IN THE SUPREME COURT OF THE STATE OF FLORIDA

JOHN CARDEGNA, and DONNA REUTER
on behalf of themselves and
those similarly situated,

Appellants,

v.

BUCKEYE CHECK CASHING, INC., et al.,

Appellee.

INITIAL BRIEF OF APPELLANTS

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

CASE NO. SC02-2161

Lower Tribunal No.: 4D01-3549

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STATEMENT OF THE CASE AND OF THE FACTS

This appeal brings for review the Fourth District Court of Appeal's opinion holding that an arbitration provision is enforceable even when a party alleges and presents colorable evidence that the contract containing the arbitration provision is illegal, which reversed the trial court's order denying the appellees' motion to compel arbitration. As set out in Appellants' jurisdictional brief, this holding conflicts with the Fifth District Court of Appeal's decision in *FastFunding v. Betts*, 827 So.2d 294 (Fla. 5th DCA 2002).

This action was brought by Appellants Cardegna and Reuter ("Plaintiffs") on behalf of a class of Florida consumers (collectively "Customers") against Appellees, Buckeye Check Cashing, Inc. ("Buckeye of Ohio") and Buckeye Check Cashing of Florida Inc. ("Buckeye of Florida") and unknown entities and individuals (collectively "Appellees"or "Buckeye"). The Plaintiffs allege an unlawful scheme in which Buckeye, under the guise of what it falsely portrayed as a check cashing service, in reality charged and collected unconscionably usurious interest to thousands of customers for consumer loans through systematically repeated violations of Florida's Lending Practices Act, Chapter 687, Florida Statutes; Florida's Consumer Finance Act, Chapter 516, Florida Statutes; Florida's Deceptive and Unfair Trade Practices Act, Chapter 501, Consumer Protection, Part II, Florida Statutes; and Florida's Civil Remedies for Criminal Practices Act, Chapter 772, Florida Statutes. R. Vol. I, #9, pages 1-3.

Plaintiffs alleged that Buckeye loaned money to consumers in exchange for a written document in the form of a personal check, and an agreement to repay money in an amount larger than the borrower received within a short period of time, usually two to four weeks. These loans were then continued through loan extensions or roll-over transactions. R. Vol. I, #9, pages 1-11.

In each transaction, the Plaintiffs gave Buckeye a personal check and agreed that the face value of the check would be paid within a short time period, usually two weeks. In exchange Buckeye gave the Plaintiffs cash in an amount less than the face value of the "check." In each transaction, Buckeye agreed to hold the check until the next payday or until the customer received their next social security or other government check. R. Vol. I, #9, pages 1-3; R. Vol. I, #9, pages 25-63; R. Vol. I, #9, pages 133-134.

Customers unable to repay these loans when due were permitted to extend or roll-over their loans with Buckeye by paying "service fees" when they became due, usually every two weeks. In each transaction, once the Plaintiffs paid the "fee" to Buckeye, then Buckeye would again forbear collection of the debt. R. Vol. I, #9, pages 1-3; R. Vol. I, #9, pages 25-63; R. Vol. I, #9, pages 133-134. The "fee" on each extension was interest for allowing Plaintiffs and members of the class to defer payment on the original extension of credit. R. Vol. I, #9, pages 1-3; R. Vol. I, #9, pages 25-63. The rate of interest charged by Buckeye, ranged from approximately 137% to 1,317% A.P.R., with the rate usually over 300% A.P.R. R. Vol. I, #9, pages 25-63.

SUMMARY OF ARGUMENT

Well settled Florida usury jurisprudence, and established principles of Florida contract law, indicate that this Court should find that the payday loan agreements including the arbitration provisions are unenforceable because the agreement between the parties was on its face an illegal contract due to the feloniously criminal usurious rates charged by Buckeye. Because illegal contracts are void *ab initio* under Florida law, no provisions of the payday loan agreements are enforceable, including the arbitration clause.

To address the public policy and criminal illegality issues and effectively resolve a matter of pressing importance for the many thousands of Florida consumers who will be affected by this case, the Court must look at the sum and substance of the transactions between Plaintiffs and Buckeye, as evidenced by the written agreements which documented each transaction. In making this determination 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, the "Deferred Presentment Act". This Court has plenary jurisdiction to do so. Once this Court has jurisdiction over a matter "it may, at its discretion, consider any issue affecting the case." *Cantor v. Davis*, 489 So.2d 18, 20 (Fla. 1986).

STANDARD OF REVIEW

This case poses the question whether a contract is illegal and therefore void, and as a pure issue of law this question is to be reviewed *de novo.*

ARGUMENT

I. BUCKEYE'S DEFERRED DEPOSIT TRANSACTIONS WERE ILLEGAL USURIOUS LOANS CRIMINAL IN NATURE UNDER FLORIDA LAW.

For more than a century, the Florida Legislature has recognized the need to protect the public from usurious schemes. § 687.04, Fla. Stat. (2001). The primary purpose of Florida usury law is to bind the power of creditors over necessitous debtors and prevent them from extorting harsh and undue terms in the making of loans." *See Dixon v. Sharp*, 276 So. 2d 820 (Fla. 1973), *quoting Chandler v. Kendrick*, 146 So. 2d, 551, 552 (Fla. 1933). Through the enactment of Florida's usury laws, the legislature has clearly expressed its intention to prevent and unveil these usurious transactions that are masked by whatever form. *See Gilbert v. Doris R. Corp*., 111 So. 2d 682, 684-85 (Fla. 3d DCA 1959). In the

instant case, Buckeye has tried to conceal the usurious nature of its money-lending transactions under the pretext of check cashing.

Buckeye's money-lending transactions violate the usury laws set forth in Florida Statutes, Chapter 687, Florida's Lending Practices Act" and Chapter 516, Florida's Consumer Finance Act." Florida Statute section 516.02(1) provides that a lender must be licensed by the Department of Banking and Finance to make consumer loans,[1] and section 516.02(2) provides that an unlicensed lender may not charge an interest rate in excess of 18% per year. Loans made at a higher interest rate are not enforceable.[2] Section 516.031(3) provides that any charges, including interest in excess of the combined total authorized by Chapter 516, constitute a violation of Chapter 687, which sets allowable rates of interest and defines usury:

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[1] When the legislature intended to exclude certain loans from Chapter 516, such exclusions were specifically identified: "This Chapter does not apply to any person who does business under, and as permitted by, any law of this state or of the United States relating to banks, savings banks, trust companies, building and loan associations, credit unions, or industrial loan and investment companies. This chapter also does not apply to title loans as defined in § 538.03(1) (I) or pawns as defined in § 538.03(1)(d)." F.S. § 516.02(4), Fla. Stat. (2001).

[2] Although one *licensed* as a consumer finance lender pursuant to Chapter 516 may charge up to 30 percent per annum on the first $1,000 of the principal amount, 24 percent per annum on the principal amount exceeding $1000 and not exceeding $2000, and 18 percent percent per annum on that part of the principal amount exceeding $2,000 and not exceeding $25,000. § 516.301, Fla. Stat. (2001).

> It shall be usury and unlawful for any person ... to reserve, charge, or take for any loan, advance of money, line of credit, forbearance to enforce the collection of any sum of money, or other obligation a rate of interest greater than the equivalent of 18% per annum simple interest, either directly or indirectly, by way of commission for advances, discounts, or exchange, or by any contract, contrivance, or device, whatever, whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received, together with interest at the rate of the equivalent of 18% per annum simple interest.

§ 687.03(1), Fla. Stat. (2001).

Section 687.02 defines a "usurious contract" as "all contracts for the payment of interest upon any loan, advance of money, line of credit, or forbearance to enforce the collection of any debt, or upon any obligation whatever, at a higher rate of interest than the equivalent of 18% per annum simple interest." § 687.02, Fla. Stat. (2001). Here, Buckeye's "loan, advance of money, line of credit, or forbearance to enforce" by written agreement to defer the presentment of Plaintiffs' checks, with interest rates in excess of 137%, satisfy the definition of a usurious contract.

A review of the "Deferred Deposit and Disclosure Agreements" between Plaintiffs and Buckeye quickly reveals it was something more than just an agreement to cash a check. R. Vol. I, #9, pages 25-63. For example, a look at Appellant Donna Reuter's transaction with Buckeye on August 4, 2000 is

enlightening. R. Vol. I, #9, page 58. This form agreement sets out an "Itemization of Amount Financed" including:

> Actual Cash You Receive: $400.00"; "Total Finance Charge: $49.44"; "Total Note Amount: $449.44"; "Annual Percentage Rate: 332.24%"; "Finance Charge: $49.44"; "Amount Financed: $400.00" and "Total Of Payments: $449.44.

R. Vol. I, #9, page 58.

The document then specifies details of the customer's obligations in words and phrases descriptive of loans:

> Payment Schedule: One payment in the amount of $449.44 due on 8/18. *Id.*
>
> Promise To Pay: You promise to pay the Deferred Deposit (total of payments, plus any other permitted charge) to the order of Check$mart according to the terms stated herein. *Id.*
>
> Refund for Payment: If, after the first month of the contract, the Deferred Deposit is paid in full before the final installment payment date, any unearned interest for the unexpired period of the Deferred Deposit contract that follows the date of payment in full will be refunded according to the sum of the digits method sometimes called the 'Rule of 78ths,' according to applicable law. *Id.*

The contract goes on to define Finance Charges:

> Finance Charge: The Finance Charge consists of interest and fee only. If interest on this Deferred Deposit is not precomputed, the Finance Charge is computed on outstanding unpaid principle balances on the basis that installments shall have been paid according to the contract. Delinquency will increase the Finance Charge as the contract rate is computed on actual unpaid balances on the amount financed for the actual time outstanding. *Id.*

and then clarifies the customer's options on prepayment of the loan amount:

> Prepayment: You may repay this contract in full at any time. However you agree to pay a minimum charge of ____ as allowed by Florida law, if you pay this contract off before Check$mart has earned that much in finance charges within the first month. *Id.*

Of course, the contract follows up by prominently and officiously stating just above the line for the "Borrower's signature":

> THE FEE CHARGE FOR A DEFERRED DEPOSIT TRANSACTION IS A SERVICE FEE AND NOT INTEREST. THIS DISCLOSURE IS PROVIDED TO YOU PURSUANT TO THE FEDERAL TRUTH IN LENDING ACT, 15 USC 1601 ET SEQ, ... THE SERVICE FEES CHARGED FOR THE DEFERRED DEPOSIT TRANSACTION ARE INCLUDED IN THE CALCULATION OF AN ANNUAL PERCENTAGE RATE. THIS DOCUMENT IS FOR DISCLOSURE PURPOSES ONLY AND DOES NOT AFFECT THE CHARACTER OF THE FEES UNDER FLORIDA LAW."*Id.* [3]

Confoundingly, the contract then provides the following caveat to the financially desperate customer whom it has it has just instructed is not paying interest on a loan but is merely paying a "service fee" for cashing a check:

> WARNING: THE RATE OF INTEREST CHARGED ON THIS DEFERRED DEPOSIT AGREEMENT IS HIGHER THAN THE AVERAGE RATE OF INTEREST CHARGED BY FINANCIAL INSTITUTIONS ON SUBSTANTIALLY SIMILAR LOANS *Id.*

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[3] *Compare* THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939), (scene, the Wizard's great throne room: The Wizard [attempting to cover up with the curtain]: "The Great Oz has spoken. **Pay no attention to that man behind the curtain...the Great... er... Oz has spoken.**")

The contract then has a checklist for Buckeye's "Customer Service Representative" to fill out. Most pertinent to this analysis are the following items:

> Does the customer have a prior loan? Verify that the prior loan has been paid (check has cleared).
> Verify that the check is written for the total amount of the loan.
> Verify that the weekly income shown above is not less than the total amount of the loan. *Id.*

What is clear from evaluating Buckeye's form "Deferred Deposit" agreements is that the essence of the transaction is loaning money at highly usurious rates of interest and that the contracts were criminal on their face. The policy of the State of Florida to protect its needy citizens from predatory lenders is set out in Chapter 687 of the Florida Statutes, which provides felony sanctions for such lending practices. The threshold for criminal usury is 25% A.P.R. at which point it is a first degree misdemeanor, § 687.071(2), Fla. Stat.(2001) . When loaning money at an interest rate in excess of 45% A.P.R. the conduct becomes a third degree felony, § 687.071(3), Fla. Stat.(2001). Loaning money at either the misdemeanor or felony levels of usury is defined as "loan sharking or shylocking," § 687.071(1)(f), Fla. Stat.(2001).

The agreements at issue here set forth the lending of money at interest rates approximately two and a half to twenty-nine times the felony threshold! R. Vol. I,

#9, pages 25 -63. The written agreement(s) containing the arbitration provision are in themselves criminal contraband:

> Books of account or other documents recording extensions of credit in violation of subsections (3) or (4) are declared to be contraband and any person, other than a public officer in the performance of his or her duty, and other than the person charged such usurious interest and person acting on his or her behalf, who shall knowingly and willingly possess or maintain such books of account or other documents, or conspire to do so shall be guilty of a misdemeanor of the first degree.

§ 687.071(5), Fla. Stat.(2001).

A. <u>The transactions at issue fit squarely within the definition of usury.</u>

Florida courts have defined the elements of usury through case law. *See Dixon v. Sharp*, 276 So. 2d 817, 819 (Fla. 1973); *Antonelli v. Newman*, 537 So. 2d 1027, 1028 (Fla. 1st DCA 1988); *Rollins v. Odom*, 519 So. 2d 652, 657 (Fla. 1st DCA 1988). Four elements define a transaction as usurious: 1) a loan, expressed or implied; 2) an understanding between the parties that the money lent shall be returned; 3) interest charged at a rate greater than that allowed by law; and 4) corrupt intent to take more than the legal rate. *Id*.

A loan is defined as delivery by one party to and receipt by another party of a sum of money upon agreement, express or implied, to repay it with or without interest." Black's Law Dictionary, (6th Edition, 1990). Buckeye's payday loans,

as evidenced by the deferred deposit agreements, as well as their rollovers accomplished through the extension of the original loan, fall within the definition of a loan. The Plaintiffs' agreement to repay the borrowed money to Buckeye represents an understanding between the parties that the money lent shall be returned" and thus satisfies the second prong of the test. *Dixon*, 276 So. 2d at 819.

The third element, a charge of an interest rate greater than that allowed by law, has also been satisfied. Florida Statute section 516.01(4) defines interest" as the cost of obtaining a consumer finance loan that includes any profit advantage of any kind whatsoever that the lender may charge, contract for, collect, receive or in any way obtain." Buckeye loaned money to the Plaintiffs at interest rates ranging upward of 137% annually. The maximum interest rate under Florida law is 18%. § 516.02(2), Fla. Stat. (2001); § 687.03(1), Fla. Stat. (2001). The interest rates charged by Buckeye are at least 6 times more than the statutory ceiling.

The third element of usury is also satisfied because the fees" charged by the Buckeye constitute interest under Florida law. In determining whether the amount charged by a defendant is a fee or interest, a court should disregard the form of the agreement and consider the substance of the transaction." *Antonelli v.*

Newman, 537 So. 2d 1027, 1029 (Fla. 3d DCA 1988). First, as to the agreements between Plaintiffs and Buckeye, the plain language of the agreements drafted by Buckeye make clear that the customer is paying a fee in return for Buckeye's agreement to wait a period of time for repayment of the amount advanced. R. Vol. I, #9, pages 25-63.

Finally, the fourth element of the usurious contract, corrupt intent," is also satisfied. The lendor's testimony that he did not have an intent to charge and to receive interest in excess of the legal rate is not determinative of the question." *Rollins v. Odom*, 519 So. 2d 652, 657 (Fla. 1st DCA 1988). Rather, the element of corrupt intent is established when the lendor consciously intends and does in fact make charges which result in usury." *Id.* at 658. When a lender, such as Buckeye here, has intentionally and purposely done that which amounts to or results in a contract for or the exaction of usurious interest, an argument by the lender that it was not shown the lender intended to violate the usury statute is without merit." *Id.*

B. **Courts must look at the substance of the transactions rather than the form employed by a usurious lender in an effort to avoid the prohibition against usurious loans.**

When one analyzes the substance of these transactions rather than the form, as is required under Florida law, it is clear that all of the transactions engaged in between the Plaintiffs and Buckeye constituted usurious loans. *See Beacham v. Carr*, 166 So. 2d 456, 459 (Fla. 1936); *Antonelli*, 537 So. 2d at 1029; *Maye v. United States Leasing Corp.*, 239 So. 2d 73, 75 (Fla. 4th DCA 1970); *Kay v. Amendola*, 129 So. 2d 170, 173-74 (Fla. 2d DCA 1961). This Court long ago recognized that usurious lenders will endeavor to employ any number of contrivances in order to give the appearance that their usurious loans are something else:

> The cupidity of lenders, and the willingness of borrowers to concede whatever may be demanded or to promise whatever may be exacted in order to obtain temporary relief from financial embarrassment, as would naturally be expected, have resulted in a great variety of
>
> devices to evade the usury laws; and to frustrate such evasions, the courts have been compelled to look beyond the form of the transaction to its substance, and they have laid it down as an inflexible rule that the mere form is immaterial, but that it is the substance that must be considered.

Beacham, 166 So. 2d 456, 459 (Fla. 1936). Buckeye should not be permitted to characterize these transactions as a series of isolated, authorized check cashing transactions, when in fact the transactions viewed as a whole demonstrate that the Plaintiffs paid extremely usurious interest for the privilege of the use of Buckeye's money for a short period of time.

1. Characterizing a usurious loan as a "sale" does not preclude application of the laws against usury.

As set out in more detail in Section II of this brief, Buckeye's attempts to cloak payday loans as authorized sales of currency pursuant to Chapter 560 should be flatly rejected. Florida courts have routinely and repeatedly concluded that transactions disguised as sales" were in fact loans subject to the state usury laws. *See C.E.G. Griffin v. Kelly*, 92 So. 2d 515, 518-19 (Fla. 1957) (reversing trial court's dismissal of usury claim structured as the sale of an option); *Kay v. Amendola*, 129 So. 2d 170, 172-73 (Fla. 2d DCA 1961) (our usury statutes show a clear legislative intent to prevent accomplishment of a usurious scheme by indirection, in the concealment of the needle of usury in a haystack of the subterfuge will not avail to prevent its pricking the body of the law into action"); *Brown v. Home Credit Co.*, 137 So. 2d 887, 891 (Fla. 2d DCA 1962) (finding that lender intended to disguise a usurious loan as a sale).

2. The "fees" charged by Buckeye are interest.

Further, courts have demonstrated that they will not simply accept a lender's characterization of interest as a fee." *See Speier v. Monnah Park Block Company*, 84 So. 2d 697, 697-99 (Fla. 1955) (holding that mortgage brokers fee should be included as interest); *Williamson v. Clark*, 120 So. 2d 637, 638 (Fla. 2d DCA 1960) (affirming lower court finding that alleged inspection fee" was a mere cloak for the extraction of illegal interest"). Given the fact that Buckeye's own form

agreement makes clear that the "fee" charged is consideration for deferring the Plaintiffs' repayment, the only reasonable conclusion is that the "fee" is, in reality, interest.

3. Usurious lenders cannot avoid the prohibition against usury by mischaracterizing the transactions as being statutorily authorized.

Likewise, lenders are not permitted to cloak a usurious loan by portraying it as a statutorily authorized transaction. *See Quick Cash of Clearwater, Inc. v. State Department of Agricultural and Consumer Services.*, 605 So. 2d 898, 902 (Fla. 2d DCA 1992) (stating that Chapter 538 Florida Statutes did not exempt pawnbroker from usury laws); *W.B. Dunn Company v. Merchantile Credit Corp.*, 275 So. 2d 311, 315-17(Fla. 1st DCA 1973)(concluding that transactions were usurious loans and that fee charged was interest despite defendant's argument that the transaction was permitted under the Retail Installment Sales Act). As set forth in section II, *infra*, payday loan transactions are not authorized or even contemplated by Chapter 560. And the rollover transactions clearly fall outside any plausible reading of activity authorized by Chapter 560.

4. The transactions at issue must be viewed as a whole and not as a series of independent transactions.

Although Buckeye may seek to present their agreements with Plaintiffs as a chain of discrete, authorized transactions, this is not the case. First, as set forth in Section II, *infra*, the transactions between Plaintiffs and Buckeye do not qualify as check cashing authorized by Chapter 560. Second, lenders frequently try, to no avail, to disguise a usurious loan transaction by attempting to portray the usurious loan as a series of separate legal transactions. *See American Acceptance Corp. v. Schoenthaler*, 391 F.2d 64, 70 (5th Cir. 1968) (finding that transaction allegedly consisting of sale of personal property and separate loan was in fact one usurious loan transaction); *Griffin*, 92 So. 2d at 518 (reversing judgment for lender who claimed that transaction consisted of separate stock option sale and loan). A review of the history of the Plaintiffs' course of dealing with Buckeye demonstrates that they returned to the Buckeye locations every two to four weeks, paid additional money, and left the store still owing Buckeye the principal amount of their loan. R. Vol. I, #9, pages 25-63. Clearly, the transactions when viewed in their entirety demonstrate that the Plaintiffs paid exorbitantly illegal interest over a period of months to Buckeye in exchange for the use of Buckeye's money; that is, the transactions were simply usurious loans.

II. BUCKEYE'S PAYDAY LOANS TO PLAINTIFFS WERE NOT AUTHORIZED BY THE FLORIDA MONEY TRANSMITTERS' CODE.

The plain language of Part III of the Money Transmitters' Code (the applicable law at the time of Plaintiffs' transactions) only authorized check cashing, not payday lending or "deferred presentment" transactions. In order to determine whether the transactions conducted by Buckeye were lawful check cashing transactions authorized by Part III of Chapter 560, Florida Statutes ("the Money Transmitters' Code" or "the Code"), or whether they were unlawful, usurious loans, one must first consider the statutes regulating consumer loans, then turn to the plain language of the statutes and regulations governing check cashing. *See Dealers Acceptance Corp. v. United Pac. Ins. Co.*, 763 So. 2d 528, 530 (Fla. 4th DCA 2000). Section 560.103(3) defines a check casher" as a person who, for compensation, sells currency in exchange for payment instruments received, except traveler's checks and foreign drawn payment instruments." § 560.103(3), Fla. Stat. (2001).

Under the Code, sell" means sell, issue, provide, or deliver." §560.103(19), Fla. Stat. (2001). Currency" is defined as the coin and paper money of the United States." § 560.103(6), Fla. Stat. (2001). Payment instrument" is defined as a "check, draft, warrant, money order, travelers check or other instrument or payment of money, whether or not negotiable." § 560.103(14), Fla. Stat. (2001).

Prior to passage of the "Deferred Presentment Act" (sections 560.401-408, Florida Statutes, effective October 1, 2001) *nothing* in Chapter 560 or the regulations promulgated under Chapter 560 authorized, or even mentions, "deferred presentment" transactions.

Of course, Plaintiffs must address the Fifth District Court of Appeal's decision in *Betts v. Ace Cash Express*, which held that "deferred deposit" transactions did not constitute loans. *Betts v. Ace Cash Express*. 827 So.2d 294 (Fla. 5th DCA 2002). The majority's decision in *Ace* was simply wrong. The *Ace* majority concluded that deferred presentment payday loans were legal under the Florida Money Transmitters' Code even prior to their express authorization in the Deferred Presentment Act of 2001. *Id* at 297. This conclusion was reached even though the text of the Code prior to the 2001 amendment provides no indication that it was intended to create an exception to the state's usury laws, and the

legislative history of the original Code clearly demonstrates that it was *not* intended to authorize payday lending.

In stating that in the interim between passage of the Money Transmitters' Code and passage of the Deferred Presentment Act, effective October 1, 2001,

there was "an absence of any prohibition against the practice" of deferred presentment payday loans, *id* at 297, the majority failed to take into account Chapter 687 and decades of usury case law. This Court has consistently held that the primary purpose of Florida usury law is to bind the power of creditors over necessitous debtors and prevent them from extorting harsh and undue terms in the making of loans." *See Dixon v. Sharp*, 276 So. 2d 817, 820 (Fla. 1973) *quoting Chandler v. Kendrick*, 146 So. 2d 551, 552 (Fla. 1933).

The *Ace* majority's analysis was flawed in neglecting to consider Chapter 687 and confining its statutory analysis to Chapter 560. Chapter 560 is silent on the issue of deferred presentment because, as is apparent from the legislative history of Chapter 560, there was no reason to suspect that enactment of a check cashing code would open the door to payday loans.

To say that deferred presentment was permissible because Chapter 560 did not prohibit the practice is no different than saying a check casher could add a couple of zeros to a customer's check before cashing it. After all, there is nothing in Chapter 560 that prohibits a check casher from unilaterally converting a $100 check into a $10,000 check; but doing so would comprise a forgery in violation of Chapter 831, Florida Statutes. Similarly, agreeing to lend money to a customer at

usurious rates, or agreeing to hold a check for two weeks in exchange for a "fee" may not violate any provision of Chapter 560, but it does constitute usury under Chapter 687. Likewise, if the Legislature were to now amend Chapter 560 to permit registered check cashers to unilaterally alter the face amount of checks by a set percentage and then to negotiate that check, it would not legalize a forgery occurring before the amendment, unless the Legislature expressly stated that intent.

In its single cite to any case, the *Ace* majority stated that it construed the Deferred Presentment Act (Ch. 01-119) as a clarification of Chapter 560. *Id* at 297. Nothing in the plain language of the " Deferred Presentment Act," Sections 560.401-408, effective October 1, 2001or its legislative history suggest that the legislature's authorization of closely regulated "deferred presentment" transactions was retroactive or indicated that earlier payday lending had ever been authorized.

The legislature defined and legalized deferred presentments in the State of Florida with the enactment of Section 560, Part IV. If in fact the Legislature was simply clarifying rather than legalizing deferred deposit transactions, which Plaintiffs dispute, then the Legislature also clarified the status of rollovers: they were, and are, illegal. Although the Deferred Presentment Act permitted deferred presentment transactions for the first time, it also prohibited rollovers of the type

engaged in by the Plaintiffs. "'Rollover' means the termination or extension of an existing deferred presentment agreement by the payment of any additional fee and the continued holding of the check, or the *substitution of a new check drawn by the drawer pursuant to a new deferred presentment agreement*." § 560.402(8), Fla. Stat. (2002) (emphasis added).

Consistency requires that all provisions of the Deferred Presentment Act be given equal effect. If the Act is read as providing clarification for the authorization of initial deferred presentment transactions, it also must be read as providing clarification that rollovers were never legal.

Even if one considers the letter cited by the *Ace* majority at 297 as an official expression of Department of Banking and Finance (DBF) policy, the fact remains that the DBF cannot arrogate unto itself the power to create an exception to Florida's prohibition against usury found in Chapter 687 and if it did so, DBF far exceeded its authority. If the Legislature delegates certain authority to an administrative agency, the agency acts unconstitutionally if it attempts to "enlarge, modify, or contravene the grant of authority". *Campus Communications, Inc. v. Department of Revenue*, 473 So.2d 1290, 1291 (Fla. 1985). When an

administrative rule conflicts with a statute, the statute controls. *Nicholas v. Wainwright*, 152 So.2d 458 (Fla. 1963). There is simply no statutory authority in Chapter 560 that would even remotely suggest that check cashers could engage in payday lending prior to October 1, 2001. Instead, there was express statutory authority outlawing usurious loans at the rates charged by payday lenders as the criminal offense of loansharking. § 687.01-.071, Fla. Stat. (2001).

Furthermore, the *Ace* majority's conclusion that the "ritual" followed is largely irrelevant because "there is no practical difference" between a rollover and a consecutive transaction is, as far it goes, correct. In analyzing a transaction alleged to be a usurious loan, courts look past whatever contrived form a usurious lender may have used to conceal the usurious nature of the transaction, and instead look to the substance of the transaction. *See Beacham v. Carr*, 166 So. 2d 456 (Fla. 1936); *C.E.G. Griffin v. Kelly*, 92 So. 2d 515, 518-19 (Fla. 1957); *Quick Cash of Clearwater, Inc. v. State Department of Agricultural and Consumer Services.*, 605 So. 2d 898 (Fla. 2d DCA 1992). The *Ace* majority's analysis however went awry in that *contra* to the body of usury case law; after disregarding the form utilized by Ace and looking to the substance of the deferred presentment and rollover transactions, the majority concluded that even the rollover transactions

fell within the ambit of "check cashing." This decision contravenes the public policy against usury as unambiguously expressed in the laws of Florida, and should not stand.

Judge Griffin was eminently correct in her dissent:

> As structured, these transactions are transparently extensions of credit. The fact that Chapter 560, which regulates check cashing operations, does not expressly prohibit rollovers and deferred presentments, does not mean that the usury laws are not violated by such devices. The legislature is to be forgiven for not having the foresight to prohibit or regulate the 'uncashing' of a cashed check. Nor am I persuaded that the passage of the "Deferred Presentment Act" in October 2001 was intended by the legislature to confirm the prior legality of the practice. Indeed it appears the legislation undertook to regulate and limit these schemes. Further, the statute appears to recognize that these transactions are in fact, loans.

Ace, supra at 299.

III. WHERE, AS HERE, THE CONTRACT CONTAINING AN ARBITRATION CLAUSE IS ILLEGAL AND THUS VOID (AS OPPOSED TO MERELY VOIDABLE), THE ARBITRATION CLAUSE IS NOT ENFORCEABLE.

As Parts I and II of this brief established, Buckeye's contract with its costumers is void *ab initio* in its entirety because the contract's terms violate applicable state civil and criminal law. Accordingly, under normal principles of Florida contract law that are applicable to all contracts, the contract never came

into valid existence in the first place, and fails in its entirety. No provision of an illegal and therefore void *ab initio* contract will be enforced.

Buckeye argues that there is an exception for arbitration clauses, suggesting that arbitration clauses are subject to a special and separate set of rules from other types of contract terms. Buckeye derives this proposition from the Federal Arbitration Act (FAA) and the U.S. Supreme Court's decision in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). In *Prima Paint*, the Supreme Court held that when a party resists an arbitration clause by arguing that there was fraud in the inducement for the entire contract which contains the arbitration clause (as opposed to arguing that the arbitration clause itself was specifically induced by fraud), that this argument is to be decided by the arbitrator rather than the court. According to Buckeye, under *Prima Paint* this Court may not consider whether Buckeye's contract is illegal and void *ab initio*, because that is a decision for the arbitrator. Buckeye's position is flatly wrong.

First, Buckeye's reading of *Prima Paint* ignores the crucial distinction between a void and voidable contract. Under Florida contract law (like the law in most if not all other states), a contract that is fraudulently induced is merely voidable; a valid contract exists, but is potentially subject to a defense from one

party. In such a setting, enforcing the arbitration clause so that the arbitrator may decide this defense is entirely consistent with generally applicable contract law. As many other state supreme courts and a number of federal courts of appeal have recognized, however, void contracts pose an entirely different situation. A void contract never comes into existence and no part of a void contract may ever be enforced by a court, and thus no arbitration clause ever comes into existence. There is nothing to arbitrate. This Court should join with many other courts and refuse to extend the *Prima Paint* rule to sanction the extreme result of requiring a court to enforce an arbitration clause that is embedded in and part of a contract with a singularly illegal purpose and which is, in and of itself, illegal and void.

Second, Buckeye's position would read *Prima Paint* as providing that arbitration clauses are to be treated differently than any other terms to any contract. The U.S. Supreme Court has repeatedly rejected such an approach, however, and has repeatedly directed that arbitration clauses are to be placed on the same footing as other contract provisions and to be treated neither better nor worse than other contract terms. If a state's generally applicable contract law does not discriminate against arbitration clauses or treat them more poorly than other types of contract terms, then those contract laws are not preempted by the Federal Arbitration Act

and apply to arbitration clauses in the same way and with the same force as they apply to other contract terms.

A. Under generally applicable Florida law, illegal contracts are void, not merely voidable, and may not be enforced.

Under generally applicable principles of Florida contract law, contracts which violate Florida criminal laws and public policy are illegal and void *ab initio* and cannot be enforced.

> The right to contract is subject to the general rule that the agreement must be legal and if either its *formation* or its performance is criminal, tortious or otherwise opposed to public policy, the contract or bargain is illegal. *See* 11 Fla. Jur.2d, Contracts 81, Restatement of the Law, Contracts 512. . . . Where a statute imposes a penalty for an act, a contract founded upon said act is considered void in Florida.

Thomas v. Ratiner, 462 So.2d 1157, 1159 (Fla. 3rd DCA 1984), *reh'g denied* (1985) (emphasis in original). A violation of a criminal statute renders an agreement void *ab initio. Id*.[4] If this Court agrees with the argument set forth in Parts I and II of this brief that Buckeye's contracts violate Florida criminal statutes, then the entire contract is void *ab initio.*

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[4] An agreement that is void *ab initio* is one that "has at no time had any legal validity.@ Blacks Law Dictionary (6th ed. 1991). *See also* Restatement 2d Contracts ' 7 (AA promise for breach of which the law neither gives a remedy nor otherwise recognizes a duty of performance by the promissory is often called a void contract. Under ' 1, however, such a promise is not a contract at all; it is the ›promise or ›agreement that is void of legal effect.@)

A voidable contract, by contrast, is "one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by t he contract, or by ratification of the contract to extinguish the power of avoidance." Restatement 2d Contracts 7. With a voidable contract, a valid contract comes into legal existence, although it is possible that one party might successfully defend against the enforcement of the contract. For example,[i]t is axiomatic that fraudulent inducement renders a contract voidable, not void. *Mazzoni Farms, Inc. v. E.I. DuPont DeNemours & Co.*, 761 So.2d 306, 312 (Fla. 2000).

The rule against the enforcement of void contracts is not a partial one that selectively invalidates parts of contracts. Instead, it is an absolute rule that invalidates void contracts in their entirety. [I]t must be held that as a matter of law any contract made in violation of [the Act's] terms, provisions or requirements is void and confers **no enforceable rights** on the contracting parties *Umbel v. Foodtrader.Com, Inc.*, 820 So.2d 372, 374 (Fla. 3rd DCA 2002) (emphasis added) (citing *Edwards v. Trulis*, 212 So.2d 893, 895 (Fla. 1st DCA 1968) and *Buehler v. LTI Int'l, Inc.*, 762 So.2d 530 (Fla. 2d DCA 2000)). *See also T.C.B. v. Florida Dep't of Children and Families*, 816 So.2d 194, 196 (Fla. 1st DCA 2002) (A

contract is void as against public policy when it is injurious to the interests of the public, or contravenes some established interest of society.) (four citations omitted).

Florida courts have an affirmative duty to refuse to enforce any part of an illegal contract:

> The principle that courts will not enforce illegal contracts is well-established. *Schaal v. Race*, 135 So.2d 252. This principle is founded upon public policy; that is, the objection which avoids the illegal contract comes from the public at large who demand that there can be no legal remedy for that which is itself illegal. Indeed, there rests upon the courts the affirmative duty of refusing to sustain that which by the valid laws of the state, statutory or organic, has been declared repugnant to public policy. To do otherwise would be for the law to aid in its own undoing. *Schaal v. Race, supra*.

Gonzalez v. Trujillo, 179 So.2d 896, 897-98 (Fla. 3d DCA 1965). This Court has explained in some detail the corrosive effect upon the entire legal system of treating an illegal contract as merely voidable, rather than void:

> If we were to hold a Florida contingent fee contract entered into by a person or attorney who is not a member of The Florida Bar to be voidable rather than void, we would be recognizing the validity of a contract entered into by an attorney not subject to our regulations. This would afford viability to an unregulated contract of the very kind that we have determined to be in the public interest to regulate. *The Florida Bar-In re Amendment to the Code of Professional Responsibility Contingent Fees*, 349 So.2d 630, 632 (Fla. 1977). Additionally, recognizing such an agreement would be directly contrary to the reasons we have expressed for prohibiting the

> unauthorized practice of law. *Sperry v. Florida ex rel. Florida Bar*, 140 So.2d 587, 595 (Fla. 1962), *rev'd on other grounds*, 373 U.S. 379 (1963).

Chandris, S.A. v. Yanakaksis, 668 So.2d 180, 185 (Fla. 1995), *reh'g denied* (1996). Just as this Court refused to enforce a contract providing for unlicensed legal services, it must also refuse to enforce a contract permitting a payday lender to provide usurious loans that violate Florida's criminal laws.

Under generally applicable Florida contract law, therefore, an agreement which itself violates Florida's public policy and criminal law and is illegal is void *ab initio*; no valid agreement ever comes into existence in the first place.

B. **No rule of federal law requires this Court to enforce an arbitration clause that is part of an illegal and void *ab initio* contract.**

In the court below, Buckeye took the position that the long-established Florida law relating to all illegal and void *ab initio* contracts does not apply to arbitration clauses. Instead, according to Buckeye, a different rule applies to arbitration clauses because some special federal policy lifts arbitration clauses up over other types of provisions included in illegal contracts that are void *ab initio.* Buckeye derives this principle from the FAA and the U.S. Supreme Court's decision in *Prima Paint*, where the court held that allegations that an entire contract

was the product of fraud in the inducement were to be decided by the arbitrator through the enforcement of the allegedly voidable contract's arbitration clause, not the Court.

Buckeye's reading of *Prima Paint* would result in arbitration clauses being held to a different set of rules than all other contract terms, which is an approach that the U.S. Supreme Court has rejected in several cases. In addition, Buckeye's reading of *Prima Paint* ignores the crucial distinction between void and voidable contracts. As Part III.B.1 of this brief will establish, many other courts have also refused to extend Prima Paint to the context of contracts that are void *ab initio*, as opposed to merely voidable.

1. Numerous courts around the nation have agreed that arbitration clauses contained in illegal and otherwise void contracts may not be enforced, and that the U.S. Supreme Court's *Prima Paint* decision is not applicable to void contracts.

In *Prima Paint*, as noted above, the U.S. Supreme Court held that a claim of fraud in the inducement of a contract containing an arbitration clause was subject to arbitration because the arbitration provision was severable from the rest of the agreement. Buckeye argues, and the Court of Appeal below agreed, that *Prima Paint* requires that even where the plaintiffs argue that the contract between plaintiffs and Buckeye is illegal and therefore void *ab initio*, that the arbitration

provision contained in that contract must be enforced and the arbitrator (not any court) must decide whether the contract is illegal. Buckeye's argument misses one essential distinction between *Prima Paint* and this case -- *Prima Paint* addressed a contract defense claim (fraudulent inducement) that would have rendered the contract voidable, though not void *ab initio.* As a result, *Prima Paint* involved a case where there was no question that a legally valid contract had been formed and had come into existence. Judge Easterbrook of the U.S. Court of Appeals for the Seventh Circuit has stressed the importance of this factor: Fraud in the inducement does not negate the fact that the parties actually reached an agreement. *That's what was critical in Prima Paint*. But whether there was *any* agreement is a distinct question. *Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587 (7th Cir. 2001) (first emphasis added, second in original). Because Buckeye ignores this fact, properly described by Judge Easterbrook as Acritical,@ Buckeye's proposed extension of *Prima Paint* misunderstands that case, misunderstands federal arbitration law, and is simply wrong.

The Fifth District Court of Appeal properly applied the core principles of Florida law relating to contracts that are void *ab initio* to an arbitration clause that was embedded in a usurious and therefore illegal contract. *See Party Yards v.*

Templeton, 751 So.2d 121 (Fla. 5th DCA 2000). The *Party Yards* court held that this was proper to do precisely because of the unique nature of contracts that violate this State's criminal laws.

> As a matter of law, a usury violation does not arise under an agreement. Rather it arises under state statutory law. A claim that a contract is illegal and, as in this case, criminal in nature, is not a matter which can be determined by an arbitrator. An arbitrator cannot order a party to perform an illegal act. *See Hill v. Norfolk & W.Ry. Co.*, 814 F.2d 1192, 1195 (7th Cir. 1987). Further, the FAA puts arbitration clauses on an equal footing with other clauses in a contract. *See Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1060 (11th Cir. 1998) (Florida law), citing *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 275, 115 S. Ct. 834, 130 L.Ed.2d 753 (1995). It does not put such clauses above state law or other contractual provisions.
>
> A court's failure to first determine whether the contract violates Florida's usury laws could breathe life into a contract that not only violates state laws, but also is criminal in nature, by use of an arbitration provision. This would lead to an absurd result. Legal authorities from the earliest time have unanimously held that no court will lead its assistance in any way towards carrying out the terms of an illegal contract. *McMullen v. Hoffman*, 174 U.S. 639, 19 S. Ct. 839, 43 L.Ed. 1117 (1899). Illegal promises will not be enforced in cases controlled by federal law. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 102 S. Ct. 851, 70 L.Ed.2d 833 (1982).

Party Yards, 751 So.2d at 123. Another panel of the Fifth District subsequently embraced this reasoning in the payday lending case of *FastFunding The Co. v. Betts*, 758 So.2d 1143 (Fla. 5th DCA 2000).

A large number of Courts have reached the same conclusion as that urged by the Plaintiffs here, and that reached by the Fifth District Court of Appeal in *Party Yards* and *Betts*. The leading case in the nation is *Alabama Catalog Sales v. Harris*, 794 So.2d 312 (Ala. 2000), where the Alabama Supreme Court faced the identical legal question and the identical fact pattern that are present here. That Court correctly held that a court must resolve allegations that a payday loan contract is illegal and void under applicable state law before it can enforce the contract's arbitration clause under the FAA. The Court held that the trial court, as opposed to the arbitrator, must decide the ultimate question relating to the legality and enforceability of the contracts. *Alabama Catalog Sales*, 794 So.2d at 316-17.[5] The court rejected the defendant's argument that *Prima Paint* required submission of the plaintiffs' allegations to arbitration, finding instead that *Prima Paint* applies narrowly to arguments that a contract is voidable or subject to revocation, and that the plaintiffs' argument that the payday loan contract was void went to the very existence of an agreement. *Id*. at 315-317. *Alabama Catalog Sales* is entirely consistent with the Alabama Supreme Court's earlier decisions on

[5] *But see Burden v. Check into Cash of Kentucky, LLC*, 267 F.3d 483 (6th Cir. 2001), *cert. denied*, 535 U.S. 970 (2002) (reaching opposite conclusion in similar fact setting); and *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 695 (2002) (same).

this point. *See also Camaro Trading Co., Ltd. v. Nissei Sangyo America, Ltd.*, 577 So.2d 1274 (Ala. 1991) (holding that court, rather than arbitrator, must determine whether contract containing arbitration clause is illegal and void).

The Alabama Supreme Court recently reaffirmed *Alabama Catalog Sales* in holding that a nursing home whose license to do business in the state had been revoked could not enforce an arbitration clause in its contract with patients because the entire contract was void under state law. *See Community Care of America of Ala., Inc. v. Davis*, ___So.2d___, 2002 WL 31045217 at *3 (Ala. Sept. 13, 2002). In *Community Care*, the court observed that it was undisputed that the state had previously revoked the nursing home's license, noted that applicable state law rendered void all contracts entered into by unlicensed foreign corporations, and held that precedent had established the unremarkable proposition that a foreign corporation [may] not compel arbitration pursuant to an arbitration clause in a contract [if] the entire contract [is] unenforceable and invalid as a result of the foreign corporation's failure to qualify to do business in Alabama. *Id*. (*quoting Alabama Catalog Sales*, 794 So.2d at 312).

The Alabama Supreme Court's approach to arbitration clauses embedded in illegal contracts was followed by the South Dakota Supreme Court in *Nature's 10*

Jewelers v. Gunderson, 648 N.W.2d 804 (S.D. 2002). In *Nature's 10*, the Court held that an arbitration clause in a franchise agreement was unenforceable because the entire agreement was void where the franchisor's registration with the State to operate franchise stores had expired several months before the parties entered into their agreement. Because the franchisor's license to conduct this type of business had previously expired, the South Dakota Supreme Court held that the entire franchise agreement violated the applicable state statute and was void from its inception (not merely voidable at the parties' election). Therefore, the agreement's arbitration provision could not be enforced. The court concluded that it will not permit the individuals who committed the illegal acts on behalf of the corporation to benefit from the arbitration clause in the illegal contract. *Id*. at 807. The court explicitly followed *Party Yards*, quoting if that "A claim that a contract is illegal and, as in this case, criminal in nature is not a matter which can be determined by an arbitrator". *Nature's 10*, 648 N.W.2d at 807 (quoting *Party Yards*, 751 So.2d at 123).

The New Hampshire Supreme Court has also embraced the concept that a court may not enforce an arbitration clause contained within a void contract. In *Pittsfield Weaving Co., Inc. v. Grove Textiles, Inc.*, 430 A.2d 638 (N.H. 1981), the

Court unanimously refused to enforce an arbitration provision in a contract for the sale of yarn based on its finding that the entire contract was unconscionable. While a finding of unconscionability only renders a contract voidable (not void) in many states, in New Hampshire the state's generally applicable contract law renders any contract deemed unconscionable to be void. In light of this rule, and the unique nature of void contracts, the court rejected the defendant's argument that *Prima Paint* required arbitration of the plaintiff's allegations and held that, if the trial court found the entire contract, *including the arbitration clause*, to be unconscionable, then it could under the FAA properly deny the defendant's motion for arbitration. *Id*. at 639-40 (emphasis in original).

Many other courts have refused to extend *Prima Paint*'s holding regarding allegations of fraud in the inducement of a contract to the very different type of allegation that the entire contract is void *ab initio* and therefore never came into existence in the first place. These courts have held that this latter type of allegation by definition implicates the making of the agreement for arbitration, 9 U.S.C. 4, and therefore must be decided by a court as a precondition to any arbitration order under the FAA. A particularly important precedent is *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3rd Cir. 2000) (Becker, J.). While *Sandvik* did not involve an

illegal contract, the court's analysis of the importance of the distinction between void and voidable contracts closely tracks the argument set forth above by plaintiffs. In *Sandvik*, the Third Circuit held that a party cannot enforce an arbitration clause while denying that it is bound by the contract containing that clause because, [e]ven under the severability doctrine [of *Prima Paint*], there may be no arbitration if the agreement to arbitrate is non-existent. *Id*. at 101. The Third Circuit construed *Prima Paint* as applying only to allegations that would render a contract *voidable*, and held that courts must resolve all allegations that would render an entire contract (and therefore its arbitration clause) *void*:

> Mindful of the doctrine announced in *Prima Paint*, which did not consider a situation in which the *existence* of the underlying contract was at issue, we draw a distinction between contracts that are asserted to be void or non-existent, as is contended here, and those that are merely voidable, as was the contract at issue in *Prima Paint*, for purposes of evaluating whether the making of the arbitration agreement is in dispute.

Id. at 107.

At least five other federal courts of appeal have followed the same analysis as *Sandvik*, *Alabama Catalog Sales*, and *Party Yards* that courts not arbitrators must evaluate challenges that an entire contract never came into valid existence in the first place. In *Sphere Drake*, the Seventh Circuit was faced with the question

of whether an arbitrator or a court should resolve allegations that the person who signed a contract on behalf of one party had the authority to make that commitment. The party attempting to enforce the arbitration clause invoked *Prima Paint*, and claimed that this was a generalized challenge to the entire contract that the arbitrator should resolve. Focusing on the difference between void and voidable contracts, the Seventh Circuit rejected this claim, and held that the question was one for the court:

> This is not a defense to enforcement, as in Prima Paint; it is a situation in which no contract came into being; and as arbitration depends on a valid contract an argument that the contract does not exist can't magically be resolved by the arbitrator (unless the parties agree to arbitrate this issue after the dispute arises).

Sphere Drake, 256 F.3d at 591.

In *Chastain v. Robinson Humphrey Co., Inc.*, 957 F.2d 851 (11th Cir. 1992), similarly, the court held that a court, not an arbitrator must decide allegations that a signature to a contract was forged. The Eleventh Circuit focused on the difference between arguments that are contract defenses and arguments that go to the existence of a contract:

> The calculus changes when it is undisputable that the party seeking to avoid arbitration has not signed any contract requiring arbitration. In such a case, that party is challenging the very existence of *any* agreement, *including the existence of an agreement to arbitrate*.

> Under these circumstances, there is no presumptively valid general contract which would trigger the district court's duty to compel arbitration pursuant to the Act.

Chastain, 957 F.2d at 854.[6]

A number of other courts have agreed with these principles. *See Three Valleys Municipal Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1140 (9th Cir. 1991) (court decides whether signatory to contract had authority to bind party, we read *Prima Paint* as limited to challenges seeking to *avoid* or *rescind* a contract not to challenges going to the very existence of a contract) (emphasis in

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[6]Another Eleventh Circuit panel later distinguished *Chastain* in the case of *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002), finding that allegations that a pay day lender's entire contract was illegal were for the arbitrator. The Court distinguished *Chastain* on the grounds that *Chastain* involved the question of whether a contract ever existed, while the plaintiffs' allegations in *Bess* challenged "the *content* of the contracts, not their *existence*." *Bess*, 294 F.3d at 1305 (emphases in original). Whatever the merits of this interpretation of Alabama contract law, the *Bess* decision is counter to Florida's generally applicable contract law. In Florida, as established above, a contract which is void *ab initio* simply never comes into existence, and cannot be fairly said to be a contract at all. *Bess* simply assumes a different conclusion under Alabama state law, and certainly never addresses or offers any explanation of why Florida's generally applicable contract law to this effect might be preempted by the FAA. *Bess*, like *Burden* and *Snowden*, reflects that there is a split in authority on the issue before this Court. *Bess* is flatly contrary to the Alabama Supreme Court's own reading of Alabama contract law, however, and is unpersuasive at best with respect to the issue of federal preemption, and this Court should not follow it.

original); *I.S. Joseph Co., Inc. v. Michigan Sugar Co.*, 803 F.2d 396 (8th Cir. 1986) (court decides whether assignee can enforce contract).

Alabama Catalog Sales, *Nature's 10*, *Pittsfield Weaving* and *Party Yards* are all indistinguishable from this case; each involves the question of whether a court or an arbitrator should adjudicate allegations that a contract is illegal and therefore void. Buckeye will presumably argue that all of the other cases are distinguishable, however, because the contracts involved in those cases were alleged not to have come into existence for reasons other than that the contracts were illegal. This proposed distinction cannot carry water if this Court preserves and respects the longstanding Florida law that contracts that are void are in the same position as contracts that never came into existence in the first place. If Florida's generally applicable contract law is faithfully followed, the position espoused by Buckeye and the Court of Appeal below is contrary to the rationale undergirding the decisions of the Seventh Circuit in *Sphere Drake*, the Eleventh Circuit in *Chastain*, the Ninth Circuit in *Three Valleys*, and the other cases cited here.

2. Buckeye's reading of *Prima Paint* violates the bedrock principle that arbitration clauses are to be enforced in the same method and on the same terms as other contract terms.

Section 2 of the FAA 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. Since Florida's law providing that void contracts are not to be enforced in their entirety is applicable to any contract, it falls within the FAA's Savings Clause.

In interpreting the FAA, the U.S. Supreme Court has repeatedly given meaning to the language of the Savings Clause and instructed that federal policy regarding arbitration is simply one of enforcing contracts and that the FAA does no more or less than place arbitration agreements on the same footing as other agreements. Last year, in *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 122 S. Ct. 754 (2002), the Court refused to enforce an arbitration provision in an employment contract in a case where claims were asserted by a federal agency that was not a party to that contract. In the *Waffle House* case, the U.S. Court of Appeals for the Fourth Circuit followed the same approach as that of the Court of Appeal below instead of analyzing the arbitration clause as it would analyze any contract, the court treated arbitration clauses as some sort of super contract especially favored under federal law. Nevertheless, the [Fourth Circuit] held that the EEOC was precluded from seeking victim-specific relief in court

because the policy goals expressed in the FAA required giving some effect to Baker's arbitration agreement. *Waffle House*, 122 S. Ct. at 759. The U.S. Supreme Court expressly stated that the Fourth Circuit's attempt to balance the policy goals of the FAA against the clear language of Title VII and the agreement was inconsistent with our recent arbitration cases. 122 S. Ct. at 764. Instead, the U.S. Supreme Court directed, the FAA requires courts to place arbitration agreements on equal footing with other contracts, but it does not require parties to arbitrate when they have not agreed to do so.' *Id*. at 764 (*quoting Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

The U.S. Supreme Court also stressed that arbitration clauses are to be treated the same as other contracts in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996). In *Casarotto*, the Court held that the FAA preempted a state statute that imposed specific disclosure requirements applicable only to arbitration agreements. The Court echoed its earlier decisions in explaining that, through the FAA, Congress precluded states from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts. *Id*. at 687 (internal quotation omitted). In another, earlier

decision involving FAA preemption, the Court elaborated on the fact that the FAA does no more than place arbitration clauses on the same footing as other contracts and contractual provisions:

> States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause upon such grounds as exist at law or in equity for the revocation of *any* contract.' 9 U.S.C. 2 (emphasis added). What states may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal footing,' directly contrary to the Act's language and Congress' intent.

Allied-Bruce Terminix Co., Inc. v. Dobson, 513 U.S. 265, 281 (1995).

Plaintiffs' suggestion that Florida's generally applicable law relating to illegal and void *ab initio* contracts applies to arbitration clauses is hardly an unusual position. There are numerous illustrations of courts applying generally applicable state contract law to arbitration clauses, even when the application of those laws will bar the enforcement of a given arbitration clause. The generally applicable rule of contract law that specific contract provisions will govern over general provisions applies to disputes over the construction of arbitration clauses, for example, even when it has the effect that a party will not be required to arbitrate her or his claims.

See, e.g., Transit Casualty Co. in Receivership v. Certain Underwriters at Lloyd's of London, 963 S.W.2d 392, 399 (Mo. Ct. App. 1998).

Similarly, the generally applicable rule of contract law that ambiguities in contracts will be interpreted against the drafter will be applied to arbitration clauses, even where it results in not requiring a party to arbitrate her or his claims. *See, e.g., Victoria v. Superior Court*, 222 Cal. Rptr. 1 (1985), *reh'g denied* (1986); *Dumais v. American Golf Corp.*, 299 F.3d 1216, 1219-20 (10th Cir. 2002); *Quigley v. KPMG Peat Marwick, LLP*, 749 A.2d 405,416 (N.J. Super. Ct. App. Div. 2000).

Further, the generally applicable rule of contract law that unconscionable contracts will not be enforced applies to arbitration clauses, and a great many courts have refused to enforce particularly unfair or abusive arbitration clauses.[7]

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[7] *See, e.g., Powertel Inc. v. Bexley*, 743 So.2d 570 (Fla. 1st DCA 1999); *Murray v. United Food & Comm. Workers Int'l Union*, 289 F.3d 297 (4th Cir. 2002); *Ferguson v. Countrywide Credit Industries, Inc.*, 298 F.3d 778, 784 (9th Cir. 2002); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893 (9th Cir. 2002); *ACORN v. Household Intnat'l, Inc.*, 211 F. Supp.2d 1160 (N.D. Cal. 2002); *Popovich v. McDonald's Corp.*, 189 F. Supp.2d 772 (N.D. Ill. 2002); *Gourley v. Yellow Transp., LLC*, 178 F. Supp. 2d 1196 (D. Colo. 2001); *Camacho v. Holiday Homes, Inc.*, 167 F. Supp. 2d 892 (W.D. Va. 2001); *In re Knepp*, 229 B.R. 821 (N.D. Ala. 1999); *American Gen'l Finance, Inc. v. Branch*, 2000 WL 1868516 (Ala. Dec. 22, 2000); *Armendariz v. Foundation Health Psychcare Services, Inc.*, 99 Cal. Rptr. 2d 745 (2000); *Worldwide Inc. Group v. Klopp*, 603 A.2d 788 (Del. 1992); *Iwen v. S. West Direct*, 977 P.2d 989 (Mont. 1999); *Williams v. Aetna Finance Co.*, 700 N.E.2d 859 (Ohio 1998); *Carll v. Terminix Int'l Co., L.P.*, 793 A.2d 921 (Pa. Super. Ct. 2002); *In re Turner Bros. Trucking*

The suggestion that arbitration clauses are somehow above or exempt from this well-established, long-standing and generally applicable body of law is wrong. Not only is it counter to the U.S. Supreme Court's directions that arbitration clauses should be placed on the same footing as other contracts, but it can readily lead to absurd results. Imagine a hypothetical contract between a wholesale importer of illegal cocaine ("the Cartel") and a retail seller of cocaine to junior high school students ("the Pusher") that contains (a) a liquidated damages provision that any failure on the part of the Cartel to deliver cocaine to the Pusher would require the Cartel to pay a flat fee of $1 million; and (b) an arbitration clause requiring that any dispute between the Cartel and the Pusher be submitted to binding arbitration before the American Arbitration Association. Obviously the entire contract violates any number of criminal laws and is void ab initio no legal agreement has ever come into being and no arbiter could order or otherwise authorize performance - any performance - under the contract. Similarly, it is obvious that no court in this state (or, indeed, anywhere in the country) would, could or should ever enforce the liquidated damages provision. Under the position advocated by Buckeye,

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Co., Inc., 8 S.W.3d 370 (Tex. Ct. App. 1999); *Sosa v. Paulos*, 924 P.2d 357, 262 (Utah 1996); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W.Va. 2002), *cert. denied*, 123 S. Ct. 695 (2002); *Toppings v. Meritech Mortg. Servs., Inc.*, 569 S.E.2d 149 (W. Va. 2002).

however, the arbitration clause is somehow different from and better than all other provisions in this wholly illegal contract, and the arbitration clause would be enforced. Indeed, under that position, any question concerning the illegality of the entire contract would be one that only the arbitrator could adjudicate. The hypothetical demonstrates the extreme and unjustified nature of Buckeye's position no provision of the hypothetical contract to sell cocaine is legal or enforceable, and the idea that any court in this (or any other) state would be required to enforce an arbitration clause contained in such a contract is outrageous. The idea of arbitration of any dispute arising from or relating to the terms of a criminally usurious loan contract is equally outrageous.

CONCLUSION

For all the reasons set forth above, Plaintiffs request this Court find that the payday loans made by Buckeye to Plaintiffs were usurious and criminal in nature, violative of Chapter 687 Florida Statutes and the public policy set forth therein and therefore void *ab initio*, and that the arbitration clause contained in the payday loan agreements is consequently unenforceable.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

Undersigned counsel hereby certifies that the foregoing brief is printed in 14 point Times New Roman font.

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