

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 OF *AMICI CURIAE*
FLORIDA BANKERS ASSOCIATION AND
AMERICAN BANKERS ASSOCIATION
IN SUPPORT OF PETITIONER**

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Dated: August 12, 2005

received
8/16/05
12:00

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INTEREST OF AMICI CURIAE¹

Amicus curiae Florida Bankers Association ("FBA") is a voluntary organization of financial institutions doing business in the State of Florida. FBA regularly represents the interests of its members before all branches of government and frequently appears as an *amicus curiae* in the state and federal courts, including, on several occasions, before this Court. The issue in this case is of particular importance to FBA and

¹ This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

its members because arbitration agreements are a significant way in which FBA members attempt to promote the efficient and inexpensive resolution of disputes. By undermining the application and enforceability of arbitration clauses, the decision below, if allowed to stand, will impose greater costs and greater uncertainty upon FBA's members.

Amicus curiae American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. ABA has members in each of the fifty states and the District of Columbia. ABA member banks hold approximately 90% of the domestic assets of the banking industry in the United States. ABA frequently appears in litigation as a party or *amicus* where issues raised in a case are of widespread importance and concern to the industry. The issue in this case is of precisely such importance and concern to the banking industry because the decision below and others like it threaten to undermine the tremendous benefits of arbitration agreements used in the banking industry and to divert numerous disputes into the more expensive and less efficient court system.

SUMMARY OF ARGUMENT

1. The proper approach to assessing the making and validity of arbitration clauses is to treat them as separable or severable contracts that must be analyzed independently from the validity of the contracts with which they are associated. Both the language of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, *et seq.*, and this Court's decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), support such an independent analytical approach. The sole question for the courts is whether the parties have made a valid agreement to arbitrate, regardless whether the remainder of the parties' agreements are valid or enforceable. Numerous federal courts of appeals have correctly adopted a "doctrine of separability" to distinguish between claims that necessarily bear upon the validity of the arbitration agreement

and claims going to the validity of the substantive contract but that have no intrinsic effect on the arbitration agreement.

That analytical approach is the best and most efficient tool to help courts properly answer the question whether an arbitration agreement survives a claim that the underlying contract is void or voidable. Using such an approach, the claim below – that the contract is substantively void based on an alleged violation of usury laws – has no inherent bearing on the separate agreement to arbitrate and hence the claim should be heard by an arbitrator, not a court. The decision below, however, conflated the issue of underlying contractual validity and arbitration-agreement validity by holding that no part of a void agreement is severable. That holding is directly contrary to the federal rule that arbitration agreements are to be treated as separable contracts and hence should be reversed.

2. The expansive, efficient, and certain enforcement of arbitration agreements is of substantial importance to the banking and other industries and is a worthy goal long established and supported by Congress and this Court. Arbitration agreements are used extensively throughout the banking and other industries and the prospective adverse consequences of the decision below are significant and widespread. The particular issue in this case – whether claims of contract invalidity not independently applicable to the arbitration agreement are to be decided by the court or the arbitrator – likewise arises in connection with numerous contracts, based on many different claims of illegality. Shifting such a broad swath of claims into the courts and away from arbitration thus would severely undermine the goals of the FAA to the detriment of the banking industry, their customers, and all other contracting parties who benefit from the efficiency, expertise, and lower expenses of arbitration.

ARGUMENT

I. ARBITRATION CLAUSES MUST BE TREATED AS SEPARABLE OR SEVERABLE CONTRACTS, THE VALIDITY OF WHICH IS DETERMINED INDEPENDENTLY FROM THE SUBSTANTIVE VALIDITY OF THE UNDERLYING AGREEMENTS.

The question posed in this case is whether the alleged invalidity of a contract in general likewise invalidates an arbitration clause contained therein where the invalidity stems from some substantive defect in other parts of the contract that does not independently apply to the arbitration clause itself. That question is effectively answered by both the FAA and this Court's decision in *Prima Paint*, which treat an arbitration clause as a *separable* agreement not affected by alleged deficiencies that do not independently relate to the arbitration agreement itself. The Florida Supreme Court held otherwise and concluded pursuant to *state* law that an otherwise valid arbitration clause was not severable from the allegedly void terms of the underlying contract and hence was void by mere association. That holding was error and should be reversed.

As a matter of federal law, arbitration clauses are deemed to be separate and severable agreements from the underlying contracts in which they may appear. The basis for such separability can be found both in the statute and in this Court's cases. Section 2 of the FAA, for example, provides in relevant part that a "written *provision* in any * * * contract * * * to settle by arbitration a controversy thereafter arising out of such contract * * * *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 (emphasis added). The statute thus expressly distinguishes between a "provision" for arbitration and the "contract" in which it may be contained, and specifies the validity, etc., of such provision

without mention of or regard for the validity of the contract as a whole. Similar separation of the arbitration clause from the contract as a whole appears in other sections of the FAA as well. *See, e.g.*, 9 U.S.C. § 4 (providing for an order directing arbitration upon the court "being satisfied that the making of *the agreement for arbitration* * * * is not in issue," without regard for whether the making of any underlying contract in general is in issue) (emphasis added). By creating a distinct federal rule applicable only to the "provision" or "the agreement for arbitration," the statute necessarily creates a separation between consideration of the agreement as to forum and the substance of disputes to be resolved by that forum.

This Court in *Prima Paint* applied just such a separability analysis to reject a claim that alleged fraud in the inducement of the contract generally somehow undermined a non-fraudulently induced agreement to arbitrate issues arising out of that contract. After describing the split between the Second and First Circuits over whether an arbitration agreement's separability or severability was a matter of federal or state law, this Court concluded that "Congress has provided an explicit answer": The "making" of an agreement to arbitrate is to be analyzed independently from the underlying contract. 388 U.S. at 403. "If the claim is fraud in the inducement of the arbitration clause itself," a court may resolve it; but if the claim goes to "the contract in general," it is an issue for the arbitrator. *Id.* at 403-04. This Court reiterated such separate treatment by concluding that a court "may consider *only* issues relating to the making and performance of the agreement to arbitrate." *Id.* at 404 (emphasis added).

Numerous federal Courts of Appeals, both before and since *Prima Paint*, have correctly followed the federal-law requirement that agreements to arbitrate be analyzed independently from the underlying contract.

Perhaps the most illustrative early case comes from the Second Circuit and is the very case with which this Court sided in resolving the split that led to *Prima Paint*. In *Robert*

