


10-1-2016

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### Recommended Citation

Vaught, David (2016) "Unconscionability Attacks on Arbitration No Longer Tolerated: Torrence Effect on Arbitration Clauses in North Carolina," *North Carolina Central Law Review*: Vol. 39 : No. 1 , Article 6.  
Available at: <https://archives.law.nccu.edu/nclcr/vol39/iss1/6>

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## UNCONSCIONABILITY ATTACKS ON ARBITRATION NO LONGER TOLERATED: *TORRENCE* EFFECT ON ARBITRATION CLAUSES IN NORTH CAROLINA

DAVID VAUGHT\*

### INTRODUCTION

Arbitration as a form of dispute resolution is centuries old and exist in various forms.<sup>1</sup> Forms of arbitration have dated back to King Solomon in the Bible, Phoenician grain traders, and Native American tribes. Records indicate that England recognized arbitration as part of the judicial system as early as 1281.<sup>2</sup> Merchants in the American colonies continued the use of arbitration and before the Revolutionary War, George Washington was a known arbiter.<sup>3</sup>

In the United States, arbitration has been a growing method of dispute resolution known for its speed, cost effectiveness, and avoidance of delays.<sup>4</sup> In contrast, the civil litigation system in the United States continues to grow and a plaintiff may wait more than three years to have their day in court.<sup>5</sup>

Congress originally enacted the Federal Arbitration Act (“FAA”) on February 12, 1925, to combat the lack of authority given to arbitration by the judicial system.<sup>6</sup> The act provides a bare-bones legal framework to limit judicial intervention and favor the enforcement of arbitration agreements.<sup>7</sup> Through the FAA, courts are required to assist parties by enforcing arbitration and supporting arbitrators in exercising the powers granted under the FAA.<sup>8</sup>

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1. JAY FOLBERG ET AL., *RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW* 538 (Vicki Been et al. eds., 2nd ed. 2010)

2. *Id.*

3. *Id.*

4. *Id.* at 540.

5. Sara R. Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employers*, 64 UMKC L. Rev. 449 (1996).

6. FOLBERG ET AL., *supra* note 2, at 611.

7. *Id.* at 613.

8. *Id.*

The broad interpretation of the FAA by the United States Supreme Court continues to be a growing topic in consumer contracts. Nothing has shaken up more debate than the Supreme Court's decisions in *AT&T Mobility LLC v. Concepcion* and *American Express Co. v. Italian Colors Restaurant*.<sup>9</sup> Prior to these 2011 and 2013 decisions, respectively, the North Carolina courts upheld unconscionability claims against arbitration clauses in adhesion contracts.<sup>10</sup> In *Tillman v. Commercial Credit Corp.*, the North Carolina Supreme Court denied a motion to compel arbitration because the court found the arbitration clause to be unconscionable.<sup>11</sup> The decision in *Torrence*<sup>12</sup> provided the first time for the court to interpret the effect of *Concepcion* and *Italian Colors* on arbitration clauses in North Carolina.

In *Tillman*, the Supreme Court of North Carolina found that while arbitration is favored in North Carolina:

[A] court will find a contract to be unconscionable only when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand and no honest and fair person would accept them on the other.<sup>13</sup>

The Court would go on to find that one-sided substantive provisions of the arbitration clause and the unequal bargaining power of the parties rendered the arbitration clauses unenforceable.<sup>14</sup> Prior to *Torrence*, *Tillman* was the authority in North Carolina dealing with unconscionability attacks on arbitration agreements.

This note will focus on the *Torrence* court's application of *Concepcion* and *Italian Colors* to North Carolina state law. Whether there remains any room to attack pre-dispute arbitration clauses in North Carolina. Lastly, the note will look at what consumer protections may be on the way.

## THE CASE

*Torrence* arises out of consumer loan agreements between plaintiffs and County Bank of Rehoboth Beach, Delaware ("County Bank"), an FDIC-

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9. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

10. *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (2008).

11. *Id.*

12. *Torrence v. Nationwide Budget Fin.*, 753 S.E.2d 802 (N.C. Ct. App. 2014).

13. *Tillman*, 655 S.E.2d at 369.

14. *Id.* at 373.

insured Delaware bank.<sup>15</sup> These consumer loan agreements are also commonly referred to as “payday lending.”<sup>16</sup>

In March 2003, County Bank and Financial Services of North Carolina, Inc. (“FSNC”), doing business as “Nationwide Budget Finance”, entered into a contract to market and collect loans in North Carolina on behalf of County Bank.<sup>17</sup> County Bank began offering short-term loans to North Carolina residents in 2002 and FSNC previously had a similar contract with a South Dakota Bank.<sup>18</sup> The plaintiff’s refer to the agreement as a “rent-a-bank” arrangement to circumvent North Carolina laws.<sup>19</sup> The contract included a provision removing County Bank from liability if the contract was discovered to be illegal.<sup>20</sup>

The transactions with the named plaintiffs, James Torrence and Tonya Burke, occurred between May 2003 to February 2004 and between October 2003 to January 2004, respectively.<sup>21</sup> It is common for consumers of “payday lending” to take out renewals following the original loan because they are unable to pay back the short-term loan.<sup>22</sup> After taking out the original loan for \$350, Mr. Torrence renewed the loan 11 times.<sup>23</sup> Similarly, Ms. Burke renewed her original loan of \$150, seven times.<sup>24</sup> Ms. Burke also increased the loan to \$500 during one of the renewals.<sup>25</sup> Each loan had an annual percentage rate ranging from 365% to 938.57%.<sup>26</sup>

When applying for a loan, customers provided an application and once approved were sent a County Bank proposed loan agreement.<sup>27</sup> The loan agreements included a clause titled “Agreement to Arbitrate All Disputes.”<sup>28</sup> Each loan agreement and renewal signed by the party included the following clause:

**AGREEMENT TO ARBITRATE ALL DISPUTES:** You and we agree that any and all claims, disputes or controversies between you and us and/or the Company, any claim by either of us against the other or the

15. Brief of Defendant-Appellant at 4, *Torrence v. Nationwide Budget Fin.*, 753 S.E.2d 802 (N.C. Ct. App. 2014) (No. COA12-453), 2012 NC App. Ct. Briefs LEXIS 1052.

16. Brief of Plaintiff-Appellee at 3, *Torrence v. Nationwide Budget Fin.*, 753 S.E.2d 802 (N.C. Ct. App. 2014) (No. COA12-453), 2012 NC App. Ct. Briefs LEXIS 1053.

17. Order Denying Motion to Compel Arbitration at 4, *Torrence v. Nationwide Budget Fin.*, 753 S.E.2d 802 (2014) (No. 05-CVS-0447), 2012 WL 335947.

18. Order Den. Mot. to Compel Arbitration, *supra* note 18, at 4.

19. Br. of Pl.-Appellee, *supra* note 17, at 4.

20. Order Den. Mot. to Compel Arbitration, *supra* note 18, at 5.

21. *Torrence*, 753 S.E.2d at 803.

22. Br. of Pl.-Appellee, *supra* note 17, at 3.

23. Order Den. Mot. to Compel Arbitration, *supra* note 18, at 3.

24. *Id.*

25. *Id.*

26. Order Den. Mot. to Compel Arbitration, *supra* note 18, at 3-4.

27. *Torrence*, 753 S.E.2d at 803.

28. *Id.*

Company (or the employees, officers, directors, agents or assigns of the other or the Company) and any claim arising from or relating to your application for this loan or any other loan you previously, now or may later obtain from us, this Loan Note, this agreement to arbitrate all disputes, your agreement not to bring, join or participate in class actions, regarding collection of the loan, alleging fraud or misrepresentation, whether under the common law or pursuant to federal, state or local statute, regulation, or ordinance, including disputes as to the matters subject to arbitration, or otherwise, shall be resolved by binding individual (and not joint) arbitration by and under the Code of Procedure of the National 804 Arbitration Forum (“NAF”) in effect at the time the claim is filed.

This agreement to arbitrate all disputes shall apply no matter by whom or against whom the claim is filed. Rules and forms of the NAF may be obtained and all claims shall be filed at any NAF office, on the World Wide Web at [www.arbforum.com](http://www.arbforum.com), by telephone at 800-474-2371, or at “National Arbitration Forum, P.O. Box 50191, Minneapolis, Minnesota 55405.” Your arbitration fees may be waived by the NAF in the event you cannot afford to pay them. The cost of any participatory, documentary or telephone hearing, if one is held at your or our request, will be paid for solely by us as provided in the NAF Rules and, if a participatory hearing is requested, it will take place at a location near your residence. This arbitration agreement is made pursuant to a transaction involving interstate commerce. It shall be governed by the Federal Arbitration Act, 9 U.S.C. Sections 1-16. Judgment upon the award may be entered by any party in any court having jurisdiction.

**NOTICE:** YOU AND WE WOULD HAVE HAD A RIGHT OR OPPORTUNITY TO LITIGATE DISPUTES THROUGH A COURT AND HAVE A JUDGE OR JURY DECIDE THE DISPUTES BUT HAVE AGREED INSTEAD TO RESOLVE DISPUTES THROUGH BINDING ARBITRATION.

**AGREEMENT NOT TO BRING, JOIN OR PARTICIPATE IN CLASS ACTIONS:** To the extent permitted by law, you agree that you will not bring, join or participate in any class action as to any claim, dispute or controversy you may have against us, our employees, officers, directors, servicers and assigns. You agree to the entry of injunctive relief to stop such a lawsuit or to remove you as a participant in the suit. You agree to pay the attorney’s fees and court costs we incur in seeking such relief. This Agreement does not constitute a waiver of any of your rights and remedies to pursue a claim individually and not as a class action in binding arbitration as provided above.

**SURVIVAL:** The provisions of this Note dealing with the Agreement to Arbitrate All Disputes and the Agreement Not To Bring, Join Or Partici-

pate In Class Actions shall survive repayment in full and/or default of this Note.<sup>29</sup>

The National Arbitration Forum (“NAF”) is listed as the administrator of the arbitration. However, on July 17, 2009, the NAF ceased operations following a consent judgment with the Minnesota Attorney General.<sup>30</sup> Issues with the NAF arose from a 40% sell of the company<sup>31</sup> and alleged bias in favor of business claimants<sup>32</sup> or “repeat players.”<sup>33</sup>

The plaintiffs filed a complaint and requested for class certification on February 8, 2005.<sup>34</sup> On April 11, 2005, the defendants filed an answer, a motion to dismiss for lack of personal jurisdiction, and a motion to compel arbitration.<sup>35</sup> In a joint request by the parties, Hon. D. Jack Hooks, Jr, Special Superior Court Judge was assigned to the case.<sup>36</sup> The hearing was conducted jointly with *Knox v. First Southern*.<sup>37</sup> On January 25, 2005, Judge Hooks denied the motion to compel arbitration stating: (1) the NAF was integral to the arbitration clause (2) the NAF absence and bias made the arbitration agreement invalid; (3) The U.S. Supreme Court’s ruling in *Concepcion* did not overrule *Tillman*; (4) the arbitration clause was substantially unconscionable; (5) the arbitration clause was procedurally unconscionable; and (6) the prohibition of class actions is unlawful.<sup>38</sup>

On Review by Judge Steelman of the North Carolina Court of Appeals, the trial court’s order was vacated and the case remanded to appoint a substitute arbitrator and compel the dispute to arbitration.<sup>39</sup> Based on the policy favoring arbitration and § 5 of the Federal Arbitration Act, the Court of Appeals found the trial court erred in finding the NAF was integral to the arbitration.<sup>40</sup> Citing *Green v. U.S. Cash Advance Illinois, LLC* the court states, “that the identity of the Forum as arbitrator is not integral . . . and § 5 may be used to appoint a substitute.”<sup>41</sup> In addition to §5 of the FAA, under North Carolina law, “[w]here the mandate of an arbitrator terminates for any reason, a substitute arbitrator shall be appointed according to the rules

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29. *Id.* at 803-04.

30. *Id.* at 804.

31. Order Den. Mot. to Compel Arbitration, *supra* note 18, at 7.

32. *Torrence*, 753 S.E.2d at 804.

33. COLE, *supra* note 6, at 452.

34. *Torrence*, 753 S.E.2d at 804.

35. Brief of Plaintiff-Appellee, *supra* note 17, at 2.

36. Brief of Plaintiff-Appellee, *supra* note 17, at 3.

37. *Torrence*, 753 S.E.2d at 805.

38. *Id.* at 818.

39. *Id.* at 805.

40. *Id.* at 806.

41. *Id.* (citing *Khan v. Dell, Inc.*, 669 F.3d 350 (3d Cir. 2012); *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1236 n. 13 (11th Cir. 2012); *Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000)).

that were applicable to the appointment of the arbitrator being replaced.” (N.C. Gen. Stat. § 1-567.45 (a) (2013)).<sup>42</sup>

In addressing the substantive and procedural unconscionability, Judge Steelman overturned the ruling in *Tillman* using recent U.S. Supreme Court cases *Concepcion* and *Italian Colors*.<sup>43</sup> While in conflict with State and U.S. Supreme Court ruling, the Court of Appeals stated, “[u]ltimately, we are bound by the decisions of the United States Supreme Court construing federal laws, such as the FAA.”<sup>44</sup> In overturning *Tillman*, the court used the broad principle from *Concepcion* and *Italian Colors*, “that unconscionability attacks that are directed at the arbitration process itself will no longer be tolerated.”<sup>45</sup> Additionally, the mere presence of a class action waiver in the arbitration agreement did not make the agreement to arbitrate unconscionable.<sup>46</sup> The court added, “[t]his type of analysis, based upon extensive evidentiary presentation, is not only costly, but defeats the very purpose of arbitration, which is for the parties to have a quick, expedited resolution of their dispute.”<sup>47</sup>

Lastly, the Court of Appeals held the trial court erred in attempting to distinguish *Concepcion* and *Tillman*. The preemption of state law under *Concepcion* leaves little room for states to operate. The United States Supreme Court stated:

Of course States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.<sup>48</sup>

Judge Steelman concluded with, “The United States Supreme Court’s position is explicit—where the FAA governs, states laws (including *Tillman*) cannot carve out exceptions.”<sup>49</sup>

Bringing finality to *Torrence*, on June 11, 2014, the Supreme Court of North Carolina denied a discretionary review of the Court of Appeals and denied a writ of certiorari to review the order of the Superior Court.<sup>50</sup>

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42. *Torrence*, 753 S.E.2d at 811.

43. *Id.*

44. *Id.*

45. *Id.* at 812.

46. *Id.* at 817.

47. *Concepcion*, 563 U.S. at 347.

48. *Torrence*, 753 S.E.2d at 818.

49. *Torrence v. Nationwide Budget Fin.*, 759 S.E.2d 88 (2014).

50. Lauren Van Waardhuizen, Note, *The Evolution of Class Arbitration Waivers and the Court*, 62 DRAKE L. REV. 1131, 1131 (2014).

## BACKGROUND

“The Federal Arbitration Act (FAA) has been the governing law since 1925, yet arbitration remains a disputed issue between the state and federal courts nearly 90 years later.”<sup>51</sup> Due to the judicial branch undermining arbitration agreements, the FAA required courts to treat arbitration clauses like valid contracts, specifically pre-dispute arbitration clauses.<sup>52</sup> Since the passing of the FAA, the Supreme Court has continued to find and uphold a national policy in favor of arbitration.

One source of power came from the doctrine of severability. In 1967, the Supreme Court ruled in *Prima Paint v. Flood & Conklin Mfg. Co.* per § 4 of the FAA, “the federal court is instructed to order arbitration to proceed once it is satisfied that ‘the making of the agreement for arbitration of the failure to comply [with the arbitration agreement] is not in issue.’”<sup>53</sup> Justice Fortas continued, “if the claim is fraud in the inducement of the arbitration clause itself the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally . . .”<sup>54</sup> This doctrine of severability is a “cornerstone of modern arbitration law”<sup>55</sup> and would be the start of the authority given to arbitration clauses.

Over the next 40 years, the U.S. Supreme Court continued to strengthen the FAA by providing dicta on how a party may attack parts of the arbitration clause<sup>56</sup> or vacating an award for failure to disclose a business relationship.<sup>57</sup> In *Concepcion*, the court overturned the *Discover Bank* rule of California, stating the FAA preempts the state judicial rule.<sup>58</sup> *Discover Bank* established that class-action waivers in consumer arbitration agreements would be deemed unconscionable if: (1) the arbitration agreement appeared in an adhesion contract; (2) the dispute was likely to involve a small amount of damages; and (3) the consumer alleged a deliberate scheme to defraud.<sup>59</sup> Justice Scalia stated that § 2 of the FAA preempts the *Discover Bank* rule and takes its place.<sup>60</sup> While stating the saving clause of § 2 “permits arbitration agreement to be declared unenforceable ‘upon such grounds as exist at law or in equity for the revocation of any contract,’”

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51. FOLBERG ET AL., *supra* note 2, at 613.

52. See *Prima Paint Corp. v. Flood & Conklin MFG. Co.*, 388 U.S. 395, 403 (1967).

53. FOLBERG ET AL., *supra* note 2, at 628.

54. *Prima Paint Corp.*, 388 U.S. at 403-04.

55. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010).

56. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 383 U.S. 145 (1968).

57. *Concepcion*, 563 U.S. at 333.

58. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1111 (2005).

59. *Id.*

60. *Concepcion*, 563 U.S. at 352 (quoting *Hines v. Davidowitz*, 312 U.S. 52 (1941)).



Scalia continued that the unenforceability cannot “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”<sup>61</sup> In a 5-4 decision by the Supreme Court, the *Discover Bank* rule was preempted because “it ‘stands as an obstacle to the accomplishment and execution of the full purpose of Congress.’”<sup>62</sup>

Two years later the Supreme Court decided *American Exp. Co. v. Italian Colors Restaurant* using much of the same analysis found in *Concepcion*. “Truth to tell, our decision in *AT&T Mobility* all but resolves this case.”<sup>63</sup> *Italian Colors* was a similar challenge in denying arbitration due to the presence of a class action waiver in the arbitration agreement.<sup>64</sup> The court establishes a class waiver does not limit one’s rights stating, “[t]he class-action waiver merely limits arbitration to the two contracting parties.”<sup>65</sup> “It no more eliminates those parties’ right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938.”<sup>66</sup> Scalia concludes, “[t]he switch from bilateral to class arbitration [ ] sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”<sup>67</sup>

Another disputed topic and factual scenario in *Torrence* is payday lending and the issues that arise.<sup>68</sup> The North Carolina General Assembly enacted legislation expressly permitting payday lending in 1997.<sup>69</sup> After a month extension, the General Assembly allowed for the legislation to expire on August 31, 2001.<sup>70</sup> The North Carolina Commissioner of Banks advised all payday lenders that there was no longer a lawful basis for payday lending.<sup>71</sup> The loans were carried out by the customer handing over a post-dated check to the lender.<sup>72</sup> Mr. Torrence’s first check was written for \$413 and was post-dated for 18 days later.<sup>73</sup> On the 18th day, the check was either presented for payment or the customer paid a fee and handed over a new check to the lender.<sup>74</sup>

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61. *Concepcion*, 563 U.S. at 333 (quoting *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

62. *Italian Colors*, 133 S. Ct. at 2312.

63. *Id.* at 2313.

64. *Id.* at 2311.

65. *Id.*

66. *Id.* at 2312.

67. *Torrence*, 753 S.E.2d at 802.

68. Order Den. Mot. to Compel Arbitration, *supra* note 18, at 4.

69. *Id.*

70. *Id.*

71. Order Den. Mot. to Compel Arbitration, *supra* note 18, at 3.

72. *Id.*

73. *Id.*

74. *Id.*

## ANALYSIS

The North Carolina Court of Appeals correctly applied the United States Supreme Court opinions of *Concepcion* and *Italian Colors* to our current case. While this is not a heavily disputed topic<sup>75</sup> resulting in the Supreme Court of North Carolina denying review of the case.<sup>76</sup> Scholars may continue to disagree with the Supreme Court's decisions as seen in *The Supreme Court Trilogy and Its Impact on U.S. Arbitration Law*,<sup>77</sup> but little can be argued on the pro-FAA stance by the majority opinion. Following *Concepcion*, some lower courts have continued to push denying enforcement of class action waivers analyzed on the facts of the case.<sup>78</sup> However, Scalia's opinion in *Italian Colors* provides affirmation of the majority's stance in *Concepcion* that unconscionability attacks on arbitration clauses will no longer be tolerated.<sup>79</sup>

*Torrence* has left no room to attack arbitration clauses on substantive grounds in North Carolina. The Court of Appeals opinion is one of the few opportunities where the court was able to interpret the combination of opinions in *Concepcion* and *Italian Colors*. Judge Steelman writes:

*Concepcion* and *Italian Colors* clearly state that the United States Supreme Court is weary of state and federal trial courts assisting plaintiffs in getting around the mandatory provisions of the FAA. While both *Concepcion* and *Italian Colors* dealt with class action waivers, underlying those decisions was a broader theme that unconscionability attacks that are directed at the arbitration process itself will no longer be tolerated.<sup>80</sup>

Thus the combination of *Concepcion* and *Italian Colors* eliminates unconscionability attacks on arbitration clauses in North Carolina by effectively removing the consideration of the cost analysis hurdle applied in *Tillman*, excessive nature of adhesion contracts, and waiver of class action or joinder.<sup>81</sup> "Essentially, the court [in *Torrence*] found North Carolina law's substantive unconscionability analysis to be thoroughly undermined by *Concepcion* and *Italian Colors*."<sup>82</sup>

Despite the inability to attack arbitration clauses, consumers may still be able to seek recovery through the arbitration process. While it feels as though Mr. Torrence and Ms. Burke were unsuccessful because they are

75. See George A. Bermann, *The Supreme Court Trilogy and Its Impact on U.S. Arbitration Law*, 22 AM. REV. INT'L ARB. 551, 569 (2011) ("[U]nder *Concepcion*, courts cannot deny enforcement of class-arbitration waivers in consumer contracts as categorically unconscionable under state law.").

76. *Torrence v. Nationwide Budget Fin.*, 759 S.E.2d 88 (N.C. 2014).

77. Bermann, *supra* note 76.

78. Bermann, *supra* note 76, at 569.

79. *Italian Colors*, 133 S. Ct. at 2312; *Concepcion*, 563 U.S. at 341.

80. *Torrence*, 753 S.E.2d at 811.

81. Van Waardhuizen, *supra* note 51, at 1162.

82. Van Waardhuizen, *supra* note 51, at 1162-63.

compelled to arbitration, they are guaranteed to receive a hearing on the merits on their claim in arbitration.<sup>83</sup> The judicial system cannot promise plaintiffs the same.<sup>84</sup> Stephen Ware, law professor at University of Kansas, stated in the *Wall Street Journal* article, *Sue the Bank? You May Get Your Shot* that the concept behind class action “‘is a good, practical idea.’ . . . ‘On the other hand, what actually happens in consumer class action litigation is it often has a lot of costs to businesses and does not seem to yield much benefit to consumers at least in terms of payout.’”<sup>85</sup>

In contrast, many complaints arise from business users of arbitration that the arbitration “‘experience [ ] has become more and more like going to court.’”<sup>86</sup> Additionally, “[m]uch hinges on key choices made by attorneys at the time of drafting and during the course of the arbitration process — choices that should be informed by the particular needs and goals of their clients.”<sup>87</sup> Many of the benefits found in the arbitration process occur once the parties begin the process, starting with the selection of the arbitrator. In *Torrence*, the arbitration was to be administered by the NAF.<sup>88</sup> Similar to other arbitration services, the American Arbitration Association (“AAA”) Rules allow for both parties to agree on the specific arbitrator, timelines, discovery, privacy and other benefits during the arbitrator selection or pre-conference hearing.<sup>89</sup> The FAA provides post-arbitration remedies in § 10 And § 11 through vacatur and modification. Additionally, courts have vacated arbitration orders due to corruption, fraud, or undue means<sup>90</sup> and evident partiality or corruption.<sup>91</sup> The removal of NAF by the Minnesota Attorney General as an administrator of arbitration shows measures exist to remove unfairness from the arbitration process. It can be left to the individual by reading the agreement to arbitrate in *Torrence*, whether the clause itself or the process that follows to be unconscionable.

An additional benefit rarely discussed in the Superior Court’s order or the Court of Appeals opinion is the timeliness of the process. Plaintiffs filed the complaint on February 8, 2005<sup>92</sup> and finality was not received until the Supreme Court of North Carolina denied review on June 11, 2014.<sup>93</sup> In

83. *Cole v. Burns Int’l Sec. Serv.*, 105 F.3d 1465, 1488 (D.C. Cir. 1997).

84. *Id.*

85. Yuka Hayashi, *Sue the Bank? You May Get Your Shot*, WALL ST. J., Oct. 7, 2015, at C1.

86. FOLBERG ET AL., *supra* note 2, at 539.

87. FOLBERG ET AL., *supra* note 2, at 540.

88. *Torrence*, 753 S.E.2d at 803–04.

89. See generally AMERICAN ARBITRATION ASSOCIATION, AAA ARBITRATION ROADMAP (2007), [https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_003838](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003838).

90. *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378 (11th Cir. 1988).

91. *Commonwealth Coatings Corp.*, 393 U.S. at 145.

92. *Torrence*, 753 S.E.2d at 802.

93. *Torrence*, 759 S.E.2d at 88.

contrast, a report released by the AAA, “AAA Arbitration Roadmap,”<sup>94</sup> shows the average arbitration process, from filing to award, last 297 days.<sup>95</sup> The amount of time reduces drastically for claims up to \$75,000 with the 25th percentile lasting 126 days, the average 175 days, and the 75th percentile lasting 259 days.<sup>96</sup> A speedy resolution benefits both parties involved. Additionally, as Scalia states in *Concepcion*, the plaintiff may be “better off” with an award through arbitration than from the judicial system.<sup>97</sup>

Consumers wary of the arbitration process may have help on the way through the Consumer Financial Protection Bureau (“CFPB”). The CFPB was established through the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and helps consumer finance markets work by making rules more effective, by consistently and fairly enforcing those rules, and by empowering consumers to take more control over their economic lives.<sup>98</sup> In 2015, the CFPB recovered \$1.6 billion in compensation to consumers through 50 enforcement actions.<sup>99</sup> A March 2015 study by the CFPB concluded that arbitration agreement are a “substantial barrier to pursuing claims on a class action basis and that consumers benefit far more from class actions than from arbitrations.”<sup>100</sup> On October 7, 2015 the CFPB proposed new regulations precluding class action waiver in arbitration agreements.<sup>101</sup> “The proposals under consideration would ban companies from including arbitration clauses that block class action lawsuits in their consumer contracts for a broad range of financial products including credit cards, checking and deposit accounts, prepaid cards, money transfer services, certain auto loans, payday loans and private student loans.”<sup>102</sup> The regulations did not solely remove the use of arbitration in consumer agreements.<sup>103</sup> The potential regulations will become clear over the course of 2016. While consumer protection will continue to be an ongoing issue, how the courts will interpret the new regulations into the FAA may take some time.

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94. See AAA ARBITRATION ROADMAP, *supra* note 90 (The American Arbitration Association’s AAA Arbitration Roadmap shows how cases proceed under AAA administration, from beginning to end, when using the AAA’s Commercial Arbitration Rules).

95. AAA ARBITRATION ROADMAP, *supra* note 90.

96. AAA ARBITRATION ROADMAP, *supra* note 90.

97. *Concepcion*, 563 U.S. at 352.

98. See generally CONSUMER FINANCIAL PROTECTION BUREAU, <http://www.consumerfinance.gov/the-bureau/> (last visited Jan. 20, 2016).

99. CFPB Pursues Aggressive Enforcement Agenda and Arbitration Restrictions (Jan. 20, 2015, at 1), ([https://www.skadden.com/sites/default/files/publications/CFPB\\_Pursues\\_Aggressive\\_Enforcement\\_Agenda\\_and\\_Arbitration\\_Restrictions.pdf](https://www.skadden.com/sites/default/files/publications/CFPB_Pursues_Aggressive_Enforcement_Agenda_and_Arbitration_Restrictions.pdf)).

100. See *supra* note 96, at 2.

101. See *Supra* note 96.

102. Hayashi, *supra* note 86.

103. See *supra* note 96, at 2.

CONCLUSION

The *Torrence* decision is a landmark decision for arbitration clauses, specifically the use of class action waivers, in North Carolina. The FAA and its authority interpreted by the U.S. Supreme Court will surely preempt state substantive contract law and court orders, when challenged. Until federal legislative changes are passed through regulations or to the FAA itself, successful attacks to break through arbitration clauses will be non-existent. Consumers and most importantly lawyers must become familiar with the arbitration process, their rights within arbitration and use the process to the benefit of the consumer. The CFPB regulations will help protect consumers and is a step in the right direction, but how courts will respond is unknown.



**NORTH CAROLINA CENTRAL LAW REVIEW**

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VOLUME 39

2017

NUMBER 2

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**2016 - 2017  
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The *North Carolina Central Law Review* is published twice yearly by students of the North Carolina Central University School of Law. Editorial and business office: School of Law, North Carolina Central University, 640 Nelson Street, Durham, N.C., 27707. Phone: (919) 530-5302.

Email: lawjournal@nccu.edu

Subscriptions: Domestic, \$64.00 annually; Foreign, \$64.00 annually; payable in advance.

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Member: National Conference of Law Reviews.

Indexed in: *Contents of Legal Periodicals* and *Index to Legal Periodicals*.

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Cite as: N.C. CENT. L. REV.

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