

IN THE SUPREME COURT OF FLORIDA

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BY _____

ROBERTO BASULTO and
RAQUEL GONZALEZ,
Petitioners,

vs.

Case No.: SC09-2358

HIALEAH AUTOMOTIVE, L.L.C.
d/b/a POTAMKIN DODGE, a
Florida corporation,
Respondent.

Lower Tribunal Cases:
3D07-855
05-5556

_____ /

PETITIONERS' REPLY BRIEF

On Review from the District Court
Of Appeal, Third District
State of Florida

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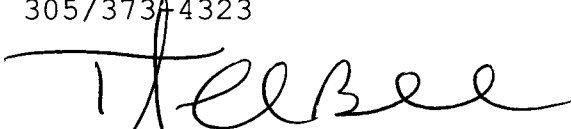
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Public Citizen Consumer Law and Policy Blog,
"An astonishing arbitration decision in an age of
astonishing arbitration decisions", Feb. 18, 2013 6

PRELIMINARY STATEMENT

Petitioners acknowledge that the Initial Brief mistakenly cites to the Hialeah Automotive, LLC v. Basulto, decision reported at 22 So.3d 586 and to specific quoted excerpts appearing at pages 590 - 591. In fact the correct citations should have been made to the decision reported at 34 Fla.L.Weekly D2502 and to the (same) specific quoted excerpts appearing at pages D2503 - 2505.

ARGUMENT

- I. **The decision of the Third District that the BUYERS executed an enforceable agreement to arbitrate conflicts with the decision of this Court in Seifert v. U.S. Home Corp., 750 So.2d 633 (Fla. 1999)**

Respondent argues that the Agreement to Arbitrate Disputes and the arbitration provision contained in the Retail Installment Sales Contract (RISC) are enforceable because they are binding agreements signed by the parties (Answer Brief, pp 5-6) and that the Third District accordingly properly enforced the arbitration provision of the RISC. Id.

In particular Respondent states that not mentioning or discussing an arbitration clause does not constitute grounds to deny a motion to compel arbitration (CFC of Del. LLC v. Santalucia, 37 Fla.L.Weekly D1590 (Fla. 4th DCA 2012)) but admits that an exception exists if "the

arbitration clause in the contract was allegedly induced by fraud." Shearson/Lehman Bros., Inc. v. Ordonez, 497 So.2d 703 (Fla. 4th DCA 1986).

This is the heart of Petitioners' case. Here both the lower Court and the Third District recognized:

The dealer's sales staff understood that the buyers did not speak or read English and conducted the entire transaction in Spanish. The dealer's personnel testified that although the contracts were written in English, they reviewed the content of the contracts with the buyers in Spanish. The buyers testified that in their conversations with the dealer's personnel, arbitration was never mentioned. The trial court found the buyers to be credible and concluded that either arbitration was not mentioned, or if mentioned, was not explained in an understandable way.

Hialeah Automotive, LLC v. Basulto, 34 Fla.L.Weekly D2502 (Fla. 3rd DCA 2009).

Respondent argues, however, (as it did below) that a party to a contract is presumed to know and understand the contract's terms (Stonebraker v. Reliance Life Ins. Co. of Pittsburgh, 166 So. 583 (Fla. 1936)) and is bound by the contract even if he cannot read it, it being "his duty to procure some reliable person to read and explain it to him before he signs." All Florida Surety Co. v. Coker, 88 So.2d 508 (Fla. 1956).

The Third District itself distinguished Respondent's argument as follows:

The dealer argues that a party to a contract is bound to the agreement, even if he or she did not read it. See Estate of Etting v. Regents Park at Aventura, Inc., 891 So.2d 558 (Fla. 3rd DCA 2004). While that is true as a general proposition, in this case the dealer's personnel undertook to explain contracts to the buyers in Spanish. Having done so, they were obliged to do so accurately. Cf. Clay Elec. Coop., Inc. v. Johnson, 873 So.2d 1182, 1186 (Fla. 2003) (in the context of tort law, "{w}henver one undertakes to provide a service to others, whether one does so gratuitously or by contract, the individual who undertakes to provide the service . . . thereby assumes a duty to act carefully and to not put others at an undue risk of harm").

As the trial court states, "It has long been recognized in this state that if one is induced not to read a contract - or, as here, not to obtain outside assistance in reading the contract - and he signs an entirely different paper from what the opposing party has represented that paper to be, the party so signing is entitled to be relieved of the obligations which he has unknowingly assumed." Order at 7 (citing Pepple v. Rogers, 104 Fla. 462, 140 So. 205, 208 (1932)). Alternatively, if arbitration was mention (sic), it was not mentioned in an understandable way.

Hialeah Automotive, LLC. V. Basulto, 34 Fla.L.Weekly at D2503 - D2504.

Nevertheless the Respondent seeks to persuade that enforceability of the arbitration agreement at issue should be judged by a different standard than that recognized under Florida's common law.

The common law governing the validity of contracts in effect at the time Seifert was decided (1999) recognized concepts of fairness and even-handedness, especially with respect to an inducing party's conduct, in determining enforceability vel non of alleged "agreements" between the parties.

"To be sure, it is generally the duty of a party to learn and understand the contents of a proposed contract before he signs it. Pepple v. Rogers, 104 Fla. 462, 140 So. 205, 208 (1932). It thus follows that a party to a written contract cannot defend against its enforcement on the sole ground that he signed it without reading it. All Florida Surety Co. v. Coker, 88 So.2d 508, 510 (Fla. 1956). However, the mere existence of an opportunity for a party to know the contents of a proposed contract is not sufficient by itself to infer constructive notice where the party justifiably relies to his detriment upon a misrepresentation by the other party about the nature of the proposed contract. Morris v. Ingraffia, 154 Fla. 432, 18 So.2d 1, 3 (1944). As our state supreme court remarked in Pepple:

[I]f the opposite party has induced one by a trickery, fraud, or any kind of artifice, not to read the contract, with the view of obtaining from him a paper which he could not otherwise have obtained, the right to prove these circumstances, and thereby establish

the fact that he was signing an entirely different paper, may be shown for the purpose of relieving such party from the obligation thus fraudulently obtained. 140 So. at 208.

Similarly, it commented in All Florida Surety Co. v. Coker, that a party to a written contract can defend against enforcement on the ground that he signed it without reading it if he aver [sic] facts showing circumstances which prevented his reading the paper, or was induced by the statement of the other parties to desist from reading it. 88 So.2d at 510.

Parham v. East Bay Raceway, 442 So.2d 399, 401 (Fla. 2nd DCA 1983).

Respondent, to the contrary, urges that the law governing validity of contracts should now be defined by the Second District's decision in Springlake NC, LLC v. Holloway, 38 Fla.L.Weekly D262 (Fla. 2nd DCA 2013).

In Holloway the Second District held that the trial court had erred in finding an arbitration agreement executed by the late Ms. Holloway when she entered a rehabilitation facility unenforceable on the ground that the contracts executed at the time of admission were so complex, a 92 year old woman with a fourth degree education, "could not possibly have understood what she was signing." *Id.* at D263.

Even though the Second District had no trouble accepting the trial court's finding that Ms. Holloway could not have understood the agreement, the Court nevertheless ruled:

For better or worse, her limited abilities are not a basis to prevent the enforceability of this contract ... [because] our modern economy simply could not function if a "meeting of the minds" required individualized understanding of all aspects of the typical standardized contract.

Id.

As observed by the Public Citizen Consumer Law and Policy Blog¹, the ramifications of Holloway are a direct affront to ordinary rules governing contract formation:

The court is thus abandoning that arbitration must be based on consent and a knowing waiver of rights. Instead, this rule permits forced arbitration to be imposed unilaterally by the more sophisticated party to any contract. And if [t]he agreements are sufficiently complex that many able-bodied adults would not fully understand the agreements," well, so much the better for the company imposing the terms, and so much the worse for the elderly patient who forgot to bring her lawyer when she checked in to the rehab center.

Even if this Court were persuaded that a "modern economy" requires not so much a "meeting of the minds" but rather a less stringent standard of "mutuality of assent" (suggested in Holloway at footnote 1), even this standard has not been met in the present case.

As both the lower Court and the Third District recognized: even if arbitration was mentioned it was not mentioned in an understandable way. Hialeah Automotive,

¹ Posted February 18, 2013: "An astonishing arbitration decision in an age of astonishing arbitration decisions". A copy of the blog is attached hereto as Exhibit A.

LLC v. Basulto, 34 Fla.L.Weekly at D2504. Thus, even under Respondent's proposed standard there was no "mutuality of assent" between the parties.

Further, an application of the law urged by the Respondent and set out in Holloway turns on its head Florida's own Arbitration Code, Section 682.03(1) and the similar provisions set out in the Federal Arbitration Act at 9 U.S.C. §2.

Section 682.03(1) states:

A party to an agreement or provision for arbitration subject to this law claiming the neglect or refusal of another party thereto to comply therewith may make application to the court for an order directing the parties to proceed with arbitration in accordance with the terms thereof. **If the court is satisfied that no substantial issue exists as to the making of the agreement** or provision, it shall grant the application. **If the court shall find that a substantial issue is raised as to the making of the agreement** or provision, it shall summarily **hear and determine the issue** and, according to its determination, shall grant or deny the application. (emphasis added).

If the law were construed as the Respondent suggests and enforceability of "agreements" to arbitrate depended merely upon a showing that both sides had signed a piece of paper, it would render the foregoing statutory provision meaningless.

Florida Statutes embody the public policy of this State as expressed by the Legislature. Shotts v. OP Winterhaven, Inc., 86 So.3d 456, 474-475 (Fla. 2011). To apply the law as urged by the Respondent would substantially diminish or circumvent specific safeguards enacted by the Legislature to ensure not just that signatures of parties appear on a piece of paper but to require judicial scrutiny into the actual "making" of any alleged "agreement" to arbitrate². This inquiry comports with Seifert's requirement that only a "valid" agreement to arbitrate can be enforced (Id. at 636, stating "[N]o party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate"). And also comports with the generally recognized contract law cited by the Third District itself in Hialeah Automotive, LLC v.

Basulto:

It has long been recognized in this state that if one is induced not to read a contract - or, as here, not to obtain outside assistance in reading the contract - and he signs an entirely different paper from what the opposing party has represented the paper to be, the party so signing

² See Operis Group, Corp. v. E. I. at Doral, LLC, 973 So.2d 485, 488 (Fla. 3rd DCA 2007) "[W]hether the alleged contract containing the arbitration clause [is] a valid agreement entered into by the parties, is a material issue that the trial court [has] a statutory duty to resolve before compelling arbitration."

is entitled to be relieved of the obligations which he has unknowingly assumed.

Id. at D2503 - D2504 (citations omitted).

The single issue before this Court is whether, having recognized that the circumstances surrounding the "making" of the arbitration "agreement" at issue constituted sufficient irregularity that there was no "mutuality of assent", the Third District should have affirmed the trial Court's conclusion that no valid agreement to arbitrate existed (App. 3:4); or whether, as Respondent suggests, the Third District was correct in concluding that this lack of any valid agreement merely constituted the procedural prong of unconscionability. See: Murphy v. Courtesy Ford, 944 So.2d 1131 (Fla. 3rd DCA 2006) cited by Hialeah Automotive, LLC v. Basulto at D2504.

Petitioners urge that the Third District erred in failing to give full effect to Seifert's directive that only "valid" agreements to arbitrate are subject to enforcement and that in fact the Third District's decision in Basulto directly contravenes the public policy of this state requiring denial of a motion to compel arbitration when a court, upon hearing, has determined that a substantial issue (of irregularity) has been established as to the making of the agreement. Section 682.03(1),

Fla.Stat.; Shotts, 86 So.3d at 474 (concluding that substantially diminishing or circumventing remedies enacted by the legislature "stands in violation of the public policy of the State of Florida").

II. Whether or not the Retail Installment Contract is (substantively) unconscionable does not affect the issue on which review has been accepted.

Respondent's second point is that in any event the stand alone arbitration provision of the RISC is not (substantially) unconscionable. That issue has not been raised by Petitioners' request for certiorari review.

The sole issue upon which review has been sought, and accepted, is whether the Third District's decision in reversing the trial Court's order denying Defendant's Motion to Compel Arbitration conflict with this Court's decision in Seifert where in the case at bar the Third District recognized that circumstances existed sufficient to invalidate the parties' "agreement" to arbitrate under the common law but nevertheless held that this showing merely constituted the procedural component of unconscionability and was insufficient - standing alone - to bar enforcement of the alleged "agreement" to arbitrate.

Respondent's second point is accordingly irrelevant to the issue under review by this Court and does not require any response by the Petitioners.

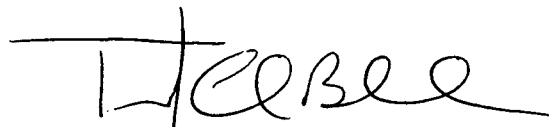
CONCLUSION

This Court should reverse the decision of the Third District Court of Appeal which reversed the lower court's denial of Defendant's Amended Motion to Dismiss and/or to Compel Arbitration with instructions to the Third District Court to remand this case to the trial court for reinstatement of the lower court's Order denying Defendant's Amended Motion to Dismiss and/or to Compel Arbitration and for further proceedings consistent therewith.

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and correct copy of this Petitioners' Reply Brief has been furnished to Mark A. Goldstein, Esq., 111 N. E. 1st Street, Suite 300, Miami, Florida 33132-2517 by regular United States mail and via email at markgoldstein98@yahoo.com on this 4 day of March, 2013.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Fla.R.App. Rule 9.210. It is typed in Courier New 12 point and is double spaced.


TIMOTHY CARL BLAKE

EXHIBIT A

From: noreply+feedproxy@google.com [mailto:noreply+feedproxy@google.com] **On Behalf Of** Consumer Law & Policy
Sent: Tuesday, February 19, 2013 8:12 AM
To: Timothy Blake
Subject: Consumer Law & Policy Blog

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- [Big Tobacco and Anti-Tobacco Team Up Against Health Care Act Smokers' Surcharge](#)
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Big Tobacco and Anti-Tobacco Team Up Against Health Care Act Smokers' Surcharge

Posted: 19 Feb 2013 03:59 AM PST

In this article, Sarah Kliff explains that the big tobacco companies and certain anti-cancer groups are allied against a provision in the Affordable Care Act that allows health insurers to charge 50% higher premiums to smokers. (In real terms, the 50% smokers' surcharge could be much higher because the Act also bars government subsidies to help smokers pay the premium surcharge, although those subsidies will be available to help pay premiums of low-income people generally.) No doubt the provision is intended to encourage people to quit smoking.

Big Tobacco is against it because a law that makes smoking more costly could cut into tobacco sales. Kliff says that health groups are against it because it could discourage smokers from getting health insurance, and, the groups explain, smokers tend to be relatively low-income people to begin with. The article says that the smoker surcharge is something of an anomaly because the Affordable Care Act seeks to curtail other group premium disparities, demanding equal premiums between men and women and limiting disparate premiums for older people. Kliff also notes that the lobbying against the provision is going on at the federal and state levels, because states have power under the ACA to bar the tobacco surcharge. Absent repeal or modification, the surcharge will go into effect in 2014.

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More on the FTC's Study of the Credit Reporting Industry

Posted: 18 Feb 2013 09:43 PM PST

We've posted ([here](#), [here](#), and [here](#)) several times on the new FTC study on the credit reporting industry showing that millions of Americans' credit reports are wrong, many seriously wrong. Now, take a look at [this piece](#) by David Lazarus. It provides a couple examples of how faulty credit reports harm consumers. He also suggests a reform:

Under the [Fair Credit Reporting Act], which was amended in 1996 with additional privacy safeguards, consumers were given the right to find out what's in their files and to dispute any inaccurate information. The act also limited access to a credit file to those with a "permissible purpose," such as lenders, other credit issuers or insurers. It's clear, though, that not enough has been done to level the playing field. Although consumers have a right to a free copy of their credit file annually from each of the big agencies -- available at [AnnualCreditReport.com](#) -- those files can be unclear or difficult to understand. Worse, because each agency uses its own system, consumers have to monitor all three to ensure that their files are accurate. If a problem is found, you have to jump through each company's hoops to make changes -- a time-consuming and often frustrating process. Here's my proposal: Create an online clearinghouse, run by the federal government's Consumer Financial Protection Bureau, that would allow people to fix all their files at one time.

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Do Car Rental Companies Charge Customers for Vehicle Damage that the Customers Didn't Cause?

Posted: 18 Feb 2013 05:57 PM PST

That's the topic of [this article](#) by consumer journalist and advocate Christopher Elliot. The article caught my eye for two reasons. First, it's fairly in-depth consumer journalism that used to be commonplace. The writer investigates and reports on a possible consumer rip-off, suggesting what might be done about it and, in the meantime, warning consumers about how to avoid the problem. Second, the topic struck me as worth knowing about. Here's one possible rip-off, according to Elliot's article. It seems there is some evidence that major car rental companies rent cars that already have some body damage, perhaps damage that can only be detected on close inspection and the car rental company apparently didn't notice when it occurred. The companies don't disclose the damage at the time of the rental. Then, the consumer returns the car in the same condition as when it was rented, but, lo and behold, the consumer is charged for the damage. The British Columbia attorney general is investigating. Elliot would like to see the FTC investigate as well.

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A Journalist Writes About His Experiences as a Debt Collector

Posted: 18 Feb 2013 01:55 PM PST

by Jeff Sovern

Back in 2008, Fred Williams, a reporter for the Buffalo News who had written stories about debt collectors, worked as a debt collector for an upstate New York debt collection firm. Williams was not exactly undercover--he disclosed that he had written the stories--but it sounds as if he was treated as any other employee: he went through training and later had to prove himself to advance to a permanent position. In 2011, Williams published a book about the experience. Though the title of the book makes it sound like a primer for consumers being pursued by debt collectors--*Fight Back Against Unfair Debt Collection Practices*--and the book does include advice for consumers, what makes the book special is Williams's account of his experiences. I read the book to learn more about the industry for the debt collection materials to appear in the next edition of our casebook, and I thought I would say a bit about it here as well.

While some have portrayed debt collectors who cross legal lines as sadists who enjoy abusing others (see, e.g., the testimony of Richard Bell in the third edition of our casebook), Williams offers a different take. Williams reports that he met few collectors who enjoyed threatening consumers but nevertheless describes numerous interactions in which collectors approached or stepped over the line demarcating improper behavior. According to Williams, debt collectors face incentives to employ inappropriate tactics because of the need to collect enough debts to retain their jobs and earn the approval of other debt collectors. Williams argued that collectors employed illegal tactics because they work. He also claims that collectors are hardened by frequent interactions with dishonest consumers who leave the collectors jaded and cynical.

As for the rules imposed on collectors by the federal Fair Debt Collection Practices Act, Williams's experiences are not always consistent. The agency where he worked seemingly followed some of the FDCPA's strictures faithfully; for example, collectors were not permitted to call consumers more than once a day. But other rules seemed to go by the wayside. Collectors largely omit the so-called "Miranda warning of FDCPA § 1692e(11). Alternatively, he reports that some collectors leaving messages for consumers hang up in the middle of the Miranda warning: "I am legally required to inform you that this is an attempt [click]" and then claim that the call was cut off. Some collectors claim that they are calling from the fraud department, a false statement which violates § 1692e. Still another collector creates the impression that a collection matter will end up in litigation by asking for the consumer's lawyer's phone number. If the consumer denies having a lawyer, the collector replies "Don't you think you're going to

need one.?" Though the agency had a compliance department, Williams reports that collectors are told when Compliance is monitoring their calls so they know when to avoid violating the FDCPA. The result, according to Williams, was that the compliance department was a sham. So why are some rules followed slavishly and others ignored? My speculation is that excessive calling can be proved by obtaining phone records while the proving the contents of unrecorded phone conversations devolves into a credibility contest.

Williams's book reads fast and is entertaining. For those who want a better understanding of the debt collection industry, it is a must-read.

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Senator Warren Petition: Senators, Give Richard Cordray an Up-or-Down Vote

Posted: 18 Feb 2013 01:09 PM PST

You can sign the petition [here](#). GoLocalWorcester.com has more [here](#).

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The Affordable Care Act's Medical Loss Ratio Rule's Application to Medicare Advantage and Prescription Drug Plans

Posted: 18 Feb 2013 12:31 PM PST

One of the key components of the new Affordable Care Act is its medical loss ratio rule. The rule seeks to control health care costs by requiring medical insurers who don't spend at least 80 to 85 percent of their premium earnings on health care — rather than on marketing and administrative expenses — to rebate the excess non-health care spending to their consumers. (Sometimes those consumers will be individuals; other times, they will be employers who purchased health care for their employees.) Last year, insurers rebated about \$1.2 billion under the rule. We have [blogged](#) about the rule several times, including [here](#) and [here](#). As [this article](#) by Ben Goad explains, the feds have proposed a regulation, currently being reviewed by the Office of Management and Budget's Office of Information and Regulatory Affairs, that will extend the rule to prescription drug plans and [Medicare Advantage](#) plans beginning next January.

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An astonishing arbitration decision in an age of astonishing arbitration decisions

Posted: 18 Feb 2013 08:01 AM PST

Why do courts enforce mandatory arbitration clauses? Because the contracting parties agreed to them, the courts tell us. Not this time. A Florida intermediate appellate court held earlier this month that an arbitration clause was enforceable in a wrongful death suit against a rehabilitation center even though Jessie Holloway, the 92-year-old woman who signed the arbitration agreement, "could not possibly have understood what she was signing." Specifically:

When she entered the facility, she executed a standard resident admission and financial agreement and a separate arbitration agreement. At the time, she was 92 years old and had a fourth-grade education. She could not spell well and often had to sound out words while reading. She had memory problems and was increasingly confused.

Even though the court had no trouble accepting the trial court's finding that Ms. Holloway couldn't have understood the agreement, the court nonetheless held that "[f]or better or worse, her limited abilities are not a basis to prevent the enforceability of this contract," because "[o]ur modern economy simply could not function if a 'meeting of the minds' required individualized understanding of all aspects of the typical standardized contract."

The court is thus abandoning any pretense that arbitration must be based on consent and a knowing waiver of rights. Instead, this rule permits forced arbitration to be imposed unilaterally by the more sophisticated party to any contract. And if "[t]he agreements are sufficiently complex that many able-bodied adults would not fully understand the agreements," well, so much the better for the company imposing the terms, and so much the worse for the elderly patient who forgot to bring her lawyer when she checked in to the rehab center.

The case is [Spring Lake v. Holloway](#), decided by Florida's Second District Court of Appeals.

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\$35 million fraud settlement in Florida

Posted: 18 Feb 2013 07:24 AM PST

From a DOJ press release: "Lender Processing Services Inc. (LPS), a publicly traded mortgage servicing company based in Jacksonville, Fla., has agreed to pay \$35 million in criminal penalties and forfeiture to address its participation in a six-year scheme to prepare and file more than 1 million fraudulently signed and notarized mortgage-related documents with property recorders' offices throughout the United States."

The CEO of a subsidiary, DocX, pled guilty to criminal charges. You can read the whole release [here](#).

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