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25Tk177 Right to Enforcement and Defenses in General

25Tk179 k. Persons Entitled to Enforce. Most Cited Cases  
(Formerly 33k23 Arbitration)

Parent corporation of funeral home, which was not signatory to contract for provision of funeral services, could not enforce arbitration agreement in funeral services contract, even though plaintiff's claims against parent corporation arose from funeral home's loss of his mother's cremated remains and made virtually no distinction between alleged bad acts of parent corporation and those of subsidiary, where language of arbitration clause provided that any controversy arising between the "parties" was subject to arbitration, and parent corporation was not party to funeral services contract.

\*623 Andrew P. Campbell, Cinda R. York, and Wendy T. Tunstill of Campbell, Waller & Poer, LLC, Birmingham, for appellants.

Bruce L. Gordon, Nicole G. Still, and Brock G. Murphy of Gordon & Associates, L.L.C., Birmingham, for appellee.  
HOUSTON, Justice.

In this arbitration case we must address the ramifications of the United States Supreme Court's recent decision in *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003). Service Corporation International ("SCI") and SCI Alabama Funeral Services, Inc. ("SCI-Alabama") (hereinafter referred to collectively as "the appellants"), appeal from the denial of the appellants' motion to compel arbitration by the Jefferson Circuit Court. The trial court denied that motion based on our decision in *Sisters of the Visitation v. Cochran Plastering Co.*, 775 So.2d 759 (Ala.2000), which the United States Supreme Court recently abrogated in *Citizens Bank*. We affirm in part, reverse in part, and remand.

### I. Facts

Following the death of his mother, Blair Fulmer entered into a contract with SCI-Alabama d/b/a Johns-Ridout's Southside Chapel pursuant to which Johns-Ridout's Chapel would, among other things,

perform a funeral service and cremate his mother's body. The contract, entitled "Statement of Funeral Goods and Services Selected/Purchase Agreement," included an arbitration provision.

After a funeral service at Johns-Ridout's, Fulmer was presented with a vase; he was told that the vase contained his mother's remains. Fulmer claims that he later discovered that the remains in the vase were not those of his mother. Following this alleged discovery, Fulmer sued SCI-Alabama and SCI (SCI-Alabama's parent company), asserting various claims. The appellants filed a motion to compel arbitration, which the trial court, relying upon *Sisters of the Visitation*, supra, denied, stating that "[t]here is insufficient evidence that this specific contract led to any substantial movement of services or materials across state lines." (Emphasis omitted.) This appeal followed.

### II. Standard of Review

"We review de novo a trial court's ruling on a motion to compel arbitration. *Green Tree Fin. Corp. v. Vinton*, 753 So.2d 497, 502 (Ala.1999). Initially, the party seeking to compel arbitration must prove 1) the existence of a contract calling for arbitration, and 2) that the contract 'is "a contract evidencing a transaction involving commerce" within the meaning of the Federal Arbitration Act (FAA).' *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 53, 123 S.Ct. 2037, 2038, 156 L.Ed.2d 46 (2003) (quoting 9 U.S.C. § 2). '[A]fter a motion to compel arbitration has been made and supported, the burden is on the non-movant to present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question.' *Jim Burke Auto., Inc. v. Beavers*, 674 So.2d 1260, 1265 n. 1 (Ala.1995)."  
*Hudson v. Outlet Rental Car Sales, Inc.*, 876 So.2d 455, 457 (Ala.2003).

### III. Analysis

The appellants argue that the trial court erred in denying their motion to compel arbitration because, they argue, the appellants\*624 met their burden of

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proving "1) the existence of a contract calling for arbitration, and 2) that the contract 'is "a contract evidencing a transaction involving commerce" within the meaning of the Federal Arbitration Act (FAA).' " *Hudson*, 876 So.2d at 457. While the appellants did produce a contract calling for the arbitration of Fulmer's claims, the trial court held that the contract did not "evidence a transaction involving [interstate] commerce." Additionally, Fulmer argues that even if the interstate-commerce requirement had been met, the trial court did not err in denying the appellants' motion because 1) Fulmer's mental capacity at the time he signed the contract was such that he could not have assented to the arbitration provision, and 2) the arbitration provision is unenforceable because it is unconscionable and the contract containing the provision is a contract of adhesion. Fulmer also contends that even if arbitration is required as to his claims against SCI-Alabama, it is not required as to his claims against SCI, a nonsignatory to the contract.

#### A. "Involvement" of Transaction in Interstate Commerce

As stated above, the trial court's ruling was based upon this Court's decision in *Sisters of the Visitation*.

However, as we have previously noted, see, e.g., *Wolff Motor Co. v. White*, 869 So.2d 1129, 1132 (Ala.2003); *Gayfer Montgomery Fair Co. v. Austin*, 870 So.2d 683, 692 (Ala.2003), the interstate-commerce analysis in *Sisters of the Visitation* was expressly rejected in *Citizens Bank*. Fulmer acknowledges that *Sisters of the Visitation* was abrogated in *Citizens Bank*; however, Fulmer contends that the United States Supreme Court in *Citizens Bank* "merely called into question the five-step analysis utilized in the *Sisters [of the Visitation]* case." Fulmer's brief at 6. Fulmer's characterization of the impact of *Citizens Bank* is drastically understated. *Citizens Bank* was a very strong, although not a novel, statement that Congress has the power to bring transactions that are even purely intrastate commercial transactions (i.e., economic transactions) within the reach of its enactments, including the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("the FAA"). To the extent that

this point is still unclear, we provide the following clarification.

#### 1. The Impact of Citizens Bank

As noted in *Citizens Bank*, our decision in *Sisters of the Visitation* erred primarily in that it applied the "substantial effect on interstate commerce" test from *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), to individual transactions to require that *each transaction*, regardless of its nature, would have to be shown to "substantially affect" interstate commerce before the FAA would be triggered. *Citizens Bank*, 539 U.S. at 54-58, 123 S.Ct. at 2039-41. In *Lopez*, the Supreme Court declared that Congress's enactment of the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q), exceeded Congress's power under the Commerce Clause of the United States Constitution.<sup>FN1</sup> The Gun-Free School Zones Act made it a federal offense "for any individual knowingly to possess a firearm ... at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(2)(A)

FN1. U.S. Const. Art. I, § 8, cl. 3 (providing that Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

In reaching its holding, the Court described the "three broad categories of activity that Congress may regulate" under the Commerce Clause:

"First, Congress may regulate the use of the channels of interstate commerce.... Second, Congress is empowered to regulate\*625 and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.... Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce."

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*Lopez*, 514 U.S. at 558-59, 115 S.Ct. 1624 (emphasis added). Each of these categories relates to the “power of Congress ... to enact” statutes. *Id.* at 559, 115 S.Ct. 1624. With respect to the third category (i.e., the “substantially affect” test), the *Lopez* Court “specifically identified two types of laws that it had upheld as regulations of activities that substantially affect interstate commerce: (1) ‘regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce,’ *Lopez*, 514 U.S. at 561 (majority), and (2) regulations that include a jurisdictional element to ensure, ‘through case-by-case inquiry,’ that each specific application of the regulation involves activity that in fact affects interstate commerce, *id.*”

*Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 831 (4th Cir.1999), *aff’d*, *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000). The *Lopez* Court held that the Gun-Free School Zones Act was unconstitutional because (1) the Act was a criminal statute that had “nothing to do with ‘commerce’ or any sort of economic enterprise,” and (2) the Act “contain[ed] no jurisdictional element which would ensure, *through case-by-case inquiry*, that the firearm possession in question affects interstate commerce.”<sup>FN2</sup> *Lopez*, 514 U.S. at 561, 115 S.Ct. 1624 (emphasis added).<sup>FN3</sup>

FN2. The *Lopez* Court was careful to use the terms “substantially affects interstate commerce” when referring to the nationwide, aggregate effect of the statute and simply “affects interstate commerce” when referring to any individual possession of a firearm. *Lopez*, 514 U.S. at 561, 115 S.Ct. 1624. The Court had held four months earlier in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995), that the use of the term “affects interstate commerce” indicated “Congress’ intent to exercise its Commerce Clause powers to the full” and should be read with the broadest possible interpretation. Of

course, in *Allied-Bruce* the Court stated that *individual contracts* had only to “affect” interstate commerce; the Court was not resolving a constitutional challenge to the FAA that would have raised the question whether the FAA’s nationwide effect was a “substantial effect” on interstate commerce.

FN3. Following *Lopez*, Congress amended the Gun-Free School Zones Act, adding a “jurisdictional element.” Under the amended statute, which has since been upheld as a proper exercise of Congress’s commerce power, see, e.g., *United States v. Danks*, 221 F.3d 1037, 1038-39 (3rd Cir.1999), it is “unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.” 18 U.S.C. § 922(q)(2)(A).

Furthermore, the *Lopez* Court held that the “aggregation principle” first announced in *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942), could not be used to uphold the Gun-Free School Zones Act. The Court noted that the aggregation principle had not been applied to uphold statutes that did not regulate a commercial or economic transactions:

“[W]e have upheld a wide variety of congressional Acts regulating intrastate *economic* activity where we have concluded that the activity substantially affected\*626 interstate commerce. Examples include the regulation of intrastate coal mining[,] intrastate extortionate credit transactions, restaurants utilizing substantial interstate supplies, inns and hotels catering to interstate guests, and production and consumption of homegrown wheat. These examples are by no means exhaustive, but the pattern is clear. Where *economic* activity substantially affects interstate commerce, legislation regulating that activity will be sustained.

“Even *Wickard [v. Filburn]*, 317 U.S. 111 (1942) ], which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved *economic* activity in a way that the possession of a gun in a school zone does not.

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Roscoe Filburn operated a small farm in Ohio, on which, in the year involved, he raised 23 acres of wheat. It was his practice to sow winter wheat in the fall, and after harvesting it in July to sell a portion of the crop, to feed part of it to poultry and livestock on the farm, to use some in making flour for home consumption, and to keep the remainder for seeding future crops. The Secretary of Agriculture assessed a penalty against him under the Agricultural Adjustment Act of 1938 because he harvested about 12 acres more wheat than his allotment under the Act permitted. The Act was designed to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages, and concomitant fluctuation in wheat prices, which had previously obtained. The Court said, in an opinion sustaining the application of the Act to Filburn's activity:

"One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce."

"317 U.S., at 128, 63 S.Ct., at 90-91.

"Section 922(q) [the Gun-Free School Zones Act] is a criminal statute that by its terms *has nothing to do with 'commerce' or any sort of economic enterprise*, however broadly one might define those terms. Section 922(q) is *not an essential part of a larger regulation of economic activity*, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases *upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.*"

*Lopez*, 514 U.S. at 559-61, 115 S.Ct. 1624

(emphasis added; citations and footnote omitted). While the Court has "not adopt[ed] a categorical rule against aggregating the effects of any noneconomic activity," the Court's opinion in *Lopez* strongly suggests that such a rule should be presumed, because "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." \*627 *Morrison*, 529 U.S. at 613, 120 S.Ct. 1740.<sup>FN4</sup> See also *id.* at 611 n. 4, 120 S.Ct. 1740 ("[I]n every case where we have sustained federal regulation under the aggregation principle in *Wickard v. Filburn*, 317 U.S. 111 (1942), the regulated activity was of an apparent commercial character."); *id.* at 617, 120 S.Ct. 1740 ("We ... reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."); *United States v. Ballinger*, 312 F.3d 1264, 1270 (11th Cir.2002) ("No aggregation of local effects is permissible to elevate a non-economic activity's insubstantial effect on interstate commerce into a substantial one in order to support federal jurisdiction."). But see *United States v. Dasenzo*, 152 F.3d 1300, 1303 (11th Cir.1998) (against constitutional challenge, criminal arson statute, 18 U.S.C. § 844(i), upheld using aggregation principle because the target property was used for commercial purposes).

FN4. The Supreme Court has not yet established a test to determine whether an individual noneconomic activity (which, apparently, cannot be viewed in light of its nationwide aggregate effect) "affects" interstate commerce. See Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance, The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 Ark. L.Rev. 1253, 1311 n. 245 (2003), and accompanying text (noting the existence of this and other still-open questions regarding the interpretation of Congress' power under the Commerce Clause); see also *United States v. Ballinger*, 312 F.3d 1264, 1280 n. 1 (11th Cir.2002) (Hall, J., dissenting) (discussing some difficulties in the Court's

Commerce Clause jurisprudence that remain after *Lopez* and *Morrison*).

[1] However, the Court in *Lopez* made it clear that where a statute regulates commercial or economic activity, broadly defined, the statute will be upheld against a constitutional challenge if the “aggregate effect” of such activity—viewed on a nationwide scale—substantially affects interstate commerce. *Id.* In situations “where a general regulatory statute bears a substantial relation to commerce,” it is crucial to note that “the *de minimis* character of individual instances arising under that statute is of no consequence.” *Lopez*, 514 U.S. at 558, 115 S.Ct. 1624 (emphasis omitted; quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n. 27, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968)); see also *Lopez*, 514 U.S. at 556, 115 S.Ct. 1624 (“The *Wickard* Court emphasized that although Filburn’s own contribution to the demand for wheat may have been trivial by itself, that was not ‘enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.’” (quoting *Wickard*, 317 U.S. at 127-28, 63 S.Ct. 82)). It is with this point that *Sisters of the Visitation* primarily conflicts; under *Lopez*, an individual transaction need not substantially affect interstate commerce to come within the reach of a federal regulatory statute (except, perhaps, when that transaction is a noneconomic transaction<sup>FN5</sup>). In fact, purely intrastate economic or commercial transactions can be within the reach of Congress if the “‘general practice’ those transactions represent” has, in the aggregate, a substantial effect on interstate commerce. *Citizens Bank*, 539 U.S. at 58, 123 S.Ct. at 2041.

FN5. See *Ballinger*, 312 F.3d at 1270 (“Where ... regulation [of noneconomic activity] is at issue, the Constitution requires that the activity, by *itself*, have economic consequences that *substantially affect* interstate commerce.”).

[2] The Supreme Court has acknowledged that the FAA is a constitutional exercise of Congress’s Commerce Clause power. See \*628 *Southland*

*Corp. v. Keating*, 465 U.S. 1, 11, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) (stating that the FAA “rests on the authority of Congress to enact substantive rules under the Commerce Clause”); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) (stating that the FAA “is based upon and confined to the incontestable federal foundations of ‘control over interstate commerce and over admiralty’”). The FAA contains a “jurisdictional element which would ensure, through case-by-case inquiry,” *Lopez*, 514 U.S. at 561, 115 S.Ct. 1624, that whatever transaction is at issue affects interstate commerce: “A written provision in any maritime transaction or a contract, evidencing a transaction involving commerce<sup>FN6</sup> to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

FN6. The phrase “involving commerce” carries the same meaning as the phrase “affecting commerce,” and “signals an intent to exercise Congress’ commerce power to the full.” *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 277, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995).

9 U.S.C. § 2 (emphasis added).<sup>FN7</sup> As stated above, economic or commercial transactions (such as, for example, the buying and selling of goods or services, contracting for employment, etc.), even one that is purely intrastate, is within the reach of the FAA if the “‘general practice’ those transactions represent” has, in the aggregate, a substantial effect on interstate commerce. *Citizens Bank*, 539 U.S. at 58, 123 S.Ct. at 2041.

FN7. As is made clear from the above discussion, not every federal statute need contain a “jurisdictional element” to be a

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proper exercise of Congress's power under the Commerce Clause. See *United States v. Cunningham*, 161 F.3d 1343, 1345 (11th Cir.1998) (stating that "we have 'rejected the argument that *Lopez* requires Congress to place a jurisdictional element in every statute enacted pursuant to the Commerce Clause' " (quoting *United States v. Wright*, 117 F.3d 1265, 1269 (11th Cir.1997))). It is not surprising, however, that the FAA contains such a jurisdictional element. Unlike federal statutes in which it is patently clear that the regulated activity is economic in nature, the FAA relates to contracts containing arbitration clauses, and those contracts could be of an economic or a noneconomic nature.

The impact of *Citizens Bank* is, therefore, to reorient our understanding of what manner of interstate commerce "involvement" is required to bring a contract within the reach of the FAA. In a very real sense, an argument that a transaction does not "involve" commerce under the FAA is actually an argument that Congress does not have the constitutional power under the Commerce Clause to reach and regulate that type of transaction. As the decisions of the United States Supreme Court have made clear, there are few, if any, economic or commercial transactions that are beyond the reach of Congress's commerce power. Furthermore, virtually every kind of industry, small or large, is currently regulated by some sort of federal statute enacted pursuant to Congress's commerce power. See, e.g., 29 U.S.C. §§ 201-19 (Fair Labor Standards Act of 1938); 29 U.S.C. §§ 651-78 (Occupational Safety and Health Act of 1970); 29 U.S.C. §§ 2601-2654 (Family Medical Leave Act of 2000); 42 U.S.C. §§ 2000e to 2000e-17 (Title VII of the Civil Rights Act of 1964, as amended).

\*629 [3] We recognize that the mere fact that Congress *does* claim regulatory power over a particular industry or type of transaction does not mean that Congress in fact has the authority to do so under the Commerce Clause. The Supreme Court has stated as much:

"[T]he existence of congressional findings is not

sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." Rather, "[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."

*Morrison*, 529 U.S. at 614, 120 S.Ct. 1740. However, we also note that, since the establishment of what would be considered the "modern" (post-1936) interpretation of Congress's power under the Commerce Clause, the Supreme Court has not declared unconstitutional a single federal statute that regulated economic or commercial activity.<sup>FN8</sup>

FN8. While there is no doubt that the post-1936 expansion of Congress's power under the Commerce Clause has been a controversial issue, see, e.g., *Selma Medical Center, Inc. v. Fontenot*, 824 So.2d 668, 681-87 (Ala.2001) (Moore, C.J., dissenting); Omar N. White, *The Endangered Species Act's Precarious Perch: A Constitutional Analysis Under the Commerce Clause and the Treaty Power*, 27 Ecology L.Q. 215, 235 (2000) ("Prior to 1936, there were significant limitations upon the power of the federal government to regulate commerce, but ... the Court has [since] almost completely deferred to Congress in such matters."); Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 Mich. L.Rev. 752, 752 (1995) (describing the Supreme Court, with regard to its post-1936 Commerce Clause jurisprudence, as being "asleep at the constitutional switch" for more than 50 years); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L.Rev. 1387, 1400 (1987) ("The New Deal was not a reformation, but a sharp

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departure from previous case law....”), Alabama courts have no discretion to depart from the interpretations of the Commerce Clause set forth by the United States Supreme Court. See U.S. Const. Art. VI.

[4] Given this background, and in light of the continued vitality of *Wickard* (which represents the outer limits of Congress's commerce power, see *Lopez*, 514 U.S. at 560, 115 S.Ct. 1624), it would be difficult indeed to give an example of an economic or commercial activity that one could, with any confidence, declare beyond the reach of Congress's power under the Commerce Clause, and by extension, under the FAA. While there can be no *per se* rule that would preclude a trial court's role in evaluating whether a contract “evidenc[es] a transaction involving commerce,”<sup>FN9</sup> see *Morrison*, 529 U.S. at 614, 120 S.Ct. 1740, given the above, a trial court evaluating a contract connected to some economic or commercial activity would rarely, if ever, refuse to compel arbitration on the ground that the transactions lacked “involvement” in interstate commerce.

FN9. 9 U.S.C. § 2.

## 2. Application to this Case

[5] In light of the above analysis, the resolution of the first issue in this case becomes relatively simple. The appellants contend that the “general practice” of providing funeral services is well within the reach of Congress's commerce power. We agree. The transaction underlying the contract between Fulmer and SCI-Alabama (for the sale of goods and services), is unquestionably economic in nature, and \*630 the nationwide aggregate effect of such a transaction on interstate commerce easily brings the practice of contracting to provide funeral services and associated goods within the reach of Congress through the FAA. See *Gayfer Montgomery Fair Co.*, 870 So.2d at 694 (holding that “the ‘general practice’ that Austin's employment contract represented, i.e., the sale of goods by a national retailer, involved interstate commerce”); *Wolff Motor Co.*, 869 So.2d at 1134 (holding that “[t]he

automobile business in the aggregate involves interstate commerce”). This is true even though the effect of this particular transaction (Fulmer's contract with SCI-Alabama) on interstate commerce may be considered trivial. See *Wickard*, 317 U.S. at 127-28, 63 S.Ct. 82.

Additionally, affidavits filed in support of the appellants' motion to compel arbitration assert that the funeral services provided by SCI-Alabama are regulated by the Federal Trade Commission (“the FTC”), see 16 C.F.R. § 453,<sup>FN10</sup> and by the Occupational Safety and Health Administration (“OSHA”). Both of these entities base their regulatory power over entities like SCI-Alabama on Congress's commerce power. See 16 C.F.R. § 453; 29 U.S.C. § 651(b) (“The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.” (emphasis added)). Fulmer does not contest the appellants' assertions that the funeral services provided by SCI-Alabama are regulated by the FTC and OSHA, nor does Fulmer contend that such federal regulation exceeds Congress's constitutional authority.

FN10. The Federal Trade Commission administers the Federal Trade Commission Act, 15 U.S.C. §§ 41-58, among many other federal statutes. See 16 C.F.R. § 0.4.

Based on the above, we hold that the contract between Fulmer and SCI-Alabama “evidenc[es] a transaction involving commerce.” 9 U.S.C. § 2.

## B. Fulmer's Other Arguments

[6] As stated above, the trial court's denial of the appellants' motion to compel arbitration relied solely on our decision in *Sisters of the Visitation*. However, Fulmer asserts three other bases upon which we might affirm the trial court's denial of the appellants' motion to compel arbitration:<sup>FN11</sup>

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Fulmer's claims 1) that he lacked the necessary mental capacity when he entered into the contract with SCI-Alabama, 2) that the arbitration provision is unconscionable, and 3) that he should not be compelled to arbitrate his claims against SCI because SCI was not a party to the contract.

FN11. See *Smith v. Equifax Servs., Inc.*, 537 So.2d 463, 465 (Ala.1988) (stating that an appellate court can affirm a judgment of a trial court for any reason, even one not raised in the trial court).

Fulmer contends that he did not consent to arbitration because, when he entered into the contract with SCI-Alabama, he was suffering great emotional distress over the loss of his mother. He also contends that the arbitration provision is unconscionable primarily because the contract in which the provision appears is a contract of adhesion. These contentions do not support an affirmance of the order of the trial court for several reasons.

First, Fulmer's breach-of-contract claim (and perhaps some of his other claims) is based upon Fulmer's own assertion that a valid contract exists between\*631 him and SCI-Alabama. It was only after the appellants filed their motion to compel arbitration that Fulmer asserted, in his response, that the contract was unconscionable and that he did not have the requisite mental capacity when he entered into it. Courts will not permit this type of inconsistent pleading—an obvious attempt to avoid arbitration while seeking the benefits of the contract. See, e.g., *Credit Sales, Inc. v. Crimm*, 815 So.2d 540, 546 (Ala.2001) (stating that a plaintiff “cannot pick and choose” between those contract provisions that benefit the plaintiff and those to which the plaintiff wishes not to be bound; “instead, [the plaintiff] must accept or reject the entire contract”); see also *Leonard v. Terminix Int'l Co.*, 854 So.2d 529, 533 (plaintiffs who alleged unconscionability as a ground for avoiding arbitration sought *rescission* of their contracts with Terminix).

[7][8] Second, Fulmer's alleged lack of mental

capacity, even if true, is a defense directed toward the contract as a whole, not just toward the arbitration provision. The resolution of such a defense is for an arbitrator, not a trial court, to decide. It is well settled that, with an exception not relevant here,<sup>FN12</sup> “a challenge that concerns ‘the making of [a] contract in its entirety, rather than just ... the arbitration agreement itself’ is for an arbitrator, rather than a court, to resolve.” *Mason v. Acceptance Loan Co., Inc.*, 850 So.2d 289, 294-95 (Ala.2002) <sup>FN13</sup> (quoting *NationsBanc Invests., Inc. v. Paramore*, 736 So.2d 589, 591 (Ala.1999) (quoting in turn *Anniston Lincoln Mercury Dodge v. Conner*, 720 So.2d 898, 902 (Ala.1998))). See also *Green Tree Fin. Corp. of Alabama v. Wampler*, 749 So.2d 409, 414 (Ala.1999) (holding that a charge of unconscionability was directed to the contract as a whole where the plaintiffs claimed “that they were forced to sign [the contract] because of ‘tremendous economic duress’ arising from a combination of sales pressure concerning the impending deadline on the availability of a no-money-down payment plan and what they describe as their limited financial condition”). Our conclusion is demanded notwithstanding Fulmer's attempt to frame the issue as though he had the mental capacity to understand everything *but* the arbitration provision. See *Wampler*, 749 So.2d at 414 (“Artful pleading cannot defeat the operation of this rule.... ‘[W]e must look beyond the *ad hoc* arguments of counsel in order to determine whether [the plaintiff's] claim actually bears upon the entire agreement’ or just the arbitration clause.” (quoting *NationsBanc Investments, Inc.*, 736 So.2d at 591 (quoting in turn *Anniston Lincoln Mercury Dodge*, 720 So.2d at 901-02))).

FN12. “[A] challenge to the very existence of the contract-as is the case when contracts are challenged as being ‘void’ as opposed to ‘voidable’ [or when fraud in the factum is alleged]-is an issue for a court, not an arbitrator, to decide.” *Mason v. Acceptance Loan Co., Inc.*, 850 So.2d 289, 295 (Ala.2002).

FN13. In *Mason*, we held that a plaintiff's claim of insanity under Ala.Code 1975, §

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8-1-170, as a defense to a contract was an issue for the court, and not an arbitrator, to decide. 850 So.2d at 295 (stating that “contracts of insane persons are wholly and completely void” (quoting *Shoals Ford, Inc. v. Clardy*, 588 So.2d 879, 881 (Ala.1991))). Fulmer asserts no claim of insanity in this case.

[9] Finally, Fulmer's claim that the arbitration provision is unconscionable would be without merit, even had it been properly asserted. It is difficult to describe precisely what Fulmer's exact argument is with regard to his unconscionability claim. Fulmer relies on our decision in *Leonard v. Terminix International Co.*, 854 So.2d 529 (Ala.2002), as support for his argument \*632 that the arbitration provision is “procedurally unconscionable.” However, the substance of Fulmer's argument appears to be that his contract with SCI-Alabama is one of adhesion, and because he signed the contract during a very stressful period in his life, the contract is unconscionable.

Fulmer misconstrues our holding in *Leonard*. While the arbitration provision in *Leonard* was part of a contract of adhesion, it also included a “limitation upon recovery of ‘indirect, special, and consequential damages or loss of anticipated profits, ’ ” and prohibited treatment of the plaintiff's claims as a class action. 854 So.2d at 538. We held that, under those circumstances, the arbitration provision was unconscionable because the terms were “unreasonably favorable [toward the defendant] and patently unfair [toward the plaintiffs,]” and therefore met the two-part unconscionability test set forth in *American General Finance, Inc. v. Branch*, 793 So.2d 738, 748 (Ala.2000).<sup>FN14</sup> 854 So.2d at 538; see also *Leonard*, 854 So.2d at 539 (“This arbitration agreement is unconscionable because it is a contract of adhesion that restricts the Leonards to a forum where the expense of pursuing their claim far exceeds the amount in controversy.”).

FN14. In *Branch*, 793 So.2d at 748, we summarized the four-part test found in *Layne v. Garner*, 612 So.2d 404 (Ala.1992), as follows: a contract can be

held to be unconscionable when it contains “(1) terms that are grossly favorable to a party that has (2) overwhelming bargaining power.” In *Leonard*, we noted that “[o]ne of the criteria for finding a contract unconscionable is that it be ‘patently unfair.’ ” 854 So.2d at 538.

[10][11][12][13] The arbitration provision at issue in this case contains none of the problematic components discussed in *Leonard*. The provision in Fulmer's contract with SCI-Alabama provides: “ANY CONTROVERSY OR CLAIM ARISING BETWEEN THE PARTIES (INCLUDING THE INTERPRETATION OF THIS ARBITRATION CLAUSE) SHALL BE SUBMITTED TO AND FINALLY RESOLVED BY MANDATORY AND BINDING ARBITRATION IN ACCORDANCE WITH THE STATUTES, RULES OR REGULATIONS GOVERNING ARBITRATIONS IN THE STATE WHERE THIS AGREEMENT HAS BEEN EXECUTED. IN THE ABSENCE OF SUCH STATUTES, RULES OR REGULATIONS, THE ARBITRATION PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE APPLICABLE RULES OF THE AMERICAN ARBITRATION ASSOCIATION (‘AAA’); PROVIDED HOWEVER, THAT THE FOREGOING REFERENCE TO THE AAA RULES SHALL NOT BE DEEMED TO REQUIRE ANY FILING WITH THAT ORGANIZATION, NOR ANY DIRECT INVOLVEMENT OF THAT ORGANIZATION. NOTWITHSTANDING ANYTHING TO THE CONTRARY IN APPLICABLE STATUTES, RULES OR REGULATIONS, THE ARBITRATOR SHALL BE SELECTED BY MUTUAL AGREEMENT OF THE PARTIES OR BY A COURT OF COMPETENT JURISDICTION IN THE CITY OR COUNTY IN WHICH SELLER IS LOCATED, UPON THE APPLICATION OF ONE OR BOTH PARTIES. THIS ARBITRATION PROVISION SHALL BE BINDING ON THE SELLER, YOU AS THE PURCHASER, AND ANY OTHER PERSON WHO CLAIMS TO BE A THIRD PARTY BENEFICIARY OF THIS AGREEMENT.”

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(Capitalization in original.) Even assuming the contract between Fulmer and SCI-Alabama was a contract of adhesion, Fulmer's\*633 claim that his mental distress at the time he signed it made the arbitration provision unconscionable is unpersuasive. Sellers of goods and services do not have a general duty to test or ensure the mental capabilities of their customers; if the terms of the provision are not "unreasonably favorable and patently unfair," the provision is not unconscionable. Fulmer bears the burden of proving that the terms of the arbitration provision are unconscionable, and he has not met that burden. *Providian Nat'l Bank v. Screws*, [Ms. 1020668, Oct. 3, 2001] So.2d \_\_\_\_\_, (Ala.2003) ("Under Alabama law, arbitration provisions are not per se unconscionable. Rather, the party asserting the affirmative defense of unconscionability bears the burden of proving that the provision is unconscionable." (citation omitted)).<sup>FN15</sup>

FN15. One of Fulmer's contentions is that he received no quid pro quo for agreeing to arbitrate his claims against SCI. He bases this assertion on a statement found in *Leonard* that, in that case, the *Leonard* plaintiffs were not "given any quid pro quo for agreeing to arbitration and forgoing their constitutional right to a trial by jury." 854 So.2d at 538. Without deciding whether this statement, in the context of *Leonard*, was erroneous, we note that any attempt to turn that statement into a generally applicable principle would clearly be erroneous.

Arbitration provisions are to be treated like any other contractual provision. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996) (noting that in enacting the FAA, "Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974))). Generally, when a party agrees

to an arbitration provision (or any other contractual provision), he is deemed to have made a cost/benefit decision to do so, even if he would have wished for more favorable terms (of course, there is no constitutional right to "favorable terms," regardless of a party's economic situation).

A party may freely choose to give up his constitutional right to a jury trial even when doing so is required to receive some good or service, and when he has done so he has weighed the costs of not having the good or service and has found those costs to outweigh the value to him, at that time, of the perceived benefit of a future jury trial in the occurrence of a future dispute.

In such a situation, he has also factored in and found favorable the benefits of arbitration. We discussed some of these considerations in *Ex parte McNaughton*, 728 So.2d 592, 597-98 (Ala.1998):

"When interpreting the FAA, the federal courts have concluded that, consistent with the federal policy strongly favoring arbitration, *Moses H. Cone Mem'l Hospital [v. Mercury Constr. Corp.]*, 460 U.S. [1.] 24-25, 103 S.Ct. 927 [(1983)], 'there is nothing inherently unfair or oppressive about arbitration clauses.' *Coleman v. Prudential Bache Securities, Inc.*, 802 F.2d 1350, 1352 (11th Cir.1986).... Moreover, the Supreme Court has stated: 'Mere inequality in bargaining power ... is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.' *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991). Instead of suffering unconscionable treatment, a party, 'by agreeing to arbitrate, ... "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."' *Gilmer*, 500 U.S. at 31, 111 S.Ct. 1647 (citations omitted). Thus, agreements to arbitrate are not in themselves unconscionable."

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*C. Can SCI Enforce the Arbitration Provision?*

[14] Fulmer's final argument is directed solely at SCI, who is a nonsignatory to the contract and who, Fulmer claims, therefore cannot enforce the arbitration provision. Fulmer claims that the arbitration provision references only the signing parties-Fulmer and SCI-Alabama-and, therefore, it cannot encompass a nonsignatory defendant like SCI. SCI argues that the provision is not strictly limited to the signing parties, and, more importantly, \*634 that Fulmer's claims against the signatory defendant, SCI-Alabama, are so "intertwined" with his claims against SCI that arbitration of all of Fulmer's claims, including those against SCI, is appropriate.

In *Ex parte Stamey*, 776 So.2d 85, 89 (Ala.2000), we discussed the doctrine of equitable estoppel with regard to nonsignatories to arbitration agreements:

"In order for a party to be equitably estopped from asserting that an arbitration agreement cannot be enforced by a nonparty, the arbitration provision itself must indicate that the party resisting arbitration has assented to the submission of claims against nonparties-claims that would otherwise fall within the scope of the arbitration provision-to arbitration. See *Ex parte Napier*, 723 So.2d [49] at 53 [(Ala.1998)]. All that is required is (1) that the scope of the arbitration agreement signed by the party resisting arbitration be broad enough to encompass those claims made by that party against nonsignatories, or that those claims be 'intimately founded in and intertwined with' the claims made by the party resisting arbitration against an entity that is a party to the contract, and (2) that the description of the parties subject to the arbitration agreement not be so restrictive as to preclude arbitration by the party seeking it. See *Id.* In other words, the language of the arbitration agreement must be so broad that the nonparty could assert that in reliance on that language he believed he had the right to have the claims against him submitted to arbitration, and, therefore, that he saw no need to enter into a second arbitration agreement."

Here, Fulmer's claims against SCI are clearly "intimately founded in and intertwined with" his claims against SCI-Alabama. *Id.* All of Fulmer's

claims arise from the same set of facts. Virtually none of Fulmer's claims makes a distinction between the alleged bad acts of SCI (the parent corporation) and those of SCI-Alabama (its subsidiary); <sup>FN16</sup> rather, the claims are asserted as if SCI and SCI-Alabama acted in concert. Because Fulmer's claims are sufficiently "intertwined," the only remaining question is whether the arbitration provision is "so restrictive as to preclude arbitration by" SCI. *Id.*

FN16. In Fulmer's complaint, the alleged bad acts are repeatedly claimed to have been performed by the "Defendants," not by SCI-Alabama or SCI.

In *Stamey*, we discussed two lines of cases that have evolved with regard to the issue of "restrictiveness":

"In most of the cases that have come before this Court on an equitable-estoppel claim, we have not allowed the claims to be arbitrated, because the language of the arbitration provisions limited arbitration to the signing parties, so that there had been no assent on the part of the resisting party to arbitrate claims against nonsignatories. See *First Family Fin. Servs., Inc. v. Rogers*, 736 So.2d 553 (Ala.1999); *Med Center Cars, Inc. v. Smith*, 727 So.2d 9 (Ala.1998); *Ex parte Isbell*, 708 So.2d 571 (Ala.1997); *Ex parte Martin*, 703 So.2d 883 (Ala.1996); *Ex parte Jones*, 686 So.2d 1166 (Ala.1996); *Ex parte Stallings & Sons, Inc.*, 670 So.2d 861 (Ala.1995); see also David F. Sawrie, *Equitable Estoppel and the Outer Boundaries of Federal Arbitration Law: The Alabama Supreme Court's Retrenchment of an Expansive Federal Policy Favoring Arbitration*, 51 Vand. L.Rev. 721 (1998). In other words, within these arbitration provisions references to the parties specifically limited the claims that would be arbitrable under those provisions. For \*635 example, the arbitration agreement at issue in *Med Center Cars* read:

" 'BUYER HEREBY ACKNOWLEDGES AND AGREES THAT ALL DISPUTES AND CONTROVERSIES OF EVERY KIND AND NATURE BETWEEN BUYER AND SELLER ARISING OUT OF OR IN CONNECTION WITH THE PURCHASE OF THIS VEHICLE WILL BE

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RESOLVED BY ARBITRATION WITH THE PROCEDURE SET FORTH ON THE REVERSE SIDE OF THIS BUYER'S ORDER.'

"*Med Center Cars*, 727 So.2d at 13. (Emphasis added.) This Court wrote:

"The language of the arbitration clauses in this case [is] not broad enough to encompass claims against the nonsignatories. The written arbitration agreements in this case expressly limit the scope of the agreements to "disputes, claims, and controversies" arising between the "Buyer" and the "Seller" only. ... Therefore, the nonsignatories have no standing to seek enforcement of those arbitration agreements.'

*Id.* at 19. Because the agreement in *Med Center Cars* limited the claims that might be submitted to arbitration to those between the 'buyer' and the 'seller,' the buyer, who was resisting arbitration, could not be found to have assented to have his claims against a nonparty lender submitted to arbitration. *Med Center Cars* applied the rule that if the arbitration provision is specifically limited to claims that arise between the parties to the contract, then any nonparties will not be able to enforce the arbitration agreement.

"However, this Court has also held that the language of other arbitration agreements was sufficiently broad to include claims against nonparties, and in regard to such agreements it has allowed nonparties to enforce the arbitration provisions against parties to the contract. See *Ex parte Napier*, 723 So.2d 49 (Ala.1998); *Ex parte Gates*, 675 So.2d 371 [ (Ala.1996) ]; see also Sawrie, *Equitable Estoppel and the Outer Boundaries of Federal Arbitration Law: The Alabama Supreme Court's Retrenchment of an Expansive Federal Policy Favoring Arbitration*, 51 Vand. L.Rev. 721. For example, the arbitration provision in *Napier* read:

"21. ARBITRATION: All disputes, claims or controversies arising from or relating to this Contract or the relationships which result from this Contract, or the validity of this arbitration clause or the entire Contract, shall be resolved by binding arbitration by one arbitrator selected by Assignee with consent of Buyer(s). This arbitration Contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1. Judgment

upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration except as provided herein. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY ASSIGNEE (AS PROVIDED HEREIN). The parties agree and

understand that all disputes arising under case law, statutory\*636 law and all other laws including, but not limited to, all contract, tort and property disputes will be subject to binding arbitration in accord with this contract. The parties agree and understand that the arbitrator shall have all powers provided by the law and the Contract. These powers shall include all legal and equitable remedies including, but not limited to, money damages, declaratory relief and injunctive relief.

Notwithstanding anything hereunto [sic] the contrary, Assignee retains an option to use judicial or non-judicial relief to enforce a security agreement relating to the Manufactured Home secured in a transaction underlying this arbitration agreement, to enforce the monetary obligation secured by the Manufactured Home or to foreclose on the Manufactured Home. Such judicial relief would take the form of a lawsuit. The institution and maintenance of an action for judicial relief in a court to foreclose upon any collateral, to obtain a monetary judgment or to enforce the security agreement shall not constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this Contract, including the filing of a counterclaim in a suit brought by Assignee pursuant to this provision.'

"*Napier*, 723 So.2d at 51. (Emphasis added.) That arbitration provision in *Napier* contained no references to the parties that would impose a limitation on what claims would be arbitrated. We held that the provision was broad enough to include claims that were related to the contract because the language was sufficient to indicate that the party resisting arbitration had assented to submit its

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claims against nonparties-claims that otherwise would fall within the scope of the provision-to arbitration. *Id.* at 54.

"Is the arbitration provision included in the Green Tree contract broad enough to indicate that the Stameys assented to have their claims against Hallmont-claims that would otherwise fall within the arbitration agreement-submitted to arbitration? In other words, is the arbitration provision involved in this action more similar to the arbitration provisions in the *First Family* line of cases or those in the *Napier* line of cases?"

*Stamey*, 776 So.2d at 89-91 (capitalization original); see also *Equifirst Corp. v. Ware*, 208 So.2d 1, 5 (Ala.2001); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753 (11th Cir.1993) (allowing nonsignatory parent company to enforce arbitration provision based on "intertwined" claims where provision required arbitration of "any controversy or claim arising out of or relating to this Agreement or the breach thereof ....").

The question at the end of the language quoted above from *Stamey*-"[I]s the arbitration provision ... more similar to the arbitration provisions in the *First Family* line of cases or those in the *Napier* line of cases?"-is the question we must resolve in this case. Is the arbitration provision in Fulmer's contract with SCI-Alabama "more similar to the arbitration provisions in the *First Family* line of cases or those in the *Napier* line of cases?" *Stamey*, 776 So.2d at 91. The arbitration provision at issue here states:

"ANY CONTROVERSY OR CLAIM ARISING BETWEEN THE PARTIES (INCLUDING THE INTERPRETATION OF THIS ARBITRATION CLAUSE) SHALL BE SUBMITTED TO AND FINALLY RESOLVED BY MANDATORY AND BINDING ARBITRATION.... THIS ARBITRATION \*637 PROVISION SHALL BE BINDING ON THE SELLER, YOU AS THE PURCHASER, AND ANY OTHER PERSON WHO CLAIMS TO BE A THIRD PARTY BENEFICIARY OF THIS AGREEMENT."

(Capitalization original; emphasis added.) FN17  
We hold that the arbitration provision in this case is more similar to the line of cases following *First*

*Family Financial Services, Inc. v. Rogers*, 736 So.2d 553 (Ala.1999), because the provision covers only claims that arise "between the parties," the only exception being that the provision also covers those who claim status as a third-party beneficiary. SCI is not a party to the contract; neither does it claim to be a third-party beneficiary. Therefore, Fulmer is not equitably estopped from asserting that SCI cannot enforce the arbitration provision. The trial court did not err in denying the motion to compel arbitration as to Fulmer's claims against SCI.

FN17. There is also a sentence on an earlier page of the contract that states: "NOTICE: BY SIGNING THIS AGREEMENT, YOU ARE AGREEING TO HAVE ANY AND ALL DISPUTES BETWEEN YOU AND THE SELLER RESOLVED BY ARBITRATION...." (Capitalization original.) However, the terms of the actual arbitration provision supersede this notice.

#### IV. Conclusion

Based on the above, we affirm the trial court's order insofar as it denied the appellants' motion to compel arbitration of Fulmer's claims against SCI, and we reverse the order insofar as it denied the motion to compel arbitration of Fulmer's claims against SCI-Alabama. We remand the case to the trial court for proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

SEE, BROWN, HARWOOD, WOODALL, and STUART, JJ., concur.  
LYONS and JOHNSTONE, JJ., concur in the rationale in part and concur in the judgment. LYONS, Justice (concurring in the rationale in part and concurring in the judgment).

I concur in the disposition in the main opinion of the issues of capacity, unconscionability, and in its rejection of SCI's claim that it is entitled to arbitration, even though it is a nonsignatory to the contract containing the arbitration provision. I concur in the result as to disposition of the question

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of the effect of the transaction upon interstate commerce. My concern is that if I joined this portion of the opinion, I doubt that I could ever subsequently find any transaction not subject to interstate commerce. I am unable to take that step at this time.

JOHNSTONE, Justice (concurring in the rationale in part and concurring in the judgment).

But for one exception, I concur in the main opinion in its treatment of Fulmer's claim of lack of mental capacity. The exception is that, in my opinion, the better statement of the allocation of prerogatives between arbitrator and court would be simply that the arbitrator, not the court, decides a claim that the whole contract is *voidable*, as distinguished from *void*. The main opinion correctly observes that the court, not the arbitrator, would decide a claim that the whole contract is *void* as distinguished from *voidable*.

I also concur in the main opinion in its treatment of Fulmer's claim that the arbitration agreement is unconscionable. I also concur in the main opinion in its rejection\*638 of the claim of the nonsignatory defendant SCI that it is entitled to the protection of the arbitration agreement. I also concur in the judgment.

However, I concur only in the result of the analysis of the applicability of the Federal Arbitration Act ("FAA") to this transaction. While the main opinion contains a number of apt and instructive quotations from United States Supreme Court cases declaring the extent of the authority granted to Congress by the Commerce Clause, the generalizations in the main opinion about these cases are even more expansive than the holdings of the cases themselves. The Alabama Supreme Court should not gratuitously surrender any of the remaining vestiges of the powers reserved to the State of Alabama by the Tenth Amendment to the United States Constitution.

I further respectfully disagree with the implication that the applicability of the regulations of the Occupational Safety and Health Administration ("OSHA") to SCI-Alabama supplies, in whole or in part, the nexus to interstate commerce necessary for the FAA to apply. The applicable test stated in

*Citizens Bank v. Alafabco*, 539 U.S. 52, 56, 123 S.Ct. 2037, 2040, 156 L.Ed.2d 46 (2003), reads:

"Congress's Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate *the economic activity in question* would represent a general practice subject to federal control."

(Internal quotation marks and ellipses omitted; emphasis added.) The employees' working conditions regulated by OSHA at SCI-Alabama are not "the economic activity in question" in this case. The sale of funeral and burial goods and services is "the economic activity in question." The nexus between interstate commerce and the transaction in the case before us recognized by the applicable *Citizens Bank* test is that "the economic activity in question" is subject to the control of *the Federal Trade Commission*, which does regulate the sale of funeral and burial goods and services, as the main opinion correctly observes.

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No. 59821-0-1

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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LESCHI CORP., a Washington corporation,

Appellant.

v.

THE PIER AT LESCHI CONDOMINIUM OWNERS ASSOCIATION, a  
Washington non-profit corporation,

Respondent

---

CERTIFICATE OF SERVICE

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ORIGINAL

I, Katherine Smith, hereby certify and declare:

1. I am over the age of 18 years and am not a party to the within cause:

2. I am employed by the law firm of Barker Martin, P.S. My business and mailing address are 719 2<sup>nd</sup> Avenue, Suite 1200, Seattle, WA 98104-1749;

3. On the 31<sup>st</sup> day of August, 2007, I caused to be served the **Brief of Respondent the Pier at Leschi Condominium Owners Association** upon the following in the manner described below:

Mark O'Donnell Lori McKown Preg O'Donnell & Gillett 1800 9 <sup>th</sup> Avenue, Suite 1500 Seattle, WA 98101 <i>Via Hand Delivery</i>	Pauline Smetka Helsell Fetterman, LLP 1001 Fourth Avenue, Suite 4200 Seattle, WA 98154 <i>Via Hand Delivery</i>
Betsy Gillaspay Salmi & Gillaspay, PLLC 500 108 <sup>th</sup> Avenue NE, Suite 215 Bellevue, WA 98004 <i>Via Facsimile and Hand Delivery</i>	Brett M. Wieburg Law Offices of Deborah Severson 3315 S. 23 <sup>rd</sup> Street, Suite 310 Tacoma, WA 98405 <i>Via Facsimile and Hand Delivery</i>

I declare under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct to the best of my knowledge and belief.

Signed this 31<sup>st</sup> day of August, 2007 in Seattle, Washington

Katherine Smith

Katherine Smith