IN THE SUPREME COURT OF FLORIDA

JOHN A. CARDEGNA, et al.,

Petitioners,

Supreme Court Case No.: SC02-2161

v.

BUCKEYE CHECK CASHING, INC., et al.,

Fourth DCA Case No.: 4D01-3549

Respondent.

_____/

ANSWER BRIEF OF RESPONDENT BUCKEYE CHECK CASHING, INC.

On Review from the Fourth District Court of Appeal

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

SECONDARY SOURCES

STATEMENT OF THE CASE AND FACTS

This case presents the question of whether an arbitrator or a judge must decide a dispute within the scope of a broad arbitration clause. Following authority under the Federal Arbitration Act and applying the plain meaning of the contracts at issue, the Fourth District directed the parties to arbitration.

On February 1, 2001, Petitioners John A. Cardegna and Donna Reuter ("Petitioners") filed this lawsuit against Buckeye Check Cashing, Inc. ("Buckeye") and other defendants in the Circuit Court of the Fifteenth Judicial Circuit in Palm Beach County. Buckeye was at all relevant times a licensed check casher under Florida's Check Cashing and Foreign Currency Exchange Act. (App. 70, 77-78).[1] As part of each check cashing transaction with the Petitioners, Petitioners signed a Deferred Deposit and Disclosure Agreement (the "Contracts"). (App. 102, 104, 106, and 108). The Contracts include on the reverse side an arbitration provision that covers the transactions at issue in this case. The provision reads in relevant part:

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[1] Because the decision below was rendered in an appeal from a non-final order denying a motion to compel arbitration, the record before this Court includes a one-volume appendix and supplemental appendix filed by Buckeye at the Fourth District and a one-volume appendix filed by Petitioners. All cites to the record that are derived from Buckeye's appendix and supplemental appendix at the Fourth District will be in the form: "(App. [page number])" or "(S. App. [page number])." All cites to the record that are derived from Petitioners' appendix at the Fourth District will be in the form: "(Pet. App. [page number])."

1. Arbitration Disclosure. By signing this Agreement, you agree that is [sic] a dispute of any kind arises out of this Agreement . . . , than [sic] either you or we or third-parties involved can choose to have that dispute resolved by binding arbitration. . . . If arbitration is chosen, it will be conducted with the American Arbitration Association (the "AAA") pursuant to the AAA's Commercial Arbitration Rules. If you have any questions concerning the AAA or if you wish to obtain a copy of the AAA's Commercial Arbitration Rules, you may call (800) 891-4741 or visit http://www.adr.org on the World Wide Web.

2. Arbitration Provisions. Any claim, dispute, or controversy (whether in contract, tort or otherwise, whether pre-existing, present, or future, and including statutory, common law, intentional tort, and equitable claims) arising from or relating to this Agreement . . . or the validity, enforceability, or scope of this Arbitration Provision or the entire Agreement (collectively "Claim"), shall be resolved, upon the election of you or us or said third-parties, by binding arbitration pursuant to this Arbitration Provision. . . . . This arbitration Agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. Sections 1-16. . . .

(App. 102, 104, 106, and 108). Buckeye invoked these arbitration provisions and elected to arbitrate this dispute, but Petitioners refused to honor their contractual commitment.

Buckeye accordingly filed a Motion to Compel Arbitration and Stay Proceedings, arguing that the dispute must be directed to arbitration consistent with the Contracts executed by Petitioners. The trial court denied Buckeye's motion.

Another Circuit judge, however, in a check cashing case similar to the Buckeye lawsuit granted the check casher's motion to compel arbitration. *See Cardegna v. The Check Cashing Store, Inc.*, Case No. CL 00-5099 (Fla. 15th Cir. Ct. order filed June 8, 2001). Both cases were appealed to the Fourth District Court of Appeal.

Buckeye's appeal subsequently "traveled together" with the appeal of the *Check Cashing Store* case. The Fourth District ultimately affirmed the *Check Cashing Store* decision. 813 So. 2d 1056 (Fla. 4th DCA 2002). This Court declined to grant review of the Fourth District's decision. 833 So. 2d 773 (Fla. 2002).

The Fourth District, in a unanimous opinion, then reversed the trial court's decision in the case at bar. *See Buckeye Check Cashing, Inc. v. Cardegna*, 824 So. 2d 228 (Fla. 4th DCA 2002). Following *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002), which rejected the proposition of law advanced by Petitioners and distinguished the authority they cited, the Fourth District concluded that under *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), a challenge to the legality of a underlying contract must be directed to arbitration in accordance with the parties' agreement. Petitioners then sought review before this Court, claiming that the Fourth District's decision conflicted with authority from the

Fifth District.

SUMMARY OF ARGUMENT

Only after wading through 22 pages of Petitioners' brief does the reader stumble upon any substantive discussion of the issue pending before this Court. Although, at the jurisdictional stage, Petitioners framed the issue as a conflict between the Fourth and Fifth Districts as to whether an arbitrator must evaluate allegations of a void contract, they now invite this Court to make factual findings and draw legal conclusions that the Contracts were illegal – despite the fact that neither lower court did so – and to overturn *Betts v. Ace Cash Express*, 827 So. 2d 294 (Fla. 5th DCA 2002), a decision not now before this Court. Notably, Petitioners' counsel served as counsel in *Betts* but never requested review by this Court. The Court should disregard these efforts to circumvent normal review procedures.

There is good reason why Petitioners go to such lengths to distract this Court's attention from the question actually before it – courts are virtually unanimous in holding that allegations of void contracts are insufficient to defeat arbitrability, and they have rejected the Fifth District's decisions that Petitioners seek to resuscitate. Petitioners and the proposed *amici* that support them also raise issues beyond the scope of this Court's review in an attempt to parlay an

anticipated favorable ruling on these matters into a means of avoiding the narrow question actually posed to this Court. Such tactics are inimical to the orderly process of appellate review, and they have no place before this tribunal.

Three federal circuits have recently considered whether allegations that a deferred presentment contract was illegal must be directed to arbitration in accordance with the parties' agreements or decided by a judge. In each instance, the courts have (unanimously) concluded that under the Supreme Court's "severability" doctrine articulated in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), such matters must be determined by an arbitrator. To hold otherwise would enmesh courts in deciding dispositive issues, which would vitiate the purposes behind the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*. ("FAA") . These decisions are consistent with FAA authority from across the country, and the Fourth District properly followed their reasoning in concluding that Petitioners must arbitrate their disputes.

STANDARD OF REVIEW

The standard of review is *de novo*. *See Powertel, Inc. v. Bexley,* 743 So. 2d 570, 573 (Fla. 1st DCA 1999), *rev. denied*, 763 So. 2d 1044 (Fla. 2000).

ARGUMENT

This Court should not condone Petitioners' attempt to avoid the arbitration

forum and to rewrite established precedent. The FAA, which governs the Contracts, requires that courts "rigorously enforce agreements to arbitrate." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). The mandatory provisions of the FAA do not permit parties to "ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984). Of course, any doubts concerning arbitration must be resolved in favor of arbitration, *see, e.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *Ronbeck Construction Co., Inc. v. Savanna Club Corp.*, 592 So. 2d 344, 346 (Fla. 4th DCA 1992), and the "party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91 (2000). If accepted, Petitioners' arguments would greatly undermine the arbitration system expressly established by Congress and embraced by the United States Supreme Court.

I. Allegations That a Contract Is Void *Ab Initio* Must Be Considered by an Arbitrator Rather Than a Court

Three federal circuit courts of appeal, including the Eleventh Circuit, have recently held that allegations that an underlying contract is void *ab initio* do not present a basis for avoiding arbitration when signatory power is not implicated. More importantly, all three of these decisions dealt with deferred presentment transactions such as the ones at issue in this litigation. Petitioners' efforts to portray "numerous courts" as accepting a contrary rule is both wrong and misleading – the federal decisions they cite have been distinguished by subsequent authority, and the handful of state cases to which they point represents a distinct minority that has not been followed outside of their respective jurisdictions.

A. *Prima Paint* Dictates That Arbitration Provisions Be Considered Independent of the Contracts in Which They Appear

The Supreme Court recognized, and embraced, the severability rule in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). *Prima Paint* involved a situation in which one party sought to avoid arbitration by claiming that the underlying contract was procured by fraud. Although some courts had followed that rule and recognized that a court, rather than an arbitrator, should determine whether fraud infected the contract, the Supreme Court squarely rejected that approach:

> We hold, therefore, that in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.

Id. at 404. As a result, only if the party resisting arbitration could demonstrate that the fraud went to the making of the agreement to arbitrate could the court "proceed to adjudicate it." *Id. See also Manning v. Interfuture Trading, Inc.*, 578 So. 2d 842, 843 (Fla. 4th DCA 1991) (following and applying *Prima Paint*); *Beaver Coaches, Inc. v. Revels Nationwide R.V. Sales, Inc.*, 543 So. 2d 359, 362 (Fla. 1st DCA 1989) (same); *Medident Construction, Inc. v. Chappell*, 632 So. 2d 194, 195 (Fla. 3d DCA 1994) (applying *Prima Paint* rationale).

In endorsing the severability rule, the United States Supreme Court discredited arguments raised by Justice Black in dissent that mirror the arguments currently advanced by Petitioners. Justice Black recognized that "a court might, after a fair trial, hold the entire contract – including the arbitration agreement – void because of fraud in the inducement. . . If the contract was procured by fraud, then, unless the defrauded party elects to affirm it, *there is absolutely no contract, nothing to be arbitrated*." *Prima Paint*, 388 U.S. at 407, 412 (Black, J., dissenting) (emphasis added). In other words, the fact that the fraud could

invalidate the entire contract, including the arbitration agreement, gave the United States Supreme Court no pause in ratifying the severability doctrine. Petitioners seem to forget that Justice Black could not secure a majority for his position, as they pitch their argument in language almost identical to his dissent: "[N]o arbitration clause ever comes into existence. There is nothing to arbitrate." (Pet. Br. at 24).

B. Recent Decisions Require Arbitration of Purported Void Contracts

Faithful adherence to the severability doctrine recognized by the Supreme Court in *Prima Paint* requires arbitration of the instant disputes. Under FAA precedent from the Eleventh Circuit, as well as other Circuits, challenges such as Petitioners' that an underlying contract was void *ab initio* or otherwise infected with illegality must be directed to an arbitrator in accordance with the parties' agreements, rather than to a judge.

The Fourth District in the case below expressly followed the Eleventh Circuit's recent decision in *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002). Despite the fact that the Fourth District quoted that decision at length and the fact that Buckeye has relied on *Bess*, Petitioners relegate their discussion of *Bess* to a footnote. (Pet. Br. at 37). While Petitioners suggest that the Eleventh Circuit was applying Alabama law, (*id.*), the court clarified that "we are not deciding questions

of Alabama contract law; rather, we are deciding . . . a question of federal law." *Id.* at 1306 n.3. In applying the FAA to this question, the Eleventh Circuit squarely rejected the proposition of law advocated by Petitioners.

Bess, as in the case at bar, involved an attack on an arbitration clause contained in a check cashing contract claimed by the plaintiff to be usurious and therefore illegal. The Eleventh Circuit refused this attempt to avoid arbitration, recognizing that the plaintiff "challenges the *content* of the contracts, not their *existence*." *Bess*, 294 F.3d at 1305 (emphasis in original). As a result, allegations that the contract was a product of, or permeated by, illegality did not place the "making of the arbitration agreement in issue." *Id.* at 1304 (internal quotations omitted). Under *Prima Paint*, a claim that a contract is void *ab initio* thus "is an issue for the arbitrator," rather than the court. *Id.* at 1306.

Lest any doubt remain, the Eleventh Circuit soon reiterated the *Bess* holding in *John B. Goodman Limited Partnership v. THF Constr., Inc.*, 321 F.3d 1094 (11th Cir. 2003). Recognizing that the court in *Bess* had "held the issue of whether the deferred payment transactions were void as illegal was for the arbitrator, not the court, to decide," the Eleventh Circuit again applied this reasoning to compel arbitration notwithstanding a challenge to the legality of the underlying contract. *Id.* at 1096. Because the plaintiff "challenges the performance of the contracts, not

their existence," and because no issue existed as to plaintiff's assent to the contracts, "this case falls within the 'normal circumstances' as explained in *Prima Paint*, *Chastain*, and *Bess*, in which the parties signed a presumptively valid agreement to arbitrate any disputes, including those relating to the validity or enforceability of the underlying contract." *Id.* (emphasis omitted).

The rule espoused by these cases adheres to the basic message of *Prima Paint* that all challenges to the entire contract must be decided by the arbitrator. In endorsing the severability rule in *Prima Paint*, the Supreme Court honored "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint*, 388 U.S. at 404. The rule advocated by Petitioners—and rejected by federal courts—would oblige courts to decide dispositive issues, which would vitiate the benefits of arbitration and contravene the purposes of the FAA. *See, e.g.*, *Burden v. Check Into Cash of Ky., LLC*, 267 F.3d 483 (6th Cir. 2001) (recognizing that a court on a motion to compel arbitration "does not reach the merits of the parties' claims"). Such time-consuming, expensive, and complicated eventualities are precisely what the parties, by agreeing to arbitration, sought to avoid.

C. Other Courts Are Consistent With *Bess* and *Goodman*

The Eleventh Circuit's decisions comport with the consistent interpretation of the FAA provided by courts around the country. Perhaps more importantly, *Bess* is one of three federal appellate courts to apply the *Prima Paint* severability doctrine to check cashing transactions.

1. The Fourth and Sixth Circuits Have Reached Identical Results in Deferred Presentment Transactions

After surveying precedent on this issue, the Eleventh Circuit noted that "[w]e are aware of only one other circuit to address the question presented in this case . . . and that circuit reached the same conclusion that we reach today." *Bess*, 294 F.3d at 1036 (citing *Burden v. Check Into Cash of Ky., LLC*, 267 F.3d 483 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1436 (2002)). In *Burden*, the plaintiffs sought to avoid *Prima Paint's* severability doctrine by claiming that the underlying contracts violated state usury laws and were thus void *ab initio.* The Sixth Circuit aptly recognized, however, that the authorities upon which they relied involved "questions of signatory power, not contract content." *Burden*, 267 F.3d at 489. The court found that because the challenge to arbitrability did not involve the narrow question of signatory power, the attack on the contract as a whole (including based on allegations of illegality) had to be decided by the arbitrator, consistent with *Prima Paint*. *See id.* at 490.

In refusing to allow void *ab initio* defenses to defeat arbitrability, both *Bess*

and the Fourth Circuit in *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 695 (2002) embraced *Burden*. *Snowden* also involved an allegation that the underlying check cashing contracts were void *ab initio* under state usury law. *Snowden*, 290 F.3d at 636. The Fourth Circuit held that such grounds did not provide a "viable basis" for avoiding arbitration because they challenge the contract as a whole and thus fall within the *Prima Paint* doctrine. *Id.* at 637. In reaching this result, the Fourth Circuit "note[d] that our conclusion is squarely in accord with the Sixth Circuit's recent and well-reasoned decision in *Burden*. . . . In that case, the Sixth Circuit rejected the same void *ab initio* arguments that Snowden presses in the present appeal." *Id.* at 637-38. Because any effort to distinguish *Burden* or *Snowden* would be unavailing, Petitioners merely acknowledge these cases in a footnote without discussion or analysis. (Pet. Br. at 32).

2. Petitioners' Authority Is Inapposite

Petitioners seek to distort cases from other circuits notwithstanding the fact that their reading conflicts with the interpretation of this authority in *Bess*, *Burden*, and *Snowden*. For example, in *Chastain v. Robinson-Humphrey Co., Inc.*, 957 F.2d 851 (11th Cir. 1992), a case trumpeted by Petitioners, the court declined to compel arbitration when the plaintiff claimed that she had never signed the contracts

at issue and the defendant conceded that fact. *See also Three Valleys Municipal Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1140 (9th Cir. 1991) (noting that "the issue in this case" is "whether the signatory had authority to bind the plaintiffs to the agreement"); *Sphere Drake Int'l Ltd. v. All American Ins. Co.*, 256 F.3d 587 (7th Cir. 2001) (recognizing that question of whether agent had authority to bind principal was for district court); *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000) ("Advent contends that the agent who signed the agreement on its behalf lacked authority to do so and that it had so notified Sandvik. . .").

By claiming that *Chastain, Three Valleys*, and cases in a similar vein support the notion that the *Prima Paint* severability rule does not apply to so-called "void" contracts, Petitioners stretch these cases beyond their actual holdings. These cases, by contrast, stand for the narrow proposition that when signatory assent is at issue, the court rather than the arbitrator decides the limited question of whether the objecting party assented to the contract's terms. Any attempt to extend such cases to disputes where signatory assent is not in issue runs afoul of *Prima Paint*, *Bess*, and their progenies.

Petitioners also ignore the fact that the plaintiffs in *Bess*, *Burden*, and *Snowden* marshaled the same array of authority that Petitioners now advance, and

in each case, the federal appellate courts recognized that these cases involved "questions of signatory power, not contract content." *Burden*, 267 F.3d at 489; *Bess*, 294 F.3d at 1305-06 (distinguishing *Sphere Drake, Sandvik, Three Valleys*, and *Chastain*); *Snowden*, 290 F.3d at 637 (distinguishing *Sphere Drake, Sandvik*, and *Chastain*). *Bess* conducted a detailed examination of *Chastain* before concluding:

> But the focus of the court's decision in *Chastain*, as just explained, was on the question of assent, *i.e.*, whether the parties mutually had agreed to the contracts. By contrast, Colburn urges that the transactions in this case are void, not because he failed to assent to the essential terms of the contracts, but because those terms allegedly render the contracts illegal under Alabama law. At bottom, Colburn challenges the *content* of the contracts, not their *existence*. Indeed, unlike the contracts in *Chastain*, both the arbitration agreement and the deferred payment contracts were signed by Colburn, and there is no question about Colburn's assent to those contracts.

Bess, 294 F.3d at 1305-06 (emphasis in original). Buckeye is simply at a loss to understand how Petitioners can invite this Court to follow *Chastain* when the Eleventh Circuit, which issued that opinion, subsequently explained that it cannot support Petitioners' proposition of law.

3. The Remaining Federal Circuits and the Supreme Court Support the Fourth District's Decision

The results in *Bess*, *Burden*, and *Snowden* comprise a consistent reading and application of *Prima Paint*, and comport with existing federal and Florida

authority. *See, e.g.*, *Large v. Conseco Finance Servicing Corp.*, 292 F.3d 49, 53 (1st Cir. 2002) ("[Plaintiffs] do not allege that [defendant] engaged in illegal conduct with respect to the arbitration clause itself."); *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 472 n.2 (5th Cir. 2002) (finding that the district court erroneously held that *Prima Paint* did not apply "to defenses which render a contract void"); *Lawrence v. Comprehensive Business Servs. Co.*, 833 F.2d 1159, 1162 (5th Cir. 1987) ("Because the Lawrences do not attack the arbitration agreement itself, *Prima Paint* requires that their claim of illegality be arbitrated pursuant to the contract."); *National R.R. Passenger Corp. v. Consolidated Rail,* 892 F.2d 1066, 1070 (D.C. Cir. 1990) (holding that the district court "erred in treating the arbitration clause as unenforceable merely because the substantive contract provision in dispute between the parties may—if the district court is correct about public policy—be unenforceable"); *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Ltd.*, 1 F.3d 639, 642 (7th Cir. 1993); *Manning*, 578 So. 2d at 843 ("Put another way, a rule has been distilled from the *Prima Paint* rationale that only where the attack is specifically and exclusively directed toward the arbitration clause or a separate agreement to arbitrate may the court try the issue before submitting the balance of the controversy to arbitration."); 4 Am. Jur. 2d Alternative Dispute Resolution § 78 ("[W]here the alleged illegality goes to a

portion of the contract that does not include the arbitration agreement, the entire controversy, including the issue of illegality, remains arbitrable."). These cases place the Fourth District's decision in context and demonstrate that the courts have reached a consensus on the scope and applicability of the FAA pursuant to *Prima Paint*.[2]

The Supreme Court has encouraged this trend by enforcing arbitration agreements notwithstanding underlying challenges based on the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et. seq.* ("RICO") and on violations of federal policies. *See, e.g., PacifiCare Health Sys., Inc. v. Book*, 123 S. Ct. 1531 (2003) (reversing denial of arbitration when plaintiffs argued the arbitration agreements' prohibition on punitive damages in a RICO action denied them meaningful relief); *id.* at 1534 ("Notwithstanding Vimar's insistence that the arbitration agreement violated federal policy as embodied in COGSA, we declined to reach the issue and held that the arbitration clause was, at least initially,

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[2] The simple answer to Petitioners' imaginative hypothetical concerning a contract to purchase and sell drugs that contained an arbitration provision, (Pet. Br. at 43-44), is that assuming there is no specific attack on the making of the arbitration agreement, the dispute would be directed to arbitration. Presumably, no arbitrator would enforce the underlying contract, but even if he or she did, a court would not enforce the arbitrator's award. *See, e.g., Theis Research, Inc. v. Brown & Bain*, 240 F.3d 795, 796 (9th Cir. 2001) ("TRI's assertions that the arbitration award was invalid because it was based on an illegal contract are properly resolved in the context of TRI's motion to vacate the award.").

enforceable.") (describing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995)). Time and again, courts have stressed that arbitrability should not be determined based on challenges to the entire contract. Petitioners' efforts to upset that rule must be rejected.

D. Petitioners Misconstrue State Authority

1. The Isolated State Cases Cannot Support the *Party Yards* Rule

Faced with unanimity on the federal side, Petitioners seek to manufacture a split of authority by pointing to three state court opinions. *See Pittsfield Waving Co., Inc. v. Grove Textiles, Inc.*, 430 A.2d 638 (N.H. 1981); *Alabama Catalog Sales v. Harris*, 794 So. 2d 312 (Ala. 2000); *Nature's 10 Jewelers v. Gunderson*, 648 N.W.2d 804 (S.D. 2002). Two of these cases, however, are inapposite, and the remaining decision contravenes the FAA in the same manner as *Party Yards v. Templeton*, 751 So. 2d 121 (Fla. 5th DCA 2000) (discussed below).

The decision in *Pittsfield* addressed the issue of unconscionability—not the question of whether allegations of a void *ab initio* contract must be heard by the arbitrator or judge. As such, the opinion does not conflict with the federal authority delineated above. *Pittsfield* has been cited by courts only a handful of times since its issuance, and no court has interpreted it to mean that a challenge to the legality of the underlying contracts exempts the agreement from *Prima Paint*. As such,

Petitioners' reliance on *Pittsfield* as supporting *Party Yards* is misplaced.

Similarly, while the result in *Nature's 10* may at first glance appear inconsistent with federal authority, the majority opinion does not make clear that it is applying the FAA. Indeed, the majority opinion in *Nature's 10* does not cite the FAA, and it relies exclusively on state law and authority from other state courts. While the court's interpretation of state law may be questionable, such matters are not of concern in the application of the FAA. Furthermore, no court outside of South Dakota has cited or followed this decision.

That leaves *Alabama Catalog Sales* as the lone outlier. While Petitioners champion *Alabama Catalog Sales* as "the leading case in the nation" for the minority position, it must be noted that the Alabama court handed down its divided *Alabama Catalog Sales* before the recent federal cases were decided, and thus did not have the benefit of these opinions. Moreover, the court gave an unduly restrictive reading to *Prima Paint*: "this Court reads *Prima Paint* narrowly." *Alabama Catalog Sales*, 794 So. 2d at 314 n.2. At bottom, the majority in *Alabama Catalog Sales* premised its opinion on a reading of *Three Valleys* that has been discredited by subsequent authority. The majority in *Alabama Catalog Sales* construed *Three Valleys* to preclude arbitration as long as a question was raised as to the existence of the underlying contract. As *Burden, Bess*, and

Snowden explain, however, *Three Valleys* and cases of similar ilk do not stand for the broad proposition that any challenge to the validity of a contract secures a judicial forum. Rather, they emphasize that only when the case involves "questions of signatory power," *Burden*, 267 F.3d at 489, or "questions of assent to the general contract," *Bess*, 294 F.3d at 1306, or an allegation that the party "never assented in the first place to the contract containing the arbitration provision," *Snowden*, 290 F.3d at 637, does the trial court intervene. Not surprisingly, in the nearly three years since *Alabama Catalog Sales'* issuance, no state court outside of Alabama has even cited the decision, and the only two federal courts to consider it have refused to follow its lead. *See Bess*, 294 F.3d at 1306 n.3; *Arnold v. Goldstar Fin. Sys., Inc.*, 2002 WL 1941546, *8 (N.D. Ill. Aug. 20, 2002).[3]

2. This Case Involves Federal Law

Petitioners go to great lengths to convince this Court that this case involves a question of Florida contract law, devoting pages in their brief to a discussion of

[3] Alabama's continued reliance on this flawed conceptualization of *Prima Paint*, *see Community Care of America of Ala., Inc. v. Davis*, __ So. 2d __, 2002 WL 31045217 (Ala. 2002), does not enhance the persuasive value of the rule, as Petitioners seem to believe. Indeed, it simply indicates that Alabama is comfortable being a minority of one.

Florida case law on void and voidable contracts. This narrative, however, is irrelevant. Petitioners have never disputed that the FAA applies in this case, and the Fourth District correctly found that "federal law controls because the arbitration agreement expressly provides that 'this arbitration Agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act. . .'" *Buckeye*, 824 So. 2d at 230; *see also Jensen v. Rice*, 809 So. 2d 895, 899 (Fla. 3d DCA 2002) (recognizing that based on Supremacy Clause principles, "Florida courts must enforce arbitration agreements that are valid and enforceable under the Federal Arbitration Act, even where. . . the arbitration agreement would not be enforceable under Florida law"); *Merrill Lynch Pierce Fenner & Smith, Inc. v. Sheen*, 405 So. 2d 790, 793 (Fla. 4th DCA 1981) ("[W]e hold that the Federal Arbitration Act is a national substantive law that supplants inconsistent state laws and that Florida courts are bound by the Act.").[4] For that reason, Florida courts routinely turn to federal authority for guidance in interpreting

[4] Although the Eleventh Circuit in *Goodman* was applying the FAA, it recognized that "the result is the same" under the Florida Arbitration Code. *Goodman*, 321 F.3d at 1097; *see also Post Tensioned Eng'g Corp. v. Fairways Plaza Assocs.*, 412 So. 2d 871 (Fla. 3d DCA 1982) ("[T]he role of the court in deciding, ab initio, whether arbitration may be compelled is limited to determining whether an enforceable arbitration clause exists."). Therefore, even if the Court turned to Florida state law, the end result would not differ. Petitioners' claim that *Bess* "is counter to Florida's generally applicable contract law," (Pet. Br. at 37), accordingly rings hollow.

the FAA, *see, e.g.*, *Computer Task Group, Inc. v. Palm Beach County*, 782 So. 2d 942, 943 (Fla. 4th DCA 2001), and they even borrow federal interpretations for application to Florida Arbitration Code. *See Ronbeck*, 592 So. 2d at 346. In fact, Petitioners seem to acknowledge this point by their reliance on federal authority to support their reading of *Prima Paint*. (Pet. Br. at 35-38).

Florida law, however, does not inform the threshold discussion of whether an arbitrator or a judge determines the arbitrability question. While Petitioners point to section 2 of the FAA as the basis for incorporating state law (Pet. Br. at 39), they overlook the fact that section 2 only applies to the arbitration provision itself. *See National R.R.*, 892 F.2d at 1070 (recognizing that "the presence of a public policy issue that may preclude enforcement of the contract" does not fall "within the meaning of § 2"). Petitioners' challenge, on the other hand, goes to the underlying Contracts, which triggers the *Prima Paint* rule. *Prima Paint* directs that courts "consider only issues relating to the making and performance of the agreement to arbitrate." *Prima Paint*, 388 U.S. at 404. Petitioners nevertheless attempt to shoehorn the entire body of Florida void-voidable law through the narrow window of *Prima Paint*. Wielding state law challenges to the entire contract (as opposed to the arbitration clause itself) as a means for avoiding arbitration would carve an exception so wide to *Prima Paint* that it could ultimately

swallow the rule.

E. The Fourth District Properly Applied the FAA

The Fourth District in the matter below correctly followed *Bess* in holding that void *ab initio* allegations could not defeat arbitration. Although Petitioners pointed to *Chastain*, the court recognized that *Chastain* involved a situation in which one party claimed that she had not signed the agreement at issue. *Buckeye*, 824 So. 2d at 230-31. Likewise, the court understood that any consideration of *Chastain* had to be informed by the Eleventh Circuit's subsequent decision in *Bess*, which squarely rejected the exact proposition of law advanced by Petitioners. *Id.*

The Fourth District also distinguished *Party Yards* based on the fact that the Fifth District limited its decision to situations in which "the language in the arbitration provision of the contract is not broad enough to encompass a usury violation." *Party Yards*, 751 So. 2d at 123. By contrast, the language of the arbitration provisions in the Contracts "expressly includes statutory claims and is broad enough to encompass a usury violation." *Buckeye*, 824 So. 2d at 231 n.1.

As in *Bess*, no question exists as to Petitioners' assent to the Contracts, and Petitioners failed to challenge the arbitration provisions themselves: "[A]ppellees did not argue that they did not enter into the arbitration agreement, nor did they

challenge the validity of the terms of the arbitration agreement." *Buckeye*, 824 So. 2d at 232. Absent such challenges, Petitioners could not call into question the making of the agreement for arbitration, and thus the court was required to compel arbitration.

II. *Party Yards* and *FastFunding* Continue to Fall in Disrepute

Against the weight of authority described above, Petitioners invite this Court to turn its back on the consistent application of the FAA by clinging to two Florida cases – *Party Yards* and *FastFunding The Co., Inc. v. Betts*, 758 So. 2d 1143 (Fla. 5th DCA 2000). The flaws in *Party Yards* become readily apparent upon even a casual reading of the case, as courts and commentators have quickly recognized. *See, e.g., Florida Court of Appeals Holds That a Determination of Whether the Contract Complies With State Usury Statutes Must Precede the Reference to Arbitration*, 11 World Arb. & Mediation Rep. 103 (2000) (arguing that the FAA preempts Florida state law as expressed in *Party Yards* and that "[t]he ruling by the Florida appellate court raises questions about whether it complies with the holdings in a number of landmark cases in the federal common law on arbitration law, including *Prima Paint* . . .").

A. Subsequent Authority Confirms That the *Party Yards*[5]

[5] *FastFunding*, which followed *Party Yards* without analysis, stands on no firmer ground.

Analysis Is Flawed

A review of the authority cited by *Party Yards* reveals that the foundation upon which it was built has since collapsed. For the proposition that "[a] party who alleges and offers colorable evidence that a contract is illegal cannot be compelled to arbitrate the threshold issue of the *existence* of the agreement to arbitrate," the Fifth District relied upon *Three Valleys, Chastain, Camping Const. Co. v. Dist. Council of Iron Workers*, 915 F.2d 1333 (9th Cir. 1990), *National R.R. Passenger Corp. v. Boston & Marine Corp.*, 850 F.2d 756 (D.C. Cir. 1988), and *I.S. Joseph Co. v. Michigan Sugar Co.*, 803 F.2d 396 (8th Cir. 1986). *See Party Yards*, 751 So. 2d at 123-24. These cases, however, do not support the Fifth District's reasoning.

First, none of those cases specifically dealt with an allegation that the underlying contract was illegal. As a result, these cases are not as informative as ones that have expressly considered the illegality issue, such as *Bess, Burden*, and *Snowden*.

Second, as explained above, any reliance on *Three Valleys*, *Chastain*, or *I.S. Joseph* for the proposition that allegations of a void contract defeat arbitrability conflicts with the subsequent Eleventh Circuit decisions in *Bess* and *Goodman*, as well as the Fourth and Sixth Circuit opinions in *Snowden* and *Burden*. The

Eleventh Circuit explained in detail why *Chastain* could not support the rule advocated by Petitioners, and it similarly distinguished *Three Valleys* and *I.S. Joseph*. *Bess*, 294 F.3d at 1305-06. While the Fifth District did not have the benefit of these recent decisions at the time it rendered its opinion, this overwhelming authority demonstrates that the *Party Yards* rule cannot stand.

Third, *Party Yards'* reliance on Ninth Circuit decisions overlooks the fact that the Ninth Circuit has ordered the arbitration of matters in contracts claimed to be illegal. In *3H & Assoc., Inc. v. Hanjin Eng. & Constr. Co., Ltd.*, 1998 WL 657722, *2 (9th Cir. Sept. 3, 1998), one party claimed that the underlying "contract was illegal," and thus "arbitration could not be compelled." The Ninth Circuit paid little heed to this argument, holding that it "is incorrect as a matter of law." *Id.* Because no claim existed that the arbitration clause was illegal, the parties were "entitled to have an arbitrator determine whether the contract was illegal." *Id.* (citing *Prima Paint*); *see also Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 476 (9th Cir. 1991) (distinguishing *Three Valleys* and reversing district court's decision that there was no contract, and thus no arbitration clause, as violative of *Prima Paint*).

Likewise, the Fifth District's citation to *National R.R.* lends no support to the *Party Yards* rationale because the D.C. Circuit subsequently held that the

district court "erred in treating the arbitration clause as unenforceable merely because the substantive contract provision in dispute between the parties may—if the district court is correct about public policy—be unenforceable." *National R.R.*, 892 F.2d at 1070. The latter *National R.R.* case is more on point than the former, and it again militates against the *Party Yards* rule.

Party Yards, in short, collapses under scrutiny. While selective quotes from the cases it cited may superficially appear to support its rationale, closer inspection of that authority only validates the conclusion of the Fourth District below.

B. Courts Have Refused to Follow *Party Yards* and *FastFunding*

Not surprisingly, the federal courts that have considered *Party Yards* and *FastFunding* have refused to follow them. The Southern District of Indiana expressly rejected *Party Yards* as inconsistent with "[c]ontrolling Supreme Court and Seventh Circuit precedents." *Furgason v. McKenzie Check Advance of Ind.*, 2001 WL 238129, **2, 11 (S.D. Ind. Jan. 3, 2001). Notably, *Furgason*, like *Bess*, *Burden*, and *Snowden*, involved a challenge to a check cashing contract that contained an arbitration clause.

Likewise, the Northern District of Illinois declined to follow the *Party Yards* rule in *Arnold v. Goldstar Fin. Sys., Inc.*, 2002 WL 1941546 (N.D. Ill. Aug. 20, 2002). The court recognized that, "as a matter of federal law," the argument that an

underlying illegal contract precludes arbitration "is a non-starter." *Id.* at *8. While the plaintiffs sought to point to a Florida choice of law clause and cited *FastFunding*, the court found those arguments unavailing: "[T]his court holds that the arbitration provisions in the present contracts are governed by federal, not Florida, law and that plaintiffs' reliance on *FastFunding* is misplaced." *Id.* (citing *Buckeye*).

Florida courts have also refused to follow *Party Yards*. In *Cardegna v. The Check Cashing Store, Inc.*, Case No. CL 00-5099 (15th Judicial Circuit, Palm Beach County June 8, 2001), Judge Wroble compelled arbitration in a case almost identical to the matter at bar. Rejecting *Party Yards*, Judge Wroble instead followed *Furgason*. (S. App. 001-2). The Fourth District affirmed this decision, 813 So. 2d 1056 (Fla. 4th DCA 2002), and this Court declined to grant review. 833 So. 2d 773 (Fla. 2002). *See also Reuter v. McKenzie Check Advance of Fla.*, 825 So. 2d 1070 (Fla. 4th DCA 2002) (affirming based on *Buckeye*).

Judge Wroble is not the only Florida judge to eschew *Party Yards*. In *Harrington v. The Check Cashing Store, Inc.*, Case No. 00-8685-Civ-Ryskamp/Vitunac (S.D. Fla. Aug. 27, 2001) (S. App. 004-018), the Southern District of Florida joined the increasing number of courts that recognize *Party Yards*' incompatibility with *Prima Paint* and its progeny. After surveying the

pertinent authority, the court concluded that "the overwhelming majority of opinions by the United States Supreme Court and other federal courts state that if a ground for avoidance or invalidity of a contract is alleged as to the entire agreement, rather than specifically as to the arbitration clause contained in that agreement, the entire matter should be resolved by arbitration." *Id.* at 9 (S. App. 012). As a result, the court held that it "should give ***no weight*** to the *Party Yards* decision." *Id.* at 10 (emphasis added) (S. App. 013).

III. Petitioners' Extraneous Arguments About Illegality Are Not Properly Before this Court and Are Misguided

In their brief, Petitioners seek to greatly expand the question presented to this Court, suggesting that "it will also be necessary to decide whether Florida Statute Chapter 560 authorized 'payday loans' or 'deferred deposit transactions' prior to the effective date of F.S. § 560.401-408. . ." (Pet. Br. at 3). By placing these issues at the forefront of their brief, Petitioners attempt to evade the teaching of *Prima Paint*, *Bess*, and the Fourth District that an arbitrator, rather than a judge, makes the illegality determination. This is little more than a thinly-veiled attempt to moot the issue before this Court—the issue, of course, for which Petitioners sought review. (*See* Pet. Br. at 22: claiming that their brief "established" that the Contracts are void).

A. Petitioners' Arguments Are Beyond the Scope of the

Conflict

In their jurisdictional brief before this Court, Petitioners framed the issue as "Whether a court may enforce an arbitration provision when the party opposing arbitration alleges and offers colorable evidence that the contract containing the arbitration provision is illegal, usurious, and, consequently, void." (Pl. Jur. Br. at 1). Petitioners asserted that this Court had jurisdiction because the Fourth and Fifth District "opinions expressly and directly conflict on the same question of law." (*Id.* at 4). Having secured jurisdiction, however, Petitioners now attempt to present questions for this Court's resolution ***that were never decided by the lower tribunals.*** Such efforts run afoul not only of this Court's precedent, but also of basic tenets of appellate review.

This Court has repeatedly refused to consider matters beyond the scope of its jurisdictional grant.[6] *See, e.g., Cargle v. State*, 770 So. 2d 1151, 1155 n.3 (Fla. 2000) ("We decline to address Cargle's second claim because it was not the basis for our conflict jurisdiction in this case and was not addressed by the district court below."); *Asbell v. State*, 715 So. 2d 258 (Fla. 1998) ("We also decline to review

[6] Perhaps anticipating this objection, Petitioners suggest that the Court can "at its discretion, consider any issue affecting the case." (Pet. Br. at 3). If the Court were ultimately to conclude that a court must decide whether the Contracts are illegal, however, due process would require a remand for further proceedings on that point in order to allow Buckeye an opportunity to present its defense on the merits.

petitioner's second point on review as it is beyond the scope of the conflict issue."); *Weygant v. Fort Meyers Lincoln Mercury, Inc.*, 640 So. 2d 1092, 1094 n.3 (Fla. 1994) ("This issue was not the basis for our jurisdiction, nor was it discussed in the district court's opinion; we therefore decline to address it now."); *Pastor v. State*, 521 So. 2d 1079, 1080 (Fla. 1988) ("[W]e decline to review that decision beyond the scope of the certified question."). When coupled with the established rule that appellate courts "should not ordinarily decide issues not ruled on by the trial court in the first instance," *Akers v. City of Miami Beach*, 745 So. 2d 532 (Fla. 3d DCA 1999), these cases counsel against resolving the new issues raised by Petitioners.

First, to those unfamiliar with the proceedings below, Petitioners' brief leaves the impression that the trial judge conducted a trial on the illegality issue and ruled in Petitioners' favor. Nothing of the sort occurred. In fact, the trial judge repeatedly emphasized that he needed to conduct an evidentiary hearing in order to determine whether even a ***colorable*** basis for illegality existed: "*Party Yards* says that I've got to make a determination as to whether this contract is illegal or not. I'm not sure we can do that in one day either. I think we're going to have a full-blown evidentiary hearing on that." (App. 158; emphasis added); *see also id.* at 167 ("I think *Party Yards* is applicable. But then, Gentlemen, I've got to have the

evidentiary hearing to get a colorable basis to find it is usurious and criminal."); *id.* at 169 ("I might as well have a hearing to determine whether it's illegal or not or at least whether it's colorably illegal."); *id.* at 171 ("I'm going to deny the motion to arbitrate and stay this proceeding until such time as I've had an opportunity to have an evidentiary hearing to see whether there can be a colorable showing" of illegality).

Petitioners now, however, endeavor to circumvent the evidentiary hearing stressed by the trial judge by inviting this Court to rule, as a matter of law, that the Contracts were illegal. The procedural posture of this case must be kept in mind – Buckeye moved to compel arbitration in response to Petitioners' Complaint. The trial court held a brief hearing on the arbitration motion. There was no evidentiary hearing or findings concerning the legality of the Contracts. Petitioners, in effect, want to file their complaint and obtain summary judgment without allowing Buckeye a chance to litigate these threshold issues (which, of course, should be decided by an arbitrator).[7] Fundamental due process concerns would not permit such a result.

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[7] Proposed *amici* make a similar plea, requesting that this Court "declare the loan contracts void in their entirety." (*Amici* Br. at 20). This issue is simply not before the Court, and thus proposed *amici*'s efforts to indict the deferred presentment industry have no bearing on the arbitration question at hand. For this reason, Buckeye has opposed proposed *amici's* motion for leave to file a brief *amici curiae*. The motion remains pending at the time of filing this Answer Brief.

Second, Petitioners impermissibly seek back-door review of the Fifth District's decision in *Betts v. Ace Cash Express*, 827 So. 2d 294 (Fla. 5th DCA 2002). Petitioners essentially concede that in order for their illegality argument to gain any traction, they must convince this Court to overturn *Betts*. (Pet. Br. at 17). Petitioners, however, never raised this issue in their jurisdictional filings, and neither the case nor its principles was discussed at all by the Fourth District in the opinion below.

Petitioners should also be estopped from seeking review of *Betts*. One of the named plaintiffs in *Betts* was John Cardegna, who is also a Plaintiff in this case, and the plaintiffs' attorneys in *Betts* were the same attorneys representing Petitioners in this matter. Although they received an adverse ruling in *Betts*, no effort was made to secure this Court's review (presumably because no appropriate basis of jurisdiction existed). The failure to seek direct review of *Betts* should preclude the collateral attack belatedly raised by Petitioners, especially when the decision actually under review made no mention of *Betts* or the legal principles that it applied.

Third, the Fourth District did not decide any of the issues on which Petitioners seek advisory opinions. Without further elaboration, the Fourth District simply noted that Petitioners "***alleged*** that Appellant made illegal usurious loans"

and that they "***contend*** that the underlying contract is void *ab initio* because it is criminally usurious. . ." *Buckeye*, 824 So. 2d at 229, 230 (emphasis added). The Fourth District accordingly did not delve into the merits of Petitioners' underlying claims. The trial court likewise did not pass on these matters because it anticipated holding a "full-blown evidentiary hearing."

As a result, these matters fall well outside the scope of the conflict and should not be entertained by this Court.

B. Petitioners Seek to Rewrite Florida Law

Petitioners John Cardegna and Donna Reuter, and Petitioners' counsel in the instant review, have initiated legal and administrative actions throughout this State in efforts to challenge deferred presentment transactions. Despite losing each case at which the merits of their claims were at issue, they declined to seek appellate review. *See Betts*, 827 So. 2d 294 (Fla. 5th DCA 2002); *Betts v. Advance America*, 213 F.R.D. 466 (M.D. Fla. 2003); *Betts v. Dept. of Banking & Fin.*, Case No. 01-1445RX (Fla. Dept. Admin. Hearings Sept. 7, 2001) (Pet. App. 1-35).

Now, however, Petitioners and their counsel attempt to utilize this case as a platform for rewriting the Florida law that they have helped create. Because these matters are beyond the scope of this Court's jurisdictional grant, and because these

decisions are consistent and have not been contradicted by any other Florida authority, the Court should decline this invitation. Even if the Court reaches these matters, however, it should not indulge Petitioners' revisionist efforts.

1. This Court Should Not Disapprove of the Fifth District's Decision in *Betts*

While Petitioners attack *Betts* as an outlier decision, the only court to consider the opinion has followed it. *See Betts*, 213 F.R.D. at 471. And contrary to Petitioners' suggestions, the *Betts* court's statutory interpretation is fundamentally sound.

The Fifth District did not, as Petitioners argue, turn a blind eye to Chapter 687. Rather, the court properly relied on Chapter 560 (the Money Transmitters' Code) in its analysis. Chapter 560 is both the more specific than the general usury laws, as well as being the later-enacted legislation. *See McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994) ("[A] specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms. . . [W]hen two statutes are in conflict, the later promulgated statute should prevail as the last expression of legislative intent."). Reliance on Chapter 560 accordingly respects basic tenets of statutory construction.

In Chapter 560, the Florida Legislature created a comprehensive regulatory

framework for the "enforcement of all laws relating to the money transmitter industry." Fla. Stat. § 560.102(1). Statutory directives, as well as interpreting regulations, prescribe the permissible levels of fees that may be charged in check cashing transactions. *See* 560.309(4) (permitting fee up to ten percent of face amount of payment instrument); Fla. Admin. Code 3C-560.801(1) (allowing fee of up to five dollars for verifying information about customer). These specific provisions, rather than the generic usury laws, define the parameters in which companies such as the *Betts* defendants and Buckeye operate.

The *Betts* court recognized that the plaintiffs "have not alleged that the Defendants charged amounts in excess of those authorized fees" under Chapter 560. *Betts*, 827 So. 2d at 296. Moreover, the defendant followed guidance from the Department of Banking and Finance ("Department") in this regard. *Id.* (citing opinion letter from Department that saw "no reason to object" to the deferred presentment arrangement so long as the entity followed Chapter 560). In light of the Department's official endorsement of deferred presentment check cashing, as well as the plain language of Chapter 560, the Fifth District properly recognized that the transactions at issue in *Betts* did not constitute loans. *Id*. at 297.

Petitioners' extended discussion of whether the 2001 amendments deserve retroactive application accordingly misses the mark – regardless of the

amendments, the actions of the defendants in *Betts* comported with both Chapter 560 and direction from the Department. While Petitioners suggest that the Department exceeded its authority, they overlook the fact that an administrative law judge upheld these actions (on a challenge brought by Plaintiff Donna Reuter and Petitioners' counsel) and that the *Betts* defendants were entitled to rely upon these official pronouncements of state policy. *See Betts v. Dept. of Banking & Fin.*, Case No. 01-1445RX (Fla. Dept. Admin. Hearings Sept. 7, 2001) (Pet. App. 1-35).

2. Petitioners Have Not Proven Illegality

For a variety of reasons already chronicled above, this Court should not consider Petitioners' illegality arguments. If it does so, however, it should give the Court no pause in affirming the Fourth District. Petitioners must "affirmatively plead and establish the four elements of a usurious transaction by clear and satisfactory evidence." *Rollins v. Odom*, 519 So. 2d 652, 657 (Fla. 1st DCA 1988). As noted above, nothing has been proven in this case because the "full-blown evidentiary hearing" envisioned by the trial judge has yet to occur. (App. 158). Indeed, there has been no evidentiary hearing whatsoever.

Regardless of the evidentiary hearing, Petitioners have simply failed to prove any of the elements necessary to establish a usury violation, much less by clear and satisfactory evidence. *Rollins*, 519 So. 2d at 657 (recognizing that borrower must

prove "(1) an express or implied loan; (2) an understanding between the parties that the money loaned shall be returned; (3) an agreement that a greater rate of interest than is allowed by law shall be paid or agreed to be paid; and (4) the existence of a corrupt intent to take more than the legal rate for the use of the money loaned"). The only Florida appellate court to evaluate deferred presentment transactions against a usury claim concluded that they did not constitute loans. *Betts*, 827 So. 2d at 297*; see also Betts*, 213 F.R.D. at 469-70 (holding that deferred presentment transactions were not loans subject to Florida's usury laws and granting summary judgment to defendants). Petitioners do not claim that Buckeye's actions differ from those of the defendants in *Betts*, which were expressly upheld. The recognition that these transactions do not constitute loans is fatal to Petitioners' usury claim.

Even if Petitioners could overcome the hurdles of the first three elements, they would fall well short on the question of intent. Corrupt and willful intent "is determined by a consideration of all the circumstances surrounding the transaction." *Rollins*, 519 So. 2d at 657. To date, no court has conducted such an inquiry. Because the difference "between a lawful transaction and a usurious one" hinges on the "difference between 'good faith' and 'bad faith," it highlights the need for evidentiary scrutiny. *River Hills, Inc. v. Edwards*, 190 So. 2d 415, 423

(Fla. 2d DCA 1966). In light of judicial and administrative validation of Buckeye's arguments, however, it is impossible to say that Buckeye harbored a corrupt intent to take more than the legal interest rate. Thus, Petitioners are not entitled to the summary judgment that they effectively ask this Court to impose.

IV. Conclusion

For all of the foregoing reasons, Buckeye respectfully requests that this Court follow the consistent application of *Prima Paint* and affirm the Fourth District's decision.

Respectfully submitted,

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I HEREBY FURTHER CERTIFY, this 14th day of July, 2003, that the type size and style used throughout Answer Brief of Respondent Buckeye Check Cashing, Inc. is Times New Roman 14-point font.

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