IN THE SUPREME COURT OF THE STATE OF FLORIDA

No. SC09-768

ANGELA I. GESSA, *etc.*,

Petitioner,

v.

MANOR CARE OF FLORIDA, INC., *et al.*,

Respondents.

After an Opinion by the
District Court of Appeal, Second District
(Case No. 2D07-1928)

On Appeal from the Circuit Court for Hillsborough County
(Case No. 05-7548, Honorable Ralph C. Stoddard, Judge)

AMENDED BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS MANOR CARE OF FLORIDA, INC., ET AL.

STEVEN GEOFFREY GIESELER
Fla. Bar No. 880981
Pacific Legal Foundation
1002 SE Monterey Commons Blvd.
Suite 102
Stuart, Florida 34996
Telephone: (772) 781-7787
Facsimile: (772) 781-7785
E-mail: sgg@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

TABLES OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rule

Miscellaneous

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases involving the Federal Arbitration Act and contractual arbitration in general, including *Rent-a-Center West Inc. v. Jackson*, United States Supreme Court Docket No. 09-497 (raising the issue of whether parties may contract to have an arbitrator determine gateway issues); *Stolt-Nielsen S.A., et al., v. Animalfeeds Int'l Corp.*, United States Supreme Court Docket No. 08-1198 (pending); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396 (2008); and *Preston v. Ferrer*, 552 U.S. 346, 128 S. Ct. 978 (2008).

INTRODUCTION

The purpose behind both the Florida Arbitration Code (FAC) and the Federal Arbitration Act (FAA) is to preserve and promote the right to contractual choice. *See Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999). It is not

to impose on contracting parties a means of dispute resolution unrelated to, or possibly contrary to, their actual preferences. *Id*. (citing both federal and state cases). Such contracts are the product of the parties' own assessments of their costs and benefits, and as no third party is in a better position to decide whether the benefits outweigh the costs, the parties' own judgment deserves respect. In this case, the parties clearly and unmistakably agreed that an arbitrator would resolve all disputes arising out of Ms. Gessa's residence at the Manor Care nursing home, including such gateway issues as whether the contract itself is unconscionable.

The decision below correctly held that the contract was valid and should be affirmed.

ARGUMENT

I

THIS CASE IMPLICATES FREEDOM OF CONTRACT CONCERNS BEYOND ARBITRATION IN THE NURSING HOME CONTEXT

A. Arbitration Statutes Permit Parties To Contract Around Default Rules

As the United States Supreme Court has recognized, parties' freedom to contract is the foundation of arbitration agreements:

> A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties.

United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960). The FAA, as the federal statute embodying this stance, "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). The Florida statute embodies the same policy. *See O'Keefe Architects, Inc. v. CED Constr. Partners, Ltd.*, 944 So. 2d 181, 188 (Fla. 2006). As such, the federal and state arbitration statutes institute default rules for arbitration.

Default rules ensure that if parties forget to include certain terms in their contracts, those contracts still will be enforced using statutory "gap fillers" that are designed to mimic what contracting parties would have wanted, had they considered the subject. *See, e.g., Publix Super Markets, Inc. v. Wilder Corp. of Delaware*, 876 So. 2d 652, 654-55 (Fla. 2d DCA 2004), *rev. denied*, 892 So. 2d 1015 (2004) (holding no breach of implied covenant of good faith and fair dealing where party acted in a reasonable, nonarbitrary manner, noting: "Florida's implied covenant of good faith and fair dealing is a gap-filling default rule. It is usually raised when a question is not resolved by the terms of the contract or when one party has the power to make a discretionary decision without defined standards.");

Adelstein ex rel. Adelstein v. Unicare Life and Health Ins. Co., 135 F. Supp. 2d 1240, 1250 (M.D. Fla. 2001), *aff'd* 31 Fed. Appx. 935 (11th Cir. 2002) (noting that parties to an ERISA contract can contract out of the default "make whole" rule). The law allows parties to waive these rules because

> a meaningful power of exit is one important component of the concept of political freedom . . . . [A] person who may not "opt out" of a social arrangement is, to this extent, unfree . . . . [G]enuine consent implies the existence of meaningful alternatives . . . [and] in a free society, persons should have the power and right to contract around the background rules supplied by a legal system.

Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 Va. L. Rev. 821, 904 (1992). *See also* Christopher R. Drahozal, *Contracting Around RUAA: Default Rules, Mandatory Rules, and Judicial Review of Arbitral Awards*, 3 Pepp. Disp. Resol. L.J. 419, 421 (2003) (Legislatures should "make a particular rule a mandatory rule only if one of the parties to the contract is unable to protect itself from the other, or if the contract has effects on third parties who are unable to protect themselves. Otherwise, the rule should be a default rule."); Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 Am. Rev. Int'l Arb. 225, 230 (1997) ("[T]he statute's default allocation of authority between courts and arbitrators need not implicate in any way the power of the parties themselves to structure the arbitration mechanism so as to advance their own interests.").

Given this "power to exit," contracting parties will tend to choose terms that suit their needs; this improves efficiency by ensuring that parties do not have their

hands tied by provisions they do not want. Contracting around default rules can be costly, but prohibiting parties from doing this can be even costlier. *See* Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. Cal. Interdisc. L.J. 389, 402 (1993) ("The state's choice of a default rule cannot affect the substance of private contracts . . . . [but] will affect total contracting costs."). In short, "freedom of contract is the general rule and restraint the exception." *Advance-Rumely Thresher Co. v. Jackson*, 287 U.S. 283, 288 (1932). In determining the validity of limits on the right to contract, "regard is to be had to the general rule that competent persons shall have the utmost liberty of contracting, and that it is only where enforcement conflicts with dominant public interests [that courts will refuse to enforce them]." *Id.* *See also Bituminous Cas. Corp. v. Williams*, 17 So. 2d 98, 101-02 (1944); *Ex parte Messer*, 99 So. 330, 330 (Fla. 1924) ("While there is no such thing as absolute freedom of contract, freedom is the general rule, and restraint is the exception, and must not be arbitrary or unreasonable, and can be justified only by exceptional circumstances."); *Larson v. Lesser*, 106 So. 2d 188, 191-92 (Fla. 1958) (citing *Messer*). Thus, Florida courts permit people to contract around usury laws (*Morgan Walton Props., Inc. v. Int'l City Bank & Trust Co.*, 404 So. 2d 1059, 1062 (Fla. 1981)), statutes of limitation (*Burroughs Corp. v. Suntogs of Miami, Inc.*, 472 So. 2d 1166, 1169 (Fla. 1985)),

and statutes relating to reciprocal attorneys' fees (*Walls v. Quick & Reilly, Inc.*, 824 So. 2d 1016, 1019-20 (Fla. 5th DCA 2002)).

B. Freedom of Contract Principles Apply to Arbitration Contracts

These principles apply to arbitration agreements as well. As the United States Supreme Court recognized in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 479 (1989), the FAA allows "the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself," because this is consistent with the Act's "primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." Because arbitration is a matter of contract, the parties to a dispute "are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate . . . so too may they specify by contract the rules under which that arbitration will be conducted." *Id*. *See, e.g., Marschel v. Dean Witter Reynolds, Inc.*, 609 So. 2d 718, 721 (Fla. 2d DCA 1992), *rev. denied*, 617 So. 2d 318 (Fla. 1993) (holding that parties may contract to have arbitrator decide statute of limitations defense); *Rintin Corp., S.A. v. Domar, Ltd.*, 766 So. 2d 407, 409 (Fla. 3d DCA 2000) (staying court proceedings where parties contracted to have arbitrator decide questions of arbitrability); *Seretta Constr., Inc. v. Great American Ins. Co.*, 869 So. 2d 676, 680 (Fla. 5th DCA 2004) (court enforced arbitration agreement requiring individual

resolution of claims, even where it noted a judicial preference for consolidation of claims). The FAA and FAC *foster*, but do not *dictate* agreements between private parties. They provide default rules that the parties may waive in order to bring their own preferences and knowledge to bear on a problem.

The decision below simply reflects the parties' choice whether to accept default rules or to customize dispute resolution procedures to best suit their needs. "Default" rules are simply intended to provide terms that are acceptable to the greatest number of people, so that those who forget or who choose to omit a provision will have the default provision incorporated into the contract. *See*, *e.g.*, *Hugo Boss Fashions, Inc. v. Fed. Ins. Co.*, 252 F.3d 608, 617-18 (2d Cir. 2001) ("When interpreting a state law contract, therefore, an established definition provided by state law or industry usage will serve as a default rule, and that definition will control unless the parties explicitly indicate, on the face of their agreement, that the term is to have some other meaning."). But default rules by themselves are neither better nor worse than customized rules. There is nothing exceptional about a three-arbitrator panel rather than a single arbitrator, for example.

Moreover, as a matter of public policy, allowing parties to negotiate around default rules increases efficiency by ensuring that parties are not given costly overprotection, or deprived of protections that they desire. For example, the speed

mandated by the arbitration contract in this case has particular value to the elderly clientele of Manor Care, making for better odds that the patients themselves will recover whatever damages are awarded. When the default rules would require parties to abide by unwanted terms in a contract, such that the unwanted terms cost more than the parties' agreement to waive those default protections, then parties will contract around those rules. "A law of contract not based on [such] efficiency considerations will therefore be largely futile." Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. Legal Stud. 83, 89 (1977). The decision below properly reflects the ability of people to make their own decisions about the costs and benefits of provisions related to dispute resolution, and should be affirmed.

II

GESSA'S CLAIM IS BASED ON A MISUNDERSTANDING OF ARBITRATION PROCEDURES AND AN ILLEGITIMATE SUSPICION OF ARBITRATION AS A METHOD OF RESOLVING DISPUTES

Gessa's briefs filed in this Court and in the court below urge the courts to invalidate the arbitration contract, resting on the unstated assumption that an arbitrator would reject Gessa's arguments and find that the parties agreed to arbitrate, and that she would prevail if permitted to proceed in court instead. Yet there is no solid basis for this assumption. First of all, parties who have not agreed to arbitrate will not be forced to arbitrate. *First Options of Chicago, Inc. v.*

Kaplan, 514 U.S. 938, 943-44 (1995); *Seifert*, 750 So. 2d at 636 ("[N]o party may be forced to submit a dispute to arbitration that the party did not intend and agree to arbitrate"). The plain language of the contract in this case is evidence of agreement to arbitrate, a matter not in dispute.

Second, arbitrating a challenge to the existence of an arbitration agreement does not necessarily keep the parties in arbitration, but rather establishes the initial venue to address that challenge. *See, e.g., Aircraft Braking Syst. Corp. v. Local 856, Int'l Union, United Auto., Aerospace & Agric. Implement Workers*, 97 F.3d 155, 158 (6th Cir. 1996), *cert. denied*, 520 U.S. 1143 (1997) (arbitrator initially found that the grievance was "not arbitrable" because there was no enforceable agreement, and that "neither the Company nor the Union intended to be contractually bound" but the court, in later proceedings, found to the contrary); *In Re E-Systems, Inc.*, 86 Lab. Arb. 441, 446 (1986) (arbitrator held that a grievance filed on behalf of retirees protesting changes in insurance coverage was not arbitrable because retirees are not "employees").

If the arbitrator finds the contract to be unconscionable, then the dispute will not proceed in arbitration. "[I]n all cases the disappointed claimant can go immediately to a court (under § 4 of the FAA) to seek an order compelling arbitration under the terms of what he still believes to be an enforceable arbitration agreement covering the dispute." Alan Scott Rau, "*The Arbitrability Question*

Itself," 10 Am. Rev. Int'l Arb. 287, 353 (1999). And arbitrators *do*, in fact, find agreements to be unconscionable in some cases. *See, e.g.*, *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp.*, U.S.A., 334 F.3d 721, 722 (8th Cir. 2003), *cert. denied*, 540 U.S. 1149 (2004) (arbitrator ruled that the last sentence in the arbitration provision, which awarded costs and fees to the prevailing party, was unconscionable and unenforceable; a ruling upheld in later court proceedings); *Jacada (Europe), Ltd. v. Int'l Marketing Strategies, Inc.*, 401 F.3d 701, 712 (6th Cir.), *cert. denied*, 546 U.S. 1031 (2005) (arbitrator invalidated a provision limiting damages to the amounts actually paid under the contract as unconscionable; a ruling affirmed by the Sixth Circuit Court of Appeals); *J.C. Gury Co. v. Nippon Carbide Indus. (USA) Inc.*, 152 Cal. App. 4th 1300, 1303, 62 Cal. Rptr. 3d 118, 120 (2007) (arbitrator invalidated as unconscionable a limitation on consequential damages, a decision upheld by later review by the court); *Local 345 of Retail Store Employees Union v. Heinrich Motors, Inc.*, 63 N.Y.2d 985, 986-87, 473 N.E.2d 247, 248 (1984) (arbitrator invalidated as unconscionable a provision in a collective bargaining agreement that prohibited retroactive awards); *Labor Ready Nw., Inc. v. Crawford*, No. 07-1060-HA, 2008 WL 1840749 *2 (D. Or. 2008) (arbitrator found the arbitration provision contained in an employment application was unconscionable and unenforceable); *Smith v. Gateway, Inc.*, No. 03-01-00589-CV, 2002 WL 1728615 *3 (Tex. App.-Austin 2002, no pet.) (arbitrator found that

the terms of the arbitration agreement that limited the remedies available to Smith were unconscionable).

Allowing an arbitrator to determine arbitrability is analogous to litigating subject-matter jurisdiction in federal court under the Federal Rules of Civil Procedure. Fed. R. Civ. Proc. 12(b)(1). The district courts exercise at least temporary jurisdiction over the parties, even when a defendant disputes whether the case belongs in federal court at all. *See Screven County v. Brier Creek Hunting & Fishing Club, Inc.*, 202 F.2d 369, 371 (5th Cir.), *cert. denied*, 345 U.S. 994 (1953) (district court has jurisdiction to determine its own jurisdiction on ground of a federal question, and appellate court has jurisdiction to review and reverse, modify, or affirm the district court's decision) (citing 28 U.S.C. § 2106). "A successful defendant will litigate the case out of court, just as a party can arbitrate the case out of arbitration." Stuart M. Widman, *What's Certain Is the Lack of Certainty About Who Decides the Existence of the Arbitration Agreement*, 59-JUL Disp. Resol. J. 54, 58-59 (2004).

Most importantly, courts may not harbor suspicion against an arbitral forum, just because arbitration operates under procedures that differ from court rules. The United States Supreme Court's recent decision, *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009) (holding that a provision in a collective bargaining agreement that clearly and unmistakably required union members to arbitrate statutory

discrimination claims is enforceable as matter of federal law), plainly requires judges to respect the arbitration process. In reaching its conclusion, the High Court rejected the broad dicta in the *Gardner-Denver* line of cases that criticized the use of arbitration for the vindication of statutory antidiscrimination rights. *Id*. at 1469. The Court thus reaffirmed holdings of recent vintage rejecting judicial hostility to arbitration. *Id*. at 1471, citing *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 232 (1987) ("[A]rbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision" and "there is no reason to assume at the outset that arbitrators will not follow the law.") and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985) ("We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators."). Affirming this position, the Court concluded:

> An arbitrator's capacity to resolve complex questions of fact and law extends with equal force to discrimination claims brought under the ADEA. Moreover, the recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration. Parties "trad[e] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." In any event, "[i]t is unlikely . . . that age discrimination claims require more extensive discovery than other claims that we have found to be arbitrable, such as RICO and antitrust claims." At bottom, objections centered on the nature of arbitration do not offer a credible basis for

> discrediting the choice of that forum to resolve statutory antidiscrimination claims.

14 Penn Plaza at 1471 (citations omitted). It is hard to fathom a justification behind Gessa's claims in this case beyond "objections centered on the nature of arbitration." A decision invalidating the arbitration contract would fail to abide by the FAA and FAC and undermine the parties' freedom of contract for no legitimate reason.

CONCLUSION

The decision below should be affirmed.

DATED: February 22, 2010.

Respectfully submitted,

STEVEN GEOFFREY GIESELER

By /s/ Steven Geoffrey Gieseler

STEVEN GEOFFREY GIESELER
Fla. Bar No. 880981
Pacific Legal Foundation
1002 SE Monterey Commons Blvd.
Suite 102
Stuart, Florida 34996
Telephone: (772) 781-7787
Facsimile: (772) 781-7785
E-mail: sgg@pacificlegal.org

Counsel for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing AMENDED BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS MANOR CARE OF FLORIDA, INC., ET AL., was furnished to the following via first-class mail, postage prepaid, on February 22, 2010:

SUSAN B. MORRISON
Law Offices of Susan B. Morrison, P.A.
1200 West Platt Street
Suite 100
Tampa, FL 33606

ISAAC R. RUIZ-CARUS
Wilkes & McHugh, P.A.
1 North Dale Mabry Highway
Suite 800
Tampa, FL 33609

Counsel for Petitioner

SYLVIA H. WALBOLT
MATTHEW J. CONIGLIARO
ANNETTE MARIE LANG
Carlton Fields, P.A.
P.O. Box 2861
St. Petersburg, FL 33731

ARAM P. MEGERIAN
BRYAN ROTELLA
Cole, Scott & Kissane, P.A.
4301 W. Boy Scout Blvd.
Suite 400
Tampa, FL 33607

Counsel for Respondents

/s/ Steven Geoffrey Gieseler
STEVEN GEOFFREY GIESELER

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), I hereby certify that the foregoing AMENDED BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS MANOR CARE OF FLORIDA, INC., ET AL., is double spaced and has a typeface of 14-point Times New Roman font.

DATED: February 22, 2010.

/s/ Steven Geoffrey Gieseler
STEVEN GEOFFREY GIESELER