Avoiding Arbitration

TEN STEPS TO CONSIDER

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■ INTRODUCTION

How many of you have encountered this situation? A client comes into your office and describes some sort of wrongdoing in connection with the purchase of a mobile home or an automobile or an insurance policy. You conduct a thorough interview, learn all the details surrounding the transaction and satisfy yourself that there is enough evidence of wrongdoing that it warrants further investigation. You file a petition for discovery before action and start digging into the documents and, lo and behold, there it is, buried somewhere within the boilerplate under an obscure heading like "**Alternative Dispute Resolution**," you find the language to the effect that "all disputes arising out of the contract" or "all disputes relating to the contract" will be resolved by arbitration according to the rules of the American Arbitration Association.

"Regardless of whether you ultimately avoid arbitration for your client in your case, it is absolutely imperative that you educate your clients. . . . Be sure they know the evils of mandatory and binding arbitration. . . ."

What do you do? Do you tell the client: "Sorry, you've agreed to arbitration and we don't handle those sorts of matters . . ." Do you plunge right into arbitration proceedings and at the same time notify your E&O carrier? Or, as the first order of business, do you try to determine whether there are any lawful ways to avoid arbitration such as having a trial court declare the arbitration provision unconscionable and, therefore, unenforceable?

This article presents a step-by-step method for assessing issues to determine whether arbitration may be avoided in any given case. First, however, we list several of the more important reasons why you should always try to avoid arbitration whenever possible.

Regardless of whether you ultimately avoid arbitration for your client in your case, it is absolutely imperative that you educate your clients about how the business and insurance communities are working to take away our constitutionally protected right to trial by jury through privatization of dispute resolution. Be sure they know the evils of mandatory and binding arbitration, such as the following:

■ NO ACCOUNTABILITY

Unlike judges who are subject to regulation by the Judicial Inquiry Commission, lawyers who are subject to regulation by the State Bar Association and politicians who are subject to regulation by the Ethics Commission, arbitrators are subject to no regulation by anybody. Arbitrators may do to you whatever they want to do, and they have no one to answer to for it.

■ IT IS TOO EXPENSIVE

The costs of arbitration increase with the size of the controversy. For example, according to the American Arbitration Association's Construction Dispute Rules, a controversy over a $50,000 house would cost the homeowner $1,250.00 just to file a claim for arbitration. A controversy over a $300,000 house would cost the homeowner $3,500.00.

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Under our traditional system of filing suit in state court, on the other hand, a controversy involving amounts up to $10,000 requires payment of only a filing fee of $115.00; controversies exceeding $10,000 require payment of a filing fee of $207.00.

In addition to the money which must be sent to the American Arbitration Association (and other, similar bodies) just to invoke the arbitration process, the consumer is also stuck with paying the arbitrator's expenses (which is ordinarily a steep hourly rate) and the costs associated with providing the place within which to conduct the arbitration hearing (such as a hotel conference room).

■ NO TIME-TESTED RULES

Under our historical civil justice system, the citizens know that there are strict rules which must be adhered to. The rules of evidence, rules of civil procedure, rules of professional conduct and local court rules all provide very clear guidance of how the lawyers and parties must act while resolving controversies. For example, if a victim can go to the judge and obtain an order requiring that the records be turned over, else the health care provider runs the risk of punishment. In arbitration proceedings, on the other hand, there is no enforcement tool to protect the victim or make wrongdoers do the right thing.

■ UNFAIR FORUM

When was the last time you ever heard of an ordinary citizen signing up to become an arbitrator? How many truck drivers, postal workers, housewives, school teachers or other working men or women do you know who are certified arbitrators? What chance will you have to prevail with your controversy when you, Mr. or Mrs. Ordinary Citizen, are being judged by those who have sought the jobs as certified arbitrators such as insurance industry executives, retired building contractors, corporate attorneys and the like?

■ DUE PROCESS

Our country's civil justice system has developed over 200 years. In that time, thousands upon thousands of cases have been heard and decided, and from that collective experience the important fabric of our nation's laws has emerged. Included among those laws are important due process protections which spell out the rights and obligations of each of our citizens.

Nothing in the arbitration rules requires the arbitrator to adhere to our basic rules of law. To the contrary, arbitrators are free to disregard these time-honored rights. What's more, many arbitrators have no training in the law and would not know how to correctly enforce the rights and obligations, assuming they were inclined to do so.

■ COMMON LAW

Appellate court decisions, and some trial court decisions, are reported in official publications for the guidance of future disputants. Even before a dispute arises, a lawyer can read cases and advise a client on a course of conduct. The application of statutes to varying situations is developed through individual cases.

Not so with arbitration. A dispute that is sent to arbitration disappears without a trace. When consumer disputes are routinely sent to arbitration, the development of any law of consumer protection will be arrested, and no adaptation to changing circumstances will occur. Thus, arbitration is the privatization of dispute resolution not only because a private individual decides the case rather than a public judicial official, but also because the result is private and no public body of law arises. Only the commercial repeat players will know what arbitrators are doing and what they can get away with.

■ HISTORY

Finally, and most importantly, we must consider how this new movement towards arbitration runs afoul of the basic, fundamental liberties entrusted to us by our Founding Fathers. The Bill of Rights sets out in the Seventh Amendment to the United States Constitution that we have the right to trial by jury. In Alabama, our forefathers preserved this sacred right through Article I, Section 11 of our Constitution, which reads: "The right to trial by jury shall remain inviolate." Thousands of heroic men and women have sacrificed their lives to protect these sacred rights and privileges. Is it to be the legacy of our generation to give up these cherished rights without ever a fight?
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STEP-BY-STEP ANALYSIS

First and foremost, bear in mind that under the Federal Arbitration Act, as interpreted in decisions from the United States Supreme Court and the Alabama Supreme Court, traditional contract defenses are available to avoid enforcement of unfair arbitration provisions. 9 U.S.C. § 2 says:

> "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 any agreement in writing to submit 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."

(emphasis added). In *Allied-Bruce Terminix Corp. Inc. v. Dobson*, 513 U.S. 265, 281 (1995), the Court held that:

> "[Section 2 of the FAA] gives states a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. 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.'"

In *Doctor's Associates, Inc. v. Cassarotto*, 517 U.S. 681, 687 (1996) the United States Supreme Court noted that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2" of the Federal Arbitration Act.

1ST – IS THERE A WRITTEN PROVISION IN A CONTRACT?

How do you get from point "A" to point "B"? The starting point is to ask whether there is a written provision in a contract concerning arbitration? The first sentence of § 2 of the FAA states that it applies to "a 'written provision' in any maritime transaction or a contract . . ."

In *Ex parte Payne*, 741 So.2d 398 (Ala.1999), the Court granted mandamus and ordered a circuit court to set aside an order compelling arbitration because there was no contract. This occurred under familiar facts – a person attempted to buy a used car, but the retail purchase order she signed said the sale was contingent on her being approved for financing. Since she wasn't approved, no contract was formed and the seller could not therefore invoke the arbitration provision. Since there was a contingency contract and the contingency never occurred, there was no contract.

2nd - DOES THE CONTRACT SUBSTANTIALLY AFFECT INTERSTATE COMMERCE?

Step 2 is to ask whether the maritime transaction or contract at issue substantially involves interstate commerce. Absent a substantial connection with interstate commerce, there is no authority for federal regulation by the Federal Arbitration Act under Congress's Commerce Clause Power. Transactions purely intrastate in nature are not regulated by Federal law.

In *Sisters of the Visitation v. Cochran Plastering Company, Inc.*, No. 1981513, Ala. Mar. 10, 2000, the Court (Lyons, J., and Houston, Cook, Johnstone, and England, J.J., concurring; Brown, J., concurring in the result; Hooper, C.J., and Maddox and See, J.J., dissenting) cited *United States v. Lopez*, 514 U.S. 549 (1995), as requiring proof of a "substantial effect" on interstate commerce before a pre-dispute arbitration provision will be deemed to be enforceable under the Federal Arbitration Act. The Court held that *United States v. Lopez* recognized limits on the power of Congress to regulate through its Commerce Clause power such that the proponent of an arbitration provision will bear the burden of proving that the transaction has a "substantial effect" in light of factors such as the citizenship of the parties, tools and equipment used, allocation of costs of services and materials, subsequent movement across state lines and degree of separability from other contracts. *Sisters of the Visitation* is a landmark decision and is required reading for any attorney confronted with a pre-dispute arbitration agreement.

Earlier, in *Rogers Foundation Repair, Inc. v. Powell*, 748 So.2d 869 (Ala. 1999), the Court held that a contract by an Alabama corporation to perform repairs on a chimney of an Alabama residence did not have a substantial effect on interstate commerce even though the contract contained a recitation which stated that it did. The Court granted a petition for mandamus and reversed a trial court order requiring arbitration upon holding that there was no substantial effect on interstate commerce and therefore that the FAA could not be invoked.

Similarly, in *Southern United Fire Ins. Co. v. Knight*, 736 So.2d 582 (Ala. 1999), the Court held that an automobile insurance policy issued by an Alabama corporation does not "substantially affect" interstate commerce, so an arbitration provision contained in such a policy will not be enforced.

3rd - WAS THERE AN AGREEMENT BY PLAINTIFF?

The third step in your analysis is to determine whether there is clear and unmistakable evidence of an agreement by the plaintiff to arbitrate? You should determine, for example, whether all of the plaintiffs were parties to the contract. Did a minor enter into a contract with arbitration without consent of his parents? Did a husband sign a new car purchase form, but not the wife? Does the document containing the arbitration provision bear the plaintiff's signature and thereby evidence his agreement to arbitrate or not? Without any signature, what is the evidence that the plaintiff actually agreed to the arbitration provision?

There are many federal decisions holding that arbitration will not be enforced absent evidence the plaintiff signed a document agreeing in writing to arbitration. *See, e.g., McCreary v. Liberty National Life*, 6 F.Supp. 920 (N.D. Miss. 1998) (only document plaintiff signed was the application for a policy, so an endorsement adding an arbitration clause did not constitute an agreement by the plaintiff to arbitrate); *IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.2d 537, 542 (7th Cir. 1998) ("As the plaintiffs did not agree to arbitrate any dispute they might have with SunAmerica Life, they cannot be forced to give up their judicial remedies ... merely because they have an arbitrable dispute with affiliates of the defendant."); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3rd 1 (1st Cir. 1999) (because Merrill Lynch did not give Rosenberg a copy of the NYSE rules that included an arbitration clause, that clause would not be enforced in her action asserting claims under the Civil Rights Act for gender discrimination in the termination of her employment).

The results from the Alabama Supreme Court on this issue, on the other hand, are a mixed bag. In *Ex parte Rush*, 730 So.2d 1175 (Ala. 1999), the Court found evidence of an agreement to arbitrate when the homeowner did not sign a "termite protection plan" document containing an arbitration provision, but the homeowner renewed his termite policy with Terminix each year for nine years. The Court concluded that by his course of conduct in renewing the policy, the homeowner impliedly consented to the arbitration provision.

4th - DETERMINE WHO WAS INTENDED TO BE COVERED BY THE ARBITRATION PROVISION

The next step is to determine whether all the wrongdoers are parties to the contract in which the arbitration provision appears? There have been several recent Alabama Supreme Court decisions which have addressed the specificity needed in an arbitration provision before a related party – not a signatory to the contract – may nevertheless invoke the arbitration provision for its own use and benefit.

The basic test for claims against non-signatories is whether the claims against them are "inextricably intertwined" with the claims against the party or parties

who did sign the document containing the arbitration provision.

In *Universal Underwriters Life Insurance Co. v. Dutton*, 736 So.2d 564 (Ala. 1999), a consumer purchased a new car and entered into an arbitration agreement with the dealership. The dealership then assigned the car loan to a lender. Included in the sale was a policy of credit life insurance. The consumer then filed a claim against the dealership, the lender assignee and the credit insurance company claiming fraud in connection with the sale of the credit insurance policy. The Alabama Supreme Court enforced the arbitration agreement as to the dealer, its salesman and the lender assignee, but refused to enforce arbitration as to the credit insurance company because claims against the credit insurance company were not within the contemplation of the arbitration provision.

5th – DETERMINE WHAT WAS INTENDED TO BE ARBITRATED

The next means of possibly avoiding the arbitration provision is to scrutinize the scope of what the parties agreed to arbitrate. For example, "disputes arising out of the contract" is narrower in scope than "disputes relating to the contract," which, in turn, is narrower than "any and all disputes between the parties to the contract, their successors and assigns."

On this issue, look at *American Bankers Life Assurance v. Rice Acceptance Co.*, 739 So.2d 1082 (Ala. 1999). There, the arbitration provision was limited to disputes "as to the meaning or interpretation of this agreement." The Court rejected an attempt to enforce arbitration of the plaintiff's fraud cause of action upon finding that it was not an issue contemplated by what the parties had agreed to arbitrate.

On the other hand, in *Selma Medical Center v. Manayan*, 733 So.2d 382 (Ala. 1999), the Court held that a provision applying to any dispute "that shall arise concerning any aspect of this agreement" was broad enough to cover a claim of fraud in the inducement.

6th – CONSUMER WARRANTY?

Once you get past the foregoing threshold questions, the next possible dispositive issue is whether the arbitration provision is contained in a document evidencing a written consumer warranty. Provisions in the Magnuson-Moss Warranty Act, 15 USC § 1501, and regulations issued by the FTC pursuant to that Act specify that any alternative dispute resolution offered by a written warrantor shall be non-binding. A binding arbitration requirement conflicts with the federal requirement that any arbitration of the warranty claim be non-binding.

In *Southern Energy Homes, Inc. v. Lee*, 732 So.2d 994 (Ala. 1999) the Alabama Supreme Court ruled that an arbitration provision in a written warranty was void because it violated the Magnuson-Moss Act. Because the provision is void, the consumer cannot be forced to arbitrate even non-warranty claims the consumer has against the warrantor. However, in a narrow five to four holding the Alabama Supreme Court overruled *Southern Energy Homes, Inc. v. Lee* and held that the Magnuson-Moss Act does not invalidate arbitration provisions in a written warranty. *Southern Energy Homes, Inc. v. Ard* 2000 WL 1971998 (Ala. 2000).

Interestingly, shortly before our Court released the second *Southern Energy* case, a Texas Court of Appeals held that an agreement compelling arbitration of a written warranty claim is invalid and unenforceable because the FAA is superseded by the Magnuson-Moss Warranty Act's provisions prohibiting binding arbitration. *In re Van Blarcum*, 2000 WL 374817 (Tex. App. Corpus Christi, 2000). The Texas court agreed with the Alabama Supreme Court's reasoning in the first *Southern Energy* case and held that the Magnuson-Moss Act "clearly reflects an intent by Congress to prohibit the use of binding arbitration." Id.

Moreover, the District Court for the Middle District of Alabama has held not only that Magnuson-Moss prohibits binding arbitration clauses in consumer warranties, but even that a warrantor may not invoke an arbitration clause in a retail sales contract, because allowing the warrantor to invoke the seller's arbitration clause would circumvent the prohibition in the Magnuson-Moss Warranty Act. *Wilson v. Waverlee Homes, Inc.* 954 F.Supp. 1530 (M.D. Ala. 1997) aff'd, 127 F.3d 40 (11th Cir. 1997); *Boyd v. Homes of Legend, Inc.*, 981 F.Supp. 1423 (M.D. Ala. 1997); *Rhode v. E & T Investments, Inc.*, 6 F. Supp.2d 1322 (M.D. Ala. 1998). In *Homes of Legend, Inc. v. McCollough*, 2000 WL 1980921 (Ala. 2000), the Supreme Court of Alabama held that a warranty requiring compliance with FTC regulations was subject to nonbinding arbitration, but not to binding arbitration.

The narrow reversal of its stance in the second *Southern Energy* case is especially curious in light of what three courts -- two judges in the Middle District of Alabama and the Texas Court of Appeals -- have held. Moreover, it seems especially odd that, after the federal courts had held that the FAA does not preempt Ala. Code § 8-1-41(3) (1975) in these circumstances, the Supreme Court would find federal preemption of Alabama law. Perhaps in the next case, the Alabama Supreme Court will agree with the decisions of the other courts that have considered the subject, and reinstate its original view that arbitration provisions violate the Magnuson-Moss Warranty Act. It is not known how the United States Supreme Court would rule on this issue, because none of these cases have been presented for certiorari review. Therefore, although the current rule in Alabama state courts allows arbitration clauses in warranties, the United States Supreme Court could reinstate the first *South Energy* rule by holding that

the Magnuson-Moss Act does invalidate arbitration provisions in a written warranty.

7th – CONFORM WITH DUE PROCESS PROTOCOL?

The next issue is whether the arbitration provision may be deemed unenforceable because of a failure to comply with the American Arbitration Association's Consumer Due Process Protocol. In a footnote of *Ex parte Napier*, 723 So.2d 49, 52 (Ala. 1998), the Alabama Supreme Court cited the Consumer Due Process Protocol with approval, thereby suggesting that arbitration provisions conform with the protocol else run the risk of being deemed unenforceable.

By way of background, this "Protocol" is the product of an Advisory Committee composed of both consumer lawyers and business lawyers who recommended to the American Arbitration Association that it adopt a principle called Principle Eleven, "special provisions relating to binding arbitration," which states the following:

"Consumers should be given:

a. Clear and adequate notice of the arbitration provision and its consequences, including a statement of its mandatory or optional character;

b. Reasonable access to information regarding the arbitration process, including basic distinctions between arbitration and court proceedings, related costs, and advice as to where they may obtain more complete information regarding arbitration procedures and arbitrator rosters;

c. Notice of the option to make use of applicable Small Claims Court procedures as an alternative to binding arbitration in appropriate cases; and,

d. A clear statement of the means by which the Consumer may exercise the option (if any) to submit disputes to arbitration or to court process."

The Reporter's Comments of the Advisory Committee suggest that consumers should have clear and adequate

notice of the arbitration provision and basic information regarding the arbitration process at the time they are called upon to consent to arbitration. The Reporter's Comments expressly state: "In all cases, there should be some form of conspicuous notice of the agreement to arbitrate and its basic consequences."

When commercial entities and insurers specify in their arbitration provisions that they are to be governed by American Arbitration Association rules, they necessarily are imposing upon themselves the standards required by AAA's due process protocol. Those entities should not be able to avoid the requirements of their own self-imposed standards of care. Accordingly, the prudent lawyer should compare the manner and method of obtaining the conumer's consent to arbitration against the requirements imposed by the AAA. If there is a significant discrepancy, the argument may be made that the commercial entity or insurer failed to abide by its own self-imposed standards.

8th – ELEMENTS OF UNCONSCIONABILITY?

The next step is to examine all the facts and circumstances surrounding the relative sophistication, financial strength and bargaining power of the parties to determine whether the agreement is so unconscionable that it should be deemed unenforceable as a matter of law.

The doctrine of unconscionability is codified in Alabama's version of the Uniform Commercial Code at Ala. Code § 7-2-302 (1975) as follows:

> "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause so as to avoid any unconscionable result."

A similar reference to unconscionability is found in Alabama's Consumer Credit Act at Ala. Code § 5-19-16:

> "With respect to a consumer credit sale, consumer lease or consumer loan, if the court as a matter of law finds the agreement or any provision of the agreement to have been unconscionable before, after or at the time it was made, the court may refuse to enforce the agreement, or it may enforce the remainder of the agreement without the unconscionable provision, or it may so limit the application of any unconscionable provision so as to avoid any unconscionable result."

What are the factors the Alabama Supreme Court will review to determine whether a contract or contractual provision is unconscionable? In *Lane v. Garner*, 612 So.2d 404 (Ala. 1992), the Court listed:

> "1) whether one party was unsophisticated and/or uneducated; 2) whether there was an absence of meaningful choice on one party's part; 3) whether the contract terms are unreasonably favorable to one party; 4) whether there was unequal bargaining power among the parties; 5) whether there were oppressive, one-sided or patently unfair terms in the contract."

More recently, in *Ex parte Dan Tucker Auto Sales, Inc.*, 718 So.2d 33 (Ala. 1998), Justice Lyons, in his concurring opinion, wrote:

> "Unconscionability, under general principles of Alabama law, can be reduced to a four-part test: 1) whether there is an absence of meaningful choice on one party's part; 2) whether the contractual terms are unreasonably unfavorable to one party; 3) whether there was unequal bargaining power between the parties; and 4) whether the contract contained oppressive, one-sided or patently unfair terms.
>
> I believe that a showing of financial hardship, lack of choice, and one-sidedness could, in a proper case, lead to a finding of unconscionability and a concomitant holding of unenforceability of an arbitration agreement that would not conflict with governing federal law."

In *Ex parte Napier*, 723 So.2d 49 (Ala. 1998), the Court listed still other factors that might be germane to a determination of unconscionability, including:

> "A refusal of a plaintiff's request for assistance after she notified someone that she was unable to see or to understand [the arbitration clause]; [a plaintiff's] inability to obtain the product made the basis of the action from this seller, or from another source, without having to sign an arbitration clause; the oppressiveness or unfairness of the mechanism of arbitration; or the unfairness of a discount or other quid pro quo in exchange for [a plaintiff]

accepting an arbitration agreement."

Still further, in *Ex parte Parker*, 730 So.2d 168 (Ala. 1999), the Court held that "lack of mutuality of a remedy (when the seller or lender reserves for itself the right to invoke the court system but leaves the consumer with only arbitration as his or her remedy) can be one factor, along with others, that a court may consider in determining whether an arbitration clause is unconscionable." It should be noted, however, that in *Ex parte McNaughton*, 728 So.2d 592 (Ala. 1998), the Court held that the absence of a mutuality of remedy, standing alone, does not render an arbitration provision unconscionable.

So, what additional factors should you look for when attempting to establish that the agreement would be unconscionable were it enforced against your client? You should scrutinize each of these issues:

1. Excessive or unreasonable costs to invoke arbitration (*see, e.g.*, AAA's Construction Industry Dispute Resolution Rules and determine whether prohibitive costs to invoke arbitration are such that they impose a financial hardship);

2. Hardship imposed because of location of arbitration proceedings;

3. Hardship caused by selection/bias of the arbitrator;

4. Deprivation of adequate remedies (i.e., no class actions; thwarting of right to rely upon state or federal statutory remedies like Deceptive Trade Practices Act, Title VII, ADEA, etc.) ;

5. Was the plaintiff forced to sign the arbitration clause under duress (e.g., at a hospital before undergoing emergency surgery)?

9th - INSURANCE CONTRACT?

The next issue concerns whether the arbitration provision is contained within a contract of insurance. In two plurality opinions, the Alabama Supreme Court has rejected arguments that the McCarran-Ferguson Act reverse-preempts the Federal Arbitration Act so as to allow the Alabama anti-arbitration statute (Ala. Code § 8-1-41(3)) to preclude the enforcement of an arbitration provision in an insurance policy. *American Bankers Ins. Co. of Fla. v. Crawford*, 757 So.2d 1125 (Ala. 1999); *Ex parte Foster*, 758 So.2d 516 (Ala. 1999). In those two cases, Justice Lyons was recused and Justice England had not yet filled the vacancy when Justice Kennedy retired. The vote was thus 4-3, with Justices Houston, Cook, and Johnstone dissenting. If fewer Justices than a majority of the 9-member Court vote for an opinion, it does not become a binding precedent of the Court. *First Nat'l Bank of Mobile v. Bailes*, 293 Ala. 474, 306 So.2d 227 (1975); *Phoenix Ins. Co. v. Stuart*, 289 Ala. 657, 270 So.2d 792 (1972). Thus, if a similar case arises and Justices Lyons and England join the dissenters, a majority would accept the argument that the McCarran-Ferguson Act reverse-preempts the Federal Arbitration Act and allows the Alabama statute prohibiting specific enforcement of pre-dispute arbitration clauses to apply to insurance contracts.

10th - EVIDENCE OF FRAUD?

Finally, you should consider whether the facts suggest fraud in the inducement or execution of the contract. Bear in mind that if you allege fraud in the inducement as to the overall contract, Alabama law holds that that issue would be resolved by the arbitrator. On the other hand, were you to allege that there was fraud solely with respect to obtaining the arbitration provision, that issue would be decided by the court. See *Green Tree Financial Corp. v. Wampler*, 749 So.2d 409 (Ala. 1999).

The Supreme Court recently gave a broad hint that it would be receptive to fraud allegations:

> The method adopted by [Blue Cross] to obtain the waiver of a policyholder's constitutional right to a jury trial does cause us some concern, however. If the evidence had presented a fact question as to whether Clark had been notified of the amendment; or had presented a fact question as to whether, if properly notified, she would have been unable to understand that she was agreeing to be bound by the arbitration provision; or had suggested fraud in the inducement, duress, or unconscionability, then Clark would be entitled to the writ and the issue of arbitrability would be determined by a jury.

Ex parte Shelton, 738 So. 2d 864, 870-71 (Ala. 1999). Similarly, in a recent special concurrence, Justice Johnstone distinguished fraud in the inducement from fraud in the execution, and notes that the Court has not considered whether an assertion of fraud in the execution of the entire contract is grounds for denying a motion to compel arbitration. *Quality Truck and Auto Sales, Inc. v. Yassine*, 730 So.2d 1164, 1170-71 (Ala. 1999) (Johnstone, J., concurring specially).

■ ANOTHER AS YET UNTESTED BUT IMPORTANT CONSIDERATION

Did you know that for one to serve as an arbitrator in this State, he or she must be a licensed attorney? It's true. Alabama Code § 34-3-6 **Authority to Practice Law – "Practice of Law" Defined** states as follows:

(a) Only such persons as are regularly licensed have authority to practice law.

(b) For the purposes of the chapter, the practice of law is defined as follows:

Whoever,

* * *

(4) as a vocation, enforces, secures, settles, adjusts or compromises defaulted, controverted or disputed accounts, claims or demands between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense;

is practicing law.

Id. Violation of Alabama Code § 34-3-6(b)(4) is a crime. Alabama Code § 34-3-7 **Unlawful Practice of Law; Generally** provides:

Any person, firm or corporation who is not a regularly licensed attorney who does an act defined in this article to be an act of practicing law is guilty of a misdemeanor and, on conviction, must be punished as provided by law. Any person, firm or corporation who conspires with, aids and abets another person, firm or corporation in the commission of such misdemeanor must, on conviction, be punished as provided by law.

Accordingly, you may have a fruitful basis for excluding as an arbitrator anyone assigned to your dispute who is not an attorney licensed to practice in this state. This may very well foreclose appointments from AAA's "list of neutrals" when they are former insurance industry executives, building contractors, bankers and the like.

■ CONCLUSION

Until the United States Supreme Court retreats from Terminix or Congress acts to protect the rights of consumers, members of the plaintiffs' trial bar must continue to fight mandatory and binding arbitration using all the skill and zeal that may be brought to bear on this new injustice. ❑