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Closing the Door, but Opening a Window: The Supreme Court's Reaffirmation of Applying the Federal Arbitration Act to the States

*Buckeye Check Cashing, Inc. v. Cardegna*¹

I. INTRODUCTION

The instant case reinforces two key Supreme Court cases regarding the enforcement of arbitration agreements, and the requirement that when parties disagree about the validity of a contract which contains an arbitration clause, the dispute should go directly to an arbitrator, and not be determined by a court.² While this case adds no new law to the arbitration landscape per se, it does reaffirm the Supreme Court's, as well as Congress's, firm stance on promoting arbitration. At first glance, the opinion seems to be a cut and dry reaffirmation of principles that have been present in United States Supreme Court case law for nearly forty years, but it could also be viewed as leaving open the possibility that at some point the Court could overturn *Southland Corp. v. Keating*,³ the Supreme Court case that applies the Federal Arbitration Act to the states.⁴

II. FACTS AND HOLDING

Respondent John Cardegna (Cardegna)⁵ entered into an agreement with petitioner Buckeye Check Cashing (Buckeye), in which Cardgena received cash in exchange for checks written for the amount of the cash received, plus a finance charge.⁶ The parties signed a contract (the Agreement), the terms of which stipulated that Buckeye would temporarily defer from cashing the checks and that if any dispute arose between the parties signing the Agreement, the dispute would go before an arbitrator, rather than a court.⁷

1. 126 S. Ct. 1204 (2006).

2. *See id.*

3. 465 U.S. 1 (1984).

4. *See id.*

5. The other named respondent in this case is Donna Reuter. *Southland Corp.*, 126 S. Ct. at 1206. The two brought this case before the Florida state court as a putative class action. *Id.*

6. *Id.*

7. The agreement was called a "Deferred Deposit and Disclosure Agreement" (Agreement), and the following arbitration provisions were included:

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 . . . 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-

A dispute arose about the terms of the agreement, and Cardegna brought the case before the state court, claiming that the exorbitant interest rates that Buckeye charged its clients violated multiple Florida lending and consumer protection laws.⁸ Cardegna alleged that that Buckeye “[m]ade illegal usurious loans disguised as check cashing transactions in violation of various Florida Statutes.”⁹ The plaintiffs claimed that Buckeye charged interest rates between 137% and 1,317% annual percentage rate (APR), with an average of over 300% APR.¹⁰ Under Florida law, any interest rate above 25% is deemed criminal usury.¹¹ Cardegna also stated that because the Agreement itself violated the law, it should be deemed criminal on its face, thus rendering it void.¹² Buckeye responded by moving to compel arbitration, pursuant to the Agreement.¹³ The court denied the motion to compel, stating that a court should determine whether or not a contract is legal, rather than an arbitrator.¹⁴

The Florida District Court of Appeal for the Fourth District reversed the lower court’s ruling, stating that because the respondents challenged the entire contract, rather than simply the portion of the contract containing the arbitration provision, then an arbitrator should determine the overall legality of the contract.¹⁵ Cardegna then appealed to the Florida Supreme Court.¹⁶ In reversing the appellate court’s decision, the Florida Supreme Court stated that enforcing the arbitration clause in an agreement which might otherwise be considered illegal and void on its face “‘could breathe life into a contract that not only violates state law, but also is criminal in nature’”¹⁷

The United States Supreme Court reversed the Florida Supreme Court’s decision, holding that when a contract containing a binding arbitration clause is challenged, whether the challenge is brought before federal court or state court, if the challenge is to the contract as a whole rather than simply the arbitration clause of the contract, the decision as to the validity of the contract as a whole must be resolved by an arbitrator.¹⁸

parties, by binding arbitration . . . This arbitration Agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act (‘FAA’), U.S.C. Sections 1-16. The arbitrator shall apply applicable substantive law constraint [sic] with the FAA and applicable statu[t]es of limitations and shall honor claims of privilege recognized by law”

Id.

8. *Id.*

9. Cardegna v. Buckeye Check Cashing, Inc., 894 So. 2d 860, 861 (Fla. 2005).

10. Brief in Opposition to Petition for Writ of Certiorari at 6, Buckeye, 126 S. Ct. 1204 (No. 04 - 1264).

11. FLA. STAT. § 687.071(g)(2) (1997).

12. Cardegna, 126 S. Ct. at 1206.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* (quoting Party Yards, Inc. v. Templeton, 751 So.2d 121, 123 (Fla. App. 2000)).

18. *Id.* at 1210.

III. LEGAL BACKGROUND

A. *History of Arbitration and the Passage of the Federal Arbitration Act*

Prior to the passage of the FAA, commercial arbitration was considered an appealing alternative to litigation in which parties could decide disputes informally, through self-governance and reference to industry norms, rather than through formal, lengthy, and costly litigation.¹⁹ Arbitrators were chosen according to the expertise within their industry, and were thus perhaps more apt at determining how such disputes should be decided, as opposed to a judge or jury who was likely less familiar with industry standards or procedures.²⁰ There was generally no expectation that arbitrators would apply legal principles, but rather the expectation was that arbitrators would rule on issues that were familiar to them because of their experience in particular areas of business industries.²¹

Much has changed within the realm of commercial contracts since the passage of the FAA, and today it is nearly impossible for an everyday consumer not to be bound by a number of arbitration agreements, such as those found in credit card agreements, cell phone contracts, or other everyday consumer activities.²² Arbitration provisions appeal to businesses because of the belief that arbitration can provide efficient resolution and low cost.²³ Arbitration also somewhat dispels the prevalent notion in litigation that the two parties are adversaries because arbitrators encourage the two parties to communicate.²⁴ Arbitrators also have the freedom to determine issues on the basis of “common sense,” as they are not bound by arbitral or legal precedent, and there is limited possibility for review of arbitration decisions.²⁵

The FAA was passed with the intention of establishing a “liberal federal policy favoring arbitration agreements.”²⁶ Perhaps the most important provision of the FAA is 9 U.S.C. § 2,²⁷ which states that if an arbitration agreement is in writ-

19. Jennifer J. Johnson, *Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration*, 84 N.C. L. REV. 123, 135 (2005).

20. *Id.*

21. *Id.*

22. Joshua R. Welsh, *Has Expansion of the Federal Arbitration Act Gone Too Far?: Enforcing Arbitration Clauses in Void ab Initio Contracts*, 86 MARQ. L. REV. 581, 581-82 (2002). Everyday consumer agreements and employment agreements are two situations where arbitration clauses are common contract provisions. *Id.* at 582.

23. *Id.* at 582.

24. *Id.*

25. *Id.* at 581-82.

26. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 (1983).

27.

A written provision in any maritime transaction or 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 (2000) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 21, 26 (1983)).

ing, it must be enforced.²⁸ This section also contains a “savings clause” that allows a party to challenge the enforcement of an arbitration clause, just like any other contract.²⁹ Since the passage of the FAA, the Supreme Court has had multiple opportunities to clarify and expand the act.³⁰ Some of the Court’s decisions have focused on whether the FAA applies to the states, and on the severability of the actual provision proving an agreement to arbitrate from the contract as a whole.³¹ Entangled in these decisions is the emerging answer to a quintessential question concerning arbitration: Does the court or an arbitrator decide whether or not an arbitration agreement is enforceable?³²

B. Supreme Court Decisions Regarding the Enforceability of Arbitration Agreements

In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,³³ the Supreme Court abandoned its reluctance toward arbitration, and deemed that Congress enacted the FAA via its commerce power, and thus the Court for the first time expanded the scope of the FAA.³⁴ *Prima Paint* involved a dispute in which the plaintiffs asserted that the contract they had signed with the defendant was fraudulent.³⁵ The defendants argued that whether or not the contract itself was fraudulent was a matter for an arbitrator to decide since the contract included a provision stating that all disputes arising from their contract would proceed to mandatory arbitration.³⁶ The court determined that, by looking at section 4³⁷ of the FAA, a

28. Welsh, *supra* note 22 at 585.

29. *Id.* at 585-86.

30. *Id.* at 587.

31. *Id.*

32. See Christopher B. Hopkins, *Emerging Trends and Conflicts in the Enforcement of Arbitration Clauses*, 24 TRIAL ADVOC. Q. 44 (2005).

33. 388 U.S. 395 (1967).

34. Welsh, *supra* note 22, at 591.

35. See *Prima Paint*, 388 U.S. 395.

36. *Id.* The arbitration clause read: “Any controversy or claim arising out of or relating to this agreement, or the breach thereof, shall be settled by arbitration in the City of New York, in accordance with the rules then obtaining of the American Arbitration Association.” *Id.* at 398.

37. Section 4 states:

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 or in admiralty 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. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. 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. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. 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. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil

federal court must compel arbitration once it has determined that it is not the arbitration clause itself that is at issue, but rather the enforceability of the contract as a whole.³⁸ Thus, in relying on the statutory language of the FAA, the Court determined that a federal court does not have the jurisdiction to consider general claims of fraud in the procurement of the contract if the contract contains a provision stating that all disputes arising from the contract must go before an arbitrator.³⁹ Only if the arbitration clause itself is under attack for fraud can a federal court review the contract's arbitration clause to determine if the contract is arbitrable.⁴⁰ Through this reasoning, the Court classified the FAA as, "a substantive law enacted under the Commerce Clause."⁴¹ Thus, the Court's decision in *Prima Paint* "served as a breeding ground for the Act's subsequent expansion."⁴² Yet, a key question that the Court did not answer in *Prima Paint* was whether there should be a distinction between "void" and "voidable" contracts.⁴³

In *Southland Corp. v. Keating*,⁴⁴ the Supreme Court further interpreted the scope of the FAA, but this time with regard to enforcement of the FAA in state court.⁴⁵ *Southland* similarly focused the enforcement of an arbitration clause when the entire contract's validity is under attack, but this case arose in the California state courts as opposed to federal court.⁴⁶ In *Southland*, the California Supreme Court ruled against compelling arbitration of the contract, stating that California state law required that any claims brought under California Franchise Investment Law be reviewed judicially.⁴⁷ The Supreme Court reversed, stating that "[t]here are strong indications that Congress had in mind something more than making arbitration agreements enforceable only in the federal courts."⁴⁸ The Court further stated that, in creating the FAA, Congress addressed two problems: "the old common law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements."⁴⁹ The Court also noted that there was no question that this contract would go to an arbitrator if the claim had been brought in federal court, and that to allow the distinction would

Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. § 4 (2000).

38. *Prima Paint*, 388 U.S. at 403-04.

39. *Id.* at 404.

40. *Id.*

41. Welsh, *supra* note 22 at 592.

42. *Id.*

43. *Id.* at 599. A "void" contract is defined as one that does not exist, for reasons that it was consent to the contract was not effective. *Id.* at 599-600. A "voidable" contract is one in which there is not problem with the consent, but the "consent was obtained through fraudulent representations." *Id.* at 599, (citations omitted).

44. 465 U.S. 1 (1984).

45. Welsh, *supra* note 22, at 593.

46. See *Southland Corp.*, 465 U.S. at 1.

47. *Id.* at 10. The relevant portion of the statute in question read: "Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void." CAL. CORP. CODE § 31512 (West 1977).

48. *Southland Corp.*, 465 U.S. at 12.

49. *Id.* at 14.

create forum shopping, which was likely not the intention of Congress when it passed the FAA.⁵⁰ Thus, in *Southland*, the Court drew on the “comprehensive powers of the Commerce Clause” to determine that the FAA applied in state courts as well as in federal courts.⁵¹

In *Allied-Bruce Terminix Companies, Inc. v. Dobson*,⁵² a dispute involving a homeowner suing Terminix after their house was deemed “clean” and later found to have been infested, the Supreme Court again compelled the parties to arbitrate, affirming *Southland*.⁵³ In addition to affirming *Southland*, this case was also noteworthy because of Justice Scalia’s positioning. Justice Scalia, an ardent critic of the *Southland* opinion, dissented from the *Terminix* majority.⁵⁴ In doing so, he stated that this would be the last time he would dissent in a case simply because the case reaffirmed *Southland* unless he was joined by four other Justices so that the *Southland* case actually would be overruled.⁵⁵

IV. INSTANT DECISION

In *Buckeye Check Cashing v. Cardegna*,⁵⁶ the United States Supreme Court was faced with the decision of who should determine the legality of a contract containing an arbitration provision: the court or an arbitrator.⁵⁷ The Court held, in following past precedent interpreting the FAA, that when the validity of a contract in its entirety is challenged, the question must go to an arbitrator, not to the court.⁵⁸ The Court noted that there is a difference between challenging the legality of a contract as a whole and challenging only the arbitration provision of a contract.⁵⁹ The Court determined that both issues had previously been worked out—the issue of the validity of the arbitration provision in *Southland Corp. v. Keating* and the issue of the validity of the contract as a whole in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*⁶⁰

The Court determined that both *Southland* and *Prima Paint* answered the question presented before in the instant case, by creating three propositions.⁶¹

50. *Id.* at 15. The court further noted that most litigation takes place in state courts, and that Congress would likely not enact the FAA if it would only be applied in 2% of litigation cases. *Id.*

51. *Id.* Justice O’Connor strongly dissented from *Southland* stating the majority opinion incorrectly determined that the FAA’s silence, in § 2 regarding its applicability to state law must mean that the FAA was intended to apply to the states. *Id.* at 22.

52. 513 U.S. 265 (1995).

53. *Id.* at 282. Note that this case originated as a state court case.

54. *Id.* at 285-86.

55. *Id.* at 285. Additionally, Scalia joined in a dissenting opinion written by Justice Thomas. *Id.* at 285-87. The Thomas/Scalia dissent in *Terminix* states that *Southland* was wrongly decided in that the FAA does not apply to state courts. *Id.* at 285. The dissent continues by stating that nowhere in the FAA does it dictate that breach of the § 2 of the FAA gives rise to a “federal question,” and thus a breach of § 2 would not grant federal court jurisdiction. *Id.* at 291. Justices Thomas and Scalia also note that they feel the *Terminix* majority simply relied on “stare decisis,” in ruling on the case, rather than looking to the substance of *Southland* to determine if it should have been overturned. *Id.* at 295.

56. 126 S. Ct. 1204.

57. *Id.* at 1206.

58. *Id.* at 1210.

59. *Id.* at 1208.

60. *Id.* (citing *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)).

61. *Id.* at 1209.

First, the Court stated that federal arbitration law allows for an arbitration clause to be separated from the rest of a contract.⁶² Next, unless a challenge is actually made to the arbitration clause itself, the question of a contract's validity will be reserved for an arbitrator.⁶³ Finally, the Court determined that this law resolving who determined whether challenges to contracts containing arbitration clauses were valid applied not only to claims presented in federal courts, but also to those brought before state courts as well.⁶⁴ The Court noted that neither party requested that the Court reconsider the holdings of *Southland Corp.* or *Prima Paint*, and the Court did not take up those issues on its own.⁶⁵ Thus, since the respondents challenged the Agreement itself rather than simply the arbitration provision, "[t]hose provisions are enforceable from the remainder of the contract." This reinforced the Court's finding that the question of the Buckeye contract's validity should be one for the arbitrator, and not for the court.⁶⁶

The Court noted that the Florida Supreme Court declined to sever the arbitration clause of the agreement from the contract as a whole, stating that, under Florida public policy and contract law, void and voidable contracts must be distinguished and that no part of a contract that is illegal can be salvaged.⁶⁷ The Court stated that this ruling violated the Court's prior ruling in *Prima Paint*.⁶⁸ The Court noted that *Prima Paint* "rejected application of state severability rules to the arbitration agreement *without discussing* whether the challenge at issue would have rendered the contract void or voidable."⁶⁹ The Court also noted that it never discussed the issue of void versus voidable contracts in *Southland*.⁷⁰ Instead, the Court in *Southland* "simply rejected the proposition that the enforceability of the arbitration agreement turned on the state legislature's judgment concerning the forum for the enforcement of the state-law cause of action," meaning that regardless of whether a dispute regarding the enforceability of an arbitration clause as a whole arose in state or federal court, the FAA would apply.⁷¹ Thus, the Court determined that it must reject the Florida Supreme Court's reasoning that the enforceability of this contract should be determined by Florida public policy and contract law, and not under federal law.⁷²

The Court also rejected the notion that *Prima Paint* does not apply in state court because it only interpreted sections 3 and 4 of the FAA.⁷³ The Court pointed

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* (emphasis supplied). The Court noted that the *Prima Paint* opinion "expressly disclaimed" that there was no need to decide what state-law remedy would have been available. *Id.* The Court further noted that in its decision in *Southland Corp.* it also never raised the issue as to whether the challenges made would render the contract void or voidable, and instead only "rejected the proposition that enforceability of the arbitration agreement turned of the state legislature's judgment concerning the forum for enforcement of the state-law cause of action." *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

out that section 4, “ultimately arises out of section 2,⁷⁴ the FAA’s substantive command that arbitration agreements be treated like all other contracts.”⁷⁵ The Court stated that this argument also conflicted with *Southland*, in which the Court found the FAA to apply to cases in state court as well as in federal court.⁷⁶

Cardegna argued that a “valid contract,” meaning one that is not “void,” must exist in order for the FAA to be applied in the first place.⁷⁷ The Court declined to read “contract” with the narrow definition that Cardegna provided, stating that upon a close reading of section 2: specifically, the final clause that allows challenges of arbitration provisions, “upon such grounds as exist at law or in equity for the revocation of any contract.”⁷⁸ Thus, the Court determined that the term “any contract” must include those contracts that will at a later time be determined void. The Court stated that, “because the sentence’s final use of ‘contract’ so obviously includes putative contracts, we will not read the same word earlier in the same sentence to have a more narrow meaning.”⁷⁹

The court agreed with the respondent’s assertion that *Prima Paint* allows a court to enforce an arbitration agreement in a contract that will later be found void, but also notes that under the approach it suggested, a court will have the authority to nullify an arbitration provision in a contract that a court will later find enforceable.⁸⁰ Thus, the Court resolved to follow *Prima Paint’s* resolution, and decided the issue in favor of enforcing arbitration.⁸¹ Accordingly, the Court reversed the judgment of the Florida Supreme Court and reaffirmed prior decisions that no matter whether a challenge is brought in state or federal court, if the challenge is to the validity of the contract as a whole, the outcome of the challenge shall be determined by an arbitrator.⁸²

Justice Thomas, the sole dissenter, reasoned that the FAA should not apply in state courts.⁸³ He further stated that in state court proceedings the FAA cannot be used to nullify a state law that would prohibit enforcement of an arbitration clause in a contract that would itself be unenforceable under state law.⁸⁴

74.

A written provision in any maritime transaction or 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 (2006).

75. *Buckeye*, 126 S. Ct. at 1209.

76. *Id.*

77. *Id.*

78. *Id.* (quoting 9 U.S.C. § 2 (2005)).

79. *Id.* at 1210.

80. *Id.* at 1208.

81. *Id.*

82. *Id.* at 1209.

83. *Id.* Justice Thomas cited *Allied-Bruce Terminix Cos. v. Dobson* 513 U.S. 265, 285-97 (1995); *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 689 (1996); and *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 460 (2003) as support for his dissent.

84. *Id.*

V. COMMENT

While *Buckeye* does not change the Supreme Court's current position on the enforceability of arbitration agreements, it does clearly reaffirm the nearly forty-year-old *Prima Paint* decision, as well as reemphasize the Court's and Congress's policy of liberally favoring arbitration.⁸⁵ The Court's opinion actually serves to make its position in favor of arbitration even stronger by reiterating a nearly forty-year-old decision that has been put to the test multiple times, and has come out on top each time. The recent dismissal of *Rubin v. Sona International Corporation*, a Southern District of New York case in which *Buckeye* was cited as authority for the proposition that the court could only look at the case if the arbitration clause alone was attacked as being invalid.⁸⁶ This case previews the degree to which state and federal courts will likely rely upon *Buckeye* as the case to look to in determining whether or not an arbitration agreement can be attacked because *Buckeye*, while not laying down any new law, is a recent case which supports long-time precedent.⁸⁷ The Court's decision reaffirms the policy that the only way to ensure that a court will hear a challenge to an arbitration agreement is to attack the arbitration clause itself.

Where the *Buckeye* Court did part ways from the past was in its nullification of the distinction between "void" and "voidable" contracts.⁸⁸ Having read section 2 of the FAA in such a way that deems any contract, whether "void" or not, as being presumed a contract for purposes of arbitration leaves a plaintiff with an even more limited option for attacking an arbitration agreement than he or she had before. Thus, one might consider that in nearly every case in which an arbitration agreement is entered into, the parties are going to end up arbitrating the dispute.⁸⁹

As noted, the Court has supported a strong policy favoring arbitration agreements.⁹⁰ While the courts appear to embrace arbitration, there are still many reasons cited for not enforcing arbitration agreements, especially those involving corporations and businesses. The argument in *Buckeye* is one example: the plaintiff has virtually no right to appeal as the arbitrator's word is nearly always the final decision. Yet this view fails to consider the fact that many plaintiffs involved in arbitration are everyday consumers who may not have the money to appeal, let alone the money for any kind of litigation. Thus, arbitration opens doors for many who would not otherwise have had the opportunity to bring their case before a neutral party, and while the plaintiff may not have her "day in court," she still has the chance to argue her case—a case that may not have ever been heard by anyone. While there is merit in both the arguments for enforcing arbitration agreements as well as the argument for not so widely embracing arbi-

85. 9 U.S.C. §§ 1-14 (2006).

86. *Buckeye Check Cashing Referenced in Dismissal of Action to Rescind Agreement, Arbitration Clause*, *Rubin v. Sona Int'l, Corp.*, N. Y. L. J., Mar. 10, 2006 at 17.

87. *Id.*

88. *Id.*

89. Interview with Robert G. Bailey, Director of the Center for the Study of Dispute Resolution, University of Missouri, in Columbia, Mo. (Apr. 3, 2006).

90. 9 U.S.C. §§ 1-14 (2006).

tration agreements, it appears that the Court will continue to make and support those favoring arbitration.⁹¹

A noteworthy aspect of this opinion is that Justice Scalia, one who has adamantly opposed arbitration in the past, wrote the majority opinion.⁹² Scalia stated in *Allied-Bruce* that he had agreed with opinions of the Court in the past when the parties did not request that *Southland* be overruled, but also that he believed *Southland* misinterpreted the FAA.⁹³ Yet, in *Allied-Bruce*, Scalia states prior to his joining with Justice Thomas's dissent, "I shall not in the future dissent from judgments that rest on *Southland*."⁹⁴ He further states that, "I will, however, stand ready to join four other Justices in overruling it, since *Southland* will not become correct over time, the course of future lawmaking seems unlikely to be affected by its existence."⁹⁵ Thus, it is difficult to interpret whether in writing this opinion, Scalia is turning over a new leaf, and fully backing arbitration, or whether he is merely supporting the arguments made in this case since neither party requested to overturn *Southland* or *Prima Paint*.⁹⁶ And, with only one judge left dissenting in this case, it appears clear that Justice Scalia will not likely find four other Justices on this court to overturn *Southland* with him.

As stated in the preceding paragraph, in the instant case, Justice Scalia specifically notes that the Court did not consider whether to overturn *Southland* or *Prima Paint*, and it can be interpreted from the opinion that the Court did not consider overturning those cases primarily because neither party to the litigation requested that the Court do so.⁹⁷ If a party in the instant case had requested that *Southland* be overturned, it is unlikely that such a request would have been granted. Justice Thomas was the sole dissenter in this case, and it seems improbable that Justice Scalia could have found three other justices to support him in overturning *Southland*. Yet, there remains open the possibility for reversal unless and until another party requests that *Southland* be overturned. Perhaps Scalia wanted to ensure that future potential litigants were aware that *Southland* may still potentially be overruled and that the next party that brings an arbitration case before the Supreme Court requests that *Southland* be overruled. Thus, this issue may not be an entirely resolved issue, and while at first glance it appears that *Buckeye* is a reaffirmation of *Southland*, it may in fact rather be a plea for a future litigant to request further consideration as to whether the FAA should be applied to the states.

VI. CONCLUSION

While it may appear that instant case does little more than reaffirm prior Supreme Court case law, in actuality this case leaves untied a few loose ends. The fact that there was never a request by the respondent for the Court to overturn *Southland* coupled with the fact that Justice Scalia wrote the opinion, leaves open

91. See *Buckeye Check Cashing v. Cardegna*, 126 S. Ct. 1204, 1210 (2006).

92. *Id.*

93. *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 284-85 (1995).

94. *Id.* at 285.

95. *Id.*

96. *Buckeye*, 126 S. Ct. at 1209.

97. *Id.*

the possibility that there could be a different result under similar circumstances in the future. For the time being, however, it appears that *Prima Paint* and *Southland* remain safe, and that courts, such as the *Rubin* court, may now be citing *Buckeye* in lieu of the older *Southland* and *Prima Paint* when deciding to turn contract disagreements containing arbitration clauses over to arbitrators.

CAROLINE KORNELIS

