

DAI v. Downey: Associational Standing and Arbitration

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The test for an association's standing to sue on behalf of its members has existed for thirty years, dating back to the U.S. Supreme Court's decision in *Hunt v. Washington State Apple Advertising Commission*.¹ It appears that franchisee associations have often encountered difficulty passing this test, although the reported authority on associational standing in franchise cases is sparse.² Common sense suggests that the standing challenge confronting franchisee associations should be even greater when their members' franchise agreements contain arbitration clauses: if the individual members of an association have promised to arbitrate a particular category of disputes, permitting the association to litigate those disputes on its members' behalf would enable easy evasion of the obligation to arbitrate—an outcome squarely at odds with the Federal Arbitration Act (FAA) and decades of Supreme Court precedent.

Few courts have considered the interplay of the law of associational standing and the strong federal policy favoring arbitration. In several cases where medical associations representing their physician members sued health management organizations (HMOs) and medical administrators, federal and state courts concluded that the associations could not litigate on behalf of members who had agreed to arbitrate. A Connecticut federal court recently reached the same conclusion in a franchise case, *Doctor's Associates, Inc. v. Downey*, holding that an association purporting to represent Subway franchisees could not sue the franchisor, Doctor's Associates, Inc., (DAI), on behalf of the association's alleged members because those franchisees had agreed to arbitrate all disputes with DAI.³

Other franchise systems are likely to confront the same issue. According to a study published in the *Franchise Law Journal* in 2002, approximately half of the subject franchise agreements con-



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tained arbitration clauses.⁴ Over 50 percent of those clauses expressly prohibited class arbitrations,⁵ and that percentage has probably increased since the Supreme Court's 2003 decision in *Green Tree Financial Corp. v. Bazzle*.⁶ In addition, passage of the Class Action Fairness Act⁷ reduces the risk that franchisors will have to defend franchisee class actions in inhospitable state forums.⁸ Whatever the venue, moreover, class actions are expensive and time-consuming, and class certification is far from a certainty. For all these reasons, if franchisees want to address systemwide issues (e.g., allegedly onerous franchise agreement terms, changes in system standards, and the evolution of the concept after a merger or acquisition), an action by a franchisee association may be a more attractive vehicle for doing so than class proceedings. Accordingly, franchisees and their counsel might view associational standing as a means to avoid both arbitration and the manifold burdens of class proceedings.

This article analyzes the tension between associational standing and agreements to arbitrate. We begin with an overview of associational standing and then review five cases in which medical associations sued HMOs and others on behalf of their physician members, some of whom had agreed to arbitrate with the defendants. We will next discuss *DAI v. Downey* and will close with an explanation of why courts and arbitrators should not permit a franchisee association to arbitrate its members' claims against a franchisor.

Basics of Associational Standing

Associations generally may assert two types of claims: direct or derivative. "There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy."⁹ Where, however, an association seeks to bring claims as a representative of its members, the standing inquiry is more complicated. In *Washington State Apple Advertising Commission*,¹⁰ the Supreme Court announced a three-part test for determining an association's standing to assert representational claims:

[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.¹¹

As Chief Justice Burger further explained for a unanimous Court,

[w]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper

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case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.¹²

Applying those principles, the *Hunt* Court concluded that the Washington State Apple Advertising Commission had standing to seek declaratory and injunctive relief challenging a North Carolina statute that prohibited the display of Washington State apple grades on closed containers shipped into North Carolina.¹³ When, as in *Hunt*, a case presents pure issues of law arising out of, for example, the constitutionality of an ordinance or regulation and the association seeks only declaratory and injunctive relief, courts generally hold that an association has standing to sue on behalf of its members.¹⁴ In contrast, an association's claims for monetary damages on behalf of individual members would usually fail the *Hunt* test because they would "require the participation of individual members" to present the damage evidence.¹⁵

The Medical Association Cases

Five courts (three federal, two state) have considered whether a medical association has standing to sue on behalf of member physicians who have agreed to arbitrate with a particular defendant. The courts traveled different analytical routes, but all reached the same conclusion: an association cannot litigate in a representative capacity if its members must arbitrate.¹⁶

Pennsylvania Psychiatric Society v. Green Spring Health Services, Inc.,¹⁷ arose out of a dispute between the Pennsylvania Psychiatric Society (PPS), a voluntary medical association whose members included certain licensed psychiatrists practicing in Pennsylvania, and Green Spring Health Services, Inc., which administered the provision of behavioral health and substance abuse services on behalf of several HMOs. As the administrator of services, Green Spring had entered into Provider Participation Agreements (PPAs) with individual psychiatrists, many of them members of the society. Each PPA contained an arbitration clause.

PPS sued the HMOs and Green Spring in the U.S. District Court for the Western District of Pennsylvania, alleging on behalf of its members that the defendants had, among other things, failed to pay member psychiatrists for services rendered, interfered directly with the physician-patient relationship, imposed overly burdensome administrative requirements that interfered with the timely and medically appropriate treatment of patients, and generally undermined the quality of patient care.¹⁸ PPS sought declaratory, injunctive, and monetary relief.¹⁹ Importantly, the complaint did not assert any claims for PPS itself but contended that PPS had standing to sue on behalf of its allegedly injured members.²⁰

On the defendants' motion to dismiss, the district court adopted the magistrate judge's recommended ruling and held that PPS lacked standing. The defendants conceded that PPS met the first two elements of the *Hunt* standard,²¹ but the court concluded that the third element—no need for participation by the association's individual members—was not satisfied because "[e]ach of these asserted improper actions on the part of defendants requires participation by the individual PPS

member who applied for credentialing, made the diagnosis for which treatment was not approved, or applied for benefits which were not timely paid."²²

That the PPAs contained arbitration clauses was a separate, independent basis for dismissing the complaint:

[T]he individual members of the Provider Network should not be permitted to circumvent the arbitration provision by having their claims brought by an association of which they are members, but which itself is not a party to the Provider Agreements. . . . [A]voidance of an arbitration provision by suing through a surrogate is simply not an appropriate use of associational standing.²³

The court held that "PPS may not raise any claims premised upon these matters in this court. Instead, PPS members must proceed to arbitration on such claims."²⁴

The Third Circuit reversed the district court's determination that individualized evidence would be necessary to resolve PPS's claims for injunctive and declaratory relief.²⁵ According to the Third Circuit, the *Hunt* Court did not intend "to limit representational standing to cases in which it would not be necessary to take any evidence from individual members of an association."²⁶ Thus, because PPS alleged that it could establish its claims for injunctive and declaratory relief with limited individual participation, the district court should not have dismissed those claims for lack of standing.²⁷ The appellate court did not consider the effect of the arbitration clause on that conclusion and instead remanded for the district court to "re-examine the scope as well as the effect of the arbitration provision."²⁸

In re Managed Care Litigation is also instructive.²⁹ There, plaintiff medical associations and individual physicians jointly sued several HMOs for alleged violations of RICO, among other claims. Defendants moved to compel arbitration of all claims based on the arbitration agreements that many of the plaintiff physicians had signed with the HMOs. The U.S. District Court for the Southern District of Florida granted that motion in part and compelled those plaintiffs with arbitration agreements to arbitrate their claims.³⁰ Judge Federico A. Moreno observed that "[a]ssociations suing in a representative capacity are generally bound by the same limitations and obligations as the members that they represent."³¹

Because not all of the physicians had agreed to arbitrate, however, the medical associations argued that they were asserting claims only on behalf of those members who had not signed arbitration agreements. The court rejected this construct, reasoning that "[a]ssociations may not pick and choose the members that they represent; otherwise, they *de facto* avoid the requirements of Fed. R. Civ. P. 23."³² According to Judge Moreno, "[a]n association that abandons some of its allegedly injured members no longer purports to be a 'representative' of its membership. Instead, it attempts to act as a *de facto* class aggregator of selected members and seek prospective injunctive relief that would benefit all of its membership."³³ The court therefore ordered into arbitration all the associations' claims asserted on behalf of members.³⁴

In doing so, the court did not rely on *Hunt*; Judge Moreno found instead that "the issue of standing is at least

partially distinct from whether the association must arbitrate its representative claims.”³⁵ He noted, however, that the associations’ claims of partial representation

would violate the prudential standing requirements articulated in the third prong of the *Hunt* test . . . [because] participation of individual members is unavoidable. The only way for the Court to determine which members have claims not subject to arbitration and what prospective relief might be appropriate for those members is for each member to participate and defend against a motion to compel arbitration.³⁶

A Maryland federal court granted the defendants’ motion to dismiss a medical association’s complaint alleging antitrust violations on behalf of its member physicians, in *Maryland Optometric Ass’n v. Davis Vision, Inc.*³⁷ Some, but not all, of the association’s members had signed contracts with one defendant requiring all disputes to be resolved through arbitration.³⁸ Judge William D. Quarles concluded that the association failed the first part of the *Hunt* standing test: “Because the individual MOA [Maryland Optometric Association] members could not pursue this action on their own behalf, they may not circumvent [the arbitration] provision by suing through an association.”³⁹ The court also rejected the association’s argument that it could pursue claims for members who had not agreed to arbitrate, reasoning, like the *In re Managed Care Litigation* court before it, that “[i]f MOA abandons its allegedly injured members who are subject to the arbitration provision, it no longer represents its membership.”⁴⁰

At least two state courts have issued similar decisions. In *Connecticut State Medical Society v. Oxford Health Plans, Inc.*,⁴¹ the Connecticut Superior Court dismissed a medical association’s complaint based on the arbitration clause in its members’ contracts with the defendant, concluding that

[a]n association whose members cannot, for procedural reasons, bring suit on their own behalf, has no standing to bring the same suit on its members’ behalf. To hold otherwise would be to defeat the enforceability of arbitration agreements, as a party that had agreed to arbitrate could sidestep that obligation merely by having a surrogate, whether an association or an assignee, bring the suit on its behalf, depriving the other party to the contract of the benefit of the provisions of the contract.⁴²

And in January 2007, the Tennessee Court of Appeals affirmed the dismissal of a medical association’s claims based on the individual physicians’ agreements to arbitrate, holding that “[t]he providers in this case cannot escape their commitments to arbitrate by having a representative sue on their behalf.”⁴³

Together, this quintet of cases teaches several lessons about the intersection of associational standing and the federal policy favoring arbitration. First, there are at least two approaches available to try to block an association’s lawsuit when some or all of its members have agreed to arbitrate the pleaded claims: a motion under *Hunt* to dismiss for lack of associational standing and a motion to compel arbitration. Second, when challenging standing, a defendant may be able to argue that the association fails to satisfy both the first and the third *Hunt*

requirements because (1) its individual members could not bring the same claims in court and (2) determining which members have agreed to arbitrate necessarily requires their individual participation. Third, because an association’s capacity to represent the interests of all its members is the very reason why courts have recognized associational standing, an association cannot pick and choose which members it represents and therefore may be barred from litigating even where only some of its members have agreed to arbitrate.

DAI v. Downey

In July 2006, the North American Association of Subway Franchisees, Inc., (NAASF) sued DAI, the franchisor of Subway sandwich shops, in Connecticut Superior Court,⁴⁴ asserting a variety of contractual and statutory claims arising out of the franchise agreements that NAASF’s alleged members executed with DAI. In short, NAASF claimed that DAI had breached its contracts with franchisees and violated state franchise laws when it changed the form of the franchise agreement it offers to prospective franchisees. NAASF did not plead any causes of action of its own and sought only declaratory and injunctive relief on behalf of its claimed members.

Every Subway franchise agreement contains a broad arbitration clause, encompassing all disputes arising out of or relating to the franchise relationship. DAI had no desire to litigate with NAASF and preferred to avoid a protracted dispute in state court over the association’s standing to sue. Because of the extensive body of federal authority enforcing arbitration agreements (including decisions involving the Subway franchise system),⁴⁵ moreover, DAI wanted to invoke the franchise agreement arbitration clauses in federal court. Accordingly, rather than move to dismiss NAASF’s state court suit, DAI proceeded under Section 4 of the FAA, filing in the U.S. District Court for the District of Connecticut (1) petitions to compel NAASF’s officers and directors to arbitrate their claims with DAI⁴⁶ and (2) a motion pursuant to Federal Rule of Civil Procedure 65 to enjoin those defendants and others (including NAASF) in “active concert and participation with them” from prosecuting NAASF’s state court suit.

In February 2007, Judge Peter C. Dorsey granted DAI’s petitions to compel arbitration and preliminary injunction motions.⁴⁷ According to Judge Dorsey, “[t]he salient issue in a petition to compel arbitration is not whether the persons involved are parties to the arbitration agreement but whether the claims in dispute are covered by the arbitration agreement.”⁴⁸ The judge concluded that because the claims in the NAASF lawsuit all arose out of or related to the franchise agreements, they were subject to arbitration even though NAASF itself was not a party to any franchise agreement.⁴⁹ The defendants’ argument that NAASF had associational standing under *Hunt* was unavailing because “NAASF’s standing to pursue its claims in state court, or to pursue claims in federal court, for that matter, is not at issue here.”⁵⁰ The court continued:

Rather, the issue before the Court is whether the arbitration clause that obligates Defendants to pursue their disputes with DAI in arbitration also obligates the membership association

representing Defendants' interests in a state court action against DAI. The resolution of this issue is clear: "Associations suing in representational capacity generally are bound by the same limitations and obligations as the members that they represent." . . . It cannot be more clear that any arbitration agreement which binds the individual members of [the membership association] would likewise be binding upon [the association] suing in a representational capacity.⁵¹

The court refused to "violate the arbitration clause and undermine the federal policy favoring arbitration by permitting Defendants to use a surrogate organization to bypass their arbitration agreements and pursue claims in court that should be resolved through [arbitration],"⁵² and it therefore granted each petition to compel the individual defendant franchisees to arbitrate.

As noted above, DAI also "move[d] the Court to enjoin the NAASF lawsuit in its entirety, even though Defendants are not named parties in that action and NAASF is not compelled to arbitrate its claims."⁵³ Judge Dorsey entered the injunction, rejecting the defendants' contention that the requested order would violate both Federal Rule of Civil Procedure 65(d) and the Anti-Injunction Act. Under Rule 65(d), every order granting an injunction is binding on the defendants and on "all others with notice of the order who are 'in active concert or participation with'" the defendants.⁵⁴ The court had no difficulty finding "sufficient 'active concert or participation'" between NAASF and the defendants to satisfy Rule 65(d):

Defendants are not only members of NAASF but members of NAASF's board of directors. In addition to the fact that the NAASF lawsuit is solely pursuing the claims of Defendants and other NAASF members[,] . . . the Defendants exert direct control over NAASF's pursuit of its members [sic] claims in the State Court action through their roles on the NAASF Board of Directors.⁵⁵

The Anti-Injunction Act, which generally prohibits federal courts from enjoining state court proceedings, contains an exception when an injunction is "necessary . . . to protect or effectuate" a federal judgment.⁵⁶ Relying on several of his own decisions in earlier cases involving the Subway franchise agreement arbitration clause, Judge Dorsey held that "because the issues sought to be litigated by NAASF fall within the scope of the arbitration clause and are therefore subject to arbitration, NAASF must be enjoined from prosecuting the state court action in order to effectuate the judgment compelling arbitration."⁵⁷

Can the Association Arbitrate?

Downey, like the earlier medical association cases, had no apparent difficulty concluding that an association cannot bring representative claims in court as an end run around its members' agreements to arbitrate. Those holdings reflect the plain terms of the FAA and more than two decades of Supreme Court precedent underscoring the strong federal policy favoring enforcement of arbitration agreements.⁵⁸

The question remains, however, whether an association that is not party to an arbitration agreement can demand arbitration

of derivative claims, ostensibly asserted on behalf of its members. In *Downey*, DAI petitioned to compel arbitration with the eleven individual franchisee defendants, not NAASF, and it was those franchisees, not NAASF, whom the court ordered to arbitrate. The arbitration clause in most Subway franchise agreements expressly prohibits both class and consolidated arbitrations.⁵⁹ Permitting NAASF to arbitrate claims on behalf of individual franchisees collectively as an association would obviously gut that provision. Accordingly, after the court issued its ruling granting the petitions to compel and entering the injunction, DAI submitted a proposed final judgment providing that each individual defendant was compelled to arbitrate his or her claims with DAI individually. The defendants opposed that order, arguing that the district court could not prevent NAASF from asserting its claims in arbitration.

Judge Dorsey refused to decide whether NAASF could be a proper party to an arbitration with DAI. As he explained in a later order refusing to enter DAI's proposed judgment, "this Court's role is limited to determining whether a valid agreement to arbitrate exists and whether one party to the agreement has failed, neglected, or refused to arbitrate."⁶⁰ Relying in part on the Supreme Court's decision in *Green Tree*,⁶¹ the court said that "[a]rbitrators are better situated to answer procedural questions such as what kind of arbitration proceeding the parties agreed to," and concluded that "[w]hether in this case the Defendants must proceed in separate arbitration proceedings or may arbitrate their claims as a group represented by NAASF is a question best left to the arbitrators."⁶² When this article went to press, neither NAASF nor any of the *Downey* defendants had filed a demand for arbitration, so the issue of an association's arbitral standing to assert claims on behalf of its members remains unresolved in this case.

The U.S. Court of Appeals for the Fourth Circuit has squarely addressed this issue, however and, rather than deferring to arbitrators, held that an association is not a proper party to an arbitration of its members' claims. In *Davis Vision*, following the district court's dismissal of the medical association's complaint,⁶³ the association filed a demand for arbitration with the American Arbitration Association (AAA), seeking to arbitrate the claims it had filed in federal court on behalf of its physician members. The defendants' response to the arbitration was to bring their own federal action, requesting an injunction and a declaration that they were not required to arbitrate with the medical association.⁶⁴ It was undisputed that the association had not signed any arbitration agreement with the defendants. The association contended, however, that the district court's dismissal of its complaint meant that the association could arbitrate its members' claims collectively. Judge Quarles agreed and on cross-motions for summary judgment held that the defendants were collaterally estopped from challenging MOA's right to arbitrate:

In [the Court's previous decision] the Court determined that MOA lacked standing to seek injunctive relief from the Court, but could represent its members in arbitration. The determination of this issue was a critical and necessary part of the decision in the prior action, and neither party appealed the decision.⁶⁵

The Fourth Circuit summarily reversed in a June 2006 per curiam opinion.⁶⁶ The appellate court held that collateral

estoppel did not apply because “the issues were not identical and the district court’s comments about MOA’s capacity to arbitrate were not critical and necessary to the prior judgment.”⁶⁷ According to the Fourth Circuit,

[t]he only issue of law presented by the prior proceeding was whether MOA had standing to seek relief for its members in the federal judicial forum. This current suit by Davis for declaratory relief presents an entirely separate issue of law: whether MOA has any right to pursue claims on behalf of its members in the arbitral forum. A party’s capacity to arbitrate is analytically distinct from its standing to sue in federal court.⁶⁸

The court therefore rejected MOA’s contention that the defendants’ reliance on the arbitration clause during the *Hunt* analysis amounted to a concession that the association could arbitrate:

Merely pointing to the arbitration clause as a fact undermining associational standing was not . . . tantamount to an admission that the clause could be enforced by the association asserting rights under it. After all, in the previous case, Davis moved to dismiss for lack of subject matter jurisdiction, not to compel arbitration.⁶⁹

Turning to the merits of MOA’s capacity to arbitrate, the Fourth Circuit concluded that “MOA had no grounds on which to force Davis into arbitration.”⁷⁰ The court reasoned that “[u]sually a dispute may not be submitted to arbitration unless the opponents are signatories to a contract containing an arbitration clause.”⁷¹ The court recognized that “[u]nder narrow circumstances . . . a party that did not enter into a contract containing an arbitration clause may nevertheless insist that a dispute be arbitrated,”⁷² but the court pointed out that the district court had not identified any theory to support that result and concluded that “MOA had no grounds on which to force Davis into arbitration.”⁷³ The Fourth Circuit therefore reversed and remanded with instructions to grant summary judgment to the defendants and enter the requested injunctive and declaratory relief, establishing that the defendants were not obliged to arbitrate with the association.

In considering the propriety of franchisee associations arbitrating the collective claims of their members, it is important to remember the bedrock principle of the FAA. As Justice Blackmun wrote in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,⁷⁴ the “liberal federal policy favoring arbitration agreements . . . is at bottom a policy guaranteeing the enforcement of private contractual arrangements,” i.e., the actual arbitration agreements into which the parties have entered.⁷⁵ It is untenable to suggest that the parties to typical franchise agreement arbitration clauses ever intended that franchisees would be able to arbitrate as a group, via an association or otherwise. The authors have never seen a franchise agreement arbitration clause that expressly contemplated group proceedings, and, absent such express contract language, it is difficult to discern a principled basis for construing an arbitration clause to confer associational standing. Before *Green Tree*, when the Supreme Court held that arbitrators, rather than courts, should determine the availability of class arbitration where the arbitration clause is silent on the

issue, the overwhelming majority of federal circuits to consider the question had held that neither class nor consolidated arbitration was available unless the arbitration agreement expressly countenanced such proceedings.⁷⁶

Arbitration is a creature of contract, and it would be the rare franchisor indeed that entered into a contract agreeing to arbitrate with a franchisee association. That fact alone should be dispositive in the vast majority of circumstances. But the assertion of derivative claims by an association is also the functional equivalent of a consolidated proceeding (and, not incidentally, a way for plaintiffs to avoid having to comply with class certification requirements). Accordingly, whether the decision properly rests with the arbitrator (as Judge Dorsey said in *Downey*) or with a court (per the Fourth Circuit’s ruling in *Davis Vision*), the outcome should be the same: absent a contract provision expressly permitting class or consolidated arbitration, a franchisee association should not be allowed to pursue derivative claims in arbitration on behalf of its members. Of course, if the arbitration clause expressly prohibits class or consolidated claims, the basis for that outcome is even more compelling.

Conclusion

Given the emerging body of precedent surveyed in this article, there should be little, if any, doubt that a franchisee who has agreed to arbitrate claims against a franchisor should not be allowed to evade that obligation by using an association as a surrogate lawsuit plaintiff. Properly understood, the fundamental federal policy requiring enforcement of arbitration agreements according to their terms also compels the conclusion that a franchisee association purporting to act on behalf of its members should not be permitted to bring an arbitration against the franchisor unless the franchisor has expressly agreed to such a proceeding.

Endnotes

1. 432 U.S. 333 (1977).

2. See, e.g., Jon S. Swierzowski, *Standing in Franchise Disputes: Check the Invitations, Not Every Party Gets Inside*, 26 FRANCHISE L.J. 107, 111–12 (Winter 2007) (concluding that franchisee associations “rarely, if ever, can satisfy the requirements” for associational standing). One reason for that lack of success might be that each franchisee is party to a separate agreement with the franchisor. The standard terms of those agreements usually change over time, making it difficult, especially in breach of contract actions, for a franchisee association to circumvent the need for individualized participation by the franchisees. See, e.g., DDFA of S. Fla., Inc. v. Dunkin’ Donuts, Inc., Case No. 00-7455-CIV, 2002 WL 1187207 (S.D. Fla. May 22, 2002) (association could not assert claims of contract breach and tortious conduct on behalf of franchisee members because determining whether the franchisor committed various torts or complied with its contracts “requires individual determinations”); Dealer Store Owners Ass’n, Inc. v. Sears, Roebuck & Co., Case No. 05-1256, 2006 WL 91335 (D. Minn. Jan. 12, 2006) (“Associational standing is not appropriate where a plaintiff seeks a declaration of rights on a group of contracts that are not uniform.”). See generally William B. Steele III & A. Darby Dickerson, *Standing Issues Related to Franchise Associations*, 12 FRANCHISE L.J. 99, 102 (Spring 1993). Where an association can

demonstrate that the relevant contracts are identical, however, it might have standing to proceed without the franchisees' individual participation. *See Nat'l Ass'n of Prof'l Allstate Agents v. Allstate Ins. Co.*, Case No. 8:01-CV-2137-T-24MSS (M.D. Fla. Apr. 22, 2002) (order) (association had standing to assert breach of contract and other claims where its members all had identical contracts with defendant); *Nat'l Ass'n of State Farm Agencies, Inc. v. State Farm Mut. Auto. Ins. Co.*, Bus. Franchise Guide (CCH) ¶ 12,431 (D.C. Super. Ct. Oct. 22, 2002) (association has standing where "each of those [affected] members operates under the same contract").

3. *See Doctor's Assocs., Inc. v. Downey*, No. 3:06-CV-1170 (D. Conn. Feb. 28, 2007) (discussed in detail *infra*).

4. *See Christopher R. Drahozal, Arbitration Clauses in Franchise Agreements: Common (and Uncommon) Terms*, 22 FRANCHISE L.J. 81 (Fall 2002). The study evaluated the top seventy-five franchises listed in *Entrepreneur Magazine's Franchise 500* with franchise agreements on file in Minnesota during the summer of 1999. *Id.*

5. *Id.* at 82.

6. 539 U.S. 444 (2003) (holding that where arbitration clause is silent on the issue, arbitrator may determine whether to permit class arbitration). For a discussion of *Green Tree*'s impact on franchise agreements, *see Kevin M. Kennedy & Bethany Appleby, Green Tree Financial Corp. v. Bazzle: A New Day for Class Arbitrations?*, 23 FRANCHISE L.J. 84, 86 (Fall 2003) (concluding that "[i]n light of *Green Tree*, a franchisor seeking to avoid consolidated or class claims should obviously draft its arbitration agreements expressly to preclude such claims"). The authors of this article are partners with Ms. Appleby and Mr. Kennedy.

7. Class Action Fairness Act of 2005, Pub. L. No. 109-02 (2005) (codified at 28 U.S.C. §§ 1332(d), 1453, 1711–15).

8. *See, e.g.*, Edward Wood Dunham & Michael J. Lockerby, *Shall We Arbitrate? The Pros and Cons of Arbitrating Franchise Disputes*, 28TH ANNUAL FORUM ON FRANCHISING 30–35 (2005).

9. *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

10. 432 U.S. 333 (1977).

11. *Id.* at 343.

12. *Id.*

13. *Id.* at 343–44.

14. *See, e.g.*, Retail Indus. Leaders Ass'n v. Fielder, 475 F.3d 180 (4th Cir. 2007) (trade association has standing to enjoin enforcement of state law alleged to be preempted by ERISA); *Council of Ins. Agents & Brokers v. Juarbe-Jimenez*, 443 F.3d 103 (1st Cir. 2006) (association had standing to pursue injunctive and declaratory relief holding provision of Puerto Rico Insurance Code unconstitutional); *see also DDFA of S. Fla., Inc. v. Dunkin' Donuts, Inc.*, Case No. 00-7455, 2002 WL 1187207 (S.D. Fla. May 22, 2002) (dismissing franchisee association's complaint alleging tortious conduct and breach of contract on behalf of its members, and noting that "[u]nlike most prior associational standing cases, this action does not challenge a statute, regulation or ordinance" and "does not raise a 'pure question of law,' which can be considered without the individual participation of DDFA's members").

15. *See, e.g.*, *Sanner v. Bd. of Trade of the City of Chi.*, 62 F.3d 918, 923 (7th Cir. 1995) ("We are not aware of any cases allowing associations to proceed on behalf of their members when claims for monetary, as opposed to prospective, relief are involved."); *United Union of Roofers No. 40 v. Ins. Corp. of*

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919 F.2d 1398, 1400 (9th Cir. 1990) ("[N]o federal court has allowed an association standing to seek monetary relief on behalf of its members.").

16. The FAA makes arbitration agreements in contracts involving interstate commerce presumptively "valid, irrevocable and enforceable." 9 U.S.C. § 2. In its numerous pronouncements on arbitration, the Supreme Court has emphatically reaffirmed the staunch federal policy, expressed in the FAA, requiring rigorous enforcement of agreements to arbitrate. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995).

17. Civ. A 99-937, 2000 WL 33365907 (W.D. Pa. Mar. 24, 2000).

18. *Id.* at *1–2.

19. *Id.* at *2–3.

20. *Id.* at *5.

21. *Id.* at *3 (*Hunt*'s first two elements are that the association's members would have standing in their own right and that the interests the lawsuit seeks to protect are germane to the organization's purpose).

22. *Id.* at *4.

23. *Id.* at *7. The district court also rejected numerous arguments about the enforceability of the arbitration clause, including that (a) it was an unenforceable contract of adhesion; (b) the clause was not intended to encompass broad-based, systemic challenges to the defendants' policies, procedures, and practices; (c) it was inefficient to arbitrate each member's claims individually, when PPS could resolve them collectively; and (d) members could not truly exercise their right to arbitrate for fear of retaliatory termination by Green Spring. *Id.* at *8.

24. *Id.*

25. *See Pa. Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278 (3d Cir. 2002). PPS did not appeal the dismissal of its claims for monetary relief.

26. *Id.* at 285 n.5.

27. *Id.* at 286.

28. *Id.* at 294.

29. MDL No. 1334, 2003 WL 22410373 (S.D. Fla. Sept. 15, 2003), *aff'd sub nom.*, *Klay v. All Defendants*, 389 F.3d 1191 (11th Cir. 2004), *cert. denied sub nom.*, *United Health Group v. Klay*, 125 S. Ct. 2523 (2005).

30. *Id.* at *10.

31. *Id.* at *9.

32. *Id.* at *10. Federal Rule of Civil Procedure 23 governs the certification of class actions under federal law.

33. *Id.*

34. *Id.* The medical associations had also asserted claims of direct injury in that "they have expended their own resources to fight Defendants' alleged unlawful practices and have lost members due to these practices." *Id.* Because the associations had not agreed to arbitrate with the defendants, the district court permitted those direct claims to proceed. *Id.*

35. *Id.*

36. *Id.*

37. Memorandum Opinion and Order, Civ. No. WDQ-04-02153 (D. Md. Dec. 21, 2004).

38. *Id.* at 2 (out of approximately 350 total MOA members, "[a]t least 54 MOA members are parties to the Davis Agreement which requires all disputes to be resolved through arbitration.").

39. *Id.* at 8.

40. *Id.* at 9 (citing *In re Managed Care Litigation*, 2003 WL 22410373, at *10).

41. No. X01-CV-0165664-S, 2001 WL 1681903 (Conn. Super. Ct. Dec. 13, 2001), *aff'd on other grounds*, 272 Conn. 469 (2005).

42. *Id.* at *6.

43. Tenn. Med. Ass'n v. Bluecross Blueshield of Tenn., Inc., 2007 Tenn. App. LEXIS 16 (Tenn. Ct. App. Jan. 9, 2007).

44. See N. Am. Ass'n of Subway Franchisees, Inc. v. Doctor's Assocs., Inc., NO. X01-CV-06-4011755-S (Conn. Super. Ct. 2006). The authors represented DAI in this litigation.

45. See, e.g., Doctor's Assocs., Inc. v. Hamilton, 150 F.3d 157 (2d Cir. 1998); Doctor's Assocs., Inc. v. Distajo, 107 F.3d 126 (2d Cir. 1997); Doctor's Assocs., Inc. v. Jabush, 89 F.3d 109 (2d Cir. 1996); Doctor's Assocs., Inc. v. Stuart, 85 F.3d 975 (2d Cir. 1996); Doctor's Assocs., Inc. v. Hollingsworth, 949 F. Supp. 77 (D. Conn. 1996), *aff'd sub nom.*, Doctor's Assocs., Inc. v. Bennett, No. 96-9599 (2d Cir. Feb. 5, 1998). Mr. Dunham represented DAI in each of these cases.

46. Section 4 of the FAA permits a "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" to file an independent action in federal court to compel arbitration. *See* 9 U.S.C. § 4; *see also* Mark R. Kravitz & Edward Wood Dunham, *Compelling Arbitration*, 23 LITIG. 34 (Fall 1996). Section 4 does not provide an independent basis for federal jurisdiction; accordingly, DAI relied on diversity jurisdiction when filing its petitions to compel arbitration against eleven individual NAASF directors. The eleven separate cases were later consolidated under the caption *Doctor's Assocs., Inc. v. Downey*, No. 3:06-CV-01170 (D. Conn.).

47. Before deciding the merits of the petitions to compel, Judge Dorsey considered whether each petition satisfied the requisite amount in controversy for diversity jurisdiction. Relying on precedent from other Subway arbitration cases (such as *Hollingsworth*, 949 F. Supp. at 92 and *Hamilton*, 150 F.3d at 160), he ruled that "[t]he amount in controversy is the difference between winning and losing the underlying arbitration." *Downey*, No. 3:06-CV-01170, at 5 (quoting *Hollingsworth*, 949 F. Supp. at 92). Because NAASF's state court suit involved, among other things, control over the approximately \$500 million in the franchise system's advertising fund, Judge Dorsey held that "[t]his amount, far in excess of that required for diversity jurisdiction, may be considered the value of the object of the underlying litigation on which this action is based." *Id.* at 6. In the alternative, the *Downey* court also held that the amount in controversy was satisfied because NAASF's complaint alleged that DAI had constructively terminated hundreds of franchise agreements. The court reasoned that "a constructive termination of any one of the 69 franchises owned by the eleven Defendants would cost DAI far more than \$75,000." *Id.* at 7.

48. *Id.* at 9–10.

49. *Id.* at 10.

50. *Id.* at 11.

51. *Id.* (citing *In re Managed Care Litigation*, MDL No. 1334, 2003 WL 22410373, at *9 (S.D. Fla. Sept. 15, 2003); Penn. Psychiatric Soc'y v. Green Spring Health Servs., Inc. Civ. A 99-937, 2000 WL 33365907, at *7 (W.D. Pa. Mar. 24, 2000)).

52. *Id.* at 11.

53. *Id.* at 12–13.

54. *Id.* at 13; *see also* FED. R. CIV. P. 65(d).

55. *Id.*

56. *Downey*, No. 3:06-CV-01170, at 14; *see also* 28 U.S.C. § 2283.

57. *See* *Downey*, No. 3:06-CV-01170, at 14–15 (citing Doctor's Assocs., Inc. v. Hollingsworth, 949 F. Supp. 77, 85 (D. Conn. 1996); Doctor's Assocs., Inc. v. Distajo, 944 F. Supp. 1007, 1009 (D. Conn. 1996)).

58. For more than twenty years, the Supreme Court has consistently held that the FAA reflects a "liberal federal policy favoring arbitration agreements" (Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)), "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate," and "requires that [courts] rigorously enforce agreements to arbitrate." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625–26 (1985). The Court's recent arbitration opinions also illustrate that the "national policy favoring arbitration" applies in both state and federal courts. *See, e.g.*, Buckeye Check Cashing, Inc. v. Cardenga, 546 U.S. 440 (2006).

59. For example, DAI's April 2005 franchise agreement (a copy of which NAASF attached to its state court complaint) provides that neither party shall "pursue class claims and/or consolidate the arbitration with any other proceedings to which we are a party." Franchise Agreement ¶ 10(a).

60. *See* *Downey*, No. 3:06-CV-1170, at 1 (order of dismissal); *see also* 9 U.S.C. § 4.

61. 539 U.S. 444 (2003).

62. *See* *Downey*, No. 3:06-CV-1170, at 2 (order of dismissal) (citing Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452–53 (2003); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002)).

63. *See* Md. Optometric Ass'n v. Davis Vision, Inc., Civ. No. WDQ-04-02153 (D. Md. Dec. 21, 2004) (memorandum and order), discussed *supra*.

64. *See* Davis Vision, Inc. v. Md. Optometric Ass'n, 401 F. Supp. 2d 465 (D. Md. 2005).

65. *Id.* at 468.

66. Davis Vision, Inc. v. Md. Optometric Ass'n, 187 F. App'x 299 (4th Cir. 2006).

67. *Id.* at 302.

68. *Id.* at 302–03.

69. *Id.* at 303.

70. *Id.* at 304.

71. *Id.* at 303.

72. *Id.* According to the Fourth Circuit, there are generally "five theories arising out of common law principles of contract and agency law that could provide a basis for binding nonsignatories to arbitration agreements: (1) incorporation by references; (2) assumption; (3) agency; (4) veil piercing/alter ego; and (5) estoppel." *Id.* (internal quotations omitted).

73. *Id.* at 304.

74. 473 U.S. 614 (1985).

75. *Id.* at 625 (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

76. *See, e.g.*, Kennedy & Appleby, *supra* note 6, at 86.