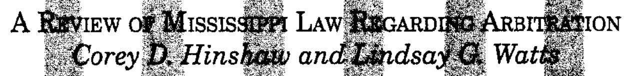

# A Review of Mississippi Law Regarding Arbitration

*Corey D. Hinshaw and Lindsay G. Watts*

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# A REVIEW OF MISSISSIPPI LAW REGARDING ARBITRATION

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## I. INTRODUCTION

Arbitration, a form of alternative dispute resolution, involves a contractual provision whereby bound parties give up their right to have their dispute heard by a court of law and, instead, submit their grievances to a neutral arbitrator who will ultimately decide the merits of the cause of action. Most commonly, agreements to arbitrate are compulsory and binding; however, depending on the agreement between the parties, arbitration may be voluntary and non-binding. Although at one time arbitration agreements were almost exclusively used by sophisticated businesspeople, arbitration agreements are now commonly imposed upon consumers involved in everyday transactions such as purchasing a car, contracting for employment, obtaining a credit card, or entering a nursing home. As a result, the precedent interpreting and analyzing arbitration agreements is steadily growing as Mississippi courts are asked to evaluate the ever-evolving set of circumstances which make an agreement to arbitrate ironclad versus invalid.

## II. THE HISTORY OF THE FEDERAL ARBITRATION ACT

"The cornerstone of United States arbitration law is the Federal Arbitration Act (the "FAA")."[1] In 1925, Congress, in

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[1] North American Free Trade Agreement [NAFTA], Advisory Comm. on Pri-

exercising its Commerce Power, enacted the FAA "to 'revers[e] centuries of judicial hostility to arbitration agreements, b[y] plac[ing] arbitration agreements upon the same footing a[s] other contracts.'"[2] It was Congress's purpose in enacting th[e] FAA to establish a broad "'federal policy favoring arbitration,' and to require all courts to "rigorously enforce agreements t[o] arbitrate.'"[3] Section 2 of the FAA provides that

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[4]

As a result, the FAA applies to any arbitration clause in written contract involving commerce—an extremely broad tes[t] which encompasses a vast majority of commercial transaction[s]. Indeed, the language "involving commerce" has been viewed b[y] United States Supreme Court as equivalent to "'affecting' interstate commerce.[5] Previous precedent has clearly state[d] that all doubts concerning the scope of arbitrable issues, th[e] construction of the contract language, and the asserted defens[-] es to arbitration "[must] be resolved in favor of arbitration."[6]

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vate Commercial Disputes, *Summary of U.S. Arbitration Law* (June 1995) (prepared by Deborah Enix-Ross & David W. Rivkin) *available* a[t] http://www.mac.doc.gov/nafta/usarb.htm; *see also* 9 U.S.C. §§ 1-16 (2000).

[2] Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 225-26 (1987) (citation omitted) (alterations in original) (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1974)).

[3] *Id.* at 226 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985)). *See generally* Janet Lee Herold, *Federal Preemption—Arbitration—Federal Arbitration Act Creates National Substantive Law Applicable in Federal and State Courts and Supercedes Contrary State Statutes*, 54 MISS. L.J. 571 (1984).

[4] 9 U.S.C. § 2 (2000).

[5] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273-74 (1995).

[6] *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25.

State laws govern only to the extent that they do not confl with the FAA.[7] Consequently, state courts have often be quoted as affirming that there is a "strong federal policy" favor of arbitration.[8] While state law principles may invalid an arbitration provision, any state law that blatantly disfav the enforcement of arbitration agreements will be preempt by the FAA.

The United States Supreme Court has specifically dressed the role of state courts in the context of the FAA:

> States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract." What states may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal "footing," directly contrary to the Act's language and Congress' intent.[9]

Although the FAA strongly urges courts to enforce agr ments to arbitrate, Congress clearly did intend for arbitrati agreements to be invalidated in some circumstances. Specific ly, arbitration agreements are invalid "upon [the assertion by party of] such grounds as exist at law or in equity for the rev cation of any contract."[10] The burden of establishing an leged defense to the enforcement of an arbitration provision placed squarely upon the shoulders of the party opposing ar tration.[11] Common grounds for invalidation may include al gations of substantive or procedural unconscionability, waiv fraud or duress, and failure of consideration.

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[7] *See* Southland Corp. v. Keating, 465 U.S. 1 (1984) (holding for the fi time that the conflicting state statute was preempted and instead federal l applied).

[8] *See, e.g.*, MS Credit Ctr., Inc. v. Horton, 926 So. 2d 167, 175 (Miss. 200

[9] *Allied-Bruce*, 513 U.S. at 281 (citation omitted) (emphasis omitted) (quoti 9 U.S.C. § 2 (2000)).

[10] 9 U.S.C. § 2.

[11] Am. Heritage Life Ins. Co. v. Lang, 321 F.3d 533, 539 (5th Cir. 2003).

Although the FAA does not delve into detailed procedures surrounding arbitration, it does give some overall guidance. For example, once a suit has been initiated in a United States court, the FAA provides for a stay of court proceedings upon the determination that the suit is "referable to arbitration."[12] The stay shall be granted "on application of one of the parties [to] stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement."[13] This procedure is most commonly seen when, after being sued by a plaintiff, a defendant files a motion to compel arbitration and stay proceedings or a similar request. If the trial court determines that the litigable issue is within the scope of an arbitration agreement which involves interstate commerce, and no contractual defenses to the agreement are present, the court will refer the matter to arbitration and the court action will be stayed. Once arbitration is complete, the court is granted the authority to confirm and enforce the arbitration award.[14] On the other hand, if a court finds that an issue is not arbitrable, regular litigation will ensue.

If a matter is referred to arbitration, the FAA still provides some safeguards to ensure the fundamental fairness of the proceedings. Federal law allows a court to vacate an award where there are findings of fraud, corruption, partiality and misconduct.[15] Additionally, federal courts have the power to modify and correct awards where miscalculation and other "material mistake[s]" are "evident."[16]

Since 1925, Congress has maintained a steadfast position with regards to the FAA. Combined with the consistently strong precedent of the United States Supreme Court which has followed, it is difficult to dispute that a national policy favoring arbitration exists. As a result, to date, most states have followed suit and enacted legislation which is favorable to

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[12] 9 U.S.C. § 3 (2000).

[13] *Id.*

[14] *Id.* § 9.

[15] *Id.* § 10.

[16] *Id.* § 11.

arbitration.[17]

## III. THE ADVENT OF ARBITRATION IN MISSISSIPPI

"Arbitration is a form of dispute resolution that has n been widely used in Mississippi."[18] Even though the FAA w enacted by Congress in 1925 and arbitration was recognized l Mississippi statutes as early as 1892,[19] Mississippi comm law circumvented the general enforcement of arbitration agre ments until 1998. Until that time, Mississippi courts consi tently held that mere "'private persons cannot[] by a contract arbitrate oust the jurisdiction of the legally constitut courts.'"[20] In sum, "all published Mississippi Supreme Cou opinions employed the logic that pre-dispute arbitration agre ments [were] invalid because they divest our courts of jurisdi tion."[21] Employing this view, a party to an arbitration agre ment could "fish with hope for a favorable award in a comm law arbitration, but when he comes to doubt that the arbitrat will go in his favor, he may, if he wishes to do so, revoke by tl notice."[22] As recently as 1995, Mississippi courts still reco nized and enforced this general bar to agreements to arb trate.[23]

Interestingly, in Mississippi, parties to construction co tracts have had the right to enforce agreements to arbitra since the 1980s. In 1981, the legislature enacted the Mississi pi Construction Arbitration Act which gives binding effect

[17] *Summary of U.S. Arbitration Law*, *supra* note 1.

[18] David Ott, *An Overview of Mississippi's Construction Arbitration Act*, MISS. L.J. 501, 501 (1983).

[19] Miss. Code Ann. ch. 6, §§ 95-113 (1892).

[20] McClendon v. Shutt, 115 So. 2d 740, 741 (Miss. 1959) (citation omitte *overruled by* IP Timberlands Operating Co. v. Denmis Corp., 726 So. 2d 96 (Mi 1998).

[21] R. Pepper Crutcher, Jr., *Overcoming Mississippi's Common Law Hostility Arbitration*, THE FEDERALIST SOCIETY, http://www.fe soc.org/Publications/practicegroupnewsletters/PG%20Links/pepper.htm (last visit Mar. 20, 2007).

[22] Wesley A. Sturges, *Arbitration and Award*, 25 MISS. L.J. 181, 183 (1954).

[23] *E.g.*, Arce v. Cotton Club of Greenville, Inc., 883 F. Supp. 117, 118 (N. Miss. 1995).

arbitration provisions included specifically in construction ı lated contracts.[24]

In 1998, the tides of tradition turned when the Mississip Supreme Court decided the landmark case of *IP Timberlan Operating Co. v. Denmiss Corp.*[25] In *Denmiss*, the court fran ly acknowledged Mississippi's long-standing common law an arbitration doctrine; however, the court recognized that "'[ there be any type of arbitration award we should be loathe disturb, it should be that between private contracting parti respecting a matter of interest only to themselves and the respective pocket books.'"[26] Most importantly, the court ove ruled previous precedent and stated that

> [t]his Court hereby overturns the former line of case law that jealously guarded the court's jurisdiction. Again, we expressly state that this Court will respect the right of an individual or an entity to agree in advance of a dispute to arbitration or other alternative dispute resolution.[27]

Since *Denmiss*, Mississippi courts have continued to an lyze and expand the case law interpreting arbitration agre ments. Although enforcement of pre-dispute arbitration agre ments is still a relatively new concept, since 1998, Mississip appellate courts have kept their word by fairly and consistent enforcing agreements to arbitrate.

## IV. The Test

Although the *Denmiss* court succeeded in lifting the ban o the enforcement of pre-dispute arbitration agreements, th issue of whether a particular claim is arbitrable must still b

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[24] Miss. Code Ann. §§ 11-15-101 to -143 (2004).

[25] 726 So. 2d 96 (Miss. 1998) (overruling McClendon v. Shutt, 115 So. 2d 74 (Miss. 1959); Mach. Prods. Co. v. Prairie Local Lodge No. 1538 of Int'l Ass'n ( Machinists, 94 So. 2d 344 (Miss. 1957); Standard Millwork & Supply Co. v. Miss Steel & Iron Co., 38 So. 2d 448 (Miss. 1949); Jones v. Harris, 59 Miss. 21 (1881)).

[26] *Denmiss*, 726 So. 2d at 104 (quoting Craig v. Barber, 524 So. 2d 974, 97 (Miss. 1988)).

[27] *Id.*

determined before arbitration can be ordered. Courts are pı vented from looking into the merits of a case until this thres old question has been decided. "In addition to establishing strong presumption in favor of arbitration, the [FAA] also lii its the role of the court to determining whether an issue arbitrable. . . . Once that determination is made, the court m: not delve further into the dispute."[28] In *United Steelworkers America v. American Manufacturing Co.*, the United Stat Supreme Court went so far as to state that courts "have ı business weighing the merits of the grievance" when the mɛ ter is referable to arbitration.[29] In *East Ford, Inc. v. Taylı* the Mississippi Supreme Court first declared the test to applied by a court when determining whether a claim is arl trable.[30] However, the true analysis was best expressed by tl Court in *MS Credit Center, Inc. v. Horton*.[31] The test stat that

> [i]n determining the applicability of the FAA, and whether its provisions require the parties in a particular case to arbitrate their claims, we conduct a two-prong inquiry. The first prong requires a threshold finding that the agreement to be arbitrated must have a nexus to interstate commerce, followed by a finding that the dispute in question is arbitrable, that is, the terms of the arbitration agreement require the parties to arbitrate the kind of dispute involved in the litigation. The second prong addresses whether legal constraints external to the agreement, such as fraud, duress, or unconscionability, foreclose arbitration of the claims.[32]

Although Mississippi courts have declared this test to be two-pronged inquiry, for ease of understanding, this paper w discuss the test in three parts.

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[28] *Id.* at 108.
[29] 363 U.S. 564, 568 (1960).
[30] 826 So. 2d 709, 713 (Miss. 2002).
[31] 926 So. 2d 167, 175 (Miss. 2006).
[32] *Id.* at 175 (citations omitted) (quoting *E. Ford, Inc.*, 826 So. 2d at 713, 71 9 U.S.C. § 2 (2000)).

### *A. Whether the Agreement to be Arbitrated has a Nexus to Interstate Commerce*

In general, "'[t]he sine qua non of the FAA's applicability a particular dispute is an agreement to arbitrate the dispute *a contract which evidences a transaction in interstate coı merce*.'"[33] Over the years, what constitutes a transaction interstate commerce has been the subject of much debate. *Allied-Bruce Terminix Companies v. Dobson*, the United Stat Supreme Court held that the language "evidencing a transa tion in interstate commerce" should be read "broadly" to resı in "a full exercise of constitutional power."[34] The Court fou "that the word 'involving' is broad and is indeed the function equivalent of 'affecting.'"[35] In *McKenzie Check Advance of Mı sissippi, LLC v. Hardy*,[36] the Mississippi Supreme Court, c ing *Allied-Bruce*, affirmed their acceptance of the Court's coı merce in fact interpretation of "involving interstate coı merce."[37] Indeed, regardless of the parties' contemplation interstate commerce involvement, a nexus to interstate coı merce may be found if the transaction simply affects commerc

Since *Denmiss*, the Mississippi Supreme Court has fc lowed the *Allied-Bruce* precedent and has interpreted the broa language of the FAA to reach a variety of transactions. Begi ning with *Denmiss*, the court "easily recognize[d] that the tir ber industry, on a national level, meets the minimum thresho of affecting or bearing upon interstate commerce, and thı initiating the Federal Arbitration Act."[38] The court rationa ized this finding by stating that both parties to the agreemeı "held forest lands in multiple states."[39] In *Smith Barney Henry*, a beneficiary of a securities account was compelled arbitrate her claims against the securities firm when the cou

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[33] *Denmiss*, 726 So. 2d at 107 (emphasis added) (quoting Peoples Sec. Li Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 813 n.4 (4th Cir. 1989).

[34] 513 U.S. 265, 277 (1995).

[35] *Id.* at 273-74.

[36] 866 So. 2d 446 (Miss. 2004).

[37] *Id.* at 451.

[38] *Denmiss*, 726 So. 2d at 107.

[39] *Id.*

"easily recognize[d] that the securities industry, on a natio level, meets the minimum threshold of affecting or beaı upon interstate commerce."[40]

In *Russell v. Performance Toyota, Inc.*, a pickup truck ț chaser sued his dealership alleging various tort claims rela to his purchase.[41] The court held that "[b]ecause Performa Toyota is a Tennessee corporation with its principal place business in Memphis, Tennessee, and Russell is an adult r dent citizen of Lee County, Mississippi, . . . this matter ' dences a transaction in interstate commerce.'"[42] A short ti later, the court decided *East Ford, Inc v. Taylor*,[43] which based on facts similar to *Russell*. In *East Ford, Inc.*, a tr buyer sued the seller of a vehicle alleging misrepresentatioı the vehicle as new; however, upon discussing the applicabi of the FAA, the court stated that the first prong of the test not in dispute and, therefore, declined to discuss whether location and residency of the parties would determine whet interstate commerce was affected or whether the automol industry in general met the minimum standard for affect interstate commerce.[44] In 2007, the court decided the case *Greater Canton Ford Mercury, Inc. v. Ables* and stated, albei dicta, that "[t]he fraudulent actions alleged by Plaintiffs res ed in the purchase of vehicles, a transaction involving c merce."[45] As a result, there may be some question as to whe er the purchaser of a vehicle from a dealership within the sa state will be considered a transaction involving interstate c merce so as to trigger the applicability of the FAA. Althoı there are arguments available for both positions, it is proba that the automobile industry in general, like the timber a securities industries, will be found to affect interstate c merce.

In *University Nursing Associates, PLLC v. Phillips,*

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[40] 775 So. 2d 722, 725 (Miss. 2001).
[41] 826 So. 2d 719, 721 (Miss. 2002).
[42] *Id.* at 722.
[43] 826 So. 2d 709 (Miss. 2002).
[44] *Id.* at 713.
[45] 948 So. 2d 417 (Miss. 2007).

court acknowledged in a footnote that an employment dispute between a state university and one of its faculty members does not involve interstate commerce, and, as a result, the FAA may not apply to the dispute.[46]

In *McKenzie Check Advance of Mississippi, LLC v. Hardy*, the court held that a nexus to interstate commerce existed in a dispute between borrowers and lenders under payday loan contracts where lenders in financing transactions must comply with federal laws and regulations such as the Truth-in-Lending Act.[47] Incidentally, the Truth-in-Lending Act was promulgated by Congress under its Commerce Clause powers.[48] Relying again on the Truth-in-Lending Act, the court reaffirmed its position in *Speedee Cash of Mississippi, Inc. v. Williams*.[49] In *Speedee Cash*, the court stated that "[i]t is elementary to find that the contract affects interstate commerce inasmuch as Speedee Cash, a lender of money to consumers, must run its business in accordance with federal laws and regulations."[50] The court later applied this same logic consistently in *Equifirst Corp. v. Jackson*,[51] and *MS Credit Center v. Horton*.[52]

In *Vicksburg Partners, L.P. v. Stephens*, the court, faced with compelling arbitration of a wrongful death action against a nursing home, held that "[t]his case clearly falls within the broad purview of the Federal Arbitration Act. Accordingly, singular agreements between care facilities and care patients, when taken in the aggregate, affect interstate commerce."[53] The court went on to explain that "basic daily activities like receiving supplies from out-of-state vendors and payments from

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[46] 842 So. 2d 1270, 1276 n.6 (Miss. 2003). *But see* Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (applying FAA to employment contracts where interstate commerce was not obviously implicated).

[47] 866 So. 2d 446, 451 (Miss. 2004).

[48] *Id.*

[49] 915 So. 2d 1061 (Miss. 2005).

[50] *Id.* at 1062-63.

[51] 920 So. 2d 458, 462-63 (Miss. 2006) (finding interstate commerce affected in home mortgage transactions).

[52] 926 So. 2d 167, 175-76 (Miss. 2006) (finding loan contracts for purchase of credit life and disability insurance involved commerce).

[53] 911 So. 2d 507, 515 (Miss. 2005).

out-of-state insurance companies or the federal Medicare ǀ gram, affect interstate commerce."[54] In a more recent nurs home case, *Covenant Health & Rehabilitation of Picayune,* *v. Estate of Lambert*, the court continued to resonate this vi regarding admission agreements "because admission agr ments, when taken in the aggregate, affect interstate cc merce, thus bringing such contracts within the scope of Federal Arbitration Act (FAA)."[55]

Finally, in *Cleveland v. Mann*, the court, in a matter first impression, compelled parties to arbitrate a wrong death suit brought against a surgeon and the surgeon's prof sional association after the patient signed an arbitration agr ment prior to surgery.[56] The court, relying on its previc analysis in *Vicksburg Partners, L.P.*, found that medical serv es provided to a patient by a doctor were economic activit that affect interstate commerce.[57]

In the past, Congress and the United States Suprei Court have clearly stated their intent for the FAA to possess expansive reach. Consequently, there does not appear to be single Mississippi case where the court has ruled the FA inapplicable due to the fact that interstate commerce is r implicated. Given the fact that the Mississippi appellate cou have already determined that interstate commerce is implic ed in each of the varied circumstances discussed above, it hard to imagine a set of facts whereby interstate commer would not be at issue, and thus make the dispute outside t purview of the FAA.

### *B. Whether the Terms of the Arbitration Agreement Require the Parties to Arbitrate the Kind of Dispute Involved in the Litigation*

Once the threshold question regarding the effect on inte

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[54] *Id.*

[55] No. 2005-CA-02223-COA, 2006 WL 3593437, at *2 (Miss. Ct. App. Dec. 1 2006).

[56] 942 So. 2d 108, 111 (Miss. 2006).

[57] *Id.* at 112-13.

state commerce is resolved, the next portion of the test involve a determination as to the scope of the arbitration clause. Liter ally, the language employed in the arbitration clause is exam ined to determine whether the clause, by its own terms, re quires the parties to arbitrate the particular dispute at issue In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co* the United States Supreme Court labeled the terminolog "'[a]ny controversy or claim arising out of or related to thi [a]greement'" as a broad arbitration clause in that the languag "arising out of or related to" covers both the "execution" an "acceleration" of the agreement.[58] Later, in *Pennzoil Explora tion & Production Co. v. Ramco Energy Ltd.*, the Fifth Circui made its own distinction between broad and narrow arbitratio clauses, stating that a clause is narrow when it limits arbitra tion to claims which "'arise under the contract.'"[59] Additional ly, "[b]ecause broad arbitration language is capable of expar sive reach, courts have held that 'it is only necessary that th dispute 'touch' matters covered by [the contract] to be arbitra ble.'"[60]

In considering whether tort claims may be subjected t arbitration, Mississippi courts have dealt with very few case on the issue. In *Adams v. Greenpoint Credit, LLC*,[61] the cour found that a borrower's tort claims of fraud, negligence, inten tional and/or negligent infliction of mental and emotional dis tress, breach of contract, and defamation were subject to arbi tration under the following arbitration clause:

> "Any controversy or claim between or among you and me or our assignees arising out of or relating to this Contract or any agreements or instruments relating to or delivered in connection with this Contract, including any claim based on or aris-

[58] 388 U.S. 395, 406 (1967) (first alteration in original) (quoting parties' arbi tration contract).

[59] 139 F.3d 1061, 1067 (5th Cir. 1998).

[60] MS Credit Ctr., Inc. v. Horton, 926 So. 2d 167, 176 (Miss. 2006) (citing *Pennzoil*, 139 F.3d at 1068).

[61] 943 So. 2d 710, 713-15 (Miss. Ct. App. 2006), *aff'd in part and vacated ir part*, 943 So. 2d 703 (Miss. 2006); *see also* Adams v. Greenpoint Credit, LLC, 94 So. 2d 703 (Miss. 2006).

ing from an alleged tort."[62]

Although the borrower argued that the arbitration agreem did not apply to his claims because he did not intend for contract to cover tort claims (although tort claims were spec cally mentioned), the Mississippi Court of Appeals cited a Fi Circuit decision in finding that "'[p]arties to arbitration agr ments cannot avoid them by casting their claims in tort, ratl than contract.'"[63] In *Speedee Cash of Mississippi, Inc. v. W liams*,[64] the Mississippi Supreme Court compelled arbitrati of a borrower's tort claims of wrongful repossession, conversi trespass, loss of income, and damage to business reputati against a lender under an extremely broad arbitration clau which stated that

> [t]his arbitration agreement shall cover all claims whatsoever pertaining in any way to any dwelling, transaction, or activities between the parties, including the arbitrability of any claim, regardless of whether they are based upon contract, tort, or otherwise and regardless of whether they are assertable at law, in equity or otherwise.[65]

Utilizing the standard set forth by the Fifth Circuit *Pennzoil*, this arbitration clause was broad in that it did r limit arbitration to claims "aris[ing] out of . . . [tl [a]greement."[66] Instead, the clause was aimed at encompa ing "all claims whatsoever pertaining in any way to . . . acti ties between the parties."[67] Again, the arbitration clause sp cifically included tort claims, so it was no surprise when t court compelled arbitration. Finally, in *Terminix Internation Inc. v. Rice*, the court compelled homeowners to arbitrate th tort claims against a termite company, stating that "it is wit

[62] *Adams*, 943 So. 2d at 713 (quoting parties' arbitration contract).

[63] *Id.* at 714 (alteration in original) (quoting Palmer v. Conseco Fin. Servici Corp., 198 F. Supp. 2d 822, 825 (N.D. Miss. 2002).

[64] 915 So. 2d 1061 (Miss. 2005).

[65] *Id.* at 1062.

[66] Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd., 139 F.3d 10 1063 (5th Cir. 1998).

[67] *Speedee Cash of Miss., Inc.*, 915 So. 2d. at 1062.

out question that the Rices' claims are within the scope of t arbitration provision, as they are claims and controversies tl directly challenge Terminix's performance of the contract However, the reported version of the case does not recite t text of the arbitration provision.[69] In *Cleveland v. Mann*, t Mississippi Supreme Court compelled arbitration of a wrong death action and stated that the tort claim was within t scope of the arbitration agreement which provided that t patient would arbitrate any dispute "'relating to the perf mance of medical services.'"[70] The theme of each of these to related cases seems to be that the torts themselves direc relate to performance under the contracts and, as such, we explicitly agreed to and contemplated by the parties upon e: cution of the contract.

Consequently, in *Rogers-Dabbs Chevrolet-Hummer, Inc. Blakeney*, the Mississippi Supreme Court held that the p chaser of a sport utility vehicle did not agree to arbitr claims of invasion of privacy, negligent hiring and supervisi civil fraud, and intentional and negligent infliction of emotio distress and mental anguish because such claims were outsi the scope of the arbitration agreement.[71] On appeal, the pla tiff argued that no consumer in an arms-length negotiati absent duress, would contract away his constitutional rights judicial redress and a jury trial when making a purchase if believed it gave the merchant the green light to commit fra forgery, and identity theft, while at the same time precludi the consumer from having his day in court.[72] The court, return, stated:

> While Blakeney no doubt agreed to arbitrate claims that originated from the sale of the vehicle or related to the sale of the vehicle, no reasonable person would agree to submit to

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[68] 904 So. 2d 1051, 1055 (Miss. 2004).

[69] *Id.* at 1053-59.

[70] 942 So. 2d 108, 118 (Miss. 2006) (emphasis omitted) (quoting parties' ai tration contract).

[71] No. 2005-IA-00125-SCT, 2007 WL 529281, at *6-7 (Miss. Ct. App. Feb. 2007).

[72] *Id.* at *6.

> arbitration any claims concerning a Hummer to which he would never receive a title; a scheme of using his name to forge vehicle titles and bills of sale to sell stolen vehicles; and the commission of civil fraud against him by misappropriating his title to the Hummer he purchased and forging his name on fake titles and bills of sale on various stolen vehicles-actions of which Blakeney was presumedly totally unaware at the time of the execution of the documents in question, including the arbitration agreement.[73]

With the advent of the decision in *Rogers-Dabbs Chevro Hummer, Inc.*, the court is clearly looking more closely i what the parties might have reasonably contemplated to within the scope of the arbitration agreement.[74]

With regards to scope, the Mississippi Supreme Court l also dealt with questions involving retroactive application agreements and application of arbitration as a condition pre dent to litigation. In *B.C. Rogers Poultry, Inc. v. Wedgewoi* as a matter of first impression, the court held that the scope the arbitration clause did not retroactively apply to dispu which pre-dated the date of the arbitration agreement.[75] T court stated that the clause "is focused only on those dispu arising under the February 5, 1997, Broiler Growing Agr ment" and "does not include broader language that might construed or interpreted to cover earlier disputes between t parties."[76] In *Doleac v. Real Estate Professionals, LLC*, as matter of first impression, an arbitration clause in an as purchase agreement which required arbitration of claims tween the parties prior to litigation was found by the court be valid and binding.[77] The clause stated that "'[a]ny dispu under this agreement, *prior to litigation*, shall be submitted arbitration.'"[78] Consequently, parties to an arbitration agre ment may agree to arbitration as a condition precedent to li

[73] *Id.*
[74] *Id.*
[75] 911 So. 2d 483, 488 (Miss. 2005).
[76] *Id.*
[77] 911 So. 2d 496, 501-02 (Miss. 2005).
[78] *Id.* at 501 (alteration in original) (quoting parties' arbitration contract).

gation.

Although Mississippi case law interpreting the scope arbitration agreements is a growing area, previous court de sions have indicated that scope, like interstate commerce, broadly construed. As a result, the first prong of the test i arbitrability of claims has been easily met in the past by tho seeking arbitration. However, in light of the fact that arbitr tion agreements are increasingly imposed on consumers on "take-it-or-leave-it" basis, development of the law interpreti scope of arbitration agreements is bound to occur in the futu

### *C. Whether Legal Constraints External to the Agreement Foreclose Arbitration of the Claims*

The United States Supreme Court has stated that t second prong in the test to determine the validity of a moti to compel arbitration under the Federal Arbitration Act "whether legal constraints external to the parties' agreeme foreclosed arbitration of those claims."[79] The Mississippi S preme Court has consistently stated that courts should app state-law contract principles in considering the second prong the arbitration test.[80] Specifically, the court has held that "t usual defenses to a contract such as fraud, unconscionabilit duress, and lack of consideration may be applied to invalida an arbitration agreement."[81]

The courts have held that "[t]he party resisting arbitrati

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[79] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 6 (1985).

[80] Greater Canton Ford Mercury, Inc. v. Ables, 948 So. 2d 417 (Miss. 200' Adams v. Greenpoint Credit, LLC, 943 So. 2d 710, 715 (Miss. Ct. App. 200 *aff'd in part and vacated in part*, 943 So. 2d 703 (Miss. 2006) ("Courts deci whether the parties have agreed to arbitrate, and ordinary state-law principl determining the formation of contracts apply.") (citing Will-Dill Res., Inc. Samson Res., Co., 352 F.3d 211, 214 (5th Cir. 2003)); *E. Ford, Inc. v. Taylor*, 8 So. 2d 709, 713 (Miss. 2002).

[81] *E. Ford, Inc.*, 826 So. 2d at 714. *See generally* Doctor's Assocs., Inc. Casarotto, 517 U.S. 681, 686-87 (1996) (holding that "generally applicable [sta law] contract defenses" are permissible when a party attempts to invalidate arbitration agreement, but "state laws [that are] applicable *only* in arbitrati provisions" are invalid).

must shoulder the burden of proving a defense to arbitr tion."[82] In one case, the court held that since the plaintiffs d not assert any contract defenses, there were no legal co straints external to the agreement between the parties th would foreclose the applicability of the arbitration agre ment.[83]

Though the law is clear that fraud and duress are contra defenses that may be used to invalidate an arbitration prov sion, there appear to be no Mississippi state law cases discus ing fraud or duress as a defense in the arbitration context. Th most common defense to the enforceability of arbitration agre ments in Mississippi case law is the defense of unconscionabil ty. As such, unconscionability will be discussed first and will b followed by a discussion of cases involving the defenses of wai er, lack of consideration, and the applicability of arbitratio agreements to non-signatories.

### 1. Unconscionability

The courts have stated that "[u]nconscionability is define as 'an absence of meaningful choice on the part of one of th parties, together with contract terms which are unreasonabl favorable to the other party.'"[84] Also, an unconscionable co tract has been described as "one such as no man in his sense and not under a delusion would make on the one hand, and a no honest and fair man would accept on the other."[85] Th courts have further held that there are "two types of unconscic nability, procedural and substantive."[86] The court has define

[82] Norwest Fin. Miss., Inc. v. McDonald, 905 So. 2d 1187, 1193 (Miss. 2005 (citing Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000)).

[83] *Ables*, 948 So. 2d 417.

[84] Covenant Health & Rehab. of Picayune, LP v. Estate of Lambert, No. 2005 CA-02223-COA, 2006 WL 3593437, at *4 (Miss. Ct. App. Dec. 12, 2006) (quotin Entergy Miss., Inc. v. Burdette Gin Co., 726 So. 2d 1202, 1207 (Miss. 1998)); *se also* Vicksburg Partners, LP v. Stephens, 911 So. 2d 507, 516-17 (Miss. 2005); *E Ford, Inc.*, 826 So. 2d at 715.

[85] *Covenant Health & Rehab. of Picayune, LP*, 2006 WL 3593437, at *4 (quoting Terre Haute Cooperage v. Branscome, 35 So. 2d 537, 541 (Miss. 1948)).

[86] *E. Ford, Inc.*, 826 So. 2d at 714 (quoting Pridgen v. Green Tree Fin. Servic

procedural and substantive unconscionability as follows:

> Procedural unconscionability may be proved by showing "a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or a lack of opportunity to study the contract and inquire about the contract terms."
>
> Substantive unconscionability may be proven by showing the terms of the arbitration agreement to be oppressive. Substantively unconscionable clauses have been held to include waiver of choice of forum and waiver of certain remedies.[87]

Consistent with the Mississippi appellate courts' holdir that the party resisting arbitration bears the burden to prov defense, the Mississippi Supreme Court held that the ler ers/defendants in *McDonald* "d[id] not have the burden to prc lack of unconscionability."[88] Furthermore, the burden is on t party seeking to uphold the arbitration provision to show tl there is a reasonable relationship between the risks and nee of the business and the arbitration provision.[89]

Mississippi courts have also held that a party cannot ra the defense of unconscionability of an arbitration agreement the first time on appeal.[90] Lastly, all unconscionability cc cerns are viewed by the court under the circumstances existi at the time the contract was created.[91]

ing Corp., 88 F. Supp. 2d 655, 657 (S.D. Miss. 2000)).

[87] *Id.* (quoting *Pridgen*, 88 F. Supp. 2d at 657; York v. Georgia-Pac. Co 585 F. Supp. 1265, 1278 (N.D. Miss. 1984)); *see also* Cleveland v. Mann, 942 2d 108 (Miss. 2006).

[88] Norwest Fin. Miss., Inc. v. McDonald, 905 So. 2d 1187, 1193 (Miss. 2005

[89] *Covenant Health & Rehab. of Picayune, LP*, 2006 WL 3593437, at *4.

[90] *See* Speedee Cash of Miss., Inc. v. Williams, 915 So. 2d 1061, 1063 (Mi 2005).

[91] *See* Vicksburg Partners, L.P. v. Stephens, 911 So. 2d 507, 517 (Miss. 20 (citing *Pridgen*, 88 F. Supp. 2d at 657).

*a. Procedural Unconscionability*

The Mississippi Supreme Court has cited *Black's Law Dictionary* in stating that procedural unconscionability "looks beyond the substantive terms which specifically define a contract and focuses on the circumstances surrounding a contract's formation."[92] The court has recognized that there are primarily two factors which indicate a finding of procedural unconscionability: (1) a lack of knowledge and (2) a lack of voluntariness.[93] A lack of knowledge is said to be "'demonstrated by a lack of understanding of the contract terms arising from inconspicuous print or the use of complex, legalistic language, disparity in sophistication of parties, and lack of opportunity to study the contract and inquire about contract terms.'"[94] A lack of voluntariness is said to be

> demonstrated in contracts of adhesion when there is a great imbalance in the parties' relative bargaining power, the stronger party's terms are unnegotiable and the weaker party is prevented by market factors, timing or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all.[95]

The court has held that a finding of "procedural unconscionability *must* be substantiated by evidence of a lack of knowledge or voluntariness by the weaker party," even in a case where a nursing home resident may not have been allowed admission into the nursing home had he not signed the admission agreement containing an arbitration provision.[96]

The Mississippi Supreme Court has stated that even if a

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[92] *Id.* at 517 (citing BLACK'S LAW DICTIONARY 1524 (6th ed. 1990)).

[93] E. Ford, Inc. v. Taylor, 826 So. 2d 709, 715 (quoting Bank of Ind., Nat'l Ass'n v. Holyfield, 476 F. Supp. 104, 109-10 (D. Miss. 1979)); *see also Mann*, 942 So. 2d at 114.

[94] *E. Ford, Inc.*, 826 So. 2d at 715-16 (quoting *Holyfield*, 476 F. Supp. at 109-10).

[95] *Id.* at 716 (quoting *Holyfield*, 476 F. Supp. at 109-10).

[96] *Vicksburg Partners, L.P.*, 911 So. 2d at 520 (emphasis added) (holding plaintiffs were competent individuals signing an agreement stating that any disputes would be resolved by arbitration and this was presented in a "well-marked, highly visible" manner).

trial court makes a finding that an arbitration provision is ; adhesion contract, the "court must still determine whether t arbitration clause included in a contract of adhesion rende the agreement/contract unconscionable."[97] The courts have t ability to restrict enforcement of terms within a contract th may specifically be unconscionable.[98] The court noted that co tracts of adhesion are drafted by the dominant party and t weaker party has no ability to negotiate the terms of the co tract.[99] In further discussing arbitration agreements and adh sion contracts, the court stated:

> The fact that an arbitration agreement is included in a contract of adhesion renders the agreement procedurally unconscionable only where the stronger party's terms are unnegotiable and "the weaker party is prevented by market factors, timing or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all."[100]

In *Russell v. Performance Toyota, Inc.*, the plaintiff "co: plain[ed] that the arbitration agreement was 'unilateral' a inequitable because he was a consumer and Performance To; ta was a corporation with a much greater bargaining po tion."[101] The plaintiff further stated that he was unable to r gotiate the terms of the contract because he was not on "eqı footing" with the defendant corporation.[102] The court rul that the plaintiff was not "coerced into signing [the contract and there were many other dealerships where he could ha

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[97] *Id.* at 516; *see also* Hughes Training, Inc. v. Cook, 254 F.3d 588, 594 (! Cir. 2001) ("[C]ontracts of adhesion[] *are not automatically void*.") (emphasis a ed); Norwest Fin. Miss., Inc. v. McDonald, 905 So. 2d 1187, 1194 (Miss. 20 ("An arbitration agreement may not be labeled unconscionable simply because carries with it aspects of adhesion.") (citing *E. Ford, Inc.*, 826 So. 2d at 716).

[98] *McDonald*, 905 So. 2d at 1194.

[99] *E. Ford, Inc.*, 826 So. 2d at 716.

[100] *Id.* (quoting Entergy Miss., Inc. v. Burdette Gin Co., 726 So. 2d 1202, 1! (Miss. 1998)).

[101] 826 So. 2d 719, 725 (Miss. 2000).

[102] *Id.*

made his automobile purchase.[103] The court also stated, "
Mississippi, a person is charged with knowing the contents
any document that he executes."[104] The court concluded
holding that the arbitration agreement not only benefited t
corporate defendant, but benefited both parties.[105] The agre
ment could not be construed in any way to protect the draft
from any potential negligence claims.[106] Lastly, the court he
that the plaintiff failed to prove that the arbitration agreeme
would subject him to "'an unreasonable risk[].'"[107]

In *EquiFirst Corp. v. Jackson*, the Mississippi Suprer
Court held that arbitration riders executed by home mortgage
at a loan closing were not procedurally unconscionable despi
one plaintiff's contention that he had difficulty reading and t
other plaintiff's contention that she felt hurried during the lo
closing.[108] The court held that such arguments were witho
merit because the reading-impaired plaintiff did not infor
anyone at the loan closing of his reading difficulties and b
cause the plaintiffs were given approximately a week's notice
the loan closing date and time and should not have felt hurri
as a result.[109]

The court specifically held in *Cleveland v. Mann* that
person's inability to read does not make him or her incapable
having knowledge about an arbitration agreement he or sl
signed.[110] In *Mann*, the court stated that the arbitrati
agreement language was "neither complex nor convoluted."
The court pointed out that the pertinent language regardi

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[103] *Id.* at 726.

[104] *Id.* (citing J.R. Watkins Co. v. Runnels, 172 So. 2d 567, 571 (Miss. 1965
*see also* Terminix Int'l, Inc. v. Rice, 904 So. 2d 1051, 1056 (Miss. 2004) ("It
well settled under Mississippi law that a contracting party is under a legal ob
gation to read a contract before signing it.") (citing McKenzie Check Advance
Miss., LLC v. Hardy, 866 So. 2d 446, 455 (Miss. 2004)).

[105] *Russell*, 826 So. 2d at 726.

[106] *Id.*

[107] *Id.* at 726-27.

[108] 920 So. 2d 458, 463-64 (Miss. 2006).

[109] *Id.* at 464. In support of its holding, the court cited *McKenzie Check A
vance of Miss., LLC* and *McDonald*.

[110] 942 So. 2d 108, 114 (Miss. 2006) (citing *Equifirst Corp.*, 920 So. 2d at 46

[111] 942 So. 2d at 115.

the plaintiff giving up his right to a trial by jury was "bolc printed in all capital letters in a font larger than the font the rest of the agreement."[112] Furthermore, the court not that the second page of the arbitration agreement fully ε plained and described the terms of the arbitration agre ment.[113] The court also cited an early Mississippi Supren Court opinion stating, "[a] person cannot avoid a written co tract which he has entered into on the ground that he did n read it or have it read to him."[114] The court concluded th the arbitration agreement was not procedurally unconscionat and noted that the plaintiff signed the first page of the agre ment and put his initials on the second page "denoting h understanding" as to the terms of the agreement.[115] Tl plaintiffs in *Mann* also asserted the arbitration agreement w procedurally unconscionable due to a lack of voluntariness. The plaintiffs asserted the arbitration agreement constitut an adhesion contract.[117] The court defined a contract of an a hesion as "an agreement 'drafted unilaterally by the domina party and then presented on a 'take-it-or-leave-it' basis to tl weaker party who has no real opportunity to bargain about i terms.'"[118] The court further noted that adhesion contrac generally contain provisions in very small font and are usual pre-printed agreements.[119] The court held that the plaintifi claim of lack of voluntariness was without merit.[120] The cou based its reasoning on the fact the plaintiff initialed on tl second page of the agreement indicating he was not in need emergency care or under stress.[121] Additionally, the agre ment allowed for the plaintiff to resend the agreement withi

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[112] *Id.*
[113] *Id.*
[114] *Id.* (alteration in original) (quoting Cont'l Jewelry Co. v. Joseph, 105 S 639 (Miss. 1925)).
[115] *Id.*
[116] *Id.* at 116.
[117] *Id.*
[118] *Id.* (quoting E. Ford, Inc. v. Taylor, 826 So. 2d 709, 716 (Miss. 2002)).
[119] *Id.* (quoting *E. Ford, Inc.*, 826 So. 2d at 716).
[120] *Id.*
[121] *Id.* (citing parties' arbitration contract).

fifteen days and the plaintiff had a total of nineteen days fore he underwent surgery.[122]

In *East Ford, Inc. v. Taylor*, however, the Mississippi preme Court held the arbitration agreement at issue was pro durally unconscionable because the arbitration clause was o third the size of most of the rest of the contract, the arbitrati clause was in very fine print, some details in the contract w in bold lettering but the arbitration clause was not, and t arbitration clause was preprinted on the contract.[123]

In *MS Credit Center, Inc. v. Horton*, the plaintiffs assert procedural unconscionability, specifically, that the plaintiff " not knowingly and voluntarily agree to the terms of the ar tration agreement."[124] The court went through the *East Fo Inc.* six factor test in considering whether the arbitration pro sions were procedurally unconscionable.[125] The facts the co considers are as follows: "1) lack of knowledge; 2) lack voluntariness; 3) inconspicuous print; 4) complex legalis language; 5) disparity in sophistication or bargaining power; lack of opportunity to study the contract and inquire about t contract terms."[126] As to the plaintiff's lack of knowledge a understanding about the arbitration agreement, the co pointed out that parties to a contract in Mississippi have duty to read all the terms of a contract which they sign. Additionally, the court noted it has never held that one party

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[122] *Id.*

[123] 826 So. 2d at 716-17.

[124] 926 So. 2d 167, 176 (Miss. 2006) (citing *E. Ford, Inc.*, 826 So. 2d at 71 Plaintiffs' contention of procedural unconscionability is based on four claims:

> (1) she did not have knowledge of the arbitration agreement; (2) the arbitration provision was not explained to her or otherwise brought to her attention; (3) she did not voluntarily agree to the arbitration agreement, as it was a contract of adhesion; and (4) the arbitration agreement was not understandable and could not be explained by MS Credit's employee.

*Id.*

[125] *Id.* at 177-79.

[126] *Id.* at 177.

[127] *Id.* (citing Titan Indem. Co. v. City of Brandon, 27 F. Supp. 2d 693, 6 (S.D. Miss. 1997)).

a contract has "an inherent duty" to explain a contract's terı to the other party.[128] As to the lack of voluntariness fact( the court held that a defendant employee testified that t arbitration agreement was negotiable and plaintiff failed testify to the contrary.[129] Also, the court noted that becau the arbitration agreement was specifically separated from t rest of the document, it could have been excluded from the lo: transaction.[130] Lastly, the court noted there was no eviden to suggest the plaintiff requested to negotiate the terms of tl loan transaction or requested that the arbitration agreement l amended.[131]

Further, the record showed the arbitration agreement w. on a separate page of paper and was in the same font as tl rest of the document, and the title of the arbitration agreeme: was printed in all bold, capital letters.[132] As to the factor r garding "complex legalistic language," there was no authori to support an argument that a contract should be unenforc able merely because a lay person may have difficulty unde standing its provisions.[133] The agreement also made clear the plaintiff she was "'waiving any right to a trial by a judge ( by a judge and jury.'"[134] As to the plaintiff's contention of di parity in sophistication or bargaining power, the court cite plaintiff's failure to support this argument by any sworn test mony, affidavits or other evidence.[135] Additionally, the cou noted the plaintiff provided no evidence to suggest she wa prevented from studying and inquiring about the terms of tl agreement or was rushed and hurried into reading and signir the agreement.[136] In summary, the court stated, "This Cou

[128] *Id.* The court further explained that such a duty would arise only "in fidı ciary or confidential relationships." *Id.* (citing Van Zandt v. Van Zandt, 86 So. 2 466 (Miss. 1956)).

[129] *Id.* at 178.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.* (quoting parties' arbitration contract).

[135] *Id.* at 179.

[136] *Id.*

could hardly employ a rule which required the parties to ever contract to be of exactly equal sophistication."[137]

In another case, the court held affidavits by borrowe plaintiffs indicating an inability to get a loan anywhere withou signing an arbitration agreement were insufficient withou other evidence to prove procedural unconscionability.[138] Th court specifically pointed to a lack of evidence showing tha "any borrower even balked at the idea of signing the arbitra tion agreement" or "that the borrowers could not get a competi tive loan from another company or even that they could not d without the loan."[139]

*b. Substantive Unconscionability*

An arbitration agreement is said to be substantively uncon scionable when its terms are shown to be oppressive.[140] Th court in *MS Credit Center, Inc. v. Horton* noted that arbitratio agreements are substantively unconscionable if the agreement are:

> "one-sided [and] one party is deprived of all the benefits of the agreement or left without a remedy for [the other] party's nonperformance or breach, a large disparity between cost and price or a price far in excess of that prevailing in the market price [exists], or [the] terms bear no reasonable relationship to business risks assumed by the parties."[141]

The court in *Horton* held the plaintiff's substantive unconscio nability argument was unmeritorious because the arbitratio agreement between the defendants and the plaintiff containe "no limitation of damages, no limitation on bringing claims and no waiver of liability."[142] In fact, the only thing the arbi

[137] *Id.*
[138] Norwest Fin. Miss., Inc, v. McDonald, 905 So. 2d 1187, 1194 (Miss. 2005).
[139] *Id.* at 1194-95.
[140] Covenant Health & Rehab. of Picayune, LP v. Estate of Lambert, No. 2005-CA-02223-COA, 2006 WL 3593437, at *4 (Miss. Ct. App. Dec. 12, 2006).
[141] 926 So. 2d 167, 177 (Miss. 2006) (quoting Bank of Ind., Nat'l Ass'n v Holyfield, 476 F. Supp. 104, 110 (S.D. Miss. 1979)).
[142] *Id.* at 179.

tration agreement did was "submit[] the question of liabilit a forum other than the courts."[143]

The court in *Vicksburg Partners, L.P. v. Stephens* sta "[In] reviewing a contract for substantive unconscionability, look within the four corners of an agreement in order to dis er any abuses relating to the specific terms which violate expectations of, or cause gross disparity between, contract parties."[144]

Though the court held the arbitration agreement conscionable in *Vicksburg Partners, L.P.*, the court found limitation of liability sections to be substantively unconscio ble and unenforceable because the weaker party was limite a $50,000 recovery whereas the other party's recovery was limited whatsoever.[145] The court has made clear that if par an arbitration provision is found to be void and unconsciona the remainder of the agreement may still be binding agai the parties.[146]

"Grievance resolution" provisions allowing a nursing ho or other facility to bring payment-related grievances in co but prohibits a resident from bringing a suit in court for reason whatsoever have been held to be substantively unc scionable.[147] Additionally, terms of an arbitration agreem requiring the resident to pay "all costs for enforcement of

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[143] *Id.*

[144] 911 So. 2d 507, 521-22 ("While unconscionably oppressive terms can facially invalid, a per se finding of substantive unconscionability is strictly ap cable only to a provision that by its very language significantly alters the le rights of the parties involved and severely abridges the damages which they r obtain."). *See generally* Covenant Health & Rehab. of Picayune, LP v. Brown, So. 2d 732 (Miss. 2007) (acknowledging applicability of court's holding regard substantive unconscionability in *Vicksburg Partners, LP* to arbitration agreem in issue).

[145] *Vicksburg Partners, L.P.*, 911 So. 2d at 523. The exact same provisi were most recently held unconscionable by the court in *Brown*. 949 So. 2d 7 Additionally, a waiver of punitive damages by both parties was held to be unc scionable in that the nursing home could unjustly benefit from the provis whereas the resident would be deprived of his right to seek punitive damages.

[146] *Id.* (citing Russell v. Performance Toyota, Inc. 826 So. 719, 724-25 (M 2002)).

[147] *Id.* (citing Pitts v. Watkins, 905 So. 2d 533, 555-56 (Miss. 2005)).

agreement if the resident avoids or challenges either the grie' ance resolution process or an award therefrom" have been hel substantively unconscionable because they unreasonably favc defendants and are one-sided and oppressive in nature.[148]

In *Cleveland v. Mann*, the plaintiffs also argued the arb tration agreement was substantively unconscionable becaus the defendants had sole choice over the arbitration associatio and because appeal was allowed for the plaintiff only in limite circumstances.[149] The court held that the plaintiff's conter tions as to substantive unconscionability were without me: it.[150] The court noted that the plaintiff put his initials next t the terms of the agreement stating the arbitration would b performed by a particular association of neutral arbitrator who did not work for the physician or for the patient.[151] Th court held the plaintiff had a fair opportunity and a prope forum to dispute his claims, that his legal rights were not lin ited, that the defendant's liablity was not limited, that th plaintiff's damages were not limited, and that the agreemer provided for a neutral arbitration association to provide a neu tral arbitrator.[152] Ultimately, the court held "the agreemer [at issue was] neither procedurally nor substantively unconscic nable" and overturned the trial court's denial of the defendant: motion to compel arbitration.[153]

In *Pitts v. Watkins*, the Mississippi Supreme Court foun an arbitration clause in a home inspection agreement substar tively unconscionable where one party was allowed to pursu his claims in a court of law and the other party was required t arbitrate his claims.[154] The court also noted that a limitatio of liability clause and the creation of a private one-year limita tions period in the agreement provided even more evidence c

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[148] *Id.*
[149] 942 So. 2d 108, 116 (Miss. 2006).
[150] *Id.* at 116-17.
[151] *Id.* at 117.
[152] *Id.*
[153] *Id.*
[154] 905 So. 2d 553, 555 (Miss. 2005).

substantive unconscionability.[155]

The court in *Brown* also held that "a contractually creat time limitation on suits" will not be enforceable.[156] The cou however, did not find a provision waiving both parties' rights a jury trial to be unconscionable because it is effectively t same as an arbitration provision.[157]

2. Lack of Consideration

The contract defense of lack of consideration has only be discussed in one recent Mississippi case, which was sub quently overturned by the Mississippi Supreme Court stati that the issue of lack of consideration was not an issue rais by the parties on appeal.[158] The Mississippi Supreme Co did not hold that the Court of Appeals' reasoning regarding t applicability of the defense of lack of consideration to be error, but rather did not specifically address the issue all.[159]

In *Fradella v. Seaberry*, the Mississippi Court of Appe held that the arbitration contract in question was unenfor able and void on its face because it was not supported by cc sideration.[160] In *Fradella*, a contract for the sale and purcha of real estate was entered into between the purchasers, t Seaberrys, and the sellers, the Germanys.[161] After closing, t Seaberrys discovered discrepancies regarding their home a land purchase and initiated a lawsuit against the German

[155] *Id.* at 557-58.

[156] Covenant Health & Rehab. of Picayune, LP v. Brown, 949 So. 2d 7 (Miss. 2007).

[157] *Id.*

[158] Fradella v. Seaberry, No. 2005-CA-00404-COA, 2006 WL 924037 (Miss. ( App. Apr. 11, 2006), *rev'd*, No. 2005-CT-00404-SCT, 2007 WL 852097 (Miss. M 22, 2007).

[159] *Fradella*, No. 2005-CT-00404-SCT, 2007 WL 852097 (Miss. Mar. 22, 2007)

[160] 2006 WL 924037, at *3. The Mississippi Supreme Court has held that long as there is consideration, mutuality of obligation is not required for an ar tration agreement to be enforceable in Mississippi. *See* McKenzie Check Advan of Miss., LLC v. Hardy, 866 So. 2d 446, 453 (Miss. 2004).

[161] 2006 WL 924037, at *1.

the real estate agency, and the real estate company.[162] Bas on the contract between the Seaberrys and the Germanys, t real estate agent and the real estate company filed a motion compel arbitration in the trial court.[163] In analyzing this cas the appellate court stated that in Mississippi there must be "'meeting of the minds'" as to "the essential elements of t contract in order for it to be enforceable."[164] Additionally, t court noted that offer, acceptance, and consideration must present in order for a contract to be enforceable.[165] The cou held that both the Seaberrys and the Germanys indicated individual willingness to enter into arbitration agreemen with the real estate agent and the real estate company when initialed the contract terms.[166] However, the court noted th neither the real estate agent nor the real estate company ga any consideration to the Seaberrys or the Germanys for t arbitration agreements; therefore, since there was no conside ation, the arbitration contract was held to be void.[167]

### 3. Enforcement by and Against Non-signatories to the Contract

An issue which has arisen in several arbitration-relat cases is whether non-signatories or non-parties may be bou to an arbitration agreement and, conversely, whether they m attempt to enforce an arbitration agreement. Though technic ly this issue arguably falls under the first prong of the te regarding scope, which has previously been discussed, t courts have dealt with this issue by applying state contract la principles.

The appellate courts of Mississippi have held th "[a]rbitration agreements are enforceable as to non-signatori to a contract when the non-signatory party is a third-par

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162 *Id.*

163 *Id.*

164 *Id.* at *2 (citing Hunt v. Davis, 45 So. 2d 350, 352 (Miss. 1950)).

165 *Id.* (citing Gatlin v. Methodist Med. Ctr., Inc., 772 So. 2d 1023, 1029 (Mis 2000)).

166 *Id.* at *3.

167 *Id.*

beneficiary."[168] In *Terminix International, Inc. v. Rice,* Mississippi Supreme Court adopted an earlier Fifth Cir holding when it stated, "[A] nonsignatory party may be bo to an arbitration agreement if so dictated by the ordinary p ciples of contract and agency."[169] The court further quoted Fifth Circuit holding:

> In the arbitration context . . . a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. To allow [one] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.[170]

The court adopted the Fifth Circuit's principles in *Bailey* a held that Mrs. Rice was bound to the arbitration clause sig by her husband.[171]

Arbitration agreements have not been held to be invalid ed upon "the death of the signatory and may be binding successors and heirs if provided in the agreement."[172] *Brown*, the arbitration provision was held to be enforceable and against the decedent's administrators and the nurs home.[173] In *Adams v. Greenpoint Credit, LLC*, the court no that the plain language of the arbitration provision did indicate "a clear intent" by the parties to the contract to ma

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[168] Holman Dealerships, Inc. v. Davis, 934 So. 2d 356, 359 (Miss. Ct. A 2006); *see also* Adams v. Greenpoint Credit, LLC, 943 So. 2d 703, 708 (M 2006) ("[A]rbitration agreements can be enforced against non-signatories if s non-signatory is a third-party beneficiary."); Smith Barney, Inc. v. Henry, 775 2d 722, 727 (Miss. 2001).

[169] 904 So. 2d 1051, 1058 (Miss. 2004) (quoting Wash. Mut. Fin. Group, LLC Bailey, 364 F.3d 260, 266 (5th Cir. 2004)).

[170] *Id.* (quoting *Bailey*, 364 F.3d at 266).

[171] *Id.*

[172] Covenant Health & Rehab. of Picayune, LP v. Brown, 949 So. 2d 7 (Miss. 2007) (citing Cleveland v. Mann, 942 So. 2d 108, 118 (Miss. 2006)).

[173] *Id.*

Beth Brown, a plaintiff, a third-party beneficiary.[174] The cou noted that Ms. Brown did not sign the contract, was not allu ed to in the contract, and was not a beneficiary of the co tract.[175] Because Ms. Brown is a non-signatory, non-thir party beneficiary, she "is effectively a stranger to the contrac and "is not bound by the arbitration provision."[176]

The Mississippi Supreme Court has also decided the issu of whether an arbitration agreement is binding on wrongf death beneficiaries.[177] The wrongful death beneficiary plai tiffs in *Mann* contended they did not sign the arbitration agre ment and it was not signed by anyone with authority to sign o their behalf.[178] Nevertheless, the plain language of the agre ment stated that it applied to disputes between "'Patient . . . c the heirs-at-law or personal representative of Patient, as th case may be, and the Clinic, PLLC and each physician indivi ually.'"[179] The court stated it is "'clear that a nonsignator party may be bound to an arbitration agreement if so dictate by the ordinary principles of contract and agency.'"[180] Add tionally, the court reiterated one of its previous holdings tha "[t]he death of a party to an agreement to arbitrate futur disputes does not invalidate the agreement."[181] If the arbitra tion agreement evinces an intent between the parties for suc disputes to be resolved via arbitration, the intent of the partie must be respected by the court.[182] Because the Mississipp

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[174] 943 So. 2d at 709.

[175] *Id.*

[176] *Id.* The court also failed to consider the "extraordinary remedy" of equitabl estoppel. *Id.* (quoting B.C. Rogers Poultry, Inc. v. Wedgeworth, 911 So. 2d 482 491 (Miss. 2005)); *see also* EEOC v. Waffle House, Inc., 543 U.S. 279, 294 (2002 ("It goes without saying that a contract cannot bind a nonparty.").

[177] Cleveland v. Mann, 942 So. 2d 108, 117 (Miss. 2006).

[178] *Id.*

[179] *Id.* at 117-18 (quoting parties' arbitration contract).

[180] *Id.* at 118 (quoting Terminix Inter'l, Inc. v. Rice, 904 So. 2d 1051, 105 (Miss. 2004)); *see also* Wash. Mut. Fin. Group, LLC v. Bailey, 364 F.3d 260, 26 (5th Cir. 2004).

[181] *Id.* (alteration in original) (quoting Smith Barney, Inc. v. Henry, 775 So. 2 722, 726 (Miss. 2001)).

[182] *Id.*

wrongful death statute[183] only allows wrongful death bene ciaries to bring claims a decedent could have brought had t decedent survived, the court held the converse must also true and wrongful death beneficiaries "may NOT bring clai the decedent could not have brought had the decedent su vived."[184] Because a wrongful death beneficiary may not bri a claim a decedent could not have brought himself, an arbitı tion agreement binding on a decedent is also binding on l wrongful death beneficiaries.[185]

Most recently, the Mississippi Supreme Court in *Fradel* held that an arbitration clause in a contract for the sale a purchase of real estate entered into between the buyer a seller was also applicable to the real estate agency and the re estate agent representing both parties in a dual capacity. Though the contract was not signed by the real estate agent agency, the court held the contract "clearly created rights a responsibilities" applicable to the agent and agency.[187] As result, the court held it was of no consequence that the contra was not signed by someone on behalf of the real estate age cy.[188]

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[183] Miss. Code Ann. § 11-7-13 (2004 & Supp. 2006).

[184] *Mann*, 942 So. 2d at 118.

[185] *Id.* The court noted that the same reasoning was applied in *Jenkins Pensacola Health Trust*, 933 So. 2d 923 (Miss. 2006). The *Jenkins* court held th wrongful death beneficiaries were barred from bringing a wrongful death cla where the statute of limitations had expired against the decedent. 933 So. 2d 926. The *Mann* majority cited several other jurisdictions to support their holdir *See, e.g.*, Briarcliff Nursing Home, Inc. v. Turcotte, 894 So. 2d 661, 664 (A 2004); Herbert v. Superior Court, 215 Cal. Rptr. 477 (Cal. Ct. App. 1985); All v. Pacheco, 71 P.3d 375, 379 (Colo. 2003).

[186] *Fradella*, No. 2005-CT-00404-SCT, 2007 WL 852097, at *9 (Miss. Mar. 2 2007).

[187] *Id.*

[188] *Id.* (holding that *Parkerson v. Smith*, 817 So. 2d 529 (Miss. 2002), was n applicable to this real estate transaction, which was the principal case that t trial court relied on in denying arbitration for the defendant).

4. Waiver

The Mississippi Supreme Court has stated, "A party see ing to invoke arbitration may waive that right if it active participates in litigation."[189] The court also pointed out, ho ever, that "[w]aiver of arbitration is not a favored finding, a there is a presumption against it."[190] The court furth opined, "We have expressed our intention to uphold arbitrati agreements if at all possible under the circumstances."[191] P another way, the court has stated that "'[a] party alleging wai er of arbitration must carry a heavy burden.'"[192] The cou has also pointed out that the legislative intent behind the Fe eral Arbitration Act was "'to move the parties to an arbitral dispute out of court and into arbitration as quickly and easi as possible.'"[193]

In *University Nursing Associates, PLLC v. Phillips*, t court held generally that a defendant who merely files an a swer and a motion to dismiss does not waive his or her right invoke arbitration.[194] The court cited a Fifth Circuit decisi holding, "[a] defendant did not waive arbitration, prior to mo ing for a stay, by filing an answer, interrogatories and a r quest for production of documents, moving for a protecti order, and agreeing to a joint motion for continuance reque ing an extension of the discovery period."[195] The *Phillips* cou held that the plaintiff was not prejudiced by delay because t

[189] Univ. Nursing Assocs., PLLC v. Phillips, 842 So. 2d 1270, 1276 (Miss. 200 (citing Cox v. Howard, Weil, Labouisse, Freidrichs, Inc., 619 So. 2d 908, 9 (Miss. 1993)).

[190] *Id.* (citing Steel Warehouse Co. v. Abalone Shipping Ltd. of Nicosai, 1 F.3d 234, 238 (5th Cir. 1998)); *see also* MS Credit Ctr., Inc. v. Horton, 926 So. 167, 179 (Miss. 2006); Russell v. Performance Toyota, Inc., 826 So. 2d 719, 7 (Miss. 2002) ("[W]aiver of arbitration is not a favored finding.") (quoting Mill Brewing Co. v. Fort Worth Distrib. Co., 781 F.3d 494, 497 (5th Cir. 1986)).

[191] *Phillips*, 842 So. 2d at 1276.

[192] Doleac v. Real Estate Profls, Inc., 911 So. 2d 496, 505 (Miss. 2005) (qu ing Subway Equip. Leasing Corp. v. Forte, 169 F.3d 324, 326 (5th Cir. 1999)).

[193] *Phillips*, 842 So. 2d at 1277 (quoting Moses H. Cone Mem'l Hosp. v. Merc ry Constr. Co., 460 U.S. 1, 24 (1983)).

[194] *Phillips*, 842 So. 2d at 1276.

[195] *Id.* at 1277 (citing Tenneco Resins, Inc. v. Davy Int'l, AG, 770 F.2d 41 420 (5th Cir. 1985)).

defendant asserted arbitration as an affirmative defense in i answer less than two months after the plaintiff filed her pet tion for accounting, and a hearing regarding arbitration wa held four months later.[196] Despite not finding that waiver o curred in the *Phillips* case, the court issued this admonitio "As a practice note, parties desiring to seek arbitration shoul promptly file and present to the trial court a motion to sta proceedings and a motion to compel arbitration."[197]

The Mississippi Supreme Court, in *Pass Termite & Pe Control, Inc. v. Walker*, stated that "'service of an answer in a action on the contract does not constitute waiver of the right t arbitration, even though the answer does not set up the arb tration clauses as a defense.'"[198] However, the court held i *Walker* that the defendant's actions of requesting a jury trial i its answer coupled with the invocation of the discovery proces indicated an intent to forgo arbitration.[199]

In *Sanderson Farms, Inc. v. Gatlin*, the court held waive may be express or implied and may be inferred by the condu of the parties.[200] Additionally, the court held a party ma waive its right to arbitration by its refusal to pay fees and cost which are a part of the arbitration agreement because such refusal is "inconsistent with the right to arbitrate."[201]

In *Horton*, the court pointed out that arbitration can i fact be waived where a party "'actively participates in a lawsu or takes other action inconsistent with the right to arbitra

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[196] *Id.* at 1278. *Compare* Walker v. J.C. Bradford & Co., 938 F.2d 575 (5t Cir. 1991) (holding a thirteen month delay did not constitute waiver), *with* Pric v. Drexel Burnham Lambert, Inc., 791 F.2d 1156 (5th Cir. 1986) (holdin aseventeen month delay did constitute waiver).

[197] *Phillips*, 842 So. 2d at 1277; *see also* In re Tyco Int'l (US), Inc., 917 So. 2 773, 780 (Miss. 2005) (holding Tyco defendants' active participation in numerou actions inconsistent with seeking arbitration for more than three years constitute an excessive delay and a waiver of their right to arbitration).

[198] 904 So. 2d 1030, 1034-35 (Miss. 2004) (quoting *Phillips*, 842 So. 2d a 1276).

[199] *Id.* at 1035.

[200] 848 So. 2d 828, 837 (Miss. 2003).

[201] *Id.* at 838. Specifically, the court held the entire arbitration agreemen should be stricken for defendant's failure to pay fees in contravention of contrac tual agreement. *Id.*

tion.'"[202] Furthermore, the court noted that arbitration may waived if the judicial process has been so substantially invol that the other party has suffered detriment or prejudic The court also noted that it had found waiver of arbitrat only in limited circumstances.[204] In one case, the party questing that arbitration be compelled had already filed 'summary judgment motion, requested two continuances, pealed to [the] court based on a pre-trial ruling, and had quested various types of discovery.'"[205] As a result, the co found that the right to arbitration was waived due "'extensive' pre-trial litigation."[206] In another case, arbitrat was waived where the defendant refused pay one-half of arbitration costs.[207] In a third case, the court held that a tration had been waived where the movant did not seek compel arbitration for 237 days after the filing of the c plaint, failed to raise arbitration as an affirmative defense the answer, requested a trial by jury in the answer, and unc took discovery prior to seeking to compel arbitration.[208] *Horton,* the defendants asserted arbitration as an affirmat defense in their answers; however, the defendants engaged pre-trial litigation by "consenting to a scheduling order, eng ing in written discovery, and conducting [the plaintiff's] dep tion."[209] The court noted that although participation tow litigation is an important factor, more is needed to constit waiver of the right to compel arbitration.[210] The court spec cally pointed out that typically a party's delay in pursuing

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[202] MS Credit Ctr., Inc. v. Horton, 926 So. 2d 167, 179 (Miss. 2006) (quot Cox v. Howard, Weil, Labouisse, Friederichs, Inc., 619 So. 2d 908, 913-14 (M 1993)); *see also In re Tyco Inter'l (US), Inc.*, 917 So. 2d at 779.

[203] *Horton*, 926 So. 2d at 179 (quoting *Phillips*, 842 So. 2d at 1278).

[204] *Id.* at 179.

[205] *Id.* at 179-80 (quoting *Cox*, 619 So. 2d at 914).

[206] *Id.* at 179 (quoting *Cox*, 619 So. 2d at 914).

[207] *Id.* at 180 (citing Sanderson Farms v. Gatlin, 848 So. 2d 828, 838 (M 2003)).

[208] *Id.* (citing Pass Termite & Pest Control v. Walker, 904 So. 2d 1030, 1 (Miss. 2004)).

[209] *Id.*

[210] *Id.*

right to compel arbitration and a party's participation in t] judicial process are simply not enough to constitute waiv standing alone.[211] Nevertheless, the court held that the defe dant in *Horton* waived its right to compel arbitration as the was "a substantial and unreasonable delay in pursing the rigl coupled with active participation in the litigation process."[212]

The Mississippi Supreme Court in *Phillips* cited cases l the Fifth Circuit as to what amount of delay in time in d manding arbitration constituted a waiver of one's right to arl trate. The Fifth Circuit has noted that a delay of only thirtee months *does not* constitute a waiver of the right to arl trate.[213] However, the Fifth Circuit has noted that a delay seventeen months *does* constitute a waiver of the right to arl trate.[214] The *Doleac* court held that "taking possession of tl collateral [or self-help] or other similar actions do not waive party's right to arbitration."[215]

In *Rice*, the defendant was held to have not waived i right to arbitration in a case where the plaintiffs alleged th the defendants "demonstrated a 'disinclination to arbitrate'" l participating in discovery after its motion to compel arbitratic was denied by the trial court.[216] The court stated that the d fendant had no choice but to go forward and participate i discovery after its motion to compel arbitration was denied.[ The court also held that merely because the defendant attemp ing to compel arbitration agreed to the scheduling order e tered by the trial court did not mean the defendant was sul

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[211] *Id.*

[212] *Id.*

[213] Univ. Nursing Assocs., PLLC v. Phillips, 842 So. 2d 1270, 1278 (Miss. 200 (citing Walker v. J.C. Bradford & Co., 938 F.2d 575 (5th Cir. 1991)).

[214] *Id.* (citing Price v. Drexel Burnham Lambert, Inc., 791 F.2d 1156, 1160-6 (5th Cir. 1986)).

[215] Doleac v. Real Estate Prof'ls, Inc., 911 So. 2d 496, 505 (Miss. 2005); *se also* Russell v. Performance Toyota, Inc., 826 So. 2d 719, 724 (Miss. 2002) (hold ing that a defendant's repossession of a defaulting consumer's car does not resu in a waiver of arbitration, as the judicial process has not even been invoked).

[216] Terminix Int'l, Inc. v. Rice, 904 So. 2d 1051, 1057 (Miss. 2004).

[217] *Id.*

mitting to a jury trial and waiving its right to arbitration.[218]

## V. CONCLUSION

Arbitration is a relative newcomer to the jurisprudence the state of Mississippi. The Mississippi high court did not fu recognize the right to pre-dispute arbitration agreements un 1998. Since that time, case law regarding arbitration has gra ually increased as more arbitration agreements ha been drafted and attempted to be enforced. Today, opinio regarding the scope, arbitrability and enforceability of arbit tion agreements can be found in almost every hand down l coming from the Mississippi appellate courts. Attorneys fr every end of the state are confronted with drafting arbitrati agreements, explaining arbitration to clients, attempting enforce arbitration agreements, arguing that certain arbitrati agreements are unenforceable, and serving as the arbitrator disputes. As arbitration agreements become even more ubiq tous in daily consumer transactions and service-provider co tracts, the courts will increasingly confront issues involvi arbitration agreements. As a result, the courts will continue grapple with many of the same issues discussed herein and w likely encounter a myriad of other potential challenges to a arguments for supporting enforcement of arbitration agre ments. In conclusion, arbitration is a pertinent and ever-evo ing reality in our legal system and in our society which will doubt provide a litany of further case law in Mississippi a continue to have far-reaching effects on virtually all Mississippi's citizens.

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[218] *Id.*