

OHIO SUPREME COURT

American General Financial Services,
Inc.

Defendant–Appellant

v.

Shelton Coleman

Plaintiff–Appellee

S. Ct. No. 2008-1009

Appeal from Ohio
8th District Appeals Court

Cuyahoga App.
No. CA-07-089311

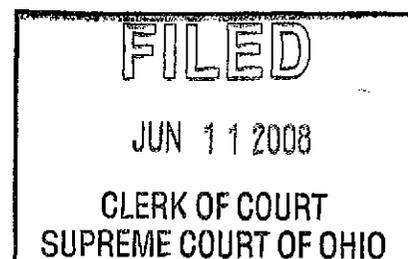
MEMORANDUM OPPOSING JURISDICTION

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**THIS CASE PRESENTS NO MATTER OF PUBLIC
OR GREAT GENERAL INTEREST**

Discretionary review is granted to address questions of unsettled law. American General Finance (AGF) asks this Court to accept this case to resolve whether “a unitary secured transaction can be splintered when determining arbitrability” and resolve a purported conflict between a non-appealed federal trial court decision and the Ohio Eighth District Court of Appeals decision in this case. AGF Memorandum in Support of Jurisdiction at p. 1. AGF says certification is needed to clarify this area of the law. *Id.*

But this Court already recently established the law in Ohio on this issue in *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657. *Aetna*, written by Justice Pfeifer with concurrence by Chief Justice Moyer and Justices Resnick, O’Connor, and O’Donnell, agreed that the standard in Ohio for determining arbitrability of a claim where there is a broad “arising out of or relating to” arbitration clause is whether the “action could be maintained without reference to the contract or relationship at issue.” See *Aetna* at ¶6.

Rather than being a currently unsettled question of law, that was the specific issue upon which this Court granted the jurisdictional motion, and answered, in *Aetna*:

This court granted appellant’s jurisdictional motion on a limited basis, ordering briefing only on the following issue: ‘In determining whether a cause of action is within the scope of an arbitration agreement, may a state court in Ohio base that determination on a federal standard that inquires whether the “action could be maintained without reference to the contract or relationship at issue?”’ . . .

Aetna at ¶9.

AGF insists that this Court should clarify that “whether a contract containing an arbitration clause has terminated is a question for the arbitrator, not the court.” See AGF Memorandum at p. 12.

But that question was also specifically answered in *Aetna*:

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.’ . . . The arbitration provision in this case purports to cover any disputes about the parties’ business relationship and must be considered a broad clause.

Aetna at ¶18.

AGF complains that the court of appeals went astray because Ohio law is unclear whether a cause of action arising by statute (here Article 9 of the Uniform Commercial Code) is subject to an arbitration clause. AGF Memorandum at p. 1. Again, rather than being something upon which this Court’s guidance and holding is necessary, that specific question was also answered in *Aetna*.

Arbitration is not limited to claims alleging a breach of contract, and creative pleading of claims as something other than contractual cannot overcome a broad arbitration provision. The over-arching issue is whether the parties agreed to arbitrate the issue. . . . ‘There is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded in statutory rights.’ . . .

Aetna at ¶19.

Aetna already directed Ohio courts to use the test whether the “action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration agreement.” *Aetna* at ¶6.

The court of appeals in the *Bluford v. Wells Fargo Fin. Ohio 1, Inc.*, Cuyahoga App. No. 89491, 2008-Ohio-686 (incorporated by reference by the court of appeals decision in this case) used exactly that test:

A proper method of analysis here is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration agreement.

Bluford at ¶25.

The application of an already-established standard of law, to a particular case or set of facts, is not a matter upon which certification is granted. *Williamson v. Rubich* (1960), 171 Ohio St. 253, 254.

The court of appeals decision here is not surprising, nor of interest to anyone other than these class members. The operative statutes R.C. 1309.513 and 1309.625 pertain only to Financing Statements. The determination of liability in such a case is made “without reference” to the Loan Agreement or contract at issue. This particular lawsuit pertains only to the recorded and never-released Financing Statement.

Finally, another issue presented by AGF to this Court for certification—and one, which has not been addressed by this Court—is the unconscionability/public policy of a class action waiver in an arbitration clause. However, the court of appeals did not issue a ruling on that question. Court of Appeals Opinion at ¶12 (“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. App.R. 12(A)(1)(c).”). Therefore, jurisdiction for review would not lie. *Mills-Jennings, Inc. v. Dept. of Liquor Control* (1982), 70 Ohio St.2d 95, 99(questions not passed upon by the lower court will not be ruled upon by this Court).

STATEMENT OF THE CASE AND OF THE FACTS

The brief statement of the case and facts by AGF on pp. 3–4 of its Memorandum is sufficient to outline the factual and procedural background of this matter. Plaintiff only adds the following points:

At the time of the loans, Coleman and the other class members separately filled-out and signed UCC-1 Financing Statements.

The Complaint identifies the class as “all persons named as debtors in financing statements filed in Ohio covering consumer goods” with AGF. For the named plaintiffs, the Complaint asserts that he “was named as the debtor in a financing statements filed in Ohio covering consumer goods, where defendant was the secured party (and the secured party of record).” Complaint, ¶¶1 & 3. The Complaint does not in any way reference or rely on the Loan Agreement.

ARGUMENT ON PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. I: A Secured Transaction Cannot Be Split Into Its Component Parts When Determining Arbitrability, Especially Where There is a Broad Arbitration Clause.

APPELLEES’ RESPONSE: This proposition is already the law in the State of Ohio. *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657.

There is no unsettled question on this point—for it is already the law—that completion or failure of the underlying contract does not affect the enforceability of the arbitration clause. *ABM Farms v. Woods* (1998), 81 Ohio St.3d 498.

The “standard” articulated in the Proposition of Law proposed by AGF is already the law in Ohio.

‘A proper method of analysis . . . is to ask if an action could be maintained without reference to the contract or relationship at issue.’ . . .

Aetna, at ¶¶24 & 30.

Here, the Eighth District specifically used that standard. See Court of Appeals Opinion at ¶11. AGF disputes the outcome on this particular case, but certification is not granted to determine the correctness of rulings by lower courts in individual cases. *Williamson v. Rubich*, *supra*. Further, the principle that arbitration clauses apply equally to statutory claims is not an “unsettled” point of law upon which this Court’s guidance is necessary. It is already Ohio law:

Arbitration is not limited to claims alleging a breach of contract, and creative pleading of claims as something other than contractual cannot overcome a broad arbitration provision. The over-arching issue is whether the parties agreed to arbitrate the issue. . . . ‘There is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded in statutory rights.’ . . .

Aetna at ¶19.

Bringing a claim under a statute like Article 9 of the UCC does not guarantee that it will be arbitrable, or not. Rather, the statutory claim undergoes the same analysis as any other type of claim:

Statutory claims, including antitrust claims, are neither per se arbitrable or not arbitrable. Those claims must undergo the analysis that every other claim faces: whether the parties agreed to arbitrate the issue.

Aetna at ¶20.

The court of appeals reviewed the trial court’s conclusion on that question using the standard required by *Aetna*. See Opinion at ¶11. Was the fact that the parties had a written Loan Agreement irrelevant, or controlling, to the cause of action pled in the lawsuit? *Aetna* at ¶24.

In *Aetna*, the plaintiffs were medical associations and doctors who had written provider agreements with Aetna. Plaintiffs claimed that Aetna fixed the prices in the provider agreements in violation of antitrust law.

It was not disputed that “but-for” provider agreements between the plaintiffs and Aetna, there would not have been a relationship upon which to allege price fixing; unlawfully fixed rates; and thus a lawsuit. The *Aetna* defendants therefore claimed that the arbitration agreements controlled. This Court disagreed, and established the *Aetna* test. Interestingly, AGF’s argument to this Honorable Supreme Court now is identical to the argument made by the two dissenting Justices in *Aetna*:

The provider agreements constitute the alleged anti-competitive instruments that gave the physicians standing to sue. ... They are at the core of the Valentine Act claims, for they allegedly contain the evidence of anti-competitive conduct and financial harm. They contain the reimbursement rates allegedly implicating unlawful restraint. The antitrust conspiracy claims relate to the provider contracts that contain the broad clauses requiring arbitration of any dispute ‘about the business relationship’ between the physicians and [defendant].

Aetna dissent at ¶38.

The *Aetna* majority rejected that approach and established what the standard in Ohio is now. Where the lawsuit arises from an obligation independent from the contract containing the arbitration provision and is not determined by the provisions of the contract, the dispute is not covered by the arbitration provision. Rather than requiring certification, that was the standard in this case used by the Eighth District. In the types of transactions presented by this case, the Loan Agreement is extinguished—and the consumer’s account is marked “Paid in full.” The only dispute between the parties relates to not terminating the Financing Statement.

Very simply, could AGF have included language on the Financing Statement indicating that it was subject to arbitration? Yes. Could it have drafted the arbitration agreement to indicate that it encompassed not only the Loan Agreement, but also any disputes thereafter arising under the Financing Statement? Yes. But it did not. That issue, in the instant case, is

entirely peculiar to these parties and these facts. It is not a matter of public or great general interest.

In the particular set of facts pertaining to this case, the arbitration clause depends on neither the contract nor the relationship under the Loan Agreement. The relationship and contract are over, *Pinchot v. Charter One Bank, F.S.B.*, 99 Ohio St.3d 390, 2003-Ohio-1422, but an independent duty exists between AGF and certain customers (the ones against whom AGF filed Financing Statements) to terminate them.

Where a party has “fully performed” under a contract, and then a lawsuit is brought questioning obligations arising from that contract, or making claims that analyze the terms of the contract to determine who prevails, an arbitration clause in that contract is enforceable. Conversely, where the contract is over and a lawsuit is brought, but the issues raised do not depend on the contract relationship or any of the contract terms, the arbitration provision does not apply. This has nothing to do whether the contract is “completed.” It has to do with whether the underlying lawsuit can be brought within the *Aetna* test. That is already the law in Ohio. And it is also the law federally. See, e.g., *Howard v. AGF*, 2007 U.S. Dist LEXIS 70099—a decision the defense cites liberally in its Memorandum, but not for any of the following points.

First, “arbitration clauses are subject to the same defenses or bars as other contract provisions. 9 U.S.C. Section 4 (2003). The Court must ascertain whether the parties agreed to arbitrate the dispute at issue. See, *Mitsubishi Motors Corp.*” *Howard* at *6.

Second, “a party cannot be required to arbitrate any dispute if the party has not agreed to do so. *Steelworkers v. Warrior & Gulf Co.*, 363 US 574, 582 (1960).” *Howard* at *6.

Third, “the FAA does not confer an absolute right to compel arbitration, but only a right to obtain an order directing that ‘arbitration proceed in the manner provided for in the parties’

agreement.” *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 469 (1989).”

Howard at *7.

PROPOSITION OF LAW NO. II: The Conflict Between the Opinion and Howard Should Be Resolved by Holding That the Pre-Emption Analysis Does Not Apply to the Arbitrability Analysis.

APPELLEE’S RESPONSE: The Howard decision cited by AFG was a federal District Court decision—and was never appealed. *Fazio v. Lehman Bros., Inc.* (6th Cir. 2003), 340 F.3d 386 established federal law on this issue—which the Cuyahoga appeals court decision does not conflict with (and which it actually cited and discussed in the decision).

The *Howard* decision cited by AFG was a federal District Court decision—and was never appealed. *Fazio v. Lehman Bros., Inc.* (6th Cir. 2003), 340 F.3d 386 earlier established federal law on this issue—which the Cuyahoga appeals court decision does not conflict with (and which it actually cited and discussed in the decision).

PROPOSITION OF LAW NO. III: Whether a Contract is Terminated So As To Preclude Arbitration is a Question for the Arbitrator, Not the Court.

APPELLEE’S RESPONSE: AGF argues that a person who paid off a loan can claim that “a contract containing an arbitration clause has terminated” and use this argument by itself to avoid arbitration—and that this alleged termination should be “a question for the arbitrator, not the court.” Again, the Eighth District never made that holding. The court of appeals did not rule on this question. Therefore, certification does not lie.

The court of appeals did not rule upon this issue. There was never any dispute that the loan was paid off.

Since our court of appeals did not address the class waiver issue at all, certification does not lie. *Mills-Jennings, Inc. v. Dept. of Liquor Control* (1982), 70 Ohio St.2d 95, 99(questions not passed upon by the lower court will not be ruled upon by the supreme court). In cases granted discretionary appellate review, jurisdiction only extends to matters decided by the court of appeals and part of the underlying judgment. *Mills-Jennings, supra; cf. Fallang v. Hickey* (1988), 40 Ohio St.3d 106, 109(determining matter not passed upon below would be rendering of

improper advisory opinion). See, also, Ohio Constitution, Article IV, Section 2(E): “The supreme court shall have appellate jurisdiction as follows ... in cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals.”; and see, *Hoffman v. Staley* (1915), 92 Ohio St. 505 (dismissing petition for review on basis that question involved in cause had not been “decided by the court of appeals”).

RESPONSE TO AMICUS BRIEF

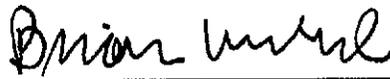
The *amici* argue that the standard is unclear in these cases. Just the opposite, this Court set the standard in *Aetna*, and the court of appeals here applied that standard. The *amici* argue that the court of appeals reflected a suspicion of consumer arbitration. That is curious since the court of appeals stated the opposite—indicating that arbitration will be broadly construed in favor of arbitration. The *amici* purport to cite “surveys and statistics” on whether different groups of people do or do not like arbitration. Who cares? In short, rather than threatening to “undermine millions of arbitration agreements currently in place in Ohio and across the nation” as the *amici* complain, the court of appeals Opinion applies the standard this Court directed in *Aetna*.

The one thing the *amici* do get right, is their comment on p. 11 of their Brief that, “American General has an extremely strong argument that its statutory duty to file termination statements is **related to and arises out of the fact that a financing statement was filed ...**” (emphasis added). And that is exactly the point.

CONCLUSION

Rather than presenting any new or unresolved question, the matters raised by AGF were already, and recently, addressed by this Court in *Academy of Medicine of Cincinnati v. Aetna*

Health, Inc., 108 Ohio St.3d 185, 2006-Ohio-657. This Court should not accept jurisdiction of this case.



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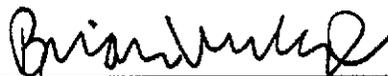
PROOF-OF-SERVICE

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