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Supreme Court of Texas.

In re FIRSTMERIT BANK, N.A. f/k/a Signal Bank, N.A. and Mobile  
Consultants,  
Inc., Relators.  
No. 00-0548.

February 14, 2001.

Appearances:

John A. Seib, Jr., The Seib Law Firm, Dallas, TX, for relator.  
F. Terry Callahan, Law Offices of F. Terry Callahan, San Antonio,  
TX, for respondent.

Before:

Chief Justice Thomas R. Phillips, Justice Priscilla Richman Owen,  
Justice Harriet O'Neill, Justice Wallace B. Jefferson, Justice Nathan  
L. Hecht, Justice Deborah G. Hankinson, Justice James A. Baker, Justice  
Craig T. Enoch, Justice Greg Abbott

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JUSTICE: Thank you. Be seated. The Court is ready to hear argument  
from relator In re Firstmerit Bank.

SPEAKER: May it please the Court. Mr. John A. Seib will present  
argument for the relators. Relators had reserved ten minutes for  
rebuttal.

#### ORAL ARGUMENT OF JOHN A. SEIB JR. ON BEHALF OF THE PETITIONER

MR. SEIB: May it please the Court. This is yet another mandamus  
from a denial of a motion to compel arbitration by a trial court in  
which it's -- there's no rebuttable fact -- that there's no fact to  
dispute that there is an arbitration agreement and it then did involve  
inter-state commerce. There are some issues in this particular case  
that are unique only because of the number of parties involved. On the  
side of the respondents we have a father and mother, the De Los Santos  
family, and then you have their daughters and son-in-law Gary, Sarah  
Alvarez. De Los Santos, husband and wife, signed the contracts  
including arbitration agreement for the purchase of a manufactured  
home. They signed the retail installment contract on arbitration  
agreement in numerous other documents. The retail installment contract  
was assigned to Signal Bank which was merged with one of my clients  
Firstmerit Bank. Firstmerit Bank relies upon a servicing agent called

Mobile Consultants Inc., both of these corporations have a principal place of business in Ohio, and they are foreign of the State of Texas. There is no dispute that the arbitration agreement was signed by the De Los Santos, what they claim is that there was some type of contractual defense to arbitration which we believed does not exist in this case.

JUSTICE: Mr. Seib, let me ask you a question. The arbitration agreement specifically applies to any issue involving the loan?

MR. SEIB: Yes, sir, including the validity of the loan, the performance or any breach thereof.

JUSTICE: And if the complaint is that the house is not as it was represented, that would not be subject for arbitration.

MR. SEIB: Well, your honor, it also discusses the fact that the impact of the any warranty claim on the note itself would certainly be covered by the arbitration agreement.

JUSTICE: But -- but the arbitration agreement applies to the loan agreement, and you are arguing that since it applies to the arbitration agreement any claim of breach of warranty on the selling of the house is subject to arbitration. That would be clear from this arbitration agreement?

MR. SEIB: Yes, sir, it says it's covered -- excuse me, it covers the retail installment contract.

JUSTICE: The retail installment -- the retail installment contract is not a loan or it's a loan or --

MR. SEIB: It's certainly it's a loan, your Honor.

JUSTICE: And the sale of the -- any representations from the sale of the document necessarily involves a dispute over the installment contract.

MR. SEIB: Yes, sir, I believe that all of the claims that arises in this case, arise out over directly or indirectly related to the retail installment contract, and whatever represents of course could be a loan from my clients to the consumers for the purchase of the manufacture --

JUSTICE: But if their argument is that the house is not as a seller represented [inaudible] because the result of that might be some change in the amount of money that is due under the loan that is a dispute arising under the loan.

MR. SEIB: That's the rule.

JUSTICE: Okay. My next question is, the arbitration agreement requires the buyer to arbitrate their complaint about the loan, but it excludes the seller from arbitrating about its authority to sue on the loan.

MR. SEIB: I think that's a too narrow interpretation of this arbitration agreement. I don't think that you can discriminate or segregate out the warranties that run with the manufactured home from the retailing installment contract and security breach. It would be a case of first impression in this state if that was the reason behind the --

JUSTICE: I'm not sure that's my -- that's not my -- I'm not sure that's my question. You are arguing that the buyer must arbitrate any complaint they have about the loan, and you argue that that's broaden up to include breach of warranty claims.

MR. SEIB: Your Honor, I think my argument is far more narrow than that because they only represent the lenders in this particular case. I am focusing on the claims against my clients, but if this was broadly discussing whether or not I personally think that if I was representing the retailer, let's say, the retailer was accused of fraud, misrepresentation or other claims, yes. I believe that we also would

cover that but I don't believe that --

JUSTICE: [inaudible] I'm sorry --

JUSTICE: I'm sorry. Well, very quickly then. So, you're not insisting that you can sue under the note in the counterclaim against the sellers. I mean, against the buyers here, and you'll agree that's subject to arbitration as well.

MR. SEIB: Yes.

JUSTICE: Okay.

JUSTICE: Looking at the pleadings were not containing any appendix that we have, what claims specifically have been made against your client?

MR. SEIB: Your Honor, in the brief that was presented by the respondents, they outlined a numerous claims that are maybe against my clients. All of which arise out of the contract or statute that involves the performance under the contract. Specifically such things as Deceptive Trade Practices Act claims, performance issues, every -- probably every lender liability issue that I've ever seen outside the truth in lending disclosure claims.

JUSTICE: I remember that. I just -- that's why I'm asking because I haven't heard you in terms of what -- when you talked about the claims being subject to arbitration agreement that I'm not comfortable. I know you say that the breach of warranty claim should be construed as part of the loan. It separate on the part from the breach of warranty claims, what specific claims were made against your client that arise from the actual findings as in transaction to the loan?

MR. SEIB: Well, I find to interpret the original petition as it's written. I would presume that would be claims arising under the relationship between the retailer and the lender under the FTC rule, number one. Secondly, that there was a not a conspiracy in the relationship between the retail and the lender such that the lender would be liable for the misrepresentations by the retailer of the fraud of the retailer. There are more specifically enumerated, and I'm sure my honorable opposition would be able to respond to that more specifically. I did not memorize all of that.

JUSTICE: But -- but if your -- the reason I'm giving you the opportunity to ask the question, it seems to me the starting point is whether or not any of the claims that may involve within the scope of the arbitration agreement. Assuming that as Justice Enoch was talking about, we disagree with you that breach of warranty claims or anything regarding the action of the quality of the home that was sold are claims arising out of the financing end of the transaction. And my question to you is, if we put those aside what claims have been alleged that followed in the scope of the arbitration agreement. Since the arbitration agreement specifically refers to claims arising out of the loan. Somehow you got to deal within the scope that seems to me as the starting point and then we can go from there. I just wanna know how you get underneath it.

MR. SEIB: Well, I believe that there are, there are no claims that have been -- I have to answer broadly -- there are no claims that have been asserted by these consumers against the Firstmerit Bank and Mobile Consultants that are -- and there's certainly enumerated that are not covered by the broad reading of this arbitration agreement.

JUSTICE: I -- can I --

JUSTICE: [inaudible] conclusion. I'm trying to understand I want you to identity for me what claims. I understand that the conclusions you want us to draw. I want you tell -- I really need your help in telling me on how to get there?

JUSTICE: Let me see if I could expand on that question. My understanding is [inaudible] is not forms. Is that right?

MR. SEIB: That's correct, your Honor --

JUSTICE: [inaudible]

MR. SEIB: [inaudible] default.

JUSTICE: All right, and there's a judgment against the seller of the home?

MR. SEIB: For liability only.

JUSTICE: Okay, so the only claim against you or as the lender --

MR. SEIB: That's the way I understand --

JUSTICE: -- and therefore, any claim that you're asserting means to get arbitration necessarily by definition have to relate to a loan.

MR. SEIB: That's correct.

JUSTICE: Let -- let me --

MR. SEIB: I presumed that would also include in the FTC relationship that might exist. But that is we never heard from the retailer on that losses to what the retailers defenses would be at this point.

JUSTICE: Well, I just -- I'm trying to understand again the pleadings that were made in this case. I understand the claims they made against you as a lender, but is there an effort being made to hold you responsible for the fact that the home is it what it is supposed to be or is there's some claim that you accelerated the loan, and you shouldn't have or that you did something -- the factual underpinning of the claims are against you is it all tied to the fact that the home isn't what it is supposed be or is it tied to your conduct, your clients conduct as a lender.

MR. SEIB: I believe it is both, your Honor, to the extent that there is any conduct that were held liable for all those claims. It must be ordered arbitration the --

JUSTICE: But her question, what are those claims --

MR. SEIB: Well --

JUSTICE: It seems [inaudible] arbitration.

MR. SEIB: This is the predicament we find ourselves in because we have not gone through a special exemption process. We have not gone through to any of the preliminary discovery that would give me an opportunity and stand here and outline specifically what are these that we think that we're being sued for. At this point, it would be best the Court to order all of the claims that are enumerated --

JUSTICE: But isn't that a [inaudible] question that Justice Hecht just posed that the [inaudible] have to be decided. What faults within the scope of the arbitration agreement that's your client have signed?

MR. SEIB: I agree --

JUSTICE: And if you don't want ever tell us what they are, I don't see how we can answer the question [inaudible] arbitrator at this claim.

MR. SEIB: Well, I think we can look towards the respondents answering in this particular matter --

JUSTICE: Did they say --

MR. SEIB: -- [inaudible] --

JUSTICE: Because of what Verde Homes did, we don't owe the lender any money and we want to --

MR. SEIB: [inaudible] they also claim that there was a wrongful foreclosure, that there was a trespass by my client in recovering the collateral, that we reported wrongfully credit information, that we had gone of them incorrectly --

JUSTICE: Okay, now [inaudible] --



MR. SEIB: -- for insurance payments. Well, I find it -- I understand the question, but I do not necessarily concur with all of those particular issue, I just think that --

JUSTICE: Well --

MR. SEIB: -- all of those [inaudible] --

JUSTICE: -- you could say, you don't think [inaudible] any good but the issue is all they are arbitrable under your agreement and --

MR. SEIB: They must be --

JUSTICE: -- [inaudible] those statement, we didn't they know what they were. So, there are specific claim that have said what they took the judgment against verdict or that go against your client, which would in your view arise out of the loan documents.

MR. SEIB: That's correct -- as well as --

JUSTICE: -- arise [inaudible] under the loan documents --

MR. SEIB: As well as the judgment against Verde includes a rescission type of relief which obviously would have an impact to my client.

JUSTICE: Any other questions? Thank you, Counsel. The Court is ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. F. Terry Callahan will present argument for the respondents.

ORAL ARGUMENT OF F. TERRY CALLAHAN ON BEHALF OF THE RESPONDENT

MR. CALLAHAN: The pleadings that the plaintiffs had against the lender that should have been inquired about in this case are two fold against first the Firstmerit Bank those cause of action were DTPA violations of one or more of the provisions of the Article 50 -- 69 Chapter 6(a) or the Texas Finance Code Section 347, because there was a transition when the old laws was in effect then the new law came in place that happened during this transfer period --

JUSTICE: And what conduct is alleged to form the basis of those complaint?

MR. CALLAHAN: Basically, the retail installment contract is the only document that passing about financing and in that document -- one of our primary contention is, is that we have shown that the defense, a revocation of acceptance, which basically destroys that.

JUSTICE: Right, but we take me back to you again the same question. I was trying to get Mr. Seib to answer and that is, I'm trying to ask what kind of if there are any claims that come underneath the arbitration claim. When you do that, you have to understand what claims were made. Your DTPA in statutory -- other statutory claims are all they based on conduct by the lender and its servicing agent related to the financing and the transaction and the long [inaudible] they conducted themselves with respect to that --

MR. CALLAHAN: Yes, yes, your honor --

JUSTICE: Then why don't those claims fall within the language of the arbitration agreement?

MR. CALLAHAN: Because basically, your Honor, they did not show -- they talked about that the entity before you now is the same entity that was clearly originally sued on the Single Bank. There is no evidence to that affecting in this case. Mobile Consultant who basically brokered and handled this entire transaction who perpetrated Immunities Acts. They're not even mentioned or they're not a signatory

--

JUSTICE: Well, no but that's not my question. My question is if in fact you are making claim that arise out of the financing end of this transaction. Why aren't those claims subject to arbitration under the -- I just don't know the face of it. Why don't they fall within the terms of the arbitration agreement? I Understand that you may have other defenses like the contract has been rescinded or raised --

MR. CALLAHAN: Okay.

JUSTICE: -- other facts or thing, but -- but just upfront.

MR. CALLAHAN: Well, because talking about the loan document does not address those particular causes of action. The loan document doesn't address the fact that you come in and wrongfully take a piece of property of a real estate. The loan document does not address the situation or someone does not comply with the in making disclosure to consumers about the loans. The loan document -- the reference to loan in this particular case doesn't talk about the fair credit reporting that they damaged someone's credit --

JUSTICE: Wouldn't that all -- wouldn't that all reflect the interpretation validity performance in the breach of the clients in transaction why aren't all of those things matters related to that?

MR. CALLAHAN: Because, your Honor, there's a specific causes of action that relate before of my defendant -- my plaintiff clients.

JUSTICE: I know but you don't -- you are not saying that the arbitration agreement has to anticipate these specific claims are made [inaudible] and say, "Unless you've said we're gonna arbitrate the DTPA client, then, you don't get to arbitrate it." Don't you -- don't are arbitration agreement typically tied with the subject matter of the client as opposed to the specific causes of action that are ultimately alleged?

MR. CALLAHAN: In many cases there are, in this case it's not. This case is a different. I mean, I've seen a lot of retail installment contracts in consumer cases, this one is different. It talks about the loan document --

JUSTICE: Okay, we -- persuade me why the kinds of claims that you pledged are not the type of claim -- they are not disputes claims or other matters in question arising out of or relating to this one, it's interpretation, validity, performance or the breach thereof. That sounds pretty board.

MR. CALLAHAN: Well, if the instructions like that, they would probably arguably all the [inaudible] on their side. I would argue that they were all within the scope of that, is that you read it there. Taking away the fact that there are no other defenses to this arbitration document itself.

JUSTICE: Okay, so, you agree then [inaudible] upfront that they followed in there and we have to look to your the defenses in order to avoid arbitration?

MR. CALLAHAN: I do not agree with that. I think that --

JUSTICE: Okay. Well, then persuade me why I shouldn't agree with them on the officers point --

MR. CALLAHAN: Well, because -- it's hard to explain judge because as a lawyer that document has been written, and the way that document has been written -- any good lawyer would have to answer you positively, yes, as we probably covered and accomplished those claims. I do not agree with that type of concept, that type of trickery. That is something we have to live with that here defending consumers in these cases. So, I'm not stipulating that, that's what it should be, I'm saying that's how they used it, and that's what harmful to the

consumers of Texas.

JUSTICE: Thank you.

MR. CALLAHAN: Basically, under the Amlin case set out our principles for this arbitration process. The problem in Amlin is it when they say that we had to go to arbitration, they didn't talk about the kind of what arbitration. What's happening is we got triple A arbitration and other type of arbitration is pending. These proceedings are not properly addressed or identified in these transactions for these consumers. The Amlin case could be set out the fact and also In Re Oakwood about the -- once the burden has been put on that there wasn't an arbitration agreement that has been signed and has been in existence and the burden of shift to the consumer, the plaintiffs in their case to show that there are some types of a defense to that document. We have done that in this case.

I cite for Court the Gothurberg v. Land cases in Texas Supreme Court decision on revocation of acceptance. That case has been cited across the United States. It's been in law review articles and also in ALR. In there, if the consumer properly revokes acceptance of the manufactured home within the proper time period is done soon and [inaudible] right at the very beginning that that creates basically a cancellation of that contract. There have been no issues raised in that revocation that we did in this case and letters that we sent, were improper and not sufficient or it wasn't done timely or anything like that. It established as a matter of law with [inaudible] in the evidence of the Judge Kerdrith. She heard the evidence about the problems with the manufactured home. This was a piece of land that my clients were told they were gonna buy. They agreed to do it. No contracts were done. They dropped the mobile home on it. That wasn't finished. My clients put money in this land, developing roads, septic system, a water system, electric. They didn't have title to it. And then their world falls to the death. They don't get any of it.

So, my clients [inaudible] acceptance of this home. Put everyone on notice. The lender didn't have the right to come in, and repossess [inaudible] because under the UCC and my clients have a security interest in the manufactured home for the amount of money that they have into at that point in time. I think that defense is the defense to their arbitration agreement in this case and in the Gothurberg and UCC, any type of the contract just has been properly revoked, for revocation except that it's been done with, that contract is canceled. Even the remedies under the UCC also indicate that revocation of acceptance. The second one is that, the cause of arbitration. That is the biggest problem we are facing with--

JUSTICE: What's in the record [inaudible]?

MR. CALLAHAN: Cause of arbitration? In the transcript there's a number of the provisions and then talked about my clients were asked the question, "Could you?" They have reviewed the triple A rules. We presented that to them. I presented a motion to the court to take judicial notice of the triple A rules and their fees and expenses.

JUSTICE: What are those things?

MR. CALLAHAN: What are those fees and expenses? I would have to look in my brief to tell you exactly --

JUSTICE: or a [inaudible]?

MR. CALLAHAN: As a general rule what they normally goes about thousand of dollars of fifteen hundred dollars a day per hour arbitrator that's law --

JUSTICE: What -- what's your fee?

MR. CALLAHAN: Ma'am?



JUSTICE: What's your fee?

MR. CALLAHAN: My fee to do arbitration?

JUSTICE: Your fee to represent you client?

MR. CALLAHAN: \$250 dollars an hour, it's on an contingency fee basis. If I don't get a recovery from my clients I get nothing. I take my cases on that basis and then when we go to the arbitration, we try to figure our fees on an hourly basis. That's based upon years of experience. [inaudible] paid them both sides of the expenses.

JUSTICE: So, it's a thousand to fifteen hundred dollars a day per arbitrator?

MR. CALLAHAN: Yes, your Honor, it is --

JUSTICE: -- [inaudible] and I wonder, how many arbitrators?

MR. CALLAHAN: Normally, in triple A there are three-member panels of three arbitrators. Plus they get the travel expense, their meals, their lodging, there's a fee for everything that you file and there is a fee of the American Arbitration Associations files.

JUSTICE: And how long would an arbitration such as this last?

MR. CALLAHAN: Normally, on what's happening involving, your Honor, which a little over a 100, it's been somewhere between two to three days sometimes four or more or like it was.

JUSTICE: -- but the rules don't say it pays everything?

MR. CALLAHAN: No, I don't know if there are any rules that talks about that.

JUSTICE: Then how do we know that --

MR. CALLAHAN: Oh, oh, I'm sorry, the triple A, yes. On the triple A if I represent the plaintiffs, I could go ahead and contact triple A. Give them notice of my claim. Set out what I think the proper claims for damages were. Triple A would then send me a letter saying, "This is what the initial filing fee has to be." That's not the filing fee that goes to any of the arbitrators, that's triple A's policy. And then they submit to us a letter of usually and we're in between five to twelve triple A arbitrators. And has a fee schedule then it used to have cases they were involved in. And lawyers who were on those cases but that now has been removed. So, we can't check with other lawyers who these are or the decisions. Then you make a strike, one or two or three --

JUSTICE: Well, I'm not as concern with the procedure as how as to determine [inaudible]. Is that determined after arbitration, the arbitrators can award?

MR. CALLAHAN: No. Every [inaudible] if I wanna pursue my lawsuit and I'm one of the triple A arbitration, and go to arbitration like they have it on their contract. I have to pay that and my client does. I do not pay it, my contracts in employment do not have that.

JUSTICE: Okay. So that's get paid upfront.

MR. CALLAHAN: Yes, ma'am.

JUSTICE: And then after it's arbitrated can they paneled in re-allocate that?

MR. CALLAHAN: Yes, they can. The problem is would you go along is that consumers in this case here, my clients paid a relatively small down payment on this house. They couldn't afford even pay what's the minimum file and --

JUSTICE: Is justice different than if they went to trial --

MR. CALLAHAN: Well, tremendous.

JUSTICE: What would what happen is that if you didn't have arbitration, you will have the case and if you subject to taking deposition is another discovery, and you would spend just as much in pre-trial discovery. As you would in the cost of arbitration --

MR. CALLAHAN: No, sir. I have to disagree with that I have been a



number of years of experience on both sides of that things what we can see is in the area of the law that I deal with in consumers and manufactured housing, that's not what happens. In the manufactured housing case, it's a rarity that I would spend out of my pocket over \$1500 dollars in all discovery files. That maybe hard to believe but that's the truth, and sometimes even less than that.

Now, that's a great defense argument that we have to spend all this money for pre-trial discovery, that's not true. Most of the time I can write the lawyers and get to the discovery in exchange. We are talking about the package of documents [inaudible]. And that doesn't happen in this area of the law, and that's why this area of the law involving consumers on manufactured housing it is hurting people. It is hurting the consumers of the state --

JUSTICE: Your clients voluntarily agreed to this, so --

MR. CALLAHAN: They don't Judge, they don't. I mean, I can see the parent telling you candidly that stuck in front of their face and they're told of all kinds of things about it. I have been listening to tape recordings just recently, and send remarks before Judge Robinson 2314 over there. And the tape recorder says, "This is an arbitration agreement." All of means is that you sit down and have a mediator and then you can fall asleep --

JUSTICE: Have you seek for fraud to rescind the arbitration agreement [inaudible] --

MR. CALLAHAN: Yes, I had. And I have been successful along in the trial --

JUSTICE: No, in this case?

MR. CALLAHAN: I'm not sure if we have pledge fraud in this case. I don't --

JUSTICE: Fraud directing at the arbitration agreement itself. Would they defrauded in believing [inaudible].

MR. CALLAHAN: Yes, I did have -- I did have allegation in this case but they were not appropriately disclosed to them or situations [inaudible] and how they were induced into --

JUSTICE: How long is it -- why do you have to go to the American Arbitration? I mean, this two said it should be going by the Federal Arbitration Act. Well, what could been there and just be you appoint somebody and the manufacture appoint somebody they get a third arbitrator and you go over there and talk about it with no discovery?

MR. CALLAHAN: That's why --

JUSTICE: How does it slip in from that to what you are telling us those 10 or \$15,000 thousand of fare?

MR. CALLAHAN: Because what's happened judge and these where we could really has to guide us out there is that if the courts here would describe the type of arbitration that would be in this kind of cases, the best thing is three lawyers. Picked two let the two pick one or pick or to say go to a presiding judge and let the presiding judge picked three lawyers --

JUSTICE: [inaudible]

JUSTICE: How did you get assigned a triple A here. How did you get assigned of triple A here?

MR. CALLAHAN: That was what they wanted to do the prior attorney they wanted to go the triple A [inaudible] --

JUSTICE: If the plaintiff [inaudible] plaintiff's attorney?

MR. CALLAHAN: The -- the defense attorney --

JUSTICE: Why is that? We're under this contract is it deal the seller-assignee the right to decide to have the arbitration is gonna be [inaudible].

MR. CALLAHAN: It doesn't and that's the problem. How do you, what's the guidance that the trial court gets what's the guidelines of the plaintiff gets. A plaintiff gets blind sided these plaintiffs come in there, they signed that document. They don't know what's gonna happen Judge. They do not know what's gonna happen --

JUSTICE: Why did you write a letter on behalf of your client that say, "The Federal Arbitration Act will proceed to arbitrate my clients claims and here's we pick our arbitrator and [inaudible] --

MR. CALLAHAN: I do that and most of the jury in my cases now, and I've spoke for the state bar, that's what I do, that's the best way to do these cases. This case could have been overwhelmed and --

JUSTICE: Where is it --

JUSTICE: But all of this -- all that argument has existed ever since arbitration, the criticism of the arbitration movement all along was there added cost to the litigation. The difference between arbitration going to court is the judge is free for you to litigate this in the court house it's the judge's time is free. You need to have discovery and not have discovery. You can even pay for additional motions or not pay for motions but the moment you send it and send it to arbitration you now out of pocket have to pay for that judge. For how many days a judge can serve and that's the problem around per arbitration ever since the courts have said we want arbitration. How does that analogy become different in these circumstances?

MR. CALLAHAN: Because the people of this state, the people that buy these homes and buy these goods don't know that. We've been as lawyers but everybody that walks in these places gets [inaudible] judge. I mean, you can't realize the scale of this over a third of the houses in the state or being bought by these type of consumers. And the [inaudible] in this case and then want a proof of it. This is just a [inaudible] about the expenses, it's not. It is not.

JUSTICE: But you are saying now and all your cases your -- at the time you demand arbitration you're sending in the name of your arbitrator?

MR. CALLAHAN: No, sir. I -- normally if I have a case and I want to go to arbitration and my client has the money, which has not been the case ever yet. Usually, I contact the lawyers. Have a conference with this one of them said listen, "Let's all agree upon on attorney. Select three of them. Let's get -- let's take them and let them guide us by the triple A arbitration rules. I have an order that we prepared in the past. These three lawyers agreed to this. They agreed to follow those rules maybe with some modifications --

JUSTICE: Where on the record can we see that you did that in this case?

MR. CALLAHAN: I did not do that in this case. The reason I didn't do this in this case because the other attorney in representing the lender was totally animosity against my clients. Totally did not want. He says, "The lenders are not subject to any of these kind of stuff period."

JUSTICE: Did you acquiesce and agreed to triple A?

MR. CALLAHAN: Sir?

JUSTICE: Did acquiesce and agreed to triple A?

MR. CALLAHAN: No. I agree. I acquiesce that we picked lawyers to hear the cases as arbitrators, not triple A. Triple A is too expensive. Triple A doesn't do us any good.

JUSTICE: Did the court ordered triple A?

MR. CALLAHAN: Sir?

JUSTICE: Did the court ordered triple A?

MR. CALLAHAN: No, they did not. In this case, the court denied the arbitration agreement based upon the defensive theories that are presented in the evidence presented to her. She said there she --

JUSTICE: How do we know I guess we -- how do we know were you just required as triple A?

MR. CALLAHAN: It doesn't say in their document that triple A is required. Triple A is the guiding document that talks about these and talks about arbitration and their document they talk about going to arbitration and what's left that is how do you define, what type of arbitration is this? Who do you use for the arbitrators? What are the costs for this? To even think that the consumers knows those factors is -- it's just lost. I mean, it doesn't happen like that. I mean we've got to have some help here, and we really do. I mean, this needs to be spelled out, and I think Amlin by saying arbitration not defining arbitration would put in your hands --

JUSTICE: Let me ask you this. So, you would not complain then if we send this to arbitration that said it can't go to triple A. It has to go to the arbitration mechanism or scheme that you just enunciated?

MR. CALLAHAN: I would complain in this case judge because of what happened to my clients and their family. Yes, because here we have at least three or four solid defenses that we presented in that short hearing that day, and I think they established on basis for defenses against that arbitration contract. As the general rule, when I get these cases, I find those lawyers are very cooperative Mr. [inaudible] had number this and Mr. [inaudible] involved In Re Oakwood cases, I believe.

And you can do that, and I spoke on that arbitration seminars. I mean that's the way to solve this problem and get these cases over with. We can't have -- when you get somebody just gonna be [inaudible] and try to force this down to consumer's neck, there's nothing I can do except put on a fight. And come in there and try to clean up some facts which was hard do to show that there are defense to that arbitration agreement, like it has been defined [inaudible]. But we have the cause -- my cause of arbitration, the Randolph v. Green Tree case before the Supreme Court that was our answer but the problem is that evidence didn't get before the trial court so the Supreme Court of the United States didn't rule on it. It's still open bible issue. The defense --

JUSTICE: Do you have any circuit opinions that are helpful?

MR. CALLAHAN: There some out -- there some other states, your Honor. Unconscionability, I think is we have some case law in Texas that I cited that Judge Gonzales wrote something on these cases, and I can't remember the cite, that's on top of my head. He said out some elements that I think are very good elements. It could be a guidance for the determining elements for --

JUSTICE: [inaudible] surely there are some courts that has to wrestle with this, I know that Alabama Supreme Court did. They went one way and then another way.

MR. CALLAHAN: Well, I have a lot of cases in the other state that I didn't burden the court --

JUSTICE: There's a -- Isn't there a Ninth Circuit case before the US Supreme Court right now that address this issue? Is that Randolph or maybe on --

MR. CALLAHAN: The Randolph v. Green Tree, that was gonna be the answer, yes, sir, then what happened it was argued the week before the presidential thing and the --

JUSTICE: So, the Supreme Court has already coming back on that?

MR. CALLAHAN: Yeah, but they carved it out. They said because the



lawyers in the trial court did not bring evidence to prove out what those cost were. What they did is that they gathered all kinds of evidence from across the country of what all types of the lawyers and experience as far as this type of hearings. They got it admitted, but they got it admitted after the fact after the trial that was too late. And then we are trying to argue that theory and the court said, "Because that's not before the court there's no evidence before the court on that, we cannot rule on that at this time."

JUSTICE: And it's still open?

MR. CALLAHAN: Yes, and I think we have that in this case. I mean this is not a big case, but it is a case that people don't have a lot of money and I think --

JUSTICE: Do we have that evident -- evidence before us?

MR. CALLAHAN: Yes, your Honor, because in this thing I have -- the only [inaudible] force is this triple A rules, and I have that on -- the court judicial knowledge of that.

JUSTICE: Of the rules I mean, do we have in the record what arbitrator's costs?

MR. CALLAHAN: Yes, we do. I have that in my brief. It's pointed out some of my items in there and also it's pointed out and the -- I heard you said you didn't get the pleadings in this case, which I was surprised --

JUSTICE: No, no. I -- I'm just -- is there in the record -- I'm just saying that in the appendix there's not a copy of the pleadings.

MR. CALLAHAN: Yeah, in my pleadings my responds --

JUSTICE: Not -- not with pleadings -- I mean, does she need evidence? Does she need evidentiary hearing as to what we called that?

MR. CALLAHAN: Yeah, okay, that's right. I was just trying to tell you where they were in my -- in the pleadings. They are in the pleadings in my response too. I have them all set out. In the evidence that was before the trial court, we -- I filed a motion to take judicial notice of the rules of the American Arbitration Association as a guide basically. The court did approve that order and took judicial notice of those. So, I have a standard by which the trial court was looking at what some of the cause are for arbitration. That was not opposed by the --

JUSTICE: Are those in the rules that cost?

MR. CALLAHAN: Yes, ma'am, they are. They sure are. And --

JUSTICE: The arbitrator fees are in there?

MR. CALLAHAN: Right, they are, but what they leave out of those rules. And this is were lawyers get hurt to represent consumers is, they don't tell me how much each one of you were charged if you were out there as independent lawyers.

JUSTICE: What do [inaudible] Federal Act statute Section 5 of the act, and it doesn't require you to go to triple A and it says [inaudible] procedure that you're saying that we just because triple A is expensive we should advocate federal act that applies here go on with the district court?

MR. CALLAHAN: No, I'm not. What I'm saying is what we've shown here is what we had available to us to show to the trial courts of what kind of expenses are being charge down there in this state.

JUSTICE: So, it's an issue not when an order of arbitration that what kind of arbitration?

MR. CALLAHAN: That would be helpful if we got to be where it was something that was not apprehended to the consumer. You are helping ask people that pay a couple of thousand dollars to pay those kind of arbitration. This is not right. I mean I don't think our laws in the

states are meant to be like that. And it's got to be changed. I mean you cannot force that upon these people, and they just don't have [inaudible] and lawyers. Why would --

JUSTICE: Mr. Callahan, with all due respect we have a Texas Act, and it seems to me what you are asking is a policy decision on how appropriations were affected, and it seems to me that's the legislative function and not this Court's function.

MR. CALLAHAN: I agree Judge. That's a --

JUSTICE: [inaudible] to some degree regret that but I think that that's what you're asking for us to do. It's not our prerogative?

MR. CALLAHAN: But you know, what I thought about this if I may I speak, what I thought about was this I believe the Amlin case does give you that open because in there the use of the word of arbitration. You all have been trial lawyers. You can define what type of arbitration and who's talking about. It was not hard to do. I think, we could do it or you could do it. And that would give all of us tremendous amount of guidance, and these cases would move faster. I can get these cases settle faster in those kinds of things. I mean, it just takes three good lawyers, and even maybe a guy you don't like, it doesn't make any difference. The lawyers are normally fair, and it works like that. But you can't -- you've got to have the guidelines to do it. I mean, it's just -- it's a big [inaudible] that needs to be filled, and I think that could do it. I think, defining that kind of arbitration that this court would guide us as lawyers to follow, would be very helpful for all of us.

JUSTICE: Any other questions? Thank you, Counsel.

MR. CALLAHAN: Thank you.

SPEAKER: May it please the Court. Mr. John A. Seib will present the rebuttal for the relators.

JUSTICE: Mr. Seib, I don't get it. Question at -- as I -- as I understand where we are. Your position is, that the only issues left really out here to be litigated are simply against the lender and because all the issues, coming under the terms of the loan or subject to arbitration in this case ought to go to arbitration, I understand that would be your argument?

REBUTTAL ARGUMENT OF JOHN A. SEIB JR. ON BEHALF OF THE PETITIONER

MR. SEIB: Yes, sir.

JUSTICE: The arbitration agreement said that the parties agreed that the assignee, I think that referring to you all, their claims which are below enumerated are excluded from arbitrability under the arbitration [inaudible] and what's excluded from arbitration is the assignees authority to enforce the monetary obligation containing to the manufactured home. I assumed that's the loan, and the assignees ability to foreclose for the failure to pay the loan. I understand that's excluded from the arbitration, and in any proceedings to enforce the said security agreement. If the only issues that the plaintiff brings are with respect to the loan obligations, but the lender is specifically excluded from having to arbitrate their authority to sue on the loan, do we have a [inaudible] in your argument I was asking this question and you said, "Oh, no we're subject to arbitration," but the document so says you're not, so --

MR. SEIB: Your Honor, I believed the defense is readily available

to the consumers under that scenario would certainly be subject to arbitration state court proceedings [inaudible]. We go to arbitration and arbitrate over their defenses.

JUSTICE: Is there -- is there something wrong --

MR. SEIB: Okay.

JUSTICE: -- when you read this agreement the part that Judge Enoch read that the consumer has to go to the arbitration, the seller does not, and if the seller goes to court against the consumer to enforce obligations and define its agreement, any counterclaims of fraud you have to go to arbitration. So, even if you sue the consumer in court and they come back and say no, "We shouldn't have to pay, because of all these other things." Then you get stay in court but they have to go arbitration [inaudible] --

MR. SEIB: Actually, that's has been used many times against us, your Honor. We actually get stayed in court and were forced to go arbitrator defense --

JUSTICE: I understand that, but with [inaudible] agreement where you get to go to court and they don't. I mean that's, that's a kind of disagreement does, doesn't it?

MR. SEIB: Well --

JUSTICE: Then you get [inaudible] in the meantime but they don't get to the other court to litigate anything that they have a claim over and you do under this agreement. Is that what is, is that what I'm reading out right?

MR. SEIB: You are reading it right.

JUSTICE: Okay.

MR. SEIB: Just a couple of points --

JUSTICE: You have problem with that?

MR. SEIB: Not as it works out practically --

JUSTICE: [inaudible]

MR. SEIB: Because most of the relief that's requested from the lender's point view is relief that is best available from this state district court --

JUSTICE: Why?

MR. SEIB: Because you are seeking for sequestration --

JUSTICE: I'm trying -- I'm -- what if you try to collect the balance on the note? Why is that --

MR. SEIB: Well, I would suggest that you're arguing in a contract of adhesion which sounds --

JUSTICE: I understand that -- I'm just trying to understand how it works.

MR. SEIB: Well, I think you've -- known exactly how it works. The lender in exchange for making this loan has reserved itself some rights, which it wants to have in order to recover its debt and the manufactured home if necessary. At the same time, it's willing concede that the defenses that are available certainly provide them with an opportunity to state those proceedings and go to arbitration.

As far as this case is concerned, this is not a triple A arbitration agreement, and we're unaware were all getting this from. There's nothing in this agreement talks about triple A as controlled by Section 5 of the Federal Act. But, we can agree on arbitrators. The Court will point three arbitrators. I am not here to defend triple A, but they also have pauper's affidavit, which was thrown into my face all the time in representing the industry. As far as fraudulent inducement or the rest is concerned, the only document these people testified if they remembered, when they signed for one and a half to two hours was the arbitration agreement, and they were specifically



told that if you don't sign the arbitration agreement, you'll not fully get the loan. That was the same argument that was made in In Re Oakwood Mobile Homes two years ago. This court entered a decision saying, "That is not fraud in this fraudulent this is no [inaudible]."

JUSTICE: How -- how much does it cost to arbitrate a case like this?

MR. SEIB: It depends upon the arbitrators. In this particular case, the judge could appoint three arbitrators that don't charge a thousand dollars a day --

JUSTICE: I know but -- excuse me, again I was trying to understand the practical side of it. What -- how much --

MR. SEIB: Than the --

JUSTICE: I'm a little [inaudible] --

MR. SEIB: Almost 100 of arbitrations I've been involved then I would say on the average it cost 800 to \$1200 per day, per arbitrator. And most arbitrations take no longer than two days. And every case in which it takes longer I would suggest that more often than not the side with the deep pockets seems to be paying for. I have not had an arbitration yet where we've actually gone through an arbitration and we've zeroed out the other side. Mr. Callahan has done very well as a result of our arbitration issue. He should be quiet pleased with his performance --

JUSTICE: Does -- does -- who has to be paid upfront. The arbitrators of estates have to be paid upfront?

MR. SEIB: That is the decision made by the arbitrators. On many occasions the arbitrators will not require all payments upfront. They would take 50 percent. Some will take none. Some will take all of it. Some will say, "Okay, one side has been paid a half." If you file a pauper's affidavit sometimes you don't have to pay at all. We're using triple A as a standard here but there -- I would suggest that there are more arbitration agreements out there that don't refer to triple A then they do refer to triple A. For instance, Conseco is one of the largest lenders, independent lender on the manufactured housing industry in this state. I represent them all the time. Every one of their agreement is silent as to how the arbitrator are to be selected in terms of the triple A. They leave it out just like this agreement that leaves it out. There's other federal arbitration. I thought the judge appoint them. Of course Mr. Callahan pointed out, they pick one, I'll pick one, we'll pick it further or maybe we will weigh this and then just go to one.

JUSTICE: So, it's your position that you disagree with Mr. Callahan that cost in any way is a barrier or a problem for a consumer to be able to take the case to litigation. That's all I'm saying here.

MR. SEIB: No. In terms of --

JUSTICE: I am giving you a chance to respond. His point is that your arbitration is not a real alternative because of cost. I mean is that -- do you agree with that or is that you have a different perspective and in fact that is not problem consumers.

MR. SEIB: For over 7000 cases of experience on the industry side, I would suggest this that the nuisance value of the jury trial is every bit the chip is being played against us when it comes to arbitration. From the arbitration point of view, does arbitration cost more? It can cost more. It can for -- but it does force consumers to closely evaluate their claims. For instance, even under the triple A, based upon the size of your claim is the size of your filing fee. Do you think that a \$200,000 lawsuit arising out of a \$5,000 down payment under a case such as this, well, then you should have to pay more as

far as the arbitrators as concerned that's based upon every arbitration, every arbitrators agreement --

JUSTICE: I understand that, I just would like to get -- I understand that, that's your perspective from the industry. Do you believe that there is a problem with respect to consumers being able to afford arbitration, that's all I'm trying to get some [inaudible] or do you disagree with Mr. Callahan?

MR. SEIB: I think it is a problem for the lawyers representing consumers where they wanna invest in that type of a process. If they come up against a case where you're in front of triple A and the only three arbitrators everyone agrees on cost \$2500 per day, per arbitrator. Yes, that would certainly have a bearing on whether or not they will proceed. I've never seen a case yet though when they have a good case, they won't proceed. They're willing to invest and not just like they're willing to invest in medical malpractice claims and all the other lawsuits that are out there, because they make a living at it. And Mr. Callahan makes a very good living at it because he's very good on what he does and he picks and chooses his case and just like we pick and choose our defenses. And I'm not have been foolish enough to say that whether it cost 10 or 3000 versus \$1500 doesn't have an impact, I don't know. I don't know how they marshal their work just when they go into cases --

JUSTICE: I just really wanna know whether or not consumers are unable to have their claims heard because they can't afford to go arbitration?

MR. SEIB: I have not had a case yet where that -- that has occurred.

JUSTICE: Thank you.

MR. SEIB: In closing I would just like to say that the cost and expenses were not relevant because this is not a triple A case. The revocation of the sentence argument I think should fall on deaf ears because that is really a remedy. It's not a hurdle which I must overcome to prove that there is no revocation with acceptance available in order to have an arbitration during the crime of [inaudible] talked about the discrimination between those and the defenses of contractual claims -- contractual defenses to arbitration. Those are the underlying case in chief.

In this particular case, I think the trial court was caught up and all of the allegations about the retailer and forgot to discriminate the arbitration agreement that was the only document again. These people actually talked about the closing in new specifically. And when they signed it, they would not get a day in court. They go to arbitration and in fact their words were, "We didn't want to sign that when they told us we couldn't get the manufactured on the buy it, we did so, because we want to report children." They wanted to put themselves in this credit relationship with my clients so that they could buy a manufactured home for their children. They did so knowingly. They knew it at the time that they would have to go to arbitration. I don't think that there's any unconscionability or duress or any fraud involvement in that particular agreement. And I would ask this Court to allow us to have the right we contracted for and let us to go to arbitration in accordance with this agreement.

JUSTICE: Any other questions? Thank you, Counsel. That concludes the arguments and marshal will now adjourn the Court.

SPEAKER: All rise Oyez, oyez, oyez. The Honorable, the Supreme Court of Texas now stands adjourned.

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