LADIES AND GENTLEMEN, THE
FLORIDA SUPREME COURT.
PLEASE BE SEATED.
THE NEXT CASE ON THE COURT'S
CALENDAR GESSA VERSUS MANOR
CARE OF FLORIDA.
>> MAY IT PLEASE THE COURT.
MY NAME IS JIM WILKS I
REPRESENT THE PETITIONER.
I WOULD LIKE TO START OFF BY
SAYING THIS IS THE CASE
INVOLVING CONFLICT BETWEEN
THE DISTRICT COURTS OF
APPEAL INVOLVING AN
ARBITRATION AGREEMENT AND
THERE WAS ATTACK ON THE
VALIDITY OF ARBITRATION
AGREEMENT AT THE TRIAL LEVEL
AND I HAD THE OPPORTUNITY TO
HEAR AN ARGUMENT AND
QUESTIONS, SO I CHANGED HOW
I WILL PRESENT THIS A LITTLE
BIT.
I WANT TO QUOTE FROM THE
4th DISTRICT'S OPINION
THAT WAS RENDERED SUBSEQUENT
TO THE BUCKEYE DECISION.
IT SAYS ON BUCKEYE, THE
SUPREME COURT OF THE UNITED
STATES REAFFIRM THE
PRINCIPLE REGARDLESS OF THE
CHALLENGES BROUGHT IN
FEDERAL OR STATE COURT THE
CHALLENGE TO THE CONTRACT AS
A WHOLE AND NOT SPECIFICALLY
TO THE ARBITRATION CAUSE
MUST GO TO ARBITRATOR.
BUCKEYE IS THE CASE THIS
CASE.
MRS. BRYANT DID NOT
CHALLENGE THE VALIDITY AT
THE CONTRACT AS WHOLE RATHER

CHALLENGED PACIFIC
ARBITRATION PROVISIONS
INCLUDING LIABILITY THUS
BUCKEYE IS OPPOSITE.
THAT IS WHAT WE ARE DEALING
WITH HER.
WE'RE NOT ATTACKING THE FACT
THAT THERE WAS UNDERLYING
NURSING HOME AGREEMENT THAT
THERE WAS A CONTRACT BETWEEN
2:00 THE RESIDENT THROUGH A
PROXY AND THE FACILITY.
WE HAVE AGREED TO THAT.
WHAT WE ARE ATTACK -- DID.
>> IS YOUR CASE DIFFERENT
WITH THE FLORIDA ARBITRATION
VOTE APPLIED THERE IS A
PROVISION IN THERE THAT
TALKS IN TERMS OF EXPRESSLY
SET FORTH HERE AND THE
ARBITRATION CODE AND THE
STATUTE SHALL GOVERN?
>> OUR PROVISION WAS IN LIKE
PAGES 40 THROUGH 44 OF THE
LARGER AGREEMENT AND IT
REFERENCED THE FEDERAL
ARBITRATION ACT.
THE FAA AND FLORIDA LAW.
>> WHERE DOES IT DO THAT?
I WAS UNDER THE IMPRESSION
THAT FLORIDA ARBITRATION
CONTROL, WHERE DOES IT
REFERENCE THE FEDERAL
ARBITRATION ACT?
>> I DON'T ARE THE
AGREEMENT.
I DIDN'T BRING IT IN FRONT
OF ME?
WELL, ON THE A, PARAGRAPH
A1.1 OF THE ARBITRATION
PROVISIONS, IT SAYS
ARBITRATION CODE IS UNDER

CONTROL.
>> THEN, LIKE I SAY, I DONE
HAVE AGREEMENT.
I RECK ELECT IT SAID THE
FLORIDA ARBITRATION -- I
DONE THINK THERE IS A MOMENT
HERE.
WHICHEVER ONE CONTROLS.
>> FLORIDA ARBITRATION.
>> WELL, IT IS EXCEPT WHEN
WE ARE LOOKING AT THE
VALIDITY OF THE ARBITRATION,
UM, ITSELF.
THE SUPREME COURT HAS MADE
IT CLEAR, THAT WE ARE GOING
TO HAVE TO SEVER THESE OUT.
WE HAVE TO LOOK AT TWO
DIFFERENT AGREEMENTS WE HAVE
TO LOOK AT THE CONTRACT AS A
WHOLE OVER HERE AND THEN
LOOK SEPARATELY AND
SPECIFICALLY AS THE
ARBITRATION.
>> THAT IS NOT UNDER THE
FLORIDA ARBITRATION CODE
DOESN'T OPERATE LIKE THAT?
>> THAT IS WHAT JUSTICE
SAID, YOU ARE MUCH BETTER
OFF IF THERE IS FLORIDA
ARBITRATION CODE THAN UNDER
THE FEDERAL.
>> ANNAL SAYS THAT THE
ANALYSIS UNDER FEDERAL AND
FLORIDA LAWS THE SAME.
THAT IS WHAT YOU ARE SAYING?
>> I THOUGHT SO UNTIL I READ
THE TRANSCRIPT.
THEY HAVE AN OPINION.
I READ THE CENTER VERSUS
JACKSON BEING ARGUED THE
QUESTION THERE ARE POST
FORMATION ACTS OF

UNCONSCIONABILITY TO BE
DETERMINED BY THE ARBITRATOR
BY THE COURT.
THAT'S THE CASE.
>> WE HAVE ANSWERED THAT.
THIS COURT HAS ANSWERED THAT
QUESTION.
>> YES.
>> WE TAKE A DIFFERENT VIEW
AND THE U.S. SUPREME COURT.
>> CONSTANTLY.
YOU ARE ALMOST ARGUING
AGAINST YOURSELF HERE.
>> NO.
I AM TRYING TO ANTICIPATE IN
CASE THE SUPREME COURT COMES
OUT IN A FEW WEEK THAT'S THE
COURT CAN REMAIN CONSIST
WENT WITH ITS POSITION AS IT
ALWAYS HAS AND BE CONSISTENT
WITH THE SUPREME COURT.
>> SO THE U.S. SUPREME
COURT, BECAUSE I AM NOT
AWARE OF THIS CASE, SAYS,
THEY ARE LOOKING AT WHETHER
EVEN AN ISSUE OF
UNCONSCIONABILITY WOULD BE
FOR THE ARBITRATORS TO
DECIDE?
>> RIGHT.
THERE WAS AN ARGUMENT
APRIL 7th RENT A CENTER
VERSUS JACKSON.
WHAT THE SUPREME COURT GOT
RIGHT THERE WAS THAT ITS
STATE LAW THAT DETERMINES
THE MAKING EVEN UNDER THE
FEDERAL ARBITRATION AC.
I IS STATE LAW THAT
DETERMINE FUSS ARE DEALING
WITH THE STATE CONTRACT
WHETHER THERE WAS A VALID

CONTRACT IN THE FIRST PLACE.
>> WELL, LET'S GO TO THAT ISSUE WHICH IS -- DO YOU AGREE THAT YOU HAVE GOT, THAT THE FIRST ISSUE LOOK AT IS PROBABLY WHETHER THE OFFENDING PROVISIONS ARE SEVERABLE OR NOT?
>> WHICH THINK THE FIRST THING YOU LOOK ARE THERE OFFENDING PROVISIONS? THEN ONCE THE PROVISIONS, YOU LOOK TO SEE?
4th DISTRICT ANSWERED THAT.
>> WELL, LET ME STOP THERE YOU.
>> EXCUSE ME.
>> BECAUSE IF THEY ARE SEVERABLE, WHATEVER THOSE ARE, THEN, ARBITRATION AGREEMENT IS NOT INVALID.
IT IS ONLY IF THEY ARE NOT SEVERABLE THAT THE ARBITRATION AGREEMENT IS INVALID.
>> I WOULD AGREE WITH THAT AS GENERAL PRINCIPAL OF ASH RACIAL.
I THINK WE MAY HAVE SPECIAL ISSUES WITH CHAPTER 400 NURSING HOME RESIDENTS.
BUT AGREE WITH YOU.
IF THEY ARE SEVERABLE.
THE TRIAL COURT WOULD SEVER THE PHONING PROVISIONS AND SEND THE MATTER TO ARBITRATION.
OR DECIDE THAT THEY ARE SEVERABLE UNDER THE THEORY THAT THEN THE WHOLE ARBITRATION AGREEMENT IS NOT

INVALID AND EVEN SEND THE
ISSUE OF WHETHER THE OH
FENDING AGREEMENTS ARE
INVALID TO THE ARBITRATORS
NOT THAT THAT IS SOMETHING
THAT I WOULD AGREE WITH BUT
THAT IS SEEMS TO BE AT LEAST
UNDER BUCKEYE WHAT MAY HAVE
TO HAPPEN.
>> THAT IS WHAT HAPPENED IN
ALTERRA VERSUS BRYANT.
THERE WAS A CLAUSE.
>> IN THE CASE THERE IS NOT
ONE.
>> THERE IS NOT ONE.
THERE'S CASES ON POINT
INVOLVING THE SAME CONTRACT.
LACEY VERSUS HEALTH CARE AND
RETIREMENT CORPORATIONS IN
THE MANOR CARE CASE OUT OF
THE 4th DISTRICT.
THEY STATED THAT REGARDING
THIS SAME CONTRACT.
THE INSTANT AGREEMENT IS
TITLED ARBITRATION LIABILITY
AGREEMENT THE TITLE ALONE
SUGGESTS OFFENSIVE
LIMITATIONS OF LIABILITY GO
TO THE ESSENCE OF THE
CONTRACT.
IN THE CASE THE LIMITATIONS
WERE INCORPORATED BY
REFERENCE TO THE CONTRACT SO
UNDER LACEY IN THE ABSENCE
OF THE SEVERABILITY CLAUSE
THIS IS MUCH SIMPLER TO
ANSWER THAT IT DOES INCLUDE
THE PROVISIONS THAT VIOLATE
PUBLIC POLICY AND A NEW
VALID CONTRACT WAS MADE AND
THE FLORIDA LAW IS
CONTROLLING IN THE STATES

YOU HAVE TO HAVE.
>> WELL, IS THERE A
DIFFERENCE BETWEEN SOMETHING
BEING VOID OR VOIDABLE?
>> YES.
VOIDABLE IS OPTION.
>> I MEAN, IN OTHER WORDS,
GOING TO, AND YOU HEARD THE
LAST ARGUE AM, IS THERE AN
ARGUMENT TO BE MADE THAT,
FIRST OF ALL,
UNCONSCIONABILITY SHOULD BE
TREATED AS ONE OF THE
CONTRACT FORMATION, BUT
WHETHER A PROVISION IS VOID
AGAINST PUBLIC POLICY,
OCCURS AFTER ASSUMING THERE
IS A VALID AGREEMENT TO
BEGIN WITH?
>> WELL, THERE IS A
DIFFERENCE BETWEEN
POST-FORMATION
UNCONSCIONABILITY AND
FORMATION.
UNCONSCIONABILITY IN THE
FORMATION.
GENERALLY COURTS SEEM TO
CALL UNCONSCIONABILITY IN
THE FORMATION OF A CONTRACT
VOID AGAINST PUBLIC POLICY.
>> WELL, THAT BETWEEN VOID
WAS EXPRESSLY REJECTED,
WASN'T IT?
>> NOT IN THIS CONTEXT.
>> THE BUCKEYE CASE?
>> NO, SIR.
NOT IN THE CONTEXT OF -- IT
WAS IN THE CONTEXT OF
WHETHER YOU LOOK AT THE
BIGGER CONTRACT TO THE
LITTLE CONTRACT.
UM, VOID AND VOIDABLE, A

MINOR CAN VOID A CONTRACT.
IT IS MERELY VOIDABLE.
THERE IS NOT SOMETHING
OFFENSIVE AND AVOIDABLE
CONTRACT.
THERE IS OFFENSIVENESS IN IN
A VOID CONTRACT.
WHAT THE SUPREME COURT WAS
SAYING WHETHER THE
UNDERLYING CONTRACT ITSELF
IS VOID OR VOIDABLE, THEY,
THEY SAY IT DOESN'T MATTER
IF IT IS SERIOUS.
WE DON'T CARE THAT THE
ENTIRE AGREEMENT CAN BE A
SHAM, BUT IF THE ARBITRATION
AGREEMENT IS THERE, THE
COURT HAS TO LOOK JUST AT
THE ARBITRATION AGREEMENT
AND THEN LET THE ARBITRATOR
LOOK AT THE BIG CONTRACT.
I MEAN, IT IS JUSTICE
KENNEDY SAID.
THE LAW IS UPSIDE-DOWN.
REGARDLESS.
THAT IS THE LAW.
WHERE THEY WERE TALKING
ABOUT.
VOID AND VOIDABLE DON'T
MATTER IS IN THE EXAMINATION
BY THE STATE COURT AND THEY
SAID IN BUCKEYE, IT DIB
MATTER WHETHER IT WAS
CRIMINALLY SERIOUS AND VOID
OR VOIDABLE.
YOU STILL CAN ONLY LOOK AT
THE ARBITRATION AGREEMENT.
THESE CASES, TODAY, THIS
CASE HERE.
THIS CASE, WE ARE LOOKING AT
THE ARBITRATION.
WE ARE NOT LOOKING AT THE --

>> WELL, WHY IS IT THAT IN THIS CASE WHERE THERE ARE NO SHIFTING STANDARDS OF PROOF. WHY ISN'T IT THAT IF YOU TAKE OUT THE LIMITATIONAL LIABILITY AND THE HUMAN DAMAGES THAT THERE IS STILL NOT A VALID ARBITRATION PROVISION?
>> BECAUSE THAT IS THE LACEY COURT SAYS THE AGREEMENT, SUGGESTED THE LIMITATIONS ON LIABILITY GO TO THE ESSENCE OF THE AGREEMENT.
>> WELL, THEY CAN SAY THAT. AGAIN, YOU KNOW, MY SYMPATHIES ARE WHERE JUSTICE ARE ABOUT THE, THESE KINDS OF PROVISIONS AND HAVING ARBITRATORS HAVE TO, YOU KNOW, WHETHER THEY DECIDE IT OR NOT BUT I AM TRYING TO DECIDE ON THE ISSUE OF IF YOU, IF THERE IS NOT UNCONSCIONABILITY QUESTION WHICH HAS NOT BEEN PER SERVED HERE THAT JUST ON THE ISSUE OF VOID AGAINST PUBLIC POLICY, THAT, YOU KNOW, THE LEGISLATURE COULD SAY, THERE SHALL BE NO PROVISIONS IN ARBITRATION AGREEMENTS THAT LIMIT LIABILITY.
WHY WOULD THAT VOID AN ENTIRE ARBITRATION AGREEMENT?
>> BECAUSE THE SUPREME COURT'S ROLE TO SET PUBLIC POLL SIN FLORIDA.
GOING BACK LONG BEFORE MEDICINE WE DETERMINED THAT OUR COURTS WOULD SET PUBLIC

POLICY NOT OUR EXECUTIVE
BRANCH AND LEGISLATIVE
BRANCH.
PUBLIC POLICY HAS SET
JUDICIAL PUBLIC POLICY SET.
>> AREN'T THERE TWO.
ONE IS THAT WE WOULDN'T WANT
TO LIMIT THE DAMAGES WHERE
THE LEGISLATURE HAS ALREADY
SAID THAT WE -- THOSE
DAMAGES ARE NECESSARY TO
PROTECT OUR MOST VULNERABLE
SITS BUT IN THE STATE STILL
WE HAVE A PRESUMPTION IN
FAVOR OF ARBITRATION?
>> AND -- SO WHY ISN'T THE
IDEA OF SEVERING THE
OFFENDING PORTION AND
ALLOWING ARBITRATION TO GO
FOURTH, MEETING BOTH PUBLIC
POLICY GOALS WHICH IS NOT
LIMITING THE LIABILITY BUT
ACCEPTING THE CHOICE, THE
CHOICE IF THE AGREEMENT IS
NOT OTHERWISE
UNCONSCIONABLE.
BECAUSE IN THIS INSTANCE,
THE WAIVER IS ONE OF A
CONSTITUTIONAL RIGHT.
A PROTECTED RIGHT UNDER
REMEDIAL STATE OUT? THE
WAIVER OF A RIGHT OF A JURY
TRIAL?
>> THE WAIVER OF THE RIGHT
OF DAMAGES THAT ARE
RECOVERABLE UNDER ACCESS TO
COURTS.
BUT I JUST GAVE YOU SCENARIO
WHERE YOU GET THESE DAMAGES,
YOU WOULD GET THEM IN A
FORUM THAT IS NOT PREFERABLE
FORUM FOR PLAINTIFFS WHICH

IS AN ARBITRATION FORUM?
>> JUDGE COULD ASK THIS QUESTION IN HIS --
>> THE SAME QUESTION?
>> HE SAID, FLORIDA SUPREME COURT ENCAPSULATED THE THREE QUESTIONS THE COURT MUST ANSWER AND FACED WITH MOTION TO COMPEL.
ONE WHETHER A VALID WRITTEN AGREEMENT EXISTS.
TWO, WHETHER AN ISSUE EXISTS AND WHETHER THE RIGHT TO ARBITRATION WAS WAIVED?
RESOLUTION TO THE MATTERS IS A MATTER OF CONTRACT INTERPRETATION.
>> THIS INSTANCE, THE COURT FOUND THOUGH PROVISIONS WERE AGAINST PUBLIC POLICY AN AVOID THE CONTRACT.
IT IS NOT TO THE COURT WHERE THERE IS NO, CLEARLY, THERE IS NO SEVERANCE AGREEMENT FOR THE COURT TO GO BACK AND REFORM OR FIX THE AGREEMENT.
WE ARE DEALING WITH MORE THAN JUST UNCONSCIONABILITY.
WE ARE DEALING WITH INCREDIBLE PROCEDURAL CONSCIONABILITY AS TO THE MATTER OF THE NATURE OF THE RELATIONSHIP BETWEEN THE RESIDENT.
>> BUT THAT IS NOT BEFORE US IN THE CASE WHAT IS BEFORE US, THIS CONTRACT THAT CONTAINED THE OFFENSIVE PROVISIONS HAD BEEN STRICKEN DOWN.
THIS COMPANY, THIS VERY COMPANY HAD ALREADY HAD ITS

PROVISIONS IN 2001 IN ROMANO
STRICKEN AND PRESENTING
THESE YEARS LATER TO THE
RESIDENTS TO SIGN HOPING THE
COURT WAS COME IN TO GIVE
THEM RELIEF.
THAT IS WHY ID ITS VOID
AGAINST PUBLIC POLICY.
>> HELP ME UNDERSTAND THE
RELATIONSHIP HERE BETWEEN
ARBITRATION PROVISION.
NOW, I UNDERSTAND IN THE
END, THE ARBITRATION
PROVISION SAYS THAT THE
LIMITATION OF LIABILITY
INCORPORATED BUT THEY DO
SEEM TO BE ADDRESSING TWO.
SO I DON'T, I AM HAVING
TROUBLE IF WE WERE, MAYBE WE
ARE NOT.
BUT IF WE WERE WORKING
WITHIN A FRAMEWORK, THE
FRAMEWORK ESTABLISHED BY
BUCKEYE, THIS MAY BE A
LITTLE DIFFERENT THAN THE
CASE WE ALL JUST HEARD ABOUT
WHERE THE PROVISIONS THAT
WERE ARGUED TO BE AGAINST
PUBLIC POLICY WERE REALLY
MAYBE INTEGRAL TO THE WHOLE
ARBITRATION PROCESS THATS
WITH AGREED TO.
MAYBE THAT IS DIFFERENT THAN
SOMETHING WHERE WE HAVE
REALLY A SEPARATE CONNECTED
BUT SEPARATE LIMITATION OF
LIABILITY PROVISION.
THE ATTACK HERE IS ON THAT.
I DON'T SEE HOW IT IS IN
ANYWAY ON THE MAKING OF THE
AGREEMENT TO ARBITRATE.
>> BECAUSE IT SAYS THEY ARE

INCORPORATED BY REFERENCE.
JUST AS THEY HAD ATTACHED
THE APPENDIX AND SAID IT IS
INCORPORATED THEY STUCK THE
THINGS ON THE COURSE OF
APPEALS HAD BEEN TELLING
THEM AND AGAINST THE PUBLIC
POLICY AND VOID, THEY STUCK
THOSE LIMITATIONS IN THERE
AND STAYED WE IN CORPORATE
THESE BY REFERENCE TO THE
ARBITRATION SECTION OF THIS
AGREEMENT.
AND NOW THAT WE HAVE
BUCKEYE, WE DON'T HAVE TO
LOOK AT THE WHOLE AGREEMENT
AND SAY THE WHOLE AGREEMENT
IS INVALID.
IN THE CASE, IT MAKES IT
SIMPLER.
WE ARE LOOKING AT THE
ARBITRATION AGREEMENT.
WE HAVE AN ACTOR OVER HERE
THAT KNEW WHAT THEY WERE
DOING WAS AGAINST PUBLIC
POLICY.
THEY CONTINUED TO DO IT
AFTER THE COURTS TOLD THEM
NOT TO DO.
NOW THEY ARE ASKING FOR
RELIEF.
THEY ARE ASKING THE COURT TO
REFORM THE MISCONDUCT.
THAT IS WHERE THE PROBLEM
LIES.
I DON'T WANT TO --
>> THOSE TWO PROVISIONS HERE
SEEMED LIKE THE KIND OF
PROVISIONS THAT YOU COULD
SAY, THESE ARE NOT
ENFORCEABLE PROVISIONS, THEN
SEND US THE, THE CASE TO

ARBITRATION WITHOUT THOSE
PROVISIONS, AND THAT IS,
WOULD YOU NOT HAVE THAT
LIMITATION ON THE DAMAGES OR
THE LIMITATION, SO WHY ISN'T
THAT A WAY TO DO THIS?
YOU COULD.
BUT WE HAVE GOT 70,000
NURSING HOME RESIDENTS WHO
FACE THESE AND EVERY TIME
THEY ARE GOING HAVE TO GET A
LAWYER AND HAVE SOMEBODY GO
BACK AND GO TO COURT AND ASK
THE COURT.
THE WHOLE POINT OF THIS.
THIS IS WHAT JUDGE IS SO
FRUSTRATED ABOUT.
THIS IS SUPPOSED TO BE
EFFICIENT.
WE ARE GOING TO END UP FOR
THE NEXT 20 YEARS CONTINUING
FOR THIS COURT FOR THE
DISTRICT COURT BE A THE
TRIAL COURTS TO REFORM THESE
CONTRACTS.
THAT IS WHY NURSING HOMES AS
IMPORTANT AS IT IS TO LOOK
AT ARBITRATION GLOBALLY ON
THOUSAND FIX BUSINESS.
WE DO HAVE A SPECIAL ROLE
HERE WITH NURSING HOME
RESIDENTS.
AND --
>> YOU HAVE REBUTTAL TIME.
ALL RIGHT.
>> THANKS.
>> MAY IT PLEASE THE COURT
MY NAME IS MATT CONIGLIARO
ON BEHALF OF MANOR CARE.
>> COULD WE GET A COUPLE OF
THINGS?
>> NUMBER ONE IS COUNSEL

CORRECT THAT THIS LIMITATION
OF LIABILITY HAS BEEN
STRICKEN WITH REGARD TO THIS
PARTICULAR DEFENDANT AND
SOME PRIOR CASES?
>> THERE WERE CASES IN THE
MID 200Os OUT OF THE THIRD
DCA WHERE SIMILAR AGREEMENTS
INVOLVING SIMILAR
LIMITATIONS WERE FOUND TO BE
THE SAME, UNCONSCIONABLE.
>> SORRY?
>> RELATED BEATER.
>> I AM NOT SURE IT WAS THE
SAME MANOR CARE.
>> THIS ISSUE ABOUT THE
FLORIDA ARBITRATION CODE AND
WHETHER THE FEDERAL
ARBITRATION CODE CONTROLS.
>> I AM HAP TO ADDRESS THAT.
IN THIS CASE SHALL, THE
FEDERAL ARBITRATION AC
CONTROLS.
THE LANGUAGE THAT JUSTIN
PAULSON POINTED OUT EARLIER
REFERRING TO SET FORTH HERE
IN THE PROVISIONS OF THE
ARBITRATION CODE SHALL
GOVERN THE ARBITRATION.
>> RIGHT.
>> FIRST OF ALL, IT
PROVIDES, SHALL GOVERN THE
ARBITRATION.
WE HAVE STILL NOT GOT ON THE
ARBITRATION.
SECOND OF ALL, THAT LANGUAGE
DOES NOT CHANGE THE
APPLICATION OF THE FEDERAL
ARBITRATION ACT AND THE U.S.
SUPREME COURT'S DECISION IN
BOTH THEY WERE DEALING WITH
A SIMILAR PROVISION THAT

MADE THE LOCAL LAW
CONTROLLED.
AND THE U.S. SUPREME COURT
EXPLAINED THAT MERELY
CHOOSING PERHAPS THE
PROCEDURAL RULES OF SOME
STATE OR ANOTHER DOES NOT
CHANGE THE APPLICATION OF
THE FEDERAL ARBITRATION ACT.
IN THIS CASE, THE
ARBITRATION ACT.
>> I AM SORRY.
I AM NOT SURE I READ IT THE
SAME WAY WITH YOU.
THE QUESTION IS GOING TO
COME DOWN AS TO WHETHER THE
FEDERAL ARBITRATION ACT IS
CONTROLLING?
IS IT AND WHY?
>> IT IS FOR MULTIPLE
REASONS.
>> ALL RIGHT.
>> FIRST OF ALL, THE TEST
UNDER THE FEDERAL
ARBITRATION ACT WHETHER
THERE IS A CONNECTION TO
INTERSTATE COMMERCE.
THERE IS A CONNECTION.
IN THE CASE TO INTERSTATE
COMMERCE.
WE HAVE SAID THAT SUNS THE
INITIAL HEARING.
THE OTHER SIDE IN THIS CASE,
NOT IN THE TRIAL COURT, NOT
IN THE SECOND DCA, NOT IN
THE COURT, HAS NEVER
CHALLENGED THE FEDERAL
ARBITRATION ACT CONTROLLED.
THEY AGREED IT CONTROLS
THROUGHOUT THE LITIGATION.
>> AND YOU ARE TELLINGS THAT
YOU THERE IS UNITED STATES

SUPREME COURT CASE THAT SAYS
IF I HAVE A CONTRACT TO
ARBITRATE THAT SAYS THE
FLORIDA ARBITRATION CODE
SHALL CONTROL THAT STILL THE
FEDERAL ARBITRATION CODE
PREVAILS THAT IS WHAT YOU
ARE SAYING TO US?
>> YES, YOUR HONOR.
I WILL ADD THAT HERE IT SAYS
SHALL GOVERN THE
ARBITRATION.
HERE WE HAVE NEVER GOTTEN TO
THE ARBITRATION.
>> WHERE IT SAID THAT THE
LAW OF CALIFORNIA IS GOING
TO CONTROL THE ACTUALLY,
THERE IS A LOT OF DISCUSSION
IN THAT CASE ABOUT WHETHER
THERE WAS GOING TO BE.
WHETHER THE LAW, THE CHOICE
OF LAW PROVISION IN THERE
REALLY WAS THE CHOICE OF
ARBITRATION.
NEVERTHELESS, THE, THE
CALIFORNIA STATE COURTS
DETERMINED THAT THAT THIS IS
WAY IT WAS GOING TO BE
INTERPRETED THAT THE
CALIFORNIA CRA ARBITRATION
LAW CONTROLLED IN THIS
SITUATION AND THEY ACTUALLY
APPLIED TO CALIFORNIA
ARBITRATION PROVISIONS DID
THEY NOT?
>> AS I RECALL.
THE CASE, THE U.S. SUPREME
COURT APPLIED THE FEDERAL
ARBITRATION ACT THROUGHOUT
THE DECISION THAT WELL, IF
THERE IS ONE THING THAT
SEEMS TO ME APPLICABLE TO

ARBITRATION LAW IN GENERAL
THAT THE CONTRACT LANGUAGE
ITSELF IS GOING TO CONTROL.
EVERYTHING WHETHER IT IS
FEDERAL OR STATE LAW IS
GOING TRYING TO ENFORCE WHAT
THE PARTIES HAVE AGREED TO.
>> I WOULD AGREE WITH THAT,
YOUR HONOR.
BY EK SEIZE THAT HERE BOTH
SIDES THROUGHOUT THE
LITIGATION FROM THE TRIAL
COURT THROUGH TODAY HAVE
AGREED THAT THE FEDERAL
ARBITRATION ACT CONTROLS.
WE HAVE DISAGREED ON
THOUSAND APPLY TO.
I WILL ADD TO THAT, THAT WE
WOULD URGE THE COURT THAT
THERE IS ULTIMATELY NO
DIFFERENCE.
ON THE MERITS OF WHAT THE
LAW PROVIDES.
>> LET ME MOVE YOU TO THE
SEVERANCE PROVISION.
HERE, THE DISTRICT COURT
ACTUALLY SEVERED OUR SEVERED
THE PROVISIONS WHEN THERE
WAS NO SEVERANCE EXPRESS
LANGUAGE IN THE CONTRACT.
>> YES, YOUR HONOR.
>> WHY SHOULD WE DO THAT?
>> WHY SHOULD WE SAY THAT
THAT IS LEGALLY PERMISSIBLE
THING TO DO?
>> FLORIDA LAW HAS NEVER
REQUIRED PARTIES TO INCLUDE
A SEVERANCE PROVISION IN
THEIR CONTRACT IN ORDER FOR
COURT TO SEVER OUT
IMPERMISSIBLE TURN.
WHAT FLORIDA LAW HAS LONG

PROVIDED IF WHEN TERMS ARE
REMOVED THERE IS STILL END
FORCIBLE AGREEMENT AND IF
THE PARTIES DIDN'T INTEND
THAT THEY WOULD ONLY AGREE
TO THOSE IMPERMISSIBLE
PROVISIONS THEN THE COURT
CAN SEVER.
IN THE CASE, NEITHER SIDE
HAS EVER TAKEN THE POSITION
THAT THEY WOULD NOT HAVE
AGREED WITHOUT THESE
LIMITATIONS.
WE HAVE NEVER TACK IN THE
POSITION THE WE WOULD HAVE
NOT AGREED.
>> WHAT CONCERNS ME IS THAT
IT SEEMS LIKE THAT IS
PROVIDING THE RIGHT
OPPORTUNITY FOR COURTS TO
START REWRITING THE
CONTRACTS BY SEVERING
PROVISIONS OUT OF THERE
BASED UPON VOID AS PUBLIC
POLICY AND HAVING THE
RESULTS THAT ARE TOTALLY
DIFFERENT THAN WHAT ANYBODY
TEND.
THAT IS A MAJOR CONCERN OF
MINE.
>> YOUR HONOR, I THINK,
PERHAPS, IN SOME CASES,
THERE COULD BE A CONCERN
THERE.
I DON'T THINK THAT IS A
CONCERN IN THE CASE.
NEITHER PARTY IS SUGGESTING
WITHOUT THE LIMITATIONS WE
WOULD HAVE NEVER AGREED TO
ARBITRATE T. THAT THIS IS
POSITION OF NEITHER SIDE.
BUT I WOULD EMPHASIZE, UNDER

BOTH THE FEDERAL ARBITRATION
ACT AND THE FLORIDA
ARBITRATION CODE, THE ISSUE,
THE CHALLENGE THAT THE PLAY
HAS BROUGHT TO THESE
LIMITATION IS FOR THE
ARBITRATOR.
>> WELL, SO, ON THAT ISSUE,
IF IT IS NOT SEVERABLE, HOW
IS THAT?
IF IT IS NOT SEVERABLE, THEN
THE ISSUE OF WHETHER, FIT IS
VOID AGAINST PUBLIC POLICY.
IT IS NOT SEVERABLE, DOESN'T
THAT MAKE THE ARBITRATION
AGREEMENT VOID?
INVALID?
>> NO.
I WANT TO BE REALLY CAREFUL
HOW I ANSWER.
WE HAVE TWO ARGUMENTS WHY WE
BELIEVE THE SHALL YOU FOR
THE ARBITRATOR NOT FOR THE
COURT.
THE FIRST ARGUMENT THAT IS
THE TEST UNDER THE FLORIDA
ARBITRATION CODE, THE TEST
UNDER THE FEDERAL
ARBITRATION ACT IS THE SAME.
IT IS WHETHER OR NOT A
CHALLENGE HAS BEEN BROUGHT
TO THE MAKING OF AN
ARBITRATION AGREEMENT.
IN A NUTSHELL, THAT IS THE
FIRST ARGUMENT WE PRESENT IN
COURT.
THAT'S THE FIRST ARGUMENT
THE SECOND BACK IN THE
DECISION AGREED WITH.
THERE IS A SECOND ARGUMENT I
WON A SAY IT IS NOT RELATED.
IT IS INDEPENDENT.

THAT IS IF THE CHALLENGE PROVISIONS ARE SEVERABLE, THEN YOU DON'T HAVE A CHALLENGE TO THE VALIDITY OF THE AGREEMENT.
I THINK I AGREED WITH YOU ON THAT.
>> I MEAN, THEN IN OTHER WORDS, SEVERABILITY IS A THRESHOLD ISSUE.
FIT IS NOT SEVERABILITY.
THEN THE WHOLE AGREEMENT IS INVALID.
FIT IS SEVERABLE.
THEN THEORETICALLY.
AN ARBITRATOR COULD MAKE DECISION, ALTHOUGH, ON THESE PROVISIONS WHICH ARE ELIMINATING STATUTORY RIGHTS BY LIMITING DAMAGES AND PUNITIVE DAMAGES, THE NURSING HOME HAS EVENTUALLY THUMBED ITS NOSE AT THE FLORIDA LEGISLATURE AND I WOULD THINK THAT, I MEAN, I AM TRYING TO THINK OF AN ARBITRATOR IN LIGHT OF THE LAW IN THE STATE OF FLORIDA THAT WOULD OR COULD FUND THE PROVISION NOT TO BE VOID AGAINST PUBLIC POLICY.
I GUESS I AM ASKING TWO THINGS.
ONE IS IF IT IS NOT SEVERABLE, I THOUGHT MAYBE YOU WERE, YOU SAID I WANTED TO BE CAREFUL.
FIT IS NOT SEVERABLE.
THEN, THE JUDGE NEEDS TO MAKE THE DECISION IF THAT PROVISION IS INVALID OR NOT.
FIT IS VALID, THEN, THE

WHOLE, IT GOES TO
ARBITRATION.
IF IT IS INVALID OR VOID,
THEN THE WHOLE AGREEMENT IS
VOID.
BECAUSE THAT IS WHAT THE
SEVERABILITY HAS TO DEAL
WITH.
>> AND THERE, YOUR HONOR, I
WOULD RESPECTFULLY DISAGREE
THAT WE HAVE CITED A SERIES
OF CASES SOME 1 OR 11 CASES
AROUND THE COUNTRY THAT EACH
OF THEM HELD AND I QUOTE
FROM THE SUPREME COURT OF
SOUTH CAROLINA THE QUESTION
OF WHETHER THE CLAUSE
PREVENTING PUNITIVE DAMAGES
VIOLATES PUBLIC POLICIES NOT
YET RIGHT BECAUSE THE
ARBITRATOR HAS NOT RULED.
>> DO THEY DEAL WITH
SEVERABILITY?
>> THEY WERE NOT DEALING
WITH SEVERABILITY.
>> THAT IS WHAT I AM ASKING
YOU THOUGH.
YOU AGREED THE SEVER K IS
FOR THE TRIAL COURT TO
DECIDE.
>> UNDER ONE OF OUR
ARGUMENTS SEVERABILITY IS A
THRESHOLD ISSUE THAT IF THE
PROVISIONS ARE SEVERABLE YOU
DO GO STRAIGHT TO THE
ARBITRATOR.
SO THEN, SO YOU BOTH, AND
YOUR COUNT SEN THE PRIOR
CASE AGREED THAT IT IS FOR
THE TRIAL JUDGE, IF NOT,
THEN UNDER WHAT THEORY OF
LOGIC COMMON SENSE WOULD

TELL YOU THAT THE POLICIES
IN YEAR LINING THE FEDERAL
ARBITRATION ACT THE FLORIDA
ARBITRATION ACT WOULD HAVE
THAT THRESH HOLD ISSUE THAT
IS WHETHER THE ENTIRE
AGREEMENT IS INVALID WOULD
GO TO THE ARBITRATOR AND NOT
BE DECIDED BY THE TRIAL
JUDGE?
I WILL ANSWER THAT BY
QUOTING THE 7th CIRCUIT.
BECAUSE THE ADEQUACY OF
ARBITRATION REMEDIES HAS
NOTHING TO DO WITH WHETHER
THE PARTIES AGREED TO
ARBITRATE THESE CHALLENGE
MUST BE CONSIDERED.
THIS GUESS BACK TO THE
LANGUAGE IN BOTH.
>> IT DOES SOUND LIKE AGAIN.
I HAVE TO READ THAT CASE IF
THEY WERE NOT DEALING WITH
SEVERABILITY.
WOULD YOU BE RIGHT IF A
TRIAL COURT FOUND IT WAS
SEVERABILITY.
>> LET ME TRY TO EXPLAIN WHY
THAT IS THE CASE, YOUR
HONOR.
IN ALL OF THOSE CASES THAT I
BELIEVE WE HAVE CITED IN
THOSE PAGES OF OUR BRIEF,
NONE OF THEM DEALT WITH
BECAUSE THESE ARE TWO
DISTINCT ARGUMENTS.
UNDER THE FLORIDA
ARBITRATION CODE, IF THE
COURT IS SATISFIED THAT NO
SUBSTANTIAL ISSUE EXIST AS
THE MAKING OF THE AGREEMENT
SHALL GRANT THE APPLICATION.

UNDER THE FEDERAL
ARBITRATION ACT UPON BEING
SATISFIED THAT THE MAKING OF
THE AGREEMENT FOR
ARBITRATION IS NOT AN ISSUE.
THE COURT SHALL MAKE
ARBITRATION.
THE THRESHOLD QUESTION ON
THIS ARGUE IS WHETHER THE
CHALLENGES HAS BEEN BROUGHT
TO THE MAKING OF THE
AGREEMENT.
AND DO WE HAVE THAT HERE?
THE ANSWER IS, WE DON'T.
WE DON'T BECAUSE THE
CHALLENGE HERE GOES TO
REMEDIAL LIMITATIONS NOT
WHETHER THE PARTIES MADE IN
AGREEMENT IS A CHALLENGE TO
THE TERMS OF THE AGREEMENT
THAT THE PARTY HAS MADE.
AND THAT SET OF CASES, AND
THIS IS -- I THINK
CONSISTENT WITH QUESTIONS
THAT JUSTICE KENNEDY WAS
ASKING EARLIER.
THE ISSUE IS TO LOOK AT WHAT
THE CHALLENGE GOES TO THE
MAKINGS OF THE AGREEMENT.
I WOULD LIKE TO GO BACK TO
SEIFERT AND THE REFERENCE TO
VALIDITY.
>> IF VALIDITY IN THE
CONTRACT IT WOULD BE A LOT
SIMPLER CASE.
WOULDN'T IT?
I MEAN, IF THE VALIDITY OF
THE CONTRACT WERE ACTUAL IN
THERE ARBITRATION AGREEMENT
IN THE CODE, THEN, THAT
CERTAINLY WOULD BE A MATTER
FOR THE ARBITRATION PANEL TO

CONSIDER AND NOT THE COURT.
THAT WOULD BE CLEAR.
>> I'M NOT SURE I FOLLOW YOU, YOUR HONORER WELL IN THE BUCKEYE CASE.
THEN EXPRESS LANGUAGE OF THE ARBITRATION AGREEMENT.
IT SPECIFICALLY SAYS THE VALIDITY OF THE AGREEMENT WOULD BE CONSIDERED BY THE ARBITRATION.
THERE IS NOT A TYPE REFERENCE IN THIS ARBITRATION AGREEMENT.
>> THAT'S TRUE, YOUR HONOR.
THERE IS NOT A REFERENCE TO THAT IN THIS ARBITRATION AGREEMENT; HOWEVER UNDER THE FLORIDA ACT AND THE FEDERAL ACT THE THRESHOLD ISSUE WITH THE COURT IS WHETHER OR NOT THERE IS A CHALLENGE TO THE MAKING OF AN AGREEMENT AND WHAT CONSTITUTES THE MAKING OF AN AGREEMENT WELL, HERE, IT IS PROVISION AT THE BEGINNING OF THE ARBITRATION AGREEMENT THAT SAYS, YOU KNOW, ANY CLAIMS OR CONTROVERSIES RELATING TO THE PARTIES SHALL BE HEARD BY ARBITRATOR THE CHALLENGE WOULD BE ARGUMENT SUCH AS I DIDN'T SIGN THIS.
OR I WASN'T COMPETENT TO SIGN.
OR IT WAS UNCONSCIONABLE.
>> I WAS NOT AUTHORIZED TO SIGN IT.
I AM GOING TO RESPECTFULLY DISAGREE ON UNCONSCIONABILITY.

IT IS NOT AN ISSUE IN THE
CASE, YOUR HONOR.
YES THERE IS NO ISSUE BEFORE
THIS COURT.
THERE WAS ONE IN THE TRIAL
COURT.
WAS DROPPED GUY GESSA.
>> WE'RE HERE ON CONFLICT
ISSUES IN BROADER QUESTIONS
AND MATTHEW WITHIN YOUR,
THERE ARE OTHER ISSUES YOU
BROUGHT UP WITH CONTRACT
FORMATION.
I MEAN, ARE NOT ISSUES IN
THIS HE CASE, IS
UNCONSCIONABILITY LIKE ONE
OF THOSE?
>> WELL, I THINK
UNCONSCIONABILITY IS
HISTORICALLY A LOT OF CASES
SAY THAT UNCONSCIONABILITY
IS AN ISSUE FOR THE COURT AS
THRESHOLD MATTER AS HAS BEEN
DISCUSSED ALREADY THERE IS A
CASE PENDING AT THE U.S.
SUPREME COURT WHERE DECISION
THAT DEALS WITH
UNCONSCIONABILITY CHALLENGE
TO SOMETHING THAT DOESN'T TO
FORMATION OF THE CONTRACT.
AND EVERYONE IS, THE PARTIES
ARE SORT OF WAITING ON WHAT
WILL COME FROM THAT.
I SUSPECT THAT WHAT WILL
COME FROM THAT WILL BE
DECISION THAT MAKES THE
ANSWER TO YOUR HONOR'S
QUESTION MAYBE.
THAT IT WILL DEPEND ON WHAT
IS SUPPOSEDLY
UNCONSCIONABLE.
I LIKE PUBLIC POLICY.

ARGUE PRESIDENT THAT NOT ALL
GO TO ARBITRATOR.
THE ARGUE AM YOU HAVE TO
LOOK AT WHAT IS BEING
CHALLENGED.
IS A POLICY CHALLENGE TO
MAKING OF AN ARBITRATION
AGREEMENT.
HERE IT IS NOT BECAUSE IT
GUESS TO THE CHALLENGE GOES
THE REMEDIES.
NOT TO FORMATION OF THE
AGREEMENT.
MAKING OF THE AGREEMENT.
IN ANOTHER CASE, YOU MIGHT
ARGUE THAT IT IS AGAINST
PUBLIC POLL SIN FLORIDA TO
ARBITRATE THESE TYPES OF
DISPUTES THAT WOULD BE A
CHALLENGE THAT GOES THE
MAKING OF THE AGREEMENT.
SO I WANT TO BE CAREFUL NOT
TO ANSWER CATEGORY ONE WAY
OR THE OTHER.
>> WELL LET ASK YOU THE
QUESTION AGAIN.
I AM STILL TRYING TO GRAPPLE
WITH HOW SEVERABILITY ROSE
TO THE MAKING OF THE
AGREEMENT.
YOU ARE ARGUING IS A
FALLBACK ARGUMENT OR AIM
MISSING SOMETHING THERE?
>> IT IS ONE OF TWO
ARGUMENTS.
I THINK THE ANSWER IS IF THE
PROVISION IS NOT -- WELL IF
THE PROVISION IS
SEVERABILITY, IT IS EASY TO
SEE THIS IS NOT AN ATTACK.
>> WHAT FIT IS NOT
SEVERABLE? WELL YOU CAN'T

SAY IT IS AN ISSUE FOR THE
COURT IF IT IS SEVERABLE BUT
IF IT FOR ONE WAY BUT IT IS
NOT AN ISSUE FOR THE COURT
IF ITS THE OTHER WAY.
I MEAN IT SEEMS LIKE YOU GOT
HAVE THE, UNLESS, IF YOU
CAN, HELP ME UNDERSTAND?
>> WELL, I THINK, HERES THE
ANSWER, YOUR HONOR.
IF THE ULTIMATE QUESTION
UNDER BOTH ACTS DOES IT GO
TO THE MAKING OF THE
AGREEMENT?
>> RIGHT.
>> SEIFERT IN THE FIRST
PRONG USED THE TERM VALIDITY
WE EXAMINED WHETHER THERE IS
A VALID AGREEMENT TO
ARBITRATE.
THAT WAS A PARAPHRASE OF
BOTH THE FEDERAL ACT AND THE
STATE ACT.
AND HELPFUL PARAPHRASE BUT
HAS LIMITS ON IT AND DOESN'T
ALWAYS WORK.
WHAT HAPPENED IN THE BUCKEYE
CASE THAT CAME THROUGH THE
SUPREME COURT OF FLORIDA IS
AN EXAMPLE OF WHERE IT
DIDN'T WORK.
THIS COURT LOOKED TO
VALIDITY AS A MATTER OF
FLORIDA LAW AND THE U.S.
SUPREME COURT SAID THAT IS
NOT CORRECT YOU CAN NOT LOOK
AT THE VALIDITY OF THE
ENTIRE AGREEMENT YOU MUST
LOOK AT THE ARBITRATION
CLAUSE WHAT IS THE
ARBITRATION CLAUSE?
WELL, READING PRIMA PAINT

AND READING BUCKEYE.
THE ARBITRATION CLAUSE, THE MAKING OF THE ARBITRATION AGREEMENT IS THE LANGUAGE WHERE THE PARTIES AGREE ARBITRATE.
OTHER ITEMS SUCH AS THE REMEDIES AVAILABLE IN ARBITRATION OR PERHAPS OTHER CONCERNS THAT ARE RELATED TO ARBITRATION DON'T GO THOUGH MAKING OF IT.
SO IT DOES SORT OF WORK ONE WAY.
>> I MEAN --
>> DISINGENUOUS ARGUMENT?
THESE ARE PART OF THE ARBITRATION AGREEMENT AND THEN, WELL, SAYING THERE IS NO PART OF IT.
I MEAN, TO ME, IT IS TALK.
YOU KNOW?
MY GOODNESS.
IT SAYS IN HERE, DOES IT NOT SAY ALL THE LIMITATIONS ARE PART OF THE ARBITRATION AGREEMENT.
DOESN'T IT?
>> YES, IT DOES.
>> IT SAYS THAT.
WELL WE START SAYING THAT IS NOT PART OF THE ARBITRATION AGREEMENT.
DOP KNOW HOW TO MAKE OF THE ARGUMENTS.
THIS KEEPS CHASING ITS TAIL.
I AM TRYING TO UNDERSTAND IT.
I AM NOT BEING HELPED.
I WILL DO MY BEST TO HELP YOUR HONOR.
WHERE SOME OF THE CONFUSION

COMES FROM HERE IS WHAT IS
MEAN BY THE ARBITRATION
CLAUSE ITSELF.
IS IT THE GREATER
ARBITRATION AGREEMENT?
IF TWO PEOPLE ENTER AN
ARBITRATION AGREEMENT
INCLUDE LOTS OF TERMS, IT
SAYS EVERYONE OF THOSE TERMS
CONSTITUTE THE ARBITRATION
CLAUSE INTO THIS MAKES SENSE
TO ME.
>> THAT SOMEBODY IN THE
PUBLIC DOO SAY YES.
THIS IS PART OF THE
ARBITRATION AGREEMENT.
THE AGREEMENT SAYS THAT.
>> UNDER THE GATEWAY ISSUES
TEST OF THE FEDERAL ACT AND
THE FLORIDA ACT, THOUGH, WE
WOULD DISAGREE.
A LAY PERSON ON THE TREAT,
YES, THIS IS PART OF AN
AGREEMENT, FOR PURPOSES OF
THE ACT, WHEN IT MAKES THE
POLICY DECISION THAT WE
FAVOR ARBITRATION, UNLESS
THE CHALLENGE GOES TO THE
MAKING OF THE ARBITRATION
CLAUSE -- OUTHOUSE J MEANS
WE AGREE ARBITRATE WE'LL PUT
EVERYTHING ELSE NOW.
THAT'S THE ONLY CLAUSE.
>> WHERE IS THE
CONSIDERATION FOR THAT?
I MEAN, WHERE IS THE CASE
LAW THAT EVEN REMOTELY
SUGGESTS THAT IT IS ONLY THE
ONE SENTENCE THAT I AGREE TO
ARBITRATE THAT IS THE ONLY
ISSUE THAT SHOULD BE
CONSIDERED?

I MEAN, I AM HEARING THAT ARGUMENT.
I MEAN, IN ALL DUE RESPECT. MAYBE YOU MADE IT IN YOUR BRIEF WHICH I READ.
THE BRIEF WAS EXCELLENT.
BUT I THINK THAT IS REALLY FORCING SOMETHING THAT HAS NEVER BEEN BEFORE.
>> YOUR HONOR, WE'RE NOT SAYING IT IS THE SINGLE.
I AM NOT SURE WHERE THE LINE IS IN THIS CASE WE HAVE NOT HAD TO TRY TO DRAW IT EXCEPT TO SAY THAT REMEDIAL LIMITS ARE OUTSIDE OF IT.
WE CITED ALMOST A DOZEN CASES FROM AROUND THE COUNTRY THAT ADDRESSED THAT ISSUE.
IF THE LEGISLATURE SAID THAT ANY AGREEMENT TO ARBITRATE THAT CONTAINED THE LIMITATION OF LIABILITY SHALL BE VOID.
WHO WOULD DECIDE WHAT THE LEGISLATURE MEANT BY THAT?
>> THE ARBITRATOR.
BECAUSE IF A CHALLENGE IS BROUGHT TO THE REMEDIAL LIMITATION IN AN AGREEMENT IT IS NOT A CHALLENGE TO THE MAKING OF THE AGREEMENT.
THAT IS WHAT THEY SAID.
>> IF YOU EXPLAIN MAYBE THE U.S. SUPREME COURT, PLANNED IT WILL.
BY WHAT LOGIC THAT WOULD BE AN IMPORTANT PUBLIC POLICY OF THE STATE OF FLORIDA THAT REMEDIAL STATUTE WOULD BE ONE THAT WOULD BE SECRET AND

MADE BY ARBITRATORS THAT
MIGHT INVALIDATE WHOLE
AGREEMENT.
EXPLAIN THE POLICY OF THIS
DATE WHERE THE ARBITRATION
ACT THAT WOULD SAY THAT IS
WHO SHOULD, THOSE ARE THE,
THAT IS THE GROUP THAT
SHOULD DECIDE.
THE THRESHOLD QUESTION OF
WHETHER A WHOLE AGREEMENT IS
VOID?
>> THE POLICY BEHIND IT IS
THE FEDERAL POLICY THAT IN
MOSES AND MANY CASES SINCE
THE U.S. SUPREME COURT HAS
SAID ALL COURTS MUST GIVE A
HEALTHY REGARD TO THE
FEDERAL POLICY FAVORING
ARBITRATION.
>> BUT NOT ARBITRATION OF
AGREEMENTS THAT ARE VOID
AGAINST PUBLIC POLICY?
ISN'T THAT WHY IT IS A
THRESHOLD ISSUE BECAUSE IF
AN AGREEMENT IS VOID AGAINST
PUBLIC POLICY, THEN THERE IS
NO, THEN THE PERSON WHO HAS
MADE THAT AGREEMENT DOES NOT
GET THE BENEFIT OF THE
LIMITING THE DECISION TO AN
ARBITRATOR.
THAT'S THE REASON.
>> WELL, I THINK WE WOULD
DISAGREE, THE LIMITATIONS
WHICH ARE WHAT AN ISSUE THIS
CASE ARE SEPARATE FROM THE
ARBITRATION CLAUSE ITSELF.
AN WHERE THE CHALLENGE GOES
TO AS HERE JUST REMEDIAL
LIMITATIONS THAT IS NOT A
CHALLENGE THOUGH MAKE OF THE

AGREEMENT.
THAT IS THE FIRST ARGUMENT.
THE SECOND ARGUMENT WE MADE
BASED ON SEVERABILITY THAT
THE PROVISIONS ARE
SEVERABILITY FOR REASONS
THAT HAVE ALREADY BEEN
DISCUSSED HERE TODAY.
AN WE WOULD ASK THIS COURT
TO FOLLOW THE SECOND
DISTRICT AN PROVE THE
2nd DISTRICT'S OPINION,
THE FEDERAL CASES DECIDED IN
ROLLINS AND IF YOU AGREE
WITH THE 11th CIRCUIT
DECISION REGARDING
SEVERABILITY THOSE ARE TWO
SEPARATE LINES OF ARGUMENTS
WE ASK THE COURT TO AFFIRM
THOSE DECISION.
>> THANK YOU.
>> THANK YOU.
>> REBUTTAL?
MAY IT PLEASE THE COURT I AM
CO COUNSEL ALONG WITH
MR. WILKS ALONG WITH ANGELA
GESSA.
>> FOUR AND A HALF MINUTES.
>> FOUR AND A HALF.
TO ADDRESS ONE OF THE ISSUES
THAT WAS RAISED BY JUDGE
LEWIS AN ALSO JUSTICE
PAULSON WITH REGARD TO
APPLICATION OF THE FAA I
HAVE TO APOLOGIZE TO THE
COURT AND MR. WILKS
SOMETIMES WHEN YOU HAVE TWO
CASES BACK-TO-BACK BOTH WE
WERE COUNSEL IN BOTH THE
CASE AN THIS CASE AN I MIXED
UP THE FACTS.
I WHISPERED TO MR. WILKS

BEFORE HE GOT UP FAA APPLIED
TO THIS ONE.
I WAS INCORRECT.
I APOLOGIZE TO THAT.
WITH REGARD TO COUNSEL
COMMENT THAT WE CONCEDED
THAT THE FAA APPLIED WE DID
NOT.
IF WE CITED CASES, IN FACT,
WE WERE CRITICIZED FOR NOT
EVEN MAKING REFERENCE TO
EITHER PRIMA PAINT OR
BUCKEYE IN THE INITIAL
BRIEF.
WE DID BRING IT UP TO IX
PLAIN THAT EVEN UNDER THOSE
FEDERAL CASES THAT THE LAW
IS CONSISTENT IN SO FAR AS
BOTH PRIMA PAINT AND BUCKEYE
SAID, YOU LOOK AT THE
ARBITRATION PROVISIONS
SEPARATELY FROM THE
UNDERLYING CONTRACT.
AND IN RESPONSE TO JUSTICE'S
QUERY EARLIER I THINK THE
LANGUAGE YOU REFERENCED WITH
REGARD TO YOU ARE ATTACKING
AN ILLEGAL PROVISION IN THE
CONTRACT GUESS NOT TO THE
ARBITRATION SEVERED
ARBITRATION AGREEMENT BUT IF
YOU ARE LOOKING AT FOR
EXAMPLE THE ILLEGAL
PROVISION IN THE UNDERLYING
CONTRACT.
THAT THAT WOULD BE SOMETHING
FOR THE ARBITRATOR TO
DECIDE.
BUT IN CASES --
>> I DON'T REALLY UNDERSTAND
WHY THAT WOULD BE SO.
BECAUSE IF THE FOCUS IS ON

THE MAKING OF THE AGREEMENT
TO ARBITRATE, UM, AND
THAT -- IF I UNDERSTAND IT
CORRECTLY.
WHAT THEY ARE GETTING AT
THERE.
CASES SHOULD NOT GO OFF TO
AN ARBITRATOR IF THE PARTIES
DIDN'T AGREE TO ARBITRATE.
>> THAT IS RIGHT.
>> YOUR HONOR.
>> THAT IS NOT WHAT IS AT
ISSUE HERE.
IT IS NOT, IT IS NOT AT
ISSUE WHETHER THE PARTIES
AGREE TO ARBITRATE THE CASE.
THE QUESTION IS WHETHER
THERE IS THIS, UM, THIS
OTHER PROVISION THAT
INVALIDATES THE WHOLE
AGREEMENT.
>> WE WOULD RESPECTFULLY
DISAGREE, YOUR HONOR.
I WILL TELL YOU WHY.
UNDER SEIFERT THE VALIDITY
ISSUE REFERENCED BY BOTH
COUNSEL GOES TO AND I WILL
THWART THE COURT THE
VOLUNTARINESS, THE KNOWLEDGE
OF THE PARTIES, THE
BARGAINING POWER OF THE
PARTIES, SEIFERT WAS LOOKING
AT THE TOTALITY OF THE
CIRCUMSTANCE SAID IT GOES
THE FORMATION OF THE
CONTRACT SIMILARLY AND
MR. WILKS BRENT UP THE RENT
A CENTER ARGUMENT LAST MON.
>> MAYBE THAT IS RELATED TO
UNCONSCIONABILITY THAT IS
DIFFERENT.
THAT IS DIFFERENT ISSUE

THOUGH.
WE ARE NOT DEALING WITH THAT
HERE IN THE CASE, ARE?
HE THERE WAS NO MEETING OF
THE MINES YOU HAVE TO HAVE A
SENT IN ORDER TO HAVE A
CONTRACT WHEN, WHEN A PARTY
OF UNEQUAL BARGAINING PARTY
SLIPS IN THINGS THAT GO FAR
BEYOND THE REMEDY PROVISION.
FOR EXAMPLE IF YOU CAN'T
BRING A PUNITIVE DAMAGE
CLAIM YOU CAN NOT CHIEF ANY
EVIDENCE OF PRIOR BAD ACT,
ANY EVIDENCE OF MOTIVE
PUTTING PROS SERVE OH THE
CARE OF RESIDENCE IT CHANGES
THE CASE COMPLETELY.
>> IS MEAT ARE MEETING OF
THE MINES MENTIONED?
>> NO.
>> THAT IS AN SURE?
NO, YOUR HONOR.
AM BRINGING ABOUT IT OUT FOR
THE SEIFERT CASE.
WHEN THE COURT IS DOING ITS
DUTY UNDER THE FIRST PRONG
OF SEIFERT TO DETERMINE.
IT HAS TO LOOK AT THINGS
SUCH AS VOLUNTARINESS.
THE KNOWLEDGE, THE SCOPE OF
THE CONSENT TO ARBITRATE.
>> DID THE 2nd DISTRICT
IN THE TRIAL COURT
ESSENTIALLY AGREE THAT THIS
WAS, THIS PROVISION WAS A
VOID IN PUBLIC POLL? I NO,
YOUR HONOR.
THAT WAS FRUSTRATING THING
FOR US.
UNDER THE FIRST PRONG OF
SEIFERT THE COURT SAID THE

COURT NOT ONLY HAS AUTHORITY
TO DECIDE VALIDITY OF THE
ARBITRATION AGREEMENT.
I HAS THE DUT TOY DO SO.
THE SECOND DISTRICT IN FOUR
CASES NOW HAS SAID WE THINK
IT MAY BE AGAINST PUBLIC
POLICY BUT WE ARE NOT GOING
SEE DECIDE THAT.
WE THINK IT IS SEVERABILITY.
WE ARE NOT GOING TO SEVER.
WE TAKE THE POSITION THAT
THEY DID NOT DISCHARGE THEIR
DUTY UNDER THE FIRST PRONG
OF SEIFERT IN MAKING THAT
DETERMINATION.
>> IF WE AGREED WITH YOU
THAT IT SHOULD NOT BE
SEVERED WHAT SHALL WE DO?
SEN IT BACK?
>> WELL, YOUR HONOR WE
BELIEVE IT IS NOT SEVERABLE
FOR AN ISSUE HAS NOT BEEN
RAISED YET THE DISTRICT
COURTS OF APPEAL HAVE
DIFFERENTIATED BETWEEN CASES
THAT HAVE, THE CASES THAT
DON'T HAVE SEVER K CLAUSE
THESE PRECEDENT IN THE LOCAL
234 CASE SAYS IT DOESN'T
REALLY GO TO THE ISSUE OF
WHETHER THAT PROVISION IS IN
THE CONTRACTOR NOT.
IT GOES TO THE INTENTION OF
THE PARTIES.
THE INTENTION OF THE PARTIES
IS DETERMINED BY THE COURT
LOOKING AT THE CIRCUMSTANCES
OF EXECUTION OF THE CONTRACT
AN OF THE TERMS ITSELF.
IN THE GESSA CONTRACT THE
FACT THAT WE DIDN'T HAVE A

SEVERABILITY CLAUSE IS THE
INTENTION AND THE FACT WE
INCORPORATED THOSE REMEDIES
BY REFERENCE INTO THE
ARBITRATION AGREEMENT IS
ANOTHER THAT WE DIN D NOT
INTEND TO SEVER THESE THINGS
OUT.
>> IF WE ASSUME IT IS NOT
SEVERABILITY THEN WHAT
HAPPENED?
THEN THE COURT HAS TO ENTER
TO DETERMINE IT IS VOID.
DCA DID NOT EXPLICITLY DID
NOT REACH THAT ISSUE SO WE
SHOULDN'T WE SEN IT BACK TO
THEM?
>> YOU CAN DO THAT YOUR
HONOR WITH IN STRICT THEY
MAKE THAT DETERMINATION.
THAT THE DUTY OF THE TRIAL
COURT UNDER THE FIRST PRONG
OF SEIFERT TO DETERMINE THE
VALIDITY OF THE CONTRACT.
>> IN THE CASE BECAUSE EVERY
OTHER DISTRICT COURT HAS
SAID THAT THIS IS, THIS IS A
VOID PROVISION.
SO TO SEN IT BACK FOR THEM
TO PERHAPS MAKE A DIFFERENT
DECISION JUST PUTS US BACK
IN CONFLICT.
>> WELL, THIS IS REVIEW
SITUATION, YOUR HONOR, IT IS
INTERPRETATION OF A CONTRACT
THAT IS A MATTER OF LAW AN
THIS COURT CAN DECIDE THAT
UNDER CIRCUMSTANCES SUCH AS
THESE CONTRACTS SHOULD NOT
BE A PART.
>> AREN'T THERE EXACT CASES
ON POINT FROM ALL THE OTHER

DISTRICT COURT.
>> YES THERE ARE.
THE SECOND DISTRICT DID NOT SAY THAT ABOUT RULE ON ISSUE.
THERE ARE CASES THAT SAY IN ALL OF THE CASES MOST OF HE THEY CASES CITED BY COUNSEL AN BRIEFED FROM OTHER FEDERAL DISTRICTS WERE NOT REMEDIAL STATUTES.
REMEDIATE STATUTES ARE TREATED DIFFERENTLY.
PUBLIC POLICY CONCERNS THIS COURT AS EARLY AS 1998 IN THE LIFE AN HEALTH OF AMERICA CASE SAID PARTIES ARE FREE TO CONTRACT AWAY THE RIGHTS BUT NOT THEIR RIGHTS UNDER OR THEIR REMEDIAL RIGHTS UNDER A PUBLIC POLICY STATUTE.
THAT WAS WHAT WE HAVE HERE.
THAT IS WHERE WE ASKED THIS COURT TO DETERMINE THAT THE CONTRACT IS VOID IN ITS ENTIRETY AN BRING SOME CLARITY TO THE LAW IN THIS ISSUE BECAUSE WE'RE BEFORE THE DISTRICT COURT WEEKLY ALMOST ON THESE ISSUE.
THE CASES ARE ALL OVER THE PLACE.
ALSO REPEATED BY JUDGE NORTH CUT IN THE CASE AND BY JUDGE FARMER IN THE BLANKFIELD CASE IT IS FRUSTRATING, I DON'T AGREE NOR DOES PETITIONER AGREE THAT IT IS FOR THE LEGISLATURE TO ENACT POLICIES.
THE LEGISLATURE ALREADY DID

THAT IN THE PREAMBLE TO THE STATUTE THEY SAID WE KNOW THAT THIS BODY OF PEOPLE NEED PROTECTION AND THAT THE INDUSTRY DESPITE THE GOOD FAITH ARE NOT SELF-POLICING, SO THEY HAVE ENACTED A STATUTE WHICH PROTECTS THE FOLKS AND IT IS UP TO THIS COURT TO ENSURE THAT THOSE RIGHTS ARE PROTECTED.

ONE LAST POINT.
>> THANK YOU VERY MUCH.
YOU HAVE WELL EXCEEDED YOUR
TIME.
>> THANK.
>> SORRY.
>> THANK YOU.
>> I THINK ALL OF YOU FOR
YOUR ARGUMENTS HERE TODAY.
I THANK ALL OF YOU FOR
ARGUMENTS HERE TODAY.