IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-514

MCKENZIE CHECK ADVANCE OF FLORIDA, LLC, STEVE A. MCKENZIE, and BRENDA G. LAWSON,

Petitioners.

vs.

WENDY BETTS, DONNA REUTER, et al.,

Respondents.

/

L.T. Case Nos.: 4D08-493, 4D08-494

ON REVIEW OF A CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE FROM THE FOURTH DISTRICT COURT OF APPEAL

PETITIONERS' INITIAL BRIEF ON THE MERITS

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INTRODUCTION

This case is in this Court on review of a certified question from the Fourth District Court of Appeal. That court affirmed the denial of Defendants' motion to compel individual arbitration of claims under Florida's Unfair and Deceptive Trade Practices Act ("FDUTPA") and other Florida remedial statutes. The Fourth DCA held that the class action waiver in the parties' arbitration agreement violates Florida public policy when consumers are unable to secure competent representation to pursue individual small claims. Thus, according to the Fourth DCA, "[o]nly with the availability of class representation would consumers' rights in these payday loan transactions be vindicated." The Fourth DCA certified the following question to this Court as one of great public importance:

> WHEN ASSERTED IN A CLAIM INVOLVING A VIOLATION OF FDUTPA OR ANOTHER REMEDIAL STATUTE, DOES A CLASS ACTION WAIVER IN AN ARBITRATION AGREEMENT VIOLATE PUBLIC POLICY WHEN THE TRIAL COURT IS PERSUADED BY EVIDENCE THAT SUCH A WAIVER PREVENTS CONSUMERS FROM OBTAINING COMPETENT COUNSEL?

This question is now moot, however, and the Fourth DCA's opinion cannot stand, because in the interim the United States Supreme Court has decided AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011). Concepcion makes clear that the Federal Arbitration Act ("FAA") *preempts* any state statute or public policy that conditions enforcement of an arbitration clause on the availability of a

class action. As the Court held, "The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." Id. at 1748. Because the Fourth DCA's opinion *did* condition enforcement of the arbitration agreement at issue in these proceedings on Florida public policy and the availability of class procedures, this Court should remand the case to the Fourth DCA with instructions to vacate its opinion and reverse the order denying the motion to compel arbitration.

In the alternative, if this Court considers the certified question, it should answer "no." The agreement's bar on class representation in arbitration does not violate Florida public policy. As Florida courts have held, neither FDUTPA's text nor its legislative history suggests that the Legislature intended to confer a non-waivable right to class action procedures. To the contrary, as this Court has found, the Legislature determined that FDUTPA's fee-shifting provision—not a blanket right to a class action—provides adequate incentive to bring individual small-value FDUTPA claims.

STATEMENT OF THE CASE AND FACTS

Facts relevant to this appeal are outlined first, followed by the course of proceedings below.

A. Facts Relevant to the Appeal

Plaintiff Tiffany Kelly, a self-described "borderline genius" whose IQ was measured at 129 when she was 8 years old, is "a very bright, articulate woman" [R5. 784; A.5-6; A.110]. Kelly first became a customer of McKenzie Check Advance of Florida, LLC ("MCA") in November 1999 when she contracted for a payday advance [R2. 321-24]. Kelly was not rushed or pressured during her transactions with MCA, and she understood MCA's disclosures [R2. 326]. No one discouraged her from reading the documents presented to her, but instead of reading the agreements, she chose "to get the cash and run" [R2. 324-25; R5. 835-36].

Kelly's contract with MCA includes a one-page binding arbitration agreement, which prominently states in all capital letters and bold type, in the section titled "**WAIVER OF JURY TRIAL AND ARBITRATION AGREEMENT,"** that:

> 3. **THE ARBITRATOR SHALL NOT CONDUCT CLASS ARBITRATION; THAT IS, THE ARBITRATOR SHALL NOT ALLOW YOU TO SERVE AS A REPRESENTATIVE, AS *PARENS PATRIAE*, AS A PRIVATE ATTORNEY GENERAL OR IN ANY OTHER REPRESENTATIVE CAPACITY FOR OTHERS IN THE ARBITRATION.**
>
> *******
>
> **5. You acknowledge and agree that by entering into this Agreement:**

> **(a) YOU ARE WAIVING YOUR RIGHT TO HAVE A TRIAL BY JURY TO RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES;**
>
> **(b) YOU ARE WAIVING YOUR RIGHT TO HAVE A COURT, OTHER THAN A SMALL CLAIMS TRIBUNAL, RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES; and**
>
> **(c) YOU ARE WAIVING YOUR RIGHT TO SERVE AS A REPRESENTATIVE, AS *PARENS PATRIAE*, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY, OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT FILED AGAINST US AND/OR RELATED THIRD PARTIES.**

[A.1].

Kelly also initialed the agreement. In the space just above her initials appears the following, also in upper case and in bold type:

> **NOTICE: By initialing the space below you acknowledge that you have read, understand and agree to the "ADDITIONAL TERMS AND CONDITIONS OF THIS AGREEMENT," including the provisions on "WAIVER OF JURY TRIAL AND ARBITRATION AGREEMENT."**

[A.1].

The arbitration provision grants Kelly several rights that make the arbitration process more flexible and less costly. For example, it gives Kelly her choice of arbitrators and requires MCA, upon request, to advance the costs of arbitration

(other than Kelly's own attorney and witness fees) [Id.]. If Kelly prevails at arbitration, she has no obligation to reimburse MCA [Id.].

Significantly, the arbitration provision also preserves all the substantive rights and remedies that consumers such as Kelly may have under applicable statutes or law, including the right to recover reasonable attorney's fees and expenses [Id.]; [A.110-11]. Kelly also retains the right to seek relief in small claims court [Id.].

Over the next 16 months, Kelly entered into 21 similar transactions with MCA [A.111]. Other than the first two contracts, all others granted Kelly a one-day right of rescission, which she never exercised [Id.]. Each contract contained an arbitration clause and class action waiver [A.7]. The arbitration agreements are all governed by the FAA [Id.]; [A.111]. The parties agreed that if the class action waiver was found to be unenforceable, the arbitration clauses should be stricken [R5. 896].

Kelly's Claims Demand Substantial Damages.

Kelly borrowed a total of $6,950 in principal and paid MCA a total of $860 in fees or interest [A.5-7]. Kelly's individual claims total $24,200 *before* attorney's fees and interest [Id.].

Attorneys Have Represented Consumers in Hundreds of Individual Small Value Suits.

Between January 2005 and July 2007 alone, more than 500 complaints were filed in small claims and county courts in Orange County, Florida by attorney-represented plaintiffs, all claiming damages less than $15,000 [A.19-68]. The complaints assert claims under a variety of consumer protection statutes, including the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) (section 501, Florida Statutes), Florida's Consumer Collection Practices Act (section 559, Florida Statutes), and Florida's Civil Remedies for Criminal Practices Act (section 772, Florida Statutes) [Id.]. During this same time frame, more than two hundred complaints were filed in Palm Beach County by attorney-represented plaintiffs, all claiming damages less than $15,000 [A.69-99]. These complaints also assert claims under various consumer statutes [Id.]. Attorney-represented plaintiffs have filed similar small-dollar claims complaints in the United States District Court for the Southern District of Florida involving claims for truth-in-lending, fair debt collections violations, and fair credit reporting violations [A.101-03].

Between 2006 and 2011, attorney-represented consumers have also filed more than 1,300 small value cases with the American Arbitration Association. See American Arbitration Association, Consumer Statistics: Provider Organization Report, http://www.adr.org/sp.asp?id=22042 (last visited June 14, 2011). Many of these cases involve claims against cash advance businesses. Id. More than 250

cases were resolved with the consumer bearing none of the arbitrator's fees and costs. Id.

B. Course of Proceedings

Plaintiffs Donna Reuter and Wendy Betts filed this putative class action in 2001, asserting state law claims under the Florida Lending Practices Statute (Chapter 687, Florida Statutes), the Florida Consumer Finance Act (Chapter 516, Florida Statutes),[1] the Florida Civil Remedies for Criminal Practices Act (Chapter 772, Florida Statutes ("FCRCPA")), and FDUTPA.

All of these statutes contain fee-shifting provisions. Chapter 687 authorizes an award of principal plus two times the interest paid and reasonable attorney's fees and costs. § 687.147, Fla. Stat. FDUTPA authorizes the award of actual damages, reasonable attorney's fees and costs, and injunctive relief. § 501.2105, Fla. Stat. FCRCPA authorizes treble actual damages and reasonable attorney's fees. § 772.104, Fla. Stat. These provisions do not require that the attorney's fee award be proportional to the damages recovered.

In April 2001, Defendants moved to compel arbitration of Reuter's claim under the arbitration agreement she signed for each of her transactions [R.1 94-96]. In January 2002, the trial court granted Defendants' Motion to Stay and Compel

[1] As the Fourth DCA noted, Chapter 516, which contains no private right of action, is not at issue here. McKenzie v. Betts, 55 So. 3d 615, 617 n.2 (Fla. 4th DCA 2011) [A.122].

Arbitration [A.104-06]. In doing so, the court rejected Reuter's public policy challenge to the class action waiver in the Arbitration Agreement [Id.]. The Fourth DCA affirmed this ruling *per curiam*. Reuter v. McKenzie Check Ad. of Fla., 825 So. 2d 1070 (Fla. 4th DCA 2002) [A.107-08].

In 2007, Plaintiffs amended their complaint to add Tiffany Kelly as a plaintiff [R1. 104-23]. Defendants again moved to compel arbitration based on arbitration agreements that Kelly signed, which were either identical or virtually identical to those Reuter signed [R2. 203-13]. After an evidentiary hearing, the trial court ruled that Kelly's arbitration agreement was not unconscionable under Florida law because the arbitration clause was not procedurally unconscionable [A.114-15]. The trial court observed that "[n]ot all contracts of adhesion are procedurally unconscionable," and found that "Kelly had the opportunity to read the arbitration clauses; MCA did nothing to lead her to believe that she should not; and she had the intellect to understand them" [Id.]. And because the trial court recognized that "[a] clause is void as unconscionable only if it is both procedurally and substantively unconscionable," it held that the arbitration clauses were not unconscionable [Id.]. But the trial court refused to enforce the arbitration agreement because it found that the class action waiver violated Florida's public policy [A.115-18].

Defendants appealed to the Fourth DCA, which affirmed. Betts, 55 So. 3d at 629 [A.134]. The Fourth DCA concluded that "[b]ecause payday loan cases are complex, time-consuming, involve small amounts, and do not guarantee adequate awards of attorney's fees, individual plaintiffs cannot obtain competent counsel without the procedural device of a class action" and that "[t]he class action waiver prevents consumers from vindicating their statutory rights, and thus violates public policy." Id. Relying on the California Supreme Court's decision in Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005), the court concluded that public policy is a contract law defense that applies to all contracts and thus was not preempted by the FAA. Betts, 55 So. 3d at 624 [A.129].

This Court has jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v). Defendants have timely invoked it.

C. Standard of Review

This appeal presents a pure question of law certified by the Fourth DCA: Whether an arbitration clause that provides for bilateral arbitration but prohibits class arbitration is enforceable. Such issues are reviewed *de novo*. D'Angelo v. Fitzmaurice, 863 So. 2d 311, 314 (Fla. 2003) (reviewing certified question of great public importance *de novo*).

SUMMARY OF ARGUMENT

The Fourth DCA's holding that the arbitration provision violates Florida public policy because it does not provide for class proceedings is flatly precluded by AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011). Indeed, in Concepcion, the United States Supreme Court made clear that the FAA preempts state rules conditioning an arbitration agreement's enforceability on the availability of class procedures. Id. at 1748. The Court held that a state law barring enforcement of an arbitration agreement, on grounds that it fails to make class proceedings available, interferes with the FAA's overriding purpose of enforcing arbitration agreements according to their terms. Id. Specifically, the Court held that the Discover Bank decision—relied on here by the Fourth DCA below—was preempted by the FAA. Id. at 1750. The Court expressly rejected the argument—which the Fourth DCA also adopted below—that class proceedings are necessary to prosecute small-dollar claims. Id. at 1753.

Even if Concepcion did not control, this Court should still quash the Fourth DCA's decision. Bilateral arbitration of FDUTPA disputes does not violate Florida public policy or defeat FDUTPA's purposes. No public policy creates a non-waivable right to bring a class action under FDUTPA. To the contrary, by authorizing fee-shifting provisions in FDUTPA, the Legislature has determined that an award of reasonable attorney's fees and costs is the appropriate mechanism

for encouraging private actions to enforce FDUTPA's consumer protection provisions. Because class proceedings are not necessary to vindicate small value claims where an arbitration agreement preserves the consumer's substantive right to recover attorney's fees and costs, class waivers do not impede consumers from obtaining representation on an individual basis, nor do they function as exculpatory clauses leaving consumers without a realistic remedy.

Moreover, the Fourth DCA's "enforceability rule" would allow a trial court to substitute its own policy preferences for the Legislature's whenever a plaintiff persuaded it that, despite FDUTPA's fee-shifting provisions, a plaintiff would not be able to attract competent counsel for a particular claim. The Fourth DCA's analysis would require a case-by-case determination of whether a particular class action waiver violates Florida's public policy. Such a process is unworkable in practice and would lead to inconsistent results. Further, the time, effort, and expense required for a trial court to make such subjective determinations—discovery, briefing, evidentiary hearings, etc.—would deprive the parties of the "lower costs, greater efficiency and speed" of bilateral arbitration. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775 (2010).

ARGUMENT

I. THE FEDERAL ARBITRATION ACT PREEMPTS STATE LAWS INVALIDATING ARBITRATION AGREEMENTS THAT REQUIRE ARBITRATION ON AN INDIVIDUAL BASIS.

The FAA, which governs Kelly's arbitration agreement with MCA (A.111), embodies "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). The FAA also embodies the "fundamental principle that arbitration is a matter of contract." Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010). "By enacting [Section] 2 [of the FAA] . . . Congress precluded States from singling out arbitration provisions." Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996). Therefore, courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms. Stolt-Nielsen, 130 S. Ct. at 1773 ("[T]he central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms."). Under the FAA, "parties are generally free to structure their arbitration agreements as they see fit," including "specify[ing] *with whom* they choose to arbitrate their disputes." Id. at 1774 (emphasis in original).

Consistent with these principles, in Concepcion, 131 S. Ct. 1740, the United States Supreme Court held this term that the FAA preempts state laws that

predicate the enforcement of arbitration provisions on the availability of class action procedures. The Fourth DCA's holding that Florida law prohibits a class action waiver in an arbitration agreement where the plaintiff's claim is for a violation of FDUTPA or another remedial statute—like the similar California Supreme Court decision in Discover Bank that Concepcion abrogated—is preempted by the FAA.

In Concepcion, the Supreme Court specifically rejected the argument that section 2 of the FAA, which preserves certain generally applicable contract defenses, also preserves a state's refusal to enforce class waivers in consumer contracts based on public policy. Concepcion, 131 S. Ct. at 1748. The Court recognized that "nothing in [section 2] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." Id. "The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." Id.

Thus, Concepcion makes clear that the FAA preempts a Florida public policy conditioning the enforcement of an arbitration agreement on the availability of classwide procedures; such a policy would interfere with the FAA's

fundamental purpose, which reflects the federal policy favoring arbitration. Indeed, "class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate a procedural morass." Id. at 1751 (noting that class arbitration *requires* procedural formality to satisfy due process concerns and to bind absent class members to the arbitration results). And class arbitration greatly increases risks to defendants, who have no rights to "appellate" review, even when the damages allegedly owed to thousands of claimants are aggregated to millions of dollars. Id. at 1752.

The Supreme Court in Concepcion also considered and rejected the argument that classwide proceedings are necessary to vindicate small claims and that class action waivers effectively serve as exculpatory clauses, leaving consumers without an effective remedy. Id. at 1753. Rather, the Supreme Court held that whether a class waiver frustrates a state public policy is irrelevant because "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." Id.

In addition, because the Fourth DCA's enforceability rule applies *only* to arbitration agreements in consumer contracts under FDUTPA or other remedial statutes, and *only* where the trial court is persuaded by evidence that a class action waiver prevents consumers from obtaining competent counsel, the rule *does not*

apply to contracts generally and such a rule cannot invalidate MCA's bilateral arbitration agreement. See Concepcion, 131 S. Ct. at 1747 (a court may not rely on the uniqueness of an agreement to arbitrate as the basis for a state-law holding that enforcement would be unconscionable or would violate public policy because this would enable the court to effect what the state legislature cannot). Additionally, such a rule would contravene the FAA's command that arbitration agreements be placed on the same footing as other contracts. Id. at 1745.

In sum, Concepcion established a rule of general applicability: State laws requiring the availability of classwide arbitration, or allowing a party to a consumer contract to invalidate a class waiver in an arbitration agreement, interfere with the fundamental attributes of arbitration and are preempted by the FAA. 131 S. Ct. at 1748. The rule is not limited to the state law defense of unconscionability. The Supreme Court held that the FAA preempts *all* state laws inconsistent with the FAA's purposes, regardless of doctrinal or statutory basis. See id. at 1746-47. As an illustration, the Court pointed to a state rule that refused to enforce, as against public policy, a consumer arbitration agreement that failed to provide for judicially monitored discovery. The Court noted that a "court might reason that no consumer would knowingly waive his right to full discovery, as this would enable companies to hide their wrongdoing" or "the court might simply say that such agreements are exculpatory." Id. at 1747. The Court, however, rejected the contention that such a

rule "is applicable to 'any' contract and thus preserved by § 2 of the FAA," because "[i]n practice, of course, the rule would have a disproportionate impact on arbitration agreements[.]" Id.

Shortly after Concepcion, the Supreme Court granted certiorari and vacated, on preemption grounds, a judgment of the South Carolina Supreme Court holding that an arbitration clause prohibiting class actions is unenforceable on public policy grounds, and remanded for further consideration in light of Concepcion. See Sonic Auto. v. Watts, No. 10-315, 2011 WL 1631040 (U.S. May 2, 2011).

A federal district court recently applied the same broad reading of Concepcion. In Arellano v. T-Mobile USA, Inc., No. C-10-05663-WHA, 2011 WL 1842712 (N.D. Cal. May 16, 2011), the court rejected the plaintiff's argument that Concepcion never addressed the question of "whether a legislature could restrict a private arbitration agreement when it inherently conflicted with a public statutory purpose and transcended private interests" but rather "focused on the availability of a class action procedure." Id. at *2. The court ruled that "Concepcion, on the contrary, decided that states cannot refuse to enforce arbitration agreements based on public policy." Id.[2]

[2] State courts have similarly concluded, in light of Concepcion, that the "enforcement of arbitration clauses cannot be conditioned upon the availability of classwide arbitration." Wallace v. Ganley Auto Group, No. 95081, 2011 WL 2434093, at *3 (Ohio Ct. App. June 16, 2011) (affirming order granting motion to compel arbitration in putative consumer class action). The court concluded that

Here, the Fourth DCA ruled that MCA's arbitration agreement was unenforceable on public policy grounds because it failed to provide for classwide proceedings. Concepcion forecloses such a ground for invalidation; the FAA preempts the Fourth DCA's rule.

II. KELLY'S CONTRACT REQUIRING BILATERAL ARBITRATION OF HER DISPUTE DOES NOT VIOLATE FLORIDA PUBLIC POLICY.

As shown above, this Court need not address Florida public policy or any of the state-law grounds on which the Fourth DCA based its opinion because the FAA preempts state law. Even if this Court did consider state law, however, the parties' agreement to arbitrate claims on an individual basis does not violate public policy.

As we explain below, (A) the legislature's public policy choices bind the courts; (B) no public policy mandates class procedures in FDUTPA cases; and (C) the legislature has determined that an attorney's fee award provides a sufficient incentive for consumers to vindicate their FDUTPA rights.

A. **The Legislature's Public Policy Choices Are Binding on Trial Courts.**

A judicially created policy cannot override a valid legislative policy announcement. See, e.g., In re Apportionment Law, Senate Joint Resolution No. 1305, 263 So. 2d 797, 806 (Fla. 1972); City of Jacksonville v. Bowden, 64 So. 769,

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"even if we were to find that the [state consumer protection act] contains a policy favoring class actions (an issue we need not decide), this court may not apply that policy in a way that disfavors arbitration." Id.

772 (Fla. 1914). This Court long ago explained that "[w]here a statute does not violate the federal or state Constitution, the legislative will is supreme, and its policy is not subject to judicial review. The courts have no veto power, and do not assume to regulate state policy[.]" Bowden, 64 So. at 772.

This Court later quoted this passage and concluded that:

> [T]his Court, in accordance with the doctrine of separation of powers, will not seek to substitute its judgment for that of another coordinate branch of the government, but will only measure acts done with the yardstick of the Constitution. The propriety and wisdom of legislation are exclusively matters for legislative determination.

In re Apportionment Law, 263 So. 2d at 806. This Court reiterated this principle in Bankston v. Brennan, 507 So. 2d 1385 (Fla. 1987), holding that "[W]hen the legislature has actively entered a particular field and has clearly indicated its ability to deal with such a policy question, the more prudent course is for this Court to defer to the legislative branch." Id. at 1386 (declining to create a common-law cause of action against social hosts who serve alcohol to minors where Legislature has limited such liability).

Courts have applied this well-established separation of powers doctrine in the FDUTPA context, holding that "the judicial policy pronouncement in the form of the economic loss rule promulgated by our supreme court has no application within the realm of a statutory cause of action brought under the FDUTPA when the genesis of such a claim is founded on a written sales contract." Delgado v.

J.W. Courtesy Pontiac GMC-Truck, Inc., 693 So. 2d 602, 609 (Fla. 2d DCA 1997); see also Comptech Int'l, Inc. v. Milam Commerce Park, Ltd., 753 So. 2d 1219, 1222 (Fla. 1999) (refusing to allow "the judicially favored economic loss rule to override a legislative policy pronouncement").

Measured against these principles, the Fourth DCA's substitution of its policy preference for that of the legislature cannot stand. As demonstrated below, the Legislature has unequivocally stated that consumers do not have a non-waivable right to bring class action suits for violation of FDUTPA. To the contrary, FDUTPA's fee-shifting provision represents a statutory manifestation of a clear legislative policy choice to promote the filing of private actions through the award of reasonable attorney's fees to prevailing plaintiffs—not a blanket right to a class action. Where, as here, the Legislature specifically considered, but chose not to include, provisions explicitly providing for class actions, the judicial branch "has no prerogative to alter or limit the legislative policy clearly expressed in the enactment in order to further a different policy or view preferred by the courts, including one favored by the Florida Supreme Court." Delgado, 693 So. 2d at 609 (citing Webb v. Hill, 75 So. 2d 596, 605 (Fla. 1954)).

Florida courts "should be guided by the rule of extreme caution when called upon to declare transactions void as contrary to public policy[,]" not only because the Legislature sets policy, but to avoid conflict with "the fundamental public

policy of the right to freedom of contract[.]" Bituminous Cas. Corp. v. Williams, 17 So. 2d 98, 101-02 (Fla. 1944). "The court should not strike down a contract, or a portion of a contract, on the basis of public policy grounds except in very limited circumstances." Fla. Windstorm Underwriting v. Gajwani, 934 So. 2d 501, 506 (Fla. 3d DCA 2005).

Similarly, the "law has long recognized an individual's right to waive statutory protections as well as constitutional or contractual rights." S.J. Bus. Enters., Inc. v. Colorall Techs., Inc., 755 So. 2d 769, 771 (Fla. 4th DCA 2000) (citing Gilman v. Butzloff, 22 So. 2d 263, 265 (Fla. 1945)). When the Legislature wishes to declare certain rights nonwaivable, it knows how to say so.[3] In the absence of a legislative or constitutional limitation on a party's ability to waive the right at issue, courts should presume that the right can be waived. Fla. Windstorm Underwriting, 934 So. 2d at 507 (refusing to declare a contract void as against public policy "in the absence of a clear public policy directive in the language of the statute").

[3] See, e.g., § 718.612(3), Fla. Stat. ("It is against the public policy of this state for any developer to seek to enforce any provision of any contract which purports to waive the right of a purchasing tenant to bring an action for specific performance."); § 320.839, Fla. Stat. (manufacturer or dealer of mobile home may not require buyer to waive warranty rights and "[a]ny such waiver shall be deemed contrary to public policy and unenforceable and void"); § 520.13, Fla. Stat. (nonwaivable right to attorney's fees); § 516.31(6), Fla. Stat. (waiver of limitation of consumer's liability for certain deficiencies after the collateral for a loan is repossessed "shall be void and unenforceable as contrary to public policy").

B. No Florida Public Policy Mandates Class Procedures for FDUTPA Actions.

No Florida public policy provides consumers with a non-waivable right to bring class action suits for violation of FDUTPA. The Legislature has not chosen to forbid consumers from bargaining away the ability to bring a class action. Indeed, Florida courts, including the Fourth DCA, have repeatedly held that an "arbitration clause's bar on class representation does not defeat any of the remedial purposes of FDUTPA." Fonte v. AT&T Wireless Servs., Inc., 903 So. 2d 1019, 1024 (Fla. 4th DCA 2005). The Fourth DCA in Fonte examined FDUTPA's text and legislative history and concluded that class actions are not necessary to vindicate the statute's consumer protection goals:

> [T]here exists a difference between the availability of the class action tool, and possessing a blanket right to use the tool under any circumstance. . . . An intent to create such a "blanket right," a non-waivable right, to litigate by class action [must] be gleaned from the text and legislative history. . . . *We find that neither the text nor our review of the legislative history of FDUTPA suggests that the legislature intended to confer a non-waivable right to class representation.*

Fonte, 903 So. 2d at 1024-25 (emphasis supplied). See also Orkin Exterminating Co. v. Petsch, 872 So. 2d 259, 261 (Fla. 2d DCA 2004) ("When considering whether the legislature intended to preclude the submission of FDUTPA claims to arbitration . . . , the legislature would have to state such a requirement in unambiguous text. . . . FDUTPA contains no such statement of legislative

intent."); Cruz v. Cingular Wireless, LLC, No. 2:07-cv-714-FtM-29-DNF, 2008 WL 4279690, at *3 (M.D. Fla. Sept. 15, 2008) (finding no evidence of legislative intent to preclude class action waiver); Reuter v. Davis, 2006 WL 3743016, at *2 (Fla. 15th Cir. Ct. Dec. 12, 2006) (same). Indeed, as the legislative history demonstrates, in enacting FDUTPA, the Legislature specifically considered, but *rejected*, provisions explicitly providing for class actions. Cf. Committee bill drafts [A.255], with bill introduced and enacted [A.270; A.141].

Below we demonstrate that a class action waiver is consistent with Florida public policy because (1) bilateral arbitration benefits consumers; and (2) a class action waiver does not deprive Kelly of a fair opportunity to seek redress.

1. Bilateral arbitration benefits consumers.

Contrary to violating public policy, the class action waiver *promotes* the public policy of Florida favoring arbitration as an alternative way to resolve disputes. See Roe v. Amica Mut. Ins. Co., 533 So. 2d 279, 281 (Fla. 1988) (reiterating that Florida favors arbitration for settling disputes). Because arbitration is quicker and less expensive than litigation, a bilateral arbitration agreement often allows for greater consumer recovery. By "trad[ing] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration," consumers reduce the costs and delays of the courts. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S.

614, 628 (1985). See also Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1378 (11th Cir. 2005) ("[T]hat certain litigation devices may not be available in arbitration is part and parcel of arbitration's ability to offer simplicity, informality, and expedition[.]"); accord Stolt-Nielsen S.A., 130 S. Ct. at 1775 ("In bilateral arbitration, parties forego the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution . . . .").

As the United States Supreme Court noted in Stolt-Nielsen, in contrast to the recognized benefits of traditional, bilateral arbitration, there is nothing efficient, quick or cost-effective about class actions. Id. ("[C]lass-action arbitration changes the nature of arbitration" and "the relative benefits of class-action arbitration are much less assured[.]"). Indeed, contrary to the assumption that class actions are necessary to protect consumers' rights, in many cases plaintiffs often recover *more* in individual arbitration than in a class action. Class action plaintiffs—as opposed to their attorneys—rarely receive large recoveries. See Class Action Fairness Act of 2005, Pub. L. No. 109-2 §2(a)(3), 119 Stat. 4 ("Class members often receive little or no benefit from class actions, and are sometimes harmed.").

2. A class action waiver does not deprive Kelly of a fair opportunity to seek redress.

MCA's arbitration agreement offers customers several low-cost alternatives to class litigation to pursue their claims. A customer can pursue claims in small claims court [A.1-4], with or without an attorney or costly expert witnesses.

Businesses often have a substantial incentive to settle even meritless small value claims to avoid the cost of defense.

If the customer initiates arbitration, MCA advances the customer's portion of the costs of arbitration, including the filing, administrative, hearing and arbitrator's fees, to the extent they exceed the comparable court costs [A.3-4]. If the arbitrator renders a decision or award in the customer's favor, then the customer need not reimburse MCA for these fees, and MCA will reimburse the customer any fees previously paid [Id.]. The customer may select from three different venues (or a local arbitrator): unless otherwise agreed, the arbitration hearing will be conducted in the county of the customer's residence, or within 30 miles from such county, or in the county in which the transaction occurred [Id.].

Most importantly, MCA's agreement preserves all substantive rights a customer would have in court, including the right to attorney's fees and costs [Id.]. "In short, the only avenue taken away from the Plaintiff by the arbitration/class action waiver is a class action itself which, although providing one mechanism through which to assert several small claims, is not the only way to bring Plaintiff's small claim." Pendergast v. Sprint Nextel Corp., 592 F.3d 1119, 1141 (11th Cir. 2010); see also Rivera v. AT&T Corp., 420 F. Supp. 2d 1312, 1322 (S.D. Fla. 2006) (holding enforceable under Florida law a class action waiver in a telephone contract because of alternative avenues for relief).

C. The Legislature Has Determined That an Attorney's Fee Award Provides a Sufficient Incentive for Consumers to Vindicate Their FDUTPA Rights.

Rather than conferring a non-waivable right to class representation, the Legislature provided incentives for consumers to enforce FDUTPA through section 501.2105, Florida Statutes—FDUTPA's fee-shifting provision. As this Court has noted, that provision's "primary purpose . . . is to encourage individual citizens to bring civil actions to enforce statutory policy." Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d 828, 833 (Fla. 1990). As this Court explained, "[FDUTPA] depends for its enforcement on its 'enforcing authority' and the injured consumers. If, because of the small sums involved, consumers cannot recover in full their attorney fees, they will quickly determine it is too costly and too great a hassle to file suit, and individual enforcement of this act will fail." Id. (quoting LaFerney v. Scott Smith Oldsmobile, Inc., 410 So. 2d 534, 536 (Fla. 5th DCA 1982)); see also Presidential Leasing, Inc. v. Krout, 896 So. 2d 938, 942 (Fla. 5th DCA 2005) (noting that the fee provision "was intended to facilitate private claims against businesses engaging in deceptive trade practices.").[4]

This Court in Quanstrom expressly recognized that FDUTPA cases may involve small value claims; thus, in these and similar public policy enforcement cases it adopted the lodestar approach, which uses several factors to arrive at a

[4] The Legislature also protected consumers who unsuccessfully bring good faith claims by making attorney's fee awards discretionary. § 501.2105, Fla. Stat.

reasonable attorney's fee. Under this approach, the amount of damages recovered is *not* the controlling factor in determining reasonable attorney's fees. Quanstrom, 555 So. 2d at 834; see also LaFerney, 410 So. 2d at 536 (holding that the trial court abused its discretion by awarding an unreasonably low amount of attorney's fees to a prevailing consumer in a FDUTPA action and "completely reject[ing]" the defendant's argument that the relatively small amount of damages recovered justified a low fee award). In addition, in determining a reasonable attorney's fee, "the existence of a contingency fee arrangement is but one of the factors to be considered." Quanstrom, 555 So. 2d at 834.

Justice Overton, who wrote the majority opinion in Quanstrom, later noted that in public policy enforcement cases an enhancement of the lodestar was authorized when the prevailing plaintiff can establish that it would have faced substantial difficulties in finding counsel in the local or other relevant market without the adjustment for risk. See Lane v. Head, 566 So. 2d 508, 513 (Fla. 1990) (Overton, J., specially concurring). And this Court confirmed in Bell v. U.S.B. Acquisition Co., 734 So. 2d 403 (Fla. 1999), that the lodestar contingency adjustment factor for public policy enforcement cases like FDUTPA means that a court is "authorized to award a greater fee based on the contingent nature of the fee arrangement . . . [which] would be analogous to a court's application of a multiplier [in tort and contract cases]." Id. at 411.

The availability of a reasonable attorney's fee award under FDUTPA thus "assists parties with legitimate causes of action or defenses in obtaining competent legal representation even if they are unable to pay an attorney on an hourly basis." Id.; see also Munao v. Homeowners Ass'n of La Buona Vita Mobile Home Park, Inc., 740 So. 2d 73, 79 (Fla. 4th DCA 1999) (citing Quanstrom and U.S.B. Acquisition Co., and approving a contingency risk multiplier under public interest-oriented statute prohibiting unconscionable rent in mobile home parks because "this policy also will encourage attorneys to provide services to persons who otherwise could not afford the customary legal fee"). Therefore, the Fourth DCA's concerns—that "an inadequate fee award is likely even when fees are mandatory" and will "prevent[] individual plaintiffs from obtaining competent representation to pursue their claims against payday lenders"—are unfounded. Betts, 55 So. 3d at 629 [A.134].

With respect to the public policy considerations underlying attorney fee awards, Quanstrom declared that FDUTPA and other consumer protection cases were in the same category as civil rights anti-discrimination and environmental cases. Quanstrom, 555 So. 2d at 833-34 (public policy enforcement cases "generally present discrimination, environmental and consumer protection issues"). As shown below, FDUTPA is only one of many statutes where, as courts have

repeatedly held, the Legislature properly made the policy choice to use a fee-shifting provision to provide incentives for bringing enforcement actions.

1. Florida Consumer Collection Practices Act Claims

This Court has held that a plaintiff who prevailed on a claim under the Florida Consumer Collection Practices Act ("FCCPA") is entitled to an award of attorney's fees that exceeds the contingency fee contained in the contract between plaintiff and his attorney. Salzgeber v. Kelly, 826 So. 2d 366, 367 (Fla. 2d DCA 2002). The court reasoned that a FCCPA case "is a category one case, a public policy enforcement case," under Quanstrom, and that the "primary purpose of [category one] fee authorizing statutes is to encourage individual citizens to bring civil actions that enforce statutory policy." Id. (modifications in original). Because a contractual fee arrangement does not cap the amount of fees awarded in public policy enforcement cases, the fee award was authorized. Id. (citing U.S.B. Acquisition Co., 734 So. 2d at 407).

2. Federal Civil Rights Claims

In Hensley v. Eckerhart, 461 U.S. 424 (1983), the Supreme Court noted that the purpose of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. section 1988, "is to 'ensure effective access to the judicial process' for persons with civil rights grievances." Id. at 429 (quoting H.R.Rep. No. 94-1558, p. 1 (1976)). The Supreme Court reiterated this term that a fee award to a prevailing plaintiff under

section 1988 is justified because "he serves as a private attorney general, vindicating a policy that Congress considered of the highest priority." Fox v. Vice, ___ S. Ct. ___, 2011 WL 2175211, at *5 (U.S. June 6, 2011) (citations and internal quotations omitted). As with the consumer statutes at issue here, the Court explained that the fee provision in civil rights laws serves both a compensatory and deterrent function, stating that "[f]ee shifting in such a case at once reimburses a plaintiff for what it cost him to vindicate civil rights and holds to account a violator of federal law." Id. (citations and internal quotations omitted).

3. Equal Access to Justice Claims

In Commissioner, Immigr. & Natur. Serv. v. Jean, 496 U.S. 154, 163 (1990), the Supreme Court found that "the specific purpose of [the Equal Access to Justice Act (EAJA)] is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." The Court explained that "[t]he Government's general interest in protecting the federal fisc is subordinate to the specific statutory goals of encouraging private parties to vindicate their rights. . . ." Id. at 165.

Due to the similarity in language in the EAJA, section 1988, and other statutes, the Supreme Court made clear that "[t]he standards set forth in this

opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" Hensley, 461 U.S. at 433 n.7.[5]

As these cases illustrate, the Legislature's authorization of fee-shifting provisions answers the Fourth DCA's concern that individual plaintiffs may not be able to obtain competent representation in small value cases without the availability of a class action. Betts, 55 So. 3d at 629 [A.134].

III. FLORIDA PUBLIC POLICY CANNOT BE DETERMINED BY TRIAL COURTS ON AN AD HOC, CASE-BY-CASE BASIS.

As demonstrated above, so long as an arbitration agreement preserves the consumer's right to recover attorney's fees and costs, class waivers do not prevent consumers from obtaining individual representation, nor do they function as exculpatory clauses. Rather than following this bright-line standard for determining whether an arbitration agreement violates public policy, however, the Fourth DCA instead adopted a rule requiring subjective, case-by-case determinations. Under the court's approach, if "no evidence is presented indicating that awards will be inadequate or unlikely," then "courts will assume that an individual plaintiff can obtain competent representation." Betts, 55 So. 3d

[5] The similar purpose of awarding attorney's fees in environmental cases is to encourage citizens to bring meritorious actions. See Natural Res. Defense Council, Inc. v. EPA, 484 F.2d 1331, 1337 (1st Cir. 1973). "Without the possibility of fees many meritorious actions would never be brought, since the plaintiff would face a certainty of attorney's fees far higher than any personal gain he would reap if victorious." Id.

at 625 [A.130]. However, if "the plaintiff presents evidence that adequate fees are unlikely" then "courts need not assume that the plaintiff can obtain competent counsel for an individual claim." Id. at 627 [A.132].

The Fourth DCA's approach contains several fundamental flaws. First, its newly minted policy overrides the Legislature's policy choice, embodied in FDUTPA's attorney's fee provision, that an award of reasonable attorney's fees and costs provides sufficient incentive to bring private actions. See supra, at II.C. In addition, its enforceability rule would turn every trial court into a mini-legislature, determining "policy" at its own discretion based on the particular facts involved. This would create several additional problems: the public policy determination will turn on subjective and unpredictable factors such as (i) the ability (and diligence) of a plaintiff to procure "expert" testimony regarding the complexity and costs of these cases; and (ii) whether the FDUTPA claims would be too "small" to attract counsel. But as the United States Supreme Court recently found, an enforceability framework that requires "damages [to] be predictably small" is so "toothless and malleable" as to be no standard at all. Concepcion, 131 S. Ct. at 1750. Further, by requiring individualized evidentiary hearings about the adequacy of an attorney's fee award in a particular case, the proposed rule would transform many simple consumer disputes into a costly, time-consuming, and

unnecessarily complex "battle of the experts"—precisely the situation that arbitration is designed to avoid.

The Fourth DCA's rule also would create an unworkable patchwork policy whereby Florida's public policy is determined on an ad hoc, case-by-case basis, and risks inconsistent results. Different trial judges could reach different conclusions about whether the same arbitration clause violated Florida's public policy. In each case, the result would depend on the trial judge's subjective determination about whether "persuasive" evidence was presented that the plaintiff would be unlikely to recover an adequate amount in fees to attract competent representation. For example, although the trial court here rejected plaintiff *Reuter's* public policy challenge to the class action waiver, it later ruled that the virtually identical clause in plaintiff *Kelly's* agreement violated Florida's public policy. The court discounted the evidence that consumers have had little trouble securing representation for individual actions in small claims and county courts under consumer protection statutes with fee-shifting provisions [A.113]. See supra at 6.

Perhaps the worst part of the Fourth DCA's rule, however, is the uncertainty its case-by-case approach creates. In addition to increasing litigation, its standard would place a new and uncertain burden on commerce and ordinary business relationships. This Court has recognized the importance of fostering certainty in

such relationships. "Such a rule would be inconsistent with the proposition that a basic function of the law is to foster certainty in business relationships, not to create uncertainty by establishing ambivalent criteria for the construction of those relationships." Horne v. Vic Potamkin Chevrolet, Inc., 533 So. 2d 261, 262 (Fla. 1988) (declining to create a new, fact-specific public policy rule that would have expanded tort liability for automobile dealers).

The Fourth DCA's subjective, ad hoc approach of evaluating whether an arbitration clause violates public policy thus cannot be reconciled with "what is generally recognized as a bedrock feature of our system of jurisprudence: stability and certainty of the law through decisions based upon established legal principles and doctrines." Gilbert v. Gilbert, 447 So. 2d 299, 303 (Fla. 2d DCA 1984) (Lehan, J., concurring and dissenting in part). Indeed, "[i]f courts felt entirely free to use their perceptions of 'public policy' as grounds to decide disputes on a case by case basis without regard to established legal principles and doctrines, citizens and their lawyers would be hard-pressed to predict the legal consequences of their conduct or, with confidence, to accommodate their conduct to the law." Id.

CONCLUSION

This Court should decline to answer the certified question and instead quash the Fourth DCA's decision in light of Concepcion. If the Court decides to answer the certified question, however, the answer should be "no." In either event, this Court should remand the case to the trial court with instructions to order Kelly's individual dispute to arbitration.

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Respectfully submitted,

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I certify that this brief complies with the font requirement of Fla. R. App. P. 9.210(a)(2) and is submitted in Times New Roman 14-point font.

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