SUPREME COURT OF THE UNITED STATES

No. 99–1235

GREEN TREE FINANCIAL CORP.-ALABAMA AND GREEN TREE FINANCIAL CORPORATION, PETITIONERS *v.* LARKETTA RANDOLPH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[December 11, 2000]

JUSTICE GINSBURG, with whom JUSTICE STEVENS and JUSTICE SOUTER join, and with whom JUSTICE BREYER joins as to Parts I and III, concurring in part and dissenting in part.

I

I join Part II of the Court's opinion, which holds that the District Court's order, dismissing all the claims before it, was a "final," and therefore immediately appealable, decision. *Ante*, at 4–8. On the matter the Court airs in Part III, *ante*, at 8–12– allocation of the costs of arbitration– I would not rule definitively. Instead, I would vacate the Eleventh Circuit's decision, which dispositively declared the arbitration clause unenforceable, and remand the case for closer consideration of the arbitral forum's accessibility.

II

The Court today deals with a "who pays" question, specifically, who pays for the arbitral forum. The Court holds that Larketta Randolph bears the burden of demonstrating that the arbitral forum is financially inaccessible to her. Essentially, the Court requires a party, situated as Randolph is, either to submit to arbitration without knowing who will pay for the forum or to demonstrate up front that the costs, if imposed on her, will be prohibitive.

Ante, at 11–12. As I see it, the case in its current posture is not ripe for such a disposition.

The Court recognizes that "the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum." *Ante*, at 10. But, the Court next determines, "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration" and "Randolph did not meet that burden." *Ante*, at 11. In so ruling, the Court blends two discrete inquiries: First, is the arbitral forum *adequate* to adjudicate the claims at issue; second, is that forum *accessible* to the party resisting arbitration.

Our past decisions deal with the first question, the *adequacy* of the arbitral forum to adjudicate various statutory claims. See, *e.g.*, *Gilmer* v. *Interstate/Johnson Lane Corp.,* 500 U. S. 20 (1991) (Age Discrimination in Employment Act claims are amenable to arbitration); *Shearson/American Express Inc.* v. *McMahon,* 482 U. S. 220 (1987) (Claims under Racketeer Influenced and Corrupt Organizations Act and Securities Exchange Act are amenable to arbitration). These decisions hold that the party resisting arbitration bears the burden of establishing the inadequacy of the arbitral forum for adjudication of claims of a particular genre. See *Gilmer*, 500 U. S., at 26; *McMahon*, 482 U. S., at 227. It does not follow like the night the day, however, that the party resisting arbitration should also bear the burden of showing that the arbitral forum would be financially inaccessible to her.

The arbitration agreement at issue is contained in a form contract drawn by a commercial party and presented to an individual consumer on a take-it-or-leave-it basis. The case on which the Court dominantly relies, *Gilmer*, also involved a nonnegotiated arbitration clause. But the "who pays" question presented in this case did not arise in *Gilmer*. Under the rules that governed in *Gilmer*– those

of the New York Stock Exchange— it was the standard practice for securities industry parties, arbitrating employment disputes, to pay all of the arbitrators' fees. See *Cole* v. *Burns Int'l Security Servs.,* 105 F. 3d 1465, 1483 (CADC 1997). Regarding that practice, the Court of Appeals for the District of Columbia Circuit recently commented:

> "[I]n *Gilmer*, the Supreme Court endorsed a system of arbitration in which employees are not required to pay for the arbitrator assigned to hear their statutory claims. There is no reason to think that the Court would have approved arbitration in the absence of this arrangement. Indeed, we are unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her or his case." *Id.*, at 1484.

III

The form contract in this case provides no indication of the rules under which arbitration will proceed or the costs a consumer is likely to incur in arbitration.[1] Green Tree, drafter of the contract, could have filled the void by speci-

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[1] In Alabama, as in most States, courts interpret a contract's silence (about arbitration fees and costs) according to "usage or custom." *Green Tree Financial Corp. of Ala.* v. *Wampler*, 749 So. 2d 409, 415 (Ala. 1999); see also Restatement (Second) of Contracts §204, Comment *d* (1979) (where an essential term is missing, "the court should supply a term which comports with community standards of fairness and policy"). Cf. *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 944 (1995) (courts should generally apply state contract law principles when deciding whether parties agreed to arbitrate a certain matter); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U. S. 52, 62–64, and n. 9 (1995) (interpreting arbitration clause according to New York and Illinois law).

fying, for instance, that arbitration would be governed by the rules of the American Arbitration Association (AAA). Under the AAA's Consumer Arbitration Rules, consumers in small-claims arbitration incur no filing fee and pay only $125 of the total fees charged by the arbitrator. All other fees and costs are to be paid by the business party. Brief for American Arbitration Association as *Amicus Curiae* 15–16. Other national arbitration organizations have developed similar models for fair cost and fee allocation.[2] It may be that in this case, as in *Gilmer*, there is a standard practice on arbitrators' fees and expenses, one that fills the blank space in the arbitration agreement. Counsel for Green Tree offered a hint in that direction. See Tr. of Oral Arg. 26 ("Green Tree does pay [arbitration] costs in a lot of instances . . . ."). But there is no reliable indication in this record that Randolph's claim will be arbitrated under any consumer-protective fee arrangement.

As a repeat player in the arbitration required by its form contract, Green Tree has superior information about the cost to consumers of pursuing arbitration. Cf. *Raleigh* v. *Illinois Dept. of Revenue,* 530 U. S. 15, — (2000) (slip op., at 5) ("the very fact that the burden of proof has often been placed on the taxpayer [to disprove tax liability] . . . reflects several compelling rationales . . . [including] the taxpayer's readier access to the relevant information"); 9 J. Wigmore, Evidence §2486 (J. Chadbourn rev. ed. 1981) (where fairness so requires, burden of proof of a particular

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[2] They include National Arbitration Forum provisions that limit small-claims consumer costs to between $49 and $175 and a National Consumer Disputes Advisory Committee protocol recommending that consumer costs be limited to a reasonable amount. National Arbitration Forum, Code of Procedure, App. C, Fee Schedule (July 1, 2000); National Consumer Disputes Advisory Committee, Consumer Due Process Protocol, Principle 6, Comment (Apr. 17, 1998), http://www.adr.org/education/education/consumer_protocol.html.

fact may be assigned to "party who presumably has peculiar means of knowledge" of the fact); Restatement (Second) of Contracts §206 (1979) ("In choosing among the reasonable meanings of . . . [an] agreement or a term thereof, that meaning is generally preferred which operates against the [drafting] party . . . ."). In these circumstances, it is hardly clear that Randolph should bear the burden of demonstrating up front the arbitral forum's inaccessibility, or that she should be required to submit to arbitration without knowing how much it will cost her.

As I see it, the Court has reached out prematurely to resolve the matter in the lender's favor. If Green Tree's practice under the form contract with retail installment sales purchasers resembles that of the employer in *Gilmer*, Randolph would be insulated from prohibitive costs. And if the arbitral forum were in this case financially accessible to Randolph, there would be no occasion to reach the decision today rendered by the Court. Before writing a term into the form contract, as the District of Columbia Circuit did, see *Cole*, 105 F. 3d, at 1485,[3] or leaving cost allocation initially to each arbitrator, as the Court does, I would remand for clarification of Green Tree's practice.

The Court's opinion, if I comprehend it correctly, does not prevent Randolph from returning to court, post-arbitration, if she then has a complaint about cost allocation. If that is so, the issue reduces to when, not whether, she can be spared from payment of excessive costs. Neither certainty nor judicial economy is served by leaving that issue unsettled until the end of the line.

For the reasons stated, I dissent from the Court's reversal of the Eleventh Circuit's decision on the cost question.

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[3] The court interpreted a form contract to arbitrate employment disputes, silent as to costs, to require the employer "to pay all of the arbitrator's fees necessary for a full and fair resolution of [the discharged employee's] statutory claims." 105 F. 3d, at 1485.

I would instead vacate and remand for further consideration of the accessibility of the arbitral forum to Randolph.[4]

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[4]Randolph alternatively urges affirmance on the ground that the arbitration agreement is unenforceable because it precludes pursuit of her statutory claim as a class action. But cf. *Johnson* v. *West Suburban Bank*, 225 F. 3d 366 (CA3 2000) (holding arbitration clause in short-term loan agreement enforceable even though it may render class action to pursue statutory claims unavailable). The class-action issue was properly raised in the District Court and the Court of Appeals. I do not read the Court's opinion to preclude resolution of that question now by the Eleventh Circuit. Nothing Randolph has so far done in seeking protection against prohibitive costs forfeits her right to a judicial determination whether her claim may proceed either in court or arbitration as a class action.