

Case No. S00G1817

IN THE
SUPREME COURT OF GEORGIA

Ray Marlin Crawford,
Petitioner,

v.

Results Oriented, Inc. d/b/a Assured Housing,
Respondent.

**On Writ of Certiorari to the
Court of Appeals of Georgia**

BRIEF OF PETITIONER

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BASIS FOR JURISDICTION

Petitioner Ray Marlin Crawford appeals the decision of the Court of Appeals in *Results Oriented, Inc. v. Crawford*, Civil Case A00A540. This Court has jurisdiction under the Georgia Constitution, Article 6, §6, ¶V.

JUDGMENT BELOW

The opinion of the Court of Appeals was docketed on June 30, 2000. The opinion, reported at 245 Ga. App. 432, is appended to this brief.

ISSUE PRESENTED

Whether the Court of Appeals erred in holding that the arbitration provisions in the mobile home purchase and finance documents at issue here are not unconscionable?

STATEMENT OF FACTS

In August 1997, Ray Marlin Crawford paid more than \$76,000 for a mobile home manufactured by Cavalier Homes, sold by Results Oriented (d/b/a Assured Housing) and financed by Green Tree. R. 38-41. Before buying, Mr. Crawford made three trips to the Results Oriented lot to examine model homes and discuss the elements of the transaction: price, warranties and financing. R. 260-63. During these discussions, Mr. Crawford was assured that the home was covered by warranty, but was never advised that he would have to pay for an arbitration proceeding to enforce any remedies to which he was entitled. R. 261-62.

On the day of the sale, a Results Oriented manager presented Mr. Crawford with a stack of papers approximately one inch thick, assuring him that they were standard documents for mobile home

sales. R. 261. Without disclosing that the documents contained terms previously not discussed, the manager quickly shepherded Mr. Crawford through the stack, requesting his signature and initials at various points. R. 262.

Among these papers, Mr. Crawford signed two documents containing arbitration provisions: Section 10 of the "Acknowledgment and Agreement (HUD Code)" between Results Oriented, Cavalier Homes and Mr. Crawford (hereafter, "the A&A Arbitration Provision") and Section 14 of the Retail Installment Contract and Security Agreement between Results Oriented, Green Tree and Mr. Crawford (hereafter the "RIC Arbitration Provision"). R. 38-42. The A&A Arbitration Provision requires Mr. Crawford to arbitrate any dispute arising from the purchase through the American Arbitration Association ("AAA") at the manufacturer's principal place of business. R. 42. Under the RIC Arbitration Provision, Mr. Crawford is required to arbitrate his claims while Results Oriented and Green Tree have reserved their rights to sue Mr. Crawford in court to enforce the security agreement or foreclose on the home. R. 40-41.

From the time Mr. Crawford's home was assembled, it has never been right. As a result of racking and torquing, the two halves of the structure have never matched properly and the home cannot be leveled. R. 262. Other defects have been noted by Results Oriented and the State Fire Marshall. R.48-52, 58-59, 78-79. After giving Results Oriented and Cavalier Homes eleven months to repair or replace the unit, Mr. Crawford attempted to

initiate an arbitration proceeding, only then learning of the fees and costs associated with arbitrating his claims. R. 262.

Under the A&A Arbitration Provision, Mr. Crawford must pay substantial fees - a fact not disclosed in the sales documents - to pursue his claim. Mr. Crawford will have to pay administrative fees - an initial \$1250 filing fee and then a daily administrative fee of \$150. R. 527-28. He may be responsible for some or all of the arbitrator's compensation, which averages \$700 for each day of service, according to the AAA. R. 524-26. Additionally, the required location of arbitration - not disclosed in the Acknowledgment and Agreement - is Addison, Alabama, which is more than three hours from Mr. Crawford's house in Carroll County. The minimum total that Mr. Crawford would expect to pay to cover these costs is \$2000; he might be required to pay much more. Mr. Crawford has sworn that he cannot afford these fees. R. 262.

The exact costs entailed by the RIC Arbitration Provision, which does not designate an arbitration service provider, cannot be stated with precision, but are likely to be comparable to those occurring under the A&A Arbitration Provision.

In October 1998, Mr. Crawford sued Cavalier Homes, Results Oriented and Green Tree in the State Court of Carroll County for contract-based claims, breach of express and implied warranties and fraud. R. 15-86. All defendants filed motions to compel arbitration of Mr. Crawford's claims. R. 121-31, 157-64, 264-76. In July 1999, the trial court denied these motions, holding that

these arbitration provisions are unconscionable and unenforceable. The trial court found that Results Oriented's failure to disclose the substantial administrative and service fees and costs associated with arbitration, combined with the evident inequality of bargaining power between the parties, constituted procedural unconscionability. It also found that the foreclosure of remedies effectuated by the prohibitive cost of arbitration constituted substantive unconscionability. R. 533-39. Additionally, the court noted that non-mutuality of the arbitration requirement contributed to its conclusion that the RIC Arbitration Provision is unconscionable. R.535-36. Results Oriented asked the Court of Appeals to review the trial court's interlocutory order.¹

On June 30, 2000, the Court of Appeals reversed the trial court on the issue of unconscionability, holding that the substantial forum fees not disclosed to Mr. Crawford, orally or in writing, and therefore unknown to him at the time of contracting, constituted "subsequently-acquired knowledge" that could not be considered in determining unconscionability. App. 12.

This Court granted certiorari on October 27, 2000.

¹ The other defendants pursued related appeals in the Court of Appeals: *Cavalier Homes*, Case No. A00A541 and *Green Tree*, Case No. A00A542.

ENUMERATION OF ERRORS

The Court of Appeals erred in holding that the arbitration provisions in the mobile home purchase and finance documents at issue here are not unconscionable.

ARGUMENT

I. THE ARBITRATION PROVISIONS ARE UNCONSCIONABLE AND THEREFORE UNENFORCEABLE.

A. The United States Supreme Court has identified unconscionability as a ground for invalidating arbitration agreements.

The purpose of the Federal Arbitration Act (FAA) is to "place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The FAA provides that a written arbitration provision covering a contract involving commerce, "*shall be valid...save upon any grounds as exist at law or in equity for the revocation of any contract.*" 9 U.S.C. §2 (emphasis added). Fully consistent with the FAA, arbitration agreements may be challenged and invalidated on any generally applicable contract principle. The United States Supreme Court has expressly stated that state contract law defenses - including unconscionability - are available to a party challenging an arbitration agreement. *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) ("generally applicable contract defenses, such as . . . unconscionability, may be applied to invalidate arbitration agreements without contravening [the Federal Arbitration Act]").

Appellate state courts across the United States have refused to enforce arbitration agreements marked by procedural or

substantive unconscionability. See, e.g. *Graham v. Scissor-Tail*, 623 P.2d 165 (Cal. 1981); *Powertel v. Bexley*, 743 So. 2d 570 (Fla. Ct. App. 1999), rev. denied, 2000 Fla. LEXIS 1005 (May 3, 2000); *Iwen v. U.S. West Direct*, 977 P.2d 989 (Mont. 1999); *Williams v. Aetna Finance Co.*, 700 N.E.2d 859 (Ohio 1998), cert. denied, 526 U.S. 1051 (1999); *In re Turner Bros. Trucking Co.*, 8 S.W.3d 370 (Tex. App. 1999), mandamus denied (May 11, 2000); *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996); *Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854 (W. Va. 1998).

In October 2000, the Supreme Court heard oral argument in *Green Tree Financial Corp. v. Randolph*, Case No. 99-1235, on a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. 120 S. Ct. 1552 (U.S. 2000). In *Randolph*, the issue presented is not whether, as argued here, fees associated with arbitration will render an arbitration clause unconscionable as a matter of contract law. *Randolph* raises the question of whether an arbitration clause imposing the prospect of substantial fees (and other procedural limitations) prevents a person from pursuing a claim under the federal Truth in Lending Act (TILA), thus bringing the arbitration clause (and the FAA) into conflict with TILA.

As established above, states should not - and routinely do not - enforce arbitration clauses that run afoul of generally applicable state contract law on unconscionability. A very different standard, however, governs the question of whether a statute (such as TILA) conflicts with the enforcement of an

arbitration clause under the FAA. The Supreme Court has directed that a statute will only be found to conflict with the FAA if Congressional intent to preclude waiver of a judicial forum is apparent explicitly from the text of that statute or inherently in a conflict between the statute's goals and arbitration. *Gilmer*, 500 U.S. at 26.

In deciding *Randolph*, the Eleventh Circuit found that the possibility of incurring substantial fees was likely to deter claimants from bringing an action. *Randolph v. Green Tree Financial Corp.*, 178 F.3d 1149, 1158 (11th Cir. 1999). Petitioner suggests that the Eleventh Circuit's holding on this point is instructive here. If Mr. Crawford is required to pay the substantial arbitration fees implicit in these arbitration provisions, he will effectively be barred from pursuing his common law and statutory claims. The legal question of whether this result - the arbitration provisions effectively operating as exculpatory clauses - is unconscionable under state law is distinct from the statutory conflict question before the United States Supreme Court.

B. Unconscionability exists where a significant imbalance in bargaining power yields contract terms that are one-sided and lead to unjustifiably harsh results.

This dispute arose over a Georgia transaction between a Georgia citizen and a corporation conducting business in Georgia. Nevertheless, the Acknowledgment and Agreement includes a choice

of law provision stating that Alabama law governs.² The Retail Installment Contract is governed by Georgia law.

The courts of Georgia and Alabama both examine a contract's procedural formation and substantive terms to decide if the agreement is unconscionable. *NEC Technologies, Inc. v. Nelson*, 267 Ga. 390, 391, 478 S.E.2d 769, 771 (1996); *Layne v. Garner*, 612 So. 2d 404, 408 (Ala. 1992).

The Georgia courts use a two-pronged analysis, examining first the procedural elements of the contract and then the substantive components. *NEC Technologies*, 267 Ga. at 391, 478 S.E.2d at 771; *Mullis v. Speight Seed Farms, Inc.*, 234 Ga. App. 27, 29, 505 S.E.2d 818, 820 (1998), *cert. denied*, 1999 Ga. LEXIS 37 (Jan. 8, 1999).

The procedural inquiry addresses the making of the contract and focuses on two factors: oppression and surprise. *Mullis*, 234 Ga. App. at 30, 505 S.E.2d at 820. 'Oppression' may be inferred from unequal bargaining power that denies one party meaningful choice in the negotiations; 'surprise' exists where terms were

² Alabama law will govern this question of unconscionability only if it is consistent with the public policy of this state. As will be shown below, Georgia law does not permit a company to impose a contract provision that operates as an exculpatory clause upon its consumers. If the Alabama Supreme Court would not find such a provision unconscionable, Georgia should not give effect to the contract provision designating Alabama law as governing. See *Nasco, Inc. v. Gimbert*, 239 Ga. 675, 676, 238 S.E.2d 368, 368 (1977) (holding "The law of the jurisdiction chosen by parties to a contract to govern their contractual rights will not be applied by Georgia courts where application of the chosen law would contravene the policy of, or would be prejudicial to the interests of, this state."); *Enron Capital & Trade Resources Corp. v. Pokalsky*, 227 Ga. App. 727, 730, 490 S.E.2d 136, 139 (1997).

hidden or obscured in a contract drafted by the party seeking to enforce the terms. *Id.* Factors relevant to the procedural inquiry include "the age, education, intelligence, business acumen and experience of the parties, their relative bargaining power, the conspicuousness and comprehensibility of the contract language, the oppressiveness of the terms, and the presence or absence of a meaningful choice." *NEC Technologies*, 267 Ga. at 392, 478 S.E.2d at 772.

The substantive inquiry examines the contract for terms that are one-sided - either unreasonably favorable or overly harsh - without justification. *Fotomat Corp. of Fla. v. Chanda*, 464 So. 2d 626, 629 (Fla. App. 1985) (framing the unconscionability analysis used in *NEC Technologies*). In evaluating substantive unconscionability, the court will consider "the commercial reasonableness of the contract terms, the allocation of risks between the parties, and similar public policy concerns." *NEC Technologies*, 267 Ga. at 392, 478 S.E.2d at 772. A court may conclude that contract terms reached by equally-matched parties are reasonable, yet find the same terms unconscionable when they bind parties of unequal strength. *Mullis*, 234 Ga. App. at 30, 505 S.E.2d at 821.

While a determination of unconscionability depends specifically on the facts of a case, one rule is firmly settled in Georgia law: a contract may not insulate a party from all legal liability in the event of breach. This Court has held that a contract provision achieving such an effect is unconscionable.

See *Freeman v. Hubco Leasing, Inc.*, 253 Ga. 698, 705-06, 324 S.E.2d 462, 469-70 (1985) (allowing that parties to a consumer contract for the sale of goods covered by the Uniform Commercial Code may modify or limit remedies and the measure of damages in the event of breach, but finding unconscionable a contract provision that fails to provide any remedy).

Although the Alabama courts have not structured the unconscionability analysis with equal formality, the Alabama Supreme court has identified five factors that - taken together - constitute a procedural/substantive inquiry like that used in Georgia. *Layne*, 612 So. 2d at 408. Three procedural factors are considered: the education or sophistication of the party; the absence of meaningful choice for one party, and; unequal bargaining power distinguishing the parties. *Id.* Two factors address substantive concerns: first, the existence of terms that unreasonably favor one party, and; the presence of terms that are oppressive, one-sided or patently unfair. *Id.*

The Alabama courts have not weighted these factors or stated that a showing addressing each of the five *Layne* factors must be made to establish unconscionability, but recent decisions clearly indicate that more than one factor must be present. See, e.g., *Ex Parte Smith*, 736 So. 2d 604, 612 (Ala. 1999) (refusing to declare provision unconscionable where plaintiff failed to offer any evidence - aside from non-mutuality of remedy - that the court could use to evaluate unconscionability).

Alabama law provides no explicit standard for determining unconscionability, requiring that "each case must be considered on its own facts." *Marshall v. Mercury Finance Co.*, 550 So. 2d 1026, 1027 (Ala. Civ. App. 1989). As in Georgia, terms are not *per se* unconscionable, but may be found unconscionable in light of the relationship between the parties. *Lloyd v. Service Corp. of Ala.*, 453 So. 2d 735, 741 (Ala. 1984).

1. Lack of clarity in the terms and an absence of meaningful choice in their acceptance make the arbitration provisions procedurally unconscionable.

a. Surprise

The arbitration fees that Mr. Crawford could be forced to pay were not disclosed in the arbitration provisions or any sales document. The arbitration provisions simply stated that disputes would be resolved in an arbitral, rather than judicial, forum, without indicating that substantial administrative and service fees - significantly larger than the filing fee of \$65 required to initiate litigation in the State Court of Carroll County - existed and that Mr. Crawford would be responsible for these fees. Mr. Crawford learned of the arbitration fees only after his attorney requested an arbitration package from the AAA. By failing to even mention that a party would have to bear the costs of arbitration, let alone hinting at the magnitude of such costs or providing the signatory with a copy of the AAA fee schedule, Results Oriented obscured the true meaning of these arbitration provisions. Without basic cost information, the import of the arbitration provision could not be known, constituting surprise.

The Court of Appeals, in an acrobatic turn of logic, concluded that if Mr. Crawford had not known of the fees when he signed the contract, the drafter's concealment of such fees could not give way to a finding of unconscionability because "the unconscionability of a contract is not to be judged based on subsequently-acquired knowledge. . . . [It] is to be determined on the circumstances existing at the time a contract was made, rather than those existing . . . later." (citations omitted) App. 12.³ By the court's reasoning, then, Mr. Crawford could only have challenged these arbitration provisions as unconscionable if he had known about the fees before signing the contracts; with that knowledge, however, he would have been hard-pressed to demonstrate surprise. The Court of Appeals's holding is faulty as a matter of law.

A contract will be declared unconscionable if it was unconscionable at the time it was made. *NEC Technologies*, 267 Ga. at 391, 478 S.E.2d at 771. The fees implicit in these arbitration provisions existed at the time these contracts were made, even though Results Oriented successfully kept them from Mr. Crawford when he signed the contracts.⁴ Mr. Crawford's

³ After reaching this conclusion, the Court failed to look at any of the other factors (education, sophistication in business and legal matters, and disparity of bargaining power between the parties) that Mr. Crawford presented in support of his procedural unconscionability argument.

⁴ Mr. Crawford is not alleging that the arbitration clauses were fraudulently induced. Nevertheless, unconscionability, though distinct from fraudulent inducement, "is directly related to fraud and deceit." *F.N. Roberts Pest Control Co. v. McDonald*, 132 Ga. App. 257, 260, 208 S.E.2d 13, 16 (1974).

eventual discovery of the fees does not constitute a "change in circumstance." As this Court has held, a "change in circumstance" is a material change occurring beyond the four corners of a contract that makes one of the parties unwilling or unable to perform as required by the contract. See, e.g., *R.I. Kimsey Cotton Co. v. Ferguson*, 233 Ga. 962, 965-66, 214 S.E.2d 360, 363 (1975) (holding that changes in market prices, rendering contract terms for cotton sales unfavorable to farmers, could not be considered in determining unconscionability). The rule requiring courts to review contracts in light of the circumstances existing at the time the contract was made -- designed to allow parties to allocate risks in contracts -- simply is not relevant here because the circumstances have not changed.

Furthermore, as seen in *Mullis v. Speight Seed Farms*, a material fact concealed until after a contract is formed is not "subsequently-acquired knowledge" and should be considered in evaluating unconscionability. In *Mullis*, the court found that a consumer was surprised where a contract provision limiting liability was not disclosed to the customer during a telephone sale. *Mullis*, 234 Ga. App. at 30, 505 S.E.2d at 821.

Courts in other jurisdictions have found that failure to disclose fees constitutes an impermissible surprise. In *Myers v. Terminex Int'l Co.*, the court found that

[the plaintiff] was unaware of the undisclosed arbitration requirements. Such exorbitant filing fees [of \$2000], "agreed to" unknowingly, would prevent a consumer of limited resources from having an impartial

third party review his or her complaint...Therefore the undisclosed filing fee requirement...is so one-sided as to oppress and unfairly surprise [the plaintiff].

Myers v. Terminex Int'l Co., 697 N.E.2d 277, 281 (Ohio Ct. of Comm. Pleas 1998).

b. Oppression

Mr. Crawford unknowingly accepted these arbitration provisions because he lacked a meaningful choice, as shown by three facts. First, by his own description, Mr. Crawford is unsophisticated in business and legal matters. R. 262. Second, all sales documents were presented to Mr. Crawford as "standard documents" used for all mobile home sales. This presentation, and the perfunctory manner in which the closing was conducted, foreclosed negotiation. If he wanted the home, with the financing arranged by the seller, he had to sign the "standard documents" presented to him.⁵ Third, a home - unlike some consumer products - is not fungible; Mr. Crawford had invested considerable time and energy in selecting a unique home, distinguished by advertised design features and manufacturing quality, that could only be purchased under the terms of the

⁵ The Retail Installment Contract (containing the RIC Arbitration Provision) is governed by Georgia law. Under Georgia law, a party claiming unconscionability demonstrates the absence of meaningful choice by showing that the contract drafter offered no alternative to the unconscionable contract provision. See *Mullis*, 234 Ga. App. at 30, 505 S.E.2d at 821.

Acknowledgment and Agreement contract⁶ written by the manufacturer, Cavalier Homes.

Given these facts, even if Mr. Crawford had fully understood the costs implicit in the arbitration provisions, he was not in a position to bargain for more favorable terms. A disparity in power between contracting parties characterized by these factors constitutes oppression in Georgia and satisfies Alabama's requirements for procedural unconscionability. *Mullis*, 234 Ga. App. at 30, 505 S.E.2d at 821; *Layne*, 612 So. 2d at 408.

2. Burdensome fees associated with arbitration render the arbitration provisions substantively unconscionable.

a. Many courts have held that arbitration fees that would prevent or deter a consumer from pursuing a claim are unconscionable.

In a wave of cases decided during the last three years, courts have closely examined the fees associated with arbitration. Considering the practical effects of such fees, they have determined that where fees may discourage or prevent a party from bringing a claim, the arbitration provision should not be enforced. The federal Courts of Appeals have led this trend. In *Cole v. Burns International Security Services*, 105 F.3d 1465, 1484 (D.C. Cir. 1997), the D.C. Circuit concluded that an employee could not be required to pay an arbitrator's fee - which

⁶ The Acknowledgment and Agreement (containing the A&A Arbitration Provision) states that it is governed by Alabama law. Under Alabama law, a party claiming unconscionability demonstrates the absence of meaningful choice by showing that the desired product could not be obtained from the seller or any other seller without accepting the unconscionable contract provision. *Green Tree Financial Corp. of Ala. v. Vintson*, 753 So. 2d 497, 504 (Ala. 1999).

the court estimated to range from \$500 to \$1000 or more, daily⁷ - to pursue his discrimination claims because the fees would discourage such an action and prevent him from vindicating his statutory rights.

Building on *Cole*, the Eleventh Circuit found unenforceable an arbitration clause that imposed a \$2000 filing fee and potential responsibility for a portion of the arbitrator's fees, holding "costs of this magnitude [are] a legitimate basis for a conclusion that the clause does not comport with statutory policy [enabling people to vindicate their rights]." *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (Cox, J. concurring, for a majority of the court). The Tenth Circuit, reaching a similar conclusion in *Shankle v. B-G Maintenance Management of Colorado*, refused to compel arbitration where a claimant would be required to pay one-half of the arbitrator's fees - an amount projected to total between \$1875 and \$5000 - to pursue a discrimination claim. The court found that the agreement was unenforceable, "plac[ing] Mr. Shankle between the proverbial rock and a hard place - it prohibited use of the judicial forum, where a litigant is not required to pay for a judge's services, and the prohibitive cost substantially limited use of the arbitral forum." *Shankle v. B-G Maint. Mgmt. of Colo.*, 163 F.3d 1230, 1235 (10th Cir. 1999).

⁷ The average arbitrator's daily compensation is \$700, according to the AAA. *Cole*, 105 F.3d at 1480, n.8.

Other courts have similarly found that arbitration provisions imposing substantial fees create a significant, if not impassable, roadblock that prevents consumers and workers from pursuing valid claims, and therefore are unconscionable. *Horenstein v. Mortgage Mkt., Inc.*, 1999 U.S. Dist. LEXIS 21463 at *9-*11 (D. Or. Jan. 7, 1999) (finding unenforceable arbitration agreement that required claimants to pay share of arbitrator's fees, regardless of possibility that cost of fees might be recovered in subsequent award); *Jones v. Fujitsu Network Communications, Inc.*, 81 F. Supp. 2d 688, 693 (N.D. Tex. 1999) (concluding that "the prohibitive cost [of arbitration, estimated between \$1875 and \$7000] substantially limits the use of the arbitral forum" and therefore was unenforceable); *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 255-56 (S.D.N.Y. 1998) (stating that an "arbitration agreement cannot impose financial burdens on plaintiff access to the arbitral forum" including steep filing fees and arbitrators' fees); *Armendariz v. Foundation Health Psychcare Servs.*, 6 P.3d 669, 687 (Cal. 2000) (concluding that arbitration provisions in adhesion contracts should not be enforced where they impose expenses that claimants would not be required to pay to bring an action in court); *Patterson v. ITT Consumer Financial Corp.*, 18 Cal. Rptr. 2d 563, 566-67 (Cal. App. 1993) (refusing to compel arbitration of consumer claims where claimants were required to pay fees on grounds of unconscionability); *Spence v. Omnibus Indus.*, 119 Cal. Rptr. 171, 172-73 (Cal. App. 1975) (refusing to require

plaintiff seeking judicial resolution of \$37,000 claim against building contractor to pay \$720 filing fee to submit claim to arbitration where superior court filing fee was \$50.50); *In Matter of Arbitration between Teleserve Systems Inc. and MCI Telecommunications Corp.*, 659 N.Y.S.2d 659, 660, 664 (N.Y. App. 1997) (finding filing fee calculated on basis of one-half percent of the amount claimed - \$204,000 fee in a \$40 million anti-trust dispute - patently excessive, oppressive, burdensome and a bar to arbitration and therefore unconscionable in contract between sophisticated firms); *Myers*, 697 N.E.2d at 280-81 (holding unconscionable arbitration clause that would require claimant to pay a filing fee of \$2000 to pursue claim worth approximately \$120,000).

b. The fees presented here will prevent Mr. Crawford from pursuing his claims.

The Georgia courts have not considered the type of contractual limit presented here, and the Court of Appeals did not address it in rendering its opinion in this case. As set forth above, this Court, however, has held that a contract for the sale of goods that bars all remedies and avoids all damages is unconscionable. *Freeman*, 253 Ga. at 705-06, 324 S.E.2d at 469-70. Similarly, the Alabama Supreme Court has found that an exculpatory contract provision insulating a defendant from all liability for negligence is unconscionable. *Lloyd*, 453 So. 2d at 739-741.

Mr. Crawford's undisputed testimony is that he cannot afford to pay the costs associated with arbitration and continue to make

payments on his home. These arbitration provisions, by operation, bar all remedies available to Mr. Crawford, and therefore force a result that is unconscionable under Georgia and Alabama law.⁸ Such a result - overly-harsh and unjustified - renders these provisions substantively unconscionable.

The A&A Arbitration Provision

The Acknowledgment and Agreement states that it is governed by Alabama law.⁹ The cost of arbitrating through the AAA, as required by the A&A Arbitration Provision, could easily reach \$2000 or more. The cost issue presented here is easily distinguished from the situation considered in *First Family Financial Services, Inc. v. Rogers*, 736 So. 2d 553 (Ala. 1999), a case relied upon by Results Oriented below. The arbitration provision in *First Family* capped the plaintiffs' costs - both administrative fees and the arbitrator's compensation - at \$125, and assigned any additional costs to the defendant. *First Family Financial Servs.*, 736 So. 2d at 559. Furthermore, the contested arbitration provision in *First Family* disclosed in "clear and unmistakable" terms the fees associated with arbitration. *Id.* at 555-58. In this case, Crawford is facing fees - not disclosed to

⁸ The United States Supreme Court has held that arbitration may substitute for litigation only where it allows a claimant to "effectively" vindicate his rights. *Gilmer*, 500 U.S. at 28. Here, Mr. Crawford is effectively denied a forum for his claims by operation of the arbitration provisions, even though the provisions facially appear to guarantee an opportunity to have his claims heard.

⁹ As discussed above, this Court may determine that the governing law provision designating Alabama law should not be enforced for public policy reasons.

him by Results Oriented - that could easily reach \$2000 and are unlimited by the provision.

In cases where plaintiffs have failed to provide any evidence of the costs they are facing or their inability to pay those costs, the Alabama Supreme Court has been hesitant to conclude that financial hardship precludes enforcement of an arbitration clause. See *Parkway Dodge v. Yarbrough*, 2000 Ala. LEXIS 383, at *9-10 (Ala. Sept. 1, 2000) (finding that plaintiff had presented no evidence regarding costs); *Green Tree Financial Corp. of Ala. v. Wampler*, 749 So. 2d 409, 415, 417 (Ala. 1999) (finding that plaintiffs failed to assert that their financial condition would render a requirement to perform under the terms of the arbitration agreement an undue burden, leaving the court "to speculate...that the cost of arbitration could serve as a factor supporting a finding that the arbitration agreement is one-sided and unconscionable"). Because Mr. Crawford has submitted evidence addressing both the costs he faces and his inability to pay, R. 256-58, 260-63, that is not the case here.

The Alabama Supreme Court has indicated that a financial hardship argument may be foreclosed where the rules of the arbitral forum offer the possibility that fees and costs could be reduced for or shifted from a claimant. *Ex Parte Dan Tucker Auto Sales*, 718 So. 2d 33, 37-38 (Ala. 1998). When presented with this possibility, Alabama has not considered several facts that weigh against adoption of such a rule. First, the AAA Rules provide no explanation of how and when waivers are granted or

costs are shifted away from claimants.¹⁰ No evidence in the record here suggests how often such fees are actually waived or shifted in AAA's practice. Second, in the arbitrator's final award, a claimant - even an unsuccessful one -- may be assigned responsibility for deferred administrative fees and the arbitrator's compensation. R. 524. As a practical matter, where the risk of being assessed such costs exists, potential claimants will behave as though the waiver and shifting provisions do not exist and simply will not file their claims. As the California Supreme Court recently held, "[I]f it is possible that the [claimant] will be charged substantial forum costs, it is an insufficient judicial response to hold that he or she may be able to cancel these costs at the end of the process through judicial review." *Armendariz*, 6 P.3d at 687. See also *Horenstein*, 1999 U.S. Dist. LEXIS 21463, at *9-10 (stating "[T]he court is not persuaded by the fact that plaintiffs may be able to recover the Arbitrator's fees as part of an award. That possibility is small consolation when plaintiffs are prevented from participating in the hearing if unable to pay the fees in the first place.") In short, indefinite waiver and cost-shifting provisions cannot mitigate the exculpatory effect of the arbitration provision and should not be considered in determining unconscionability.

¹⁰ The federal district court for the Middle District of Alabama has noted this deficiency in the AAA rules and found the waiver provision insufficient to undo a financial hardship argument. *Rollins, Inc. v. Foster*, 991 F. Supp. 1426, 1438-39, n. 29 (M.D. Ala. 1998) (ultimately finding an arbitration clause enforceable because plaintiff failed to provide sufficient evidence of her inability to pay the fees).

The RIC Arbitration Provision

The Retail Installment Contract is governed by Georgia law. The RIC Arbitration Provision does not specify an arbitration provider, but one reasonably could assume that where Mr. Crawford is already obligated to arbitrate some of his claims against Results Oriented through AAA (under the A&A Arbitration Provision), it would be efficient to consolidate all of his claims with that service provider. If he were to use another arbitration firm, however, it is very likely that he would face similar costs.

A number of academic and legal commentators have reported that arbitration service providers frequently charge high fees to individuals as a condition of pursuing their claims. See Harry T. Edwards, *Where Are We Heading With Mandatory Arbitration of Statutory Claims in Employment?*, 16 Ga. St. U. L. Rev. 293, 306-307 (1999):

I . . . think that some courts still subscribe to the fond, but misguided, view that employment arbitration is invariably quick and cheap. The simple truth is it just ain't necessarily so. When we researched the subject in connection with the appeal in *Cole v. Burns*, we found that . . . JAMS/Endispute arbitrators charged an average of \$400 per hour, but fees of \$500 or \$600 per hour were not uncommon. CPR Institute for Dispute Resolution estimated arbitrators' fees of \$250 - \$350 per hour and 15-40 hours of arbitrator time in a typical employment case, for total arbitrators' fees of \$3750 to \$14,000 in an 'average' case. . . . I was recently told of a case in which a private mediator billed the parties \$25,000 *for one day of work!*

See also Paul D. Carrington and Paul H. Haagen, *Contract and Jurisdiction*, 1996 S. Ct. Rev. 331, 384 (1996); Frederick L. Miller, *Arbitration Clauses in Consumer Contracts: Building*

Barriers to Consumer Protection, 78 Mich. B. J. 302, 303 (1999); Dennis Nolan, *Labor and Employment Arbitration: What's Justice Got to Do With It?*, 53 Disp. Resol. J. 40, 47-48 (1998) ("sharing the arbitrator's fees and expenses might prove an insurmountable barrier for the putative grievant. Even a relatively simple case can cost several thousand dollars; a complicated case could easily run several times that."); Beth E. Sullivan, *The High Cost of Efficiency: Mandatory Arbitration in the Securities Industry*, 26 Fordham Urb. L. J. 311, 331-33 (1999) (citation omitted) ("[W]ith arbitration filing and administration fees totaling thousands of dollars per case, and hourly rates ranging from \$200-\$700, arbitration can be extremely expensive for plaintiffs...particularly in light of the fact that plaintiffs are almost always required to pay at least half of the costs.")

The national news media have also widely reported the phenomenon of prohibitively expensive arbitration fees. See *The Arbitration Trap: How Consumers Pay for 'Low Cost' Justice*, Consumer Reports, August 1999, at 64 ("Binding arbitration is touted as a low-cost way to get justice, but it can end up costlier than taking a case to court. Consumers may have to pay for the arbitrator's time, which can run \$300 or more per hour - effectively ruling out arbitration's usefulness in cases involving small claims."); Mark Curriden, *Arbitration Is Weapon Against Liability*, Dallas Morning News, May 12, 2000 ("Mr. Wheeler's only legal remedy [for his poorly constructed house] is to complain to a private arbitrator belonging to an association

chosen by the developer. That would cost him a \$3,000 advance fee, and he wouldn't be allowed to appeal a loss. So he has given up."); Caroline E. Mayer, *Hidden in Fine Print: 'You Can't Sue Us'*, Washington Post, May 22, 1999 ("the cost of arbitration can sometimes be significantly higher than court fees, making it financially impossible for some consumers to seek relief").

3. Non-mutuality in an arbitration requirement is a factor that contributes to a finding of substantive unconscionability.

The RIC Arbitration Provision imposes a non-mutual arbitration requirement. It requires Mr. Crawford to arbitrate his claims, but reserves the right of the corporate lenders, Results Oriented¹¹ and Green Tree, to seek judicial enforcement of the security agreement. Under this arbitration provision, even if Results Oriented were to initiate a judicial action, Mr. Crawford could not raise a counter-claim in court, but instead would be required to initiate a parallel proceeding in an arbitral forum. R. 41.

The Court of Appeals did not address whether non-mutuality could contribute to a conclusion of substantive unconscionability, but within the last three years, a number of appellate courts around the country have addressed this issue and have published opinions striking down non-mutual clauses. See,

¹¹ As the original signatory to the contract, the benefit of non-mutuality accrued to Results Oriented. Results Oriented subsequently assigned that benefit to Green Tree but, by the terms of the assignment, the security interest and concomitant right to seek judicial enforcement could revert to Results Oriented. R. 41.

e.g., *Arnold*, 511 S.E.2d at 862 (holding "where an arbitration agreement entered into as part of a consumer loan transaction contains a substantial waiver of the borrower's rights, including access to the courts, while preserving the lender's right to a judicial forum, the agreement is unconscionable and, therefore, void and unenforceable as a matter of law"); *Kinney v. United Healthcare Servs., Inc.*, 83 Cal. Rptr. 2d 348, 354 (Cal. Ct. App. 1999)(holding that a where one party "retains all of the benefits and protections the right to a judicial forum provides" a unilateral obligation to arbitrate is substantively unconscionable); *Nicholson v. Labor Ready, Inc.*, 1997 U.S. Dist. LEXIS 23494 at *15 (N.D. Cal. 1997); *Worldwide Ins. Group v. Klopp*, 603 A.2d 788, 791-92 (Del. 1992); *Iwen v. U.S. West Direct*, 977 P.2d at 996 (striking down as unconscionable arbitration clause where a corporation "pointedly protected itself by preserving its constitutional right of access to the judicial system while at the same time completely remov[ing] that right from the [customer]" noting that the disparity "makes no sense"). Cf. *Ex Parte Parker*, 730 So. 2d 168, 171 (Ala. 1999)(holding that non-mutuality may be considered as a factor contributing toward unconscionability, but that non-mutuality of remedy, alone, is not sufficient to support such a conclusion).¹²

Mr. Crawford does not argue that the provision should fail for want of consideration, or that non-mutuality establishes an

¹² On this issue, Alabama cases are not controlling. The non-mutual RIC Arbitration Provision is governed by Georgia law.

independent basis for voiding a contract. As seen in *Brack v. Brownlee* mutuality of obligation is not required where a contract is supported by consideration other than mutual promises. *Brack v. Brownlee*, 246 Ga. 818, 819, 273 S.E.2d 390, 391 (1980). The doctrines of consideration and conscionability, however, are distinct. Mr. Crawford asserts that the non-mutuality of this unilateral arbitration requirement - preserving Results Oriented's right to go to court, but extinguishing Mr. Crawford's - is one of several factors that may contribute to a finding of unconscionability. A contract supported by adequate consideration may be so one-sided and unfair to reach the level of unconscionability. Nothing in *Brack* precludes such a conclusion here.

C. Arbitration provisions found unconscionable should not be enforced.

If these arbitration provisions are found procedurally and substantively unconscionable, they should not be enforced. A court is under no obligation to re-write or reform an unconscionable provision under the FAA, the primary purpose of which is to ensure "that private agreements to arbitrate are enforced *according to their terms.*" *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989) (emphasis added). Where a corporation inserts an unenforceable provision in a contract of adhesion, it is not the responsibility of the court to supply the legal acumen necessary to re-work the contract and deliver otherwise-unobtainable results to the drafting party. See Restatement (Second) of Contracts § 184, cmt. b ("a court

will not aid a party who has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to offend public policy by redrafting the agreement so as to make a part of the promise enforceable”).

As a matter of state contract law, a court cannot salvage these arbitration clauses by blue-penciling (i.e., striking) the offensive cost provisions because the costs provisions in these arbitration requirements are not part of the clauses. Under the A&A Arbitration Provision, costs are dictated by the rules of the AAA, designated by the contract as the service provider, and not the contract. Under the RIC Arbitration Provision, costs will be dictated by the rules of the service provider selected; as discussed above, assigning administrative and service costs to claimants is the standard practice among arbitration service providers. To correct the unconscionability of these arbitration provisions, then, this court would have to affirmatively re-write the arbitration provisions and assign costs – a level of judicial interference that is not permitted in Georgia. *Sosebee v. McCrimmon*, 228 Ga. App. 705, 706, 492 S.E.2d 584, 586 (1997); cf. *Primerica Financial Services, Inc. v. Wise*, 217 Ga. App. 36, 39-40, 456 S.E.2d 631, 634-35 (1995) (permitting a court to sever a portion of an arbitration clause).

Under Alabama law, the same conclusion is inevitable. Where a contract is found unconscionable, a court has three options. It may: invalidate an entire contract where unconscionability permeates; strike unconscionable clauses; or, limit unconscionable clauses to avoid unconscionable results. *Wilson v. World Omni Leasing, Inc.*, 540 So. 2d 713, 716 (Ala. 1989). Alabama courts, however, will not settle a contractual dispute by re-writing the agreement. *Ex parte Assocs. Commercial Corp.*, 423 So. 2d 195, 200 (Ala. 1982).

CONCLUSION

Based upon the foregoing, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petitioner's Brief upon counsel of record for all the parties to

this appeal and related appeals, listed below, by placing same in the United States mail, properly addressed and first-class postage prepaid, this _____ of November, 2000.

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