

IN THE SUPREME COURT OF OHIO

American General Financial Services, Inc.,

Defendant-Appellant,

vs.

Shelton Coleman,

Plaintiff-Appellee.

08-1009

On Appeal from the Cuyahoga County
Court of Appeals, Eighth Appellate
District

Court of Appeals
Case No. CA-07-089311

MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT AMERICAN GENERAL FINANCIAL SERVICES, INC.

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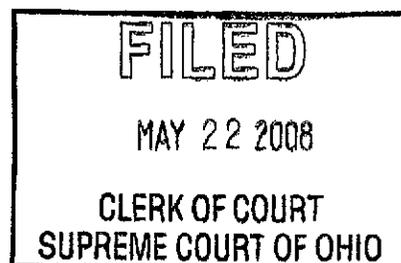


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**EXPLANATION OF WHY THIS CASE IS OF PUBLIC AND
GREAT GENERAL INTEREST**

In its decision below involving arbitrability, the Eighth District held that a loan and security agreement is not part of a secured transaction under Article 9 of the Uniform Commercial Code (“UCC”). This Court should accept this case to resolve three issues arising out of that ruling:

- (1) a secured transaction cannot be split into separate components when determining arbitrability of a secured transaction claim, especially in the context of a broad arbitration clause;
- (2) the analysis of whether a state statute is pre-empted is not applicable to the analysis of whether a claim is arbitrable (thereby resolving the conflict between the Opinion below and the *Howard*¹ decision); and
- (3) when an arbitration clause provides that issues of enforceability of a contract are for the arbitrator to decide, the arbitrator decides whether the contract has terminated, not the court.

This Court has not issued a ruling involving arbitration in the context of an Article 9 secured transaction, and it certainly has not held that a unitary secured transaction can be splintered when determining arbitrability. Attorneys and judges, as well as lenders and borrowers across Ohio, would benefit from clarification from this Court regarding this area of law.

Other courts have disagreed with the Eighth District. The District Court for the Northern District of Ohio² last year did not split a unitary secured transaction into separate components when analyzing the arbitrability of the same issue presented in this case, and compelled

¹ *Howard v. Wells Fargo* (N.D. Ohio 2007), 2007 U.S. Dist. LEXIS 70099.

² *Id.*

arbitration of that issue. Since that decision involved the same arbitration language as used here, enforcement of an arbitration agreement could depend simply upon which Ohio court an action is filed.

Arbitration is used by small and large businesses, lenders, consumers, employers, employees, and countless others. Arbitration helps keep the cost of litigation down not only for businesses, but for all parties involved. Congress believed that avoiding the “delay and expense of litigation” would appeal to big businesses and small businesses, corporate interests and individuals, and that arbitration is advantageous to individuals “who need a less expensive alternative to litigation.” (*Citations omitted*). *Allied-Bruce Terminix Cos. v. Dobson* (1995), 513 U.S. 265, 280. In light of the foregoing, this Court should accept this case to address the important arbitration issues presented.

STATEMENT OF THE CASE AND FACTS

On April 2, 2001, Plaintiff-Appellee Shelton Coleman (“Coleman”) and Defendant-Appellant American General Financial Services, Inc. (“American General”) entered into a loan (the “Loan”). The Loan was evidenced by a Loan and Security Agreement (the “Loan Agreement”) which contained Arbitration Provisions. The signing of the Loan Agreement by the parties created a security interest in the identified collateral. R.C. 1309.203. American General then filed a UCC Financing Statement to perfect that security interest.

The Loan Agreement contained Arbitration Provisions that defined “Covered Claims” as:

[A]ny and all claims and disputes arising out of, in connection with, or relating to your loan from lender...all documents, actions, or omissions relating to [the Loan]...whether the claim or dispute must be arbitrated; the validity of the Arbitration Provisions... or any defenses as to the enforceability of the [Loan] Agreement or the Arbitration Provisions;...any claim or dispute based on the closing, servicing, collection, or enforcement of any transaction covered by the Arbitration Provisions;...[and] any claim or dispute based on or arising under any federal or state statute... (Emphasis added).

The Arbitration Provisions also specifically provide that they apply even if the Loan “has been paid in full” Finally, these Provisions expressly state that the “Federal Arbitration Act, not state arbitration laws or procedures, [apply] to and govern[] the Arbitration Provisions.”

On June 16, 2006, Coleman filed suit, alleging that American General violated R.C. 1309.513 by failing to timely file a termination statement. Coleman sought to recover – for himself and a purported class – the penalty provided for in R.C. 1309.625(E).

On August 7, 2006, American General filed a Motion to Compel Arbitration, Stay Proceedings and Dismiss Class Action Claims (the “Motion to Compel”). On December 21, 2006, the trial court issued a brief Order and Decision (via postcard) denying the Motion to Compel (“Decision”).

Earlier this year, the Eighth District affirmed the Decision, with Judge Melody Stewart dissenting (the “Opinion”). Citing its recent *Bluford*³ decision, the Eighth District ruled that the “statutory duty to file a termination statement is not related to the arbitration agreement that was part of the [Loan Agreement].” Opinion, ¶ 11. The court below improperly imported the pre-emption analysis used by this Court in *Pinchot*⁴ (to determine if an Ohio statute was pre-empted by federal lending law) to the arbitrability issue in this case and refused to enforce the parties’ arbitration agreement.

³ *Bluford v. Wells Fargo Fin. Ohio 1* (8th Dist. 2008), Cuyahoga App. No. 89491, 2008 Ohio 686.

⁴ *Pinchot v. Charter One Bank, FSB* (2003), 99 Ohio St.3d 390, applying the analysis mandated by 12 C.F.R. § 560.2.

Proposition of Law No. 1: A Secured Transaction Cannot Be Split Into Its Component Parts When Determining Arbitrability, Especially Where There is a Broad Arbitration Agreement.

Ohio's version of Article 9 of the UCC, Chapter 1309, details the duties, rights and obligations incurred in connection with a secured transaction. These statutory duties, rights and obligations are intertwined, and are part and parcel of the same transaction.

A secured transaction under Article 9 of the UCC begins with the creation of a security interest, occurring when the parties sign a loan and security agreement. *Advanced Analytics Laboratories v. Kegler, Brown, Hill & Ritter* (10th Dist. 2002), 148 Ohio App.3d 440, 453-454. Upon signing that agreement, the creditor has an enforceable security interest against the debtor/borrower.

The security interest is perfected upon the filing of the lien on the collateral securing the loan, here a financing statement. Once the lien (financing statement) has been filed, the security interest becomes enforceable against third parties and obtains priority. R.C. 1309.322. The secured transaction continues in effect until the lien is released, here with the filing of a termination statement (which is statutorily defined as an amendment of the financing statement⁵). R.C. 1309.513(D).

The signing of a loan and security agreement, the filing of a financing statement, *and* the filing of a termination statement are all part and parcel of one single secured transaction. They all relate to the same loan and the same collateral, as well as the same governing documents. Therefore, where the parties agree to a broad arbitration clause, *all* documents comprising the Article 9 secured transaction should be covered by that arbitration agreement.

⁵ R.C. 1309.102(A)(79).

As Judge Stewart's dissent noted, the Loan Agreement Coleman signed created a secured transaction governed by Article 9, which was perfected when American General filed a financing statement. R.C. 1309.509. If and when Coleman paid the loan in full, American General's "corresponding duty to file a termination statement arose." Opinion, ¶ 17, citing R.C. 1309.513. Only when that termination statement is actually filed does the secured transaction end. In order to bring his claim that a termination statement was not timely filed, Coleman must refer to his Loan Agreement. That very Loan Agreement contains the Arbitration Provisions mandating arbitration of all claims related to the Loan.

In contrast to the approach established by Article 9 of the UCC, the Opinion splits this unitary secured transaction into three separate parts: (1) the Loan Agreement which granted American General a security interest in certain collateral; (2) the financing statement with respect to that collateral; and (3) the termination statement, which is required to be filed *only when the terms of the Loan Agreement have been completed*. There simply is no basis for an arbitrary separation of a solitary transaction for purposes of the arbitrability analysis, especially in light of the FAA's strong pro-arbitration policy and case law.

Whether a security interest in specific collateral has been created and perfected requires review of the loan agreement, security agreement *and* the financing statement. *National Bank of Fulton County v. Haupricht Brothers, Inc.* (6th Dist. 1988), 55 Ohio App.3d 249, 259. Similarly, whether the Loan has been fully paid off thereby triggering the statutory obligation to file a termination statement is *determined by analysis of the Loan Agreement* and its terms, in particular, whether the Loan has in fact been fully paid.

In determining whether Coleman's secured transaction claim is arbitrable, one must remember that the Arbitration Provisions in his Loan Agreement are very broad. When a broad

arbitration clause is used in a contract, only claims (a) the parties specifically removed from the scope of the arbitration provision, or (b) those where the legislature “evinced an intention to preclude a waiver of judicial remedies,” fall outside an arbitration clause. *Academy of Medicine of Cincinnati v. Aetna Health, Inc.* (2006), 108 Ohio St.3d 185, 188. This presumption of arbitrability is “particularly applicable” in cases involving broad arbitration clauses. *Simon v. Pfizer, Inc.*, (6th Cir. 2005) 398 F.3d 765, 773, n12. “Broadly written arbitration clauses must be taken at their word . . .” (*Citation omitted*). *Watson Wyatt & Co. v. SBC Holdings, Inc.* (6th Cir. 2008), 513 F.3d 646, 650.

This Court has previously held that an “arbitration clause that contains the phrase ‘any claim or controversy arising out of or relating to the agreement’ is considered ‘the paradigm of a broad clause’ and must be considered as such.” (*Quotations omitted*). *Academy of Medicine*, 108 Ohio St.3d at 188-89. Thus, a broad arbitration agreement must be given effect “unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” (*Internal quotations omitted*). *Id.* at 188. *See also Masco Corp. v. Zurich Am. Ins. Co.* (6th Cir. 2004), 382 F.3d 624, 627.

It is undisputed that the subject Arbitration Provisions – providing for the arbitration of “any and all claims and disputes arising out of, in connection with, or relating to” the Loan – is “the paradigm of a broad clause.” *Academy of Medicine*, 108 Ohio St.3d at 188. Where a clause stipulates that any dispute “arising out of or related to” a contract is arbitrable, it is hard to conclude “with positive assurance” that the arbitration clause does not apply to the disputed claim. *Id.*

Nor is the other prong of the *Academy of Medicine* test met. There is no evidence that the Ohio General Assembly “evinced an intention to preclude a waiver of judicial remedies” with

respect to secured transactions. *Academy of Medicine*, 108 Ohio St.3d at 188. Absent such intention, secured transaction disputes are arbitrable when, as here, the parties so provide.

The Eighth District focused only on one portion of the secured transaction, R.C. 1309.513 (the duty to file a termination statement) and the related damages provision (R.C. 1309.625), and ignored the rest of Chapter 1309. Whether this splintering of a unitary secured transaction under Article 9 of the UCC is appropriate in the arbitrability analysis is a question this Court should answer.

Proposition of Law No. 2: The Conflict Between the Opinion and *Howard* Should Be Resolved by Holding That the Pre-Emption Analysis Does Not Apply to the Arbitrability Analysis.

The Eighth District held that Coleman’s claim was not arbitrable based on the fact that recording of a termination statement was not an integral part of the loan process. This created a conflict with the Northern District of Ohio and other courts, leading to confusion and uncertainty for all parties.

a. The Opinion Conflicts with the Howard Decision

As this Court has held, a dispute arising after termination of a contract is still arbitrable unless “the action could be maintained without reference to the contract or relationship at issue.” *Academy of Medicine*, 108 Ohio St.3d at 191 (relying on Sixth Circuit precedent⁶). The United States Supreme Court also has held that a dispute is arbitrable even if it arises after the expiration of a contract when the dispute “clearly arises under that contract.” *Nolde Bros., Inc. v. Local No. 358, Baker & Confectionery Workers Union, AFL-CIO* (1977), 430 U.S. 243, 249.

Applying this standard, the Northern District of Ohio recently held that where an arbitration agreement calls for the “broadest possible meaning,” a statutory claim for failure to

⁶ *Fazio v. Lehman Bros.* (6th Cir. 2003), 340 F.3d 386, 395.

timely record a lien satisfaction would not exist but for the loan agreement, and therefore, that claim was arbitrable. *Howard*, 2007 U.S. Dist. LEXIS 70099 at *8-9.⁷ Since the lien satisfaction statute “would not be implicated unless there [was] satisfaction of the Note obligation,” the *Howard* court enforced the arbitration agreement. *Id.* The *Howard* decision by the Northern District of Ohio ***directly contradicts*** the Eighth District’s Opinion.

If this Court does not resolve this conflict, whether a particular dispute is arbitrable will depend on the court in which a claim is filed. Indeed, Coleman stated that it was his “specific intent not to provide any United States District Court with jurisdiction ...” and he pled his claim so as to avoid removal to federal court. This Court should accept this case so as to preclude any such forum shopping.

b. The Pinchot Decision Does Not Apply

In the instant case (and two others⁸), the Eighth District relied on this Court’s *Pinchot* decision, finding that the recording of a lien satisfaction is not an integral part of the lending process, and refused to enforce the arbitration agreements. This reliance on *Pinchot* is misplaced.

In *Pinchot*, a borrower sued his lender for failing to timely record a mortgage satisfaction after it had been fully paid, in violation of R.C. 5301.36. *Pinchot*, 99 Ohio St.3d 390. In response, the lender, a federal savings association organized under the Home Owners’ Loan Act

⁷ That case involved the alleged failure to timely file a satisfaction of mortgage.

⁸ *Bluford*, 2008 Ohio 686, and *Alexander v. Wells Fargo Financial Acceptance Ohio 1*, (8th Dist. March 27, 2008), App. No. CA-07-089277, 2008 Ohio 1402 (Stewart, J, dissenting). A Memorandum in Support of Jurisdiction was filed with this Court on April 4, 2008 in the *Bluford* case (Supreme Court Case No. 2008-0635). As of the date this Memorandum was filed, the Court had yet to rule on accepting jurisdiction.

(“HOLA”)⁹, argued that Ohio’s mortgage satisfaction statute was pre-empted, based on federal regulations promulgated by the Office of Thrift Supervision (“OTS”).

The issue in *Pinchot* was not arbitrability, but whether a federal law (HOLA) pre-empted Ohio’s mortgage satisfaction statute. As this Court noted, the analysis of whether or not a state statute is pre-empted is determined based on various factors set forth in the OTS’ regulations. *Pinchot*, 99 Ohio St.3d at 393, *citing* 12 C.F.R. § 560.2. The preemption analysis was necessary because the OTS declared that it “occupies the entire field of lending regulation for federal savings associations.” 12 C.F.R. § 560.2(a). Courts narrowly construe federal statutes and regulations in determining whether there is pre-emption of a state statute. *In re Miamisburg Train Derailment Litigation* (1994), 68 Ohio St.3d 255, 264, *citing* *Cipollone v. Liggett Group, Inc.* (1992), 505 U.S. 504, 518.

The arbitrability analysis vastly differs from this preemption analysis, and is made based on the broad pro-arbitration philosophy of the FAA. *Preston v. Ferrer* (2008), 552 U.S. _____, 128 S.Ct. 978, 981.¹⁰ Courts broadly construe application of the FAA and the scope of arbitration clauses when determining arbitrability. See, *e.g.*, *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.* (1983), 460 U.S. 1, 24.

Judge Stewart noted this in her dissent, stating that “the *Pinchot* decision had nothing to do with the interpretation or applicability of arbitration clauses contained within loan agreements.” Opinion, ¶ 14. The arbitrability analysis simply determines the venue in which a claim is adjudicated. In contrast, the preemption analysis determines whether or not a state statute applies at all to that claim.

⁹ 12 U.S.C. §14, *et seq.*

¹⁰ Given its recency, *Preston v. Ferrer* has yet to be published in the U.S. Register.

The *Howard* court flatly rejected the rationale applied by the Eighth District, noting that *Pinchot* “concerns the issue of federal preemption – a different and quite distinguishable analysis from a determination of arbitrability.” *Howard*, 2007 U.S. Dist. LEXIS 70099 at *9. The *Howard* court analyzed the same “arising out of or related to” language used in the arbitration clause here and in the virtually identical context of a failure to file a mortgage release after a loan allegedly had been fully paid. *Id.* at **8-9.

Howard held that even though this failure occurred after the debt was extinguished, the claim implicated the obligations of the parties under the loan and the borrower-creditor relationship: “[B]ut for the Loan and mortgagor-mortgagee relationship, there would be no obligation placed on the bank to record a satisfaction upon full payment.” (*Emphasis in original*). *Howard*, 2007 U.S. Dist. Lexis 70099 at *8. As such, the arbitration clause was enforceable. *Id.* This Court should accept this case to resolve this conflict over the correct arbitrability analysis.

Proposition of Law No. 3: Whether a Contract is Terminated So As To Preclude Arbitration is a Question for the Arbitrator, Not the Court.

The question of who should decide if or when the contract terminated is also important. Once again, attorneys, judges and Ohio citizens need guidance as many arbitration agreements provide that the arbitrator and not the court should decide this issue. Since this Court has not yet ruled on this issue, it should accept this case to resolve it.

The FAA requires courts to distinguish between claims that the contract was invalid or unenforceable, and claims that attack only the arbitration clause. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967), 388 U.S. 395, 403-404. The Court explained:

[T]he federal court is instructed to order arbitration to proceed once it is satisfied that ‘the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue.’ Accordingly, if the claim is fraud in the

inducement of the arbitration clause itself – an issue which goes to the ‘making’ of the agreement to arbitrate – 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.

The United States Supreme Court unequivocally held that when parties agree to arbitrate all disputes arising under their written contract, questions concerning the validity of the entire contract are to be resolved by the arbitrator in the first instance, not by a federal or state court. *Buckeye Check Cashing, Inc. v. Cardegna* (2006), 546 U.S. 440, 445-446. Applying previous holdings, the *Buckeye* Court found that, whether in state or federal court, “as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.” *Id.* Thus, questions surrounding the contract must be decided by an arbitrator, not a court.

Since a contract and its arbitration clause are separate entities, whether a contract containing an arbitration clause has terminated is a question for the arbitrator, not the court. As the FAA provides, the court decides issues surrounding the arbitration agreement before examining the merits of a claim. Once the court determines that the arbitration agreement is valid, the court must stay the action until the arbitration decides issues involving the entire contract. 9 U.S.C. § 3.

Had Coleman alleged in this case that the Loan was void, it would be up to an arbitrator, not a court, to determine the validity of that assertion. *Buckeye*, 546 U.S. at 445. Applying the principals articulated in both *Prima Paint* and *Buckeye*, where the termination of a contract is alleged, that issue should be determined by an arbitrator. Allowing the ruling in the Eighth District to stand would permit an individual to improperly avoid arbitration by simply asserting that his contract had terminated – in the same way he avoided arbitration by alleging his contract was void due to fraud before *Buckeye*. As such, this Court should accept jurisdiction to

determine whether the arbitrator or the court should decide in the first instance whether a contract containing a valid arbitration clause has terminated.

CONCLUSION

This Court should accept jurisdiction over this case to answer significant issues of arbitrability not yet ruled on by this Court. In particular, this Court must clarify that a secured transaction cannot be split into its component parts when determining if a secured transaction is arbitrable, that the *Pinchot* pre-emption analysis is irrelevant to the arbitrability analysis, and that the arbitrator, not the court, should decide if a contract has been terminated so as to preclude arbitration when a broad arbitration clause so provides.

Respectfully submitted,



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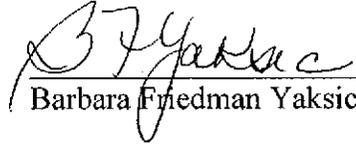
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CERTIFICATE OF SERVICE

A copy of the foregoing *Memorandum in Support of Jurisdiction of Appellant American General Financial Services, Inc.* was sent by regular U.S. Mail, first class, postage prepaid this 21st day of May, 2008 to:

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89311

SHELTON COLEMAN

PLAINTIFF-APPELLEE

vs.

AMERICAN GENERAL FINANCIAL SERVICES

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-594166

BEFORE: Blackmon, J., Gallagher, P.J., and Stewart, J.

RELEASED: March 27, 2008

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FILED AND JOURNALIZED
PER APP. R. 22(E)

APR 7 - 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY: [Signature] DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

MAR 27 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY: [Signature] DEP.

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

PATRICIA ANN BLACKMON, J.:

American General Financial Services, Inc. ("AGF") appeals the trial court's denial of AGF's motion to compel arbitration. AGF assigns the following error for our review:

"I. The trial court erred in finding that Coleman's claim against American General was not subject to the arbitration provisions agreed to by the parties."

Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

Background History

Shelton Coleman entered into a \$5,000 loan agreement with AGF. Coleman also signed a UCC-1 financing statement evidencing the collateral which secured his loan. Coleman paid his loan in full. However, AGF failed to file a termination of the financing statement prescribed by R.C. 1309.513. Pursuant to this provision, the termination statement must be filed within 30 days of the payment of the loan. Failure to timely file the statement triggers a \$500 penalty.¹

Coleman filed a class action complaint against AGF. Coleman sought to represent a class of persons who paid their loans with AGF in full, yet AGF

¹R.C. 1309.625.

failed to file a termination statement within 30 days. AGF answered the complaint and also filed a motion to compel arbitration.

The motion to compel arbitration was based on the arbitration provisions contained within the loan. The loan provided in bold and capital letters as follows:

“TO OBTAIN THIS LOAN, YOU MUST AGREE TO A MANDATORY ARBITRATION PROVISION. BY SIGNING BELOW, YOU HAVE READ, UNDERSTAND AND AGREE TO THE TERMS AND CONDITIONS OF THIS AGREEMENT, INCLUDING THE MANDATORY ARBITRATION PROVISIONS THAT PROVIDE, AMONG OTHER THINGS, ~~THAT EITHER YOU OR THE LENDER MAY REQUIRE~~ THAT CERTAIN DISPUTES BETWEEN YOU AND LENDER BE SUBMITTED TO BINDING ARBITRATION. [EMPHASIS ADDED.] IF YOU OR LENDER ELECTS TO USE ARBITRATION, BOTH YOU AND LENDER WILL HAVE WAIVED YOUR AND LENDER’S RIGHTS TO A TRIAL BY A JURY OR JUDGE, THE DISPUTE WILL BE DECIDED BY AN ARBITRATOR AND THE DECISION OF THE ARBITRATOR WILL BE FINAL. ARBITRATION WILL BE CONDUCTED PURSUANT TO THE RULES OF THE NATIONAL ARBITRATION FORUM.”

The “Covered Claims” under the arbitration agreement included “any and all claims and disputes *** that have arisen or may arise between: you and Lender, you and Lender’s affiliates; or you and the employees, agents, officers or directors of Lender; or its affiliates.” The provision specifically states that mandatory arbitration applies “even if your loan has been *** paid in full ***.”

The agreement further clarifies that arbitration applies to all disputes between Coleman and AGF, stating that:

“Covered Claims include, without limitation, all claims and disputes arising out of, in connection with, or relating to your loan from lender today * all documents, actions, or omissions relating to this or any previous loan *** any claim or dispute based on the closing, servicing, collection, or enforcement of any transaction covered by the Arbitration Provisions; *** any claim or dispute based on or arising under any federal or state statute or rule; ***.”**

The trial court denied AGF’s motion to compel arbitration, stating in its order as follows:

“Defendant American General Financial Services Inc.’s 8/7/06 motion to compel arbitration, stay court processing and to dismiss class action claims is denied. The arbitration clause at issue has no effect on the cause of action arising after the completion of the contract. Accordingly, the motion to stay or to dismiss is denied as moot as the arbitration clause is no longer binding and plaintiff may proceed in seeking class certification.”²

Denial of Motion to Compel

In its sole assigned error, AGF contends the trial court erred in denying AGF’s motion to compel. AGF contends Coleman’s claim was covered by the arbitration agreement even though it concerned a claim that arose after the loan was paid and constituted a violation of a statute. We disagree.

²Journal Entry, December 21, 2006.

In support of the trial court's judgment, Coleman contends that because the filing of the financing statement occurs after the loan is satisfied, the arbitration agreement attached to the loan document is moot. He cites to the Ohio Supreme Court case of *Pinchot v. Charter One Bank, F.S.B.*³ in support of this argument. In *Pinchot*, the Supreme Court held that the recording of a mortgage satisfaction is not an integral part of the lending process because it occurs after the debt is satisfied.

This court in *Bluford v. Wells Fargo Fin. Ohio 1, Inc.*⁴ recently addressed ~~whether a loan agreement governs the lender's duty to file a termination~~ statement. In *Bluford*, the plaintiffs had paid off their mortgages, but Wells Fargo had failed to file their mortgage satisfaction statements in a timely manner. This court, relying on the Supreme Court's decision in *Pinchot*, held that the recording of the satisfaction of the mortgage is separate and independent from the mortgage document in which the arbitration agreement was contained. This court also rejected the same "but for" argument raised by AGF. That is, but for the loan document, there would be no obligation on the part of the bank to file the satisfaction of the loan document. We explained:

"Wells Fargo relies on *Fazio v. Lehman Bros., Inc.* (6th Cir. 2003), 340 F.3d 386, for the proposition that, but for the loan

³99 Ohio St.3d 390, 2003-Ohio-4122.

⁴Cuyahoga App. No. 89491, 2008-Ohio-686.

agreement, Bluford would not now be seeking a remedy under R.C. 1309.513 and 1309.625. We hold that the decision in *Fazio* ‘functions as a tool to determine a key question of arbitrability – whether the parties agreed to arbitrate the question at issue. It prevents the absurdity of an arbitration clause barring a party to the agreement from litigating any matter against the other party, regardless of how unrelated to the subject of the agreement. It allows courts to make determinations of arbitrability based on the factual allegations in the complaint instead of on the legal theories presented. It also establishes that the existence of a contract between the parties does not mean that every dispute between the parties is arbitrable.’ *Acad. of Med. v. Aetna Health, Inc.* (2006), 108 Ohio St.3d 185, 842 N.E.2d 488.

“In this case, the loan agreement between Wells Fargo and ~~Bluford was extinguished when the debt was paid in full.~~

Despite the language in the arbitration agreement that it extends to disputes arising out of future dealings, we do not agree that it covers Bluford’s claims under R.C. 1309.513 and 1309.625. Wells Fargo’s statutory duty to file a termination statement is not related to the arbitration agreement that was part of the note and security agreement.”⁵

Based on this court’s ruling in *Bluford*, we conclude that the dispute between Coleman and AGF regarding the filing of the termination statement was not subject to arbitration. We do not need to address the issue of whether the class action waiver was against public policy or whether the arbitration agreement was unconscionable because these issues are moot.⁶ Accordingly, AGF’s sole assigned error is overruled.

⁵Id. at ¶¶ 28, 29.

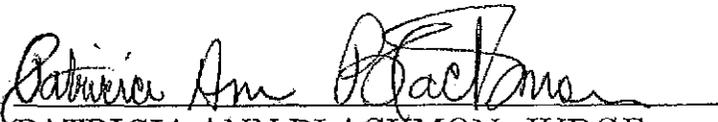
⁶App.R. 12(A)(1)(c).

Judgment affirmed.

It is, therefore, considered that said appellee recover of said appellant their costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, P.J., CONCURS;
MELODY J. STEWART, J., DISSENTS.
(SEE ATTACHED DISSENTING OPINION)

MELODY J. STEWART, J., DISSENTING:

I respectfully dissent from the decision reached by the majority. I would reverse the decision of the trial court and find that Coleman's statutorily based claim against American General is subject to the arbitration clause contained in the agreement between the parties.

The majority relies upon this court's recent decision in *Charles L. Bluford, et al. v. Wells Fargo Fin. Ohio 1, Inc.*, Cuyahoga App. No. 89491, 2008-Ohio-686, which in turn relied upon *Pinchot v. Charter One Bank*, 99 Ohio St.3d 390, 2003-Ohio-4122, to support its position that because the lender's duty to file the

UCC termination statement arose after the loan had been paid in full, the duty to release cannot be related to the arbitration clause in the loan agreement documents. The majority's reliance is unfounded. The *Pinchot* decision had nothing to do with the interpretation or applicability of arbitration clauses contained within loan agreements. *Pinchot* dealt solely with the issue of whether federal law preempts the state statute requiring the recording of a mortgage satisfaction. The court's finding that the recording function is not sufficiently integral to the lending process so as to subject the state statute to ~~federal preemption should not be so broadly interpreted to find that the lender's~~ duty to record can never be the subject of an arbitration agreement between the lender and borrower.

The Ohio Supreme Court has long recognized that in Ohio, the courts and the General Assembly favor arbitration to settle disputes. See *ABM Farms v. Woods*, 81 Ohio St.3d 498, 1998-Ohio-612. Recently, in *Academy of Med. v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657, the Court reaffirmed this position and identified four rules for determining whether arbitration may be compelled. The fourth rule states that "where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that 'an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of

an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.” Id. at ¶14, quoting *Council of Smaller Enterprises v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 666, 1998-Ohio-172.

The terms of the financing agreement between Coleman and American General are spelled out in a document entitled “Federal Disclosures and Loan, Security, and Arbitration Agreement.” This agreement includes a very broad arbitration provision in which the arbitration process, its costs, and the agreement’s coverage are spelled out in great detail. The arbitration agreement ~~specifically states that the provisions apply even if the loan has been paid in~~ full, and further provides that disputes or claims arising under state statutes are covered by the agreement.

By following *Bluford* to find that Coleman’s statutory claim falls outside of the arbitration agreement because it arises after the loan is paid, the majority decision misses a salient point. The loan and security agreement Coleman signed establishes that the loan is a secured transaction subject to Chapter 1309 of the Revised Code. Chapter 1309 sets forth the rights and duties of the parties to a secured transaction. American General’s right to file a financing statement arose when the loan documents were signed. See R.C. 1309.509. Its corresponding duty to file a terminating statement arose when Coleman paid the loan in full. See R.C. 1309.513. Coleman’s statutory claim

is created by the secured transaction. However, the right to claim damages for the failure to file the terminating statement did not, indeed could not, arise until after the loan was paid. See R.C. 1309.625.

Clearly the agreement at issue with its broad arbitration clause is, at a minimum, "susceptible of an interpretation" that covers Coleman's statutory claim. Coleman is bound by the express terms of the agreement he signed. He agreed that any claims he may have, including those arising after the loan was paid and those arising under statute, would be decided through arbitration. For ~~these reasons, I would reverse the trial court's decision denying appellant's~~ motion to compel arbitration.



CASE: CV-06-594166

426754

SHELTON COLEMAN
VS.
AMERICAN GENERAL FINANCIAL SERVICES, I

JUDGE: NANCY A FUERST
ROOM: 15B JUSTICE CENTER
DOCKET DATE: 12/21/2006

DEFT AMERICAN GENERAL FINANCIAL SERVICES
INC'S 8/7/06 MOTION TO COMPEL ARBITRATION,
STAY COURT PROCEEDINGS AND TO DISMISS CLASS
ACTION CLAIMS IS DENIED. THE ARBITRATION
CLAUSE AT ISSUE HAS NO EFFECT ON THE CAUSE
OF ACTION ARISING AFTER THE COMPLETION OF
THE CONTRACT. ACCORDINGLY, THE MOTION TO
STAY OR TO DISMISS IS DENIED AS MOOT AS THE
ARBITRATION CLAUSE IS NO LONGER BINDING AND
PLTF MAY PROCEED IN SEEKING CLASS
CERTIFICATION. D1 AMERICAN GENERAL FINANCIAL
SERVICES INC MOTION FOR PROTECT
...(OSJ)

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JUSTICE CENTER - COURT TOWER
1200 ONTARIO ST
CLEVELAND, OH 44113

TO:

BARBARA F YAKSIC
25550 CHAGRIN BLVD.
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CLEVELAND, OH 44122



42955628

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

SHELTON COLEMAN
Plaintiff

AMERICAN GENERAL FINANCIAL SERVICES, INC.
Defendant

Case No: CV-06-594166

Judge: NANCY A FUERST

JOURNAL ENTRY

DEFT AMERICAN GENERAL FINANCIAL SERVICES INC'S 8/7/06 MOTION TO COMPEL ARBITRATION, STAY COURT PROCEEDINGS AND TO DISMISS CLASS ACTION CLAIMS IS DENIED.

THE ARBITRATION CLAUSE AT ISSUE HAS NO EFFECT ON THE CAUSE OF ACTION ARISING AFTER THE COMPLETION OF THE CONTRACT.
ACCORDINGLY, THE MOTION TO STAY OR TO DISMISS IS DENIED AS MOOT AS THE ARBITRATION CLAUSE IS NO LONGER BINDING AND PLTF MAY PROCEED IN SEEKING CLASS CERTIFICATION.
D1 AMERICAN GENERAL FINANCIAL SERVICES INC MOTION FOR PROTECTIVE ORDER STAYING DISCOVERY PENDING RESOLUTION OF DEFTS MOTION TO COMPEL ARBITRATION, STAY COURT PROCEEDINGS AND TO DISMISS CLASS ACTION BARBARA F YAKSIC 0014338, FILED 08/22/2006, IS MOOT.

Judge Signature

12/20/2006

12/20/2006

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