ARBITRATIONS IN FLORIDA: A TALE OF TWO COURTS

THE HON. JUAN RAMIREZ, JR. (RET.)*

The Federal Arbitration Act ("FAA")[1] "was enacted in 1925 in response to widespread judicial hostility to arbitration agreements."[2] It is evident from a number of decisions issuing out of Florida courts that this judicial hostility endures. A frequently stated goal of arbitration is the fast and efficient resolution of disputes,[3] but decisions that refuse to enforce such agreements undermine predictability and embroil the litigants in court proceedings that delay and drive up the cost of deciding disputes.

During the last two years, the arbitration profession has gained five staunch supporters. They also comprise a majority of the United States Supreme Court: Chief Justice John G. Roberts, along with Justices Antonin Scalia, Anthony M. Kennedy, Clarence Thomas, and Samuel A. Alito. With the latest trilogy of cases,[4] the Court has emphatically promoted the use of arbitration and undermined attempts to invalidate contractual commitments that obligate the parties to arbitrate their disputes. This article will examine this trilogy of cases,[5] and will contrast how courts in Florida have reacted, ignored, or interpreted federal decisions to spurn the

* Hon. Judge Ramirez, Jr. (Ret.), is an Arbitrator/Mediator with JAMS, The Resolution Experts. He retired from the bench after 24 years, having served in the Third District Court of Appeal (2000-12), as Chief Judge (2009-11); Circuit Court Judge (1990-99) and County Court Judge (1988-90). He is currently an Adjunct Professor at the University of Miami School of Law and Florida International University School of Law. He is the author of two three-volume treatises entitled *Florida Civil Procedure* and *Florida Evidence Manual*, published by Lexis, and a case book entitled *Florida Civil Procedure*, published by the Carolina Academic Press.

1. Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006).

2. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745 (2011).

3. *See* We Care Hair Dev., Inc. v. Engen, 180 F.3d 838, 843 (7th Cir. 1999) ("[T]he goal of arbitration [is] to provide a speedy, informal, and inexpensive procedure for resolving disputes . . . ."); Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp., 978 F. Supp. 266, 309 n.190 (S.D. Tex. 1997) ("Allowing extensive discovery into the procedures of the arbitration panel would frustrate the primary goal of arbitration, the fast and efficient resolution of disputes . . . .").

4. *See* Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT'L ARB. 435, 435 (2011) ("The American law of arbitration has for some reason been replete with what we have become accustomed to call 'trilogies' . . . ."); *see also* Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law,* 71 VA. L. REV. 1305, 1306–09 (1985) (discussing an earlier trilogy of arbitration cases from the mid-1980s).

5. *AT&T Mobility LLC*, 131 S. Ct. at 1740; Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772 (2010); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010).

U.S. Supreme Court's efforts to streamline this alternative to courtroom litigation.

I. BACKGROUND

The FAA was enacted to "revers[e] centuries of judicial hostility to arbitration agreements,"[6] and was designed to allow parties to avoid "the costliness and delays of litigation" and to place arbitration agreements "upon the same footing as other contracts[.]"[7] The Act provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[8] "English courts [had] traditionally considered irrevocable arbitration agreements as 'ousting' the courts of jurisdiction, and [have thus] refused to enforce such agreements."[9] Until the adoption of the FAA, American courts uncritically adopted this view as part of the common law.[10] As the U.S. Supreme Court stated in *Dean Witter Reynolds, Inc. v. Byrd*,[11] "[t]he preeminent concern of Congress in passing the Act was to

6. Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 (1974); *see* Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 265 (1926) ("By this Act there is reversed the hoary doctrine that agreements for arbitration are revocable at will and are unenforceable, and in the language of the statute itself, they are made 'valid, enforceable and irrevocable' within the limits of Federal jurisdiction.").

7. H.R. REP. NO. 68-96, at 1–2 (1924); *see also* S. REP. NO. 68-536, at 3 (1924) (discussing the purpose of the FAA as putting arbitration agreements on the same footing as contracts generally).

8. Federal Arbitration Act, 9 U.S.C. § 2 (2006); *see* Kulukundis Shipping Co., S/A v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942). The House Committee report regarding the FAA stated:

> The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it.

Kulukundis Shipping Co., S/A, 126 F.2d at 985 (quoting H.R. REP. NO. 68-96, at 1–2).

9. *Scherk*, 417 U.S. at 510 n.4.

10. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 n.14 (1985) (citing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219–21 & n.6 (1985) (stating that "the Act was designed to overcome an anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law")); *Scherk*, 417 U.S. at 510 n.4; H.R. REP. NO. 68-96, at 1–2; Wesley A. Sturges & Irving Olds Murphy, *Some Confusing Matters Relating to Arbitration under the United States Arbitration Act*, 17 LAW & CONTEMP. PROBS. 580, 582–83 (1952).

11. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985).

enforce private agreements into which parties had entered,"[12] a concern which "requires that we rigorously enforce agreements to arbitrate[.]"[13]

The first trilogy is known as the *Steelworkers Trilogy*,[14] whose continuing validity was reaffirmed by Justice Byron White in *AT&T Technologies, Inc. v. Communications Workers of America.*[15] The cases established certain precepts: first, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit";[16] second, the question of arbitrability is an issue for judicial determination;[17] and third, where the contract contains an arbitration clause, there is a presumption of arbitrability.[18]

To appreciate the latest trilogy of cases from the U.S. Supreme Court, we need to examine the second trilogy of cases,[19] which were decided in the mid-1980s, because these cases established the FAA as a source of "federal substantive law of arbitrability."[20] In *Moses H. Cone Memorial*

12. *Id.* at 221.

13. *Id.*

14. United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960).

15. AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643 (1986).

16. *Warrior & Gulf*, 363 U.S. at 582; *see also Am. Mfg. Co.*, 363 U.S. at 570–71 (Brennan, J., concurring) (noting arbitration clauses, decisions to arbitrate, and the scope of arbitration are matters of contract).

17. *AT&T Techs., Inc.*, 475 U.S. at 649 (citing *Warrior & Gulf*, 363 U.S. at 582–83) ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."); *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (stating that a court asked to compel arbitration must first determine whether the parties agreed to arbitrate the dispute); Int'l Union of Operating Eng'rs, Local 150 v. Flair Builders, Inc., 406 U.S. 487, 491 (1972) (explaining the issue of whether a union and employer have agreed to arbitration, as well as the scope of the arbitration clause, remains a matter for judicial decision); Boys Mkts., Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235, 243 (1970) (stating the Supreme Court has cautioned the lower courts against "usurping the functions of the arbitrator"); Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 241 (1962) (explaining that whether or not a company is bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the court based on the contract between the parties), *overruled in part on other grounds by Boys Mkts., Inc.*, 398 U.S. 235.

18. Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 377–78 (1974); *Warrior & Gulf*, 363 U.S. at 582–83. "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Warrior & Gulf*, 363 U.S. at 582–83.

19. The second arbitration trilogy consists of Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983), Southland Corp. v. Keating, 465 U.S. 1 (1984), and Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985). *See* Hirshman, *supra* note 4, at 1306–07.

20. *See* Thomas J. Stipanowich, *The Third Arbitration Trilogy:* Stolt-Nielsen, Rent-A-Center, Concepcion *and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 328

Hospital v. Mercury Construction Corp.,[21] the Court stated:

> Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.[22]

The significance of this is that it allowed the Court to make the FAA applicable to the states as well as federal courts.[23] Thus, in *Southland Corp. v. Keating*,[24] the Court held that the California Franchise Investment Law, which invalidated certain arbitration agreements covered by the FAA, violated the Supremacy Clause.[25] Since then, the Court has repeatedly asserted a strong pro-arbitration imperative in a variety of contexts, such as the Sherman Antitrust Act, the Racketeer Influenced and Corrupt Organization Act, the Securities Act of 1934, and statutory employment discrimination claims.[26]

II. THE LATEST TRILOGY

A. *STOLT-NIELSEN S.A. V. ANIMALFEEDS INTERNATIONAL*

The first case in the third trilogy is *Stolt-Nielsen S.A. v. AnimalFeeds International Corp*.[27] In an opinion authored by Justice Alito, the Court was presented with a dispute between two commercial parties raising the question of whether imposing class arbitration on parties whose arbitration clauses were "silent"[28] on that issue was consistent with the FAA. Petitioners were shipping companies serving customers such as AnimalFeeds International.[29] These customers shipped their goods pursuant to a standard contract containing an arbitration clause.[30] A

(2011).

21. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

22. *Id.* at 24.

23. *See id.* at 25 (stating that "federal courts' jurisdiction to enforce the Arbitration Act is concurrent with that of the state courts").

24. Southland Corp. v. Keating, 465 U.S. 1 (1984).

25. *Id.* at 16. The Court stated that "[i]n enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.* at 10.

26. *See* Stipanowich, *supra* note 20, at 329 & n.26.

27. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010).

28. *Id.* at 1764. The parties had stipulated that the arbitration clause was "silent" with respect to class arbitration. *Id.* at 1766.

29. *Id.* at 1764.

30. *Id.* at 1764–65.

Department of Justice criminal investigation revealed that petitioners were engaging in an illegal price-fixing conspiracy.[31] When AnimalFeeds learned of this, it brought a putative class action against petitioners.[32] The parties entered into an agreement providing for the question of whether class arbitration is to be submitted to a panel of three arbitrators who were to follow the rules of the American Arbitration Association ("AAA"), developed after the decision in *Green Tree Financial Corp. v. Bazzle.*[33] The *Bazzle* Court had been presented with the issue of class action arbitration and a plurality determined that such a proceeding was permissible under the FAA.

Justice Alito in *Stolt-Nielson* was thus confronted with the *Bazzle* precedent and a decision by the arbitrators concluding that the arbitration clause allowed for class arbitration.[34] He then "conclude[d] that what the arbitration panel did was simply to impose its own view of soundpolicy regarding class arbitration."[35] Contrary to the arbitrators' interpretation of *Bazzle*, Justice Alito declared that, given the parties' stipulation that the agreement was silent as to class action arbitration, there could be no basis upon which to authorize such a proceeding.[36] He wrote that "the opinions in *Bazzle* appear to have baffled the parties in this case."[37]

After noting "the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion,'"[38] Justice Alito posited that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."[39] By stipulating that the agreement was silent on class action arbitration, he concluded that the parties had reached no agreement on that issue.

> This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of

31. *Id.* at 1765.

32. *Id.* at 1765.

33. *Stolt-Nielsen S.A.*, 130 S. Ct. at 1765; *see* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003).

34. *See Stolt-Nielsen S.A.*, 130 S. Ct. at 1766.

35. *Id.* at 1767–68. The opinion specifically refused to decide whether "manifest disregard" survived the decision in *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 585 (2008), as an independent basis for review. *Id.* at 1768 n.3.

36. *See id.* at 1775.

37. *Id.* at 1772.

38. *Id.* at 1773 (quoting Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 479 (1989)).

39. *Id.* at 1775.

> private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes . . . . But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration.[40]

Justice Alito then reviewed the differences between bilateral arbitration and class action arbitration. In a class action arbitration, the arbitrator would no longer be resolving a single dispute between the parties to a single agreement, but instead would be resolving many disputes between hundreds, or perhaps even thousands, of parties.[41] The "presumption of privacy and confidentiality" applicable to bilateral arbitrations would be lost in class arbitrations.[42] The arbitrator's award would no longer just adjudicate the rights of the parties, but also the rights of absent parties.[43] And while the high stakes of class action litigation would also apply to class arbitrations, the scope of judicial review would be much more limited.[44] The Court thus concluded that "the differences between bilateral and class action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class action arbitration constitutes consent to resolve their disputes in class proceedings."[45]

B. *RENT-A-CENTER, W., INC. V. JACKSON*

The next two trilogy opinions were authored by Justice Scalia for a five-member majority that included the Chief Justice Roberts, along with Justices Kennedy, Thomas, and Alito, with four justices dissenting.[46] We

40. *Stolt-Nielsen S.A.*, 130 S. Ct. at 1775–76.

41. *Id.* at 1776. This would hardly qualify as a difference because the same is true for arbitrations as it would be for court cases. *See id.*

42. *See id.* This would put arbitrations on a par with court cases where there is normally no confidentiality. *See id.*

43. *Id.* Again, arbitrations and court cases would be no different in this regard. *See id.*

44. *Id.* This is of paramount importance because in court cases, the litigants would enjoy full appellate rights whereas in arbitrations, the grounds for appeal are extremely limited. As set forth in the FAA and the laws of the various states, the grounds are generally limited to where the award was procured by corruption, fraud, or undue means; where there was evident partiality or corruption in the arbitrators; where the arbitrators were guilty of misconduct; or where the arbitrators exceeded their powers. The "manifest disregard for the law" ground, which is not listed in the FAA, enjoys questionable validity after the U.S. Supreme Court stated in *Hall Street Assocs. v. Mattel*, 128 S. Ct. 1396 (2008), that the statutory grounds listed in section ten were exclusive. *Hall*, 128 S. Ct. at 1103–04.

45. *Stolt-Nielsen S.A.*, 130 S. Ct. at 1776.

46. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1743 (2011); Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2774 (2010). The four dissenters in *Concepcion* were Justices Stephen G. Breyer, Ruth B. Ginsburg, Sonia Sotomayor, and Elena Kagan. *Concepcion*,

are no longer dealing with two commercial parties, but with employees and consumers. In *Rent-A-Center, West, Inc. v. Jackson*,[47] the Court dealt with a dispute between an employee and his employer. The Court framed the issue as whether, under the FAA, "a district court may decide a claim that an arbitration agreement [was] unconscionable, where the agreement explicitly assign[ed] that decision to the arbitrator."[48] But the decision had much greater reach than the issue stated.

The opinion first reinforced an important doctrinal principle—the doctrine of severability.[49] As early as 1967, in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,[50] the Court had based its decision on the notion that an arbitration clause must be considered separately from the underlying contract.[51] Prima Paint had alleged fraudulent inducement into a consulting agreement containing an arbitration clause. The Court ruled that arbitration clauses are "separable from the contracts in which they are embedded, and that where no claim [was] made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud."[52] Therefore, fraud in the inducement became a "gateway" issue to be resolved by the arbitrators, unless the challenge is only addressed to the arbitration clause. This doctrine "has become one of the cornerstones of modern arbitration law."[53]

The severability doctrine was reaffirmed in the Florida case of *Buckeye Check Cashing, Inc. v. Cardegna*,[54] which involved an allegation of usurious interest rates, making the contract illegal and void *ab initio*.[55] In a seven-to-one decision, the Court reversed the Florida Supreme Court using the severability principle and making it applicable to the states.[56] Writing for the majority, Justice Scalia declared that,

> First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the

131 S. Ct. at 1743. The four dissenters in *Rent-A-Center* were Justices John Stevens, Ginsburg, Breyer, and Sotomayor. *Rent-A-Center*, 130 S. Ct. at 2774.

47. Rent-A-Canter, W., Inc. v. Jackson, 130 S. Ct. 2772 (2010).
48. *Id.* at 2775.
49. *See id.* at 2778; Stipanowich, *supra* note 20, at 343.
50. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).
51. *See id.* at 400.
52. *Id.* at 402 (internal quotation marks omitted).
53. Stipanowich, *supra* note 20, at 345.
54. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006).
55. *Id.* at 443.
56. *Id.* at 449.

> contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts.[57]

Because Cardegna was challenging the entire agreement, but not specifically its arbitration provisions, those provisions were enforceable apart from the remainder of the contract.[58]

The Court rejected the Florida Supreme Court's distinction between void and voidable contracts in refusing to apply *Prima Paint*'s rule of severability.[59] It further discarded the Florida Supreme Court's conclusion that enforceability of the arbitration agreement should turn on Florida public policy and contract law.[60]

Justice Scalia also wrote the opinion in *Rent-A-Center*, but this time the Court divided five-to-four.[61] He framed the issue as "whether, under the Federal Arbitration Act ("FAA" or "Act"), 9 U.S.C. §§ 1–16, a district court may decide a claim that an arbitration agreement is unconscionable, where the agreement explicitly assigns that decision to the arbitrator."[62] Jackson had filed an employment discrimination suit against his former employer.[63] When the employer attempted to enforce the arbitration agreement, Jackson argued that it was unenforceable on the grounds of unconscionability.[64] Justice Scalia relied on a delegation provision in the contract called "Arbitration Procedures," which stated that "[t]he Arbitrator . . . shall have exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable."[65] Justice Scalia concluded that resolution of the current "controversy" between the parties, whether the Agreement was unconscionable, had been delegated to the arbitrator by this provision.[66]

The severability doctrine became strained in this case because the entire contract dealt with arbitration. Justice Scalia recognized that there were two types of challenges under section two of the FAA: (1) the validity of the agreement to arbitrate, or (2) the contract as a whole.[67] Under *Prima Paint* and *Buckeye*, only the first type of challenge has been deemed

57. *Id.* at 445–46.
58. *Id.* at 446.
59. *Id.*
60. *Buckeye Check Cashing, Inc.*, 546 U.S. at 446.
61. *See* Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2775, 2781 (2010).
62. *Id.* at 2775.
63. *Id.*
64. *See id.*
65. *Id.* at 2777 (alteration in original) (internal quotation marks omitted).
66. *Id.* This becomes important for the Florida Supreme Court in its application of the case.
67. *See Rent-A-Center*, 130 S. Ct. at 2778.

relevant to a court's determination whether the arbitration agreement is enforceable.[68] As the entire agreement covered arbitration, the two types seemed to merge into one. Justice Scalia treated the issue by focusing on the delegation clause.[69] Because Jackson was not attacking the validity of the delegation clause alone, but the contract as a whole, his challenge had to be decided by the arbitrator.[70]

The dissent written by Justice Stevens criticizes the Court for adding "a new layer of severability—something akin to Russian nesting dolls—into the mix: Courts may now pluck from a potentially invalid *arbitration agreement* even narrower provisions that refer particular arbitrability disputes to an arbitrator."[71] He points out that the general challenge was to a standalone arbitration agreement and accuses the majority of "read[ing] the delegation clause as a distinct mini-arbitration agreement divisible from the contract in which it resides—which just so happens also to be an arbitration agreement."[72]

C. *AT&T MOBILITY LLC V. CONCEPCION*

The last case in the trilogy is also the most controversial and possibly the most significant. In *AT&T Mobility LLC v. Concepcion*,[73] also a five-to-four decision written by Justice Scalia, the Court dealt with a putative class action filed in federal court by customers of AT&T Mobility who were challenging a very generous arbitration clause.[74] The clause provided that any arbitration award in excess of AT&T's last written settlement offer would result in a payment by AT&T of $7,500, rather than the smaller arbitral award, and also pay twice the amount of attorneys' fees incurred by the customer.[75] In ruling on the motion to compel arbitration, the district court relied on a three-part test established by the California Supreme Court in *Discover Bank v. Superior Court*,[76] and declared that it was a contract of adhesion and that the plaintiffs had met their burden of establishing that the arbitration provision was unconscionable.[77]

68. *Id.* (citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444–46 (2006); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04 (1967)).
69. *See id.*
70. *See id.* at 2779.
71. *Id.* at 2786 (Stevens, J., dissenting) (emphasis in original).
72. *Id.* at 2786–87.
73. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).
74. *See id.* at 1744–45.
75. *See id.* at 1744.
76. Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005).
77. Laster v. AT&T Mobility LLC, 584 F.3d 849, 854–55 (9th Cir. 2009).

Justice Scalia recognized that under section two of the FAA, arbitration agreements may be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract."[78] This permits the invalidation of an arbitration contract by traditional contract defenses, such as fraud, duress, or unconscionability, "but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[79] He then frames the question as whether section two preempted California's rule under *Discover Bank*, categorizing most collective-arbitration waivers in consumer contracts as unconscionable.[80] Justice Scalia then explains that the FAA preempts any state law or policy that specifically attempts to limit the enforceability of arbitration contracts.[81] "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[82] He concluded that California's *Discover Bank* rule on class action waivers in arbitration operates to limit or bar arbitration provisions in a discriminatory manner not applicable to other forms of contracts.[83]

Justice Scalia extols the virtues of arbitration as "allow[ing] for efficient, streamlined procedures tailored to the type of dispute."[84] Arbitrations allow the parties to specify "that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution."[85] In discussing class action arbitrations, he repeated the arguments made by Justice Alito in *Stolt-Nielsen* that informality suffers, appeals are limited, confidentiality is compromised, and efficiency and speed decline.[86] He pointed out that Congress never envisioned class action arbitrations when it passed the FAA in 1925.[87] But in making such a strong case that arbitration is an ill-suited mechanism for handling class actions, a viable alternative in this situation is to eliminate arbitration, not class actions.

78. *Concepcion*, 131 S. Ct. at 1744.
79. *Id.* at 1746 (citing Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996)); *see also* Perry v. Thomas, 482 U.S. 483, 492–93 & n.9 (1987).
80. *See Concepcion*, 131 S. Ct. at 1746.
81. *See id.* at 1747.
82. *Id.*
83. *See id.* at 1748.
84. *See id.* at 1749.
85. *Id.* at 1749.
86. *See Concepcion*, 131 S. Ct. at 1750–51.
87. *Id.*

Writing for the four dissenters, Justice Breyer took umbrage with the conclusion that the *Discover Bank* rule discriminates against arbitration contracts.[88] It "applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements."[89] He also disagreed that class actions are not an efficient mechanism for resolving the claims of thousands of individual consumers.[90] In fact, class arbitrations may be more efficient than class actions in court.[91]

Justice Breyer also disputed the claim that the *Discover Bank* rule will discourage the use of arbitration because it is poorly suited to cases with higher stakes as lacking empirical support and providing no convincing reason that parties would be unwilling to submit high-stake disputes to arbitration.[92] The fact that contract defenses such as duress and unconscionability may slow down the dispute resolution process has never been a reason for invalidating such defenses.[93]

The implications of this last decision in the trilogy are that arbitrators must resolve unconscionability defenses where there is an arbitration agreement. Furthermore, the *AT&T Mobility LLC v. Concepcion* case makes possible for businesses to avoid not only class action arbitrations, but also class actions in court.[94] When incorporated into consumer or employment contracts, this trilogy of cases has been criticized as undermining fundamental fairness and has advanced attempts in Congress to enact arbitration fairness legislation.[95] In fact, Professor Stipanowich makes a strong case that by boldly expanding the preemptive effect of the FAA, the U.S. Supreme Court has made arbitration jurisprudence in "the U.S. less protective of the procedural rights of consumers and employees than almost any other jurisdiction in the world."[96]

88. *See id.* at 1756–57 (Breyer, J., dissenting).

89. *Id.* at 1757 (quoting Discover Bank v. Superior Court, 113 P.3d 1100, 1112 (Cal. 2005)) (internal quotation marks omitted).

90. *See id.* at 1759–60. Justice Breyer cited counterexamples drawn from the Wall Street Journal and the New York Times. *Id.* at 1759. He also cited data submitted by the American Arbitration Association in its amicus brief that class arbitrations take considerably less time than in-court proceedings. *Id.*

91. *See id.*

92. *See Concepcion*, 131 S. Ct. at 1760.

93. *See id.*

94. Stipanowich, *supra* note 20, at 388.

95. *See id.* at 380–406.

96. *See id.* at 408.

III. FLORIDA CASES

A. IN GENERAL

Given the U.S. Supreme Court's expansive treatment of the FAA, it is not surprising that state courts have pushed back in their application of the latest trilogy to their own proceedings. Decisions out of Florida have not readily welcomed arbitration as a dispute resolution method where one of the parties is a consumer. Federal courts state unequivocally that federal policy strongly favors arbitration,[97] with the U.S. Supreme Court stating that the "Federal Arbitration Act reflects an 'emphatic federal policy in favor of arbitral resolution.'"[98] Florida courts have expressed the policy in less enthusiastic terms—that arbitration is a favored means of dispute resolution and that courts will indulge every reasonable presumption to uphold proceedings resulting in an award.[99]

Florida is not alone in pushing back. The Supreme Court of West Virginia is a more dramatic example. In *Brown ex rel. Brown v. Genesis Healthcare Corp.*,[100] citing a dissenting opinion by Justice Black,[101] the court stated that Congress intended the FAA "to govern only contracts between merchants with relatively equal bargaining power who voluntarily entered arbitration agreements."[102] Then, quoting from a law review article, the court stated, "Contrary to the intended purpose of the Federal Arbitration Act, the Supreme Court has steadily expanded the scope of the FAA since the 1980's."[103] Then, following a strategy guaranteed to generate a rebuke from the higher court, the West Virginia opinion stated, "With tendentious reasoning, the United States Supreme Court has stretched the application of the FAA from being a *procedural* statutory scheme effective only in the federal courts, to being a *substantive* law that preempts state law in both the federal *and* state courts."[104] Finally, it added that "the Supreme Court has created from whole cloth the doctrine of

97. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

98. KPMG LLP v. Cocchi, 132 S. Ct. 23, 25 (2011) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985).

99. *See* Roe v. Amica Mut. Ins. Co., 533 So. 2d 279, 281 (Fla. 1988).

100. Brown *ex rel*. Brown v. Genesis Healthcare Corp., 724 S.E.2d 250 (W. Va. 2011).

101. *See id.* at 278 n.87 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 409 n.2 (1967) (Black, J., dissenting)).

102. *Id.* at 278.

103. *Id.* (quoting Ann E. Krasuski, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DEPAUL J. HEALTH CARE L. 263, 271 (2004)).

104. *Id.* at 278.

'severability.'"[105] The court then held that "as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence."[106]

Predictably, on February 21, 2012, the U.S. Supreme Court reversed *Brown* in a per curiam opinion and stated tersely that "[t]he West Virginia court's interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court."[107] The Court found it unnecessary to quote from the Supremacy Clause. But it is important for the later analysis of Florida cases to review what the Court did say. It reaffirmed that,

> [w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. That rule resolves these cases. West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA.[108]

Another state supreme court to receive a per curiam opinion unanimously reversing its decision was the Supreme Court of Oklahoma. The court reasoned that "where two statutes address the same subject, one specific and one general, the specific will govern over the general. . ."[109] The court thus concluded that their state statute restricting non-compete clauses in contracts found in the Nursing Home Care Act would govern over the more general federal statute favoring arbitration. The U.S. Supreme Court readily disposed of this notion, stating that:

105. *Id.* at 279.

106. *Brown*, 724 S.E.2d at 292.

107. Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203 (2012) (per curiam).

108. *Id.* at 1203–04 (citing AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011)) (internal quotation marks omitted).

109. Howard v. Nitro-Lift Techs., LLC, 273 P.3d 20, 26 n. 21 (Okla. 2011).

> . . . the ancient interpretive principle that the specific governs the general (*generalia specialibus non derogant*) applies only to conflict between laws of equivalent dignity. Where a specific statute, for example, conflicts with a general constitutional provision, the latter governs. And the same is true where a specific state statute conflicts with a general federal statute. There is no general-specific exception to the Supremacy Clause, U.S. Const. Art.VI, cl.2.[110]

The unmistakable message in these two per curiam opinions is that the states have to tow the line where the FAA applies. The FAA has been applied broadly to all cases, state and federal, affecting interstate commerce, traditionally a low threshold.[111] Where the FAA does not apply, the states are free to apply their own statutes.[112] Florida's statutes are contained in the Florida Arbitration Code, chapter 682. Most cases, however, implicate interstate commerce. Thus, where the FAA applies, much of case law in Florida is on thin ice should some of their decisions find their way to the U.S. Supreme Court.

Given the latest trilogy of cases, Florida courts may even have to reconsider the oft-enunciated requirements courts must consider in ruling on a motion to compel arbitration of a given dispute: "(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived."[113] The *Concepcion* majority in the Supreme Court would make the inquiry by the courts much narrower, leaving those issues for the arbitrator. As previously explained by the U.S. Supreme Court in *AT&T Technologies, Inc. v. Communications Workers of America*,[114] the Court established in the *Steelworkers Trilogy*[115] that: (1) "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit";[116] (2) the question of arbitrability is an issue for judicial

110. Nitro-Lift Techs., LLC v. Howard, 133 S.Ct. 500, 504 (2012).

111. *See id.*; *see also* Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 386 (1992) (noting the broad scope of when the FAA can apply).

112. *Cf.* Strickland, *supra* note 111, at 396–97 (explaining that state law is preempted only "if the FAA by its terms applies to an agreement to arbitrate").

113. *See* Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999).

114. AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648–50 (1986).

115. United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960).

116. *Warrior & Gulf*, 363 U.S. at 582; *see Am. Mfg. Co.*, 363 U.S. at 570–71 (Brennan, J., concurring).

determination;[117] and (3) where the contract contains an arbitration clause, there is a presumption of arbitrability.[118] Absent from the list is whether the parties have waived arbitration.

B. WAIVER

What constitutes waiver is treated differently by the Florida Supreme Court than by the overwhelming majority of the federal courts. Finding more readily that a party has waived arbitration may be an indicator of judicial hostility to this form of dispute resolution. In *Raymond James Financial Services, Inc. v. Saldukas*,[119] the Florida Supreme Court held that there was no requirement for proof of prejudice to constitute a waiver of the right to arbitrate sufficient to deny a motion to compel arbitration.[120] Because the U.S. Supreme Court has not decided this issue as to the Federal Arbitration Act, Florida courts are free to interpret the federal statute as being consistent with Florida court decisions analyzing this same issue under the Florida Arbitration Code. Relying on precedent, the court explained that a party's contract rights may be waived by actually participating in a lawsuit or taking action inconsistent with that right.[121] Furthermore, its decisions have not held that there was a requirement for proof of prejudice to constitute an effective waiver of the right to arbitrate. Simply, "waiver" is "the voluntary and intentional relinquishment of a known right, or conduct which implies the voluntary and intentional relinquishment of a known right."[122] The court simply made this general definition of waiver applicable to a right to arbitrate.[123]

Federal courts require a showing of prejudice.[124] In *Lomas v.*

117. *AT&T Techs., Inc.*, 475 U.S. at 649 (citing *Warrior & Gulf*, 363 U.S. at 582–83) ("Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."); *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985); Int'l Union of Operating Eng'rs, Local 150 v. Flair Builders, Inc., 406 U.S. 487, 491 (1972); Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 241 (1962), *overruled in part on other grounds by* Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970).

118. Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 377–78 (1974); *Warrior & Gulf*, 363 U.S. at 582–83. "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Warrior & Gulf*, 363 U.S. at 582–83.

119. Raymond James Fin. Servs., Inc. v. Saldukas, 896 So. 2d 707 (Fla. 2005).

120. *Id.* at 711.

121. *Id.* (citing Klosters Rederi A/S v. Arison Shipping Co., 280 So. 2d 678, 680 (Fla. 1973)).

122. Major League Baseball v. Morsani, 790 So. 2d 1071, 1077 n.12 (Fla. 2001).

123. *Saldukas*, 896 So. 2d at 711.

124. *See infra* note 126 and accompanying text.

Travelers Property Casualty Corp. (*In re Citigroup, Inc.*),[125] the analysis begins with the federal policy strongly favoring arbitration, and emphasizes that a showing of prejudice is required on a claim of waiver.[126] Of course, a party may show prejudice simply by virtue of the delay in asserting the right to arbitrate, but the *Saldukas* decision makes it much easier to find waiver and deny arbitration.[127]

C. TORTS

Another area where Florida courts have displayed their antagonism to arbitrations is with tort cases. In *Seifert v. United States Home Corp.*,[128] the Florida Supreme Court held that a wrongful death claim was not subject to an arbitration clause despite its broad scope.[129] The provision was contained in a contract for the sale and purchase of a house, which was to be constructed by U.S. Home.[130] The arbitration clause was very broad, providing that:

> Any controversy or claim arising under or related to this Agreement or

125. Lomas v. Travelers Prop. Cas. Corp., 376 F.3d 23 (2004).

126. *See id.* at 26; *see also* Thyssen, Inc. v. Calypso Shipping Corp., S.A., 310 F.3d 102, 105 (2d Cir. 2002) ("The key to a waiver analysis is prejudice."); Gen. Star Nat'l Ins. Co. v. Administratia Asigurarilor de Stat, 289 F.3d 434, 438 (6th Cir. 2002) ("[A] party may waive the right by delaying its assertion to such an extent that the opposing party incurs actual prejudice."); Wood v. Prudential Ins. Co. of Am., 207 F.3d 674, 680 (3d Cir. 2000) ("In order to obtain a finding that arbitration is waived, a party seeking to avoid arbitration must demonstrate prejudice."); Subway Equip. Leasing Corp. v. Forte, 169 F.3d 324, 326 (5th Cir. 1999) ("Waiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party.") (citation omitted); Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 391 (7th Cir. 1995) (stating that "prejudice to the . . . party resisting arbitration, should weigh heavily in the decision whether to send the case to arbitration, as should the diligence or lack thereof of the party seeking arbitration."); Stifel, Nicolaus & Co. Inc. v. Freeman, 924 F.2d 157, 158 (8th Cir. 1991) ("To prove Stifel waived its right to arbitration, Freeman and Weyhmueller must show: (1) Stifel knew of an existing right to arbitration; (2) Stifel acted inconsistently with that right; and (3) Stifel's inconsistent acts prejudiced them."); Stone v. E.F. Hutton & Co. Inc., 898 F.2d 1542, 1543 (11th Cir. 1990) (per curiam) ("A party may be deemed to have waived its right to arbitrate a dispute when a party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party.") (internal quotation marks omitted); Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc., 817 F.2d 250, 252 (4th Cir. 1987) ("The dispositive question is whether the party objecting to arbitration has suffered actual prejudice."); Shinto Shipping Co., Ltd. v. Fibrex & Shipping Co., Inc., 572 F.2d 1328, 1330 (9th Cir. 1978) ("Thus, this court must be convinced not only that the appellee acted inconsistently with that arbitration right, but that the appellant was prejudiced by this action before we can find a waiver."); Hart v. Orion Ins. Co. Ltd., 453 F.2d 1358, 1361 (10th Cir. 1971) ("We find no prejudice to the insured and no waiver of arbitration.").

127. *Saldukas*, 896 So. 2d at 711.

128. Seifert v. U.S. Home Corp., 750 So. 2d 633 (Fla. 1999).

129. *See id.* at 635, 642.

130. *Id.* at 635.

> to the Property . . . shall be settled and finally determined by mediation or binding arbitration as provided by the Federal Arbitration Act (9 U.S.C. Section 1-14) and similar state statutes and not by a court of law.[131]

After U.S. Home built the house and the Seiferts moved in, their car was left running in the garage and carbon monoxide emissions penetrated the air conditioning system and killed Mr. Seifert.[132]

Writing for a unanimous court, Justice Anstead acknowledged that "the phrase 'arising out of or relating to' the contract has been interpreted broadly to encompass virtually all disputes between the contracting parties, including related tort claims."[133] The court then presumed that not every dispute that arises between contracting parties should be subject to arbitration.[134] Using the "prevailing case law," the court states that "[e]ven in contracts containing broad arbitration provisions, the determination of whether a particular claim must be submitted to arbitration necessarily depends on the existence of some nexus between the dispute and the contract containing the arbitration clause."[135] The court then describes it as a "mere coincidence" that the parties to the dispute had a contractual relationship, and rejects a "but for" test.[136] "In other words, the mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one 'arising out of or relating to' the agreement."[137] It cites, however, a federal case containing a different clause—one providing for arbitration of "any" dispute arising during the "execution" of a charter party.[138]

131. *Id.*

132. *Id.*

133. *Id.* at 637 (citing Southland Corp. v. Keating, 465 U.S. 1, 15 n.7 (1984) (involving claims for fraud, misrepresentation, breach of contract, breach of fiduciary duty, and violation of state franchise investment law); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 406 (1967) (holding that the contractual language "[a]ny controversy or claims arising out of or relating to this Agreement, or breach thereof" is "easily broad enough to encompass" claims for fraud in inducement of contract)).

134. *See Seifert*, 750 So. 2d at 638 ("After analyzing the governing principles surrounding the determination of whether a particular claim is subject to arbitration, and keeping in mind the general policy favoring arbitration, we believe it is fair to presume that not every dispute that arises between contracting parties should be subject to arbitration.").

135. *Id.* No case is cited for this nexus requirement. *See id.*

136. *See id.* It was hardly a mere coincidence that a construction defect resulted in a controversy or claim by the purchasers. *See id.* What was surely not anticipated was that such a defect would lead to such tragic consequences. *See id.*

137. *Id.*

138. *See id.* (citing Armada Coal Exp., Inc. v. Interbulk, Ltd., 726 F.2d 1566, 1568 (11th Cir. 1984)). The Florida Supreme Court also relies on *Necchi S.p.A. v. Necchi Sewing Machine Sales*

Even though the FAA clearly applied to the dispute, the court did not discuss how the decision complied with the U.S. Supreme Court directive that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration[.]"[139] Instead, the court stated that any ambiguity had to be construed against the drafter of the contract, U.S. Home.[140] Finally, similarly to the West Virginia Supreme Court, the Florida Supreme Court relied on public policy favoring jury trials, due process, and access to courts, by citing a law review article.[141]

D. USURY

There was no further appellate history for the *Seifert* case, but the same cannot be said for a later Florida Supreme Court opinion. Six years after *Seifert*, in *Cardegna v. Buckeye Check Cashing, Inc*.,[142] a contract containing an arbitration provision was challenged as void because it was contained in an illegally usurious contract.[143] In another opinion by Justice Anstead, the court distinguished *Prima Paint* on the basis that the challenge there would have made the contract voidable, whereas here the challenge made the contract void.[144] The court also acknowledged a contrary decision from the Eleventh Circuit Court of Appeals in *Bess v. Check*

Corp., 348 F.2d 693, 698 (2d Cir. 1965), which involved the obligation to arbitrate after the termination date of an agreement. *See Necchi S.p.A.*, 348 F.2d at 695. However, the case neither concerned a tort nor mentioned a "but for" analysis. *See id.* The *Seifert* court then inaccurately states that: "These [federal] cases hold that for a tort claim to be considered 'arising out of or relating to' an agreement, it must, at a minimum, raise some issue the resolution of which requires reference to or construction of some portion of the contract itself." *Seifert*, 750 So. 2d at 638. *Hersman, Inc. v. Fleming Cos.*, 19 F. Supp. 2d 1282 (M.D. Ala. 1998), *aff'd*, 180 F.3d 271 (11th Cir. 1999), which was also mentioned in *Seifert*, involved a dispute between two parties who had retained the services of an architect and signed a contract with the architect that contained an arbitration provision. *See Hersman*, 19 F. Supp. 2d at 1287. This contract only obligated the defendant to pay a fee of $27,000 for basic architectural services while the dispute concerned various misrepresentations and failure to exercise due care in connection with a multi-million dollar shopping center project. *Id.*

139. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

140. *Seifert*, 750 So. 2d at 641.

141. *See id.* at 642 (citing Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 48 (1997)). Even though the *Seifert* opinion had previously cited *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the court does not explain why the following language from that opinion did not foreclose such reasoning: "In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland*, 465 U.S. at 10.

142. Cardegna v. Buckeye Check Cashing, Inc., 894 So. 2d 860 (Fla. 2005).

143. *See id.* at 861–62.

144. *Id.* at 863.

Express,[145] but found the case distinguishable because *Bess* was expressly resolved under federal law, not state law principles.[146] The court "conclude[d] that Florida public policy and contract law prohibit breathing life into a potentially illegal contract by enforcing the included arbitration clause of the void contract."[147] Only the dissent by Justice Cantero perceived the issue as not whether the check-cashing contract was void as usurious, but who decides the issue—the courts or the arbitrator, and he correctly concluded that the issue must be decided under federal law, specifically the FAA.[148] Finally, he concluded that the majority opinion violated the FAA's express directive and failed to follow the dictates of *Prima Paint*.[149]

As stated earlier, in *Buckeye Check Cashing, Inc. v. Cardegna*, the U.S. Supreme Court, in a seven-to-one decision authored by Justice Scalia, made clear that the distinction between void and voidable was irrelevant under *Prima Paint* or other Supreme Court decisions.[150] The opinion reiterated that the severability principle of *Prima Paint* would be applicable in state as well as federal courts under the FAA, a principle that had been enunciated earlier in *Southland Corp. v. Keating.*[151] This is one case where the antagonism by Florida courts to arbitration was nullified by the intervention of the U.S. Supreme Court.[152]

E. NURSING HOMES—*SHOTTS* CASE

There have been a number of cases involving nursing homes and arbitration agreements decided by Florida appellate courts.[153] Two recent

145. Bess v. Check Express, 294 F.3d 1298 (11th Cir. 2002).

146. *Cardegna*, 894 So. 2d at 864.

147. *Id.*

148. *See id.* at 867 (Cantero, J., dissenting).

149. *Id.* at 869.

150. *See id.* at 863 (majority opinion).

151. *See id.*; Southland Corp v. Keating, 465 U.S. 1, 12 (1984) (stating that the FAA "create[d] a body of federal substantive law[,]" which was "applicable in state and federal courts") (internal quotation marks omitted).

152. *See* KPMG LLP v. Cocchi, 51 So. 3d 1165 (Fla. Dist. Ct. App. 2010), for another example where the Fourth District Court of Appeal affirmed the denial of a motion to compel arbitration. The U.S. Supreme Court reversed in a unanimous per curiam opinion. KPMG LLP v. Cocchi, 132 S. Ct. 23 (2011). The Supreme Court stated that the issue was whether the Florida courts could refuse to compel arbitration on four claims based solely on a finding that two of them were nonarbitrable. *See id*. at 25.

153. *See supra* note 100 and accompanying text. The West Virginia decision discussed earlier also involved nursing homes. *Id.* While the Florida Supreme Court was not as explicit in its antagonism to arbitration as West Virginia's court, the aversion to arbitration was nonetheless apparent. *See id.*

opinions out of the Florida Supreme Court issued on November 23, 2011, both resulted in decisions counter to the enforcement of arbitration agreements.[154] The first case was *Shotts v. OP Winter Haven, Inc.*,[155] where the court came to the direct opposite conclusion of *Rent-A-Center*, based on the lack of delegation in the Florida contract.[156] The opinion is not openly defiant of the U.S. Supreme Court, yet it is difficult to imagine that, given the opportunity, the U.S. Supreme Court would not have also reversed the Florida Supreme Court in a per curiam opinion.

At the circuit and district levels, Shotts' claim for tort was ordered to proceed to arbitration despite a claim that the agreement was unconscionable and against Florida public policy.[157] Besides providing that the FAA would govern the arbitration, the arbitration agreement contained a waiver of punitive damages and a severability clause.[158] The execution of the agreement was also not a precondition to receiving medical treatment or gaining admission to the facility.[159] In an opinion released more than four years ago, the Second District Court of Appeal affirmed the order compelling arbitration and held that, under the severability clause, the arbitrator should decide whether the waiver of punitive damages was against public policy and should be severed.[160]

The district court opinion explained that to succeed on a claim of unconscionability, a party must establish both procedural and substantive unconscionability.[161] It concluded that it was not procedurally unconscionable because the arbitration agreement was separate from the remainder of the admissions paperwork, Ms. Shotts was not rushed into signing the arbitration agreement, and, although Ms. Shotts testified that she did not fully understand the meaning of the terms in the agreement, she was not prevented from asking for assistance from the admissions director

154. *See* Gessa v. Manor Care of Fla., Inc., 86 So. 3d 484, 494 (Fla. 2011); Shotts v. OP Winter Haven, Inc., 86 So. 3d 456, 480–81 (Fla. 2011).

155. Shotts v. OP Winter Haven, Inc., 86 So. 3d 456 (Fla. 2011).

156. *See id.* at 459–60.

157. *See* Shotts v. OP Winter Haven, Inc., 988 So. 2d 639, 641, 644 (Fla. Dist. Ct. App. 2008) (noting the trial court granted the motion to compel arbitration and affirming the order granting the motion to compel arbitration).

158. *See Shotts*, 86 So. 3d at 460–61 (presenting the terms of the arbitration agreement).

159. *See id.* at 461.

160. *See Shotts*, 988 So. 2d at 640−41, 644. The opinion was authored by Judge Salcines, who retired in 2008. *See id.* The opinion does not tell when the action was filed, but we are told that Mr. Shotts died on November 23, 2003, and after speaking with trial counsel, the author learned that the case was filed in 2005. *See id.* As of October 23, 2012, the case was, seven years later, on the trial calendar. *See id.* So much for the FAA's goal of allowing the parties to avoid "the costliness and delays of litigation." *See* H.R. REP. NO. 68-96, at 2 (1924).

161. *Shotts*, 988 So. 2d at 641.

before signing the document.[162] The court then reasoned that the arbitration agreement was "worded clearly, conspicuous and separate from other [admissions] documents."[163]

The court next disposed of Ms. Shotts' argument that the agreement was contrary to public policy because it eliminated her right to recover punitive damages, an argument that relied on *Blankfeld v. Richmond Health Care, Inc.*,[164] which contained a similar provision.[165] However, the court concluded that the offensive provision could be severed, assuming that punitive damages were found to be appropriate.[166] The provision was not so interrelated and interdependent with the remainder of the arbitration agreement that the arbitrators could not sever if necessary.[167] In affirming the trial court, the opinion left open for the arbitrators the ability to sever any portions determined to be against public policy.[168]

The Florida Supreme Court opinion in *Shotts*, authored by Justice Perry, began with the issue of whether a valid written agreement to arbitrate exists and concluded that such an issue was controlled by principles of state contract law.[169] For this proposition, the court relied on a 1999 decision from the First District Court of Appeal,[170] which quotes from *Doctor's Associates, Inc. v. Casarotto*.[171] The court then concluded

162. *Id.*

163. *Id.* (quoting Bland *ex rel.* Coker v. Health Care & Ret. Corp. of Am., 927 So. 2d 252, 254 (Fla. Dist. Ct. App. 2006)) (internal quotation marks omitted).

164. Blankfeld v. Richmond Health Care, Inc., 902 So. 2d 296 (Fla. Dist. Ct. App. 2005) (en banc) (per curiam).

165. *See id.* at 298.

166. *See Shotts*, 988 So. 2d at 644.

167. *Id.* at 643−44. The court explained that *Blankfeld* and other cases invalidating arbitration agreements based on similar limitations on damages did not contain severance language, or the court determined that the "offending" provisions were not severable. *See id.* at 644.

168. *See id.* at 644.

169. *See* Shotts v. OP Winter Haven, Inc., 86 So. 3d 456, 464 (Fla. 2011).

170. *See id.* (citing Powertel, Inc. v. Bexley, 743 So. 2d 570, 574 (Fla. Dist. Ct. App. 1999)).

171. *See Powertel*, 743 So. 2d at 574 (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996)). However, *Casarotto* goes on to say, "Courts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions." *Casarotto*, 517 U.S. at 687 (emphasis omitted). Other language would indicate that Florida courts should be reluctant using state law to invalidate arbitration agreements where the FAA is applicable. *See id.* For example, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), the Court stated that section two of the FAA was "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses*, 460 U.S. at 24. This opinion was a six-to-three decision written by Justice William Brennan. *See id.* at 4, 30. The dissenters were Justices William Rehnquist, Warren Burger, and Sandra Day O'Connor. *Id.* at 30.

that public policy clearly was such a defense, so that if the arbitration agreement violated public policy, no valid agreement existed.[172]

More problematic is when the court confronted the issue of whether the court or the arbitrator should decide whether a valid agreement to arbitrate existed. This was the issue as framed by the U.S. Supreme Court in *Buckeye Check Cashing*,[173] so this would also seem like the place to begin the analysis. Instead, Justice Perry relies on two prior Florida Supreme Court cases, its decision in *Seifert*[174] and in *Global Travel Marketing, Inc. v. Shea*.[175] It then cites a series of district court cases favoring the courts, rather than the arbitrators, as the decider of public policy issues, including a lengthy quote of a concurring opinion by Judge Altenbernd in which he expressed his change of heart on the issue as reflected in Second District precedent.[176] In fact, the Second District is criticized for relying almost exclusively on federal precedent,[177] including a U.S. Supreme Court case, *PacifiCare Health Systems, Inc. v. Book*.[178]

The issue of whether a valid agreement to arbitrate exists presents a vague framework. One can think of the issue of validity as whether any

172. *Shotts*, 86 So. 3d at 464–65 (citing Global Travel Mktg., Inc. v. Shea, 908 So. 2d 392, 398 (Fla. 2005). While the court cited to its own precedent, other Florida precedent contains similar reasoning. *See Global Travel Mktg.*, 908 So. 2d at 398 (relying on other Florida cases). In *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860 (Fla. 2005), the court also concluded that an arbitration agreement violative of public policy should not be enforced. *Cardegna*, 894 So. 2d at 864. For obvious reasons, the court did not cite *Cardegna*. *See id.*

173. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 442 (2006) ("We decide whether a court or an arbitrator should consider the claim that a contract containing an arbitration provision is void for illegality."). As set out earlier, this was a seven-to-one decision holding that it was for the arbitrator, not the court, to decide. *See supra* text accompanying notes 54–56.

174. Seifert v. U.S. Home Corp., 750 So. 2d 633 (Fla. 1999); *see supra* Part III.C.

175. Global Travel Mktg., Inc. v. Shea, 908 So. 2d 392 (Fla. 2005); *see supra* note 172 and accompanying text.

176. *See Shotts*, 86 So. 3d at 467–71 (quoting ManorCare Health Servs., Inc. v. Stiehl, 22 So. 3d 96, 101–05 (Fla. Dist. Ct. App. 2009) (Altenbernd, J., specially concurring)).

177. *See id.* at 471. This criticism seems particularly inappropriate where the arbitration agreement in *Shotts* specifically stated that it would be governed by the FAA. *See id.*

178. PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401 (2003). Not coincidentally, an analysis of *PacifiCare* would have seemed to be appropriate as the Court framed the issue of "whether respondents can be compelled to arbitrate claims arising under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, notwithstanding the fact that the parties' arbitration agreements may be construed to limit the arbitrator's authority to award damages under that statute." *Id.* at 402. The Court's decision to compel arbitration relied on *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), which in turn dealt with a claim that the arbitration agreement violated federal policy. *See M/V Sky Reefer*, 515 U.S. at 530. The Court declined to reach that issue and held that the arbitration clause was, at least initially, enforceable. *See id.* at 540–41. Likewise, in *Shotts*, it was entirely speculative whether punitive damages would have been warranted in the first instance. *Shotts*, 86 So. 3d 639.

agreement between the parties was ever concluded.[179] The Florida Supreme Court chose to view validity with reference to public policy, and, by favorably quoting from *Powertel, Inc. v. Bexley*,[180] the opinion intimates that other contract defenses are equally relevant in any analysis as to the validity of a contract.[181] Thus, defenses such as fraud, duress, or unconscionability may be used to invalidate the arbitration agreement, which in turn would have to be decided by the courts, not the arbitrators.[182] In the *Shotts* case, the court had no trouble concluding that the limitation on the patient's remedies, in particular, the specific statutory remedies contained in the Florida Statutes,[183] violated the public policy of the State of Florida.

In deciding that the court, rather than the arbitrator, should decide the public policy challenge, it runs directly counter to the *Rent-A-Center* decision. The application of the FAA was undisputed, so the refusal to follow the directive of the U.S. Supreme Court was reminiscent of the West Virginia Supreme Court. At least the Florida Supreme Court refrained from accusing the higher court of using "tendentious reasoning," or "creat[ing] from whole cloth the doctrine of 'severability[.]'"[184] Instead, the opinion used the fact that in the *Rent-A-Center* case, there was a delegation provision in which the parties agreed to arbitrate the enforceability of the agreement.[185] And yet, the agreement Shotts signed was extremely broad, calling for arbitration of any dispute that might arise during the patient's stay at the defendant's facility.[186] It further provided:

> This Agreement includes, but is not limited to, violations of any right granted to the Resident by law, including statutory resident's rights, or by the Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice or any

179. *See* Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2778 n.2 (2010).

180. Powertel, Inc. v. Bexley, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999).

181. *See Shotts*, 86 So. 3d at 464 (quoting *Powertel*, 743 So. 2d at 574).

182. *See id.* Presumably other defenses could be used to challenge the "validity" of the agreement, such as overreaching or the absence of bargaining ability. By alleging these defenses, litigants could tie up the case in court for months, if not years, before the arbitration can begin. So much for the FAA's goal of allowing the parties to avoid "the costliness and delays of litigation." *See* H.R. REP. NO. 68-96, at 2 (1924). One case that seemed to limit the effect of such defenses was *O'Keefe Architects, Inc. v. CED Construction Partners, Ltd.*, 944 So. 2d 181 (Fla. 2006), which held that a broad agreement to arbitrate included determining defenses to an otherwise arbitrable claim such as statute of limitations. *O'Keefe Architects, Inc.*, 944 So. 2d at 187.

183. *See* FLA. STAT. §§ 400.022–.023 (2003); *Shotts*, 86 So. 3d at 474.

184. Brown *ex rel.* Brown v. Genesis Healthcare Corp., 724 S.E.2d 250, 278–79 (W. Va. 2011); *see supra* text accompanying notes 100–105.

185. *Shotts*, 86 So. 3d at 478–80.

186. *Id.* at 482 (Polston, J., dissenting).

> other claim based on any alleged departure from accepted standards of medical or health care or safety, whether sounding in tort resulting in personal injury, or in contract. In no event shall this Agreement apply to any Facility dispute with Resident regarding payment for services rendered by Facility during Resident's stay.[187]

It would seem that the drafter of the agreement took great pains to write an agreement as all encompassing as possible. It would seem Shotts' claim that the agreement violated public policy was a dispute between the parties, which was delegated to the arbitrator for resolution. Nevertheless, the Florida Supreme Court used the lack of language specifically delegating to the arbitrator, in addition to "any dispute" language also delegating the enforceability of the agreement, as sufficient to distinguish the application of *Rent-A-Center*'s holding.[188]

The *Shotts* opinion next dealt with the issue of severability. It first acknowledged that the agreement itself contained the following language:

> In the event that any portion of this Agreement will be determined to be invalid or unenforceable, the remainder of this agreement will be deemed to continue to be binding upon the parties hereby in the same manner as if the invalid or unenforceable provision were not a part of the Agreement.[189]

But this clear and unambiguous language was not persuasive with the court. Its analysis began with the general standard for determining whether a contractual provision is severable as set out in a 1953 case.[190] That standard provided that a contract is not severable when, after considering its terms, nature, and purpose, all of its parts appear to be interdependent.[191] In other words, "a contract is indivisible where the entire fulfillment of the contract is contemplated by the parties as the basis of the arrangement."[192] An agreement would be severable "where the illegal portion of the contract does not go to its essence, and where, with the illegal portion eliminated, there still remains of the contract valid legal promises on one side which are wholly supported by valid legal promises on the other."[193] An important element is the intention of the parties, which is to be determined

187. *Id.* at 482 (emphasis omitted).
188. *See id.* at 480–81.
189. *Id.* at 460–61 (emphasis omitted).
190. *Id.* at 475 (quoting Local No. 234 v. Henley & Beckwith, Inc., 66 So. 2d 818, 821–22 (Fla. 1953)).
191. *See Shotts*, 86 So. 3d. at 475.
192. *Id.*
193. *Id.*

by terms of the contract itself, and by the subject matter to which it refers.[194]

The court concluded that, despite the severance provision contained in the arbitration agreement, if the limitations of remedies provisions were to be severed out of the agreement, the court would be forced to rewrite the agreement.[195] Evidently the court's remedy, to simply jettison the entire thing, was less offensive. The court explained that the contract called for the imposition of the American Health Lawyers Association rules, which went to the very essence of the agreement.[196] The offending provision in the rules was that they require, for the award of consequential, incidental, punitive, or special damages, that the plaintiff prove entitlement by clear and convincing evidence, instead of the requirement under Florida Statutes that proof be made by a preponderance of the evidence.[197] This provision is currently contained in Rule 6.06, which in turn includes a number of other provisions.[198] Of course, the entire Rules of Procedure for Arbitration of the American Health Lawyers Association contain numerous other rules, yet this single offensive provision was sufficient for the Florida Supreme Court to find that it went to the very essence of the agreement.

F. NURSING HOMES—*GESSA* CASE

The second opinion issued by the Florida Supreme Court on November 23, 2011, was *Gessa v. Manor Care of Florida, Inc*.[199] This was a case filed in 2007 which also challenged a waiver of punitive damages, as well as a limitation of $250,000 on noneconomic damages.[200] The agreement was a separate document included with other admission documents.[201] Gessa's complaint, based on her second stay at the defendant's facility, alleged improper treatment.[202] This time the court concluded that the offensive clauses in the arbitration agreement were not severable because they constituted "the financial heart of the agreement."[203]

194. *Id.*
195. *See id.* at 478.
196. *See id.*
197. *See* FLA. STAT. § 400.023(2) (2012); *Shotts*, 86 So. 3d at 476–78.
198. *See* AM. HEALTH LAWYERS ASS'N, RULES OF PROCEDURE FOR ARBITRATION 11 (2012), *available at* http://www.healthlawyers.org/hlresources/ADR/Documents/Arbitration%20Rules%2005.31.2012%20final.pdf.
199. Gessa v. Manor Care of Fla., Inc., 86 So. 3d 484 (Fla. 2011).
200. *See id.* at 485, 487.
201. *See id.* at 485–86.
202. *See id.* at 487.
203. *See id.* at 490.

We are again left with the entirely speculative assumption that the claims would exceed the limitation of $250,000, or that punitive damages would come into play. More disturbing, however, is the majority opinion's lack of response to the dissent's argument that the finding that the clauses could not be severed because they constituted the financial heart of the agreement simply ignored the economic reality of the transaction.[204] In the absence of an evidentiary hearing, the dissent questions how the majority can reach this conclusion.[205] Surely when Ms. Gessa was admitted as a resident into the nursing home, the financial heart of the transaction was the room and board charges, the services provided, and any other additional charges.

Even the arbitration agreement contained other important provisions less speculative than damages in excess of $250,000 or punitive damages. The agreement provided that both parties waived their rights to attorneys' fees and costs, that the net economic damages would not be limited but offset by collateral source payments and liens, and that interest on unpaid nursing home charges would not be awarded.[206] These other provisions contradict the majority opinion's conclusion that if the provisions were severed, it would be difficult to discern with reasonable certainty that, with the offending provisions gone, there would remain "valid legal promises on one side which are wholly supported by valid legal promises on the other[.]"[207] Thus, not wanting to re-write the contract for the parties, the court simply eliminates all mutual promises, not only to arbitrate the matter, but all other provisions as well.

The dissent in *Gessa* also contains an excellent discussion of the "conundrum" inherently involved where the validity of the agreement is challenged while that agreement is the basis for compelling arbitration.[208] The conundrum is that "a contract ultimately found to be unenforceable could be used to arbitrate a dispute[.]"[209] The dissent argues that this should be resolved in favor of arbitration: "[T]o decide at the outset that the

204. *See id.* at 497 (Polston, J., dissenting).

205. *See Gessa*, 86 So. 3d at 497 (Polston, J., dissenting).

206. *See id.* at 488–89.

207. *See id.* at 490–91 (quoting Local No. 234 v. Henley & Beckwith, Inc., 66 So. 2d 818, 821–22 (Fla. 1953)).

208. *See id.* at 498–99 (Polston, J., dissenting); *see also* Marshall, Amaya & Anton v. Arnold-Dobal, 76 So. 3d 998 (Fla. Dist. Ct. App. 2011) (per curiam). The author was faced with this issue in *Arnold-Dobal*, where a party was moving to compel arbitration based on an arbitration clause contained in an agreement, the validity and enforceability of which that same party was simultaneously challenging. *Arnold-Dobal*, 76 So. 3d at 999. A majority of the court concluded, based on federal precedent, that a party could indeed do that. *Id.*

209. *Gessa*, 86 So. 3d at 498 (Polston, J., dissenting).

agreement is unenforceable because the limitations might be reached is to deny effect to an arbitration provision in a contract that the court may later find to be perfectly enforceable[.]"[210]

Equally cogent is the dissent's analysis that the Florida Legislature has not decided that it is against public policy for nursing homes to limit damage remedies.[211] Such waivers have been held to be enforceable with constitutional provisions, such as Article I, section twenty-six, that purported to limit the attorney's fees recoverable in medical malpractice cases.[212] The dissent also points out other situations where the legislature has prohibited a contractual waiver of rights and remedies, such as in unemployment compensation,[213] the Motor Vehicle Retail Sales Finance Act,[214] as well as with persons engaged in certain hazardous occupations,[215] with mechanics' liens,[216] and with health maintenance organizations.[217]

G. OTHER NURSING HOME CASES

One way to avoid arbitration in the context of nursing home litigation is to attack the authority of the party signing the admission documents. In *Lepisto v. Senior Lifestyle Newport Ltd. Partnership*,[218] the court reversed an order compelling arbitration because the contract containing the arbitration clause was signed by the wife, who had a power of attorney for her husband, only signed as the financially responsible party, but not in her

210. *Id.* at 499; *see also* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 448–49 (2006) (recognizing this approach would "permit[] a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable"); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04 (1967) (finding the FAA requires the court to order arbitration once it determines the making of the arbitration agreement is not at issue). The dissent relied on *Buckeye* and *Prima Paint* to reach its conclusion. *See Gessa*, 86 So. 3d at 498–99 (Polston, J., dissenting).

211. *See* Gessa, 86 So. 3d at 499 (Polston, J., dissenting).

212. *See* FLA. CONST. art. I, § 26; *Gessa*, 86 So. 3d at 500 (Polston, J., dissenting); *In re* Amendment to the Rules Regulating the Fla. Bar-Rule 4-1.5(F)(4)(B) of the Rules of Prof'l Conduct, 939 So. 2d 1032, 1037–40 (Fla. 2006) (per curiam) (adopting an amendment to the Rules Regulating the Florida Bar to permit a contractual waiver of section twenty-six, imposing a specified legal fee structure for contingency fees). As the dissent in *Gessa* states, "It is difficult to understand how, as a matter of public policy, the expressly declared rights of this constitutional provision may be waived, but the damages provided by statute may not be limited by contract." *Gessa*, 86 So. 3d at 500 (Polston, J., dissenting).

213. *See* FLA. STAT. § 443.041 (2004); *Gessa*, 86 So. 3d at 500 (Polston, J., dissenting).

214. *See* FLA. STAT. § 520.13 (2004); *Gessa*, 86 So. 3d at 500 (Polston, J., dissenting).

215. *See* FLA. STAT. § 769.06 (2004); *Gessa*, 86 So. 3d at 500 (Polston, J., dissenting).

216. *See* FLA. STAT. § 713.20(2) (2004); *Gessa*, 86 So. 3d at 500 (Polston, J., dissenting).

217. *See* FLA. STAT. § 641.31(11) (2004); *Gessa*, 86 So. 3d at 500 (Polston, J., dissenting).

218. Lepisto v. Senior Lifestyle Newport Ltd. P'ship, 78 So. 3d 89 (Fla. Dist. Ct. App. 2012).

individual capacity. Similarly, in *Emeritus Corp. v. Pasquariello*,[219] despite a durable power of attorney specifically authorizing Mrs. Pasquariello to consent to arbitration on behalf of her husband, the trial court denied a motion to compel arbitration. It took an appeal for the nursing home to enforce the clear language of the power of attorney.

On challenges for unconscionability, Florida law requires a party asserting the defense to demonstrate both procedural and substantive unconscionability.[220] But they have yet to hold that such a challenge must be mounted in front of the arbitrator rather than the courts.

In one case, however, an appellate court decided in favor of arbitration, despite a clause preventing the claimants from seeking punitive damages. In *Estate of Deresh v. FS Tenant Pool III Trust*,[221] the Fourth District Court of Appeal held that such a provision was severable and ordered arbitration in a contract which contained a severance clause.[222] It first reasoned that *Shotts* and *Gessa* compelled the holding that the provision in the arbitration agreement preventing the arbitration panel from awarding punitive damages violated public policy.[223] But it concluded that neither *Shotts* nor *Gessa* precluded the severance of the clause prohibiting an arbitration award of punitive damages from the arbitration agreement. The arbitration agreement in *Gessa* did not contain a severability clause.[224] It further reasoned that the Supreme Court based its ruling on non-severability upon the combination of the two limitation-of-liability provisions, "when viewed jointly."[225] It then explained that "[n]either case [stood] for the proposition that an invalid punitive damages provision in an arbitration agreement, standing alone, is not severable because it goes to the heart of the agreement."[226]

Finally, the court held that the invalid punitive damages limitation did not go to the heart of the arbitration agreement. First, the agreement allowed an award of economic and non-economic damages without limitation.[227] Second, the stated "primary thrust of the agreement [was] to

219. Emeritus Corp. v. Pasquariello, 95 So. 3d 1009 (Fla. Dist. Ct. App. 2012).

220. *See* SA-PG Sun City Ctr., LLC v. Kennedy, 79 So. 3d 916, 919 (Fla. Dist. Ct. App. 2012) (citing Bland, ex. rel. Coker v. Health Care & Ret. Corp. of Am., 927 So. 2d 252, 256 (Fla. Dist. Ct. App. 2006), *abrogated on other grounds by* Shotts v. OP Winter Haven, Inc., 86 So. 3d 456 (Fla. 2011)).

221. Estate of Deresh v. FS Tenant Pool III Trust, 95 So. 3d 296 (Fla. Dist. Ct. App. 2012).

222. *Id.* at 301.

223. *Id.*

224. *Id.*

225. *Id.*; *see* Gessa v. Manor Care of Fla., Inc., 86 So. 3d 484, 490 (Fla. 2011).

226. *Estate of Deresh*, 95 So. 3d at 301.

227. *Id.*

avoid costly and time-consuming litigation."[228] Third, central to the agreement was the selection of the forum, which was preserved with the striking of the punitive damages limitation.[229] Fourth, the severance clause was clear, intending to preserve the agreement in the event "any provision of the agreement [was] declared unlawful."[230] Fifth, "[u]nlike the situation in *Shotts*, where the invalidation of the organization's procedural rules would have required a drastic rewriting of the arbitration agreement, here there [was] no similar interdependence between the punitive damages prohibition and the remaining clauses of the agreement."[231]

H. STATUTE OF LIMITATIONS

In *Raymond James Financial Services, Inc. v. Phillips*,[232] a divided court held that, because arbitrations were not "actions" or "proceedings" under the statute of limitations,[233] arbitration claims were not covered in the contract as drafted by Raymond James.[234] The Florida Supreme Court granted review and recently held oral arguments. The district court decision is illustrative of the judicial hostility to arbitration, that such an event as an arbitration cannot be considered a "proceeding."

This claim began on November 29, 2005, with a Statement of Claim before a FINRA arbitration tribunal.[235] The Client Agreements executed by Respondents stated that the Agreements must be interpreted in accordance with the laws of the State of Florida. But it also provided that "[t]he determination of whether any . . . claim was timely filed shall be by a court having jurisdiction, upon application by either party."[236] Thus, on January 10, 2007, the clients invoked this provision and filed a complaint seeking a declaratory judgment that Florida's statute of limitations ("Chapter 95") did not apply to arbitration proceedings.[237]

The district court majority explained that the language of the contract at issue did not expressly state that Florida's statutes of limitations applied

228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. Raymond James Fin. Servs., Inc. v. Phillips, No. 2D10-2144, 2011 WL 5555691, at *1 (Fla. Dist. Ct. App. Nov. 16, 2011), *rev granted*, 81 So. 3d 415 (Fla. 2012).
233. FLA. STAT. § 95.011 (2005); *see Raymond James Fin. Servs.*, 2011 WL 5555691, at *13–14.
234. *See Raymond James Fin. Servs.*, 2011 WL 5555691, at *1.
235. *Id.* & n.1.
236. *Id.* at *1.
237. *Id.*

to the arbitration claims.[238] Instead, the language of the contract stated that it did not "limit or waive the application of any relevant state or federal statute of limitation."[239] The majority reasoned that this phrase did not affirmatively incorporate Florida's statutes of limitations into the agreement.[240]

Because section 95.011, which contains the limitation periods, uses "civil action or proceeding," the majority concluded that an arbitration was not a proceeding.[241] Thus, because Raymond James drafted the contract, and as such ambiguities are construed against it, the statute of limitations did not bar the account holder's action.[242] The result in this case can be avoided simply by placing in the agreement that the statute of limitations is explicitly adopted, but the case demonstrates how courts undermine arbitrations as a legitimate and enforceable method of resolving disputes.

IV. CONCLUSION

Arbitration proceedings cannot fulfill their stated goal of providing a fast, economical, and efficient method for resolving disputes if courts allow litigants to obstruct the path to these arbiters. To effect the goal of arbitration, courts should rule promptly on motions to compel arbitration and appellate courts should expedite any appeals of those orders, restricting the grounds available to challenge their contractual obligations. In most cases, arbitrators should be resolving gateway issues and, in these days of overcrowded dockets and understaffed courts, judicial officers should encourage alternative means of resolving disputes and lend those alternatives greater predictability with their decisions.

238. *Id.* at *4–5.

239. *Id.* at *5 (internal quotation marks omitted).

240. *Raymond James Fin. Servs.*, 2011 WL 5555691, at *4–5.

241. *See id.* at *13; *see also* FLA. STAT. § 95.011 (2005).

242. *See Raymond James Fin. Servs.*, 2011 WL 5555691, at *17–18. A review of the oral argument indicates that the justices were having trouble understanding how the plain meaning of the word "proceeding" did not encompass an arbitration proceeding. The court also had difficulty with the clients' argument in light of the fact the Florida Legislature itself refers to arbitrations as "arbitration proceedings" in the Florida Arbitration Code. *See* FLA. STAT. § 682.03(4) (2012) ("[T]he court may stay an *arbitration proceeding* . . . .") (emphasis added); FLA. STAT. § 682.07 (2012) ("A party has the right to be represented . . . at any *arbitration proceeding* . . . . A waiver thereof prior to the *proceeding* . . . is ineffective.") (emphasis added).