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CASENOTES

***BUCKEYE CHECK CASHING, INC. v. CARDEGNA:* THE LATEST EXAMPLE OF HOW THE SUPREME COURT HAS TURNED THE FEDERAL ARBITRATION ACT INTO A STATE-DEFYING MONSTROSITY**

BRIAN C. GROESSER*

INTRODUCTION

A consumer today often enters into a business contract that contains an arbitration provision. It is unlikely that the average consumer interested in buying a new cellular phone, for instance, would read an arbitration provision within the phone's contract. Furthermore, if the consumer did read the provision, it is unlikely that he would be able to ascertain its meaning and legal ramifications without some legal education. If a legal dispute arises from this transaction and is within the scope of the arbitration provision, it will be settled through arbitration according to the contract. But what if the contract itself is illegal? Does the consumer still have to go before an arbitrator to present his case or does he have the option to go through the courts? According to the United States Supreme Court in *Buckeye Check Cashing, Inc. v. Cardegna*, the arbitrator remains the appropriate trier of fact.¹

Should a dispute claiming that a contract is illegal and unenforceable be settled through arbitration if the provision compelling arbitration is part of an illegal contract? Before the Supreme Court heard *Buckeye*, the Florida Supreme Court ruled that enforcing an arbitration agreement within an unlawful contract would violate the state's public policy and contract law.² This casenote explores how *Buckeye Check Cashing, Inc. v. Cardegna* expanded the scope of federal power

* B.A. with Distinction, University of Michigan, 2003; Second-year law student at North Carolina Central University School of Law; I would first like to give God the glory for the opportunity to attend law school. I also want to thank Professor Adrienne Fox for inspiring me to research the growing practice of arbitration. My parents, John and Sarah, deserve most of the credit for aiding me in my education. Finally, I want to thank and dedicate this article to my wife, Ali, and our daughter, Ava.

1. *Buckeye Check Cashing, Inc. v. Cardegna (Buckeye II)*, No. 04-1264, slip. op. at 1 (U.S. Feb. 21, 2006).

2. *See Buckeye Check Cashing, Inc. v. Cardegna (Buckeye I)*, 894 So. 2d 860 (Fla. 2005), *rev'd*, *Buckeye II*, No. 04-1264, slip. op. at 1 (the Florida Supreme Court believed that *Cardegna*

enforcing arbitration provisions under the Federal Arbitration Act (hereinafter FAA).³ *Buckeye* is the most recent decision expanding the scope of the FAA since *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*⁴ introduced the Separability Doctrine in 1967.⁵ This note argues that *Buckeye* is the latest example that federal power has exceeded the original purpose and intent of the FAA, and that states are now unjustifiably unable to protect their own residents with regards to illegal contracts involving arbitration provisions.

This note will first discuss the facts surrounding *Buckeye*. It will then explore the history that led to the *Buckeye* decision. The history will begin with the establishment of the United States Arbitration Act (now known as the Federal Arbitration Act) and a discussion of its purpose and intent. This note will then focus on the lineage of case law that *Buckeye* arises from, starting with *Prima Paint*. Justices have continuously disagreed on the scope of the FAA, starting with a lengthy dissent from Justice Black in *Prima Paint*. This note will discuss both sides to landmark cases in the lineage such as *Prima Paint* and *Southland Corp. v. Keating*.⁶ Finally, this note will analyze *Buckeye* in the context of its role in expanding federal power and how that expansion is inappropriate.

THE CASE

John Cardegna entered into various deferred-payment transactions with Buckeye Check Cashing, Inc. in which he received cash in exchange for a personal check in the amount of the cash plus a finance charge.⁷ In each transaction, Cardegna signed a "Deferred Deposit Agreement" which included two arbitration provisions.⁸ The first provision, called "Arbitration Disclosure," alerted the signors that signing the document meant that any dispute arising from the Agreement would be resolved by binding arbitration.⁹ The second provision, called "Arbitration Provisions," defined the type of binding arbitration discussed in the first provision.¹⁰ In part, the second provi-

entered into a void contract with Buckeye Check Cashing since the contract charged usurious interest rates in violation of state contract law).

3. Federal Arbitration Act, 9 U.S.C.S. §§ 1-16 (2007).

4. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

5. The Supreme Court created the Separability Doctrine, which separated an arbitration provision from the contract as a whole. In *Prima Paint*, a claim of inducement by fraud applied to the contract as a whole and not to the arbitration provision in particular, thus making the claim appropriate for an arbitrator to decide.

6. *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

7. *Buckeye II*, No. 04-1264, slip. op. at 1.

8. *Id.*

9. *Id.*

10. *Id.*

sion stated “[t]his arbitration Agreement is made pursuant to a transaction involving interstate commerce and shall be governed by the Federal Arbitration Act.”¹¹

Cardegna brought a putative class action claim in a Florida state court, alleging that Buckeye charged usurious interest rates and that the Agreement violated various Florida lending and consumer protection laws.¹² Buckeye moved to compel arbitration.¹³ The trial court denied the motion, holding that a court rather than an arbitrator should resolve a claim that a contract is illegal and therefore void.¹⁴ The Florida District Court of Appeal for the Fourth District reversed.¹⁵ The court held that the agreement to arbitrate was enforceable since Cardegna claimed that the entire contract was void and did not challenge the arbitration provision itself.¹⁶ Therefore, an arbitrator should determine the question of the contract’s legality.¹⁷ Cardegna appealed and the Florida Supreme Court reversed.¹⁸ Quoting *Party Yards, Inc. v. Templeton*,¹⁹ the court reasoned that enforcing an agreement to arbitrate in a contract challenged as unlawful “could breathe life into a contract that . . . violates state law.”²⁰

The United States Supreme Court granted certiorari and reversed the Florida Supreme Court’s decision. The Court applied *Prima Paint*²¹ and *Southland Corp.*²² to its holding.²³ The Court held that: (1) as a matter of substantive law, the arbitration provision is severable from the remainder of the contract; (2) if the challenge is not to the arbitration clause itself then the contract’s validity is considered by the arbitrator; and (3) the FAA applies in both state and federal courts.²⁴ Utilizing those three propositions, the Court held that an arbitrator and not a court must resolve the dispute.²⁵

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Party Yards, Inc. v. Templeton*, 751 So. 2d 121, 123 (Fla. Dist. Ct. App. 2000).

20. *Buckeye Check Cashing, Inc. v. Cardegna (Buckeye I)*, 894 So. 2d 860, 862 (Fla. 2005), *rev’d Buckeye II*, No. 04-1264, slip. op. at 1.

21. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

22. *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

23. *Buckeye II*, No. 04-1264, slip. op. at 5.

24. *Id.*

25. *Id.*

BACKGROUND

In 1925, Congress enacted the Federal Arbitration Act.²⁶ Prior to 1925, several major commercial states had passed arbitration laws that the federal courts refused to enforce in federal diversity cases.²⁷ The enactment established a procedure requiring federal courts to enforce the arbitration agreements.²⁸ Thirteen years after the enactment, the Supreme Court decided in *Erie Railroad Co. v. Tompkins*²⁹ that the federal government did not have the power to create substantive law solely by virtue of the Article III power to control federal court jurisdiction.³⁰ Therefore, after *Erie*, the FAA would be considered unconstitutional if Congress enacted it as “general federal law” since the Court held that federal general common law did not exist.³¹ The Court in *Erie* held that, except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the appropriate state as governed by choice of law principles.³² Essentially, when a federal court is hearing a diversity case under 28 U.S.C. § 1332, the court must apply state substantive law.³³ Therefore, after *Erie*, the federal courts had to consider the FAA as a procedural law, not a substantive law, in order to avoid constitutional issues. The procedural approach appears to be consistent with the intent of the FAA’s drafters. Julius Cohen,³⁴ the American Bar Association member who drafted the bill, stated before Congress that the proposed bill related to the law of remedies and not to substantive law.³⁵ At hearings on the FAA, congressional subcommittees were told that “[t]he theory on which you [Congress] do this is that you have the right to tell the Federal courts how to *proceed*.”³⁶ The American Bar Association Committee, which drafted and pressed for passage of the legislation, wrote: “[t]he statute establishes a *procedure* in the federal courts for the enforcement of arbitration agreements.”³⁷

26. Federal Arbitration Act, 9 U.S.C.S. §§ 1-16 (2007).

27. *Southland Corp.*, 465 U.S. at 34; see, e.g., *Atlantic Fruit Co. v. Red Cross Line*, 276 F. 319 (S.D.N.Y. 1921) *aff’d*, 5 F.2d 218 (2d Cir. 1924); *Lappe v. Wilcox*, 14 F.2d 861 (N.D.N.Y. 1926) (holding that New York’s arbitration statute could not affect the jurisdiction of the federal courts).

28. 9 U.S.C.S. §§ 1-16 (effective Feb. 12, 1925).

29. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

30. *Southland Corp.*, 465 U.S. at 23.

31. *Erie*, 304 U.S. at 78.

32. *Id.*

33. See *id.*

34. “Julius Henry Cohen [was the] drafter of the New York statute that served as the basis for the FAA.” John D. Feerick, Professor at Fordham Univ. School of Law, Keynote Speaker at the American Arbitration Association Anniversary Lecture Series: Federal Arbitration Act at 80: A Tribute (Oct. 25, 2004), at 2 n.8.

35. *Southland Corp.*, 465 U.S. at 27.

36. *Id.* at 25 (emphasis added).

37. *Id.* at 26 (emphasis added).

Eighteen years after *Erie*, in 1956, the Supreme Court decided *Bernhardt v. Polygraphic Co.*³⁸ *Bernhardt* involved an employment contract dispute between a resident of Vermont and his New York corporate employer.³⁹ The employee's duties under the contract were to be carried out in Vermont.⁴⁰ The contract contained a provision that any dispute was subject to arbitration under New York law by the American Arbitration Association⁴¹ whose findings are final and binding.⁴² The suit was removed from a Vermont court to a federal district court on diversity grounds.⁴³ The New York corporation moved for a stay of the proceeding to compel arbitration in New York City applying New York law.⁴⁴ The district court ruled that Vermont law made an arbitration agreement revocable at any time prior to the furnishing of an award.⁴⁵ On appeal, the Supreme Court applied *Erie* and stated that Vermont law,⁴⁶ and not New York law, would govern.⁴⁷ In so doing, the Court held that the duty to arbitrate a contract dispute is *substantive* and therefore a matter governed by state law in a federal suit invoking diversity jurisdiction.⁴⁸

After *Bernhardt*, concern arose as to whether the FAA could only be applied in federal court cases arising under federal law and not diversity cases. The argument disallowing application of the FAA in diversity cases focused on the fact that the FAA's provisions were important and often outcome-determinative, and therefore substantive. Since *Erie* required federal courts to apply state substantive laws in diversity cases,⁴⁹ the FAA should not be applied in federal diversity cases. The Supreme Court addressed this concern in its 1967 landmark decision, *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*⁵⁰ In *Prima Paint*, Flood & Conklin, a New Jersey corporation, agreed by contract to perform certain services for and not to compete with Prima Paint, a Maryland corporation.⁵¹ The contract

38. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956).

39. *Id.*

40. *Id.* at 199.

41. The American Arbitration Association (AAA) is a leading provider of conflict management and dispute resolution services. American Arbitration Association, <http://www.adr.org/> (last visited 1/30/07).

42. *Bernhardt*, 350 U.S. at 199.

43. *Id.*

44. *Id.*

45. *Id.* at 199-200.

46. Even though the contract stipulated New York law would apply, that provision pertained to the actual arbitration and not to the determination of whether the agreement to arbitrate could be revoked. *Bernhardt*, 350 U.S. at 198 (1956).

47. *Bernhardt*, 350 U.S. at 202-03.

48. *Southland Corp. v. Keating*, 465 U.S. 1, 23 (1984).

49. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

50. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

51. *Id.* at 397.

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contained an arbitration clause, which required any dispute arising from the contract to be settled in New York City in accordance with the rules of the American Arbitration Association.⁵² Flood & Conklin sent Prima Paint a Notice of Intention to Arbitrate pursuant to the New York Arbitration Act, contending that Prima Paint had failed to make a payment under the contract.⁵³ Prima Paint invoked diversity jurisdiction and brought suit in federal district court to rescind the entire contract on the ground of fraud.⁵⁴ Therefore, the central issue was “whether a claim of fraud in the inducement of the entire contract [containing an arbitration provision] is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators.”⁵⁵ The Court ruled that the arbitrators should resolve such a dispute.⁵⁶

In making its decision, the Court highlighted three key provisions of the FAA. Section 2 provides that a written provision for arbitration “in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁵⁷ Section 3 requires a federal court in which suit has been brought “upon any issue referable to arbitration under an agreement in writing for such arbitration” to stay the court action pending arbitration.⁵⁸ Section 4 directs a federal court to order arbitration once it is satisfied that an agreement for arbitration has been made and not honored.⁵⁹ In *Bernhardt*, the Court had previously held that the stay provided by section 3 was only applicable to contracts covered by sections 1 and 2.⁶⁰ The scope of section 3 covered maritime transactions and contracts evidencing transactions involving commerce.⁶¹ The Court followed the same reasoning in *Prima Paint*. The Court upheld the stay because it deemed the contract between Flood & Conklin and Prima Paint was a contract “involving commerce.” The contract was inextricably tied to the transfer of manufacturing and selling operations from New Jersey to Maryland and to the continuing operations of an interstate manufacturing and wholesaling business.⁶² The Court reasoned that the federal court was bound to apply rules enacted by Congress with respect to matters over which it

52. *Id.* at 398.

53. *Id.*

54. *Id.*

55. *Id.* at 402.

56. *Id.* at 404.

57. Federal Arbitration Act, 9 U.S.C.S. § 2 (2007).

58. 9 U.S.C.S. § 3.

59. 9 U.S.C.S. § 4.

60. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 202 (1956).

61. 9 U.S.C.S. § 2.

62. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967).

has legislative power.⁶³ Since the Court determined that the contract between Flood & Conklin and Prima Paint involved interstate commerce, it fell within the authority of Congress under the Commerce Clause.⁶⁴ The Court thus framed the question not as whether Congress could fashion substantive rules in diversity cases, but whether Congress could prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate.⁶⁵ Essentially, the Court determined that the FAA applied in diversity cases because Congress had so intended.⁶⁶

The Court still had to determine why an arbitrator was entitled to hear the dispute rather than a court. In its reasoning, the Court created the Separability Doctrine by applying an earlier Second Circuit decision in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*⁶⁷ The Court of Appeals for the Second Circuit held in *Robert Lawrence Co.* that an arbitration agreement is separable from the rest of the contract.⁶⁸ The court reasoned that section 2 of the FAA did not purport to apply to the contract as a whole but rather the specific provision of arbitration in maritime transactions and contracts involving commerce.⁶⁹ The Supreme Court supported its Doctrine of Separability through section 4 of the FAA. Under section 4, the federal court is instructed to order arbitration to proceed once it is satisfied that "the making of the agreement for arbitration or the failure to comply is not in issue."⁷⁰ The language of the statute, according to the Court, did not permit federal courts to consider claims of fraud in the inducement of a contract.⁷¹ The Court held that in passing upon a section 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.⁷²

Justice Black wrote a lengthy dissent to the Court's decision in *Prima Paint*, which set the tone for future discord in regards to the application and scope of the FAA. The Separability Doctrine, as adopted by the Court, preempted state law to the contrary. Justice Black worried that the Court's adoption of the rule went against the

63. *Id.* at 406.

64. The United States Constitution empowers Congress to regulate commerce among the several States. U.S. CONST. art. I, § 8, cl. 3.

65. *Prima Paint*, 388 U.S. at 405.

66. See *Allied-Bruce Terminex Cos., Inc. v. Dobson*, 513 U.S. 265, 271 (1995) (discussing the holding of *Prima Paint*, 388 U.S. at 405).

67. *Prima Paint*, 388 U.S. at 402 (citing *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959)).

68. *Robert Lawrence*, 271 F.2d. at 409-10.

69. *Id.*

70. Federal Arbitration Act, 9 U.S.C.S. § 4 (2007).

71. *Prima Paint*, 388 U.S. at 404.

72. *Id.*

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design of the FAA to provide a procedural remedy that would not interfere with state substantive law.⁷³ Justice Black argued that sections 2 and 3 of the FAA assume the existence of a valid contract.⁷⁴ Justice Black referred to the legislative history of the FAA in his argument against the Separability Doctrine established in *Prima Paint*. According to Justice Black, the legislative history indicated that the Act was not meant to cover contracts produced through unequal bargaining power, even with a valid arbitration provision.⁷⁵ Congress' concerns regarding these forms of contracts did not contemplate unequal bargaining power towards the arbitration provision alone, but to the contract as a whole. Justice Black commented that *Prima Paint* would not have executed any contract, including the arbitration clause, if it were not for the fraudulent misrepresentations of Flood & Conklin.⁷⁶ Therefore, an agreement to an arbitration clause obtained by fraud was no more "voluntary" than an agreement obtained by unequal bargaining power.

Justice Black also believed, based on previous comments from the bill's sponsors, that they never intended the issue of fraud to be resolved by arbitration.⁷⁷ The sponsors, according to Justice Black, recognized two values in arbitration: (1) "the expertise of an arbitrator to decide factual questions in regard to the day-to-day performance of contractual obligations"⁷⁸ and (2) the speed with which arbitration can resolve disputes.⁷⁹ Arbitration served neither of these purposes when rescission was sought on the ground of fraud. The Court was not content to hold that the FAA made arbitration agreements enforceable in federal courts if they were valid and legally existent under state law.⁸⁰ The Court, instead, interpreted the FAA to give federal courts the right to fashion federal law, inconsistent with state law, to determine whether an arbitration agreement is enforceable.⁸¹

Prior to 1925, federal courts would give damages for the breach of an arbitration agreement, but refused to specifically enforce them.⁸² Therefore, according to Justice Black, Congress' limited purpose for

73. *Id.* at 411 (Black, J., dissenting).

74. *Id.* at 412-13.

75. *Id.* at 414 (citing *Hearing on S.4213 and 4214 Before a Subcommittee of the Senate Committee of the Judiciary*, 67th Cong. 6 (1923) (remarks of Senator Walsh)).

76. *Id.* at 415.

77. *Id.*

78. *Id.* See also Julius H. Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926) (arguing that arbitration is suited for resolving ordinary disputes between merchants, such as disputes over quantity and time of delivery, but arbitration is not a proper remedy for deciding major points of law, like constitutional questions).

79. *Prima Paint*, 388 U.S. at 415.

80. *Id.* at 422.

81. *Id.*

82. *Id.*

enacting the FAA was to provide a party to such an arbitration agreement a remedy formerly denied him.⁸³ Justice Black viewed arbitration under the FAA as simply a new procedural remedy. In sum, Justice Black's dissent in *Prima Paint* focused on the reality that the Court forced *Prima Paint* to submit to binding arbitration of a void and unenforceable contract without effective judicial review.⁸⁴

After *Prima Paint*, the FAA applied to federal diversity cases involving maritime transactions and contracts involving commerce. However, the Court had yet to contemplate whether the FAA would apply in state courts as well. In 1984, the Supreme Court addressed this issue in *Southland Corp. v. Keating*.⁸⁵ This case involved a franchise agreement between Southland Corp. (franchisor) and Keating (franchisee), which contained a provision requiring arbitration in accordance with the rules of the American Arbitration Association for any dispute arising from the agreement.⁸⁶ Keating filed a class action suit asserting multiple claims against Southland Corp., including a claim for violating disclosure requirements of the California Franchise Investment Law.⁸⁷ Southland petitioned to compel arbitration of all the claims.⁸⁸ The California Superior Court granted Southland's motion to compel arbitration on all claims except the Franchise Investment Law.⁸⁹ The California Court of Appeal reversed the trial court's refusal to compel arbitration.⁹⁰ The court of appeal interpreted the arbitration clause to require arbitration of all claims under the Franchise Investment Law and construed the state statute not to invalidate such agreements to arbitrate.⁹¹ The court of appeal went further and held that if the Franchise Investment Law rendered arbitration laws involving commerce unenforceable, it would conflict with section 2 of the FAA and therefore be invalid under the Supremacy Clause.⁹² The California Supreme Court reversed the court of appeal's ruling and interpreted the Franchise Investment Law to require judicial consideration of claims brought under the statute. The California Su-

83. *Id.*

84. *Id.* at 425.

85. *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

86. *Id.* at 4.

87. *Id.* (The Franchise Investment Law provided that "[a]ny 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.").

88. *Id.*

89. *Id.*

90. *Id.* at 5.

91. *Id.*

92. *Id.* (The Supremacy Clause is found in Article VI, § 2 of the United States Constitution. It establishes the Constitution, along with federal statutes, as the supreme law of the land which state judges are required to uphold even if state laws or constitutions are in conflict with it.).

preme Court concluded that the statute did not contravene the FAA.⁹³

The United States Supreme Court disagreed with the California Supreme Court and reversed. The Court referred back to *Prima Paint's* holding that the FAA rested on the authority of Congress to enact substantive rules under the Commerce Clause.⁹⁴ The Court in *Southland Corp.* reasoned that the application of the Commerce Clause implied that substantive rules of the FAA were to apply in state as well as federal courts.⁹⁵ According to the Court, the phrase "involving commerce" in section 2 of the FAA clearly indicated that Congress intended to invoke its Commerce Clause powers and apply the act to both federal and state courts.⁹⁶

In a dissent from the opinion of the Court, Justice O'Connor argued that section 2 of the FAA, on its face, did not identify which judicial forums are bound by its requirements or what procedures govern its enforcement.⁹⁷ Rather, the FAA dealt with these matters in sections 3 and 4.⁹⁸ Section 3 required a stay for any suit or proceeding brought in *any of the courts of the United States* that is referable to arbitration.⁹⁹ Thus, according to Justice O'Connor, section 3 limited the scope of the statute to the federal courts. Furthermore, section 4 specifies that a party aggrieved by another's refusal to arbitrate may petition "any United States district court" for an order directing that such arbitration proceed in the matter provided in the agreement.¹⁰⁰ The effect of the Court's ruling in *Southland Corp.*, according to Justice O'Connor, was to make states follow the procedures of sections 3 and 4, which appear to be specifically directed at federal courts.¹⁰¹ Even though *Prima Paint* held that Congress had the power to legislate over contracts involving maritime transactions and involving interstate commerce, the ruling did not express that the substantive laws should be applied in both state and federal courts.¹⁰² This absence was significant according to Justice O'Connor, since the heavily relied upon *Robert Lawrence* decision had, in dictum, stated that the FAA was a declaration of national law equally applicable in state and fed-

93. *Id.*

94. *Id.* at 11.

95. *Id.*

96. *Id.* at 14-15.

97. *Id.* at 22 (O'Connor, J., dissenting).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 23.

102. *Id.* at 23-24.

eral courts.¹⁰³ The Court in *Prima Paint* had a clear opportunity to adopt this declaration, but tellingly chose to refrain.

The enactment of the FAA, according to Justice O'Connor, rested upon Congress' ability to control the federal courts. Immediately after the FAA's enactment, the American Bar Association drafters of the Act wrote, "[the FAA] rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts."¹⁰⁴ Justice O'Connor also addressed the Court's concerns of "forum shopping" if the FAA did not extend to the state courts. No forum shopping would be possible in cases not involving complete diversity since the federal court would not have jurisdiction.¹⁰⁵ In cases involving complete diversity, both parties would have equal access to the federal courts, so no advantage would exist.¹⁰⁶ When a party resisting arbitration initiated an action in state court, the suit could be removed by the opposing party to federal court.¹⁰⁷ In fact, according to Justice O'Connor, Congress enacted the FAA for the specific purpose of preventing forum shopping since a number of states at the time had arbitration laws but the federal courts were not enforcing them.¹⁰⁸

After *Southland Corp.*, the FAA remained as federal substantive law that preempted *Erie* through Congress' powers authorized in the Commerce Clause. The FAA now applied to state courts as well, a distinction from the Court's holding in *Prima Paint*.¹⁰⁹ The Separability Doctrine adopted in *Prima Paint* distinguished an arbitration provision from the rest of the contract. Any claim not specifically attacking an arbitration provision must be decided by an arbitrator. *Prima Paint* only dealt with a claim of fraud brought in a federal court. Thus in *Buckeye Check Cashing, Inc. v. Cardegna*, the Court had to determine who should consider a claim of illegality in a case brought in a state court.

ANALYSIS

The usurious interest rates within the contract between Cardegna and Buckeye Check Cashing, Inc. rendered the contract illegal and void under Florida law.¹¹⁰ Cardegna sought a state remedy in state

103. *Id.* at 24.

104. *Id.* at 28 n.16.

105. *Id.* at 34.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 23.

110. *Buckeye Check Cashing, Inc. v. Cardegna (Buckeye II)*, No. 04-1264, slip. op. at 1 (U.S. Feb. 21, 2006).

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court. The Florida Supreme Court allowed Cardegna to avoid arbitration since enforcing an arbitration agreement within a void contract would give life to a contract that is against state law.¹¹¹ However, the United States Supreme Court reversed the Florida Supreme Court's decision. In a quite simple analysis, the Court reasoned that Congress enacted the FAA to overcome judicial resistance to arbitration.¹¹² Section 2 of the FAA embodies the Separability Doctrine.¹¹³ It provides that challenges to arbitration agreements may be made "upon such grounds as exist at law or in equity for the revocation of any contract."¹¹⁴ Challenges are divided into two classifications: (1) those challenging the validity of the arbitration agreement and (2) those challenging the validity of the contract as a whole.¹¹⁵ The former is suited for the courts while the latter is suited for the arbitrator.¹¹⁶ According to the Court, Cardegna's claim of illegality applied to the contract as a whole and therefore required arbitration.¹¹⁷

The simplicity of *Buckeye's* analysis detracts from the complexity of the judicially created entity that has emerged since the FAA's enactment in 1925, an entity that has successfully and wrongfully eliminated the rights of states established in *Erie*. To demonstrate the fault in *Buckeye*, it is imperative to dissect its rationales individually. *Buckeye* asserts that Congress enacted the FAA to overcome judicial resistance to arbitration.¹¹⁸ However, history indicates that Congress enacted the FAA to overcome *federal* judicial resistance to arbitration. Prior to the FAA's enactment in 1925, the state of New York enacted the novel New York Arbitration Act of 1920 which required enforcement of arbitration agreements and authorized the stay of legal proceedings.¹¹⁹ Federal courts, however, had refused to compel arbitration in diversity cases involving the New York statute.¹²⁰ Thus, the FAA's purpose served to create a procedural remedy requiring federal courts to enforce arbitration agreements that they had previously refused to enforce. States were attempting to enforce arbitration and the federal courts were hesitant. Ironically, the ruling in *Buckeye* shows the twisted application of the FAA today; a state attempting to *avoid* arbi-

111. *Buckeye Check Cashing, Inc. v. Cardegna* (*Buckeye I*), 894 So. 2d 860, 864 (Fla. 2005), *rev'd* *Buckeye II*, No. 04-1264, slip. op. at 1.

112. *Buckeye II*, No. 04-1264, slip. op. at 1.

113. *Id.* at 5.

114. 9 U.S.C.S. § 2 (2007).

115. *Buckeye II*, No. 04-1264, slip. op. at 4.

116. *Id.*

117. *Id.* at 6-7.

118. *Id.* at 1.

119. *See Atlantic Fruit Co. v. Red Cross Line*, 276 F. 319, 322 (S.D.N.Y. 1921), *aff'd*, 5 F.2d 218 (2d Cir. 1924).

120. *Southland Corp. v. Keating*, 465 U.S. 1, 34 (1984); *see Atlantic Fruit Co.*, 276 F. 319 (S.D.N.Y. 1921), *aff'd*, 5 F.2d 218 (2d Cir. 1924); *Lappe v. Wilcox*, 14 F.2d 861 (N.D.N.Y. 1926).

tration is forced to arbitrate by the federal courts. The drafters of the FAA could have required federal courts, in diversity cases, to adopt the arbitration law of the state in which they sit. The FAA was enacted to make arbitration agreements enforceable even in federal courts located in states that had no arbitration law.¹²¹ The goal of the FAA was not to coerce states into arbitration, but to create a uniform federal law that required federal courts to enforce the arbitration agreements that they had previously refused to enforce. Therefore, the statement in *Buckeye* that Congress enacted the FAA to overcome judicial resistance to arbitration is dangerously broad and over-encompassing.

Buckeye adopted the interpretation in *Prima Paint* that section 2 represented Congress' utilization of the Commerce Clause in the creation of the FAA. Without this interpretation, the federal courts would not have been able to apply the FAA in federal diversity cases since *Bernhardt* ruled that such cases were "outcome-determinative" and therefore must abide by state law.¹²² If a state did not have a law allowing the enforcement of arbitration agreements, a federal court could refuse to enforce a valid arbitration agreement since the FAA would not apply. The language of section 2 regarding maritime transactions and contracts involving commerce allowed the *Prima Paint* Court to use the Commerce Clause as a weapon against any accusation that federal substantive law could not overcome state law to the contrary. This would satisfy the intent of the 1925 Congress to require federal courts to enforce state arbitration laws.

Buckeye also adopts *Prima Paint's* Separability Doctrine. As discussed previously, the doctrine was a creation of an imaginative 2nd Circuit judge in *Robert Lawrence*. There was no need to create a Separability Doctrine to fulfill the original intent of the FAA while satisfying the requirements of *Erie* and *Bernhardt*. The scope of section 2 of the FAA applies to any *provision* in a maritime contract or *contract* involving commerce which contains an arbitration provision.¹²³ Such a provision or contract is considered valid, irrevocable, and enforceable save upon any grounds that exist at law or in equity for the revocation of any contract.¹²⁴ Thus, in the context of the procedural intent of the FAA, if a contract involving commerce had an arbitration provision covering the particular dispute at issue, it must be enforced unless a particular contract defense provides otherwise. The contract defense would be applied to the contract as a *whole* and not just the

121. *Id.*

122. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956).

123. 9 U.S.C.S. § 2 (2007).

124. *Id.*

arbitration provision. If the contract in *Buckeye* had been brought before a Florida federal court, the federal court would have properly denied arbitration since the contract defense of illegality would have been successfully applied. But with the judicial creation of the Separability Doctrine, an arbitrator would decide the contract's legality through the power bestowed upon him by the very contract at issue. The Separability Doctrine was an unnecessary creation of the judicial system that has thoroughly corrupted the intent and application of the FAA.

Prima Paint did not address whether the power granted to the FAA by the Commerce Clause would extend to state courts as well as federal courts. Since the invocation of the Commerce Clause in section 2 allowed the Court to apply the FAA in federal courts as the 1925 Congress had intended, it appears implausible that the FAA should be applied to state courts as well, as that was not within the contemplation of the FAA's creators. The *Buckeye* court relied on the *Southland Corp.* court's reasoning that the phrase "involving commerce" in section 2 of the FAA served as a necessary qualification on a statute intended to apply in state and federal courts.¹²⁵ But sections 3 and 4 of the FAA specifically refer to federal courts. Section 3 requires that "any suit brought in any of the courts of the United States upon any issue referable to arbitration under a written agreement for such arbitration shall stay the trial until such arbitration occurs."¹²⁶ Congress did not write "in" the United States but chose "of" to signify that the procedure applied to federal courts. This makes sense when examined in the context of the FAA as a whole. Where federal courts had previously refused to compel state-mandated arbitration in diversity cases, the Supreme Court interpreted section 3 to require federal courts to compel the arbitration. It does not make sense to make state courts follow suit since that is not what the FAA explicitly states. Section 4 allows a party, aggrieved by an alleged failure to arbitrate, to petition any United States district court¹²⁷ with proper jurisdiction to compel such arbitration.¹²⁸ This application makes sense since a person in a state that does not have a statute enforcing such arbitration could petition the federal court to have the valid agreement enforced. What does not make sense is that a person in a state that has a law *prohibiting* the enforcement of an arbitration provision can use the

125. *Buckeye Check Cashing, Inc. v. Cardegna (Buckeye II)*, No. 04-1264, slip. op. at 6-7 (U.S. Feb. 21, 2006).

126. 9 U.S.C.S. § 3 (2007).

127. The difference between "United States district court" and "court of the United States" was merely a clerical change by the 1954 Congress according to H. R. REP. NO. 83-1981, at 8, (1954).

128. 9 U.S.C.S. § 4 (2007).

FAA to enforce the agreement in a *state* court. No where in sections 2, 3, or 4 does the FAA provide such a remedy.

Congress enacted the FAA during a time when federal substantive general law was thought to exist. However, *Erie* refuted that belief thirteen years later in 1938. Thus, it is hard to imagine that in 1925, Congress created the FAA as a substantive law statute via the Commerce Clause rather than just enacting it as unlimited general substantive law.¹²⁹ The principal support for the FAA came from trade associations dealing in groceries and from commercial/mercantile groups in major trading centers.¹³⁰ Practically all who testified in support of the bill before the Senate subcommittee in 1923 explained that the bill was designed to cover contracts between people in different states who produced, shipped, bought, or sold commodities.¹³¹ Therefore, it is more likely that Congress wrote "involving commerce" not to establish its right to make substantive law through the Commerce Clause, but rather to specify with which types of contracts the FAA was concerned. If Congress wanted to make the FAA a substantive document, it would have simply used its assumed power through the Commerce Clause to create general substantive law. Instead, the intent of the FAA was to provide a procedural remedy.

To be true to the original intent of the FAA, *Buckeye* should have left the decision to enforce the arbitration provision to the state of Florida and its laws governing contracts. The usurious interest rates in the contract between Cardegna and Buckeye Check Cashing, Inc. made the contract illegal and void under state law. That should mean that the arbitration agreement, contained within the contract, is illegal and void as well. The state will not enforce the dollar amounts or other provisions in the illegal contract but, by the ruling in *Buckeye*, it must enforce the arbitration agreement. The Court contended that the Congressional intent of the FAA was to place an arbitration agreement "upon the same footing as other contracts."¹³² Yet the application in *Buckeye* placed the arbitration agreement *above* other contracts. Where the contract as a whole is void and therefore its pro-

129. The Commerce Clause at the time of the FAA's enactment had limited power according to the Supreme Court. At the time, the Court narrowly defined the meaning of "commerce" (see, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895)), restrictively described "among the States" (see, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)), and held that Congress violates the 10th Amendment when it regulates matters left to state governments (see, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918)).

130. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 411 n.2 (1967); see 50 A.B.A. Rep. 357 (1925).

131. *Prima Paint*, 388 U.S. at 411 n.2; see *Hearing Before Subcomm. of the Senate Comm. on the Judiciary on S. 4213 and S. 4214*, 67th Cong. 4th Sess., 3, 7, 9, 10 (1923).

132. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (quoting H. R. Rep. No. 96, 68th Cong. (1924)).

visions are void, the arbitration provision is not. This application is contrary to what the “equal footing” likely meant. Since prior to the enactment of the FAA, federal courts enforced contracts and their various provisions but not their arbitration provisions, a remedy was needed to place arbitration provisions on “equal footing” with the rest of the contract. That remedy became the FAA. Today, however, the FAA is used in reverse. Where the entire contract is void, only the arbitration provision is allowed to survive. Thus, where the FAA originally allowed arbitration to obtain equal status with the other provisions in a contract, it now obtains a status far above those provisions. The result requires states to force their citizens to arbitrate disputes from contracts that are void by law and whose own state law prohibits arbitration in such a matter. This result is not what Congress had in mind in 1925. Congress desired a remedy, but the judicial system has instead created a monster.

CONCLUSION

The Federal Arbitration Act began as a procedural remedy to require federal courts to enforce arbitration provisions they previously had negated. Thirteen years after its enactment, *Erie* required federal courts to follow state substantive law in diversity cases. Subsequently, *Bernhardt* determined that the duty to arbitrate a contract dispute was “outcome-determinative,” thus placing the FAA in danger of being unconstitutional in federal diversity cases. *Prima Paint* alleviated those concerns by invoking the Commerce Clause when interpreting section 2 of the FAA, thus allowing its provisions to escape *Erie* scrutiny. In so doing, *Prima Paint* also created the Separability Doctrine, which defined when disputes should be heard by a court and when they should be heard by an arbitrator. This creation was unnecessary, unwarranted, and contrary to the original intent of the FAA. In *Southland Corp.*, the Court unjustifiably extended the FAA to apply to state courts. This extension did not satisfy the original intent of the FAA. Rather it was an extension of the Court’s interpretation of section 2 in *Prima Paint*, which enabled the Court to apply the FAA in federal courts just as Congress had originally intended. The extension in *Southland Corp.* went beyond the FAA’s original intent and modified scope. That unwarranted extension has reached new levels as evidenced in *Buckeye*. What started as creative judicial license to enable the FAA, which predated *Erie* and *Bernhardt*, to survive and accomplish its original intent has turned into an abuse of that license. *Buckeye* and its predecessor *Southland Corp.* gave a congressional act power it never sought to obtain. The Court did the right thing in allowing the FAA to survive in *Prima Paint*. The Court did the wrong

thing in causing the FAA to grow and expand in undesired ways through the Separability Doctrine and application to state courts. Now the Court needs to do the right thing again by allowing the states and their laws to continue to survive in the face of the suddenly all-encompassing FAA. A revocation of the Separability Doctrine and a vacation of the holdings in *Buckeye* and *Southland Corp.* would cut this judicially created monster down to appropriate size.