Mistaken Interpretation: The American Arbitration Association, Green Tree Financial Corporation v. Bazzle, and the Real State of Class-Action Arbitration in North Carolina

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The United States Supreme Court, in *Green Tree Financial Corporation v. Bazzle*,[1] held that an arbitrator, rather than a court, must decide whether an arbitration clause is silent as to the allowance of class-action arbitration.[2] The American Arbitration Association ("AAA"), however, claims *Green Tree* gives its arbitrators the authority not only to decide that question, but also to go even further and decide whether class-action arbitration is allowed when the contract is silent.[3] This is a mistaken interpretation of *Green Tree*. The Supreme Court did not address the issue of whether an arbitrator may determine if class-action arbitration is appropriate when the contract is silent on the issue. Additionally, the Court's silence cannot be taken as an implicit authorization for arbitrators to take this power upon themselves. This Recent Development will argue that contrary to the AAA's mistaken interpretation, *Green Tree* authorizes each state, not an individual arbitrator, to determine whether it will permit class-action arbitration when agreements are silent on the issue and that North Carolina should allow class-action arbitration when the agreement is silent.[4]

This argument will begin by examining the *Green Tree* case and its holding regarding agreements that are silent on class-action arbitration. Because South Carolina law governed the decision in *Green Tree*, this discussion will proceed by evaluating three policy issues implicit in South Carolina's position that "class-wide arbitration may be ordered when the

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1. 539 U.S. 444 (2003).

2. *Id.* at 452–53.

3. *See American Arbitration Association: Policy on Class Arbitration*, *at* http://www.adr.org/index2.1.jsp?JSPssid=16235&JSPsrc=upload/livesite/Rules_Procedures/Topics_Interest/AAA%20Class%20Action%20Policy.htm ("In its June 23, 2003 decision in *Green Tree Financial Corp. v. Bazzle*, the United States Supreme Court held that where an arbitration agreement was silent regarding the availability of class-wide relief, an arbitrator, and not a court, must decide whether class relief is permitted.") (last visited Aug. 24, 2004) (on file with the North Carolina Law Review).

4. This Recent Development will occasionally use the phrase "North Carolina should allow class-action arbitration when the agreement is silent" or some variation thereof. This is for purposes of brevity and ease of reading only. It should not be read as undermining the ultimate point that North Carolina should follow the full language of South Carolina's position that "class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice." Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349, 360 (S.C. 2002), *vacated by* 539 U.S. 444 (2003).

arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice."[5] Finally, after considering these policy issues, this Recent Development will discuss both the policy arguments and legal bases supporting a decision by North Carolina to follow South Carolina to allow class-action arbitration when a contract is silent on the issue.

Green Tree is a consolidation of two class-action cases, *Bazzle v. Green Tree Financial Corporation* and *Lackey v. Green Tree Financial Corporation*.[6] Both cases involved alleged violations of the South Carolina Consumer Protection Code.[7] Green Tree was the lender in both cases, and, although the financing purposes differed, "[t]he consumers in both classes were bound to arbitration by the same clause."[8] Both cases proceeded through long, protracted litigation, arbitration, and appeal[9] until the South Carolina Supreme Court withdrew the appeal, assumed jurisdiction, and consolidated the cases for appeal.[10]

The South Carolina Supreme Court determined that the arbitration clauses at issue were silent as to whether the mandated arbitration could proceed in a class-action manner,[11] and that where agreements are silent on this issue, class-action arbitration was allowed.[12] The United States Supreme Court granted certiorari,[13] and vacated the judgment of the South Carolina Supreme Court, and remanded the cases for further proceedings.[14]

Green Tree produced four separate opinions[15] that, while running the

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5. *Id.*

6. *Bazzle* involved financing applications from Green Tree Financial that contained neither an attorney preference notice nor an insurance agent preference notice as required by the South Carolina Consumer Protection Code. *See Bazzle*, 569 S.E.2d at 352. *Lackey* involved preprinted consumer installment contracts and security agreements from Green Tree Financial that also contained no attorney or insurance agent preference notice as required by the South Carolina Consumer Protection Code. *See id.* at 353. After filing their cases, both Bazzle and Lackey filed motions for class certification. *See id.* at 352–54. These motions, and their subsequent treatment by the South Carolina courts and the arbitrators in each case, are the subject of the United States Supreme Court's *Green Tree* decision.

7. *Id.* at 352–53.

8. *Id.* at 354.

9. *See id.* at 352–54 (discussing thoroughly the procedural history of both cases).

10. *Id.* at 351.

11. *Id.* at 359.

12. *Id.* at 360 (limiting class-wide arbitration to situations where it would be efficient, equitable, and not prejudicial).

13. 537 U.S. 1098 (2003).

14. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 454 (2003).

15. Writing for the plurality was Justice Breyer joined by Justices Scalia, Souter, and Ginsburg. *Id.* at 447–54. Justice Stevens wrote an opinion concurring in the judgment and dissenting in part. *Id.* at 454–55. Chief Justice Rehnquist's dissent, which was joined by Justices O'Connor and Kennedy, took the position that the arbitration clause clearly forbade class arbitration, and that the decision of the South Carolina Supreme Court should, therefore, be flatly

gamut of possible views, produced no majority opinion. Justice Breyer's opinion, and the four votes it garnered, along with Justice Stevens' concurrence in the judgment, produced the necessary five votes to vacate the opinion of the South Carolina Supreme Court and remand the case for further proceedings.[16] When no opinion earns the vote of a majority of the Court, determining the controlling law is more difficult. However, the Court has posited that in these situations, the opinion decided on the narrowest ground should control.[17] Although many of the particular points of law derived from *Green Tree* are debatable, both Justice Breyer and Justice Stevens are in accord as to the only issue that is of consequence to this Recent Development. Both Justices implicitly agree that it is state law, and not the decision of an arbitrator, that determines whether or not class-action arbitration is allowed when the arbitration clause is silent.[18]

Justice Breyer commences his opinion with a proposition that forms the nucleus of the plurality holding: "Are the contracts in fact silent, or do they forbid class arbitration as petitioner Green Tree Financial Corp. contends? . . . [W]e cannot . . . [resolve that question], not simply because it is a matter of state law, but also because it is a matter for the arbitrator to decide."[19] This statement is followed by three restatements of "the question": "the question—whether the agreement forbids class arbitration;"[20] "[t]he question here—whether the contracts forbid class arbitration;"[21] and "this underlying question—whether the arbitration contracts forbid class arbitration."[22] Thus, Justice Breyer makes it clear that the sole question before the Court was whether the arbitrator was the proper person to make the initial determination that the contract was in fact silent as to class-action arbitration. The Court did not consider whether the arbitrator had the authority to determine if class-action arbitration should

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overturned. *Id.* at 455–60 (Rehnquist, C.J., dissenting). Additionally, Chief Justice Rehnquist argued that the terms of the contract provided Green Tree, with the consent of the particular plaintiff, the right to select an arbitrator for each individual case and that the South Carolina Supreme Court's decision deprived Green Tree of this contractual right. *Id.* Finally, Justice Thomas wrote a separate dissent in which he argued that the Federal Arbitration Act "cannot be a ground for pre-empting a state court's interpretation of a private arbitration agreement." *Id.* at 460 (Thomas, J., dissenting). Rather, Justice Thomas "would leave undisturbed the judgment of the Supreme Court of South Carolina." *Id.*

16. *See id.* at 454–55.

17. *See* Marks v. U.S., 430 U.S. 188, 193 (1977) (noting that when no single opinion garners a majority vote, the opinion decided on the narrowest grounds typically governs future interpretations of the case).

18. *See infra* notes 26–33 and accompanying text.

19. *Green Tree*, 539 U.S. at 447.

20. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 451 (2003).

21. *Id.* at 452.

22. *Id.* at 453. Justice Breyer uses the terms agreement, agreements, contract, and contracts interchangeably throughout his opinion.

proceed when the contract is silent.

Not only does Justice Breyer consistently refer to *the* question in the singular (and clearly state what the question is), but nowhere in his opinion does Justice Breyer present the proposition that would validate the AAA's reading of the case[23]—namely, that after determining whether the contract forbids class arbitration or is in fact silent (and therefore ambiguous), it is the job of the arbitrator to determine whether class arbitration should proceed under a silent clause.[24] The AAA's reading of this opinion as allowing arbitrators to decide whether class-action arbitration is allowed when a contract is silent on the issue is incorrect for two reasons. First, as previously discussed, the Supreme Court only addressed the question, "[a]re the contracts in fact silent, or do they forbid class arbitration . . . ?"[25] Second, the Court implicitly found that determination of whether class-action arbitration is appropriate when a contract is silent is a substantive state law[26] issue to be resolved by the state.[27] Justice Stevens recognized this point when he stated, "The Supreme Court of South Carolina has held as a matter of state law that class-action arbitrations are permissible if not prohibited by the applicable arbitration agreement . . . . There is nothing in the Federal Arbitration Act that precludes . . . [this determination] by the Supreme Court of South Carolina."[28] Implicit in Justice Stevens' statement is the notion that it was proper for South Carolina, not the individual arbitrator, to interpret and apply principles of state law in reaching the decision to allow or disallow class-action arbitration when the contract is silent on the issue. Like Justice Breyer, Justice Stevens did not directly address the issue, nor directly state that he agreed with Justice Breyer on the issue, because the Court only directly addressed the issue of making the underlying decision as to the contract's silence regarding class-action arbitration. However, the fact that Justices Stevens and Breyer did not expressly state that they were in accord on the issue of a state retaining the power to make and interpret its own substantive law in the realm of class-action arbitration does not mean that individual arbitrators can take this substantive law-making power upon

23. *See id.* at 447–54.

24. *See supra* note 3.

25. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 447 (2003).

26. Substantive law is that "part of the law that creates, defines, and regulates the rights, duties, and powers of parties." BLACK'S LAW DICTIONARY 1443 (7th ed. 1999).

27. Justice Breyer does not expressly address this issue because the Court only addressed the issue of whether the arbitrator was the proper person to make the initial determination of whether the contract was silent as to class-action arbitration. *See supra* notes 20–22 and accompanying text.

28. *Id.* at 454–55 (Stevens, J., concurring in the judgment and dissenting in part).

themselves.[29]

In defense of the AAA, their mistaken interpretation is not completely inexplicable as, in the end, the Supreme Court *does* vacate the judgment of the South Carolina Supreme Court.[30] But, the procedural outcome of *Green Tree* should not be over-emphasized, nor should the substance of the Breyer and Stevens opinions be ignored. A careful reading of Justice Breyer's opinion produces the unmistakable conclusion that the Supreme Court vacated the South Carolina Supreme Court's judgment because it feared the South Carolina trial court's determination that the contract was silent had influenced the arbitrator to reach the same conclusion.[31] Additionally, he concludes, "we remand the case so that the arbitrator may decide the question of contract interpretation—thereby enforcing the parties' arbitration agreements according to their terms."[32] This statement is not only a final example of a reference to the singular question before the Court, but it also makes clear that, as Justices Breyer and Stevens agree, the role of the arbitrator is one not of substantive law making but of "contract interpretation."[33]

The class-action arbitration discussion does not end with this deciphering of the Supreme Court's opinion in *Green Tree*. While some jurisdictions have already decided the question of whether class-action arbitration may proceed when the arbitration clause is silent on the issue,[34] North Carolina has yet to address the subject. Strong arguments exist in favor of both positions, but the policy and law of North Carolina demand that our state follow the path of South Carolina and adopt the position that "class-wide arbitration may be ordered when the arbitration agreement is

29. See Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349 (S.C. 2002), *vacated by* 539 U.S. 444 (2003) and Keating v. Superior Court, 645 P.2d 1192 (Cal. 1982), for examples of the state, as the proper decision-maker, deciding the issue of whether class-action arbitration was allowed when the applicable arbitration provision was silent on the issue. While it is true that a state could theoretically authorize arbitrators to make the decision, it is still the state's right to make this decision rather than the arbitrator's right to decide of his own volition.

30. *Green Tree*, 539 U.S. at 454.

31. *Id.* ("On balance, there is at least a strong likelihood in *Lackey* as well as in *Bazzle* that the arbitrator's decision reflected a court's interpretation of the contracts rather than an arbitrator's interpretation."). A South Carolina trial court ruled the contract at issue in *Bazzle*, identical to the contract in *Lackey*, authorized class-action arbitration before the *Lackey* arbitrator made a decision regarding the *Lackey* contract. *Id.* at 453–54.

32. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 454 (2003).

33. *Id.* at 454–55.

34. *See* Champ v. Siegel Trading Co., 55 F.3d 269, 275 (7th Cir. 1995) (holding that when an arbitration agreement is silent as to class-action arbitration, class-action arbitration may not proceed). *But see* Keating v. Superior Court, 645 P.2d 1192, 1209 (Cal. 1982) (holding that ordering class-action arbitration when the agreement is silent is permissible "in an appropriate case"), *appeal dismissed in part and rev'd in part on other grounds by* Southland Corp. v. Keating, 465 U.S. 1 (1984).

silent if it would serve efficiency and equity, and would not result in prejudice."[35]

South Carolina's position regarding class-wide arbitration when the arbitration agreement is silent presents three determinations that must be made as a matter of policy before adopting the South Carolina position. First, when is an arbitration agreement silent on the issue of class-action arbitration? An arbitration agreement is silent on the issue of class-action arbitration when the language of the agreement does not expressly allow or disallow class-action proceedings. An arbitration agreement is also silent regarding class-action arbitration when, absent express language, the terms of the agreement are not clear enough to imply[36] that arbitration can only proceed in a two-party format.[37]

The second policy determination posed by South Carolina's position on class-action arbitration is what it means to serve efficiency and equity. The short answer is "efficiency" means minimizing effort, expense, or waste[38] and "equity" means fairness.[39] Class-actions in the litigation setting are lauded for saving both time and cost.[40] Class-action arbitrations present the same opportunity for efficiency. Many parties who could not afford to proceed with arbitration on a two-party basis would be able to have their claims redressed in a class-action setting.[41] In addition, class-action arbitration would save time for all of those involved by disposing of all similarly situated plaintiffs in one proceeding.[42]

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35. Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349, 360 (S.C. 2002).

36. Agreements that do not expressly or implicitly address class-action arbitration may instead give rise to findings that the clause is silent or, at best, ambiguous, such as in *Green Tree*. An ambiguous agreement is one in which the meaning or intention is uncertain. *See* BLACK'S LAW DICTIONARY 79 (7th ed. 1999). However, this finding should not ultimately affect the outcome of the case. *See infra* notes 77–79 and accompanying text (arguing that, like ambiguous contract provisions, a contract that is silent in respect to a particular situation should be construed against the drafter).

37. Two-party arbitration as used in this Recent Development refers to non-class-action arbitration.

38. *See* WEBSTER'S NEW WORLD COLLEGE DICTIONARY 454 (4th ed. 1999).

39. *See id.* at 481.

40. *See generally* Maffei v. Alert Cable TV of N.C., Inc., 316 N.C. 615, 620, 342 S.E.2d 867, 871 (1986) (noting the economic advantage of class actions for holders of small claims).

41. *See* Champ v. Siegel Trading Co., 55 F.3d 269, 277 (7th Cir. 1995) (Rovner, J., concurring) (noting "[corporate defendants] typically have far more to gain by forcing unhappy customers to bear the expense of arbitrating individually").

42. *See* Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1259 (2001) ("No one disputes, however, that in some cases the class action is the most efficient and effective way to resolve a dispute."). *But see* Keating v. Superior Court, 645 P.2d 1192, 1215 (Cal. 1982) (Richardson, J., concurring in part and dissenting in part) (arguing that class-action arbitration would "interfere with the expeditious resolution of the claims"), *appeal dismissed in part and rev'd in part on other grounds by* Southland Corp. v. Keating, 465 U.S. 1 (1984). Also, those potential plaintiffs who opted out of

Class-action arbitration also serves the equitable notion of fairness for all similarly situated plaintiffs.[43] Similarly situated plaintiffs proceeding through two-party arbitration with the exact same claim based upon the exact same form contract may find themselves receiving completely opposite results based upon the contrary findings of different arbitrators because the principles of res judicata[44] and collateral estoppel[45] do not always apply in the arbitration setting.[46] Class-action arbitration, by disposing of the claims of all similarly situated plaintiffs in one proceeding, helps reduce this inequitable result.

Finally, the third policy determination posed by South Carolina's position regarding class-action arbitration is what factors should be considered in determining whether prejudice to the party opposing class-action proceedings would result by allowing class-action arbitration to proceed. Although a defendant could potentially produce a litany of possible prejudicial concerns, both meritorious and non-meritorious, the three major concerns would be the risk of increased cost, the potential loss of substantive rights, and the loss of the drafter's ability to choose the arbitrator, if that right was in fact the drafter's under the terms of the agreement.[47] Concerns regarding excessive cost increases cannot be directly assuaged. However, both arbitration proceedings and class-action judicial proceedings are lauded for saving time and costs,[48] and there is no

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the class would not have their claims disposed of with all of the other similarly situated plaintiffs.

43. *See* In re TMI, 89 F.3d 1106, 1113 (3rd Cir. 1996) (discussing how equity is promoted by treating similarly situated plaintiffs equally and eliminating inconsistent results in the context of retroactive application of a Pennsylvania state statute).

44. Res judicata, also known as claim preclusion, bars "the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been—but was not—raised in the first suit." BLACK'S LAW DICTIONARY 1312 (7th ed. 1999).

45. Collateral estoppel, also known as issue preclusion, bars "a party from relitigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one." *Id.* at 256.

46. *See* Kris-Beth, Inc. v. Dist. 17, United Mine Workers of Am., 786 F.2d 1154, 1986 U.S. App. LEXIS 22979, at *8 n.5 (4th Cir. 1986) (unpublished table decision) (stating the res judicata effect of a prior arbitration on a subsequent arbitration is an issue for the arbitrator); Capitol City Lodge 141 v. Eaton County Bd. of Comm'rs, No. 246570, 2004 Mich. App. LEXIS 1676, at *6–*8 (Mich. Ct. App. June 17, 2004) (citing decisions from the First, Third, Fifth, Sixth, Seventh, Eighth, Federal, and District of Columbia Circuits regarding the preclusive effect of a prior arbitration).

47. *See* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 459 (2003) (Rehnquist, C.J., dissenting) (arguing that by allowing class-action arbitration, the Court is denying Green Tree its "contractual right to choose an arbitrator for each dispute with the other 3,734 class members," and that this is a right Green Tree reasonably would have taken advantage of "to avoid concentrating all of the risk of substantial damages awards in the hands of a single arbitrator.").

48. *See* Ferguson v. Countrywide Credit Indus., 298 F.3d 778, 787 (9th Cir. 2002) (noting the "cost-saving benefits of arbitration"); Chandler v. Washtenaw Mortg. Co., No. 94-A-1418-N, 1998 U.S. Dist. LEXIS 22788, at *5 (M.D. Ala. July 29, 1998) (commenting on the typical cost

reason to believe that these savings would not result if the two proceedings were combined.

The substantive rights issue is a more significant factor, but it too weighs on the side of allowing class-actions to proceed. Principles such as res judicata and collateral estoppel do not always apply in the arbitration setting,[49] so the same issue could be decided in completely opposite ways in two individual arbitrations. Class-action arbitration allows these principles to effectively apply because all similarly situated plaintiffs would be proceeding under the same factual and legal conclusions. Finally, the inability to choose a new arbitrator for each individual plaintiff's claim, if the drafting party has the right by contract, is a concern to drafting parties.[50] However, one of the main changes class-action arbitration makes is simply that the drafting party loses the ability to "arbitrator-shop" from case to case in the event an arbitrator disagrees with the drafter's position in a particular case. The loss of this "shopping" option, while possibly detrimental to a drafting-party-defendant, is not the sort of prejudicial effect that our system should be concerned with in weighing the "pros and cons" of class-action arbitration.[51]

Having considered the three policy issues raised by South Carolina's position regarding court-ordered class-action arbitration, the ultimate consideration of *why* North Carolina should allow class-action arbitration when the arbitration clause is silent may now be considered. There are several reasons why North Carolina should allow class-wide arbitration when the applicable arbitration agreement is silent on the issue. First, arbitration enjoys a favored place in North Carolina, and class-action arbitration should enjoy the same favored position. Second, North Carolina's allowance of consolidated arbitration, and considerations of North Carolina substantive law regarding the ascertainment of intent in contracts and the construction of ambiguous contract provisions, support the allowance of class-action arbitration when the applicable arbitration provision is silent on the issue. Finally, considerations of the operative language of section seven[52] of the North Carolina Revised Uniform Arbitration Act[53] and section four of the Federal Arbitration Act[54] also

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and time savings of class-action proceedings).

49. *See supra* note 46 and accompanying text.

50. *See Green Tree*, 539 U.S. 444, 459 (Rehnquist, C.J., dissenting).

51. *See* Supermarkets Gen. Corp. v. United Food & Commercial Workers Union, 645 F. Supp. 831, 833 (D.C. Conn. 1986) (noting that "[t]here is likewise no policy favoring 'arbitrator-shopping' ").

52. N.C. GEN. STAT. § 1-569.7 (2003).

53. *See* N.C. GEN. STAT. §§ 1-569.1 to .31 (2003). North Carolina's RUAA applies to arbitration agreements made on or after January 1, 2004. *See id.* § 1-569.3.

54. 9 U.S.C. § 1-16 (2000).

support the allowance of class-action arbitration when the applicable arbitration provision is silent on the issue.

Arbitration holds a favored place in both North Carolina state law[55] and federal law[56] because of its "simplicity, informality, and expedition."[57] Class-action arbitration should hold a similarly favored place for the same reasons. Opponents argue that arbitration on a class basis, as opposed to traditional two-party arbitration, is "inefficient instead of efficient, lengthy instead of expeditious, and procedural instead of informal."[58] This conclusion would surely be reached if one were to commit the logical fallacy of comparing class-action arbitration with a single two-party arbitration, or if one believed the judicial system, though continuously evolving, is incapable of adapting to this much needed procedure.[59] Class-action arbitration no doubt appears to be inefficient, lengthy, and procedural compared to two-party arbitration, just as class-action lawsuits appear inefficient, lengthy, and procedural compared to "regular" two-party litigation. But using a single arbitration as the basis of comparison compares "apples to oranges" instead of "apples to apples." The appropriate analysis compares *all of the single* arbitrations that would result without a class-action proceeding to the class-action arbitration. For example, the *Bazzle* component of *Green Tree* consisted of 1,899 individuals,[60] and the argument could scarcely be made that the single *Bazzle* class-action arbitration was more inefficient, costly, and lengthy than the aggregate of each of the 1,899 individual plaintiffs proceeding singularly through two-party arbitration.

Second, arguments against class-action arbitration also involve complaints that class-action arbitration would force changes in both the nature of an arbitration proceeding and the involvement of courts in arbitration,[61] apparently in the belief that the law and the judicial system are

55. *See* Howard v. Oakwood Homes Corp., 134 N.C. App. 116, 118, 516 S.E.2d 879, 881 (1999) (remarking on North Carolina's strong public policy in favor of using arbitration to settle disputes).

56. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 626 (1985) (noting the federal policy favoring arbitration).

57. *Id.* at 628.

58. Keating v. Superior Court, 645 P.2d 1192, 1215 (Cal. 1982) (Richardson, J., concurring in part and dissenting in part), *appeal dismissed in part and rev'd in part on other grounds by* Southland Corp. v. Keating, 465 U.S. 1 (1984).

59. *See id.* at 1214–18 (discussing changes to the judicial system that class-action arbitrations would require).

60. Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349, 352–53 (S.C. 2002).

61. *See generally Keating*, 645 P.2d at 1214–18 (Richardson, J., concurring in part and dissenting in part) (remarking on perceived necessary changes, including the need to keep records of arbitration proceedings, the need for arbitrators to explain the grounds for their decisions, and the larger role courts would play in class-action arbitration as opposed to two-party arbitration).

incapable of change. However, these arguments ignore the very nature of the law itself,[62] and the opportunity to make whole an aggrieved party should not be abandoned simply because it does not fit neatly under current rules or procedures. As with all new situations, the law must stand ready to embrace new forms of conflict resolution, and neither false comparisons nor a reluctance to allow the law to evolve should prevent court-ordered class-action arbitration from being embraced or from enjoying the same favored position two-party arbitration enjoys in North Carolina.

North Carolina's allowance of consolidated arbitration is a strong factor in favor of, and a good substantive[63] starting point in the debate over, court-ordered class-action arbitration. Jurisdictions considering class-action arbitration for the first time often use arbitration consolidation as a measuring stick, with those that allow court-ordered consolidation also allowing court-ordered class-action arbitration and vice versa.[64] North Carolina's Revised Uniform Arbitration Act ("RUAA") expressly allows a court to order consolidated arbitration when it finds four requirements are met.[65] One of the most important of these requirements, and a concern that is also expressed in the certification of a class,[66] is that there must be a

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62. The Supreme Court of Florida has stated the following about the mutable nature of the law:

> The law is dynamic; it must approach certainty, but it can never stand still. It is of all things an instrument of expanding life, and its principles must be so applied as to bring within its compass new situations that constantly develop in the progress of changing times and conditions.

Chamberlain v. Chamberlain, 155 So. 136, 137 (Fla. 1934).

63. *See supra* note 26 (defining "substantive law").

64. *See* Champ v. Siegel Trading Co., 55 F.3d 269, 274–76 (7th Cir. 1995) (considering other circuits' decisions that, absent an express provision addressing consolidation, courts are barred from requiring consolidation and using these decisions as a basis for refusing to order class-action arbitration); Keating v. Superior Court, 645 P.2d 1192, 1208–09 (Cal. 1982) (analogizing court-ordered class-action arbitration to court-ordered consolidated arbitration), *appeal dismissed in part and rev'd in part on other grounds by* Southland Corp. v. Keating, 465 U.S. 1 (1984).

65. *See* N.C. GEN. STAT. § 1-569.10(a)(1)–(4) (2003). The findings that must be made for a court to order consolidation of separate arbitration proceedings are:

> (1) There are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration with a third person; (2) The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions; (3) The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and (4) Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

Id.

66. *See* FED. R. CIV. P. 23(a)(2) (requiring the existence of common questions of law or fact)

common issue of either fact or law creating the possibility that separate proceedings will result in conflicting decisions.[67] However, class certification goes a step further than consolidation and requires not only an abstract common issue of law or fact, but that the members of the class have similar claims or defenses.[68] This means that where the claims of parties to consolidated arbitration may be completely inimical, the claims of the class as a whole must be generally the same. Furthermore, the existence of generally common claims and facts, and the potential inability to assert res judicata or collateral estoppel,[69] means the risk of incurring conflicting results and of visiting inequality on similarly situated plaintiffs is even greater in situations that would be amenable to class-action arbitrations than in situations that would be amenable to consolidated arbitrations, where there may only be a common issue rather than a common claim.

The North Carolina RUAA's position regarding consolidated arbitration lends itself in another regard to the allowance of court-ordered class-action arbitration when the arbitration agreement is silent on the issue. The RUAA states that consolidation may not be ordered where the agreement prohibits consolidation.[70] Noticeably absent, however, is a requirement that consolidation may not be ordered where the agreement is silent as to consolidation. This omission lends itself to an interpretation that a court may order consolidation not only where the agreement specifically authorizes consolidation and the requirements of section ten are met, but also where the same requirements are met and the agreement is silent as to consolidation.[71] Reasoning from similar contexts, a court should be able to order class-wide arbitration when the agreement is silent, just as courts have the potential ability to order consolidation when the agreement is silent.

Considerations of the substantive law of North Carolina regarding party intent in contract formation also weigh on the side of allowing

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and (b)(1)(a) (listing the risk of inconsistent results creating "incompatible standards of conduct for the party opposing the class" as one of four possible ways to maintain a class); N.C. GEN. STAT. § 1A-1, R. 23 (2003) (providing North Carolina's rule of civil procedure concerning class actions); *see also* Crow v. Citicorp Acceptance Co., 79 N.C. App. 447, 449, 339 S.E.2d 437, 438 (1986) (discussing the basic requirements for a class-action suit in North Carolina, including the existence of "[m]ore than one issue of law or fact common to the class"), *rev'd on other grounds by* 319 N.C. 274, 354 S.E.2d 459 (1987).

67. *See* N.C. GEN. STAT. § 1-569.10(a)(3) (2003).

68. *See* FED. R. CIV. P. 23(a)(2)–(3).

69. *See supra* notes 44–46 and accompanying text.

70. *See* N.C. GEN. STAT. § 1-569.10(c) (2003).

71. Although the language of the RUAA has not been interpreted in this manner, it is at least a fair interpretation based on the blatant absence of a directive forbidding consolidated arbitration where the arbitration agreement is silent on the issue.

class-action arbitration when the contract is silent. The ascertainment of party intent is paramount in the judicial interpretation of contracts.[72] Contracts such as those at issue in *Green Tree* involve the drafting of the contract and its provisions by a party with superior bargaining strength,[73] and the presentation to the other party on a "take it or leave it" basis.[74] The only intent expressly presented by the language of these contracts of adhesion is that of the drafting party, who had the ability to frame the contract in any manner it desired within the confines of the law. Admittedly the signature of the non-drafting party manifests assent to, and agreement to be bound by, the terms contained in the contract,[75] but there is no opportunity for this party to add additional language to fully present its desires and intent. The inability to state its intent in favor of class-action arbitration should not be held against a non-drafting party when the drafting party had ample opportunity not only to state its intent against class-action arbitration,[76] but also to have the non-drafting party assent to the term by its signature. The judiciary, through contract interpretation, should not put a non-drafting party in an even more subservient position than that party already holds by the very nature of a contract of adhesion. Construing contract silence against the stronger drafting party prevents putting the non-drafting party in a more subservient position by protecting a non-drafting party's ability to seek class-action arbitration where the agreement is silent.

Another important substantive law consideration is North Carolina's rule regarding the construction of ambiguous contract provisions. Ambiguous contract provisions are construed against the drafting party.[77]

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72. *See* Salvaggio v. New Breed Transfer Corp., 150 N.C. App. 688, 689, 564 S.E.2d 641, 643 (2002) ("The principal objective in the interpretation of a contract's provisions is to ascertain the intent of the parties.").

73. Green Tree, by virtue of its resources and its position as the sole drafter of the contract with no input from the other party to the contract, was the party with the superior bargaining power in this case.

74. These contracts are commonly referred to as "contracts of adhesion." *See generally* 16 AM. JUR. 2D *Conflict of Laws* § 91 (1998) (defining adhesion contracts as those "drafted unilaterally by the dominant party and then presented on a 'take it or leave it' basis to the weaker party").

75. *See* Holder v. Aultman, 169 U.S. 81, 89 (1898) ("Then follows the signature of the defendant . . . who thereby necessarily assents to this stipulation, as well as to the other terms of the contract."); Gans & Pugh Assocs., Inc. v. Technical Communications Corp., Nos. 93-1215 & 93-1313, 1993 U.S. App. LEXIS 32005, at *7 (4th Cir. Dec. 9, 1993) ("Here, the parties signed the contract indicating their assent . . . .").

76. A clause expressly forbidding class-action arbitration in a contract of adhesion is admittedly a source of potential litigation. The Fourth Circuit has considered adhesion contracts in the context of Fair Labor Standards Act claims. *See* Adkins v. Labor Ready Inc., 303 F.3d 496, 501–03 (4th Cir. 2002) (concluding that the inability to proceed on a class-action basis cannot, without more, overcome the strong legislative preference for arbitration in FLSA cases).

77. *See* Novacare Orthotics & Prosthetics East, Inc. v. Speelman, 137 N.C. App. 471, 476,

The drafter has the opportunity to phrase the contract in exactly the way it desires, and as a result is held responsible for choosing language that lends itself to more than one reasonable interpretation.[78] The non-drafting party is thereby protected from being penalized by the interpretation of ambiguous language that it had no part in choosing. This principle of resolving ambiguity should apply no less forcefully in cases of contract silence.[79] Were contract silence not to be treated as harshly as contract ambiguity, the drafting party could potentially circumvent the principle of construction of ambiguous provisions by simply arguing that the language is silent rather than ambiguous. Equity demands that a drafting party should receive no more favorable treatment under a contract that is silent in regards to a particular issue than it would if the contract were ambiguous, and where that contract is silent regarding class-action arbitration the drafting party should have his silence held against him.

Finally, the thrust of many anti-court-ordered class-action arbitration arguments is the language of section four of the Federal Arbitration Act ("FAA"), which, in pertinent part, provides that "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement.*"[80] The Court of Appeals for the Seventh Circuit has interpreted this language to mean that if the contract does not specifically authorize class-action arbitration, ordering class-action arbitration would not be in accordance with the terms of the agreement and would therefore be prohibited under section four of the FAA.[81] While this conclusion is debatable,[82] parties proceeding under North Carolina's RUAA need not enter the fray. Section seven of the RUAA, the section comparable to section four of the FAA, simply directs the court to order the parties to arbitrate.[83] The absence of

528, S.E.2d 918, 921 (2000) (discussing an ambiguous contract provision in an employment agreement).

78. *See* Rice v. Wood, 91 N.C. App. 262, 264, 371 S.E.2d 500, 502 (1988) (citing O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 227, 250 S.E.2d 587, 597 (1978)) ("Ambiguous contracts are to be construed most strongly against the drafting party.").

79. *See supra* note 36 (discussing the difference between contract silence and contract ambiguity).

80. 9 U.S.C. § 4 (2000) (emphasis added).

81. *See* Champ v. Siegel Trading Co., 55 F.3d 269, 274–77 (7th Cir. 1995) (holding that section four of the FAA bars class-action [i.e., class-action arbitration] where not specifically authorized by the terms of the agreement).

82. The Seventh Circuit's interpretation arguably presumes that the exact terms of the arbitration provision are known and clear. However, this approach fails to consider that ordering two-party arbitration, as the Seventh Circuit did in *Champ*, is no more "in accordance with the terms" of an agreement that merely allows some unspecified form of arbitration than would be class-action arbitration.

83. N.C. GEN. STAT. §§ 1-569.7(a)(1), (a)(2), and (b) (2003).

the operative language "according to the terms of the agreement"[84] alleviates the need to take a side in this debate, and also eliminates one of the most common arguments against the ordering of class-action arbitration.[85]

Court-ordered class-action arbitration is a controversial issue, with strong opinions on both sides of the debate. Notwithstanding the opinion of the American Arbitration Association, and unless and until the Supreme Court firmly resolves the debate, the issue of whether to allow a court to order class-action arbitration when the contract is silent on the issue is a decision that resides with the legal authorities of each individual jurisdiction. North Carolina has yet to decide this issue, but when the time comes, the favored place arbitration holds in North Carolina, the allowance of court-ordered consolidated arbitration, the substantive law considerations of ascertaining party intent and resolving ambiguous contract provisions, and the absence of the operative language of section four of the Federal Arbitration Act in section seven of the North Carolina Revised Uniform Arbitration Act should all be considered. These considerations mandate that North Carolina adopt the South Carolina approach and allow court-ordered class-action arbitration when the arbitration agreement is silent if it would not result in prejudice and would serve both equity and efficiency.

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84. *See* 9 U.S.C. § 4 (2000).

85. *See Champ*, 55 F.3d at 274–77; *see also* Howard v. Klynveld Peat Marwick Goerdeler, 977 F. Supp. 654, 665 n.7 (S.D.N.Y. 1997) (citing *Champ*, 55 F.3d at 276–77).