IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

KIM RIVERA,

Plaintiff-Petitioner,

vs. No. 32,340

AMERICAN GENERAL FINANCIAL SERVICES, INC., a/k/a AMERICAN GENERAL FINANCE, INC.; AMERICAN SECURITY INSURANCE COMPANY, a/k/a AMERICAN SECURITY GROUP; LINDA CALLAHAN; and JANE DOE,

Defendants-Respondents.

AMICUS CURIAE BRIEF OF AMERICAN FINANCIAL SERVICES ASSOCIATION AND CONSUMER BANKERS ASSOCIATION IN SUPPORT OF DEFENDANT-RESPONDENT AMERICAN GENERAL FINANCIAL SERVICES, INC.

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STATEMENT OF COMPLIANCE

As required by Rule 12-213(G), we certify that this amicus brief complies with the type-volume limitation of Rule 12-213(F)(3). According to Microsoft Office Word 2007, the body of the Amicus brief, as defined by Rule 12-213(F)(1), contains 4,781 words.

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INTRODUCTION

Amici Curiae American Financial Services Association ("AFSA") and Consumer Bankers Association ("CBA") respectfully submit this brief in support of Defendant-Respondent American General Financial Services, Inc. ("American General").

AMICI'S INTEREST IN THIS CASE

AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA has a broad membership, ranging from large international financial services firms to single office, independently owned consumer finance companies. The association represents financial services companies that hold leadership positions in their markets and conform to the highest standards of customer service and ethical business practices. AFSA has provided services to its members for more than 90 years. The association's officers, board and staff are dedicated to continuing this legacy of commitment through the addition of new members and programs, and increasing the quality of existing services.

The CBA is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer, auto, home equity and education finance, electronic retail delivery systems, privacy, fair lending, bank sales of investment products, small business services and community development.

The CBA was founded in 1919 to provide a progressive voice in the retail banking industry. The CBA represents federally-insured financial institutions that collectively hold more than 70% of all consumer credit held by federally-insured depository institutions in the United States.

Many of *Amici*'s members, constituent organizations and affiliates (collectively, "Members") have adopted as standard features of their business contract provisions that in appropriate circumstances provide for the arbitration of disputes arising from or relating to those contracts. They use arbitration because it is a prompt, fair, inexpensive and effective method of resolving disputes with consumers and other contracting parties and because arbitration minimizes the disruption and loss of good will that often results from litigation. Indeed, based on the U.S. Supreme Court's consistent endorsement of arbitration over the past several decades (and as recently as May 2010), Members have structured millions of contractual relationships around arbitration agreements. Virtually all of the arbitration agreements used by Members are governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq.

Most of the arbitration agreements used by Members name the National Arbitration Forum ("NAF"), the American Arbitration Association ("AAA") and/or JAMS as the arbitrator administrator. One of the issues presently before this Court in the above matter is whether the Court of Appeals erred in "enforcing

an arbitration clause that requires arbitration before the National Arbitration Forum, which, as a result of recent law enforcement action, has been judicially barred from administering *any* consumer arbitrations and cannot possibly administer an arbitration between petitioner and respondent." (Plaintiff's Petition for Writ of Certiorari ("Petition"), filed April 19, 2010, p. 1). If this Court reaches the merits of that issue,[1] this Court's ruling will potentially affect not only Members whose arbitration agreements name the NAF as arbitration administrator, but also Members whose agreements name other organizations, such as AAA and JAMS, as the arbitration administrator, because there are occasions where the AAA and JAMS are unable or unwilling to administer a particular arbitration. An indication of the importance of this issue to Members is the following statement from plaintiff's Petition requesting this Court to grant review:

> Importantly, no court of highest appeal has yet addressed this issue, which is of substantial public interest for consumer loan disputes across New Mexico and indeed around the country .... Given the widespread use of [the] NAF in consumer arbitration provisions, lower courts, both in New Mexico and elsewhere, would benefit from the Court's guidance on this important issue.

(Petition, at pp. 12-13).

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[1] *Amici* understand that there are timeliness and jurisdictional questions before the Court. (Order, No.32,340, filed Aug. 25, 2010).

THE FEDERAL ARBITRATION ACT APPLIES IN THIS CASE

The loan contracts in this case specify that "[t]he Federal Arbitration Act, not state arbitration laws or procedures, applies to and governs the Arbitration Provision." 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., 534 U.S. 279, 288 (2002) (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991)). The FAA embodies a liberal federal policy favoring arbitration agreements. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002). To implement this policy, Section 2 of the FAA, its core provision, states that arbitration agreements are "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. Section 2 creates a body of federal substantive law of arbitrability that is binding on state as well as federal courts. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006); accord, Preston v. Ferrer, 552 U.S. 346, 349 (2008) (the FAA "calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration").

Notably New Mexico courts also embrace arbitration as a method of dispute resolution. As this Court recently stated in Durham v. Guest, 2009-NMSC-007, ¶32,145 N.M. 694, 702, 204 P.3d 19, 27:

> New Mexico has a strong public policy in favor of arbitration as a form of dispute resolution, as expressed in the Uniform Arbitration Act, NMSA 1978, §§ 44-7A-1 through -32 (2001). *See Fernandez v. Farmers Ins. Co. of Ariz., 115 N.M. 622, 625, 857 P.2d 22, 25 (1993).* New Mexico has specifically determined that arbitration is an acceptable form of dispute resolution when the parties have agreed to resolve their dispute without accessing the judicial system. *See* § 44-7A-7(a) (stating that agreements to arbitrate are "valid, enforceable and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract").

Id.

CONGRESS, THE COURTS AND CONSUMERS ALIKE HAVE REPEATEDLY RECOGNIZED THE BENEFITS OF CONSUMER ARBITRATION

Because Plaintiff's discussion of the NAF may create the impression that all consumer arbitrations and consumer arbitration administrators are suspect, some discussion of that subject is warranted to set the record straight. As discussed below, it is well-settled that the benefits of arbitration accrue to consumers who have disputes with companies. But the benefits of arbitration are not limited to parties who have actual disputes. Rather, *all* contracting parties benefit from the lower dispute resolution costs inherent in arbitration. That is because economic considerations encourage companies to pass on to their customers, in whole or in

part, the lower dispute resolution costs they incur as a result of arbitration. Stephen J. Ware, Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements, 2001 J. Disp. Resol. 89, 91-93.

Decisions under the FAA have consistently made it clear that the FAA applies to consumer contracts. 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, 531 U.S. 79, 91-92 (2000) (enforcing arbitration clause between consumer and subprime lender); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 222 (1987) (enforcing arbitration agreement between customer and brokerage firm); Jenkins v. First Am. Cash Advance of Ga., Inc., 400 F.3d 868 (11th Cir. 2005), cert. denied, 546 U.S. 1214 (2006) (enforcing arbitration agreement in contract between consumer and payday lender); Harris v. Green Tree Fin. Corp., 183 F.3d 173 (3d Cir. 1999) (enforcing arbitration agreement between borrower and subprime lender); Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997), cert. denied, 522 U.S. 808 (1997) (enforcing arbitration agreement between consumer and computer manufacturer).

Arbitration merely provides an alternative forum for resolving claims that the law has been violated. The U.S. Supreme Court has repeatedly instructed 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. 20, 26 (1991); accord, Randolph, supra, 531 U.S. at 90 ("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"); 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1469 (2009) (same).

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

> 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, 513 U.S. 265, 290 (1995) (citations omitted). Arbitration is highly favored for its "simplicity, informality, and expedition." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985). See also 14 Penn Plaza LLC v. Pyett, supra, 129 S. Ct. at 1464 ("[p]arties generally favor arbitration precisely because of the economies of dispute resolution"); id. at 1471 ("[A]rbitration procedures are more streamlined

than ... litigation .... [T]he relative informality of arbitration is one of the chief reasons that parties select arbitration.").

Empirical studies confirm that consumers benefit from arbitration and actually prefer it to litigation. For example, on March 12, 2009, the Searle Civil Justice Institute of Northwestern University School of Law released the first in-depth study of consumer arbitrations administered by the AAA. See Consumer Arbitration Before the American Arbitration Association Preliminary Report, available at http://www.law.northwestern.edu/searlecenter/ uploads/Consumer%20 Arbitration%20full_report.pdf. The study, which was based on a review of 301 consumer arbitrations that were closed by award between April and December 2007, reached the following conclusions: (1) The upfront cost of arbitration for consumer claimants is quite low (an average of $96 for claims less than $10,000 and $219 for claims between $10,000 and $75,000). These amounts are below the levels specified in the AAA fee schedule for low-cost arbitrations and are the result of arbitrators reallocating consumer costs to businesses. (2) AAA consumer arbitration is an expeditious way to resolve disputes (an average of 6.9 months). (3) Consumers won some relief in 53.3% of the cases filed and recovered an average of $19,255 (52.1% of the amount claimed). (4) No statistically significant repeat-player effect was identified using a traditional definition of repeat-player

business.[2] (5) Arbitrators awarded attorneys' fees to prevailing consumers in 63.1% of cases in which the consumer sought such an award and the average attorneys' fee award was $14,574. (6) A substantial majority of consumer arbitration clauses (76.6%) fully complied with the AAA Due Process Protocol.[3] (7) AAA's review of arbitration clauses for Protocol compliance was effective (98.2% of the time) at identifying and responding to clauses with Protocol

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[2] Consumer lawyers often allege that arbitrators are motivated in favor of businesses that draft the arbitration contracts (the "repeat-player effect"). See, e.g, Bettencourt v. Brookdale Senior Living Communities, Inc., 09-CV-1200-BR, 2010 U.S. Dist. LEXIS 3436, at *40-41 (D. Ore. Jan. 14, 2010) (rejecting plaintiff's contention that defendant's experience as a repeat player with the AAA in the arbitral forum gave it an advantage over plaintiff).

[3] The AAA has adopted a Consumer Due Process Protocol that must be complied with by companies which wish to use the AAA as an arbitration administrator. See http://www. adr.org/sp.asp?id=22019. Numerous consumer advocates and governmental groups were members of the Advisory Committee that formulated the Protocol. The Protocol was adopted by the AAA in April 1998 to ensure that arbitration agreements between consumers and the companies they deal with are endowed with "fundamental fairness." The AAA has also adopted Supplementary Consumer Rules for use in arbitrations between consumers and businesses, see http://www.adr.org/sp.asp?id=22014, and a special schedule of arbitration fees that caps the fee to the consumer on a claim of $10,000 or less at $125. All other arbitration fees are paid by the company. An impoverished consumer can also apply to the AAA for a waiver of all arbitration costs. U.S. Supreme Court Justice Ruth Bader Ginsburg characterized the AAA provisions limiting fees in consumer cases as a "model[] for fair cost and fee allocation." Green Tree Fin. Corp.-Ala. v. Randolph, supra, 531 U.S. at 95 (Ginsburg, J., concurring). JAMS has also adopted consumer fairness procedures. See http:// www.jamsadr.com/rules-consumer-minimum-standards.

violations. (8) AAA refused to administer a significant number of consumer cases because of Protocol violations by businesses. In 2007, AAA refused to administer at least 85 consumer cases, and likely at least 129 consumer cases (9.4% of its case load) because the business failed to comply with the Protocol. (9) As a result of AAA's Protocol compliance review, some businesses either waive problematic provisions or revise arbitration clauses to remove provisions that violate the Protocol.

A second study by the same organization, this one involving debt collection, showed that "[c]reditors prevailed less often (that is, consumers prevailed more often) in the arbitrations studied than in court ... even after controlling for differences among the types of cases and the venue in which they were brought" and that "[c]reditor recovery rates in the arbitrations studied were lower than, or comparable to, creditor recovery rates in court ... [e]ven after controlling for differences among the cases." Searle Institute, Creditor Claims in Arbitration and in Court Interim Report No. 1, Executive Summary (Nov. 2009) (emphasis eliminated), *available at* http://www.law.northwestern.edu/searlecenter/uploads/CREDITOR%20CLAIMS%20IN%20ARBITRATION%20AND%20IN%20COURT%20INTERIM%20REPORT%20NO.%201.pdf.

In April 2005, Harris Interactive released the results of an extensive survey of arbitration participants sponsored by the U.S. Chamber's Institute for Legal

Reform. See http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf. The survey was conducted online among 609 adults who had participated in a binding arbitration case that culminated in a decision. The major findings were that: (i) arbitration was widely seen as faster (74%), simpler (63%) and cheaper (51%) than going to court; (ii) two-thirds (66%) of the participants said they would be likely to use arbitration again, with nearly half (48%) saying they were extremely likely to do so; (iii) even among those who lost, one-third said they were at least somewhat likely to use arbitration again; (iv) most participants were very satisfied with the arbitrator's performance, the confidentiality of the process and its length; and (v) predictably, winners found the process and outcome very fair and losers found the outcome much less fair; however, 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. See also Lewis L. Maltby, Private Justice: Employment Arbitration and Civil Rights, 30 Colum. Hum. Rts. L. Rev. 29, 48, 63 (1998) (director of ACLU's National Task Force on Civil Liberties in the Workplace concludes that employees collectively receive 10.4% of their demand in litigation, compared with 18% in arbitration, and "arbitration holds the potential to make workplace justice truly available to rank-and-file employees for the first time in our history").

THE FAA IMPOSES RULES OF FUNDAMENTAL IMPORTANCE WHICH GUIDE THE CONSTRUCTION OF ARBITRATION PROVISIONS GOVERNED BY THE FAA

Earlier this year, the United States Supreme Court instructed that when a court construes a contract governed by the FAA, it must heed not only any state law principles that may be applicable but also the fundamental principles of federal arbitration law embodied in the FAA: "While the interpretation of an arbitration agreement is generally a matter of state law ..., the FAA imposes certain rules of fundamental importance ...." Stolt-Nielsen v. AnimalFeeds Int'l, Inc., 130 S. Ct. 1758, 1773 (2010). The FAA preempts any contrary state law principles. Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) ("[FAA] Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary").

Among those fundamental principles is that the FAA creates a presumption in favor of arbitrability. Gilmer v. Interstate/Johnson Lane Corp., supra, 500 U.S. at 25; Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217 (11th Cir. 2000). The U.S. Supreme Court has repeatedly instructed that (a) any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, and (b) an order to arbitrate should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that

covers the dispute. See United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582-83 (1960); AT&T Techs., Inc. v. Communications Workers, 475 U.S. 643, 650, 659 (1986). Thus, a "claim will be deemed arbitrable if an arbitration clause is capable of any interpretation that a claim is covered." Lieschke v. RealNetworks, Inc., No. 99 C 7274, 2000 U.S. Dist LEXIS 1683, at *6 (N.D. Ill. Feb. 10, 2000); accord, Kiefer Specialty Flooring, Inc. v. Tarkett, Inc., 174 F.3d 907 (7th Cir. 1999).

In her brief, Plaintiff makes much of the circumstances under which the NAF abandoned the administration of consumer arbitration claims. But the NAF is not the real story here. This is not the first time, not will it be the last, that an arbitration administrator or arbitrator selected by the parties to decide the dispute has been unable to do so. Over the years other organizations have also declined to administer arbitrations in which they had been selected. For example, in January 2003 the AAA ceased handling individual health care disputes. See http://www.adr.org/sp.asp?id=32192. More recently, it imposed a moratorium on consumer debt collection arbitrations. See http://www.adr.org/sp.asp?id=36427. The National Association of Securities Dealers has also declined to administer particular disputes from time to time. See, e.g., Reddam v. KPMG, LLP, 457 F.3d 1054, 1059 (9th Cir. 2006).

The real issue here is not the reasons why the NAF cannot administer this arbitration, but rather what is to be done, consistent with the FAA, now that the NAF is unable to serve. That is the same question in virtually every case in which the administrator selected by the parties -- whether it be the NAF, the AAA or JAMS -- is unable to serve. And it is the reason why Congress, in Section 5 of the FAA, created a procedure for filling arbitrator vacancies consistent with the overriding federal policy favoring the arbitration of disputes. Congress anticipated that arbitrator vacancies (such as the one in this case) would occur from time to time, and in Section 5 of the FAA it devised the remedy of permitting the court to select the arbitrator.

To be sure, the withdrawal of the NAF affects literally millions of arbitration provisions that are currently in use. For more than a decade, most financial services arbitration agreements named the NAF, either alone or in conjunction with the AAA and/or JAMS, as an arbitration administrator. So this Court's ruling on the issue presented will have an immediate impact that resonates far outside New Mexico. But the broader issue – one that focuses not on the NAF per se but rather on the salient policies embodied in Section 5 of the FAA – will affect FAA jurisprudence far into the future. This Court is now presented with an opportunity to reaffirm the fundamental principles underlying the FAA because arbitration is

possible under the American General arbitration provision herein notwithstanding the inability of the NAF to serve as the arbitration administrator.

CONSISTENT WITH THE FAA, THE ARBITRATION PROVISION HEREIN CAN BE REASONABLY INTERPRETED IN A MANNER THAT WILL PERMIT ARBITRATION TO PROCEED WITH A COURT-APPOINTED ARBITRATOR

Section 5 of the Federal Arbitration Act, 9 U.S.C. § 5, provides:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

New Mexico's Uniform Arbitration Act has its own counterpart to Section 5 of the FAA -- NMSA 1978, 44-7A-12(a) -- which provides that:

> If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed unless the method fails. If the parties have not agreed on a method, the agreed method fails or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator. An arbitrator so appointed has all the powers

> of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

Accordingly, New Mexico's arbitration law, like the FAA, authorizes the court to appoint an arbitrator where, as in this case, the method for appointing an arbitrator agreed to by the parties fails. Directing the court to appoint an arbitrator in this case is therefore totally consistent with both federal and New Mexico public policy regarding arbitration.

American General's Arbitration Provisions state that arbitration will be conducted under the rules and procedures of the NAF and refer to the NAF's arbitration selection procedures in several places. (Record Proper 81, 84, 67.) That method for appointing an arbitrator has failed. But under the FAA and New Mexico law, that is not fatal to enforcement of the Arbitration Provisions. That is because the Arbitration Provisions contain a severability clause which provides:

> If any term of the Arbitration Provisions is unenforceable, the remaining terms are severable and enforceable to the fullest extent permitted by law.

(Emphasis added). (Record Proper 67.)

Although Plaintiff contends that appointment of the NAF was "integral" to the Arbitration Provisions and that the inability of the NAF to administer the arbitration means that no arbitration should occur, the severability language of the Arbitration Provisions demonstrates that the parties' primary intent was that an arbitration take place, not that an arbitration administered only by the NAF take

place. The language states that if "any" term of the Arbitration Provisions is unenforceable, the remaining terms must be enforced to the fullest extent permitted by law. The severability clause did not except the NAF arbitrator-appointment procedures from its operation. Unquestionably, then, the parties intended that arbitration occur even if the NAF could not administer the arbitration.

Those parts of the Arbitration Provisions referencing NAF-administered arbitration are "unenforceable" because the NAF is no longer administering consumer arbitrations. Therefore, the severability clause directs that the remaining parts of the Arbitration Provision be enforced "to the fullest extent permitted by law." With references to the NAF severed, the Arbitration Provisions contain "no method" of arbitrator selection and, therefore, under FAA § 5, the court "shall" appoint the arbitrator. See 9 U.S.C. § 5 ("If the parties have not agreed on a method ..., the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator").

Likewise, the inability of the NAF to serve as arbitration administrator clearly constitutes a "lapse in the naming of an arbitrator" within the meaning of Section 5 of the FAA. Although Plaintiff asserts that "lapse" only means "'a lapse in time in the naming of the arbitrator'" (Pl. Br., p., 16) (citation omitted), "lapse" can also mean "failure" or "failure of some contingency." See Dictionary.com, "lapse," available at http://dictionary.reference.com/ browse/lapse?&qsrc=. Here,

the administration of the arbitration by the NAF has failed because of the contingency that the NAF is no longer administering consumer arbitrations. Defining "lapse" in a narrow fashion that would restrict arbitration, when the term is also capable of other meanings that would enable arbitration, is not in keeping with the fundamental policy of the FAA that all doubts are to be resolved *in favor of* arbitration. Indeed, the language of FAA Section 5 itself, which is broad and phrased in the disjunctive, strongly suggests that Congress intended "lapse" to mean any reason for the failure to have an arbitrator, not simply a failure resulting from a time delay:

> ... but if no method be provided therein, *or* if a method be provided and any party thereto shall fail to avail himself of such method, *or* if for *any other reason* there shall be a lapse in the naming of an arbitrator ... *or* in filling a vacancy .....

(Emphasis added). See Brown v. ITT Consumer Fin. Corp., supra, 211 F.3d at 1222 ("Section 5 of the FAA provides a mechanism for appointment of an arbitrator where 'for any [] reason there shall be a lapse in the naming of an arbitrator....' The unavailability of the NAF does not destroy the arbitration clause.").

Other courts faced with analogous circumstances have construed the arbitration provision in a manner consistent with the FAA's mandate that any doubts be resolved in favor of arbitration, not against it. For example, in Levy v.

Cain, Watters & Associates., No. 2:09-cv-723, 2010 U.S. Dist. LEXIS 9537 (S.D. Ohio. Jan. 15, 2010), plaintiff sued defendant for violating federal and state securities laws. The defendant moved to compel arbitration pursuant to an arbitration agreement stating in pertinent part as follows:

> Any "dispute" ... shall be resolved in accordance with the dispute resolution procedures set forth hereafter, which constitutes the sole methodologies for the resolution of all such disputes ....
>
> The following procedures are the sole methodologies to be used to resolve any ... "dispute" ....
>
> THE PARTIES AGREE THAT ALL DISPUTES ... SHALL BE RESOLVED BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARBITRATION FORUM UNDER THE CODE OF PROCEDURE THEN IN EFFECT ....

Id. at *7-8. The arbitration agreement further provided that it was governed by the FAA. It also contained a severability provision stating that the failure or invalidity of one provision shall have no effect on the remainder of the arbitration agreement.

Plaintiff argued that the arbitration provision was void because the NAF was no longer available as it had ceased administering consumer arbitrations. The court rejected plaintiff's argument, holding that Section 5 of the FAA, 9 U.S.C. § 5, authorized it to appoint a substitute arbitrator. Notwithstanding the language of the arbitration agreement that all disputes "shall" be resolved by binding arbitration administered by the NAF, and that this was the "sole" methodology for

resolving disputes, the court found that there was no evidence that the choice of the NAF as the arbitration forum was an integral part of the agreement to arbitrate. The court concluded that the langauge of the arbitration agreement was "ambiguous," since even though an argument could be made that the choice of the NAF was intended to be exclusive, another, equally reasonable argument could be made that it was the intent to arbitrate that was paramount and the choice of the NAF was secondary. Moreover, the fact that the selection of the NAF was not excepted from the severability provision indicated that the NAF was not an integral part of the arbitration agreement but was instead an ancillary logistical concern. Accordingly, the court severed the requirement that the NAF conduct the arbitration and enforced the remainder of the arbitration provision. 2010 U.S. Dist. LEXIS 9537, at *16. The court emphasized that "'any doubts are to be resolved in favor of arbitration ...." Id. at *6.

Numerous other courts concur with this analysis. See, e.g., Fellerman v. American Ret. Corp. (ARC) Imperial Plaza, Inc., No. 03:09-CV-803, 2010 U.S. Dist. LEXIS 43177, at *15-16 (E.D. Va. May 3, 2010) (even if AAA was unable to administer arbitration of patient health care dispute, court could sever provisions relating to AAA and appoint substitute arbitrator under Section 5 of FAA); Estate of Eckstein v. Life Care Ctrs. of Am., 623 F. Supp. 2d 1235 (E.D. Wash. 2009) (same); Jones v. GGNSC Pierre LLC, 684 F. Supp. 2d 1161, 1167-68 (D.S.D.

2010) (although arbitration agreement specified arbitration under NAF Rules, court appointed a substitute arbitrator under Section 5 of the FAA because "[t]he existence of the severance clause in the arbitration agreement is evidence that the parties did not intend for the entire agreement to fail if one portion was invalid or unenforceable"); Chambers v. Dollar Fin. Grp., No. 09-cv-01587, 2010 WL 457433 (E.D. Cal. Feb. 2, 2010) (refusing to reinstate plaintiff's claims after NAF became unavailable); Jackson v. Payday Loan Store of Ill., Inc., No. 09 C 4189, 2010 WL 1031590 (N.D. Ill. Mar. 17, 2010) ("even if none of the three named arbitrators in the Agreement are willing to administer the arbitration of this dispute, the FAA itself provides for a mechanism by which that gap may be filled and the Agreement upheld"); Adler v. Dell, Inc., No. 08-cv-13170, 2009 WL 4580739 (E.D. Mich. Dec. 3, 2009) (although arbitration provision stated that disputes would be resolved "exclusively" by the NAF, court appointed a substitute arbitrator under Section 5 of the FAA, emphasizing that: "Congress envisioned a situation such as this one ... in which the named arbitrator is no longer available. Either party may request that the court appoint a replacement .... The tone of the FAA certainly implies that Congress intended that arbitration remain the prevailing method of resolving disputes if one of the parties requests arbitration.").

CONCLUSION

In sum, this Court can reasonably construe American General's Arbitration Provisions to find that the NAF was not an integral part of the Arbitration Agreement because the references to the NAF can be severed. A substitute administrator, such as the AAA or JAMS, can be appointed under Section 5 of the FAA and/or NMSA 1978, § 44-7A-12(a). Such a procedure would be consistent with the FAA's mandate that all doubts concerning arbitration should be resolved in favor of arbitration and with New Mexico's own arbitration statute authorizing the court to appoint an arbitrator where the agreed-upon method for doing so fails.

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