IN THE SUPREME COURT OF OHIO

AMERICAN GENERAL FINANCIAL SERVICES, INC.,	:	
	:	Case No. 2008-1009
Defendant-Appellant,	:	
	:	On Appeal From Cuyahoga County Eighth District, Eighth Appellate District
v.	:	
	:	
SHELTON COLEMAN,	:	Eighth District Case No. CA-07-089311
	:	
Plaintiff-Appellee.		

BRIEF OF *AMICI CURIAE* AMERICAN FINANCIAL SERVICES ASSOCIATION AND CONSUMER BANKERS ASSOCIATION IN SUPPORT OF APPELLANT, AMERICAN GENERAL FINANCIAL SERVICES, INC.

OF COUNSEL:

Alan S. Kaplinsky
Mark J. Levin
BALLARD SPAHR ANDREWS
& INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
Telephone: (215) 665-8500
Facsimile: (215) 864-9755
kaplinsky@ballardspahr.com
levinm@ballardspahr.com

Patrick M. McLaughlin (0008190)
(Counsel of Record)
Adrienne B. Kirshner (0075508)
McLAUGHLIN & McCAFFREY, LLP
1111 Superior Avenue, Suite 1350
Cleveland, Ohio 44114-2500
Telephone: (216) 623-0900
Facsimile: (216) 623-0935
pmm@paladin-law.com
abk@paladin-law.com

Counsel for *Amici Curiae*
American Financial Services Association
and Consumer Bankers Association

FILED
NOV 21 2008
CLERK OF COURT
SUPREME COURT OF OHIO

Patrick J. Perotti (0005481)
(Counsel of Record)
DWORKEN & BERNSTEIN CO., L.P.
60 South Park Place
Painesville, Ohio 44077
Telephone: (440)351-3391
Facsimile: (440) 352-3469
pperotti@dworkenlaw.com

Brian G. Ruschel (0046631)(Counsel of Record)
925 Euclid Avenue, Suite 660
Cleveland Ohio 44115
Telephone: (216) 621-3370
Facsimile: (216) 621-3371
bruschel@aol.com

Counsel for Plaintiff-Appellee

Barbara F. Yaksic (0014338)
(Counsel of Record)
Monica Levine Lacks (007869)
Richard Freshwater (0080762)
McGLINCHEY STAFFORD, PLLC
25550 Chagrin Boulevard, Suite 406
Cleveland, Ohio 44122
Telephone: (216) 378-9905
Facsimile: (216) 378-9910
byaksic@mcglinchey.com
mlacks@mcglinchey.com
rfreshwater@mcglinchey.com

Counsel for Defendant-Appellant American General Financial Services, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. STATEMENT OF FACTS AND IDENTIFICATION OF AMICI 1

II. ARGUMENT 2

Proposition of Law: The Federal Arbitration Act requires that "arising out of or relating to" language in an arbitration agreement be broadly construed and be given effect even when statutory claims are brought after the underlying contract has terminated 2

A. The Issues Before This Court Are of Great Interest to Amici Members 2

B. Arbitration Benefits Consumers 5

C. The Scope of an Arbitration Agreement Must Be Construed Liberally in Favor of Arbitration 10

D. An Arbitration Agreement Survives Termination of the Underlying Contract 13

E. Statutory Claims Are Subject to Arbitration 16

III. CONCLUSION 18

CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

Cases

Allied-Bruce Terminix Cos. v. Dobson (1995), 513 U.S. 265 6

Aspero v. Shearson Am. Express, Inc. (6th Cir. 1985), 768 F.2d 106 14

AT&T Techs., Inc. v. Communications Workers of Am. (1986), 475 U.S. 643 ..... 4, 10, 12

Blount v. National Lending Corp. (S.D. Miss. 2000), 108 F. Supp. 2d 666 18

Buckeye Check Cashing, Inc. v. Cardegna (2006), 546 U.S. 440 ..... 6, 7

Cappalli v. National Bank of the Great Lakes (3d Cir. 2001), 281 F.3d 219 17

Cleveland Police Patrolman's Assoc. v. City of Cleveland (Oh. App. 8th Dist. 1994), 643 N.E.2d 559 14

Colegrove v. Handler (Oh. App. 10th Dist. 1986), 517 N.E.2d 979 ..... 14, 15

Coleman v. American General Financial Services, Inc. (8th Dist. March 27, 2008), Appl. No. CA-07-089311 ..... 12, 13

Coleman v. American General Financial Services, Inc., Ohio Supreme Court No. 08-1009c 1, 12, 13, 14

Conseco Finance Servicing Corp. v. Wilder (Ky. Ct. App. 2001), 47 S.W.3d 335 17

Creson v. Quickprint of America, Inc. (W.D. Mo. 1983), 558 F. Supp. 984 15

Dimick v. First USA Bank (D.N.J. Jan. 14, 2000), No. 99-2550 17

Discover Bank v. Szetela (2003), 537 U.S. 1226 1

Dorsey v. H.C.P. Sales, Inc. (N.D. Ill. 1999), 46 F. Supp. 2d 804 15

Drake Bakeries, Inc. v. Local 50, Am. Bakery & Confectionary Workers Int'l, AFL-CIO (1962), 370 U.S. 254 14

Drews Distrib., Inc. v. Silicon Gaming, Inc. (4th Cir. 2001), 245 F.3d 347 11

EEOC v. Waffle House, Inc. (2002), 534 U.S. 279 6

Fell v. Joseph W. Riley Co., Inc. (E.D. Pa. Oct. 4, 1999), No. 99-1324, 1999 U.S. Dist. LEXIS 15246 10

Ferro Corp. v. Garrison Indus. (6th Cir. 1998), 142 F.3d 926 15

Flower World of America, Inc. v. Wenzel (Ct. App. 1978), 122 Ariz. 319 17

Frerichs v. Credential Services International (N.D. Ill. Sept. 30, 1999) 1999 U.S. Dist. LEXIS 22811 17

Gilmer v. Interstate/Johnson Lane Corp. (1991), 500 U.S. 20 ..... 6, 7, 16, 17

Gras v. Associates First Capital Corp. (N.J. App. Div. 2001), 346 N.J. Super. 42 17

Green Tree Fin. Corp.-Ala. v. Randolph (2000), 531 U.S. 79 ..... 7, 16, 17

Greenleaf Engineering & Constr. Co., Inc. v. Teradyne, Inc. (1983), 15 Mass. App. 571 17

Harris v. Green Tree Fin. Corp. (3d Cir. 1999) 183 F.3d 173 ..... 7, 9, 18

Herrington v. Union Planters Bank, N.A. (S.D. Miss. 2000), 113 F. Supp. 2d 1026 18

Hill v. Gateway 2000, Inc. (7th Cir. 1997), 105 F.3d 1147 7

Howard v. Wells Fargo (N.D. Ohio Sept. 21, 2007), No. 1:06CV2821, 2007 U.S. Dist. LEXIS 70099 12

Howsam v. Dean Witter Reynolds, Inc. (2002), 537 U.S. 79 6

In re Conseco Fin. Serv. Corp. (Tex. Ct. App. 2000), 19 S.W.3d 562 17

In re Pate (Bankr. S.D. Ga. 1996), 198 B.R. 841 ..... 17, 18

Ishmael v. Dutch Housing Inc. (Ohio App. Aug. 13, 1997), 1997 Ohio App. LEXIS 3974 17

J&K Cement Constr., Inc. v. Montalbano Builders, Inc. (1983), 119 Ill. App. 3d 663 17

Jenkins v. First American Cash Advance of Georgia, Inc. (11th Cir. 2005), 400 F.3d 868 7

Kiefer Specialty Flooring, Inc. v. Tarkett, Inc. (7th Cir. 1999), 174 F.3d 907 11

Lackey v. Green Tree Fin. Corp. (S.C. Ct. App. 1998), 330 S.C. 388 18

Leopold v. Delphi Internet Servs. Corp. (E.D. Pa. Oct. 24, 1996), 1996 WL 628593 11

Masco Corp. v. Zurich Am. Ins. Co. (6th Cir. 2004), 382 F.3d 624 11

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. (1985), 473 U.S. 614 ..... 6, 16

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp. (1983), 460 U.S. 1 10

Munoz v. Green Tree Fin. Corp. (2001), 343 S.C. 531 17

Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO (1977), 430 U.S. 243 14

Patnik v. Citicorp Bank Trust FSB (N.D. Ohio 2005), 412 F. Supp. 2d 753 10

Perry v. Thomas (1987), 482 U.S. 483 4

Phillips v. Associates Home Equity Services, Inc. (N.D. Ill. Sept. 28, 2001), 2001 WL 1159216 16

Prima Paint Corp. v. Flood & Conklin Mfg. Co. (1967), 388 U.S. 395 ..... 13, 14, 15

Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., (3d Cir. 1993), 7 F.3d 1110 11

Rodgers Builders, Inc. v. McQueen, (1985), 76 N.C. App. 16, 331 17

Salley v. Option One Mtg. Corp. (2007), 592 Pa. 323 1

Shearson/American Express, Inc. v. McMahon (1987), 482 U.S. 220 ..... 7, 17

Simon v. Pfizer Inc. (6th Cir. 2005) 398 F.3d 765 10

Southland Corp. v Keating (1984), 465 U.S. 1 ..... 4, 6

Stout v. J.D. Byrider (6th Cir. 2000), 228 F.3d 709 ..... passim

Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress International, Ltd. (7th Cir. 1993), 1 F.3d 639 15

Textron Funding Corp. v. Bessette (2001), 532 U.S. 1048 1

Unionmutual Stock Life Ins. Co. v. Beneficial Life Ins. Co. (1st Cir. 1985), 774 F.2d 524... 14, 15

United Steel Workers of Am. v. Warrior & Gulf Navigating Co. (1960), 363 U.S. 574 4

Watson Wyatt & Co. v. SBC Holdings, Inc. (6th Cir. 2008), 513 F.3d 646 10

West v. West (9th Cir. Dec. 22, 1998), No. 97-16789, 1998 WL 894594 15

Statutes

Federal Arbitration Act, 9 U.S.C. §§1 et seq. ..... passim

R.C. §5301.36 12

R.C. §2711.01 4

Other Authorities

American Arbitration Association, "Drafting Dispute Resolution Clauses, A Practical Guide" ... 3

H.R. Rep. No. 97-542, p. 13 (1982) 6

JAMS, "Guide to Dispute Resolution Clauses for Commercial Contracts" (2006) 3

National Arbitration Forum, "Drafting Mediation and Arbitration Clauses, Practical Tips and Sample Language," at p. 7 (Jan. 2005) 3

S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924) 6

I. STATEMENT OF FACTS AND IDENTIFICATION OF AMICI

The American Financial Services Association ("AFSA") and the Consumer Bankers Association ("CBA") (collectively "*Amici*") incorporate herein by reference American General's Statement of Facts set forth in its Merits Brief.

The AFSA, organized in 1916, is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, credit card issuers, industrial banks and industry suppliers.

The CBA is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer financial services, including auto finance, home equity lending, card products, education loans, small business services, community development, investments, deposits and delivery. The CBA was founded in 1919 and provides leadership, education, research and federal representation on retail banking issues. The CBA members include most of the nation's largest bank holding companies as well as regional and super community banks that collectively hold two-thirds of the industry's total assets.

The AFSA and the CBA frequently appear in litigation as *amici curiae* where the issues raised are of widespread importance to the nation's business community and its customers. See, e.g., Textron Funding Corp. v. Bessette (2001), 532 U.S. 1048; Discover Bank v. Szetela (2003), 537 U.S. 1226; Salley v. Option One Mtg. Corp. (2007), 592 Pa. 323, 925 A.2d 115.

The AFSA and the CBA respectfully submit this Brief as *amici curiae* in support of Appellant, American General Financial Services, Inc. ("American General") in Coleman v. American General Financial Services, Inc., Ohio Supreme Court No. 08-1009.

II. ARGUMENT

<u>Proposition of Law</u>: The Federal Arbitration Act requires that "arising out of or relating to" language in an arbitration agreement be broadly construed and be given effect even when statutory claims are brought after the underlying contract has terminated

A. The Issues Before This Court Are of Great Interest to Amici Members

The Eighth District's opinion raises issues of exceptional importance to *Amici* members, constituent organizations and affiliates (collectively, "*Amici* Members"), which include banks, consumer financial services companies, credit card issuers, mortgage companies and other businesses located in Ohio and throughout the nation. Most *Amici* Members include arbitration agreements in their business contracts because arbitration is a prompt, fair, inexpensive and effective method of resolving disputes, and it minimizes the disruption and loss of good will that often results from litigation. Based on the consistent endorsement of arbitration over the past several decades by the U.S. Supreme Court and the federal and state courts in Ohio and throughout the country, *Amici* Members have structured millions of contractual relationships around consumer arbitration agreements.

If not reversed, the Eighth District's decision will have a serious adverse impact on the arbitration agreements used by *Amici* Members. Virtually all of those agreements employ the same "arising out of or relating to" language that is used in American General's Arbitration Provision. Indeed, that language is the same, or very similar to, the language recommended by the major national arbitration administrators for use in arbitration agreements.

For example, the standard language suggested by the American Arbitration Association ("AAA"), a national organization used for decades by many *Amici* Members in Ohio and elsewhere to administer their arbitrations, includes the same "arising out of or relating to" language at issue herein:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association ....

American Arbitration Association, "Drafting Dispute Resolution Clauses, A Practical Guide" (hereinafter "AAA Drafting Guide"), at pp. 9-10 (Sept. 2007) (emphasis added).

Similarly, the National Arbitration Forum ("NAF"), another national arbitration administrator widely used by *Amici* Members in Ohio and throughout the nation, includes the following language in its model arbitration clause:

> any claim, dispute or controversy between us or arising from or relating to this agreement or the relationships which result from this agreement ... shall be resolved by binding arbitration by the National Arbitration Forum ....

National Arbitration Forum, "Drafting Mediation and Arbitration Clauses, Practical Tips and Sample Language," at p. 7 (Jan. 2005) (emphasis added). JAMS, a third national arbitration administrator often used by Amici Members, likewise incorporates "arising out of or relating to" language in its standard arbitration agreement. JAMS, "Guide to Dispute Resolution Clauses for Commercial Contracts" (2006).

Hundreds, if not thousands, of state and federal courts have enforced arbitration agreements containing "arising out of or relating to" language in countless factual contexts. The AAA has annotated its standard arbitration language, quoted above, with the following comment:

> The preceding clause ..., which refer[s] to the time-tested rules of the AAA, ha[s] consistently received judicial support. The standard clause is often the best to include in a contract. By invoking the AAA's rules, such a clause ... makes clear that all disputes are arbitrable. Thus, it minimizes dilatory court actions to avoid the arbitration process.

AAA Drafting Guide, p. 10.

The arbitration agreements used by *Amici* Members are governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§1 et seq., which was enacted in 1925. Pursuant to Section 2 of the FAA, the statute's core provision, "[a] written provision in any...contract evidencing a

transaction involving commerce to settle by arbitration a controversy thereafter *arising out of* such contract or transaction ... shall be valid, irrevocable, and enforceable ...." (Emphasis added).[1] The principles of federal arbitration law embodied in the FAA are binding on state courts as well as federal courts because the FAA preempts inconsistent state law. See Perry v. Thomas (1987), 482 U.S. 483, 489; Southland Corp. v Keating (1984), 465 U.S. 1, 10. Significantly, the FAA mandates that the language of arbitration agreements be construed broadly in favor of arbitration. This is so even if the scope of the arbitration agreement is ambiguous or subject to doubt -- all doubts and ambiguities must be resolved in favor of arbitration. AT&T Techs., Inc. v. Communications Workers of Am. (1986), 475 U.S. 643, 650, United Steel Workers of Am. v. Warrior & Gulf Navigating Co. (1960), 363 U.S. 574, 582-83.

While acknowledging that the FAA applies, the Eighth District declined to enforce American General's broadly worded Arbitration Provision. Instead, it narrowly construed the agreement's "arising out of or relating to" langauge and held that the borrower's statutory claims were "not related" to the parties' contract. It further concluded that an Arbitration Provision in a loan contract is extinguished once the loan is paid, contrary to federal arbitration law.

This Court should reverse because this case strays far from the judicial mainstream and casts a dark cloud over the millions of arbitration agreements utilized by *Amici* Members in Ohio and throughout the nation. *Amici* Members will no longer be confident that their arbitration agreements will be enforced by courts as written and interpreted pursuant to the standards mandated by federal arbitration law and decades of interpretive judicial decisions. The decision in question interjects chaos and uncertainty into arbitration issues that have long been settled. It

---

[1] 9 U.S.C. §2. As shown by the quotation, the FAA itself uses "arising out of" language. So does the Ohio Arbitration Act. See R.C. §2711.01 ("arises out of the contract").

also creates loopholes in the law of arbitration which many may try to use in an effort to avoid arbitration, hoping that companies would rather pay an inflated settlement rather than proceed through years of costly and time-consuming court litigation. Even if such efforts are not successful, substantial costs will be incurred by companies in defending against what the AAA called "dilatory court actions to avoid the arbitration process."

Especially during these challenging economic times, it is important to remember that arbitration programs substantially lower litigation costs and the cost savings are passed through to consumers, in whole or in part, in the form of lower prices for goods and services. See Stephen J. Ware, Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements, 2001 J. Disp. Resol. 89, 91-93; Richard A. Posner, Economic Analysis of Law 7 (6th ed. 2003). If millions of arbitration agreements are put at risk, and litigation over the enforceability of such agreements increases, ultimately it is the consumers who will suffer the consequences through higher prices caused by these increased litigation costs.

Accordingly, *Amici* Members have a compelling interest in the issues at stake in these cases and respectfully request this Court to reverse. Four fundamental principles of federal arbitration law would have compelled a different result had they been applied by the Eighth District: (1) arbitration benefits consumers; (2) the scope of an arbitration agreement must be construed liberally in favor of arbitration; (3) an arbitration agreement is enforceable even if the contract in which it was contained allegedly was terminated; and (4) statutory claims are subject to arbitration.

B. Arbitration Benefits Consumers

The FAA was designed specifically "'to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by

American courts, and to place arbitration agreements on the same footing as other contracts.'" EEOC v. Waffle House, Inc. (2002), 534 U.S. 279, 288 (quoting Gilmer v. Interstate/Johnson Lane Corp. (1991), 500 U.S. 20, 24). The FAA embodies a liberal federal policy favoring arbitration agreements. Howsam v. Dean Witter Reynolds, Inc. (2002), 537 U.S. 79. See also Stout v. J.D. Byrider (6th Cir. 2000), 228 F.3d 709, 714 ("[t]he FAA was designed to override judicial reluctance to enforce arbitration agreements, to relieve court congestion, and to provide parties with a speedier and less costly alternative to litigation"), cert. denied, (2001), 531 U.S. 1148.

Section 2 of the FAA, quoted earlier, creates a body of federal substantive law of arbitrability that is binding on state courts as well as federal courts. As the U.S. Supreme Court instructed in Buckeye Check Cashing, Inc. v. Cardegna (2006), 546 U.S. 440, 445:

> [I]n Southland Corp. [v. Keating, 465 U.S. 1(1984)], we held that the FAA "created a body of federal substantive law," which was "applicable in state and federal courts" .... We rejected the view that state law could bar enforcement of §2, even in the context of state-law claims brought in state court.

The U.S. Supreme Court has also emphasized that arbitration benefits consumers and that Congress intended the FAA to apply to consumer transactions:

> We agree that Congress, when enacting this law [the FAA] had the needs of consumers, as well as others, in mind. See S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924) (the Act, by avoiding "the delay and expense of litigation," will appeal "to big business and little business alike ..., corporate interests [and] ... individuals"). Indeed, arbitration's advantages often would seem helpful to individuals ... complaining about a product, who need a less expensive alternative to litigation. See, e.g., H.R. Rep. No. 97-542, p. 13 (1982).

Allied-Bruce Terminix Cos. v. Dobson (1995), 513 U.S. 265, 290. Arbitration is highly favored for its "simplicity, informality, and expedition." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. (1985), 473 U.S. 614, 628.

Amici Members have relied upon these and countless other opinions which hold that the FAA is fully applicable to contracts between businesses and consumers. See, e.g., Cardegna, supra (U.S. Supreme Court enforced arbitration clause in dispute between borrower and payday lender); Green Tree Fin. Corp.-Ala. v. Randolph (2000), 531 U.S. 79, 91-92 (enforcing arbitration clause between consumer and subprime lender); Stout v. J.D. Byrider, supra (Sixth Circuit enforced arbitration agreement between consumer and used car dealership); Shearson/American Express, Inc. v. McMahon (1987), 482 U.S. 220, 222 (enforcing arbitration agreement between customer and brokerage firm); Jenkins v. First American Cash Advance of Georgia, Inc. (11th Cir. 2005), 400 F.3d 868, cert. denied, (2006) 126 S. Ct. 1457 (enforcing arbitration agreement in contract between consumer and payday lender); Harris v. Green Tree Fin. Corp. (3d Cir. 1999) 183 F.3d 173 (enforcing arbitration agreement between borrower and subprime lender); Hill v. Gateway 2000, Inc. (7th Cir. 1997), 105 F.3d 1147, cert. denied, (1997) 522 U.S. 808 (enforcing arbitration agreement between consumer and computer manufacturer).

By contrast, the Eighth District's opinion reflects a suspicion of consumer arbitration that is not compatible with the FAA. As the U.S. Supreme Court admonished in Gilmer v. Interstate/Johnson Lane Corp. (1991), 500 U.S. 20, 30:

> Gilmer also raises a host of challenges to the adequacy of arbitration procedures. Initially, we note that in our recent arbitration cases we have already rejected most of these arguments as insufficient to preclude arbitration .... Such generalized attacks on arbitration "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."

Numerous empirical studies confirm that arbitration benefits consumers. To cite only a few:

- On April 2, 2008, the U.S. Chamber of Commerce announced the results of a poll of 800 persons showing that 82% of likely voters prefer arbitration to litigation as a means to resolve a serious dispute with a company.

- A synopsis of independent studies and surveys concerning the benefits of pre-dispute consumer arbitration was published by the NAF in 2004. See "Effective and Affordable Access to Justice by Consumers -- Empirical Studies & Survey Results." The results showed, among other things, that: (a) 78% of trial attorneys find arbitration faster than lawsuits; (b) 86% of trial attorneys find arbitration costs are equal to or less expensive than lawsuits; (c) 78% of business attorneys find that arbitration provides faster recovery than lawsuits; (d) 83% of business attorneys find arbitration to be equally or more fair than lawsuits; (e) monetary relief for individuals is slightly higher in arbitration than in lawsuits; (f) arbitration is approximately 36% faster than a lawsuit; (g) individuals receive a greater percentage of the relief they ask for in arbitration versus lawsuits; (h) 93% of consumers using arbitration find it to be fair; (i) consumers prevail 20% more often in arbitration than in court; and (j) 64% of American consumers would choose arbitration over a lawsuit for monetary damages.

- In December 2004, Ernst & Young issued a study ("Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases") examining the outcomes of contractual arbitration in lending-related, consumer-initiated cases. The study, based on consumer arbitration data from January 2000 to January 2004 from the NAF, observed that: (a) consumers prevailed more often than businesses in cases that went to an arbitration hearing, with 55% of the cases that faced an arbitration decision being resolved in favor of the consumer, the exact same win-rate for consumers as exists in state court; (b) consumers obtained favorable results in 79% of the cases that were reviewed (favorable results include results from arbitration decisions, as

well as settlements satisfactory to the consumer and cases that were dismissed at the claimant's request); (c) 40% of consumers who brought claims actually got their "day in court" to tell their stories, while only 2.8% of cases in state court ever reach trial; and (d) 69% of consumers surveyed indicated that they were very satisfied with the arbitration process.

- In April 2005, Harris Interactive released the results of an extensive survey of arbitration participants sponsored by the Institute for Legal Reform at the U.S. Chamber of Commerce. The survey was conducted online among 609 adults who participated in a binding arbitration case (voluntarily, due to contract language or with strong urging by the Court, but not a court order) that reached a decision. The major findings were: (a) arbitration is widely seen as faster (74%), simpler (63%), and cheaper (51%) than going to court; (b) two-thirds (66%) of participants say they would be likely to use arbitration again with nearly half (48%) saying they are extremely likely; (c) even among those who lost, one-third say they are at least somewhat likely to use arbitration again; (d) most participants are very satisfied with the arbitrator's performance, the confidentiality of the process and its length; (e) predictably, winners found the process and outcome very fair and the losers found the outcome much less fair, but 40% of those who lost were moderately to highly satisfied with the fairness of the process and 21% were moderately to highly satisfied with the outcome; (f) while one in five of the participants were required by contract to go to arbitration, the remainder were voluntary – suggested by one of the parties, one of the lawyers, or the court; and (g) two-thirds of the participants were represented by lawyers.

- A 2003 Roper survey concluded that 64% of individuals would choose arbitration over court litigation, 67% believe court litigation takes too long and 32% believe court litigation costs too much.

C. The Scope of an Arbitration Agreement Must Be Construed Liberally in Favor of Arbitration

"'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.'" AT&T Technologies v. Communications Workers of Am. (1986), 475 U.S. 643, 650 (citation omitted); accord, Fell v. Joseph W. Riley Co., Inc. (E.D. Pa. Oct. 4, 1999), No. 99-1324, 1999 U.S. Dist. LEXIS 15246, at *3 "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp. (1983), 460 U.S. 1, 24-25; accord, Stout, 228 F.3d at 714-15 (Sixth Circuit held that "[c]ourts are to examine the language of the contract in light of the strong federal policy in favor of arbitration" and that "[i]t is settled authority that doubt regarding the applicability of an arbitration clause should be resolved in favor of arbitration").

Arbitration agreements -- like American General's -- that cover disputes "arising out of or relating to" a particular agreement are considered "broad." See Patnik v. Citicorp Bank Trust FSB (N.D. Ohio 2005), 412 F. Supp. 2d 753, 759 ("[a] broad arbitration clause uses language such as 'any dispute arising out of an agreement ...") (citing Simon v. Pfizer Inc. (6th Cir. 2005) 398 F.3d 765, 775). "[I]n cases involving broad arbitration clauses the [U.S. Supreme] Court has found the presumption of arbitrability 'particularly applicable,' and only an express provision excluding a particular grievance from arbitration or 'the most forceful evidence of a purpose to exclude the claim from arbitration' can prevail." Simon, 398 F.3d at 773 (citation omitted). See also Watson Wyatt & Co. v. SBC Holdings, Inc. (6th Cir. 2008), 513 F.3d 646 ("broadly written arbitration clauses must be taken at their word ...").

Thus, under the FAA, a broad arbitration agreement must be given effect unless the court can be absolutely certain that the parties intended otherwise. See Masco Corp. v. Zurich Am.

Ins. Co. (6th Cir. 2004), 382 F.3d 624 (all doubts must be resolved in favor of arbitrability "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute") (citation and quotations omitted). As discussed infra, the fact that a party is seeking to enforce a statutory right does not affect the analysis of whether an arbitration clause should be enforced. See Stout, 228 F.3d at 715 (the duty of a court to enforce an arbitration clause "is not diminished when a party bound by the agreement raises claims arising from statutory rights").

Numerous other courts construing "arising out of or relating to" arbitration agreement language have likewise concluded that such language has a very broad reach. See, e.g., Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., (3d Cir. 1993), 7 F.3d 1110, 1114 (arbitration clause covering all controversies that may arise between signatories "broadly construed ... to apply to all disputes between signatories"); Drews Distrib., Inc. v. Silicon Gaming, Inc. (4th Cir. 2001), 245 F.3d 347, 349-50 (recognizing as "broad" an arbitration clause covering any controversy or claim related to an agreement); Kiefer Specialty Flooring, Inc. v. Tarkett, Inc. (7th Cir. 1999), 174 F.3d 907, 909 ("[s]milar types of arbitration provisions have been characterized as extremely broad and capable of an expansive reach"); Leopold v. Delphi Internet Servs. Corp. (E.D. Pa. Oct. 24, 1996), No. 96-4475, 1996 WL 628593, at *2 (arbitration clause covering any dispute arising from contract covered fraud claims arising in signatories' business relationship).

American General's Arbitration Provisions broadly apply to, inter alia, "any and all claims and disputes ... that have arisen or may arise between ... you and Lender" including "all claims and disputes arising out of, in connection with, or relating to your loan from Lender," "all documents, actions or omissions relating to this ... loan" and "any claim or dispute based on or arising under any federal or state statute ...." Such language is extremely broad and naturally

and easily encompasses the claims asserted here. Nevertheless, the Eighth District construed this language narrowly, reasoning that the filing of a financing statement is not an "integral part" of the lending process and, therefore, the failure to file a termination statement is "not related to the arbitration agreement that was part of the note and security agreement." Coleman v. American General Financial Services, (8th Dist. March 27, 2008), Appl. No. CA-07-089311 at ¶¶10-11. The federal law of arbitration required just the opposite construction -- a broad reading that resolved all doubts in favor of arbitration. American General's statutory duty to file a termination statement is related to and arises out of the fact that a financing statement was filed in connection with plaintiff's loan agreement -- indeed, without the loan contract which contained the Arbitration Provision, plaintiff's claims would not even exist.

At the very least, it cannot "be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." AT&T Technologies, supra. Indeed, an Ohio federal court recently concluded that the same "arising out of or related to" language does encompass a claim of the type asserted by the plaintiff *sub judice*. As explained in Howard v. Wells Fargo (N.D. Ohio Sept. 21, 2007), No. 1:06CV2821, 2007 U.S. Dist. LEXIS 70099, at *8-9:

> Howard also contends the recording of a mortgage satisfaction is not an integral part of the lending process, since it occurs after the debt and the extension of credit are extinguished. Wells Fargo counters, and the Court agrees, Howard's claim does implicate the obligations of both Wells Fargo Bank and Howard under the Loan, as well as the mortgagee-mortgagor relationship between them; and the claim cannot be maintained without reference to her loan. *But for* the Loan and the mortgagor-mortgagee relationship, there would be no obligation placed on the bank to record a satisfaction upon full payment .... [S]ince R.C. §5301.36 would not be implicated unless there were satisfaction of the Note obligation, this Court finds arbitration applies.

Not only is American General's arbitration language "susceptible" to an interpretation that would support arbitration of the plaintiff's claims, but a federal court has held that it does

support arbitration in an analogous factual circumstance. Moreover, Judge Stewart, dissenting in Coleman, likewise found that the scope of American General's Arbitration Provision supported arbitration: "American General's right to file a financing statement arose when the loan documents were signed .... Its corresponding duty to file a terminating statement arose when Coleman paid the loan in full .... Coleman's statutory claim is created by the secured transaction .... 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 (8th Dist. March 27, 2008), App. No. CA-07-089311 at, ¶¶17-18 (Stewart, J, dissenting).

D. An Arbitration Agreement Survives Termination of the Underlying Contract

Under the FAA, a valid arbitration clause is severable from the contract it accompanies and survives termination of the underlying contract. Buckeye Check Cashing, Inc., 546 U.S. at 445 (U.S. Supreme Court enforced arbitration clause even though it was contained in a payday loan agreement alleged to be void ab initio, holding that "as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract" and that "this arbitration law applies in state as well as federal courts"); Prima Paint Corp. v. Flood & Conklin Mfg. Co. (1967), 388 U.S. 395 (arbitration clause enforced even though the contract in which it was contained was allegedly fraudulently induced).

In Prima Paint, a party to a consulting contract which contained an arbitration clause sought to rescind the contract on the ground that it was fraudulently induced. The seller sought to enforce the arbitration clause. The Supreme Court held that because plaintiff claimed that the contract as a whole was fraudulently induced, it was for the arbitrator, not a court, to adjudicate plaintiff's fraudulent inducement defense. The Prima Paint Court created the doctrine of "severability" under which arbitration clauses are viewed as separate from the contracts which

contain them. Thus, "where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud." 388 U.S. at 402. Although Prima Paint involved an allegation of fraud in the inducement of a contract, "the basis of the underlying challenge to the contract does not alter the severability principle." Unionmutual Stock Life Ins. Co. v. Beneficial Life Ins. Co. (1st Cir. 1985), 774 F.2d 524, 529.

American General's Arbitration Provision specifically states that it applies "even if your loan has been ... paid in full ...." Coleman, ¶6. It is well established under both federal and Ohio law that an arbitration provision survives an allegation that the contract in which it was contained was terminated. See, e.g., Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO (1977), 430 U.S. 243, 249 (a dispute, "although arising after the expiration of the collective-bargaining contract, clearly arises under that contract"); Drake Bakeries, Inc. v. Local 50, Am. Bakery & Confectionary Workers Int'l, AFL-CIO (1962), 370 U.S. 254, 262 ("[a]rbitration provisions, which themselves have not been repudiated, are meant to survive breaches of contract, in many contexts, even total breach"); Aspero v. Shearson Am. Express, Inc. (6th Cir. 1985), 768 F.2d 106 ("the duty to arbitrate does not necessarily end when the contract is terminated") (citation omitted); Cleveland Police Patrolman's Assoc. v. City of Cleveland (Oh. App. 8th Dist. 1994), 643 N.E.2d 559, 564 ("the failure to expressly exclude from arbitration any contract disputes after termination gives rise to the presumption that a contended provision of an expired agreement is enforceable") (citation and quotations omitted); Colegrove v. Handler (Oh. App. 10th Dist. 1986), 517 N.E.2d 979, 983 ("there is no reason, absent a specific contractual provision, to restrict arbitrability to disputes that arise under the contract to situations where the demand for arbitration precedes the termination of the contract").

Otherwise, parties could easily avoid arbitration by simply terminating a contract that requires arbitration and bringing suit in court. See Colegrove, 517 N.E.2d at 983 (rejecting plaintiff's contention that since "[defendant] terminated the contract prior to attempting to enforce the arbitration provision, it waived its right to demand arbitration").

Similarly, it is widely held that the alleged rescission of a contract does not impair the enforceability of an arbitration clause contained in the contract. See, e.g., Unionmutual Stock Life Ins. Co. v. Beneficial Life Ins. Co., 774 F.2d at 528-29 (under Prima Paint, "the arbitration clause is separable from the contract and is not rescinded by [an] attempt to rescind the entire contract based on mutual mistake and frustration of purpose"); Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress International, Ltd. (7th Cir. 1993), 1 F.3d 639, 641 (although "[a] successful rescission annuls the contract and returns the parties to the status quo ante," claims for rescission that challenge contract as whole must be referred to arbitration under Prima Paint); West v. West (9th Cir. Dec. 22, 1998), No. 97-16789, 1998 WL 894594, at *1 (under Prima Paint a party's "claim that she had validly rescinded the settlement agreement was not an independent challenge to the arbitration provision of the agreement and did not deprive the arbitrator of jurisdiction to determine the issue of rescission"); Ferro Corp. v. Garrison Indus. (6th Cir. 1998), 142 F.3d 926, 938 ("[u]nder the plain language of the FAA, and the Supreme Court's interpretation of the FAA," a claim for rescission based on "the issue of fraudulent inducement of an entire contract is an issue to be decided through arbitration"); Creson v. Quickprint of America, Inc. (W.D. Mo. 1983), 558 F. Supp. 984, 988 (compelling arbitration of action including rescission claim and noting that Prima Paint itself "was an action in which the plaintiff sued for rescission ... [y]et the Supreme Court held that the action properly was stayed" pending arbitration); Dorsey v. H.C.P. Sales, Inc. (N.D. Ill. 1999), 46 F. Supp. 2d 804, 806 ("We ... 'will not allow a party to unravel a

contractual arbitration clause by arguing that the clause was part of a contract that is voidable'") (citation omitted); Phillips v. Associates Home Equity Services, Inc. (N.D. Ill. Sept. 28, 2001), No. 01 C 1944, 2001 WL 1159216 (rejecting argument that arbitration agreement was unenforceable because the loan contract had been terminated).

E. Statutory Claims Are Subject to Arbitration

Finally, it has long been established that by agreeing to arbitrate, "a party does not forgo ... substantive rights" but "only submits to their resolution in an arbitral, rather than a judicial, forum." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. at 26; accord, Green Tree Fin. Corp.-Ala. v. Randolph (even claims arising under a statute designed to further important social policies may be arbitrated because 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,' the statute serves its functions"); Stout, 228 F.3d at 716 ("a district court's duty to enforce an arbitration agreement under the FAA is not diminished when a party bound by the agreement raises claims arising from statutory rights"). In Stout, the Sixth Circuit held that plaintiff's statutory claims for violations of the Truth in Lending Act ("TILA") and the Ohio Consumer Sales Practices Act "arose under" their purchase and finance contracts with the defendants and that "neither this Court nor the Ohio courts have the ability to mandate judicial resolution of these disputes in violation of the parties' [arbitration] agreement." Id. at 716.

Amici Members have long relied on these and numerous other decisions which hold that statutory claims, including claims by consumers for violation of consumer protection statutes are subject to arbitration. Indeed, in our highly regulated society statutory claims are perhaps the most common type of claim asserted by consumers against businesses. See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. (1985), 473 U.S. 614 (1985) (Sherman Act);

Shearson/American Express, Inc. v. McMahon (1987), 482 U.S. 220 (federal securities laws); Gilmer v. Interstate/Johnson Lane Corp (Age Discrimination in Employment Act); Green Tree Fin. Corp.-Ala. v. Randolph (TILA and Equal Credit Opportunity Act); Cappalli v. National Bank of the Great Lakes (3d Cir. 2001), 281 F.3d 219 (federal usury statutes); Munoz v. Green Tree Fin. Corp. (2001), 343 S.C. 531, 542 S.E.2d 360 (South Carolina Consumer Protection Code); In re Conseco Fin. Serv. Corp. (Tex. Ct. App. 2000), 19 S.W.3d 562 (Texas Deceptive Practices Act); Conseco Finance Servicing Corp. v. Wilder (Ky. Ct. App. 2001), 47 S.W.3d 335 (Kentucky Consumer Protection Act); In re Pate (Bankr. S.D. Ga. 1996), 198 B.R. 841 (Georgia Motor Vehicle Sales Finance Act); Ishmael v. Dutch Housing Inc. (Ohio App. Aug. 13, 1997), No. 96-AP-100084, 1997 Ohio App. LEXIS 3974 (Ohio Retail Installment Sales Act and Ohio Sales Practices Act); Gras v. Associates First Capital Corp. (N.J. App. Div. 2001), 346 N.J. Super. 42, 786 A.2d 886 (New Jersey Consumer Fraud Act), cert. denied, 171 N.J. 445, 794 A.2d 184; Rodgers Builders, Inc. v. McQueen, (1985), 76 N.C. App. 16, 331 S.E.2d 726 (North Carolina Unfair and Deceptive Practices Act), rev. denied, (1986), 315 N.C. 590, 341 S.E.2d 29; J&K Cement Constr., Inc. v. Montalbano Builders, Inc. (1983), 119 Ill. App. 3d 663, 456 N.E.2d 889, 896 (Illinois Consumer Fraud Act); Greenleaf Engineering & Constr. Co., Inc. v. Teradyne, Inc. (1983), 15 Mass. App. 571, 447 N.E.2d 9 (Massachusetts Unfair and Deceptive Practices Act); Flower World of America, Inc. v. Wenzel (Ct. App. 1978), 122 Ariz. 319, 594 P.2d 1015 (Arizona Unfair and Deceptive Practices Act); Dimick v. First USA Bank (D.N.J. Jan. 14, 2000), No. 99-2550 (New Jersey Consumer Fraud Act); Frerichs v. Credential Services International (N.D. Ill. Sept. 30, 1999) 1999 U.S. Dist. LEXIS 22811)) (Fair Credit Reporting Act); Sagal v. First USA Bank (D. Del. 1999), 69 F. Supp. 2d 627, aff'd, 245 F.3d 1078 (3d Cir. 2001) (Delaware Consumer Fraud Act); Blount v. National Lending Corp. (S.D. Miss. 2000), 108 F.

Supp. 2d 666 (Real Estate Settlement Procedures Act); Herrington v. Union Planters Bank, N.A. (S.D. Miss. 2000), 113 F. Supp. 2d 1026 aff'd, 265 F.3d 1059 (5th Cir. 2001) (Truth in Savings Act); Harris v. Green Tree Fin. Corp. (3d Cir. 1999), 183 F.3d 173 (Pennsylvania Unfair Trade Practices and Consumer Protection Law); Lackey v. Green Tree Fin. Corp. (S.C. Ct. App. 1998), 330 S.C. 388, 498 S.E.2d 898 (South Carolina Attorney Preference Statute); Kentucky Consumer Protection Act); In re Pate (Bankr. S.D. Ga. 1996), 198 B.R. 841 (Georgia Motor Vehicle Sales Finance Act).

III. CONCLUSION

The Eighth District decision contravenes four fundamental principles that lie at the core of the FAA. For that reason, it is particularly unsettling to *Amici* Members, who rely heavily on consumer arbitration programs for the economic, efficient and expeditious resolution of disputes with their customers. If not reversed, this decision will threaten to undermine millions of arbitration agreements currently in place in Ohio and across the nation. Respect for the primacy of federal law -- the FAA -- and for the rights of consumers and businesses throughout Ohio, weighs heavily in favor of reversal. Therefore, *Amici* respectfully urge this Court to reverse the Eighth District's decision.

Respectfully submitted,

Patrick M. McLaughlin (0008190)
(Counsel of Record)
Adrienne B. Kirshner (0075508)
McLAUGHLIN & McCAFFREY, LLP
1111 Superior Avenue, Suite 1350
Cleveland, Ohio 44114-2500
(216) 623-0900 (Telephone)
(216) 623-0935 (Facsimile)
pmm@paladin-law.com
abk@paladin-law.com

Counsel for *Amici Curiae*
American Financial Services Association and
Consumer Bankers Association

OF COUNSEL:

Alan S. Kaplinsky
Mark J. Levin
BALLARD SPAHR ANDREWS
& INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
Telephone: (215) 665-8500
Facsimile: (215) 864-9755
kaplinsky@ballardspahr.com
levinm@ballardspahr.com

CERTIFICATE OF SERVICE

I hereby certify that the foregoing memorandum in support of jurisdiction was served via regular U.S. Mail on this 20th day of November, 2008 upon:

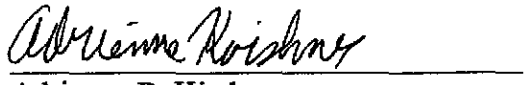
Patrick J. Perotti (Counsel of Record)
DWORKEN & BERNSTEIN CO., L.P.
60 South Park Place
Painesville, Ohio 44077
Telephone (440)351-3391
Facsimile: (440) 352-3469
pperotti@dworkenlaw.com

Brian G. Ruschel (Counsel of Record)
925 Euclid Avenue, Suite 660
Cleveland Ohio 44115

Counsel for Plaintiff-Appellee Shelton Coleman

Barbara F. Yaksic
Monica Levine Lacks
Richard Freshwater
McGLINCHEY STAFFORD, PLLC
25550 Chagrin Boulevard, Suite 406
Cleveland, Ohio 44122

Counsel for Defendant-Appellant American General Financial Services



Adrienne B. Kirshner