

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 08-3837

FRANCIS J. PULEO, TRISH C. PULEO, ON BEHALF
OF THEMSELVES AND ALL OTHER PENNSYLVANIA
RESIDENTS SIMILARLY SITUATED

Appellants

v.

CHASE BANK USA, N.A.

Appellee

SUPPLEMENTAL BRIEF OF THE APPELLANTS

On Appeal from the August 13, 2008 Order
Entered by the United States District Court for the
Eastern District of Pennsylvania, C.A. No. 07-4800

Michael J. Quirk
Mark R. Cuker
WILLIAMS CUKER BEREZOFSKY
One Penn Center at Suburban Station
1617 J.F.K. Boulevard, Suite 800
Philadelphia, PA 19103
(215) 557-0099

Counsel for Appellants and the Class

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INTRODUCTION

The parties' dispute in this case over whether the class action waiver provision in Defendant-Appellee Chase Bank USA, N.A.'s arbitration clause is enforceable is for an arbitrator, not a court, to decide. This answer follows from the Supreme Court's decisions construing and applying the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, and from the terms of Chase's own contract.

First, Plaintiffs' challenge to the class action waiver's validity should be decided by an arbitrator because it does not raise questions of "arbitrability." In applying the FAA, the Supreme Court has held that disputes between parties to an arbitration clause that go to the "merits" of their claims are presumptively for an arbitrator to decide unless the clause clearly states otherwise, whereas disputes over the "arbitrability" of claims are decided by courts unless a clause clearly and unmistakably states otherwise. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 and 944-45 (1995). In addressing what constitutes an "arbitrability" dispute, the Supreme Court has held that a dispute over "whether the contracts forbid class arbitration does not fall into this narrow exception" because it "concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties." *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (plur. op.). The same rationale applies to the dispute here

over the validity of Chase's class action waiver provision. *See Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 57 (1st Cir. 2007) (“[I]t is likely that this question of the unconscionability of the class action waiver provision, viewed as severable from the arbitration provision, is an issue for the arbitrator.”).

Second, even if this dispute were deemed to involve an arbitrability issue, it still should be arbitrated here because Chase's arbitration clause demonstrates a clear intent to arbitrate this dispute. This arbitration clause covers “[a]ny claim or dispute . . . by either you or us against the other . . . arising from or relating in any way to the Cardmember Agreement,” and specifies that, “[a]s used in this Arbitration Agreement, the term ‘Claim’ is to be given the broadest possible meaning.” App. 88. Since the class action waiver is a term of the Cardmember Agreement, Plaintiffs' challenge to its validity clearly relates to the agreement, and clearly falls within the “broadest possible meaning” given by Chase to the scope of arbitrable claims. This challenge to Chase's class action waiver provision thus may be arbitrated regardless of whether it is deemed to raise an arbitrability issue.

ARGUMENT

I. Plaintiffs' Challenge to the Validity of This Arbitration Clause's Class Action Waiver Provision is for an Arbitrator to Decide under the FAA.

The text of the FAA and the Supreme Court's interpretation of it in the *First*

Options line of cases provide the framework for answering the Court's first question presented as it applies to this case. The Act provides in relevant part that:

A written provision in . . . a 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, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The Act thus by its express terms provides for enforcement of agreements to arbitrate disputes arising out commercial contracts or transactions. Moreover, the Supreme Court long has found that this provision creates a "federal policy favoring arbitration agreements," under which "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

In *First Options*, the Supreme Court addressed the relationship between the FAA's policy favoring arbitration agreements and its requirement that there be such an agreement for the Act to apply. The issue presented in *First Options* was whether the determination of whether a party is bound by an arbitration agreement is for a court or an arbitrator to make under the FAA. 514 U.S. at 942. In holding that this issue was for a court to decide on the facts presented, the Court reaffirmed its prior recognition that any doubt concerning the scope of arbitrable *merits* issues should be resolved in favor of arbitration, *id.* at 945, but recognized a reverse

presumption *against* arbitration of “arbitrability” disputes wherein “[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clear and unmistakable’ evidence that they did so.” *Id.* at 944 (quoting *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986)).

The Court in *First Options* explained the reverse presumptions applied to arbitration of merits and arbitrability issues under the FAA as reflecting the likely expectations of parties. The Court noted that disputes over the arbitrability of merits issues arise “when the parties have a contract that provides for arbitration of some issues,” signifying that “the parties likely gave at least some thought to the scope of arbitration,” so that “one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter.” 514 U.S. at 945 (emphasis in original). By contrast, the Court found the issue of who should decide arbitrability disputes to be “rather arcane,” so that a contracting party “often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers.” *Id.* (citing Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1508-09 (1959)). Accordingly, and in light of the principle under the FAA that “a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration,” *First Options* directs courts not to construe a contract’s silence on the “who should decide

arbitrability” point as favoring arbitration, because doing so “might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.” 514 U.S. at 945.

In subsequent decisions addressing the role of courts and arbitrators under the FAA, the Supreme Court has applied the *First Options* framework and its rationale, while clarifying what constitutes an “arbitrability” dispute that is presumptively decided by a court. In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), the Court held that a dispute over the timeliness of a party’s submission under an arbitration service’s rule providing a six-year limitations period for initiating claims must be decided by an arbitrator, not a court. The Court explained that the phrase “question of arbitrability” has a “limited scope.” *Id.* at 83. It applies to “a gateway dispute about whether the parties are bound by a given arbitration clause,” or a “disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.” *Id.* at 84. But *Howsam* also found that this exception for judicial resolution does not apply to other types of gateway issues that parties likely would expect arbitrators to decide: “Thus ‘procedural questions which grow out of the dispute and bear on its final disposition’ are presumptively *not* for the judge, but for an arbitrator, to decide.” *Id.* (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557

(1964)) (emphasis in original). Because the plaintiff's satisfaction of the six-year limitations rule was deemed an "aspect of the controversy" that invoked the arbitration clause and an arbitrator was deemed more expert at applying this rule, *id.*, *Howsam* held that "it is reasonable to infer that the parties intended the agreement to reflect that understanding." *Id.* Thus, the presumption for arbitral, rather than judicial, resolution applied. *Id.*

In *Bazzle*, *supra*, the Supreme Court addressed the line of authority between courts and arbitrators in disputes over the availability of class action procedures in arbitration. *Bazzle* involved a "disputed issue of contract interpretation "over whether an arbitration clause prohibited class action proceedings or was silent on the issue, which under applicable state law would allow class action proceedings. 539 U.S. at 450. Again applying the *First Options* framework, the Supreme Court held that, "[u]nder the terms of the parties' contracts, the question--whether the agreement forbids class arbitration--is for the arbitrator to decide." *Id.* at 451 (plurality op.); *see also id.* at 455 (Stevens, J. conc. in judgment and diss. in part) ("[B]ecause JUSTICE BREYER's opinion express a view of the case close to my own, I concur in the judgment.")¹

¹ This Court has treated the *Bazzle* plurality opinion as controlling, finding that "a 'common denominator implicitly' runs through the reasoning of the 'five Justices who support the judgment' in the *Green Tree* decision." *Certain Underwriters at Lloyd's London v.*

In holding that the dispute over whether a class action was allowed in arbitration was for an arbitrator to decide, the Supreme Court relied both on the broad scope of the arbitration clause at issue and on the conclusion that this is not a “question of arbitrability.” The arbitration clause covered ““*all* disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract.”” *Id.* at 451 (quoting arbitration clause) (emphasis in op.). The Court held that the parties’ dispute about whether the arbitration clause prohibited class actions “is a dispute ‘relating to this contract’ and the resulting ‘relationships,’” so that “the parties seem to have agreed that an arbitrator, not a judge, would answer the relevant question.” *Id.* at 451-52. Moreover, the Court also held that any uncertainty on this score would favor arbitral resolution because the “question here--whether the contracts forbid class arbitration--does not fall into [the] narrow exception” for judicial resolution of arbitrability disputes. *Id.* at 452. As the Court explained:

Unlike *First Options*, the question is not whether the parties wanted a judge or an arbitrator to decide *whether they agreed to arbitrate a matter*. Rather the relevant question here is what *kind of arbitration proceeding* the parties agreed to. That question does not concern a state statute or judicial procedures. It concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer

Westchester Fire Ins. Co., 489 F.3d 580, 586 (3d Cir. 2007) (quoting *Rappa v. New Castle County*, 18 F.3d 1043, 1057-58 (3d Cir. 1994)) (internal citation omitted).

that question. Given these considerations, along with the arbitration contracts' sweeping language concerning the scope of the questions committed to arbitration, this matter of contract interpretation should be for the arbitrator, not the courts, to decide.

Id. at 452-53 (citations omitted) (emphasis in original).

The *Bazzle* decision and this Court's decisions construing it and the entire *First Options* line of cases all support arbitral, not judicial, resolution of Plaintiffs' challenge to the validity of Chase's class action waiver here. Under *Howsam* and *Bazzle*, this Court has concluded that "'only when there is a question regarding whether the parties should be arbitrating at all' is a question of arbitrability raised for the court to resolve." *Certain Underwriters*, 489 F.3d at 585 (quoting *Dockser v. Schwartzberg*, 433 F.3d 421, 426 (4th Cir. 2006)); see also *Gay v. CreditInform*, 511 F.3d 369, 387 (3d Cir. 2007) (quoting *Certain Underwriters*). Under this framework, Plaintiffs' challenge to the validity of the class action waiver alone does not raise a question of arbitrability because it does not question whether the parties should be arbitrating at all. Rather, as in *Bazzle*, this dispute goes to *what kind* of arbitration may take place, individual or class-wide, and thus implicates procedural issues of the type that *Bazzle* held were for an arbitrator to decide.

The fact that the dispute in *Bazzle* was over whether the arbitration clause *did* prohibit class actions, while the dispute here is over whether the arbitration

clause *can* prohibit class actions, does not change the result. In both cases, the arbitrator is deciding not whether the parties agreed to arbitrate, but how the arbitration may proceed on claims that the parties agree are arbitrable. Thus, the First Circuit recently found in addressing this very issue that “it is likely that this question of the unconscionability of the class action waiver provision, *viewed as severable from the arbitration provision*, is an issue for the arbitrator.” *Skirchak*, *supra*, 508 F.3d at 56 (emphasis added).² The same conclusion should apply here. Since Plaintiffs’ challenge to the validity of Chase’s class action waiver provision alone does not implicate whether the parties should be arbitrating at all, it does not raise an issue of arbitrability and thus should be decided by an arbitrator.

Moreover, even if this challenge to the class action waiver’s validity were held to raise an issue of arbitrability, it still should be decided by an arbitrator under the sweeping scope of Chase’s arbitration clause. As discussed, this arbitration clause covers any claim or dispute between the parties “arising from or relating in any way to the Cardmember Agreement.” App. 88. Here, Plaintiffs’ challenge to the validity of the class action waiver provision is, as in *Bazzle*, a dispute clearly “arising from or relating to” the Cardmember Agreement. But even

² In *Skirchak*, the First Circuit proceeded to decide this issue only because the parties had “affirmatively stated their intention that the court decide the unconscionability and statutory invalidity questions.” *Id.*

if this were not clear, the clause sweeps more broadly by providing that, “[a]s used in this Arbitration Agreement, the term ‘Claim’ is to be given the broadest possible meaning.” App. 88. The clause thus can only be read *not* to cover this dispute if it is impossible for *any* arbitration clause to do so. In this circumstance, the Court should hold that Chase’s arbitration clause clearly requires arbitral resolution of Plaintiffs’ challenge to the class action waiver’s validity.

II. Applicable State Contract Law Allows Plaintiffs to Challenge the Class Action Waiver’s Validity Without Challenging the Entire Arbitration Clause.

In light of the foregoing, the answer to the Court’s second question is that the answer to Question 1 does turn in part on whether invalidation of the class action waiver provision would invalidate the whole arbitration clause. This is because an argument that *would* invalidate the whole arbitration clause would raise a “question regarding whether the parties should be arbitrating at all,” *Certain Underwriters*, 489 F.3d at 585 (citation omitted), which is at least presumptively for a court to decide under the FAA. But this is not the case here because Plaintiffs’ challenge to this class action waiver’s validity does not implicate the entire arbitration clause’s validity.

The Supreme Court has not addressed whether invalidation of a single term in an arbitration clause compels invalidation of the entire clause. In *Pacificare*

Health Systems, Inc. v. Book, 538 U.S. 401 (2003), the Court arguably had an opportunity to do so where the issue presented was whether parties could be compelled to arbitrate statutory claims under an arbitration clause that was alleged to prohibit treble damages awards available under the statute. *Id.* at 402. But the Court did not decide this issue because it found that the clause was ambiguous as to the statutory damages sought, and that courts “should not take upon ourselves the authority to decide the antecedent question of how the ambiguity is to be resolved.” *Id.* at 407. Instead, the Court held that an arbitrator must resolve the ambiguity because this was not an issue of arbitrability. *Id.* at 407 n.2.

Absent any clear directive based on the FAA itself, this Court long has recognized that courts are “to look first to the relevant state law of contracts . . . in deciding whether an arbitration agreement is valid under the FAA.” *Spinetti v. Service Corp. Int’l*, 324 F.3d 212, 214 (3d Cir. 2003). Here, Plaintiffs are Pennsylvania consumers asserting claims under Pennsylvania law, App. 22, although Chase contends that Delaware law governs. *See* Brief of Appellee at 10. Under either state’s law, a contract term may be invalidated without invalidating the entire agreement in which it appears. *See, e.g., Spinetti*, 324 F.3d at 220 (“Pennsylvania law supports the actions of the district court in referring Spinetti’s employment discrimination dispute to arbitration and striking the agreement’s

illegal provisions.”); *State Farm Mutual Auto. Ins. Co. v. Wagamon*, 541 A.2d 557, 561 (Del. 1988) (“[W]hen finding a contract provision violative of public policy, we follow the well-established rule of construction that if the offending provision is separable, it should be stricken, while the remaining contract provisions should be enforced.”). Thus, neither state’s law *requires* invalidation of the whole arbitration clause if the class action waiver is held invalid.

In addressing when to sever unlawful terms and when to invalidate an entire agreement, this Court has looked to Restatement principles in different states’ contract law. In *Spinetti*, for example, the Court invoked the principle that:

A bargain that is illegal only because of a promise or a provision for a condition, disregard of which will not defeat the *primary purpose* of the bargain, can be enforced with the omission of the illegal portion by a party to the bargain who is not guilty of serious moral turpitude unless this result is prohibited by statute.

324 F.3d at 219 (quoting RESTATEMENT (FIRST) OF CONTRACTS § 603 (1932) (emphasis in op.); *see also Parilla v. IAP Worldwide Serv’s VI, Inc.*, 368 F.3d 269, 286 (3d Cir. 2004) (citing same provision in applying Virgin Islands law); *cf. Alexander v. Anthony Int’l, L.P.*, 341 F.3d 256, 270-71 (3d Cir. 2003) (same, invalidating entire arbitration clause on grounds that unconscionability “permeates the agreement” and “taints its central purpose of requiring arbitration”).

Here, Plaintiffs do not (and likely could not) invoke any of these arguments

concerning the primary purpose of the entire arbitration clause or Chase's "moral turpitude" in challenging the single class action waiver provision. *Cf. Parilla*, 368 F.3d at 288 ("The 'policy is not penal,' however, and 'where a term rather than the entire contract is unconscionable, the appropriate remedy is ordinarily to deny effect to the unconscionable term.'") (quoting RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. g). Absent any allegation tainting or even implicating the whole arbitration clause, Plaintiffs' challenge to the class action waiver here does not raise an arbitrability issue and thus is decided by an arbitrator under the FAA.³

III. The Parties' Agreement that Plaintiffs' Claims are Arbitrable and the Arbitration Clause's Severability Provision Both Further Support Arbitral Determination of the Class Action Waiver's Validity.

In answer to the Court's third question presented, the parties' agreement that Plaintiffs' underlying claims are arbitrable is relevant in two respects. First, it underscores that the dispute over the class action waiver provision does not raise an arbitrability issue because it "concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties." *Bazzle*,

³ In this respect, Plaintiffs' arguments here may direct a different result than would arguments in another case where, for example, a clause's designated arbitral forum prohibits class actions so that the agreement for arbitration is itself the source of unconscionability. In such a case, these issues may not be deemed separable. Here, however, the arbitration clause allows Plaintiffs to choose the American Arbitration Association, App. 88, whose rules permit class action proceedings, App. 101-106, and which will accept cases involving class action issues where directed by a court. App. 108 (AAA Policy Statement, July 14, 2005).

539 U.S. at 452. Instead, it concerns “what *kind of arbitration proceeding*,” *id.*, will take place. The agreement that the case is arbitrable thus supports applying *Bazzle*’s holding that an arbitrator decides disputes over class action proceedings.

Second, this agreement also differentiates this case from a number of cases decided by this and other courts where the party challenging a class action waiver or other exculpatory terms did so as part of a challenge to an entire arbitration clause, thereby raising an arbitrability dispute that is not present here. *See, e.g., Parilla*, 368 F.3d at 273 (plaintiff opposed arbitration motion); *Alexander*, 341 F.3d at 263 (same); *Spinetti*, 324 F.3d at 213 (same); *Johnson v. West Suburban Bank*, 225 F.3d 366, 368 (3d Cir. 2000) (same); *cf. Homa v. American Express Co.*, 558 F.3d 225, 227 (3d Cir. 2009) (describing parties’ arguments to court over validity of class action waiver provision). Since neither party here contests the arbitrability of Plaintiffs’ underlying claims, none of these cases deciding the validity of class action waivers or other arbitration clause provisions prevents arbitral resolution of the parties’ dispute here.

Finally, the severability provision in Chase’s arbitration clause likewise supports arbitral resolution of this dispute because it too separates class action issues from arbitrability issues. This provision states that “if *any* provision of this Arbitration Agreement is deemed invalid or unenforceable, the remaining portions

shall nevertheless remain in force.” App. 89 (emphasis added). In this respect, Chase’s arbitration clause is different from clauses addressed by other courts that expressly *prohibited* severance of a class action waiver. *See, e.g., Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1098 (9th Cir. 2009) (“[T]he arbitration agreement itself includes a provision prohibiting severance of the class action waiver. Therefore, in accordance with its severability clause, the arbitration agreement as a whole is unenforceable.”); *Shroyer v. New Cingular Wireless Serv’s, Inc.*, 498 F.3d 976, 986-87 (9th Cir. 2007) (same ruling); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1009 (Wash. 2007) (same ruling). Since Chase too could have written its contract to make the class action waiver’s validity a question of arbitrability by tying it to the whole arbitration clause’s validity, but did not do so, the Court should hold that the dispute here over the class action waiver provision alone is properly decided by an arbitrator on the facts presented in this case.

CONCLUSION

For all of the reasons set forth herein, the district court’s order enforcing Defendant’s class action waiver should be reversed and the dispute over this provision’s validity should be resolved through arbitration.

Dated: December 24, 2009

Respectfully submitted,

/s/ Michael J. Quirk

Michael J. Quirk

Mark R. Cuker

WILLIAMS CUKER BEREZOFSKY

One Penn Center at Suburban Station

1617 John F. Kennedy Blvd., Suite 800

Philadelphia, PA 19103-1819

(215) 557-0099

Counsel for Plaintiffs-Appellants

COMBINED CERTIFICATIONS

BAR MEMBERSHIP

Pursuant to Third Circuit L.A.R. 28.3(d), I, Michael J. Quirk, hereby certify that I am a member of the Bar of this Court, having been admitted on or about January 30, 2003.

WORD COUNT AND TYPEFACE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman Font in 14-point font size.

IDENTICAL COMPLIANCE OF BRIEFS AND VIRUS CHECK

Pursuant to Third Circuit L.A.R. 31.1(c), I hereby certify that the foregoing E-Brief and the hard copies of the brief have identical text. I also certify that a virus detection program — Symantec Norton Anti-Virus (2008 version) — was run on the file and that no virus was detected.

Dated: December 24, 2009

By: /s/ Michael J. Quirk
Michael J. Quirk
Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on December 24, 2009, I electronically filed the foregoing REPLY BRIEF OF THE APPELLANTS with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I also certify that 30 hard copies of the foregoing REPLY BRIEF OF THE APPELLANTS shall be filed by hand delivery to the Office of the Clerk, United States Court of Appeals for the Third Circuit, within three days of this day when the electronic copy was filed.

Dated: December 24, 2009

By: /s/ Michael J. Quirk
Michael J. Quirk
Counsel for Plaintiffs-Appellants