EMERGING TRENDS AND CONFLICTS IN THE ENFORCEMENT OF ARBITRATION CLAUSES

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Editor's Note: [The growth in the use of mandatory arbitration clauses in a variety of contracts and the litigation that has resulted regarding the enforcement of those clauses have resulted in a challenging variety of inconsistent approaches to enforcement. This article reviews the major conflicts among Florida's District Courts of Appeal regarding enforcement of arbitration clauses and the analysis of unconscionability. It also describes conflicts between state and federal law regarding when arbitration can be compelled. Until these conflicts are resolved, practitioners need to be aware of the different rules that may govern an arbitrable dispute depending on where the dispute arises.]

Both Florida and federal law agree that arbitration agreements are favored by the courts. It is increasingly clear, however, that arbitration is *not* preferred by plaintiff's lawyers, who have developed numerous techniques to avoid this "favored" method of alternative dispute resolution.[1] The enforcement of an arbitration clause no longer involves the mere satisfaction of the three-prong *Seifert*[2] test, as stated by the Florida Supreme Court in 1999, but requires intensive analysis of threshold questions, the application of an alternative "public policy" test, and the resolution of whether the court or the arbitrator should decide certain issues. Indeed, given these complexities, it is difficult to determine what it means to be "favored." The question of litigation-versus-arbitration often becomes a mini-battle at the beginning of lawsuits, potentially prolonged by an interlocutory appeal, which defeats the purpose of quick and inexpensive dispute resolution.[3]

At least three different approaches to the *Seifert* test currently exist. The First District applied it in *Powertel v. Bexley*,[4] further defining the "unconscionability" portion of the test. The Fourth District Court of Appeal then softened the *Powertel* standards by analyzing unconscionability along a "sliding scale."[5] Taking a step further, the Fourth District recently employed a "public policy" inquiry which appears to sidestep the unconscionability test altogether.[6] To date, no other appellate court has adopted either the "sliding scale" or "public policy" test. Because of the Fourth District's standards, a defendant in West Palm Beach may find it more difficult to enforce arbitration than defendants in Orlando, Tampa or other Florida cities.

Enforcement of arbitration clauses does not solely depend on meeting defined tests, though, and the choice of venue also may influence the success of enforcing arbitration. The Second District Court of Appeal concluded in *Rollins, Inc. v. Lighthouse Bay Holdings, Ltd.*[7] that remedial limitations[8] are for the arbitrator, not the court, to decide. The Florida Supreme Court denied review of that case and there is no clear support or disapproval from the other districts. In short, the Second District's approach propels a Tampa defendant into arbitration while the West Palm Beach defendant mentioned above would still be litigating the sliding scale and public policy tests.

Worse still, the Court of Appeals for the Eleventh Circuit and the Supreme Court of Florida squarely conflict on who decides — court or arbitrator — whether a disputed contract is void.[9] Thus, Floridians in state court face an additional litigation hurdle that Floridians in federal court do not address until arbitration.

With these conflicts unresolved, "arbitration enforcement" has developed into a complicated sub-specialty of litigation. This article serves to explain emerging trends in arbitration enforcement including (1) the conflict between Florida state and federal courts on who decides whether a contract is "illegal," (2) the Fourth District Court of Appeal's "sliding scale" and "public policy" tests, and (3) the Second District Court of Appeal's opinion directing remedial limitations to the arbitrator. As other appellate courts decide arbitration questions, these issues are expected to get more, rather than less, complicated. Until then, the choice of forum may predict the likelihood of enforcing arbitration.

A BRIEF PRIMER ON ARBITRATION ENFORCEMENT

In 1999, the Florida Supreme Court held that there are three elements for trial courts to consider when ruling on a motion to compel arbitration: (1) whether a valid arbitration agreement exists, (2) whether an arbitrable issue exists, and (3) whether the right to arbitration has been waived.[10] This *Seifert* test has endured as the basic framework for both state and federal arbitration enforcement analysis for six years.[11]

The first prong of the *Seifert* test includes the critical debate of unconscionability, which is the battleground for the enforcement of arbitration clauses.[12] Most Florida courts recognize the definitions and requirements set forth in *Powertel*, which held that to decline to enforce a contract as unconscionable, the contract must be both procedurally and substantively unconscionable.[13] "Procedural unconscionability" refers to the circumstances under which the contract was entered.[14] "Substantive unconscionability" involves the agreement itself and whether the terms are so unreasonable and outrageously unfair as to shock the conscience.[15]

The second prong of the *Seifert* test is the question of whether the arbitration clause is broad enough to include the cause of action.[16] Finally, the third prong addresses whether a party has waived its right to arbitration by acting inconsistently with its desire to compel arbitration.[17] The standard for "waiver" is different, however, depending on whether the court is applying state or federal law. In state court, the Florida Supreme Court has recently determined that there is no requirement for proof of prejudice to the party opposing arbitration in order for there to be waiver of the right to arbitrate.[18] One might think that, lacking the need for prejudice, any pleading other than a motion to compel arbitration would amount to waiver. But the "no prejudice required" standard for waiver of arbitration in state court should not be seen as a conclusive bright line test. The Fourth District Court of Appeal even more recently held that a successful motion to dismiss for failure to state a cause of action does not constitute "active participation" in litigation amounting to waiver.[19] This indicates that at least one appellate court believes that a party can file some responsive pleading prior to seeking arbitration without committing waiver. The First District has also pointed out that "timeliness" and waiver are distinct issues, with disputes over timeliness to be resolved in arbitration.[20]

In stark contrast, the Eleventh Circuit, applying the Federal Arbitration Act ("FAA"),[21] requires both waiver *and* prejudice to the opposing party.[22] Thus, a careless litigant who fears it has committed waiver may want to seek arbitration under the FAA, rather than the Florida Arbitration Code.

STATE AND FEDERAL LAW CONFLICT ON THE "THRESHOLD CHALLENGE"

Before a defendant can analyze the chances of enforcing arbitration under the *Seifert* test, a threshold question must be resolved. The Florida Supreme Court held in *Cardegna v. Buckeye Check Cashing, Inc.*[23] that the trial court, upon motion by the opposing party, must determine whether the subject contract is illegal and *void ab initio* before compelling arbitration. Shortly after the divided *Cardegna* decision, the Fifth District, in *Vacation Beach v. Charles Boyd Construction*,[24] confirmed that the trial court must consider this "threshold challenge" before arbitration may be enforced.

Confusing matters, the Florida Supreme Court distinguished "void" from "voidable" and held that the court can bar enforcement of a contract which violates "public policy."[25] It is unclear if this is the same "public policy" referenced by the Fourth District in *Blankfeld v. Richmond Health Care, Inc.* (discussed below).[26] Meanwhile, the Eleventh Circuit sends the federal question of "voidability" of the contract to the arbitrator.[27] This creates the inconsistent situation where a Florida defendant can immediately enforce arbitration in the face of an "illegality challenge" but not in state court down the street.[28]

At the outset of litigation, defense counsel should investigate whether there is a colorable question of illegality or violation of "public policy." If it is anticipated that this argument will arise, defense counsel may consider removing the matter to federal court in order to avoid a lengthy court-battle on the illegal-contract question. Court observers who do not have the deadlines of pending litigation will want to wait and see if the U.S. Supreme Court resolves the conflict in its 2005-2006 term.[29]

A. *Cardegna v. Buckeye Check Cashing, Inc.*

In *Cardegna*, a class of borrowers filed suit claiming that a check cashing ("payday advance") contract was really an illegal, usurious loan which violated Florida statutes. The defendant invoked the arbitration clause which specifically referenced the FAA. The plaintiffs argued that the contract was *void ab initio* on the grounds that it was illegal and therefore none of the contractual terms were enforceable (even the otherwise valid arbitration clause). The court concluded that Florida "public policy" and contract law prohibit "breathing life into a potentially illegal contract" and

that "a contract which violates a provision of the constitution or a statute is void and illegal and will not be enforced."[30] The court went on to note that contracts in violation of statutory prohibitions are void.[31]

The *Cardegna* decision specifically limited the holding to void, rather than voidable, contracts.[32] Under general contract theory, a party to a voidable contract could still assent to the agreement whereas a void contract is null as a matter of law.[33] It is this "key distinction" that permits the *Cardegna* decision to yield a different outcome than a 1967 U.S. Supreme Court decision where a claim of fraud in the inducement of the contract was sent to the arbitrator to decide.[34]

The Florida Supreme Court did, however, expressly acknowledge that *Cardegna* conflicts with the Eleventh Circuit's opinion in *Bess v. Check Express*.[35] In a remarkably similar case involving a dispute over a payday advance contract, the court in *Bess* held that federal law, and not state law, required compulsion of arbitration where the legality of the contract would be resolved.[36] The *Bess* court concluded that the plaintiff was challenging the content of the contract, and not the existence of the contract, which was an issue for the arbitrator under the FAA.[37] In Justice Cantero's dissent in the *Cardegna* decision, he concluded that the issue was not whether the contract is void but *who decides* whether the contract is void.[38] Consistent with *Bess* and three other federal appellate courts, Justice Cantero claimed in his *Cardegna* dissent that the FAA expressly limits courts to determine whether the making of the arbitration agreement itself — not the contract — is disputed.[39] In June 2005, the U.S. Supreme Court accepted review of the *Cardegna* case.[40]

B. *Vacation Beach v. Charles Boyd Construction*

In July 2005, the Fifth District Court of Appeal ruled in *Vacation Beach v. Charles Boyd Construction* that a trial court erred in compelling arbitration by not first ruling on the issue of whether a construction contract was illegal or in violation of public policy.[41] Relying on *Cardegna*, the court held that if a party claims a contract containing an arbitration clause violates state law, the trial court is required to determine the legality of the contract before it can compel arbitration.[42]

In *Vacation Beach*, a landowner entered into a contract to build condominiums with an allegedly unlicensed building contractor. When suit arose, the landowner contended that the defendant-contractor could not enforce the arbitration clause under Florida Statute 489.128 ("[a]s a matter of public policy, contracts entered into on or after October 1, 1990 by an unlicensed contractor shall be unenforceable in law our in equity by the unlicensed contractor").[43]

The Fifth District held that arbitration could not be enforced since "contracts transgressing public policy, including contracts sought to be enforced by an unlicensed contractor..., are to be considered illegal and will not generally be enforced by the courts."[44] In the court's analysis of "public policy," each of the cases the court cited involved parties who either (1) violated statutes where certain acts were unlawful if undertaking without a license (for which there was a penalty) or (2) violated statutes where certain acts were prohibited for the protection of the public.[45]

C. Lingering Questions Beyond the State-Federal Conflict

The definition of "public policy" is distinctly absent in the *Cardegna* and *Vacation Beach* cases and thus appears open to interpretation. Creative lawyering may reveal any number of statutes which fit the criteria.[46] Indeed, creative drafting also might provide a solution if the party developing a contract simply sets out the arbitration provision as a separate document thereby preventing a valid arbitration clause from being tainted by an allegedly "illegal" contract.

None of the cases cited in *Vacation Beach* discussed the application of statutory waiver. For example, Chapter 400, Florida Statutes (Nursing Home Resident's Rights) is a remedial statute with civil penalties driven by a stated public policy of ensuring quality care to the elderly, but there is at least one Florida Supreme Court decision confirming that statutory rights under that section can be waived.[47] If *Cardegna* is applied broadly enough, almost any party disputing arbitration and claiming breach of contract might be able to make a colorable claim that the enforcing party has violated the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), a broad consumer protection statute rife with public policy.[48]

In 1944, the Florida Supreme Court cautioned courts to be guided by the "rule of extreme caution" before declaring private contracts void as contrary to public policy and stated that there must be "some great prejudice to the dominant public interest sufficient to overthrow the fundamental public policy of the right to freedom of contract between parties *sui juris*."[49] That case remains valid law, but the *Cardgena* court did not discuss the "rule of extreme caution," nor did it address the waiver of statutory rights.

On a national scale, a notably absent issue in *Cardegna* is the question of class arbitration. The default rule is that if the arbitration clause is silent then class action claims can be arbitrated and any dispute on that topic is for the arbitrator, not the court, to resolve.[50] Defense counsel should be prepared for the

claim that an arbitration clause improperly prohibits classwide relief, contrary to a controlling statute.[51] Counsel should also watch the developing nationwide case law on class arbitration waivers which may follow *Cardegna* to the U.S. Supreme Court.[52]

The Fourth District has also developed a "public policy" test which may — or may not — be the same test as *Cardegna*'s "public policy" standard. As discussed more fully below, it is perhaps notable that neither the Florida Supreme Court in *Cardegna* nor the Fifth District in *Vacation Beach* referenced the Fourth District's test (nor vice versa), which leaves open the question as to whether these courts are applying the same test.

THE FOURTH DISTRICT'S "SLIDING SCALE" AND "PUBLIC POLICY" TESTS

A. The Sliding Scale

In 2003, the Fourth District complicated the first prong of the *Seifert* test by setting forth what appears to be a new standard for unconscionability analysis in Florida. In *Romano v. Manor Care, Inc.*,[53] the Fourth District claimed that "most courts" use a sliding scale standard when assessing whether both forms of unconscionability are present. The court held that "because of the egregious substantive unconscionability of the terms of the agreement," only "some quantum of procedural unconscionability" was necessary to deny arbitration in that case.[54] This standard admittedly "tip[s] the scales in favor of unconscionability," despite the fact that arbitration is supposed to be favored and the burden is on the party opposing arbitration.[55]

Curiously, the "most courts" that the Fourth District relied upon in *Romano* were located in Michigan, California, and Nevada.[56] Less than two years after *Romano*, the Fourth District downgraded the precedent to "many courts" (not "most") which use the sliding scale analysis — but then proceeded to cite to six of its own decisions and two other Florida decisions where "balancing approach" and "sliding scale" are never mentioned.[57] Reducing the numbers even further, the Second District subsequently noted that only "some courts" use the sliding scale test, citing to two Fourth District decisions, but declined to apply it.[58] In the years since *Romano*, no other Florida court has adopted the Fourth District's sliding scale test.[59] Despite the Fourth District's varying proclamations, the application of the sliding scale test has yet to become widely accepted in Florida unconscionability jurisprudence.

The *Romano* decision also weakened the requirement that both forms of unconscionability must exist in order to deny arbitration when it relied upon fairly mundane facts to establish "some quantum"[60] of procedural unconscionability. Specifically, in addressing the procedural circumstances, the court admitted that the arbitration agreement was not "hidden in the fine print" but, instead, the court noted that the signor was elderly and "while [he] owned his own business, there was no showing he had legal training to understand the rights he was signing away..."[61] The court further pointed out that, in the nursing home agreement, the resident was already admitted to the facility and was not specifically told that he did not have to agree to arbitration.[62]

One interpretation of the basis for procedural unconscionability in *Romano* is that arbitration will only be enforced when the facts include a young person with "legal training" who signed a voluntary arbitration agreement with a three day recision clause.[63] This stands contrary to other decisions where signed arbitration agreements have been enforced against blind or non-English speaking signors merely because they were bound by their signatures.[64] While the signor's life experience is relevant, even the U.S. Supreme Court has enforced arbitration against a kitchen employee suing a nationwide chain restaurant.[65] To suggest that a signor must have some "legal training" is a demand beyond even the Fourth District's own prior opinions.[66] Finally, contrary to the *Romano* opinion, the Fifth District opined that the belated execution of a contract, after several months of performance by both sides, should have heightened the signor's concern to study and discuss the documents or consult an attorney before signing.[67]

B. "Public Policy" Test

Two years after *Romano*, in May 2005, the Fourth District issued an arbitration opinion arising out of another nursing home case. In *Blankfeld v. Richmond Health Care, Inc.*, the court held that an arbitration clause was void as contrary to "public policy" and that the signor lacked capacity as a mere health care proxy.[68] Despite the fact that the court previously engaged in an unconscionability analysis when faced with arbitration clauses, the Fourth District in *Blankfeld* set forth its new "public policy" test and then "clarif[ied] that holding a contractual provision unenforceable because it defeats the remedial provisions of a statute, and is thus contrary to public policy, is distinct from finding unconscionability."[69] This new test may confuse more than "clarify" but, given that *Blankfeld* was an *en banc* decision, the test is almost certain to be used.

The Fourth District also sought to "clarify" some

potential conflicts as well. First, only two years before, in *Consolidated Resources Healthcare v. Fenelus*, the Fourth District had enforced a nursing home arbitration agreement signed by the son/health care proxy.[70] When the same situation arose in *Blankfeld*, the court declined to enforce arbitration on the grounds that a health care proxy did not have authority to agree to arbitrate.[71] The Fourth District, in *Blankfeld*, looked back on *Fenelus* and "clarified" that, in that decision, "we held that the lack of a signature by the nursing home on the agreement did not invalidate the entire agreement..."[72] To the contrary, however, even a superficial review of *Fenelus* reveals that the lack of signature by the nursing home was addressed in three of the six pages of the opinion, leaving the second half of the opinion to employ the pre-*Romano* unconscionability analysis.[73]

Second, in *Blankfeld*, the Fourth District declined to certify conflict with *Powertel* or *Weston* because neither the *Powertel* nor *Weston* claimants asserted the public policy argument, which the Fourth District itself did not develop until 2005.[74] Third, the *Blankfeld* decision completely overlooked the court's own statement a year before that there was no authority to decline a valid arbitration clause "for reasons other than unconscionability."[75]

One might argue that the first three pages of *Blankfeld* were merely dicta because the decision ultimately rested upon the lack of an authorized signor.[76] Shortly after *Blankfeld*, however, the Fourth District issued its opinion in *Fonte v. AT&T Wireless Services, Inc.*, in which it applied both the "public policy" and post-*Romano* unconscionability tests.[77] In *Fonte*, the plaintiff purchased a cell phone service which included an arbitration clause and a waiver of attorney's fees and class representation. The Court held that FDUTPA's remedial entitlement to attorney's fees voided the contractual prohibition of fees (however that term was severed from the contract).[78] As to class representation, however, the Court saw no statutory basis to confer a non-waivable right to class representation in FDUTPA.[79] Apparently passing the public policy test, the Fourth District then applied the *Romano* unconscionability test and ultimately sent the matter to arbitration.[80]

C. Lingering Questions After *Romano* and *Blankfeld*

The Fourth District's *Romano* unconscionability analysis and the new "public policy" test raises several questions for defense counsel. First, it is unclear whether the sliding scale analysis is exclusively applied by the Fourth District or if the other districts will ultimately follow this test. Since *Romano* was decided, there have been more than 130 appellate decisions regarding arbitration in Florida with no court other than the Fourth District applying the *Romano* sliding scale test.[81] It is assumed that parties resisting arbitration will cite to *Romano*'s test, since it is acknowledged to favor a finding of unconscionability.

Second, the Fourth District has not addressed waiver of statutory rights under either test. This includes the issue of whether a waiver of punitive damages creates a denial of a statutorily-created remedial right when, at the responsive pleading stage, the claimant does not have leave to seek punitive damages.[82] Indeed, even one concurring judge in *Blankfeld* wrote separately to suggest that the category of "remedial" statutes is so broad that the designation, by itself, does not reveal anything meaningful about "public policy."[83]

Third, it is unclear whether the *Blankfeld* test applies the same "public policy" referenced in *Cardegna*. Both *Blankfeld* and *Fonte* were decided after *Cardegna*, so the Florida Supreme Court's test was certainly available to the Fourth District to rely upon; indeed, *Cardegna* is even cited in *Fonte* regarding the separate issue of severability.[84] As it stands, however, it is unclear whether both courts are applying the same "policy."

Fourth, and leading into our final section, what remains unclear is whether these issues are more appropriately left for the arbitrator, rather than the court, to decide.[85]

THE SECOND DISTRICT SENDS REMEDIAL LIMITATION ISSUES TO ARBITRATION

In *Rollins, Inc. v. Lighthouse Bay Holdings, Ltd.*, the Second District Court of Appeal held that, in a case of first impression, an arbitrator, not the court, must decide whether an arbitration provision is enforceable when it contains a limitation on a statutory remedy.[86] Shortly thereafter, a federal district court concurred with *Rollins* and approved the use of a severability clause to eliminate offending limitations.[87] More recently, the Florida Supreme Court declined review of *Rollins* despite the plaintiff's claim that the decision conflicted with nine other Florida decisions, including *Cardegna* and *Romano*.[88] Indeed, even the U.S. Supreme Court has thus far declined to offer a clear ruling on who decides the so-called "gateway" versus "non-gateway" issues.[89] It is anticipated that the breadth of the arbitration clause and the presence of a severability clause may play roles in the resolution of who decides these issues.

In *Rollins*, the plaintiff brought suit over the performance of a termite treatment contract which in-

cluded an arbitration clause with remedial limitation provisions. Relying upon a thirty-five count complaint, the plaintiff was able to argue that the remedial limitation conflicted with at least one of their statutory claims and that arbitration was unenforceable.[90] The Second District concluded that this decision was outside of the context of unconscionability and was up to the arbitrator.[91]

To date, the U.S. Supreme Court has declined to decide whether remedial limitations are questions of "arbitrability" for the court or a question for the arbitrator to decide.[92] If there is ambiguity in a remedial limitation, the U.S. Supreme Court has held that the arbitrator shall interpret the provision.[93] Several federal courts have also considered the issue and have sent remedial limitations to the arbitrator.[94] The Eleventh Circuit has considered the same issue and, acknowledging the presence of a severability clause, has sent matters to the arbitrator.[95]

The *Rollins* court followed the federal court precedent and, in support of the decision to leave the interpretation of remedial limitations to the arbitrator, noted that "we can only speculate whether [the plaintiff] will ever be affected by the remedial limitations of which it complains.[96] That will depend in part on whether [the plaintiff] prevails in its claim and it will also depend on how the arbitrator construes provisions..."[97] In short, the court acknowledged that a plaintiff may never reach the alleged limitation. A good example of the "prematurity" argument involves waiver of punitive damages. At the responsive pleading stage, a plaintiff has not sought nor has been granted leave to claim punitive damages; as such, the claim that a remedial limitation barring punitive damages has somehow prejudiced the plaintiff is speculative or, at best, premature at the point when the parties are disputing a motion to compel arbitration.

Defense counsel should raise the *Rollins* "let the arbitrator decide" argument at the trial and appellate level. In doing so, however, the defendant may have to concede that the plaintiff can at least bring such claims in arbitration, which would leave it up to the arbitrator to decide whether it can award damages or remedies.[98] If ambiguities exist in a disputed remedial limitation, counsel should illuminate them for the court in order to take advantage of the U.S. Supreme Court's holding that such ambiguities shall be interpreted by the arbitrator. Counsel should also carefully review the contract language in order to argue that the arbitration clause calls for "all disputes" to be resolved by the arbitrator or that any offending limitations can be severed.[99] Counsel seeking to enforce arbitration should argue that the resolution of remedial limitations is premature at the responsive pleading stage and/or further argue that the plaintiff has waived those statutory rights. Additionally, it will be useful to follow, or participate, as organizations like the ABA or the American Arbitration Association (AAA) develop their positions on these disputes.[100] Finally, counsel may want to consult the client to determine any willingness to waive disputed provisions.[101]

CONCLUSION

Throughout all of these trends and conflicts, it does appear that a "plain vanilla" arbitration agreement in a valid contract has a strong chance of being enforced.[102] That said, given conflicting federal and state standards of waiver as well as the Fourth District's unique "sliding scale" application of the *Powertel* unconscionability analysis, it also appears that being in federal court or at least outside of the Fourth District may be the most favorable venues for parties seeking to enforce arbitration.

The confusion over "public policy" and remedial limitations have become nation-wide issues — not simply a Florida issue — with courts resolving these issues in conflicting decisions. The U.S. Supreme Court will likely have to weigh in to resolve the conflicts before anyone can claim that there is clarity in the enforcement of arbitration clauses.

1 *Ivax Corp. v. B. Braun of America, Inc.*, 286 F.3d 1309, 1315 (11th Cir. 2002) (citations omitted) ("questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration); *Hirshenson v. Spaccio*, 800 So. 2d 670, 674 (Fla. 5th DCA 2001); Jeffrey Liggio, *Combatting Mandatory Arbitration Clauses in Insurance Contracts*, Winter 2004 ATLA-CLE 179 (2004); David Wirtes, Jr., *Suggestions for Defeating Arbitration*, 24 A. J. Trial Advoc. 111 (2000).

2 *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999).

3 For some stirring commentary on the "abusive practice [of] the use of compelled arbitration agreements," see Robert Hornstein, *The Fiction of Freedom of Contract — Nursing Home Admission Contract Arbitration Agreements*, 16 St. Thomas L. Rev. 319, 320 (Winter 2003); Ann Krasuski, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts With Residents*, 8 DePaul J. Health Care L. 263 (2004).

4 *Powertel v. Bexley*, 743 So. 2d 570 (Fla. 1st DCA 1999).

5 *Romano v. Manor Care, Inc.*, 861 So. 2d 59, 62 (Fla. 4th DCA 2003).

6 *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296, 297 (Fla. 4th DCA 2005).

7 898 So. 2d 86 (Fla. 2d DCA 2005), *rev. denied*, No. SC05-689 (Fla. July 12, 2005).

8 A "remedial limitation" is a contract clause which limits liability or damages in contravention of a remedial statute.

9 *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860 (Fla. 2003); *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002).

10 *Seifert*, 750 So. 2d at 636.

11 *Raymond James Financial Servs. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005); *see also, e.g., John B. Goodman Ltd. Partnership v. THF Const., Inc.*, 321 F.3d 1094, 1098 (11th Cir. 2003).

12 Christopher Hopkins, *The Perils of Enforcing "Favored" Arbitration*, 24 No. 1 Trial Advoc. Q. 30, 31-33 (2005).

13 *Powertel*, 743 So. 2d at 574.

14 *Id.*

15 *Id.*

16 *See King Motor Co. v. Jones*, 901 So. 2d 1017 (Fla. 4th DCA 2005) (finding claim for auto salesperson's alleged theft of customer's identity did not have a significant relationship with the sales agreement containing an arbitration clause).

[17] *Seifert*, 750 So. 2d at 636.
[18] *Raymond James Financial Services*, 896 So. 2d at 711.
[19] *Houchins v. King Motor Company of Ft. Lauderdale*, 906 So. 2d 325, 328 (Fla. 4th DCA 2005).
[20] *Alderman v. City of Jacksonville*, 902 So. 2d 885 (Fla. 1st DCA 2005).
[21] 9 U.S.C. § 1 *et. seq.*
[22] *Ivax Corp.*, 286 F.3d at 1315-1316.
[23] 894 So. 2d 860.
[24] *Vacation Beach v. Charles Boyd Constr.*, 906 So. 2d 374 (Fla. 5th DCA 2005).
[25] *Cardegna*, 894 So. 2d at 863.
[26] *See id.*; *Vacation Beach*, 906 So. 2d at 377; *Blankfeld*, 902 So. 2d at 297-299.
[27] *Bess*, 294 F.3d 1298.
[28] Petition for Writ of Certiorari at 4, *Buckeye Check Cashing, Inc. v. Cardegna*, No. 04-1264 (March 21, 2005) (available at 2005 WL 670174).
[29] *See Buckeye Check Cashing, Inc. v. Cardegna*, 125 S. Ct. 2937 (2005) (granting certiorari).
[30] *Cardegna*, 894 So. 2d at 864.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.* at 863 (*citing Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)).
[35] *Id.* at 864 (*citing Bess*, 294 F.3d at 1298).
[36] *Id.*
[37] *Id.*
[38] *Id.* at 867-875 (Cantero, J., dissenting) (referencing decisions from 4th, 6th, 7th, and 11th Circuit Courts of Appeals).
[39] *Id.*; *see also* Appellant's Opening Brief at 24, *Costello v. Beneficial Montana, Inc.*, No. 05-126 (Mont. July 2005), available at 2005 WL 1841287 (the Maryland and North Dakota supreme courts have agreed with Justice Cantero's dissenting position in *Cardegna*, and the issue is pending before the Supreme Court of Montana).
[40] *Buckeye Check Cashing, Inc. v. Cardegna*, 125 S. Ct. 2937. At least one commentator has suggested that, by the mere fact of accepting certiorari, the high court may overturn *Cardegna* and clarify to what extent the FAA may preempt state contract law. *See* Barkley & Barbara Clark, *U.S. Supreme Will Hear Florida Case on Validity of Payday Loan Arbitration Clauses*, 07-05 Clark's Sec. Trans. Monthly 3 (July 2005).
[41] *Vacation Beach*, 906 So. 2d at 378.
[42] *Id.* at 377.
[43] *Id.*
[44] *Id.* (citations omitted).
[45] *Id.* (*citing Promontory Enters., Inc. v. Southern Eng'g & Contracting., Inc.*, 864 So. 2d 479 (Fla. 5th DCA 2004); *Castro v. Sangles*, 637 So. 2d 989 (Fla. 3d DCA 1994); *Cardegna*, 894 So. 2d 864; *D & L Harrod, Inc. v. U.S. Precast Corp.*, 322 So. 2d 630 (Fla. 3d DCA 1975)).
[46] *Blankfeld*, 902 So. 2d at 301-309 (Farmer, C.J., concurring).
[47] *See Unicare Health Facilities, Inc. v. Mort*, 553 So. 2d 159 (Fla. 1989).
[48] Currently plaintiffs can avoid arbitration enforcement by claiming a violation of FDUTPA is unconscionable. Under *Cardegna*, an opposing party would not need pursue the two-part unconscionability analysis but simply claim that the contract violated public policy.
[49] *See Bituminous Gas. Corp. v. Williams*, 17 So. 2d 98, 101-102 (Fla. 1944).
[50] *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414 (2003).
[51] *See Powertel v. Bexley,* 743 So. 2d 570 (Fla. 1st DCA 1999) (holding arbitration clause was substantively unconscionable because it precluded classwide relief). *But see Orkin Exterminating Co., Inc. v. Petsch*, 872 So. 2d 259 (Fla. 2d DCA 2004) (sending class action to arbitration but stating that limitation of liability clause was not barred; defendant acknowledged that arbitrator had power to declare limitation clause unenforceable).
[52] *See Discover Bank v. Superior Court of Los Angeles*, 30 Cal. Rptr. 3d 76 (Cal. 2005) (deeming the matter a gateway issue for the courts to decide, and holding that "at least some class action waivers in consumer contracts [such as "bill stuffer" amendments to credit card agreements] are unconscionable under California law"); *see also* Barkley & Barbara Clark, *California Supreme Court Strikes Down Arbitration Clause/Class Action Waiver and Delaware Choice of Law Provision*, 07-05 Clark's Sec. Trans. Monthly 4 (July 2005) (noting that (1) almost all consumer contracts are adhesive, (2) California may become the forum of choice for consumer class relief, and (3) there may be preemption and conflict of law issues for the U.S. Supreme Court to resolve).
[53] *Romano*, 861 So. 2d at 62 ("Most courts take a 'balancing approach' to the unconscionability question").
[54] *Id.* at 63.
[55] *Id.* at 62; *see supra* note 1 and *Weston v. Gainesville Health Care Cntr.*, 857 So. 2d 278, 288 (Fla. 1st DCA 2003) ("As the party seeking to avoid the arbitration provision on the ground of unconscionability, the burden was on the appellee to present evidence sufficient to support that claim") (citations omitted); *Greentree Financial Corp. v. Randolph*, 531 U.S. 79, 91-92, 121 S.Ct. 513, 522, 148 L. Ed. 2d 373 (2000) ("the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration") (citations omitted).
[56] *Romano*, 861 So. 2d at 62.
[57] *See Fonte v. AT&T Wireless Services, Inc.*, 903 So. 2d 1019, 1023 n. 1 (Fla. 4th DCA 2005)(citations omitted).
[58] *Orkin Exterminating Co.*, 872 So. 2d at 265 (*citing Romano*, 861 So. 2d at 60-63 and *Kohl v. Bay Colony Club Condo., Inc.*, 398 So. 2d 865, 868 (Fla. 4th DCA 1981)).
[59] The Fourth District has twice distinguished *Romano*. See *Richmond Healthcare v. Digati*, 878 So. 2d 388 (Fla. 4th DCA 2004), *reh'g denied* (Jan. 12, 2004) and *Fonte v. AT&T Wireless Services, Inc.*, 903 So.2d 1019 (Fla. 4th DCA 2005). According to a Westlaw search in August 2005, no other appellate court has relied on *Romano*.
[60] *Romano*, 861 So. 2d at 63.
[61] *Id.* at 63-64.
[62] *Id.*
[63] The plaintiff in *Consolidated Resources Healthcare Fund I Ltd. v. Fenelus*, 853 So. 2d 500, 505 (Fla. 4th DCA 2003) had previously failed to convince the court that a fifty year old signor was an "older man" lacking competence to bargain.
[64] See *Merrill, Lynch v. Benton*, 467 So. 2d 311 (Fla. 5th DCA 1985) (holding non-English speaking signor was bound by a signed contract); *Estate of Etting v. Regents Park at Aventura, Inc.*, 891 So. 2d 558 (Fla. 3d DCA 2005) (finding arbitration agreement was not invalid merely because signed by legally blind nursing home resident).
[65] *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002) (enforcing arbitration agreement between grill operator and national restaurant chain).
[66] *See Stewart Agency, Inc. v. Robinson*, 855 So. 2d 726 (Fla. 4th DCA 2003) (signor with a two-year (not four year) degree in business was not "academically handicapped" nor an "unschooled layperson").
[67] *Weston v. Gainesville Health Care Cntr.*, 857 So. 2d at 287; *see also Hardy v. Regions Mortgage Inc.*, 2005 WL 1820042 (11th Cir. August 3, 2005) (unreported decision) (also referencing the significance of a delayed execution of a contract after performance has begun).
[68] *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296 (Fla. 4th DCA 2005).
[69] *Id.* at 297. Also of note, the *Blankfeld* decision appears to be the second time that the Fourth District has voiced its disapproval of the form arbitration clause used by this nursing home. *See id.* at 297-299 and 302, n. 5 (Farmer, C.J., concurring) ("It is not clear to me how we get from the *administration* of an arbitration proceeding to replacing Florida law with the NHLA's private body of rules..."); *Richmond Healthcare v. Digati*, 878 So. 2d at 393 (Gross, J., dissenting) ("I believe the arbitration agreement in this case is substantively unconscionable...").
[70] *Fenelus*, 853 So. 2d at 502.
[71] *Blankfeld*, 902 So. 2d at 300-301.
[72] *Id.* at 299 n. 1.
[73] *Fenelus*, 853 So. 2d at 503-506.
[74] *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d at 300 n. 2.
[75] See *Digati*, 878 So. 2d at 391. Presumably, the two cases could be harmonized on the grounds that the *Blankfeld* public policy test would confirm whether an arbitration provision was "valid" before the unconscionability analysis could be applied.
[76] The Fourth District held in *Blankfeld* that the health care proxy could not bind the nursing home resident to arbitration because waiving a right to sue in court is not a health care decision since "there is nothing in the statute to indicate legislative intent that such a proxy can enter into contracts which agree to things not strictly related to health care decisions." 902 So. 2d at 301. Arguably, however, the health care proxy statute does provide the authority to obtain and release not only medical information, but financial information (income, assets, banking and financial records) in order to apply for benefits. *See* § 765.401 and § 765.205(1)(e), (2), Florida Statutes. In fact, "health care decisions" is defined to include non-health care matters such as access to private medical records and authority to waive that privacy right; access to financial records and authority to disseminate them; the authority to apply (or not) for benefits;

and whether the patient will make an anatomical gift after death (certainly not a health care decision benefitting the *patient*). *See* § 765.101 and § 765.401, Florida Statutes. Practically speaking, since the proxy may bind the patient financially, it is likely that the proxy will need to sign lengthy forms, including those with legal provisions which are now standard in our society. To pick and choose what terms are "strictly related" to health care decisions may create complications which the health care surrogate and proxy statutes were intended to overcome. *See* § 765.102, Florida Statutes.

77 See *Fonte v. AT&T Wireless Services, Inc.*, 903 So. 2d at 1023.

78 *Id.* at 1024.

79 *Id.* at 1025.

80 Counsel for parties seeking arbitration can find some solace in *Fonte*, since the matter was ultimately sent to arbitration after passing both tests. *Fonte* also may reinvigorate the severability argument because the court severed an offending attorney fee provision. Although *Fonte* and its two cited cases involve agreements with severability clauses, this may not foreclose severing offending terms in a contract without a severability clause when severance does not alter the essence of the agreement. Indeed, the Fourth District noted that severance was supported by the Florida Arbitration Code. *See Fonte*, 903 So. 2d at 1024.

81 Based upon an August 2005 Westlaw search for Florida state and federal cases with "arbitration" in the Headnotes after October 1, 2003.

82 This issue was raised in *Estate of Lacey v. Healthcare and Retirement Corporation of America,* pending before the Fourth District, case number 4D 04-4450.

83 *Blankfeld*, 902 So. 2d at 303-307 (Farmer, C.J., concurring).

84 *Fonte*, 903 So. 2d at 1025.

85 See *King Motor Co. v. Jones*, 901 So. 2d at 1018 (declining to consider argument of whether issue is for arbitrator, not court, to decide).

86 898 So. 2d 86 (Fla. 2d DCA 2005), *rev. denied*, No. SC05-689 (Fla. July 12, 2005).

87 *Penberthy v. AT & T Wireless Services, Inc.*, 354 F. Supp. 2d 1323 (M.D. Fla. 2005).

88 Petitioner's Amended Jurisdiction Brief at 2, *Rollins, Inc. v. Lighthouse Bay Holdings, Ltd.*, No. SCO5-689 (Fla. May 2005), available at 2005 WL 1303983. While the Florida Supreme Court's denial of discretionary review is not published, it is anticipated that the Court believed that there was no direct conflict since no other state court had taken up whether issues were for the arbitrator to decide. Throughout arbitration decisions, as shown in this article, there is frequent reference to issues not being raised by counsel which may illustrate the complexity and speed of emerging trends in this area of the law. *See King Motor Co.*, 901 So. 2d at 1018 ("[A]ppellant's point on appeal, that the arbitrator, rather than the judge, should have decided the issue of arbitrability was not properly raised below.").

89 *Penberthy v. AT & T Wireless Services, Inc.*, 354 F. Supp. 2d at 1329 n. 6 (*citing Pacificare Health Sys. Inc. v. Book*, 538 U.S. 401, 123 S.Ct. 1531, 155 L.Ed.2d 578 (2003)).

90 *Rollins, Inc.*, 898 So. 2d at 86.

91 *Id.* at 89.

92 *Id.* at 87-88; *Penberthy*, 354 F. Supp. 2d at 1329 n. 6 (*citing Pacificare Health Sys. Inc. v. Book*, add cite).

93 *Rollins, Inc.*, 898 So. 2d at 87.

94 *Id.* at 88; *see also Booker v. Robert Half International*, 413 F.3d 77 (D.C. Cir. 2005).

95 *Penberthy*, 354 F. Supp. 2d at 1328 (*citing Anders v. Hometown Mortgage Servs., Inc.*, 346 F.2d 1024, 1027 (11th Cir. 2003)).

96 *Rollins, Inc.*, 898 So. 2d at 88.

97 *Id.*

98 *See Orkin Exterminating Co.*, 872 So. 2d at 265.

99 In both *Rollins* and *Penberthy*, the courts relied upon the existence of severability clauses. It is unclear whether courts or arbitrators could be persuaded to sever offending remedial limitations without a severability clause. *See also Richmond Healthcare v. Digati*, 878 So. 2d at 390 ("The trial judge further held that no portion of the arbitration clause was severable because he 'would have to 'blue pencil or rewrite' the NHLA Rules to preserve them.").

100 *Arbitration: ABA Session Focuses on Severability, Arbitration Pacts, Arbitration Disclosure*, BNA-CLD d9 (8/16/05).

101 *See Orkin Exterminating Co.*, 872 So. 2d at 262-265. Counsel should note the court's warning: "And we note that in future proceedings Orkin will be bound by the construction of the limitation of liability provision it has advanced in this appeal."

102 *See Fenelus*, 853 So. 2d at 505; *Weston*, 857 So. 2d at 287.

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