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.

REPLY 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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I. THIS COURT, AND NOT AN ARBITRATOR, SHOULD DECIDE THE GATEWAY QUESTION OF WHETHER A LEGAL AND VALID AGREEMENT TO ARBITRATE EXISTS

For many years, Florida's generally applicable rules of state contract law have provided that illegal contracts are void *ab initio*, meaning that they never come into existence in the first place. Many important principles underlie this rule of law, including the concern that it would have a corrosive effect on the courts to play a role in enforcing illegal contracts, and the policy against rewarding parties who draft illegal contracts by allowing them to enforce those contracts. Buckeye argues that among all types of contracts, that arbitration clauses alone are exempt from this longstanding body of Florida law, because the Federal Arbitration Act, 9 U.S.C. § 1 et. seq., ("FAA") supposedly preempts Florida's contract law. The majority of Buckeye's brief does not focus upon the language of the FAA, however, or the U.S. Supreme Court's explanations of how that Act is to be applied.

Where the U.S. Supreme Court has not spoken to an issue, this Court has a Constitutional responsibility to determine if the FAA preempts and overrides Florida state laws that are designed to (and would in this case act to) protect consumers. The Supreme Courts of Alabama, New Hampshire and South Dakota have agreed with the consumer plaintiffs here and with several Florida Courts of Appeal that arbitration clauses that are embedded in contracts that are void *ab initio* cannot be

enforced. See Petitioner's Initial Brief at 34, 35, 39. Buckeye attempts to distinguish two of these state Supreme Court decisions, but neither argument is telling. First, Buckeye argues that *Nature's 10 Jewelers v. Gunderson*, 648 N.W.2d 804 (S.D. 2002) is not on point because the Court did not discuss the FAA. Brief at 18. The FAA applies of its own force in any dispute involving interstate commerce, however, and definitely would have applied in the *Nature's 10* case. The best explanation for the South Dakota Supreme Court's choice not to focus on the FAA is that the FAA does not preempt generally applicable state contract defenses under § 2.

Buckeye attacks *Pittsfield Weaving Co., Inc. v. Grove Textiles, Inc.*, 430 A.2d 638 (N.H. 1981), on the grounds that the case involved unconscionability. Buckeye ignores that New Hampshire law treats unconscionability the same way that Florida law treats illegality – both sets of law render a contract void *ab initio*. Buckeye's distinction of *Pittsfield* is only persuasive if one begins with the improper assumption that it does not matter what a state's generally applicable contract law provides.

Buckeye argues that a number of federal courts of appeal have held that arbitration clauses are such a special type of contract provision that they are enforceable even when embedded in a contract that never came into legal existence;

however, there is a sharp split in authority. In derogation of accepted principles of federalism, Buckeye repeatedly suggests that this Court should put greater weight on the views of U.S. Courts of Appeal than on judgments of state Supreme Courts. Buckeye cites to no authority to support this notion, because there is none. Recent history is replete with examples of cases where the U.S. Supreme Court rejected the views of a consensus of federal courts of appeal.[1] This Court should independently determine which body of law most closely adheres to the language of the FAA, to the directions of the U.S. Supreme Court, and to Florida's generally applicable (and therefore not preempted) state contract law.

Buckeye cites *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002). This Court should firmly reject the reasoning of *Bess*, which ignores the Supreme Court's repeated directions that arbitration clauses are to be treated the same as other types of contracts, and instead essentially reads the FAA to rewrite generally applicable principles of state contract law relating to when contracts are void *ab initio* and what

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[1] *See, e.g., Sprietsma v. Mercury Marine*, 123 S. Ct. 518 (2002) (unanimously rejecting the views of about half a dozen federal courts of appeal, and agreeing with one state Supreme Court that state common law claims relating to propeller guards were not preempted by the Federal Boat Safety Act); *Randolph*, 531 U.S. 79 (unanimously rejecting the views of the vast majority of federal courts of appeal, and finding that decisions of federal district courts dismissing claims and compelling arbitration are appealable under the FAA).

it means to say that a contract is void *ab initio*.[2]

The FAA contains a savings clause that subjects arbitration clauses to the same state contract laws that apply to other types of contracts. The U.S. Supreme Court and other courts have repeatedly stressed that arbitration clauses are governed by state, not federal, contract law except in those instances where state contract laws target arbitration clauses for treatment that is inferior to other types of contracts. Indeed, the Supreme Court has noted that the primary source of protection for consumers against corporate over-reaching in cases governed by the FAA is the rules and requirements of state contract law.[3]

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[2] Amicus Check Cashing Store argues that since terms such as "void" and "voidable" are often used incorrectly or interchangeably, they are "just words, and do not get to the heart of the matter." Amicus at 11. The "heart of the matter" is that Buckeye and Check Cashing Store have systematically and repeatedly violated state criminal loansharking laws. As a result their contracts are void in their entirety and create absolutely no enforceable rights on the part of the loansharking entities. Of all the cases cited by amicus, none involve a situation where a party was permitted to enforce a contractual provision in spite of criminally illegal conduct on the part of that same party.

[3] *See, e.g., Allied-Bruce Terminix Co's, Inc. v. Dobson*, 513 U.S. 265, 281 (1995) ("In any event, § 2 gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. 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.'"); *see also Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931 (9th Cir. 2001) ("The arbitration clause in the Franchise Agreement was unenforceable as unconscionable under Montana law, which was not preempted by the Federal Arbitration Act."). *Cf., First Options of*

The U.S. Supreme Court has reiterated the importance of state contract law under the FAA's scheme. In *Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402 (2003), the bank argued that the FAA preempted South Carolina's state contract laws as they applied to the question of whether an arbitration could proceed as a class action. The decision rejected the federal preemption argument and stated that the question of contract interpretation is "a matter of state law. . . ." 123 S. Ct. at 2405.[4]

Buckeye engages in no serious discussion of the principles of federal preemption. As the U.S. Supreme Court has recognized, however, "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Sciences*, 489 U.S. at 477.

Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) (courts "should apply ordinary state-law principles that govern the formation of contracts"); *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) ("the interpretation of private contracts is ordinarily a question of state law").

[4] The Court also held that the contract interpretation question was a matter for the arbitrator to decide. This is not surprising, given that there was an agreement by both parties that the arbitration contract was legal and binding. The Court stated that "The question here . . . [does not] concern . . . the validity of the arbitration clause. . . ." 123 S. Ct. at 2407. "Rather the relevant question here is what kind of arbitration proceeding the parties agreed to. That question does not concern a state statute or judicial procedures, . . . [i]t concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question." *Id.* This case, by contrast, involves both (a) the validity of the arbitration clause, and (b) a state statute.

Therefore, the FAA can only displace state law through the doctrine of implied conflict preemption. *Id.* at 477-78. In order to establish that the FAA impliedly preempts Florida's contract law relating to void *ab initio* contracts, Buckeye must demonstrate that there is an "actual conflict" between federal and state law, either because it is "impossible for a private party to comply with both . . . requirements" or because the state laws "stand[] as an obstacle to the accomplishment and execution of full purposes" of Congress. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (citations omitted). Implied conflict preemption cannot lie here because the FAA contains no independent rules of federal law for governing which contracts are void ab initio and which come into existence so that their arbitration clauses can be enforced.

The U.S. Supreme Court has found that the FAA preempts two types of state laws that show hostility towards arbitration by aiming to restrict enforcement of the parties' contractual selection of the private forum. The first are state laws that single out arbitration clauses for disfavored treatment by imposing unique obstacles to their enforcement, thereby placing them on a "different footing" from other contracts. *See Casarotto*, 517 U.S. at 687 (FAA preempts state statute that "conditions the enforceability of arbitration agreements on compliance with a

special notice requirement not applicable to contracts generally"); *Allied-Bruce Terminix*, 513 U.S. at 269-70 (FAA preempts state statute that makes all pre-dispute arbitration agreements invalid and unenforceable). The second are state laws that "take[] [their] meaning precisely from the fact that a contract to arbitrate is at issue," *Perry v. Thomas*, 482 U.S. 483, 492 n. 9 (1987), such as statutory anti-waiver rules that are construed to bar enforcement of *all* arbitration clauses in cases involving specific types of claims. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

In *Bess*, the Court acknowledged that arbitration clauses are not to be enforced when they are embedded in contracts that are void *ab initio* because one party did not have the authority to sign the contract. The Court then held that illegal contracts are subject to a different rule because the issue of illegality only goes to "the *content* of the contracts, not their *existence*." *Bess*, 294 F.3d at 1305 (emphasis in original). The *Bess* opinion never explains the rationale or cites any authority for this conclusory statement. Florida's generally applicable contract law is to the contrary. Buckeye never challenges this conclusion as to Florida law. Given that *Bess*'s characterization of illegality as unrelated to the existence of a contract is simply wrong as a matter of contract law, *Bess*'s holding relies upon the

mistaken conclusion that federal law preempts and overrides a state's generally applicable and longstanding rules of contract law.

***Bess* and similar cases ignore the rule that the FAA requires that arbitration contracts be treated the same as other contracts. Buckeye reads *Bess* to create a new federal rule of law that apparently only applies to arbitration clauses. According to Buckeye, the meaning of a holding that a contract is void *ab initio* depends upon why the contract is void *ab initio,* but only when one is talking about arbitration clauses. For illegal contracts, Buckeye imagines that the FAA re-writes the entire notion of void *ab initio,* and that federal law requires that the contracts be treated as merely voidable.**[5]

Buckeye gives no convincing explanation for why the Congress, when it passed the FAA in 1925, could have possibly intended to honor generally applicable state law as to contracts that are void *ab initio* in some settings but to sweep it aside in others. Buckeye never addresses the question of how such a doctrine could stand against the U.S. Supreme Court's statements that "The FAA directs courts to place arbitration agreements on equal footing with other contracts," *Waffle House,* 122

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[5] *Bess* and Buckeye both rely on this distinction to square *Bess* with such decisions as *Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587 (7th Cir. 2001), holding that arbitration clauses embedded in contracts which are void *ab initio* may not be enforced.

S. Ct. at 764, and that "the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, *but not more so*." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n. 12 (1967) (emphasis added).

Buckeye argues that *Pacificare Health Sys., Inc. v. Book*, 123 S. Ct. 1531 (2003), requires that the arbitrator (not a court) determine if the contract is illegal, because in that case the Court left to the arbitrator challenges based upon the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et. seq. ("RICO"). Brief at 17. Buckeye misreads *Pacificare*, and overlooks important elements of other U.S. Supreme Court decisions that contradict its interpretation.

***Pacificare* is readily distinguishable because it involved an ambiguous arbitration clause. The clause banned punitive damages but did not mention treble damages and the Court noted that it was not at all clear that the arbitration clause's limitation on damages would affect the outcome in that case. *See Pacificare*, 123 S. Ct. at 1535 (referring to "the ambiguous terms of the contracts," and noting that the case law is very unclear as to whether RICO's treble damages are punitive or remedial). Given the ambiguity of the arbitration contract at issue, the *Pacificare* Court referred the question of how to interpret the provision to the arbitrator. In this case, by contrast, there is no ambiguity in the arbitration clause or in the single**

purpose contract in which it is embedded. Instead, the sole question is whether a contract ever came into existence in the first place, which is a classic question for the Court.

Second, *PacifiCare* did not involve a state law challenge to an arbitration clause under § 2 of the FAA (which authorizes such challenges). Indeed, recognizing the importance of this point, the HMO defendant in *PacifiCare* repeatedly hammered the point that the plaintiffs there were not making the kind of § 2 challenge which has generally been resolved by courts. *See* Petitioners' Reply Brief, 2003 WL 359257 at * 1, 3 and 10. As Pacificare demonstrably understood, the argument that won the day for the HMO in *Pacificare* depended on the fact that the case was completely different from this one. Accordingly, *PacifiCare* did not involve a question that the FAA has entrusted to state law.

***PacifiCare* must be read in context with the Supreme Court's decision in *Howsam v. Dean Witter*, 537 U.S. 79, 123 S. Ct. 588 (2002). In *Howsam*, the court unsurprisingly held that an arbitrator, not a court, should determine whether a party violated an arbitration rule. After all, as the Court noted, "the NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it." *Howsam*, 123 S. Ct. at 593.**

There was no question that the parties were bound by a legally valid arbitration agreement, however, and the Court explained that disputes on that question are for the Court. "[A] gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide." 123 S. Ct. at 592. This case, unlike *Howsam* or *Pacificare*, involves precisely the type of "gateway question" that the U.S. Supreme Court has said is for the court, not the arbitrator. Buckeye employs a great deal of high octane rhetoric about how the entire structure of the FAA will come undone if courts rather than arbitrators decide the question of whether a contract is illegal. *See* Brief at 6, 22. This argument ignores the unique nature of the allegations in this case. While Buckeye repeatedly insists that this Court should not trouble with the issue, petitioners' opening brief establishes that Buckeye's contracts violated Florida's criminal laws. Simply put, Buckeye was engaged in criminal loansharking.

This sort of issue rarely arises in civil cases. Civil plaintiffs regularly argue that some particular conduct of a defendant breaks a contract or gives rise to a remedy under some remedial statute, but it is quite rare to encounter a civil plaintiff arguing that an entire line of business operated contrary to the rule of law and is per se illegal. A ruling for the petitioners here will have no effect upon traditional

banks, or any other legitimate business enterprise. A ruling for the petitioners here will only impact upon businesses whose contracts are wholly illegal, such as the loanshark defendants here or the cocaine sellers hypothesized in petitioners' opening brief at 43. (It is notable that Buckeye failed to respond to this hypothetical, which demonstrated the absurdity of its position.)

II WHETHER THE AGREEMENT BETWEEN PETITIONERS AND BUCKEYE IS ILLEGAL IS A CRUX ISSUE WHICH THIS COURT CAN AND SHOULD DECIDE

In its Answer Brief at various points Buckeye attempts to limit this Court's consideration of a related issue which is at the very core of this case. To fail to address what is the crux of ultimate resolution of this case would be unfortunate and wasteful of judicial resources.[6]

Petitioners assert that only a Court can determine illegality when a party offers colorable evidence that a contract violates usury laws. In this case, however, the evidence before the lower Court, and in the record, is more than merely

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[6] As this Court stated in *Consiglio v. State*, citing *Hall v. State* "We address a second issue raised by Consiglio . . . 'Once we have conflict jurisdiction, we have jurisdiction to decide all issues necessary to a full and final resolution.'" *Consiglio v. State*, 818 So. 2d 467 (Fla. 2002), *Hall v. State*, 752 So. 2d 575, 578, n.2 (Fla. 2000). See also, *Jacobson v. State*, "We have jurisdiction because of the facial conflict between *Vollmer* and this case. Having jurisdiction, we have jurisdiction over all issues (citation omitted), and dispose of the case on a ground other than the conflict ground." *Jacobson v. State*, 476 So. 2d 1282 (Fla. 1985).

colorable, it supports a finding of usurious loans as a matter of law. Petitioners contend, as they have consistently asserted throughout this appeal, that the Court should decline to enforce arbitration "because the agreement between the parties is a criminally illegal contract." [7] **See also Answer Brief of Appellees (R. Vol. II, #16, p. 4) submitted to the Fourth District Court of Appeal: "An examination of the contract(s) between Buckeye and Appellees show them to be criminal on their face. (See, the 'Deferred Deposit and Disclosure Agreements' with attachments . . ." (R. Vol. I #9, pages 25 to 65). The trial court correctly observed that "on its face the contract itself, the interest rate would appear to violate the Criminal Usury Statute." (R. Vol. I #9, Buckeye Appendix at 145). Buckeye had produced the contract as an attachment to the Motion to Compel and relied on it during argument on the Motion. (*Id.*, pp. 147, 148). It would be superfluous to Petitioners' claim to merely remand to the trial court to make a determination of illegality in light of the *Ace* opinion from the Fifth District Court of Appeal. *Betts v. Ace Cash Express*, 827 So.2d 294 (Fla. 5th DCA 2002) Buckeye would assert that the *Ace* decision would bind the trial court to find the agreement between Buckeye and Petitioners was not a loan, even though on its face, it clearly creates an obligation**

[7] R. Vol. I #9, page 127.

to repay a debt in the future. *Ace* was decided on a motion to dismiss with no evidentiary hearing. *Ace* at 295. Similarly, this Court can review the plain language and history of F.S. Chapter 560 vis a vis, Chapters 516 and 687, to determine whether payday lending or deferred presentment was legally permitted prior to the enactment of Part IV of Chapter 560 on October 1, 2001.

Buckeye makes the remarkable argument that counsel's decision not to pursue an appeal of *Ace* means this Court should not consider the legality of deferred presentment payday loans. Appellees' Brief at 32. *Betts* was, and remains today, the only District Court opinion addressing the legality of deferred presentment payday lending. Since no other District Court has even addressed the issue, there exists no conflicting opinion from another District Court on the issue. The argument that counsel's decision not to burden this Court with a meritless jurisdictional brief in *Betts* should now estop Cardegna from challenging the legality of payday lending in this appeal is novel, to say the least. Similarly (and ironically), when Judge Antoon (who authored *FastFunding* while on the Fifth DCA) decided *Betts v. Advance America*, 213 F.R.D. 466 (M.D. Fla. 2003) he was bound by *Ace* since it was the only appellate precedent on the issue of the legality of payday lending.

Buckeye's assertion that the lack of an appeal in *Betts , et al. v. DBF, et al.*, indicates this Court should not entertain the ultimate issue is unfounded. In fact, the Final Order in that case emphatically supports Plaintiff's argument that Chapter 560 never authorized payday lending. *Betts and Reuter v. Dept. of Banking and Finance and Advance America, Cash Advance Centers of Florida, Inc.*, No. 01-1445RX (Fla. Dept. Admin. Hearings, Sept. 7, 2001).

In *Betts, et al. v. DBF, et al., Id.*, Petitioners' asserted Rule 3C-560-803 F.A.C. was invalid per *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000), but if found valid the Rule merely allowed a check casher to accept a postdated check and did not permit a deferred presentment transaction also called a payday loan. *Betts v. DBF, supra*, Final Order, ¶¶ 21, 22.

Although the Administrative Law Judge agreed with Betts that the Rule would have been found invalid at the time Betts' challenge was filed, the Court found that additional citations of law implemented (which the Department of Banking and Finance filed five days prior to hearing) saved the Rule's validity. Final Order ¶¶ 37, 39, 40, 59, 71, 81. Most important to this discussion, however, were the Final Order's Findings of Fact and Conclusions of Law:

- **"A check cashing occurs when the check casher receives the customer's personal check and gives currency to the customer." Final Order, ¶ 15.**

- **"Deferred deposit, also sometimes referred to as 'payday lending' occurs subsequent to the check-cashing transactions when a check casher agrees to hold the customer's check for a certain agreed period of time." Final Order, ¶ 16.**

- **"The Department has no Rule, Order or Declaratory Statement authorizing deferred deposit transactions or repeated, consecutive deferred deposit transactions by a registered check casher." Final Order, ¶ 22.**

- **"Nothing in Chapter 560, F.S., requires a check casher to deposit a check. Rather, the money transmitters' Code addresses the cashing of checks by those regulated by Chapter 560, F.S. The act of cashing the check is complete at the time the check casher pays the maker or drawer of the check in currency. Therefore, Chapter 560 F.S. does not *prohibit* a check casher from holding a customer's postdated check for an agreed period of time." Final Order, ¶ 74 (emphasis added).**

The Final Order makes clear what Plaintiffs have contended all along; that Chapter 560 regulated check cashing and that the usurious loan agreements at issue were never contemplated by the statute in effect at that time. Any argument that 560 "authorized" payday lending requires twisted logic. Because 560 did not prohibit payday lending does not mean that the legislature authorized check cashers to loan money at usurious rates or that Chapter 560 carved out an exception to the strictures of Chapter 687.

These petitioners ask this Court to review the contract at issue in light of the

plain meaning of Florida Statutes, Chapters 560, 516 and 687 in effect during the pertinent period. The Department of Banking and Finances' strange decision to don legal blinders to render an informal non-binding opinion in a letter to someone seeking to circumvent Florida's usury law did not change the law and does not prevent this Court from enforcing the law at this time.

Accordingly, Petitioners' request this Court to determine that the contracts at issue were criminally usurious and therefore under general principles of Florida contract law void ab initio, making the arbitration clause therein a nullity.

Respectfully submitted,

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

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