

IN THE SUPREME COURT OF OHIO

American General Financial Services, Inc.,

Defendant-Appellant,

vs.

Shelton Coleman,

Plaintiff-Appellee.

Case No. 08-1009

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

REPLY BRIEF OF APPELLANT
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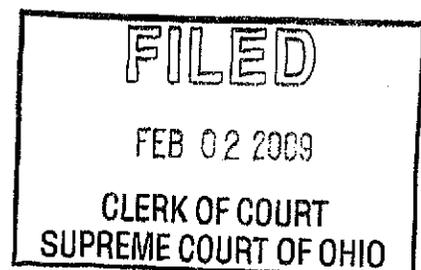


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INTRODUCTION

Throughout this case, Plaintiff-Appellee Shelton Coleman has attempted to avoid his promise to arbitrate his claims, pursuant to the Loan Security Agreement he entered into with Defendant-Appellant American General Financial Services, Inc. Misconstruing American General's arguments and improperly asking this Court to address the factual merits of his underlying claim, Coleman seeks to have this Court assist him in this endeavor.

As set forth in detail in American General's Merit Brief and below, the Arbitration Provisions agreed to by Coleman *do* apply to his claim for failure to timely file a termination statement. Inasmuch as the Eighth District improperly created a new analysis that breaks apart a unified secured transaction into three component parts when determining arbitrability of claims relating to that transaction, American General respectfully requests that the decision below be reversed.

I. 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

In Coleman's Brief, he chose not to respond directly to the Propositions of Law propounded by American General and accepted by this Court for review. Instead, he created three new propositions of law.¹ Merely restating general principles of law does not address the issue this Court deemed to be of public and great general interest: Whether a secured transaction can be split into its component parts when determining arbitrability, especially where there is a broad arbitration agreement.

Coleman also argues throughout his Merit Brief that American General improperly asks this Court to adopt a "but for" test to determine arbitrability, a test that has already been rejected

¹ Coleman's Brief, pp. 4, 13.

by some courts in Ohio.² Nowhere, however, in either American General's Memorandum in Support of Jurisdiction or in its Merit Brief are the words "but-for" used when describing the proper arbitrability analysis to be used in the context of a unified secured transaction.

As detailed in American General's Merit Brief, Article 9 of the UCC (R.C. Chap. 1309) sets forth the intertwined duties, rights and obligations incurred in connection with a secured transaction. The various documents created with a secured transaction – here a Loan Security Agreement, a financing statement and a termination statement – all relate to the same loan, the same collateral and the same parties, as well as the same governing documents. Particularly when the parties have agreed to a broad arbitration clause, *all* documents comprising the Article 9 secured transaction should be covered by the arbitration agreement in those documents.

II. Ohio and Federal Law Must be Uniform in Applying an Arbitration Analysis Under the Federal Arbitration Act

As this Court has previously recognized, the appropriate test to determine whether a particular claim is arbitrable is the one promulgated by the Sixth Circuit: Can the "action be maintained without reference to the contract or relationship at issue." *Academy of Medicine of Cincinnati v. Aetna Health Inc.* (2006), 108 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488, ¶24, citing *Fazio v. Lehman Brothers, Inc.* (6th Cir. 2003), 340 F.3d 386, 395. In the context of a secured transaction, a claim under R.C. 1309.513 simply cannot be maintained without reference to the underlying Loan Security Agreement or relationship at issue.

In his Brief, Coleman only focuses on half of this test, repeatedly stating that one must look to whether his claim could be maintained without reference to the underlying contract or, to use Coleman's terminology, "the paperwork signed at the time of the loan."³ Indeed, his Second

² Coleman's Brief, pp. 3, 10, 11, 12.

³ *Id.*, pp. 1, 4, 5, 8, 9, 11, 13, 14.

Proposition of Law asks only if his claim can be maintained without reference to the contract.⁴ Coleman incorrectly ignores the fact that the *Fazio* test also provides that a claim is arbitrable if that claim cannot be maintained without reference to the relationship at issue. *Academy of Medicine*, 108 Ohio St.3d 185, 2006-Ohio-657 at ¶24; *Fazio*, 340 F.3d at 395.

Coleman's argument, *albeit* erroneous, that his claim is not arbitrable since it "arises from an obligation independent from paperwork having the arbitration provision"⁵ would mean that only breach of contract claims are arbitrable. As this Court has held, "arbitration is *not* limited to claims alleging a breach of contract" *Academy of Medicine*, 108 Ohio St.3d 185, 2006-Ohio-657 at ¶19 (*emphasis added*). Arbitration has been upheld with respect to a wide variety of both common law and tort claims, as long as the parties agreed to arbitrate an issue, as determined by application of the *Fazio* test.⁶

It is instructive to look at the particular language the *Fazio* court used in promulgating this test. After stating that the proper method of analysis is to ask whether a claim could be maintained without reference to either the contract or relationship at issue, the *Fazio* court went on to hold that claims can and will be covered by arbitration provisions "if the allegations underlying the claims touch matters covered by the [agreement]." *Fazio*, 430 F.3d at 395 (*quotations omitted*). Thus, contrary to Coleman's assertion, the arbitrability analysis involves consideration of not only the underlying Loan Security Agreement, but also the relationship between American General and Coleman, as well as whether Coleman's claim touches matters covered by the Loan Security Agreement.

⁴ Coleman's Brief, p. 4.

⁵ *Id.*, p. 8.

⁶ Coleman states that the Arbitration Provisions are contained in a separate document. Coleman's Brief, pp. 3-4. Those Provisions, however, are part of the Loan Security Agreement he signed, not in a separate document. Supp., 16-21.

Using this analysis, it is clear that a claim such as Coleman's for failure to timely file a termination statement falls within the scope a broad arbitration clause such as the one Coleman signed. The duty to file a termination statement arises when there "is no obligation secured by the collateral covered by the financing statement, and no commitment to make an advance, incur an obligation, or otherwise give value" R.C. 1309.513(A)(1). This determination can only be made by looking at the documents that set forth both parties' obligations; that document is the Loan Security Agreement, the very same agreement that contains the Arbitration Provisions.

Coleman's argument that at least some of this information could also be derived from other American General records⁷ is irrelevant. It does not alter the fact that it is the Loan Security Agreement that determines whether there remains an obligation secured by the collateral covered by the financing statement or any commitment to making an advance, incur an obligation or otherwise give value. For example, what if there was an error in a lender's records as to whether the loan obligation had been fully paid? Under Coleman's position, the determination of whether the duty to file a termination statement had arisen would be made based on those erroneous documents, and not based on the signed governing loan agreement specifically describing the obligations of the parties. Since the issue of whether an obligation secured by the collateral covered by the financing statement is ultimately determined by the governing Loan Security Agreement, any claim under R.C. 1309.513 cannot be maintained without reference to the Loan Security Agreement, rendering that claim arbitrable.

⁷ Coleman's Brief, pp. 2, 3, 9, 13, 14.

Nor does Coleman's repeated assertion that American General is not disputing that the Loan was paid off and thus there is no claim to arbitrate preclude arbitrability.⁸ As this Court has repeatedly recognized, a court may not rule on the potential merits of the underlying claim when determining arbitrability. *Council of Smaller Enterprises v. Gates, McDonald & Co.* (1998), 80 Ohio St.3d 661, 666, 1998-Ohio-172, 687 N.E.2d 1352; *Academy of Medicine*, 108 Ohio St.3d 185, 2006-Ohio-657 at ¶13.

An agreement to submit claims to arbitration is one to submit *all* claims to arbitration, "not merely those which the Court will deem meritorious." *AT&T Technologies, Inc. v. Communications Workers of America* (1986), 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (*quotation omitted*). Indeed, even if a claim or defense "appears to the court to be frivolous," that issue is to be decided, "as the parties have agreed, by the arbitrator." *Id.* at 649-50. Coleman's improper attempt to assert a merits determination into the arbitrability analysis simply should not be countenanced.

This Court has previously recognized Ohio and federal law concerning arbitrability must be consistent. *Academy of Medicine*, 108 Ohio St.3d 185, 2006-Ohio-657 at ¶¶10-15. The Eighth District's decision below directly conflicts with a decision by the United States District Court, Northern District of Ohio, Eastern Division, which held that a claim for failure to timely file a mortgage release was arbitrable. *Howard v. Wells Fargo* (N.D. Ohio 2007), 2007 WL 2778664, *3.

Coleman attempts to get around this conflict by arguing that the *Howard* court did not apply the *Fazio* test adopted by this Court in *Academy of Medicine*, and instead applied a "but

⁸ Coleman's Brief, pp. 3, 5, 9, 13.

for” test.⁹ *Howard* specifically found that the borrower’s “claim *does* implicate the obligations of both [lender] and [borrower] under the Loan, as well as the mortgagee-mortgagor relationship between them, and this claim cannot be maintained without reference to her loan.” *Howard*, 2007 WL 2778664 at *3 (*emphasis in original*). The fact that the *Howard* court then went on to say that but for the loan and the relationship between the parties there would be no obligation to timely record a satisfaction does not change the plain fact that the *Howard* court *did* apply the appropriate test, and not the new arbitrability analysis created by the court below.

Coleman similarly misinterpreted several of the other cases he relied on (none of which are binding upon this Court) in support of his argument that his claim can be maintained without reference to the Loan Security Agreement between American General and Coleman and their relationship. For example, Coleman cited the *Coors* decision, claiming that the *Coors* court found that plaintiff’s antitrust claims were not subject to arbitration because they did not depend on any of the terms of the underlying agreement.¹⁰ The *Coors* court specifically held that some of *Coors*’ claims *were* arbitrable and some were not. That court noted the existence of a broad arbitration clause and the absence of an express exclusion of antitrust claims from arbitrability. The Tenth Circuit then individually analyzed each of the various claims to determine whether they implicated either the licensing agreement containing the arbitration provision or the relationship between the parties. *Id.* at 1515-1517. As discussed above, such an analysis establishes the arbitrability of any claim arising under R.C. 1309.513.

Coleman’s reliance on *Dillard* also is unfounded.¹¹ In that case, a narrowly crafted arbitration agreement was entered into when plaintiff opened an IRA with the bank, and was

⁹ Coleman Brief, p. 3.

¹⁰ *Coors Brewing Co. v. Molson Breweries* (10th Cir. 1995), 51 F.3d 1511. Coleman’s Brief, p. 7.

¹¹ *Dillard v. Fifth Third Bank* (Ohio App. 8th Dist.), 2005-Ohio-6341. Coleman’s Brief, p. 12.

specifically limited to “controversies relating to the IRA.” *Dillard*, 2005-Ohio-6341 at ¶10. Plaintiff later entered into a separate loan agreement, which was the basis of his lawsuit. The *Dillard* court found that plaintiff’s dispute concerning the separate loan agreement was outside the arbitration agreement entered into in connection with the IRA because “it does not arise from or directly relate to the IRA.” *Id.* In the case at bar, the statutory duty to file a termination statement under Article 9 of the UCC (R.C. 1309.513) is triggered when the Loan was fully paid. This is determined by the terms of the Security Loan Agreement, which contains the Arbitration Provisions. Furthermore, the Arbitration Provisions here are the “paradigm of a broad clause,”¹² unlike the narrow one used in *Dillard*.

Likewise the case of *Complete Personnel Logistics* is not applicable.¹³ The court there held that the claims asserted were outside the scope of the arbitration clause because they could be asserted without reference to the Claims Administrative Service Agreement (“CASA”). The CASA contained an arbitration clause covering “any dispute or claim arising from or in connection with [CASA] or the benefits provided by the Trust and its agents.” *Id.* at ¶6. The plaintiff asserted claims of misrepresentation concerning insurance, but “[t]he insurance was not provided pursuant to the [CASA]. Premiums were not collected pursuant to the CASA. The[] claims are unrelated to the [CASA] and to the benefits provided by the Trust . . .” and thus, the claims were outside the scope of the arbitration clause. *Id.* at ¶15.

¹² See *Academy of Medicine*, 2006-Ohio-657 at ¶18 (holding 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.’”).

¹³ *Complete Personnel Logistics, Inc. v. Patton* (Ohio App. 8th Dist.), 2006-Ohio-3356. Coleman’s Brief, pp. 10-16.

Finally, the *Schumaker* decision heavily relied upon by Coleman is distinguishable.¹⁴ *Schumaker* addressed whether an arbitration clause in a consumer's credit card agreement governed her claim against a Saks' personal shopper for unconscionable sales practices by selling her over \$100,000 in merchandise. That arbitration clause was "specifically limited to disputes regarding the credit agreement, the credit card holder's account and any balances on that account." *Id.* at ¶13. The *Schumacher* court found that the consumer's claims arising from the personal shopper's conduct could be and in fact were asserted without reference to the credit account, and thus were not arbitrable. *Id.* at ¶17. Significantly, the *Schumaker* court distinguished the arbitration clause at issue in that case from arbitration clauses in which courts upheld arbitration based upon broad arbitration clauses like the one Coleman signed. See *id.* at ¶¶18-20, discussing *Vincent v. Neyer* (Ohio App. 10th Dist. 2000), 139 Ohio App.3d 148, 745 N.E.2d 1127 and *Joseph v. MBNA American Bank* (Ohio App. 8th Dist.), 148 Ohio App.3d 660, 2002-Ohio-4090, 775 N.E.2d 550.¹⁵

Indeed, this case more closely represents *Fazio*, since a claim under R.C. 1309.513 necessarily makes reference to the agreement at issue and the relationship between the parties. In *Fazio*, a stockbroker misappropriated \$54,000,000 of his client's money, resulting in claims against his brokerage house for numerous securities violations including theft. *Fazio*, 430 F.3d at 391-392. Compelling arbitration, the Sixth Circuit found that "the lawsuit by necessity must describe why [the broker] was in control of the plaintiffs' money and what the brokerage houses' obligations were. The plaintiffs therefore cannot maintain their action without reference to the

¹⁴ *Schumaker v. Saks, Inc.* (Ohio App. 8th Dist.), 163 Ohio App.3d 173, 2005-Ohio-4391, 837 N.E.2d 393. Coleman's Brief, pp. 10-11.

¹⁵ It is worth noting that *Schumaker*, like every other opinion relied on by Coleman, is not binding upon this Court.

account agreements, and accordingly, this action is covered by the arbitration clauses.” *Fazio*, 340 F.3d at 395.

Likewise, Coleman’s claim, or any similar claim, “by necessity must describe” the Loan Security Agreement to determine there was any obligation secured by the collateral covered by the financing statement, a necessary predicate to the duty to file a termination statement. R.C. 1309.513(A)(1). Such is the case involving any secured transaction. The obligation secured by the collateral governing the financing statement is the Loan detailed in the Loan Security Agreement. Since Coleman cannot maintain his claim without reference to his Security Loan Agreement or his relationship with American General, his claim is arbitrable.

There can be no doubt that a loan, the financing statement securing that loan and the termination statement ending that secured transaction are all part and parcel of the same secured transaction. In each instance, one gives rise to the other. They all reference the same parties, the same obligation and the same collateral. Article 9 acknowledges that a lender’s duty to file a financing statement arises only when the underlying obligation is paid off. R.C. 1309.513(A)(1). Thus when determining arbitrability, an action for a violation of R.C. 1309.513 simply cannot be maintained without reference to the underlying obligation and/or the relationship created by that obligation.¹⁶

Creating a statewide standard clarifying that a secured transaction cannot be broken down into its component parts would elucidate the arbitrability analysis for lower courts. Making it clear that a secured transaction cannot be fragmented under an arbitrability analysis would also ensure that the federal and state standards surrounding arbitration remain uniform. This would

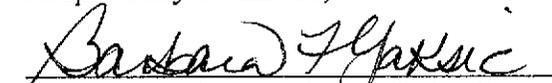
¹⁶ Coleman contends that rather than looking to the Loan Security Agreement, one could simply “consult the [lender’s] records.” Coleman’s Brief, p. 2. These “records” however, are nothing more than a reflection of the terms contained within the Loan Security Agreement.

eliminate the opportunity of parties to forum shop between federal and state courts in Ohio. It also would guarantee that broad clauses are given the deference they are due under *AT&T Technologies*, 475 U.S. 643 and *Council of Smaller Enterprises*, 80 Ohio St.3d 661. Finally, it would make certain that courts would not adopt a preemption analysis in place of an arbitrability analysis – when the two are clearly two distinct and separate tests.¹⁷ As such, this Court should adopt the propositions of law as articulated above to provide clear guidance to lower courts on the arbitrability analysis in the context of a secured transaction.

CONCLUSION

For the reasons set forth above and in its previously filed Merit Brief, Defendant-Appellant American General Financial Services, Inc. respectfully requests that this Court reverse the Decision of the court below and order that Plaintiff-Appellee Shelton Coleman submit his claim to arbitration.

Respectfully submitted,



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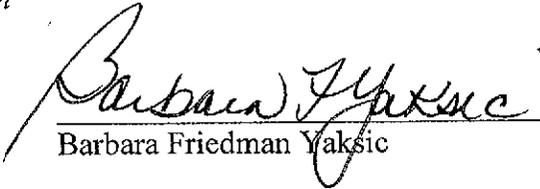
¹⁷ See American General's Merit Brief, pp. 13-16.

CERTIFICATE OF SERVICE

A copy of the foregoing *Reply Brief of Appellant American General Financial Services, Inc.* was sent by regular U.S. Mail, first class, postage prepaid this 31st day of January, 2009 to:

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