

No. 04-1264

IN THE
Supreme Court of the United States

BUCKEYE CHECK CASHING, INC.,

Petitioner,

v.

JOHN A. CARDEGNA AND DONNA REUTER,

Respondents.

**On Writ of Certiorari to the
Supreme Court of Florida**

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Florida Supreme Court erred by holding that the Federal Arbitration Act allows a party to avoid arbitration by claiming that the underlying contract containing an arbitration clause (but not the arbitration clause itself) is void for illegality.

PARTIES TO THE PROCEEDING

Petitioner Buckeye Check Cashing, Inc. was respondent in the Florida Supreme Court. Respondents John A. Cardegna and Donna Reuter were petitioners in that court.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner hereby states that it has no parent corporation, and that no publicly traded company owns 10% or more of its stock.

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INTRODUCTION

Almost forty years ago, in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), this Court held that the Federal Arbitration Act (“FAA”) does not allow a party to avoid arbitration by claiming that the underlying contract containing an arbitration clause (but not the arbitration clause itself) was fraudulently induced. Under the FAA, the *Prima Paint* Court explained, a challenge to the validity of the underlying contract is severable from a challenge to the validity of the arbitration clause. Thus, once it is clear that the parties have agreed to arbitrate their dispute, the arbitrator—not the court—must resolve any challenge to the validity of the underlying contract in the first instance.

That principle is controlling here, because respondents are challenging the validity of their underlying contracts with petitioner, but their challenge does not implicate the making of their agreement to arbitrate. Respondents neither deny that they assented to an arbitration agreement, nor challenge the arbitration agreement itself as illegal. Rather, respondents contend only that the underlying contracts are illegal as usurious. Under *Prima Paint*, that challenge must be resolved in the first instance by an arbitrator, not a court.

The Florida Supreme Court, however, attempted to distinguish *Prima Paint* on the ground that the challenge there (fraud in the inducement) would have rendered the underlying contract *voidable* under state law, whereas the challenge here (illegality) would render the underlying contracts *void* under state law. But, as Justice Cantero noted in dissent below, that is a distinction without a difference in this context. Whether the underlying contracts are alleged to be voidable or void as a matter of *state* law has nothing to do with the real issue—whether respondents’ challenge to the legality of their underlying contracts implicates their assent to arbitration as a matter of *federal* law. Not surprisingly, thus, all six federal courts of appeals that have considered this issue have concluded

that a party cannot avoid arbitration under *Prima Paint* by simply challenging the underlying contract as illegal. See *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 880-82 (11th Cir. 2005); *Bess v. Check Express*, 294 F.3d 1298, 1304-06 (11th Cir. 2002); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 636-38 (4th Cir. 2002); *Burden v. Check Into Cash of Ky., LLC*, 267 F.3d 483, 489-90 (6th Cir. 2001); *Harter v. Iowa Grain Co.*, 220 F.3d 544, 550 (7th Cir. 2000); *3H & Assocs., Inc. v. Hanjin Eng'g & Constr. Co.*, No. 97-16751, 1998 WL 657722, at *2 (9th Cir. Sept. 3, 1998) (unpublished); *Lawrence v. Comprehensive Bus. Servs. Co.*, 833 F.2d 1159, 1161-62 (5th Cir. 1987). As these courts recognize, *Prima Paint* establishes as a matter of federal law that the alleged invalidity of an underlying contract does not “taint” or otherwise prevent enforcement of an arbitration clause to which the parties concededly have assented.

Because the Florida Supreme Court majority (as the dissent below noted) “disregard[ed] controlling federal law and the federal preference for enforcing arbitration clauses,” Pet. App. 26a, this case once again calls for this Court to vindicate federal arbitration rights against the very hostility that motivated the FAA in the first place. Accordingly, this Court should reverse the judgment.

OPINIONS BELOW

The Florida Supreme Court’s decision is reported at 894 So. 2d 860 (2005), and reprinted in the Appendix to the Petition for Certiorari (“Pet. App.”) at 1a-26a. The Florida District Court of Appeal’s decision is reported at 824 So. 2d 228 (2002), and reprinted at Pet. App. 27a-32a. The Florida trial court’s unreported decision denying petitioner’s motion to compel arbitration is reprinted at Pet. App. 33a-34a.

JURISDICTION

The Florida Supreme Court rendered its decision on January 20, 2005. Pet. App. 1a. Petitioner filed a timely petition for certiorari on March 21, 2005. This Court granted that petition on June 20, 2005. The Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

PERTINENT STATUTORY PROVISIONS

Section 2 of the Federal Arbitration Act provides in pertinent part:

A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

Section 4 of the Federal Arbitration Act provides in pertinent part:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action ... of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. ... The court shall hear the parties, and upon being satisfied that the making of the agreement for

arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. ... If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.

9 U.S.C. § 4.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Buckeye Check Cashing, Inc. provides check-cashing and payday advance (or “deferred presentment”) services in many States, including Florida. These services allow consumers to obtain immediate cash, either by cashing a third-party check or (more commonly) by writing a personal check to be cashed at some future date against anticipated income. Payday advances are typically short-term, small-dollar transactions that, for a service fee, allow consumers to deal with unanticipated cash-flow shortfalls between regularly scheduled paydays. Buckeye is licensed to do business in Florida under that State’s Check Cashing and Foreign Currency Exchange Act, Fla. Stat. § 560.301, and its conduct is comprehensively regulated under the State’s Deferred Presentment Act, Fla. Stat. § 560.401 *et seq.*

Respondents John A. Cardegna and Donna Reuter (collectively “plaintiffs”) entered into separate deferred presentment transactions with Buckeye throughout 1999 and 2000. With each transaction, plaintiffs signed a “Deferred Deposit and Disclosure Agreement,” which (among other things) documented the amount of each cash advance, detailed the service fees associated with each such advance (both as a dollar amount and as an annual percentage rate equivalent), and denoted the date on which Buckeye would seek to redeem the

personal checks plaintiffs presented at the time of their respective transactions.¹ Each of those contracts specified that “[t]he fee charge[d] for a deferred deposit transaction is a service fee and not interest.” JA 35, 37, 39, 41.

Each contract also contained a broad arbitration provision, which plaintiffs were required to review and separately initial every time they conducted a transaction with Buckeye. In relevant part, those provisions state:

1. Arbitration Disclosure. By signing this Agreement, you agree that i[f] a dispute of any kind arises out of this Agreement or your application therefore or any instrument relating thereto, th[e]n either you or we or third-parties involved can choose to have that dispute resolved by binding arbitration as set forth in Paragraph 2 below.

2. Arbitration Provisions. Any claim, dispute, or controversy (whether in contract, tort or otherwise, whether pre-existing, present, or future, and including statutory, common law, intentional tort, and equitable claims) arising from or relating to this Agreement ... *or the validity, enforceability, or scope of this Arbitration Provision or the entire Agreement* (collectively “Claim”), shall be resolved, upon the election of you or us or said third-parties, by binding arbitration pursuant to this Arbitration Provision.... This arbitration Agreement is made pursuant to a transaction involving interstate commerce, and shall be

¹ All told, respondent Cardegna entered into 34 transactions with Buckeye, and respondent Reuter entered into 9 such transactions, and each respondent executed a separate contract for each transaction. The wording of the relevant provisions of each contract is identical. Representative contracts were included in the record below, and are set forth in the Joint Appendix (“JA”) at 35-42.

governed by the Federal Arbitration Act (“FAA”), 9 U.S.C. Sections 1-16. The arbitrator shall apply applicable substantive law cons[istent] with the FAA and applicable statu[t]es of limitations and shall honor claims of privilege recognized by law.

JA 36, 38, 40, 42 (emphasis added).

B. Proceedings Below

In February 2001, plaintiffs filed a putative class action against Buckeye in the Fifteenth Judicial Circuit of Florida. JA 12-34.² The complaint alleged that the fees Buckeye charged for its check cashing services were actually usurious interest rates on loans. Thus, according to plaintiffs, Buckeye was engaged in unlawful “shylocking,” JA 26, and the transactions violated provisions of Florida’s Lending Practices Statutes, the Florida Consumer Finance Act, the Florida Deceptive and Unfair Trade Practices Acts, and the Florida Civil Remedies for Criminal Practices Act, JA 25-32. As relief, plaintiffs sought, *inter alia*, (1) “injunctive relief against the Defendants prohibiting them from continuing to engage in the illegal conduct as alleged,” (2) that “[t]he Defendants be ordered to cease their efforts to collect monies from Plaintiffs and class members,” (3) that “the transactions between Plaintiffs and members of the class and Defendants be declared void and Plaintiffs and members of the class be awarded all sums paid to Defendants including but not limited to principal, double interest, and any other fees, including collection costs paid, for each and every transaction,” (4) “actual damages, attorneys’ fees and costs,” (5) “treble damages supplemental to damages awarded under any other claim, costs and attorneys’ fees,” and (6) “expenses, costs, pre-judgment and post-judgment interest.” JA 32-33.

² The complaint also named as a defendant, in addition to petitioner Buckeye Check Cashing, Inc., another entity named “Buckeye Check Cashing of Florida, Inc.” Plaintiffs, however, never served the complaint on that entity.

Buckeye timely removed the case to federal court based on diversity of citizenship, and moved to compel arbitration and stay all proceedings. JA 6. The district court (Hurley, J.), however, remanded the case, holding that Buckeye had failed to establish that the amount in controversy exceeded the jurisdictional threshold. JA 7.

Back in state court, Buckeye again moved to compel arbitration of plaintiffs' claims and stay all proceedings. JA 2-3. After briefing and argument, the trial court (Barkdull, J.) summarily denied Buckeye's motion. Pet. App. 33a-34a. The court did not deny that plaintiffs' claims fell within the broad language of the parties' arbitration agreement, but relied on two Florida intermediate appellate decisions from another district holding that a court, not an arbitrator, must resolve a challenge to the legality of the underlying contract. Pet. App. 34a (citing *Party Yards, Inc. v. Templeton*, 751 So. 2d 121 (Fla. Dist. Ct. App. 2000); *FastFunding v. Betts*, 758 So. 2d 1143 (Fla. Dist. Ct. App. 2000)).

Buckeye immediately appealed that order, and the intermediate appellate court reversed. *See* Pet. App. 27a-32a. The court noted that while plaintiffs alleged that "the underlying contract is void ab initio because it is criminally usurious and, therefore, never existed at all," Pet. App. 30a, they "did not argue that they did not enter into the arbitration agreement, nor did they challenge the validity of the terms of the arbitration agreement." Pet. App. 32a. Relying on the Eleventh Circuit's decision in *Bess* (which in turn relied on this Court's decision in *Prima Paint*), the court therefore held that the parties' arbitration agreement was enforceable and that plaintiffs' challenge to the validity of the underlying contracts must be resolved by an arbitrator, not a court, in the first instance. *See* Pet. App. 31a-32a.

Plaintiffs appealed that decision to the Florida Supreme Court, which—in a divided decision—again reversed.

Pet. App. 1a-26a. The majority held that “an arbitration provision contained in a contract which is void under Florida law cannot be separately enforced while there is a claim pending in a Florida trial court that the contract containing the arbitration provision is itself illegal and void ab initio.” Pet. App. 1a. *Prima Paint* was not controlling, the majority held, because the challenge to the underlying contract there (fraud in the inducement) would have rendered the contract *voidable* under state law, whereas the challenge to the underlying contract here (illegality) would have rendered the contract *void* under state law. Pet. App. 5a-6a. The majority acknowledged that this holding was inconsistent with the Eleventh Circuit’s analysis in *Bess*, but asserted that “the case presently before us is distinguishable because *Bess* was expressly resolved under federal law, not state law principles.” Pet. App. 7a.

Justice Bell specially concurred to acknowledge “that the issue before us is one of federal law.” Pet. App. 9a. Justice Bell proceeded, however, to “disagree with the conclusions that have been reached” by every federal appellate court to consider the issue. *Id.* While conceding that plaintiffs “do[] not dispute that [they] assented to the arbitration agreement,” Justice Bell asserted that “assent alone does not make for a valid and enforceable contract.” Pet. App. 12a. According to Justice Bell, “[t]he issue of the underlying contract’s legality must be determined by the courts before any claim or dispute arising out of the contract may be referred to arbitration pursuant to the contract’s arbitration clause.” Pet. App. 12a.

Justice Cantero dissented, noting that “[t]he issue in this case is not whether a check-cashing contract is void as usurious,” but “*who decides* whether the contract is void—the arbitrator, as provided in the contract itself, or the court.” Pet. App. 13a (emphasis in original). That issue, Justice Cantero explained, is one of *federal* law under *Prima Paint*. Pet. App. 14a. Justice

