

**MULTISTATE PERFORMANCE TEST  
JULY 2011**

The MPT Question administered by the State Board of Law Examiners for the July 2011 Maryland bar examination was *In re Field Hogs, Inc.*. Two representative good answers selected by the Board are included here, beginning at page 2.

The National Conference of Bar Examiners (NCBE) publishes the MPT Question and the “point sheet” describing the issues and the discussion expected in a successful response to the MPT Question. The “point sheet” is analogous to the Board’s Analysis prepared by the State Board of Law Examiners for each of the essay questions.

The NCBE does not permit the Board to publish the MPT Question or the “point sheet” on the Board’s website. However, the NCBE does offer the MPT Question and “point sheet” for sale on its website.

**Materials for an unsuccessful applicant:** An applicant who was unsuccessful on the July 2011 Maryland bar examination may obtain a copy of the MPT Question, his or her MPT answer, representative good answers selected by the Board, and the “point sheet” for the July 2011 MPT Question administered as a component of the Maryland bar examination. This material is provided to each unsuccessful applicant who requests, in writing, a copy of the answers in accordance with instructions mailed with the results of the bar examination. The deadline for an unsuccessful applicant to request this material is January 3<sup>rd</sup>, 2012.

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**MULTISTATE PERFORMANCE TEST  
REPRESENTATIVE ANSWER 1**

MEMORANDUM

TO: Carlotta DeFranco  
FROM: Examinee  
DATE: July 26, 2011  
RE: Arbitration Clause for Field Hogs, Inc.

Introduction

This memorandum address the issues you asked me to discuss regarding the scope and enforceability of Field Hogs Inc.'s arbitration clause. The first section addresses what claims would be covered by the arbitration clause under Franklin law. The second section addresses whether Field Hogs' allocation of arbitration costs is enforceable under Franklin law. Finally, in the last section I have drafted a new arbitration clause that I propose Field Hogs use instead of its current clause. Following that clause, I have included an explanation of why I believe this clause will better serve Field Hogs' needs.

Question 1(a): Does Field Hogs' Arbitration Clause Cover All Potential Claims by Consumers?

The arbitration clause currently used by Field Hogs might not extend to tort claims, and thus may expose Field Hogs to litigation. Franklin courts generally favor arbitration. The Franklin Court of Appeal has held in *New Home Builders Inc v. Lake St. Clair Recreation Association*, that "all disputes between contracting parties should be arbitrated according to the arbitration clause in a contract, unless it can be said with positive assurance that the arbitration clause does not cover the dispute." The court went on to state that only the most forceful evidence of purpose to exclude a claim from arbitration can prevail over a broad contractual arbitration clause. However, courts have been more reluctant to apply arbitration clauses to claims arising out of tort, rather than contract. For instance, the Franklin Court of Appeal stated in *Norway Farms v. Dairy and Drivers Union*, "absent a clear explicit statement in a contract directing an arbitrator to hear tort claims by one party against another, it must be assumed that the parties did not intend to withdraw such disputes from judicial authority." Such an approach implies that unless tort actions are explicitly included within the scope of an arbitration clause, it will be presumed that the parties did not intend such claims to be subject to arbitration.

Other jurisdictions have adopted an even more hard line approach, holding that public policy bars compelling arbitration of tort claims. For example, the Olympia Court of Appeal held that tort claims are independent of a consumer sale and thus could not be bound to mandatory arbitration despite an arbitration clause that explicitly stated all tort claims would be settled by arbitration. Although the Franklin Court of Appeals has not

reached the issue of how to interpret an arbitration clause that explicitly includes tort claims, in *LeBlanc v. Sani-John Corporation*, it expressed disfavor for the hard-line approach taken by the Olympia Court of Appeals. In *LeBlanc* the court went so far as to say that arbitration clauses that do not explicitly mention tort claims cannot be said to compel tort claims to arbitration. With respect to including tort claims in an arbitration clause, the court instructed parties to explicitly express their intent and stated that courts would in turn strictly construe such clauses.

Field Hogs' current arbitration clause would not cover tort claims under Franklin law. The clause covers "any claim or controversy arising out of or relating to this contract or the breach thereof." The clause makes no mention of tort claims. This is virtually identical to the arbitration clause at issue in *LeBlanc*. As the court held in *LeBlanc*, because the clause does not explicitly address tort claims it cannot be said that the parties intended all tort claims to be resolved by arbitration. Although the clause will compel arbitration for any contract claims, it will not prevent litigation with respect to tort actions.

Question 1(b): Is Field Hogs' Allocation of Arbitration Costs Enforceable Against Consumers?

Field Hogs' allocation of arbitration costs in its current arbitration clause is likely not enforceable under Franklin law. Field Hogs' arbitration clause states that it shall occur in accordance with the rules and procedures of the National Arbitration Organization (NAO). Under the procedures of the NAO, payment of arbitration fees is first dependent on the amount of all claims and counterclaims. If the total amount of all claims and counterclaims is below \$75,000, the consumer is responsible only for one-half of the arbitrator's fees up to a maximum amount of \$750. If, however, the amount of all claims and counterclaims exceeds \$75,000, then the consumer is responsible for one-half of the arbitrator's fees, which the consumer must deposit in advance. An arbitrator's fees include a one-time fee of \$2,000 as well as \$1,000/day for each day of a hearing plus \$200/hour for time spent on pre- and post-hearing matters.

In Franklin, an allocation of arbitration costs in an agreement will be invalidated if it contains both procedural and substantive unconscionability. It is likely that any agreement between Field Hogs and consumers would be found to be procedurally unconscionable because the consumer lacks any reasonable opportunity to negotiate more reasonable terms. The determinative issue will be whether the clause is deemed to be substantively unconscionable. Franklin courts have permitted clauses that allocate minimal fees to the consumer, but have rejected clauses that burden the consumer with substantial costs or leave the allocation of costs up to the arbitrator.

In Field Hogs' current agreement, the first part of the clause for claims less than \$75,000 would likely be permissible in Franklin. In such claims, the consumer's expenses are capped at \$750. In *Georges v. Forestdale Bank*, the Franklin Court of Appeals upheld a

clause that required the consumer to pay minimal fees. Because the fees are capped at \$750, the court would likely not invalidate this part of the clause.

The second part of the clause, dealing with claims over \$75,000 is likely to be invalidated by Franklin courts, however. In *Ready Cash Loan, Inc. v. Morton*, the Franklin Court of Appeals invalidated a clause that only required the consumer to pay 25% of the arbitration costs. Here, Field Hogs' clause requires the consumer to pay 50%. Additionally, Franklin courts have invalidated arbitration clause's whose allocation of costs are not foreseeable. *Athens v. Franklin Tribune* invalidated a clause that permitted an arbitrator to award costs, while *Scotburg v. A-1 Sales and Service, Inc.* rejected a clause that was silent on how costs would be allocated. The Franklin Supreme Court stated that such unforeseeable or high costs could discourage consumers from pursuing their claims through arbitration. The Court held that if arbitration costs would exceed the expected costs of litigation, an arbitration should not be mandatory.

Here, the lack of any cap on claims exceeding \$75,000 makes the potential costs unforeseeable. Additionally, the requirement that the consumer pay 50% of all costs will likely be seen as too great of a burden. These two factors may discourage consumers from pursuing arbitration claims and, thus Franklin courts are likely to invalidate the clause.

#### Proposed Arbitration Clause for Field Hogs, Inc.

"Any claim, dispute, or controversy (whether in contract, tort, or otherwise) arising from or related to the sale of Field Hogs equipment shall be subject to binding arbitration in accordance with the rules and procedures for arbitration promulgated by the National Arbitration Organization, except as provided otherwise in this Agreement.

With respect to the payment of the arbitrator's fees, the consumer is responsible for one-half of the arbitrator's fees up to a maximum of \$750. The consumer must pay this amount as a deposit, and it shall be refunded if not used.

If any portion of this Agreement is deemed invalid or unenforceable, it shall not invalidate the remaining portions of this Agreement, each of which shall be enforceable regardless of such invalidity."

#### Explanation of Proposed Arbitration Clause

The inclusion of all tort claims in the proposed clause makes it more likely that Franklin Courts will require any tort claim to be settled by mandatory arbitration. Although Franklin courts have not explicitly rules on this issue, the Court of Appeal has stated that parties should explicitly express any intention to bind tort claims to arbitration. The Court of Appeals also expressed disapproval with other jurisdictions forbidding arbitration for tort claims when an agreement so included such provisions. Although it is

not certain that Franklin courts would allow mandatory arbitration for tort claims, the inclusion of this language makes it more likely that a court would find it permissible.

The proposed agreement also departs from the default allocation of arbitration fees of the National Arbitration Organization. The proposed clause eliminates the NAO's distinction between claims over/under \$75,000. Instead, it requires the consumer to pay half of all costs, up to a cap of \$750, for all claims. This eliminates the problem of unforeseeability of costs, making enforcement by a court much more likely. Although this will result in higher arbitration costs for Field Hogs in cases where the amount of the claims exceeds \$75,000 it will likely prevent a court from invalidating the clause altogether. Field Hogs has stated that its primary goal is to avoid arbitration and ensure more predictability. This clause will allow for that, despite its potential increase in costs. Additionally, given the cap on consumer costs at \$750 it is unlikely that a court would invalidate this clause based on the costs to the consumer, as any potential litigation would likely have at similar minimal costs.

Finally, the proposed clause includes a severability clause that will allow for a court to invalidate one aspect of the clause without invalidating the entire Agreement. This provides additional protection for Field Hogs in case a court were to, for instance, invalidate its allocation of arbitration costs. With a severability clause included in the Agreement, Field Hogs can still go through with arbitration even if the allocation of costs is invalidated. This ensures that Field Hogs' primary goal of avoiding jury trials is met even if the allocation of arbitration costs is invalidated.

### Conclusion

By including the above clause in all agreements, Field Hogs is more likely to be able to enforce its mandatory arbitration as to all claims, including torts. Additionally its provision regarding the allocation of arbitration costs is more likely to be upheld. This will provide greater protection to Field Hogs and better meet its needs.

## **MULTI STATE PERFORMANCE TEST REPRESENTATIVE ANSWER 2**

### Memorandum

To: Carlotta DeFranco  
From: Examinee  
Date: July 26, 2011

Field Hogs, Inc. has asked us to determine the applicable law and issues regarding a potential arbitration agreement for their sales of lawn equipment of consumers. Although the law in Franklin is not fully developed, we need to modify our existing arbitration clause to ensure it (1) is fully enforceable for consumer transactions and (2) achieves Field Hog, Inc.'s goals.

I. Will the firm's current arbitration clause cover all potential claims by consumers against Field Hogs under Franklin law?

a. Contract claims.

The current arbitration agreement would likely cover contract claims by Franklin residents arising out of use of Field Hogs, Inc. purchases.

Under Franklin law, arbitration is "generally favored." See LeBlanc, New Home and Howard. Such a policy means that even a binding arbitration agreement, such as the one the firm has in place will apply to contract claims. The language of the arbitration clause states that claims "arising out of or relating to this contract or the breach thereof" should be subject to arbitration. In describing a similar provision contract, the Franklin court of appeals had no problem holding that such a contract dispute would be subject to arbitration, even for a consumer. See LeBlanc.

b. Other claims, specifically in tort.

Based on the applicable law, an arbitration clause with language only referring to claims "arising out of" a contract, will not cover consumer tort claims. See LeBlanc. Under LeBlanc and its analysis of relevant precedent, in order for an arbitration clause to cover a tort claim, it at all (1) the provision must be explicit in its reference to tort claims, and (2) such a provision would strictly construe the provision which compelled tort claims.

Without an explicit mention of tort claims, the Franklin Court will not enforce an arbitration clause. See Norway Farms. However, Franklin has declined to expressly limit compelling arbitration in tort actions. See LeBlanc (distinguishing non-binding Olympia case Willis).

II. Would the firm's allocation of arbitration costs be enforceable against consumers under Franklin law?

The firm's current arbitration agreement has a two-tiered payment structure. For the first \$75,000 of claims and counterclaims, the consumer pays half of the fees, subject to a \$750 cap, which must be paid in advance. If the claims are above \$75,000, the consumer pays half of the arbitrator's fees, however, there is no cap on what the consumers potential liability will be. Again, the consumer must pay in advance the estimated costs.

The Franklin Supreme Court recently addressed the issue of consumer fees in arbitration, but declined to declare a set rule concerning what will be enforceable. See Howard.

a. Provision for claims up to \$75,000. On its face, the provision which requires the payment of up for \$750 for arbitration as a split cost would be likely enforceable. However, the one time \$2,000 administrative fee is not likely reasonable.

Under Georges, which the Howard Court reviews and generally accepts, a small fee is generally appropriate, so long as it does not rise to the level of substantive unconscionability, meaning “terms of the contract were oppressive and one-sided.” Howard in this case, however, the \$2,000 administrative fee will likely be found unconscionable, especially in a consumer contract.

b. Provision for claims above \$75,000. This provision will not be enforceable under the reasoning of Ready Cash, also adopted by the court in Howard. In Ready Cash, the court found the provision in a consumer loan contract which allocated 25% of cost to the consumer, to be invalid. Here, the consumer must pay 50% of costs. Additionally, the concern there was specifically targeted at “disputing substantial” claims, which is directly at issue in the \$75,000 and above claims. Again, the administrative fee would also be a concern.

c. Other issues: Binding arbitration, advancing of fees and relationship to judicial costs.

The Howard decision tested on a case with elective, not binding, arbitration. When the arbitration is binding, the court may be more likely to find unfairness in the fee to the consumer.

Next, the current arbitration clause requires the consumer to pay fees up front. Based on the Ready Cash decision, this may have the “chilling effect” which would concern the court.

The Court in Howard looked to whether arbitration costs born by the consumer would be comparable to those in litigation. Our firm should do more factual research to determine how arbitration costs relate to actual court costs to determine unconscionability.

Finally, the Howard court dealt with cases where (1) the arbitrator decided costs and (2) where the agreement was silent as to costs. See Scotburg and Athens. Those are not at issue in this case, as neither elements are present in the current agreement.

### III. Model Agreement.

A model arbitration agreement for Field Hogs’ consumer sales would have four elements in order to best serve their goals (1) explicit reference to tort claims, (2) provision that Franklin law covers, (3) severability to clause and (4) costs that provided that the consumer pay a minimal fee, which does not need to be paid up front.

A. Text of Arbitration Agreement:

“Any claim or controversy arising out of or relating to this contract, the breach thereof or any claims in tort or products liability shall be settled by arbitration. The laws of Franklin shall govern.

If any portion of this agreement is deemed invalid or unenforceable, it shall not invalidate the remaining portions of this Agreement, each of which shall be enforceable regardless of such invalidity.

Costs of the Arbitration: Field Hogs shall pay all arbitration costs which exceed \$750.00. Arbitrator’s fees and selections should be governed by National Arbitration Organization Disputes.

B. This new arbitration agreement should help Field Hogs, Inc. achieve their goals.

(i) Avoid jury trial: Since this is mandatory arbitration which explicitly references tort suits, all claims shall go to arbitration rather than a jury. This will also help Field Hogs avoid bad publicity associated with trials.

(ii) Franklin law applies: This will help Field Hogs anticipate the claims against them and develop certainty in their defense.

(iii) Avoiding litigation on the validity of the clause: This new clause is based on Howard and LeBlanc to ensure enforceability. Some elements of cost savings were sacrificed in order to achieve certainty and the possibility of a large jury verdict with bad publicity. The severability clause will also help with the avoidance of litigation uncertainty. If one provision of the clause is held invalid, it will not destroy all the other clauses and then subject Field Hogs to a jury trial.

Conclusion

The current arbitration agreement needs to be modified in order to (1) be enforceable and (2) better suit Field Hogs’ needs.

While the current law in Franklin is not entirely clear, this new clause should be enforceable and suit Field Hogs’ needs.