NOTES

Jackson v. Shakespeare Foundation, Inc.: Can Florida Courts Circumvent Precedent Set by the Supreme Courts of the United States and Florida Regarding the Enforcement of Arbitration Provisions?

CRAIG TOMPKINS*

* Executive Editor, *University of Miami Law Review*; J.D. 2015, University of Miami School of Law; M.B.A. 2006, University of Miami School of Business; B.B.A. 2003, Stetson University. I would like to thank my wife, Rebecca, and my parents, Joe and Barbara Wortley, for their unwavering support during my law school adventure. I would also like to thank fellow *Law Review* members Karla Albite and Adrienne Scheffey, as their editing work greatly aided in sharpening the finer points of this note, and Kelly Balkin, who did an excellent job of policing my writing style. A very special thank you is also owed to Vice Dean Patrick Gudridge, whose commentary provoked me to go down the research paths that built the arguments made in Parts IV and V of this note.

I. Introduction

In February 2013, the Florida Supreme Court issued a ruling that to some—at least at first glance—may seem puzzling. In *Jackson v. Shakespeare Foundation, Inc.*,[1] the defendant, when attempting to sell a piece of land, placed an advertisement describing the property that included the following language: "Topography and boundary survey completed recently," and "Wetlands study verifies No Wetlands."[2] However, as the plaintiff would later find out through discovery, "[w]hen the [defendant] posted this advertisement, they had in their possession a Property Report Land Use Planning Analysis, which established, contrary to the advertisement, that 25% of the subject property constituted wetlands."[3] When deciding this case, the Florida Supreme Court accepted that the plaintiff "relied on the representations set forth in the advertisement" in deciding to enter into a contract to purchase the property.[4]

Further, it was alleged that the plaintiff made it known to the defendant, prior to purchasing the property, that the plaintiff intended to build a housing development on the land.[5] It was only when the plaintiff had already taken title to the land and begun the building process that it discovered that a significant portion of the property was made up of wetlands.[6] The plaintiff filed suit, alleging fraudulent misrepresentation—"that in the advertisement for the sale of the property, the [defendant] knowingly and falsely misrepresented that the property had no

1. 108 So. 3d 587 (Fla. 2013).
2. *Id.* at 590.
3. *Id.*
4. *Id.* The Florida Supreme Court accepted as a "fact" of the case that the Shakespeare Foundation did indeed rely on the representations made by the advertisement.
5. *Id.*
6. *Id.* The discovery came after a builder reported his suspicions to the plaintiff, and the plaintiff consequently hired an engineer to perform a study of the land.

wetlands and that the property was suitable for the construction of thirty units."[7] The defendant countered by filing a motion to dismiss the suit, pointing to the land sale contract's arbitration clause that provided, in part: "this Contract will be construed under *Florida law*, [and] all controversies, claims, and other matters in question arising out of or relating to this transaction or this Contract or its breach will be settled" through binding arbitration.[8]

When making a prediction on the outcome of this case, intuition may lead one to believe that a court would be reluctant to enforce an arbitration agreement against a plaintiff who is essentially saying: "If it were not for the defendant's fraudulent behavior in inducing me to enter this contract that contains this arbitration clause, I would have never signed this contract in the first place. How can you hold me to a provision in a contract that I was fraudulently coaxed into?"[9] But, contrary to what may be an intuitive result, even if a judge is absolutely convinced that the entire contract in which the arbitration provision lies (the "container contract") was procured by fraud, that judge must actually enforce that arbitration provision.[10] In fact, in *Jackson v. Shakespeare*

7. *Id.*

8. *Id.* at 591 (emphasis added).

9. An important point to keep in mind for purposes of this discussion is that generally when a party prevails on a fraud in the inducement claim, it has the effect of making the disputed contract voidable. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 9.22 (6th ed. 2009). A party claiming fraud in the inducement is essentially saying that the contract entered into is not what the other party said it was and that, because of this misrepresentation, they entered into an agreement in which they otherwise would not have; therefore, they are seeking to cancel or rescind that agreement. *See* RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981). Alternatively, a party may choose to keep to the agreement and instead seek monetary damages. This would be a tort action rather than a contractual suit. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 9(b)(1) (Tentative Draft No. 2, 2014) ("Rescission is a remedy for fraud available under the law of restitution and contract, not tort. Both sides give back whatever they received from the other, to the extent such a return is feasible. Rescission is not always available because it requires that a reasonably complete restoration of performance be possible between both parties. These acts of restoration can be supplemented by awards of incidental damages to make up for value that cannot be fully returned, or to reflect costs that the defrauded party incurred in reliance on the transaction.").

10. *See, e.g.*, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) (holding that when fraud in the inducement is alleged against a contract containing an arbitration clause, an arbitrator, not the court, is to determine the fraud in the inducement claim); *Jackson*, 108 So. 3d at 594 (holding that when fraud claims have a "clear contractual nexus with, and thus a significant relationship to, the contract," an arbitrator, not the court, is to determine the fraud in the inducement claim). Yet, many would agree that this seems highly counterintuitive. *See, e.g.*, Jonathan Pollard, *Florida Supreme Court Continues Trend Toward All Arbitration, All the Time*, FLA. BUS. LITIGATOR BLOG (Feb. 28, 2013), http://floridabusinesslitigator.com/2013/02/28/florida-supreme-court-continues-trend-toward-all-arbitration-all-the-time/ ("[A]s Florida's Fifth District Court of Appeals once noted, 'As a matter of pure logic, if a contract is entered into because of the fraud or misrepresentations of one party, the whole contract should fail, including any agreement to arbitrate contained in the contract.'") (quoting Beazer Homes Corp. v. Bailey, 940 So. 2d 453 (Fla. Dist. Ct. App. 2006)).

Foundation, Inc., the Florida Supreme Court seemed to go as far as acknowledging that the plaintiff relied upon the false advertisement,[11] but nonetheless held that the arbitration provision had to be enforced.[12] Consequently, an arbitrator (and not a judge) would have to determine the threshold issue of whether the container contract was procured by fraud before holding further proceedings to resolve other contractual disputes and their possible remedies.[13]

This note places the Florida Supreme Court's *Jackson v. Shakespeare Foundation, Inc.* decision in the context of federal and state law and makes an attempt to explain why the court was compelled to issue a ruling that, at least on the surface, would appear to many to be "unfair." This note then discusses and analyzes whether there lies within current law a way for lawyers to argue for, or judges to frame an opinion in, a legitimate manner that avoids this seemingly unjust result requiring parties to arbitrate disputes pursuant to agreements that were induced by fraud.[14] Part II of this note provides a background discussion on the Federal Arbitration Act[15] ("FAA") and some of the United States Supreme Court's jurisprudence on the FAA, for the purpose of later discussion on the role that federal law may have played in *Jackson*. Part III provides a discussion of the Florida cases that lead up to the *Jackson* ruling. Part IV is an analysis of how the case law discussed in this note shaped the *Jackson* decision. Part V explores arguments that lawyers and judges might make using current law in order to avoid enforcing arbitration clauses in cases where the arbitration provision lies within a contract that was entered into through illicit means. Part VI concludes by determining that the Florida Supreme Court purposefully aligned Florida arbitration law with federal arbitration law, but argues that Florida's lower courts may not necessarily be compelled to reach the same result in future cases with fact patterns similar to that in *Jackson v. Shakespeare Foundation, Inc.*

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11. *See Jackson*, 108 So. 3d at 590 ("The Shakespeare Foundation relied on the representations set forth in the advertisement and entered into a contract with the Jacksons for the purchase of the real property.").

12. *See id.* at 594–96.

13. Justice Black, in a dissenting opinion to the *Prima Paint* decision, noted the perverse incentive this placed on arbitrators. *Prima Paint*, 388 U.S. at 416 (Black, J., dissenting). Black suggested that parties seeking to rescind a contract based on fraud in the inducement, and who are consequently disavowing an arbitration clause in that very contract, should be concerned that an arbitrator's "compensation corresponds to the volume of arbitration they perform[, and that if the arbitrators] determine that a contract is void because of fraud, there is nothing further for them to arbitrate." *Id.*

14. Practically speaking, one could imagine many different fact patterns where it seems wholly unjust to enforce an arbitration provision. Yet, under this holding, arbitration would be mandated.

15. 9 U.S.C. §§ 1–16 (2012).

II. The Federal Arbitration Act's Impact on State Court Cases

The Federal Arbitration Act[16] and the Supreme Court jurisprudence shaping the interpretation and the enforcement of the FAA could probably be fairly described as having a long and convoluted history—especially as it applies to issues being heard by state courts.[17] The resulting precedents from this history are important to understanding the Florida Supreme Court's decision in *Jackson v. Shakespeare Foundation, Inc*. However, this note does not seek to comment upon the wisdom of the resulting precedents—that topic has already been covered extensively by others.[18] Instead, this note seeks merely to present past precedent as a

16. *Id.*

17. "The relationship between state and federal arbitration law is far from settled. There remain significant open questions and there are still vigorous dissenting views represented on the Court." Katherine V.W. Stone, Arbitration Law 23 (2003). To be fair, it has been over ten years since that quote was written in a law school textbook, and, at least as far as the United States Supreme Court goes, it is probably no longer accurate that there are "vigorous dissenting views." *See, e.g.*, Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 440–49 (2006) (holding in a 7-1 decision that when the FAA applies, there is no room for application of state law and policy—Justice Thomas was the lone dissenter, and he issued a three-sentence dissent). The Court has taken up additional cases relating to the FAA, which have clarified *some* of those "open questions." *See, e.g.*, AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740, 1747 (2011) ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.") (citing Preston v. Ferrer, 552 U.S. 346, 353 (2008)); *see also* Pierre H. Bergeron, *At the Crossroads of Federalism and Arbitration: The Application of* Prima Paint *to Purportedly Void Contracts*, 93 Ky. L.J. 423, 430 (2005) ("Although many argue that the Court elevated policy goals above legislative history, even Justice O'Connor, who authored the stinging dissent in [*Southland Corp. v. Keating*, 465 U.S. 1 (1984)], has since acquiesced in the Court's end result.").

18. *See, e.g.*, Bergeron, *supra* note 17, at 424–72 (arguing that attacks on the Supreme Court's "severability" doctrine are misguided, and that the attacks wrongly focus on the void/voidable distinction); Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 Fla. L. Rev. 175, 178 (2002) ("Although some have decried the Supreme Court's revamped 'arbitration federalism' as judicial legerdemain, given the FAA's original limited purpose to validate arbitration agreements only in federal court, there is no use in crying over spilt milk.") (quoting Paul D. Carrington & Paul A. Haagen, *Contract and Jurisdiction*, 1996 Sup. Ct. Rev. 331, 333); Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 Ala. L. Rev. 789 (2002); Richard C. Reuben, First Options*, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. Rev. 819, 872–82 (2003) (calling for the Court to overturn the "separability" doctrine as applied to the FAA); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 Tul. L. Rev. 1, 9–10 (1997) ("The Court [is] far from engaging in neutral legal analysis that simply allows parties to contract for arbitration . . . [and] has in recent decisions stretched and twisted traditional canons of construction to favor arbitration over litigation. . . . [T]he Supreme Court's interpretation of the FAA as favoring arbitration over litigation is not merely bad as a matter of policy, but also is often inconsistent with the proper interpretation of the Constitution.") (footnote omitted); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. Rev. 931,

basis for understanding how the Florida Supreme Court arrived where it did in *Jackson* and to discuss how Florida courts may proceed going forward.

A. *In State Court, the FAA Applies Only to Actions Involving Interstate Commerce*[19]

Today, the FAA is to be applied by state courts only when they are presiding over matters involving interstate commerce,[20] unless, of course, the parties have otherwise agreed to be governed by the FAA.[21] As for federal courts, the FAA applies whenever they have subject-matter jurisdiction,[22] or when they are sitting in diversity over a matter involving interstate commerce[23]—hence, the FAA does not apply when federal courts are sitting in a diversity action not involving interstate commerce.[24]

In order for state courts to be required to apply the FAA, it was necessary to determine that the FAA was substantive law—not merely a procedural rule to be followed by federal courts.[25] In 1956—thirty-one years after the FAA was passed—the Supreme Court decided in *Bernhardt v. Polygraphic Co. of America* that because the FAA was a matter of substantive law, federal courts sitting in diversity must apply the *Erie* doctrine[26] and use the relevant state's arbitration law when deciding the

943–69 (1999) (explaining how the Court has improperly expanded the scope of the FAA over many years, and arguing that its primary justifications for doing so are invalid).

19. Actually, the FAA applies to maritime transactions as well, but that area of law is outside the scope of this note. *See Southland*, 465 U.S. at 10–11 ("We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written *maritime contract* or a contract evidencing a 'transaction involving commerce.'") (quoting 9 U.S.C. § 2 (1976)) (emphasis added).

20. *Southland*, 465 U.S. at 10–11.

21. Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) (holding that parties may "specify by contract the rules under which th[eir] arbitration will be conducted"); *see also* Shotts v. OP Winter Haven, Inc., 86 So. 3d 456, 481 (Fla. 2011) ("arbitration agreement[s] should be enforced as agreed by the parties") (citing Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682 (2010)).

22. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967) ("[T]he question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative.").

23. Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 202–05 (1956).

24. *Id.* at 205 ("[I]f arbitration could not be compelled in the Vermont courts, it should not be compelled in the Federal District Court.").

25. *See id.* at 202; *cf.* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("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 State.").

26. *See* Guar. Trust Co. of N.Y. v. York, 326 U.S. 99, 109 (1945) ("[I]n all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties,

case at hand.[27] This established that arbitration was a matter of substantive law, and that federal courts sitting in diversity should only apply the FAA in cases involving maritime transactions and interstate commerce.[28] Otherwise, the federal court must look to the relevant state arbitration law.[29]

While *Bernhardt* had established that federal courts should be applying the FAA in diversity cases involving interstate commerce,[30] it left unanswered the matter of how state courts should be approaching the FAA.[31] This was not resolved until 1984 in *Southland Corp. v. Keating*, where the Court overruled a California Supreme Court's holding that a provision of the California Franchise Investment Law voided any agreement requiring a franchise owner to arbitrate disputes with their franchisor.[32] The Court held that in a case involving interstate commerce such as this, where a group of 7-Eleven franchisees had filed a class action suit against their franchisor, and the franchisor subsequently sought enforcement of the arbitration agreements in the individual franchise agreements, the Supremacy Clause of the U.S. Constitution would preclude application of state laws that conflicted with the FAA.[33] The Court then elaborated, making a definitive declaration that state courts must apply the FAA when disputes falling into the realm of interstate commerce come before them:

> We would expect that if Congress, in enacting the Arbitration Act, was creating what it thought to be a procedural rule applicable only in federal courts, it would not so limit the Act to transactions involving commerce. On the other hand, Congress would need to call on the Commerce Clause if it intended the Act to apply in state courts. Yet at the same time, its reach would be limited to transactions involving

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the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.").

27. *Bernhardt*, 350 U.S. at 207. The Court in *Bernhardt* arrived at its conclusion by giving its interpretation of the text of the FAA, noting that "section 2 makes 'valid, irrevocable, and enforceable' only two types of contracts: those relating to a maritime transaction and those involving commerce." *Id.* at 200. The Court made the inference that Congress intended to use its constitutional power granted under the Commerce Clause to make law that must be applied by the states. *Id.*; *see generally* United States v. Lopez, 514 U.S. 549, 560 (1995) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."). This ruling made the FAA applicable to state court hearings with the caveat that it only applied to cases involving interstate commerce (and maritime law). *Bernhardt*, 350 U.S. at 202.

28. *Bernhardt*, 350 U.S. at 201–05.

29. *Id.* at 200.

30. *Id.* at 201–05.

31. *See id.* at 199–205.

32. *See* Southland Corp. v. Keating, 465 U.S. 1, 3–6 (1984).

33. *Id.* at 10.

interstate commerce.[34]

While the *Southland* decision seemed to make it a forgone conclusion that the FAA, regardless of venue, would govern any and all contracts involving interstate commerce,[35] the Supreme Court added a wrinkle just five years later.[36] In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, the Court held that if the parties to an interstate commerce contract have a choice-of-law clause in their contract that requires that any disputes arising from their contract be governed by the laws of a specific state, a court must honor the parties' agreement and apply the arbitration law of whatever state's laws have been chosen by the contracting parties.[37] Except, the Court held, if it was a matter of interstate commerce, a court could apply state arbitration laws to the extent that they did not conflict with the FAA—i.e., state law can govern arbitration procedure so long as the arbitration procedures set up by state law are not in conflict with the FAA.[38] This means that in all cases involving interstate commerce, choice-of-law provisions notwithstanding, courts may not rule in a manner that conflicts with the FAA. The Court reasons that to do otherwise would create a result that "would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms."[39]

B. *How the FAA Functions as a Matter of Procedure in State Courts: The Separability Issue*

The *Southland* case tells state courts when the FAA must apply to state court proceedings.[40] But it is another line of cases that details the mechanics of how state courts are supposed to proceed when a party to a suit moves, as a matter of procedure, to stay litigation that is before a

34. *Id.* at 14–15.

35. *See id.* at 10–11 (holding that arbitration provisions under the FAA are enforceable in state court if they are "part of a written maritime contract or a contract 'evidencing a transaction involving commerce'") (quoting 9 U.S.C. § 2 (1976)). "Eleven years [after the *Southland* decision], in *Allied-Bruce Terminix Cos. v. Dobson*, the Court rejected the plea of twenty state attorneys general and reiterated that the FAA applied in state as well as federal court." Sternlight, *supra* note 18 (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272–74 (1995)).

36. *See* Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 470 (1989).

37. *Id.* at 479.

38. *See id.* at 477 (holding that even when an arbitration clause has a choice-of-law provision choosing laws of a certain state, "state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law").

39. *Id.* at 479.

40. *Southland*, 465 U.S. at 14–15 (holding that state courts must apply the FAA in contract disputes involving interstate commerce).

court on the basis that there is an agreement to arbitrate.[41] *Jackson v. Shakespeare Foundation, Inc.*[42] pertains to how a court in Florida is to proceed with respect to a contract, where a plaintiff is suing for fraud in the inducement, but a defendant moves to stay litigation on the basis of an agreement to arbitrate contained in that very contract.[43] It is therefore pertinent to focus on how similar situations have been handled by the Supreme Court of the United States.

Section 2 of the FAA states that a contract "involving" interstate commerce that contains an agreement to arbitrate "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*."[44] "According to this provision, a party can resist arbitration if it can effectively assert a defense that would constitute grounds *at law or in equity* for the revocation of any contract."[45]

Section 3 of the FAA states that if a claim is brought that is referable to arbitration by agreement of the parties involved, "the court . . . upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration, shall on application of one of the parties stay the trial" until such arbitration takes place.[46] Thus, "if there is a written arbitration clause that comes under the FAA, the plaintiff . . . has the burden of showing why the arbitration clause should not be enforced."[47] Section 4 then directs a court to compel arbitration upon motion by a party after the court has found that there is in fact an agreement to arbitrate.[48] So, when a court is presented with a motion to either stay litigation or compel arbitration under the FAA:

> The [c]ourt must engage in a two-step inquiry. First, it must determine whether there is a valid agreement to arbitrate between the parties, and then it must determine whether the dispute comes within the arbitration clause. The first step requires the court to consider the validity of the agreement on the basis of state contract law principles. In applying state law to determine whether a valid agreement to arbitrate exists, a court considers such contract formation issues as mutual assent, consideration, and the Statute of Frauds. . . . *Thus, litigation under Section 3 or 4 of the FAA involves a complex blend*

41. *See, e.g.*, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

42. 108 So. 3d 587 (Fla. 2013).

43. *Id.* at 589–91, 594–97.

44. 9 U.S.C. § 2 (2012) (emphasis added).

45. STONE, *supra* note 17, at 187 (emphasis added).

46. 9 U.S.C. § 3.

47. STONE, *supra* note 17, at 187.

48. 9 U.S.C. § 4.

of state and federal law.[49]

The question of whether this procedure is changed by an allegation that a contract containing an arbitration provision was procured by fraud is one that was directly answered by the Supreme Court in the 1967 *Prima Paint* decision.[50] "This case present[ed] the question whether the federal court or an arbitrator is to resolve a claim of 'fraud in the inducement,' under a contract governed by the [FAA],"[51] and was presided over by a federal district court sitting in diversity of citizenship jurisdiction.[52] The plaintiff was seeking a court order staying the defendant from carrying out arbitration procedures, while the defendant sought a stay of the litigation to allow the arbitration to proceed.[53]

In making its ruling, the Court in *Prima Paint* applied what has become known as the "separability doctrine," believing this to be the best way honor the intent of the contracting parties:

> *Except where the parties otherwise intend*, arbitration clauses as a matter of federal law are 'separable' from the contracts in which they are embedded, and that where no claim is made that fraud was directed to the arbitration clause itself, *a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud*.[54]

Under this interpretation, unless a court can find that the parties to an agreement specifically intended that fraud in the inducement claims not be arbitrated, the arbitrator, not the court, determines if there was fraud in the inducement, therefore making the whole contract voidable.[55] Further, such a finding that the contract is void or voidable does not void the arbitration clause in that contract; if this were not the case, an arbitrator finding that a whole contract is void would in effect be finding that the very contract that gave an arbitrator the power to make such a

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49. STONE, *supra* note 17, at 210 (citing Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd., 139 F.3d 1061 (5th Cir. 1998)) (emphasis added).

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

51. *Id.* at 396–97.

52. *Id.* at 398.

53. *Id*. at 399.

54. *Id.* at 402 (emphasis added).

55. *See id.* at 409. The conduct that gave rise to the fraud allegations may be of interest to the reader and can be summarized as follows: The plaintiff bought a piece of the defendant's business. *Id.* at 397. About three weeks after this transaction closed, the plaintiff contracted with the defendant to provide consulting services related to this purchased business line. *Id.* Interestingly, "[t]he agreement took into account the possibility that [the plaintiff] might encounter financial difficulties, including bankruptcy, but no corresponding reference was made to possible financial problems which might be encountered by [the defendant]." *Id.* The defendant then filed for bankruptcy just one week later. *Id.* at 398. The plaintiff alleged that the defendant made representations that it was financially solvent and could perform under this consulting agreement, but that the defendant must have known that these representations were false and that a bankruptcy filing was imminent. *See id.*

decision did not exist.[56] The exception to this would be when a litigant claims that there was fraud in the inducement specifically relating to the arbitration agreement.[57] If fraud with respect to the arbitration clause is claimed, then a court would have to hear that matter first, and then refer the remainder of the contractual disputes to an arbitrator if there was a finding that there was no fraud in the inducement specific to the arbitration clause.[58]

III. The Florida Supreme Court's Collision with the FAA and *Prima Paint*

A. Cardegna v. Buckeye Check Cashing, Inc.[59]

In 2005, the Florida Supreme Court heard a case in which the FAA clearly governed a disputed contract's arbitration provision, because the matter at hand was clearly one of interstate commerce.[60] The Florida court attempted to distinguish a contract that the plaintiff was claiming to be void as a matter of law from the contract in the *Prima Paint* case, where the plaintiff was claiming a contract to be merely voidable due to fraud in the inducement.[61] The United States Supreme Court rebuked this rationale in overturning the Florida court's decision and confirmed that the *Prima Paint* severability doctrine applies regardless of the type of attack that a plaintiff makes toward the validity of the larger contract containing the arbitration clause.[62]

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56. *See Prima Paint*, 388 U.S. at 403–04. In other words, under the separability doctrine, an arbitrator can invalidate an entire contract between two parties without destroying the arbitration provision that gave the arbitrator the authority required in the first instance to void a contract. For a discussion of the separability doctrine, see George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 Yale J. Int'l L. 1, 22 (2012) ("As an agreement separate and apart from the main contract, an arbitration clause remains valid even though the contract of which it forms a part is not, thus permitting the former to survive the demise of the latter.").

57. *Prima Paint*, 388 U.S. at 403–04.

58. *Id.*

59. Cardegna v. Buckeye Check Cashing, Inc., 894 So. 2d 860 (Fla. 2005), *rev'd*, 546 U.S. 440 (2006).

60. *See supra* Part II.A.

61. *See Cardegna*, 894 So. 2d at 863 ("There is a key distinction between the claim in *Prima Paint* and the claim presently before us: in *Prima Paint*, the claim of fraud in the inducement, if true, would have rendered the underlying contract merely *voidable*. . . . [But], if the underlying contract is held entirely void as a matter of law, all of its provisions, including the arbitration clause, would be nullified as well.").

62. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 446 (2006) ("[T]he Florida Supreme Court relied on the distinction between void and voidable contracts. . . . *Prima Paint* makes this conclusion irrelevant.").

1. The *Buckeye Check Cashing* Case Makes Its Way Through the Florida Courts

In 2005, the Florida Supreme Court heard the case of *Cardegna v. Buckeye Check Cashing, Inc.*[63] In that case, Cardegna "entered into numerous check-cashing transactions (also known as 'payday loans') with Buckeye Check Cashing,"[64] and "received cash in exchange for a personal check in the amount of the cash plus a finance charge."[65] Cardegna "argue[d] that these check-cashing transactions were actually nothing other than usurious loans under Florida law, which would make the check-cashing contracts void ab initio and unenforceable."[66] "For each separate transaction [Cardegna] signed a 'Deferred Deposit and Disclosure Agreement,'"[67] which contained an arbitration provision expressly covering "[a]ny claim, dispute, or controversy, whether in contract, tort, or otherwise."[68] The final clause of the arbitration provision said that "this arbitration Agreement is made pursuant to a *transaction involving interstate commerce*, and shall be governed by the Federal Arbitration Act,"[69] and "the parties concede[d that] they [were] governed by the FAA."[70]

The Florida trial court denied Buckeye Check Cashing, Inc.'s motion to stay the litigation and compel arbitration, "holding that arbitration could not be compelled under a contract that would be void under Florida law and that the issue of the contract's legality must be determined in Florida's courts."[71] Upon appeal to Florida's Fourth District Court of Appeal, the appellate court "reversed the trial court's decision and held that Cardegna's challenge to the underlying contract's validity

63. *Cardegna*, 894 So. 2d at 860.

64. *Id.* at 865 (Bell, J., concurring).

65. *Buckeye Check Cashing*, 546 U.S. at 442.

66. *Cardegna*, 894 So. 2d at 865 (Bell, J., concurring).

67. *Buckeye Check Cashing*, 546 U.S. at 442. A "deferred deposit agreement" is terminology for what is more commonly known as a "payday loan," where a business will give a person cash for a written check, but will not deposit the check until some defined future date. *See, e.g.*, Ky. Rev. Stat. Ann. § 286.9-010(14) (West 2014); Cal. Dep't of Bus. Oversight, *California Deferred Deposit Transaction Law (CDDTL)*, CA.gov, http://www.dbo.ca.gov/Licensees/Payday_Lenders/ (last visited Aug. 11, 2015). The amount of the cash advanced will be some percentage less than the amount written on the face of the check. In *Cardegna v. Buckeye Check Cashing*, it was alleged that the amount of the discount on the face value of the check amounted to a usurious loan—i.e., the rate of interest being charged was above the maximum rate allowed by state law. *See Cardegna*, 894 So. 2d at 861; *see also* Fla. Stat. § 687.02(1) (2014) ("a higher rate of interest than the equivalent of 18 percent per annum simple interest [is] hereby declared usurious" for loans less than $500,000).

68. *Cardegna*, 894 So. 2d at 861.

69. *Id.* (emphasis added).

70. *Id.* at 868 (Cantero, J., dissenting).

71. *Id.* at 862 (majority opinion).

must be resolved by an arbitrator, not a trial court."[72] The rationale of the appellate court in holding that an arbitrator, not the court, must decide whether the contract is void because of illegality was that "federal law controls[. The] arbitration agreement expressly provide[d] that 'this arbitration [a]greement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act.' "[73] Further, because federal law controls, "the trial court erred when it failed to construe the arbitration provision in a manner consistent with *Prima Paint*,"[74] which would dictate that because the "appellees did not argue that the arbitration provision was unconscionable . . . the issue of unconscionability [was] not properly before [the] court for review."[75]

When the *Cardegna v. Buckeye Check Cashing* case came before the Florida Supreme Court, that court held that claims that an underlying contract was illegal and void had to be resolved by a trial court before arbitration could be compelled.[76] Effectively, the court held that the separability doctrine does not apply to cases governed by the FAA when there is a claim that the underlying contract is illegal under Florida law.[77] The court quoted an earlier Florida appellate court decision, stating:

> A court's failure to first determine whether the contract violates Florida's usury laws could breathe life into a contract that not only violates state law, but also is criminal in nature, by use of an arbitration provision. This would lead to an absurd result. Legal authorities from the earliest time have unanimously held that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. Illegal promises will not be enforced in cases controlled by federal law.[78]

The court continued to say that a party can have a court first determine the legality of a contract before being referred to arbitration by "alleg[ing] and offer[ing] colorable evidence that a contract is illegal," and if a party can do this, the party "cannot be compelled to arbitrate the threshold issue of the *existence* of the agreement to arbitrate."[79]

To arrive at this decision, the Florida Supreme Court distinguished

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72. *Id.* at 862.

73. Buckeye Check Cashing, Inc. v. Cardegna, 824 So. 2d 228, 230 (Fla. Dist. Ct. App. 2002), *rev'd*, 894 So. 2d 860 (Fla. 2005), *rev'd*, 546 U.S. 440 (2006).

74. *Id.* at 229–30.

75. *Id.* at 229.

76. *Cardegna*, 894 So. 2d at 861.

77. *See id.* at 861.

78. *Id.* at 862 (quoting Party Yards, Inc. v. Templeton, 751 So. 2d 121, 123 (Fla. Dist. Ct. App. 2000)).

79. *Id.* (quoting *Party Yards, Inc.*, 751 So. 2d at 123–24).

this case from the fraud in the inducement scenario presented by *Prima Paint* by pointing out that if fraud in the inducement is proved, it merely makes a contract *voidable*, whereas if a contract violates Florida's usury laws, it is rendered *void*.[80] The court's reasoning was that "if the underlying contract is held entirely void as a matter of law, all of its provisions, including the arbitration clause, would be nullified as well."[81] The court was able to cite multiple state and federal court decisions from outside of Florida that have ruled similarly to its holding in *Cardegna v. Buckeye Check Cashing*, noting that one federal circuit court held that "*Prima Paint*'s 'holding dealt strictly with fraud in the inducement of the larger contract and made no broader pronouncements regarding 'void' agreements.'"[82] The Florida Supreme Court concluded its decision by holding that:

> Florida public policy and contract law prohibit breathing life into a potentially illegal contract by enforcing the included arbitration clause of the void contract. . . . In other words, there are no severable, or salvageable, parts of a contract found illegal and void under Florida law. . . . We do not believe federal arbitration law was ever intended to be used as a means of overruling state substantive law on the legality of contracts.[83]

2. SCOTUS Shoots Down the Florida Decision

The *Buckeye Check Cashing* case wound up in front of the Supreme Court of the United States ("SCOTUS"). The Florida Supreme Court was overruled in a 7–1 decision[84] that cited the two leading Supreme Court cases on the FAA—*Southland* and *Prima Paint*.[85] The Court noted that *Southland* distinguished between attacks on the validity of a contract as a whole and attacks directed specifically at an arbitration agreement.[86] The Court then reiterated the separability doctrine and stated that in the *Prima Paint* decision, "[w]e rejected the view that the question of 'severability' was one of state law, so that if state law held the arbitration provision not to be severable a challenge to the contract as a whole would be decided by the court."[87] The Court concluded that

80. *Id.* at 863.

81. *Id.*

82. *Id.* at 863–64 (citing Sandvik AB v. Advent Int'l Corp., 220 F.3d 99, 110 n.9 (3d Cir. 2000)).

83. *Id.* at 864. Note, however, that the Florida Supreme Court "did [not] offer an explanation for how such state-law principles can escape the preemptive scope of the FAA." Bergeron, *supra* note 17, at 455.

84. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444–46 (2006).

85. *Id.* at 444.

86. *Id.* (citing Southland Corp. v. Keating, 465 U.S. 1, 4–5 (1984)).

87. *Id.* at 445 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402–03 (1967)).

because the FAA applied, and Cardegna's challenge was to the agreement as a whole, not specifically to the arbitration agreement, the arbitration provision was separable from the contract.[88] Accordingly, an arbitrator, not a state court, would have to decide if the contract was illegal under state law.[89]

Under the *Buckeye Check Cashing* precedent, the Supreme Court has taken a hard line approach to cases where the FAA applies. State courts, when dealing with a dispute involving interstate commerce, must compel arbitration when a party files a motion asking it to do so regardless of the type or manner of the plaintiff's attack on the validity of the contract, so long as that attack is not specific to the arbitration clause itself.[90] The Supreme Court of the United States makes it clear that there is no room for application of state contract law or public policy when the FAA applies.[91]

B. Jackson v. Shakespeare Foundation, Inc.*: The Supreme Court of Florida Falls in Line (Sort of) with the FAA When Applying State Law*

In January 2013, eight years after the Supreme Court of the United States overruled Florida's *Buckeye Check Cashing* decision,[92] the Florida Supreme Court heard *Jackson v. Shakespeare Foundation, Inc.*[93] The *Jackson* case involved a fraud in the inducement claim and was different from *Buckeye Check Cashing* in that it did not require the court to apply the FAA, as it did not involve interstate commerce.[94] In *Jackson*, the Florida court was free to apply Florida state law and policy as it saw fit, just as it had attempted to in 2005 in the *Buckeye Check Cashing Case*.[95] However, the Florida Supreme Court declined to do so and instead ruled

88. *Id.* at 446.

89. *Id.*

90. *Id.* at 445–47. Further, *Prima Paint* makes the distinction between void and voidable irrelevant. *Id.* at 446.

91. *Id.* at 446.

92. *Id.* at 449.

93. Jackson v. Shakespeare Found., Inc., 108 So. 3d 587, 590 (Fla. 2013). The facts of this case are discussed in the introduction to this note. *See supra* Part I.

94. *Compare* Cardegna v. Buckeye Check Cashing, Inc., 894 So. 2d 860, 868 (Fla. 2005) ("[T]he issue in this case arises under federal, not Florida, law. As no one disputes, the arbitration agreement itself provides that it 'is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act.'") (citation omitted), *with* Shakespeare Found., Inc. v. Jackson, 61 So. 3d 1194, 1200 (Fla. Dist. Ct. App. 2011) ("Here, the dispute does not affect interstate commerce because it involves the sale of one parcel of real estate."). *See also infra* Parts IV–V.

95. *Buckeye Check Cashing*, 546 U.S. at 446 (holding that when disputes involve interstate commerce, the Court cannot accept the Florida Supreme Court's conclusion that enforceability of the arbitration agreement should turn on 'Florida public policy and contract law.'") (quoting *Cardegna*, 894 So. 2d at 864).

almost as if the FAA had applied.[96]

The holding of *Jackson v. Shakespeare Foundation, Inc.* can be most simply stated as this: Fraud in the inducement claims involving real estate transactions are to be referred to arbitration if there is a valid and sufficiently broad arbitration provision in the contract.[97] This would seem to produce nearly identical results to what would occur if the FAA applied to all cases,[98] not just those involving interstate commerce.

However, the Florida Supreme Court did not just adopt Supreme Court precedent on the issue. The holding of *Jackson v. Shakespeare Foundation, Inc.* can be more completely stated as creating a two-part inquiry, with each of those two parts containing multiple steps. The Florida Supreme Court said that, first, "three fundamental elements [ ] must be considered . . . (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived."[99] If there is in fact an agreement to arbitrate within a contract, and that agreement has not been waived or does not explicitly exclude the issue sought to be arbitrated, a court must proceed to the next step of the inquiry.[100]

The next step for courts is to determine if an arbitration provision is broad or narrow.[101] The Florida Supreme Court defines the difference between a narrow and a broad arbitration provision, respectively, as the difference between whether the arbitration provision "requires arbitration for claims or controversies 'arising out of' the subject contract," and whether the arbitration provision "requires arbitration for claims or con-

96. *Jackson*, 108 So. 3d at 594 (holding that the fraud claim was within the scope of the arbitration agreement, and therefore an arbitrator would have to determine the validity of the contract). One could speculate that this decision was partially motivated by a fear of being overruled by the Supreme Court of the United States on the issue of arbitration clauses for a second time in less than ten years, as this author has done. *See* Craig Tompkins, *The Florida Supreme Court Makes a Ruling Using Local University Student Handbook; Says to SCOTUS, "Don't Tase Me, Bro!,"* U. MIAMI L. REV. (Apr. 19, 2014), http://lawreview.law.miami.edu/florida-supreme-court-ruling-local-university-student-handbook-scotus-dont-tase-me-bro/.

97. *See Jackson*, 108 So. 3d at 594.

98. Under the FAA, if an arbitration agreement exists, state courts, when dealing with a dispute involving interstate commerce, must compel arbitration when a party files a motion asking it to do so regardless of the type or manner of the plaintiff's attack on the validity of the contract, so long as that attack is not specific to the arbitration clause itself. *Buckeye Check Cashing*, 546 U.S. at 445–47.

99. *Jackson*, 108 So. 3d at 593 (citing Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999)).

100. Note also that the Florida Supreme Court stated that any ambiguities regarding the language of an arbitration agreement should be resolved in favor of compelling arbitration. *Jackson*, 108 So. 3d at 593 (citing *Seifert*, 750 So. 2d at 636). This further pushes the Florida rule toward being functionally the same as the federal rule where once a Judge determines that an arbitration agreement exists, arbitration must be compelled. *See Buckeye Check Cashing*, 546 U.S. at 445–47.

101. *See Jackson*, 108 So. 3d at 593.

troversies 'arising out of *or relating to*' the subject contract."[102] According to the court, an arbitration clause that covers claims or controversies "arising out of or relating to" a contract is broad enough that a court must compel arbitration of any claims that have "'a significant relationship' to the contract—regardless of whether the claim is founded in tort or contract law."[103]

The court then referred to its decision in *Seifert v. U.S. Home Corp.*[104] to provide an example of how a broad arbitration provision could exist, but a claim between the two contracting parties would not be referable to arbitration.[105] In *Seifert*, a married couple bought a house from a developer using a contract with a broad arbitration provision that covered "any controversy or claim *arising under or related to*" the agreement.[106] Subsequently, the husband was killed by carbon monoxide poisoning as a result of the home's faulty air conditioning unit.[107] When the wife sued the developer for negligence in installing the air conditioning unit, the seller moved to compel arbitration, pointing to the broad arbitration clause and saying that negligence is a claim related to the sale

102. *Id.* (citing *Seifert*, 750 So. 2d at 637).

103. *Id.* (citing *Seifert*, 750 So. 2d at 637–38). The corollary to this is that if an arbitration clause can only be said to cover claims or controversies "arising out of" a contract—i.e., not merely "relating to" a contract—that is a narrowly written arbitration provision, which would not extend to tort claims. *See id.* Finding a "significant relationship" between a claim and a contract requires more than just two parties who have a dispute and incidentally happen to have a contractual relationship. *Id.* (citing *Seifert*, 750 So. 2d at 637–38) (stating that there must be a "'contractual nexus' between the claim and the contract"). "A contractual nexus exists between a claim and a contract if the claim presents circumstances in which the resolution of the disputed issue requires either reference to, or construction of, a portion of the contract," or when a claim "emanates from an inimitable duty created by the parties' unique contractual relationship." *Id.* (citing *Seifert*, 750 So. 2d at 639). For example, even if an arbitration provision is extremely broad, a tort claim between two parties to a contract will only be arbitrated if that tort claim has some sort of connection to the contractual duties the parties owe to one another. Consequently, the Florida Supreme Court notes that as a general matter, "a claim does not have a nexus to a contract if it pertains to the breach of a duty otherwise imposed by law or in recognition of public policy." *Id.* (citing *Seifert*, 750 So. 2d at 639). Here, the court is perhaps referring to tort claims where the conduct complained of is so far outside of the realm of the types of conduct that the parties could have possibly contemplated when entering into a contract, that not even the broadest of arbitration provisions would mandate that those tort claims be arbitrated. *Cf.* RN Solution, Inc. v. Catholic Healthcare W., 165 Cal. App. 4th 1511, 1523 (2008) (stating that "even a broad form arbitration clause will not cover every type of dispute that might arise between those bound by it," and in a dispute between two businesses, "it cannot seriously be argued that the parties intended it to cover tort claims arising from an alleged violent physical assault by an employee of one company against an employee of the other in the context of an intimate domestic relationship between them"). *But see* Bigler v. Harker Sch., 213 Cal. App. 4th 727, 741 (2013) (holding that a student's claim of battery against her teacher was arbitrable under the school's enrollment contract).

104. *Seifert*, 750 So. 2d at 633.

105. *Jackson*, 108 So. 3d at 593–94 (citing *Seifert*, 750 So. 2d at 635).

106. *Id.* at 594 (citing *Seifert*, 750 So. 2d at 635).

107. *Id.* (citing *Seifert*, 750 So. 2d at 635).

contract.[108] The Florida Supreme Court held that in that case,

> the negligence-type claims did not have a significant relationship to the contract because they were founded in the tort of common law negligence and were unrelated to any unique legal duties imposed under the contract, i.e., the actions were predicated on the sellers' breach of general common law duties of care owed to the injured parties; not on a breach of a unique duty imposed under the contract.[109]

Further, the court noted that the arbitration clause in *Seifert* had a "total absence of any mention of rights regarding personal injury or negligence actions."[110] Therefore, the court reasoned, "the parties did not intend for the arbitration provision to apply to the negligence-type claims."[111]

To summarize, while the holding of *Jackson v. Shakespeare, Inc.* can be stated as simply as fraud in the inducement claims involving real estate transactions are to be referred to arbitration if there is a valid and sufficiently broad arbitration provision in the contract,[112] the manner in which a court must determine whether an arbitration provision is valid and sufficiently broad in Florida can be quite complicated. A court must first determine whether an agreement to arbitrate exists,[113] and also whether the issue is one that can be arbitrated.[114] A court must then determine whether an arbitration provision is written such that it "requires arbitration of matters 'arising out of' the subject contract," or whether the arbitration provision "requires arbitration for claims or controversies 'arising out of *or relating to*' the subject contract."[115] If it is the former, perhaps only disputes about the contract would be arbitrable;[116] if it is the latter, it opens the door for other types of claims—such

108. *Id.* (citing *Seifert*, 750 So. 2d at 635).

109. *Id.* (citing *Seifert*, 750 So. 2d at 640–42).

110. *Id.* (citing *Seifert*, 750 So. 2d at 640–42).

111. *Id.* (citing *Seifert*, 750 So. 2d at 640–41). By this logic, it would seem, negligence in building a house is not covered by a broad arbitration clause appearing in a contract for the subsequent sale of that house, unless the broadly worded arbitration clause specifically mentions "personal injury or negligence actions." *See id.* However, this seems contradictory to the court's logic elsewhere in the *Jackson* opinion that arbitration clauses using general terms are "broad." *See id.* ("[T]he contract at issue has a broad arbitration provision because it subjects '[a]ll controversies, claims, and other matters in question *arising out of or relating to* this transaction or this Contract or its breach' to binding arbitration.") (quoting *Seifert*, 750 So. 2d at 637). Would the corollary—arbitration provisions that mention that specific causes of action are to be narrowly construed—also be true?

112. *Id.*

113. Courts must also resolve any doubts about the scope of the arbitration agreement in favor of mandating arbitration. *Id.* at 593 (citing *Seifert*, 750 So. 2d at 636).

114. *Id.* (citing *Seifert*, 750 So. 2d at 636).

115. *Id.* (citing *Seifert*, 750 So. 2d at 637).

116. *See Seifert*, 750 So. 2d at 640 ("[B]ecause the wrongful death action here is predicated upon a tort theory of common law negligence unrelated to the rights and obligations of the

as tort claims—to be sent to arbitration, as long as the court can say that those claims have some sort of "contractual nexus."[117]

Although this precedent seems open to plenty of different interpretations, one thing is certain: Just as the Supreme Court of the United States held when applying the FAA in *Prima Paint*, under Florida law, if a contract has an enforceable arbitration provision, claims of fraud in the inducement directed at the contract as a whole will be sent to arbitration unless the arbitration provision is written either so narrowly or specifically that a court can be certain that the parties did not intend to have fraud claims sent to arbitration.[118]

IV. Was the Florida Court Correct in Not Applying the FAA?

Some arguments could be made to avoid parties who seem to have been fraudulently induced into entering a contract—specifically a contract to buy real estate—from having to go to arbitration against their will due to an arbitration provision buried within the very contract they are disputing. But, first, it is necessary to deal with the federal preemption issue[119] and the Florida Supreme Court's seemingly taking for granted that the real estate transaction in *Jackson v. Shakespeare Foundation, Inc.* was not a matter of interstate commerce.[120] Indeed, when the Florida First District Court of Appeal heard the *Jackson* case, it stated that real estate transactions were not a matter of interstate commerce.[121]

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contract, petitioner asserts such an action was not contemplated by the parties when the contract was made and should not be subject to arbitration. We agree.").

117. *Jackson*, 108 So. 3d at 594 (citing *Seifert*, 750 So. 2d at 639).

118. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 396–97 (1967) (answering "yes" to "the question [of] whether . . . an arbitrator is to resolve a claim of 'fraud in the inducement,' under a contract governed by the United States Arbitration Act of 1925, *where there is no evidence that the contracting parties intended to withhold that issue from arbitration*.") (emphasis added); *Jackson*, 108 So. 3d at 596 ("[D]ecisions from the United States Supreme Court . . . support the conclusion that the fraud claim here is within the scope of the broad language of the arbitration provision at issue.") (citing *Prima Paint Corp.*, 388 U.S. at 397–403, 406); *see also id.* at 593 (stating that courts should "try to resolve an ambiguity in an arbitration provision in favor of arbitration").

119. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 29 (2005) ("The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.").

120. *See Jackson*, 108 So. 3d at 592–94 (analysis immediately refers to Florida law without explaining why Florida law, and not federal law, applies).

121. *See* Shakespeare Found., Inc. v. Jackson, 61 So. 3d 1194, 1200 (Fla. Dist. Ct. App. 2011) ("Here, the dispute does not affect interstate commerce because it involves the sale of one parcel of real estate in Panama City, Florida. Regarding the sale of real estate, the phrase *lex loci rei sitae* [law of the place where the property is situated] applies. . . . Several courts have reached the same

A. *Was* Jackson v. Shakespeare Foundation, Inc. *Actually a Matter of Interstate Commerce, and Did the Florida Supreme Court Err in Not Applying the FAA to This Matter?*

Recall that the arbitration provision in *Jackson* explicitly stated that Florida law applies;[122] and recall that the United States Supreme Court held in *Volt* that even in matters of interstate commerce, if parties to a contract agreed to be governed by the laws of a certain state, the arbitration laws of that particular state would apply—but only to the extent that the state arbitration law was not in conflict with the FAA.[123] If the Florida Supreme Court in *Jackson* was relying purely on the clause in the arbitration provision that called for Florida law as its justification for applying Florida arbitration law, it would not be able to make a ruling that was in conflict with the FAA in any manner—i.e., the court would have to find that interstate commerce was not present before circumventing FAA jurisprudence.[124] The court in *Jackson*, while it in fact achieved the same result that would have followed had the FAA applied—i.e., the fraud in the inducement claim was sent to an arbitrator[125]—it used a method to get there that set new precedent and deviated from what the Supreme Court of the United States had told courts to use in interpreting the FAA. This new precedent, if applied in interstate commerce cases, could lead Florida's courts to violate the federal mandate requiring strict enforcement of all valid arbitration agreements. Therefore, it seems that the Florida Supreme Court must have believed

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conclusion: the sale of real estate is inherently intrastate; thus, the Federal Arbitration Act does not automatically govern arbitration agreements in contracts for the sale of real property.").

122. *See supra* text accompanying note 8.

123. Assuming first that a matter of interstate commerce was present. *See supra* notes 37–39 and accompanying text; *see also* Jansen Props. of Fla., Inc. v. Real Estate Assocs., Ltd. VI, 674 So. 2d 210, 212 (Fla. Dist. Ct. App. 1996) ("It is settled that the parties to an arbitration agreement involving commerce may contract to apply the arbitration laws of a specific state—but *only* so long as that state's arbitration laws are not in conflict with [the FAA].").

124. *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 446 (2006) ("In declining to apply *Prima Paint*'s rule of severability, the Florida Supreme Court relied on the distinction between void and voidable contracts. 'Florida public policy and contract law,' it concluded, permit 'no severable, or salvageable, parts of a contract found illegal and void under Florida law.' *Prima Paint* makes this conclusion irrelevant.") (citation omitted), *rev'g* 894 So. 2d 860 (Fla. 2005). *See also* Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989) (holding that even when an arbitration clause has a choice-of-law provision choosing laws of a certain state, "state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law"); *Jansen Props.*, 674 So. 2d at 212.

125. *Compare* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402 (1967) ("[A] broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud."), *with* Jackson v. Shakespeare Found., Inc., 108 So. 3d 587, 594, 596 (Fla. 2013) (finding that fraud in the inducement was covered by a broad arbitration provision and that "decisions from the United States Supreme Court and other state courts support the conclusion that the fraud claim here is within the scope of the broad language of the arbitration provision at issue.").

that this was not a matter of interstate commerce, otherwise they would have applied the "'federal substantive law of arbitrability.'"[126]

While the Florida Supreme Court seemed to just accept that real estate transactions do not fall under the umbrella of interstate commerce,[127] it is not entirely clear that this is the case. If you were to approach someone who has studied the law and ask whether Congress has the authority to regulate the sale of a private home through use of the Commerce Clause, that person would likely say "probably." They would raise the case of *Wickard v. Filburn*[128] and tell you about the farmer who was growing wheat purely for the use of his own farm—i.e., not placing the wheat into the stream of commerce—but whose production was nonetheless held to be limitable through Congress's Commerce Clause power.[129] It would follow that, if a farmer who is just growing wheat on his land, and not actually selling anything, can be governed by Congress's Commerce Clause power, then so can someone *selling* their land. Surely land sales and ownership of land has a "substantial economic effect on interstate commerce,"[130] the person would say. The person may even offer an example of how Congress currently governs real

126. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 23 (U.S. 1983)) ("[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make this determination by applying the 'federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.'"). "The FAA was designed to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate, and to place such agreements upon the same footing as other contracts." *Volt*, 489 U.S. at 478 (internal quotation marks and citations omitted). "[I]t simply requires courts to enforce privately negotiated agreements to arbitrate, *like other contracts*, in accordance with their terms." *Id.* (emphasis added). "When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the *formation* of contracts." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (emphasis added). Thus, state law can be applied to contract *formation* issues—e.g., whether there was a lack of assent or of a "meeting of the minds"—but upon deciding that a contract was formed, courts must "enforce agreements to arbitrate." *See Volt*, 489 U.S. at 478. Further, the "federal substantive law of arbitrability" requires resolving "any doubts concerning the scope of arbitrable issues . . . in favor of arbitration." *Mitsubishi Motors*, 473 U.S. at 626. It is this element of FAA jurisprudence—the strict enforcement of arbitration agreements that resolves all doubts in favor of compelling arbitration—that the Florida Supreme Court's "broad/narrow," "contractual nexus," and "significant relationship" tests are in danger of violating. *See supra* Part III.B.

127. The court seems to just dive into applying Florida law without saying why Florida law applies. *See Jackson*, 108 So. 3d at 593.

128. 317 U.S. 111 (1942).

129. *See id.* at 127–29.

130. *See id.* at 125 ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."); *see also* United States v. Lopez, 514 U.S. 549, 560 (1995) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.").

estate sales: The Fair Housing Act.[131]

It would seem that many students of the law—and maybe even practitioners—would be surprised to hear that when the *Jackson* case was at the appellate level, Florida's First District Court of Appeal explicitly stated that the FAA does not apply to sales of a *single* parcel of real estate.[132] The appellate court's commentary that it was free to apply state law to a sale of residential real estate, irrespective of the FAA, is actually supported by the decisions of multiple federal district courts and further bolstered by decisions of the supreme courts of other states.[133]

For example, in the case of *Cecala v. Moore*,[134] an Illinois resident bought a home in Illinois from a Michigan resident.[135] Prior to closing, the seller delivered to the buyer a written disclosure report, as is required by Illinois law.[136] That report indicated that the defendants had no knowledge of any recurring flooding problems and that the subject prop-

131. *See* 42 U.S.C. §§ 3601–31 (2012). *But see* 42 U.S.C. § 3603(b)(1) (providing an exemption from anti-discrimination provisions of the Act to sellers of single-family homes if they own no more than three houses and do not use a broker in the sale).

132. Shakespeare Found., Inc. v. Jackson, 61 So. 3d 1194, 1200 (Fla. Dist. Ct. App. 2011) ("Here, the dispute does not affect interstate commerce because it involves the sale of one parcel of real estate in Panama City, Florida. Regarding the sale of real estate, the phrase *lex loci rei sitae* applies."); *cf.* Kyle v. Kyle, 128 So. 2d 427, 429 (Fla. Dist. Ct. App. 1961) ("Some authorities have indicated that, in determination of a choice of law, a particular contract is classified as either concerning land directly, or as being personal and only incidentally relating to land. Agreements falling into the latter category will be governed by the usual rules of contracts and will not be influenced by the lex rei sitae. When a contract executed in one state involves land in another, however, and the question arises whether such contract creates a right in rem in the land, it is ordinarily governed by the lex rei sitae.").

133. *See, e.g.*, Valley Prop. Invs., L.L.C. v. Bank of N.Y. Mellon, No. 2:12-cv-02234, 2012 WL 6560757 (E.D. Cal. Dec. 14, 2012) ("[R]eal estate transactions typically do not fall within the scope of the Federal Arbitration Act."); Garrison v. Palmas Del Mar Homeowners Ass'n, Inc., 538 F. Supp. 2d 468, 473 (D.P.R. 2008) ("The FAA generally does not apply to residential real estate transactions that have no substantial or direct connection to interstate commerce, regardless of whether said transactions involve out-of-state purchasers."); Saneii v. Robards, 289 F. Supp. 2d 855, 858 (W.D. Ky. 2003) ("Notwithstanding its congenial effects on interstate commerce, the sale of residential real estate is inherently intrastate."); SI V, L.L.C. v. FMC Corp., 223 F. Supp. 2d 1059, 1062 (N.D. Cal. 2002) ("An agreement to sell real property between an in-state buyer and an out-of-state seller does not involve interstate commerce as defined in the FAA. . . . Therefore, the FAA is not applicable to this dispute, but, rather, the state law governing the Agreement."); Bradley v. Brentwood Homes, Inc., 730 S.E.2d 312, 318 (S.C. 2012) ("[N]either the inclusion of the national warranty nor . . . use of out-of-state financing converted the intrastate [real estate] transaction into one involving interstate commerce."); *see also* Keene v. Hayden, 964 So. 2d 10, 10–11 (Ala. 2007) (reversing trial court order compelling arbitration under the FAA for a dispute over a real estate sales contract, reasoning that the party seeking to invoke the FAA provided no evidence that the transaction was part of interstate commerce).

134. 982 F. Supp. 609 (N.D. Ill. 1997).

135. *Id.* at 611.

136. *Id.*

erty was not located in a flood plain.[137] Nine days after the plaintiff took possession of the home, the basement flooded and continued to flood on multiple future occasions.[138] When the plaintiff alleged that the "defendants 'falsely and fraudulently' represented that the property did not leak or flood," the defendant moved to have the arbitration clause in the sale contract enforced pursuant to the FAA.[139] The court denied the defendant's motion, finding that a real estate transaction where one of the parties is from a different state does not qualify as interstate commerce; thus, the FAA need not be applied in this instance.[140]

In deciding *Cecala v. Moore*, the federal court for the Northern District of Illinois endorsed an earlier decision of the South Carolina Supreme Court, where "[t]he property at issue was in South Carolina, the seller was a California entity and the buyer was a Pennsylvania partnership, [and the] transactions incident to the sale took place in jurisdictions outside South Carolina."[141] In that earlier decision, the South Carolina Supreme Court found that although neither party was a resident of South Carolina, and the transaction was executed outside of South Carolina, the transaction "did not involve interstate commerce as defined in the [FAA]."[142]

In a more recent decision, *Bradley v. Brentwood Homes Inc.*,[143] the South Carolina Supreme Court also concluded that a sale of a new home that was financed by an out-of-state bank, warrantied by an out-of-state firm, and for which the materials came at least in part from out of state, was not a part of interstate commerce.[144] To arrive at this decision, the South Carolina Supreme Court relied on the *Sanelli v. Robards*[145] decision of the District Court of the Western District of Kentucky,[146] where a homebuyer sued for fraud in the inducement in the purchase of their house, and the defendant argued that the fraud claim needed to be heard

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 611–12.

141. *Id.* (citing Mathews v. Fluor Corp., 440 S.E.2d 880 (S.C. 1994), *overruled in part by* Munoz v. Green Tree Fin. Corp., 542 S.E.2d 260 (S.C. 2001)).

142. *Mathews*, 440 S.E.2d at 881–82. Part of the South Carolina Supreme Court's rationale in ruling that the FAA did not apply to *Mathews* was that there was no evidence that the parties intended to make their transaction as part of interstate commerce. *See id.* at 882. This part of the opinion was later overruled by the South Carolina Supreme Court. *Munoz*, 542 S.E.2d at 363 n.3 ("We overrule *Mathews v. Fluor Corp.* . . . to the extent it considered whether the parties contemplated interstate commerce as a factor in determining if the FAA applied."). The correct standard is whether the transaction *in fact* involved interstate commerce. *See id.* at 538 (citing Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265 (1995)).

143. 730 S.E.2d. 312 (S.C. 2012).

144. *Id.* at 313–14, 317–18 (citing Saneli v. Robards, 289 F. Supp. 2d 855 (W.D. Ky. 2003)).

145. 289 F. Supp. 2d 855.

146. *Bradley*, 730 S.E.2d. at 457.

by an arbitrator pursuant to the FAA.[147] The district court held that this fraud in the inducement claim did not need to be referred to an arbitrator because real estate transactions are not part of interstate commerce, and therefore the FAA did not apply.[148]

Thus, there is precedent to support the Florida First District Court of Appeal's conclusion that "the sale of real estate is inherently intrastate, [and therefore,] the [FAA] does not automatically govern arbitration agreements in contracts for the sale of real property."[149] This is true even if the transaction involves out-of-state buyers or sellers, out-of-state financing, or is executed out of state. Therefore, at least in dealing with real estate transactions involving a single piece of land, there does not seem to be a federal law requirement that Florida courts fall in line with the holdings of the United States Supreme Court on the issues of separability and whether the court or the arbitrator should hear fraud in the inducement claims related to those transactions.[150] In the case of *Jackson v. Shakespeare Foundation, Inc.*,[151] and similar cases involving a dispute between the buyer and seller of a *single* parcel of real estate, Florida courts are not explicitly barred by the FAA from hearing fraud in the inducement claims related to real estate sales just because an arbitration provision is present.

B. *Would Holding That Real Estate Transactions Are Not Part of Interstate Commerce Hold Up Against Supreme Court Review Under Current Commerce Clause Jurisprudence?*

Having established that, at least for now, there is law that states that a transaction involving the sale of a single parcel of real estate is not a matter of interstate commerce,[152] it should be asked whether this conclusion would withstand Supreme Court review. Answering that question requires examining the relevant portion of current Commerce Clause jurisprudence and applying that to real estate sales.

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147. *Saneli*, 289 F. Supp. 2d at 857–58.

148. *See id.* at 860 ("Bearing in mind the historical intrastate nature of residential property transactions, as well as the Supreme Court's analysis of purposes of the FAA, the Court concludes that a residential real estate sales contract does not evidence or involve interstate commerce. . . . The Court will apply Kentucky law . . . to the fraudulent inducement claim.").

149. Shakespeare Found., Inc. v. Jackson, 61 So. 3d 1194, 1200 (Fla. Dist. Ct. App. 2011).

150. The Supreme Court has not directly ruled on this. However, as alluded to *supra*, it would be interesting to see whether the Court would extend *Wickard v. Filburn* to real estate sales or if the Court would distinguish real estate sales from other types of transactions. *See supra* notes 128–33 and accompanying text.

151. 108 So. 3d 587 (Fla. 2013).

152. *See supra* Part IV.A.

1. Current Commerce Clause Jurisprudence as It Applies to the FAA

Having already held that the FAA's jurisdiction is invoked in matters of interstate commerce,[153] the Court later heard a case where it needed to provide guidance as to how closely a contract must involve interstate commerce such that it was sufficient to say that the FAA preempted whatever state's laws were sought to be employed.[154] In *Allied-Bruce Terminix Cos., Inc. v. Dobson*, the Court found a need to interpret the language in Section 2 of the FAA,[155] which purportedly invokes Congress's Commerce Clause powers.[156] The Court "conclude[d] that the word 'involving' is broad and is . . . the functional equivalent of 'affecting,'"[157] and that the "phrase—'affecting commerce'—normally signals Congress' intent to exercise its Commerce Clause powers to the full."[158] Therefore, the Court concluded, the FAA's reach coincides "with that of the Commerce Clause."[159]

It is thus established that the reach of the FAA is exactly the same as it is for the Commerce Clause; however, the question remains as to whether the Commerce Clause covers transfers of a single parcel of real estate. Currently, in determining whether the Commerce Clause reaches a regulated activity, the Court will ask whether that "activity 'substantially affects' interstate commerce,"[160] and ask whether that activity is an "economic activity."[161] In *Gonzales v. Raich*, the Court defined "economic activity" as "referring to 'the production, distribution, and consumption of commodities.'"[162]

2. Applying Commerce Clause Jurisprudence to Real Estate Transfers

It seems clear that real estate transfers are "economic activity"—ownership of something valuable (economic) changes hands (activity). Under current Commerce Clause precedent,[163] to determine whether a

153. *See supra* Part II.

154. *See generally* Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265 (1995).

155. *See* 9 U.S.C. § 2 (2012) ("a contract evidencing a transaction involving commerce").

156. *See supra* Part II.

157. *Allied-Bruce Terminix*, 513 U.S. at 273–74.

158. *Id.* at 273 (citing Russell v. United States, 471 U.S. 858, 859 (1985)).

159. *Id.* at 274 (citing Perry v. Thomas, 482 U.S. 483, 490 (1987)).

160. *See* United States v. Lopez, 514 U.S. 549, 559 (1995).

161. *See* Gonzales v. Raich, 545 U.S. 1, 25–26 (2005); United States v. Morrison, 529 U.S. 598, 613 (2000); *Lopez*, 514 U.S. at 559–61.

162. *Raich*, 545 U.S. at 25 (quoting Webster's Third New International Dictionary 720 (1966)).

163. It has since been decided that the Commerce Clause only gives Congress the power to regulate *existing activity*, i.e., not inactivity. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct.

real estate transaction falls within the FAA's jurisdiction, one need only analyze whether that transaction "substantially affects" interstate commerce. In determining whether an inherently local transaction substantially affects interstate commerce, under the holdings of *Wickard*[164] and *Raich*,[165] it needs to be asked whether a particular type of transaction—in aggregate with all other similar transactions—has a substantial effect on the interstate market for those transactions.[166]

While the Supreme Court has never decided whether a single real estate transaction for a single parcel of land is part of interstate commerce, there have been occasions when other courts have found real estate transactions to be part of interstate commerce. But, generally, these seem to be cases involving more than just a single real estate transaction,[167] or they are not basic contractual disputes between a transferor and a transferee.[168]

2566, 2586–88 (2012) ("The power to *regulate* commerce presupposes the existence of commercial activity to be regulated. . . . The farmer in *Wickard* was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce. The Government's theory here would effectively override that limitation . . . ."); *see also* Brad Plumer, *Supreme Court Puts New Limits on Commerce Clause. But Will It Matter?*, WASH. POST (June 28, 2012), http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/06/28/the-supreme-court-put-limits-on-commerce-clause-but-does-it-matter/ ("Chief Justice John Roberts' majority opinion appears to have placed new limits on Congress's ability to regulate interstate commerce. . . . Basically, the court ruled that Congress can regulate *existing* interstate commercial activity, but it can't directly force people to enter into a market . . . ."); Tom Scocca, *Obama Wins the Battle, Roberts Wins the War*, SLATE (June 28, 2012, 11:59 AM), http://www.slate.com/articles/news_and_politics/scocca/2012/06/roberts_health_care_opinion_commerce_clause_the_real_reason_the_chief_justice_upheld_obamacare_.html ("This is a substantial rollback of Congress' regulatory powers, and the chief justice knows it."). However, it seems clear that real estate transfers are "economic activity"—as stated above, ownership of something valuable (economic) changes hands (activity). So, whatever impact the Affordable Care Act ruling may have on Congress's Commerce Clause powers, it seems inapplicable to this discussion of the FAA and real estate transactions.

164. *See* Wickard v. Filburn, 317 U.S. 111, 125 (1942) (holding that a farmer growing wheat for his own use substantially affects interstate commerce, because if all farmers did this, in aggregate, it would have a substantial effect on the national wheat market).

165. *See Raich*, 545 U.S. at 18 (invalidating a state law that allowed individuals to grow marijuana for their own medical purposes under the rationale that this state law undercut Congress's ability to regulate the interstate marijuana market).

166. And, in some instances, whether that activity is something that Congress has sought to regulate. *Raich*, 545 U.S. at 10–12 (reasoning that in passing the Comprehensive Drug Abuse Prevention and Control Act, Congress intended to create a "comprehensive regime to combat the international and interstate traffic in illicit drugs."). It could perhaps be argued that Congress has no intention of governing the transfers of individual parcels of real estate in private transactions.

167. *See infra* notes 168–86 and accompanying text.

168. *See, e.g.*, Shepard v. Edward Mackay Enters., Inc., 148 Cal. App. 4th 1092, 1100–01 (2007) (concluding that when a dispute arose over a home purchased from a developer who had used materials from across state lines, the FAA was invoked because "this transaction substantially affected interstate commerce"). Note, however, that there is a distinguishing element to this California Third District Court of Appeal decision: The plaintiff was suing the developer over a construction defect (water pipes that broke), rather than the land transfer itself. *Id.* at 1094.

Fortunately, there is at least one Supreme Court case that provides color as to whether the Court would rule that a real estate transaction is part of interstate commerce, although it does not directly answer the question. In *McLain v. Real Estate Board of New Orleans, Inc.*,[169] the Burger Court heard a case to decide whether jurisdiction under the Sherman Act could be invoked against an association of real estate brokers in the New Orleans area who had agreed "to conform to a fixed rate of brokerage commissions."[170] In order to invoke the Sherman Act's jurisdiction, the plaintiff would have to identify, with evidence, the particular aspect of interstate commerce that the complained-of conduct fell within.[171]

In *McLain*, the Court held that price fixing by real estate brokers had some effect on interstate commerce—the fixed price has an impact on the purchase price of homes, which consequently affects demand for houses, which then affects demand for mortgage loans and insurance.[172] However, because of the Sherman Act's special pleading requirements, this particular case was remanded to see whether the plaintiffs could show that the price fixing had "a not insubstantial effect on" interstate commerce.[173]

While the *McLain* case does not specifically say that every *single* real estate transaction is part of interstate commerce, it does acknowledge that real estate transactions in aggregate do have *some* effect on interstate commerce. Also, similar to *McLain*, and notwithstanding the *Bradley v. Brentwood Homes Inc.* case from the South Carolina

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However, there may be instances when an ordinary real estate transaction may be subject to the FAA. The California Second District Court of Appeal has held that when financing for the purchase of a home came from the Federal Housing Administration, which made the transaction subject to the jurisdiction of the U.S. Department of Housing and Urban Development, that was evidence enough to say that interstate commerce was involved and that the FAA should be applied. *See* Hedges v. Carrigan, 11 Cal. Rptr. 3d 787, 793 (Cal. Ct. App. 2004). Note again, however, that there is another distinguishing element in this case: The plaintiffs were suing their *broker*—not the seller—for failing to disclose defects. *Id.* at 580. Also note that the court relied on the fact that the financing for the purchasing was granted by a federal agency. *Id.* at 586.

169. 444 U.S. 232 (1980).

170. *Id.* at 234.

171. *See id.* at 242 ("[J]urisdiction may not be invoked under [the Sherman Act] unless the relevant aspect of interstate commerce is identified; it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce. To establish jurisdiction a plaintiff must allege the critical relationship in the pleadings and if these allegations are controverted must proceed to demonstrate by submission of evidence beyond the pleadings either that the defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce.") (citing Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 202 (1974)).

172. *Id.* at 246.

173. *Id.*

Supreme Court,[174] state courts routinely hold that when a dispute is over certain elements of a real estate transaction—such as a dispute with a lender that provided financing from out of state,[175] or disputes over homeowners' warranties given by an out-of-state firm,[176] or suits for construction defects when building materials came from out of state[177]—the transaction does indeed have a substantial effect on interstate commerce such that the FAA should be invoked.[178] When deciding this way, courts are usually relying on the Court's *Allied-Bruce Terminix Cos., Inc.*, decision.[179] But, note, disputes that are between an individual homebuyer and a larger entity that provides services and goods that are in the stream of commerce can be distinguished from a dispute between a transferor and a transferee in a very basic real estate sale.

A more recent case providing insight to this issue comes from the Washington Supreme Court. In *Satomi Owners Ass'n v. Satomi, L.L.C.*,[180] the court considered whether a suit between a condominium owners association and the building's developer over construction defects implicated interstate commerce such that the FAA would preempt Washington state arbitration law.[181] In deciding that the FAA did apply, the court took account of the fact that (1) the condo units were built with out-of-state materials, (2) "a significant number of the units . . . were bought by" out-of-state owners, and (3) a significant number of the purchases were financed by out-of-state lenders.[182]

So, it can be seen that courts have held that use of out-of-state materials, financing, or warranties—or price fixing amongst a group of brokers—will be sufficient to say that a real estate transaction is part of

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174. *See supra* notes 143–52 and accompanying text.

175. *See, e.g.*, AmSouth Bank v. Dees, 847 So. 2d 923, 936–38 (Ala. 2002) (holding that dispute between mortgagor and mortgagee was part of interstate commerce because loan funds had moved across state lines and the transaction required use of the instruments of interstate commerce, such as phone lines and Internet connections).

176. *See, e.g.*, McKee v. Home Buyers Warranty Corp. II, 45 F.3d 981, 982–84 (5th Cir. 1995) (holding that when the homebuyer and the warranty firm were from different states, a matter of interstate commerce was present).

177. *See, e.g.*, Steele v. Walser, 880 So. 2d 1123, 1126–27 (Ala. 2003); Satomi Owners Ass'n v. Satomi, L.L.C., 225 P.3d 213, 219–20 (Wash. 2009).

178. *See, e.g.*, *Steele*, 880 So. 2d at 1126–30; *Amsouth Bank*, 847 So. 2d at 936–38; *Satomi*, 225 P.3d at 226.

179. *See, e.g.*, *Satomi*, 225 P.3d at 219–25 (Wash. 2009) (saying that in a case where a condo association was suing a builder for breach of warranty, "[t]he FAA's displacement of conflicting state law is 'now well-established' ") (citing Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265 (1995)); Basura v. U.S. Home Corp., 120 Cal. Rptr. 2d 328, 330–33 (Cal. Ct. App. 2002) (saying that when a homebuyer was suing a developer for construction defects, "[i]n the instant case, the indicia of interstate commerce are far greater than in *Allied-Bruce Terminix*").

180. 225 P.3d 213 (Wash. 2009).

181. *Id.* at 219–20.

182. *Id.* at 226.

interstate commerce when purchasers are suing *developers* or *brokers* and *lenders*. However, this does not speak directly to the instance when an individual transferee is suing a transferor who did not build the house—with or without out-of-state materials.

Recall that the *Jackson v. Shakespeare Foundation, Inc.* case involved a sale of vacant land,[183] so there were no materials that had been in the stream of commerce to speak of. Further, the transferor was a Florida resident, and the transferee was a Florida corporation.[184] Therefore, it is perhaps accurate to say that in this particular instance before the Florida Supreme Court, the transaction by itself was not part of interstate commerce. But, at the same time, it seems self-evident to say that, in aggregate, all land sales—even if we say "all land sales between residents of the same state, where no out-of-state financing is used"—taken together "substantially affect" interstate commerce. Nonetheless, the facts of *Jackson v. Shakespeare Foundation, Inc.* are a lot more similar to the cases where state and federal courts have held that real estate transactions are not part of interstate commerce[185] than cases like the Washington Supreme Court case, *Santomi*, where the plaintiff was a condo association made up of residents of several different states, who had obtained financing from banks in several different states, to purchase units in a large building comprised of materials from multiple different states.[186]

It can be concluded that Florida courts are able to apply state law to simple real estate transactions. There is currently no binding precedent that expressly forbids this, and Congress has not expressed an intent to regulate one-off real estate transfers between two private parties.[187] Fur-

183. *See* Jackson v. Shakespeare Found., Inc., 108 So. 3d 587, 589 (Fla. 2013).

184. Complaint at 1–2, Jackson v. Shakespeare Found., Inc., 108 So. 3d 587 (Fla. 2013) (No. 09-001399CA). Note that there is a second named plaintiff to this case, "Herd," who is described as "a California Corporation authorized to do business in the State of Florida . . . having its principal place of business in Tallahassee, Leon County, Florida." *Id.* at 2. None of the courts that heard the case made mention of where the financing came from. *See generally Jackson*, 108 So. 3d 587; Shakespeare Found., Inc. v. Jackson, 61 So. 3d 1194, 1196 (Fla. Dist. Ct. App. 2011), *rev'd*, 108 So. 3d 587 (Fla. 2013); Shakespeare Foundation Inc. v. Jackson, No. 09-001399CA, 2010 WL 8747760 (Fla. Cir. Ct. Jan. 27, 2010), *rev'd*, 61 So. 3d 1194 (Fla. Dist. Ct. App. 2011).

185. *See supra* notes 132–52 and accompanying text.

186. *See* 225 P.3d 213, 226 (Wash. 2009).

187. *See* Wyeth v. Levine, 555 U.S. 555, 565 (2009) ("'[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.'") (quoting Medtronic Inc. v. Lohr, 518 U.S. 470, 485 (1996)). Further, if Congress has been silent on this issue, it is hard to imagine that a state court applying state law contract interpretation rules is something that would run afoul of the "dormant" Commerce Clause, as it is not something that treats out-of-state residents differently than in-state residents. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld *unless the burden imposed on such commerce is clearly excessive* in relation to the putative local benefits.") (emphasis added). It is

ther, the states traditionally control property law,[188] meaning there could be federalism concerns if Congress attempted to regulate individual real estate transfers. It must be noted, however, that the far-reaching precedent of *Wickard* is still good law.[189] Against the backdrop of the recent financial crisis, caused in part by declining real estate prices and widespread defaults on real estate debt, it is not hard to imagine that someday Congress could successfully regulate real estate sales at the granular level of one-time transfers of residential land between two individuals.[190]

V. ARE THERE ARGUMENTS BASED IN FLORIDA LAW THAT COULD AVOID THE RESULT OF *JACKSON V. SHAKESPEARE FOUNDATION, INC.*?

Florida courts are able to apply state law in deciding whether to enforce arbitration provisions in real estate sales contracts.[191] There are arguments using state law that litigants could make in order to avoid being sent to arbitration for their claims arising from real estate sales contracts.[192] Specifically, litigants might argue that they did not assent to

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hard to say whether there is any burden imposed on interstate commerce by a state court's rule of contract interpretation that is neutral as to the domicile of the parties.

188. *See* Preseault v. I.C.C., 494 U.S. 1, 22 (1990) (O'Connor, J., concurring) ("[S]tate law [i]s the traditional source of the real property interests."); *see also* Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 74 & n.1 (2005) ("Property law in the United States is largely the domain of the states, not the federal government.") (citing *Preseault*, 494 U.S. at 22 (O'Connor, J., concurring)); *cf.* Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) ("State family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden.") (quoting United States v. Yazell, 382 U.S. 341, 352 (1966)). "'[I]n a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Levine*, 555 U.S. at 565 (quoting *Lohr*, 518 U.S. at 485).

189. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578–79 (2012) ("The power over activities that substantially affect interstate commerce can be expansive. That power has been held to authorize federal regulation of such seemingly local matters as a farmer's decision to grow wheat for himself and his livestock . . . .") (citing Wickard v. Filburn, 317 U.S. 111 (1942)). "Congress's power, moreover, is not limited to regulation of an activity that by itself substantially affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others." *Id.* at 2586 (citing *Wickard*, 317 U.S. at 127–28).

190. *Wickard*, which upheld legislation that sought to prevent wild fluctuations in wheat prices, was decided against the backdrop of the United States's mobilization effort in World War II. *See generally Wickard*, 317 U.S. at 111–17. By "successfully" I mean that such hypothetical regulation—if it were to be created during a time where the political and economic climate made this type of regulation necessary—would survive Supreme Court review as to whether it exceeds Congress's power under the Commerce Clause.

191. *See supra* Part IV.

192. Some may be tempted to explore whether the order compelling arbitration in *Jackson v. Shakespeare Foundation, Inc.* violated the Access to Courts provision of the Florida Constitution. *See* FLA. CONST. art. I, § 21 ("The courts shall be open to every person for redress of any injury,

the contract that calls for arbitration; they could argue that amendments made by the Florida Legislature to Florida's arbitration code after the *Jackson* decision provide relief; and, finally, they could raise the issue of whether courts should give any special consideration to a purposeful nondisclosure of the presence of wetlands, as was done in *Jackson v. Shakespeare Foundation, Inc.*

A. *Making a Contractual Defense That the Plaintiff Did Not Assent to the Contract Containing an Arbitration Provision*

If Florida courts decline to stray from the Supreme Court's separability doctrine in the name of equity or state policy, arguments seeking to avoid arbitration that rely on the void/voidable distinction are a dead end. This is because that distinction is rendered completely irrelevant by the separability doctrine.[193] Florida courts relying on that distinction are likely to be overturned—seemingly even when the FAA does not control.[194]

But what if rather than making the argument that a contract should not exist because the facts make it such that it may be either void or voidable under state law—e.g., "but for the fraudulent inducement, I would have never entered into this contract"—a plaintiff instead asserts that they never assented to the purported contract?[195] For example, what if a plaintiff alleges that a defendant forged his signature on a contract

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and justice shall be administered without sale, denial or delay."). But, the Shakespeare Foundation raised this issue in its brief to the Florida Supreme Court to no avail. *See* Respondents' Answer Brief on the Merits at 26, Jackson v. Shakespeare Found., Inc., 108 So. 3d 587 (Fla. 2013) (No. SC11-1196). The argument, in part, was that the contract at issue made no mention of fraud claims, and therefore the parties did not agree to submit fraud claims to an arbitrator. *Id.* The argument continues: Denying the parties access to the courts on a claim for which they did not expressly agree to submit to an arbitrator—and therefore did not waive their constitutional right to have that type of claim heard by a court—would violate the Florida Constitution's Access to Courts provision. *Id.* The Florida Supreme Court made no mention of this argument in their opinion. *See generally Jackson*, 108 So. 3d 587. The absence of any mention might be attributed to this already being settled law, as Florida courts have held that, in the context of covenants not to sue, claimants are not denied access to the courts when restriction on their access was of their own agreement. *See, e.g.*, Shay v. First Fed. of Miami, Inc., 429 So. 2d 64, 67 (Fla. Dist. Ct. App. 1983) (disagreeing with plaintiff's argument that enforcement of a covenant not to sue was a denial of the plaintiff's constitutional right to access the courts). Thus, if a party can agree to having no remedy whatsoever—i.e., a covenant not to sue—without it being deemed a violation of their constitutional right to access the courts, an agreement to arbitrate *any* dispute should not violate that right.

193. *See supra* Part III.A.2.

194. *See infra* notes 231–38 and accompanying text (discussing the Revised Uniform Arbitration Act that adopts the separability doctrine).

195. *See* Bergeron, *supra* note 17, at 425 ("Rather than focusing on the void/voidable distinction, courts should evaluate the arbitrability question by asking if the challenge to arbitration implicates the underlying agreement and, if so, whether the party resisting arbitration can raise a credible issue of signatory assent.").

containing an arbitration clause?[196] Would Florida courts still be mandated to have an arbitrator decide the validity of the contract? The answer is "probably not," as there have been decisions from federal appellate courts that indicate that this argument may work.[197]

A very narrow window seems to be open for plaintiffs to have a court, rather than an arbitrator, hear their contractual defenses prior to being compelled to go to arbitration. But it is doubtful that the opening is wide enough that the plaintiff in *Jackson v. Shakespeare Foundation, Inc.* could have passed through it.

1. A Contract That Was Never Assented to Is Different from a Contract That Is Void or Voidable

There is a distinction to be made "between contracts to which the plaintiff admittedly assented, but now claims are *either* void or voidable, and contracts to which the plaintiff gave no assent."[198] In 1992, the Eleventh Circuit wrote an opinion that allows this distinction to be raised by a plaintiff seeking to have a court decide the validity of a container contract before sending the dispute to arbitration.[199] In the case of *Chastain v. Robinson-Humphrey Co.*, the plaintiff was suing a securities dealer, who in turn was seeking to have the dispute heard by

196. *See* Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136, 1140 (9th Cir. 1991) ("[A]ny citizen of Los Angeles could sign a contract on behalf of the city and Los Angeles would be required to submit to an arbitrator the question whether it was bound to the contract, even if its charter prevented it from engaging in *any* arbitration."); Bergeron, *supra* note 17, at 465 ("The most extreme scenario would involve one party pointing a gun at the other party and forcing the party to sign the agreement.").

197. *See, e.g.*, Sphere Drake Ins. Ltd. v. All Am. Ins. Co., 256 F.3d 587, 591–92 (7th Cir. 2001) (stating that "many appellate courts have held that the judiciary rather than an arbitrator decides whether a contract came into being," and holding that the lower court had to determine whether the party signing the contract had authority to do so before compelling arbitration); Sandvik AB v. Advent Int'l Corp., 220 F.3d 99, 105 (3d Cir. 2000) (saying that a case where it was alleged that the person signing the contract did not have authority to do so is distinguishable from *Prima Paint* because the party was not contending that the contract was voidable, "but rather that no contract ever existed"); Chastain v. Robinson-Humphrey Co., 957 F.2d 851, 854 (11th Cir. 1992) ("The calculus changes when it is undisputed that the party seeking to avoid arbitration has not signed any contract requiring arbitration. In such a case, that party is challenging the very existence of *any* agreement, *including the existence of an agreement to arbitrate*."). While it is true that this line of cases focuses on whether or not an agreement was signed, or whether the person signing the agreement had the authority to do so, "they highlight the role that assent plays under the FAA." Bergeron, *supra* note 17, at 434.

198. Cardegna v. Buckeye Check Cashing, Inc., 894 So. 2d 860, 873 (Fla. 2005) (Cantero, J., dissenting).

199. *See Chastain*, 957 F.2d at 852–55. More recently, in 2002, the Third Circuit used similar logic to hold that when a party alleges that they never assented to a container contract because the agent of the party who signed the contract did not have the authority to do so, the court must first determine a contract's validity before mandating arbitration. *See Sandvik AB*, 220 F.3d at 100, 106 (reasoning that if "no contract ever existed," there could not be an agreement to arbitrate).

an arbitration panel per the plaintiff's account opening documents.[200] However, the plaintiff alleged that her signature did not appear on any of the account documents, rather her father and perhaps another unidentified individual—who may or may not have been attempting to forge the plaintiff's signature—signed those documents.[201] The defendants did not dispute that the plaintiff did not sign the account documents.[202]

The Eleventh Circuit, in holding that before compelling arbitration the district court must first decide whether the plaintiff can be bound to an arbitration agreement in a container contract, which she did not sign, acknowledged that under "*normal circumstances*" the separability doctrine of *Prima Paint* would mandate that an arbitrator decide whether the underlying contract was valid.[203] However, the Eleventh Circuit stated, "[t]he calculus changes when it is undisputed that the party seeking to avoid arbitration has not signed any contract requiring arbitration."[204] The distinction from *Prima Paint*, according to the court, is "that [a] party is challenging the very existence of *any* agreement," not that the party is arguing that a contract should be void or voidable.[205]

The Eleventh Circuit concluded its opinion by issuing a rule that is surely meant to prevent abuse of the argument that a party did not assent to a contract—i.e., preventing a party who is seeking to avoid or delay arbitration from just making the bare accusation that there was no mutual assent.[206] The court held that a party raising an assent-based contractual defense "must substantiate the denial of the contract with enough evidence to make the denial colorable."[207]

2. Could the Plaintiff in *Jackson v. Shakespeare Foundation, Inc.* Make a "Colorable" Argument That They Did Not Assent to the Real Estate Sales Contract?

It seems pretty clear that both parties in the *Jackson v. Shakespeare Foundation, Inc.* case assented to the purchase and sale of a specific parcel of land, and that both parties signed a contract specifying so.[208]

200. *See Chastain*, 957 F.2d at 852.

201. *See id.*

202. *Id.* The defendants alleged that the plaintiff's father opened these accounts for her benefit, and that she should consequently be liable for the indebtedness on the accounts. *See id.*

203. *See id.* at 854 (emphasis added).

204. *Id.*

205. *Id.* Note how this rationale does not delve into the void versus voidable distinction, but instead reasons that when there is no evidence of assent, there was never any agreement to do anything, let alone arbitrate. *See id.*

206. *See id.* at 855.

207. *Id.*

208. "Ordinarily . . . assent is established by a process of offer and acceptance." Joseph M. Perillo, Calamari and Perillo on Contracts § 2.1 (6th ed. 2009).

But, is there a way the plaintiff in the *Jackson* case could have framed its argument that arbitration should not have been compelled due to lack of assent under the Eleventh Circuit's *Chastain v. Robinson-Humphrey Co.* decision? One possible argument might be that the plaintiff assented to purchasing a property that contained no wetlands, as was advertised, but got something completely different than what he had assented to. Raising this argument would have required the court to decide whether this difference in what the plaintiff thought he were getting and what he actually received is such that there was never any assent on the part of the plaintiff to purchase the subject property containing wetlands. In *Jackson*, the plaintiff would not be arguing that they did not assent to purchase land from the defendant, but rather that the land the defendant was offering for sale did not actually exist or that the land was of such a different quality than was supposed by the plaintiff that there was no actual "meeting of the minds." However, this is probably a losing argument for the plaintiff because it is only when there is a *mutual* mistake as to the *existence* of the subject property that a court might find that no contract was ever made,[209] and the facts alleged by the Shakespeare Foundation are that the sellers knew that the property contained wetlands.[210]

Further damaging to this particular argument is that the *Jackson* case was not about the existence of the subject property or whether the seller did not have rights that they could transfer; it was about a buyer getting something that was not of the nature and quality of which it first thought.[211] And, even if the plaintiff could frame their argument to allege that both parties mistakenly believed that the property contained no wetlands—i.e., the false advertisement posted by the defendant was a result of the defendant's honest belief that the property contained no wetlands—such that " 'there [wa]s an absence of the requisite meeting of the minds to the contract,' "[212] having a court find in their favor on that argument would merely render the contract voidable.[213] Therefore, the

209. *See id.* § 9.26(a) ("[I]f at the time of contracting for the sale of specific goods, *unbeknownst to the parties*, the goods never existed or are no longer in existence, no contract is made."); *see also* Cnty. of Orange v. Grier, 30 A.D.3d 556, 556–57 (N.Y. App. Div. 2006) (holding that when both parties mistakenly believed that the seller owned the lots of land sold to the buyer, when in fact the seller did not own the land sold, the contract was "impossible ab initio").

210. Jackson v. Shakespeare Found., Inc., 108 So. 3d 587, 590 (Fla. 2013).

211. No wetlands versus 26% wetlands. *See id.*

212. *Grier*, 30 A.D.3d at 556–57 (quoting Sunlight Funding Corp. v. Singer, 146 A.D.2d 625, 626 (N.Y. App. Div. 1989)) (internal quotation marks omitted).

213. *See* Sherwood v. Walker, 33 N.W. 919, 919–23 (Mich. 1887). *Sherwood v. Walker* is the famed case where both a buyer and seller of a cow believed the cow to be barren, but when it was later discovered that the cow was in fact fertile, the contract became voidable, giving the seller "a

argument that the Shakespeare Foundation lacked assent because of a mutual mistake about the nature of the land would have to be heard by an arbitrator because it is really an argument that the contract is voidable, and would therefore fall under the *Prima Paint* separability doctrine.[214]

So, it seems that a party seeking to avoid arbitration could perhaps argue that there was a mutual mistake as to the *existence* of the subject matter of the contract and have that matter heard by a court.[215] However, *Jackson v. Shakespeare Foundation, Inc.* does not seem to fit into this distinct category, as the plaintiff's own allegations are that the defendants were fully aware of the nature of the land they were selling. Further, this means that the Shakespeare Foundation could not have successfully argued that they did not assent to this land purchase agreement—it may have been deceived into assenting, but it assented nonetheless.

B. *The Florida Arbitration Code Was Revised After the* Jackson v. Shakespeare Foundation, Inc. *Decision: Will This Give Relief to Claimants Seeking to Avoid Arbitration?*

Although the Florida courts that decided the arbitration issues discussed in Part III made little, if any, reference to the Florida Arbitration Code ("FAC") in their written opinions,[216] it is worth noting that in the weeks and months after the Florida Supreme Court decided *Jackson v. Shakespeare Foundation, Inc.*, the Florida Legislature revised the FAC.[217] While the bill that revised the FAC amended or created various sections of that statute,[218] the amendment to § 682.02 is directly relevant to the cases discussed in this note.[219] Prior to the recent revision, at the time the Florida Supreme Court decided *Jackson*, the language of § 682.02 echoed—but did not mirror—the key language in the FAA, reading that arbitration agreements or provisions "shall be valid, enforceable, and irrevocable without regard to the *justiciable character of the controversy*."[220] The 2013 revision to the FAC made two changes

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right to rescind" the contract. *See id.*; *see also* Ford Motor Co. v. City of Woodhaven, 716 N.W.2d 247, 255–56 (Mich. 2006) (summarizing and reaffirming *Sherwood v. Walker*).

214. *See supra* Parts II.B, III.A.2.

215. *See supra* notes 209–17 and accompanying text.

216. *See generally Jackson*, 108 So. 3d at 587–96; Cardegna v. Buckeye Check Cashing, Inc., 894 So. 2d 860, 864 (Fla. 2005); Seifert v. U.S. Home Corp., 750 So. 2d 633 (Fla. 1999); Shakespeare Found., Inc. v. Jackson, 61 So. 3d 1194 (Fla. Dist. Ct. App. 2011); Maguire v. King, 917 So. 2d 263 (Fla. Dist. Ct. App. 2005).

217. S. S.B. 530, 2013 Leg., Reg. Sess. (Fla. 2013).

218. *See* S. C.B. 530, 2013 Leg., Reg. Sess. (Fla. 2013).

219. *Compare* FLA. STAT. § 682.02 (2013), *with* FLA. STAT. § 682.02 (2012).

220. § 682.02 (2012).

to § 682.02.[221] First, subsection 1 of the newly worded § 682.02 now mirrors the language of the FAA, reading that arbitration agreements are "valid, enforceable, and irrevocable *except upon a ground that exists at law or in equity for the revocation of a contract*."[222] Secondly, the revised § 682.02 of the FAC adds subsections 2 and 3, which codify the holdings of the Florida Supreme Court in *Jackson* and of the United States Supreme Court in *Prima Paint*.[223] Subsection 2 dictates that "the court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate,"[224] and subsection 3 states that "an arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable."[225] In other words, when a motion to compel arbitration is filed, a court decides only whether there is a valid arbitration provision in the contract, and if there is, an arbitrator decides whether or not the contract was valid to begin with.

The revision that was made to the FAC, removing language that stated that arbitration agreements are enforceable "without regard to the justiciable character of the controversy,"[226] and replacing it with an exception "upon a *ground that exists at law or in equity* for the revocation of a contract,"[227] appears to make the statute less restrictive than its previous version in that it gives a court the ability to go against the general rule for the sake of equity.[228] But, at the same time, subsection 3 of § 682.02 of the revised code expressly puts the decision as to the validity of a contract into the hands of an arbitrator.[229]

It should be asked whether Florida courts could use the new statu-

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221. *See* § 682.02(1)–(3) (2013).

222. *Compare* 9 U.S.C. § 2 (2012), *with* FLA. STAT. § 682.02(1) (2013) (emphasis added).

223. *See* BUS. LAW SECTION OF THE FLA. BAR, ANALYSIS OF PROPOSED REVISIONS TO THE FLORIDA ARBITRATION CODE 1 (2012), *available at* http://www.sifma.org/uploadedfiles/newsletters/state-news/2013/white%20paper%20-%20proposed%20fla%20arbitration%20code.pdf.

224. FLA. STAT. § 682.02(2) (2013).

225. § 682.02(3).

226. § 682.02 (2012) ("Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract . . . . Such agreement or provision shall be valid, enforceable, and irrevocable without regard to the justiciable character of the controversy.").

227. § 682.02(1) (2013) ("An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.").

228. *See* Southland Corp. v. Keating, 465 U.S. 1, 18 (1984) (Stevens, J., concurring in part and dissenting in part) (quoting 9 U.S.C. § 2 (1976)).

229. § 682.02(3) (2013) ("An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.").

tory language that grants an exception to the enforcement of arbitration agreements upon grounds of either law or equity. Justice Stevens, in a 1984 opinion referring to § 2 of the FAA, argued that even though the FAA generally requires state courts to enforce arbitration clauses in interstate commerce transactions, the general rule "is subject to an exception based on 'such grounds as exist at law or in equity for the revocation of any contract.' [And] that exception leaves room for the implementation of certain substantive state policies that would be undermined by enforcing certain categories of arbitration clauses."[230] So, perhaps lawyers could use the rationale articulated by Justice Stevens—i.e., arbitration clauses are generally enforceable except when a court finds that a contract should be revocable by law or in equity—to argue that the new language in the FAC, which was added after the *Jackson* decision, allows courts the ability to be less rigid in the enforcement of arbitration clauses. That is, when alleged facts or overwhelming evidence is produced showing that a contract is probably legally void or voidable, courts may cite reasons in policy or equity to find an arbitration provision revocable.

To analyze whether Florida courts would take seriously the argument that they may use the amended FAC to contravene the recent Florida Supreme Court mandate that arbitration provisions be strictly enforced, it would be pertinent to first discuss the reason that the legislature amended the statute.[231] The stated purpose of the amendments to the FAC, which had not been significantly amended since 1967, was to adopt "the provisions of the 2000 revision of the Uniform Arbitration Act" ("Revised Uniform Arbitration Act" or "RUAA").[232] Florida is now one of seventeen states to adopt this most recent version of the RUAA,[233] which exists to provide uniformity amongst the states in arbitration law.[234]

A key provision of the RUAA expressly adopts the separability

230. *Southland*, 465 U.S. at 18 (Stevens, J., concurring in part and dissenting in part) (quoting 9 U.S.C. § 2 (1976)).

231. This is in reference to the principle of statutory interpretation that effect should be given to legislative intent. *See* State v. Ogden, 880 P.2d 845, 853 (1994) ("The principal command of statutory construction is that the court should determine and effectuate the intent of the legislature, using the plain language of the statute as the primary indicator of legislative intent.") (citations omitted).

232. S. C.S. 530, 2013 Leg., Reg. Sess., at 3 (Fla. 2013).

233. For example, the District of Columbia has also adopted the RUAA. *Legislative Fact Sheet—Arbitration Act (2000)*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Arbitration%20Act%20(2000) (last visited Aug. 15, 2015).

234. *See Why States Should Adopt UAA*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UAA (last visited Aug. 15, 2015).

doctrine that the Supreme Court has applied to the FAA.[235] Therefore, in adopting the RUAA, the Florida Legislature seems to be pushing Florida law toward conformity with the FAA and its jurisprudence, not away from it. Being such, it is unlikley that Florida courts would read the amended Florida Arbitration Code as permitting them to interpret and enforce arbitration provisions in a manner that is meaningfully different from how the Supreme Court applies the FAA.

Nonetheless, Florida courts are still free to apply state law and policy when matters of interstate commerce are not at hand.[236] Lawyers seeking to avoid arbitration on behalf of their clients should encourage courts to use the statutory language that grants an exception to the enforceability and irrevocability of arbitration agreements if there are grounds in equity to revoke the agreement. This new statutory language gives the lower courts a statutory provision to rest on when declining to compel arbitration if a fraud in the inducement claim comes before them.[237] As Justice Stevens said when interpreting the very same statutory language appearing in the FAA, "that exception leaves room for the implementation of certain substantive state policies that would be undermined by enforcing certain categories of arbitration clauses."[238]

A court could say that in cases such as *Jackson v. Shakespeare Foundation, Inc.*, where it seems plainly obvious to the court that a contract was procured by fraud, basic fairness would dictate that the court should not deny the defrauded party a jury trial based on a contract that they were fraudulently induced into entering. The rationale for defying past precedent would be that the recently revised Florida Arbitration Code allows for exceptions based in equity for declining to enforce an arbitration provision.

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235. *See* Timothy J. Heinsz, *The Revised Uniform Arbitration Act: An Overview*, 56 DISP. RESOL. J. 28, 31 (2000) ("[S]ection 6(c) [of the RUAA] incorporates the 'separability' doctrine of *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* by stating that the arbitrator determines 'whether a contract containing a valid agreement to arbitrate is enforceable.' Under this holding, if a party challenges the enforceability of the underlying agreement, i.e., the 'container' contract, and not just the arbitration clause on grounds such as fraud, illegality, mutual mistake, unconscionability, or the like, the arbitrator and not the court decides the contract's validity. The separability doctrine is the law under both the FAA and, in a majority of decisions, the [Uniform Arbitration Act].") (footnotes omitted); *see also* FLA. STAT. § 682.02(3) (2013) ("An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.").

236. *See supra* Part IV.

237. *Compare* FLA. STAT. § 682.02(1) (2013), *with* § 682.02 (2012); *see also supra* notes 44–45 and accompanying text.

238. Southland Corp. v. Keating, 465 U.S. 1, 18 (1984) (Stevens, J., concurring in part and dissenting in part) (citing 9 U.S.C. § 2 (1976)).

C. *The "As Is" Provision and the Applicability of the Florida Supreme Court's Holding to Non-Commercial Real Estate Sales and to Disclosure of Wetlands*

A distinguishing feature of the *Jackson v. Shakespeare Foundation, Inc.* case is that the purchase was made on an "as is" basis,[239] and this is perhaps the strongest argument that regardless of whether or not arbitration was mandated, equity would actually be best served by ruling against the purchaser's fraud in the inducement claim. The Florida Supreme Court did not make any findings as to whether the contract's "as is" provision negated any fraud in the inducement claims.[240] However, in reasoning that the fraud claim does have a significant relationship to the contract, the court said that "the resolution of the fraud claim requires reference to and construction of both the contract's arbitration provision and its 'as is' provision."[241] The "as is" provision that the court is referring to is a provision in the purchase contract that required the buyer to perform a feasibility study to "determine whether the property is suitable, in buyer's sole and absolute discretion," and that failure to notify the seller of the buyer's determination could "constitute acceptance of the property as suitable for buyer's intended use in its 'as is' condition."[242]

1. "As Is" Provisions in Residential Real Estate

In the *Jackson* case, the purchaser was a corporate entity that was purchasing the land with the intent to develop it by building a multiunit low-income housing project.[243] It is not unreasonable to think that a corporate developer would perform a study on the land it was contracting to purchase before closing in order to ensure that the property was in fact suitable for its planned project. Also, when considering that the contract mandated that the developer either perform due diligence, or take the property "as is,"[244] there is little reason to think that a court or a jury would feel sympathy for a developer who did not discover until after closing that the presence of wetlands on the subject property would make the developer's intended use of the property untenable.[245]

It is not certain from the *Jackson* holding whether the court would

239. *See* Jackson v. Shakespeare Found., Inc., 108 So. 3d 587, 595 (Fla. 2013).
240. *Id.*
241. *Id.*
242. *Id.* at 595 n.3.
243. *Id.* at 590.
244. *Id.* at 595 n.3.
245. *But see* Johnson v. Davis, 480 So. 2d 625, 627–28 (Fla. 1985) (holding that buyers may rely on representations even if the buyer could have found out that the representations were false had they investigated).

have reached the same result had the facts been that it was an *individual* purchasing from another individual or from a corporate developer without an "as is" clause, but it would seem to be inconsistent to do otherwise. The court has held that the language of the arbitration provision appearing in the standard Real Estate Sale and Purchase Contract commonly used in Florida is sufficiently broad to capture fraud in the inducement claims in the net of the "contractual nexus" test,[246] so it stands to reason that the same holding would have to be applied regardless of who the buyer and seller are, and without regard to equity.

2. Disclosure of Wetlands

Wetlands are amongst the factors that must be disclosed to a buyer of real estate.[247] Further, under Florida law, selling real estate "as is" does not alleviate the sellers of their duty to disclose defects.[248] But, the Florida Supreme Court seemed to think that it was at least possible that a claim for fraudulent representation regarding the (non)disclosure of wetlands on the property could have been waived by the language of the "as is" clause in *Jackson*.[249]

It could be argued that if there is any reason, in equity or as a matter of policy, to treat a certain category of disclosures differently from others, it would be the required disclosure of wetlands. Over the past couple of decades, society has become increasingly aware of the importance of conserving wetlands,[250] but it is argued by many that cur-

246. *See Jackson*, 108 So. 3d at 593–94; Shakespeare Found., Inc. v. Jackson, 61 So. 3d 1194, 1200 (Fla. Dist. Ct. App. 2011).

247. *See* E. Lee Worsham, *Must Information in the Public Record Be Disclosed to Buyers of Residential Real Property and May It Be Misrepresented?*, 80 Fla. B.J. 33, 33 (2006) (listing wetlands among the factors that are frequent subjects of failure to disclose litigation); *see also* Fla. Ass'n of Realtors, Seller's Real Property Disclosure Statement § 5(b) (2009) (form disclosure statement used by realtors representing sellers, asking "Are You Aware: . . . of wetlands . . . or other environmentally sensitive areas located on the property?").

248. Levy v. Creative Const. Servs. of Broward, Inc., 566 So. 2d 347, 347 (Fla. Dist. Ct. App. 1990) (citing *Johnson*, 480 So. 2d 625). Under Texas law, for comparison, there is clear authority saying that if a seller knowingly conceals a material fact, an "as is" clause will be unenforceable. *See* Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd., 896 S.W.2d 156, 162 (Tex. 1995) ("A buyer is not bound by an agreement to purchase something 'as is' that he is induced to make because of a fraudulent representation or concealment of information by the seller."); *see also* William H. Locke, Jr., Representations, Warranties and "As Is" Disclaimers 8–9 (2008), *available at* http://www.gdhm.com/images/pdf/whl-representations-warranties-as_is_disclaimers.pdf (discussing the "*Prudential* Rule").

249. *See supra* text accompanying notes 240–46. The Florida Supreme Court did not rule on this issue, stating that it was an issue for the arbitrator to decide. *See Jackson*, 108 So. 3d at 595–96 ("Although the Shakespeare Foundation's election of the option [to not inspect the property] may not result in a waiver of the fraud claim, whether this argument is viable will require reference to, and the construction of, the contract and all other facts.").

250. *See, e.g.*, Fla. Dep't of Envtl. Prot., Homeowners Guide to Wetlands 4 (2002), *available at* http://www.dep.state.fl.us/water/wetlands/docs/erp/wetland_guide.pdf [hereinafter

rent conservation efforts are falling short.[251] Efforts have been taken to ensure that Florida landowners are educated about wetlands and aware of the need to use caution when developing land adjacent to wetlands.[252] But the presence of wetlands on a specific property is not always readily apparent,[253] and their presence can be hard to discover through use of public records.[254]

If it is important that people are made aware of wetlands on their property, and it is acknowledged that becoming aware of their presence may be difficult, it may make sense for Florida courts to make a bright-line rule regarding the disclosure of the presence of wetlands in real estate transactions. Required disclosures in real estate transactions are usually court-made rules,[255] so Florida courts would not be doing any-

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GUIDE TO WETLANDS] ("Floridians are becoming increasingly aware of the importance of and the need to protect wetlands."); COMM. ON MITIGATING WETLAND LOSSES, NAT'L RES. COUNCIL, COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT 1 (2001) ("In recent years, concern about the loss of wetlands in the United States has led to federal efforts to protect wetlands on both public and private lands."); Tirso M. Carreja, Jr., Note, *Adding a Statutory Stick to the Bundle of Rights: Florida's Ability to Regulate Wetlands Under Current Takings Jurisprudence and Under the Private Property Rights Protection Act of 1995*, 11 J. LAND USE & ENVTL. L. 423, 424 (1996) (describing how "[w]etlands serve a vital function in Florida's ecology and economy"); Alyson C. Flournoy & Allison Fischman, *Wetlands Regulation in an Era of Climate Change: Can Section 404 Meet the Challenge?*, 4 GEO. WASH. J. ENERGY & ENVTL. L. 67, 67 (2013) (quoting Clean Water Act of 1972 § 101(a), 33 U.S.C. § 1251(a) (2006)) ("Protection of wetlands is a necessary element in the calculus of 'restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters.'") (alterations in original); Shannon O'Shea, Note, *Lucas Leaves Room for Categorical Defenses for Regulations of Wetlands That Are Critical to Water Resources and Essential for Public Drinking*, 5 FIU L. REV. 243, 244 (2009) ("Wetlands play a critical role . . . . Throughout the history of the United States, wetlands have been cleared, drained, and developed. . . . Scientists later learned about the importance of wetlands and significant protection efforts began in the 1960s; however, wetlands continued to disappear. . . . [B]y the 1990s [Florida had lost] almost 44% of [its] wetlands.").

251. *See, e.g.*, COMM. ON MITIGATING WETLAND LOSSES, *supra* note 250, at 2 ("The goal of no net loss of wetlands is not being met for wetland functions by the mitigation program . . . ."); Royal C. Gardner et al., *Compensating Wetland Losses Under the Clean Water Act (Redux): Evaluating the Federal Compensatory Mitigation Regulation*, 38 STETSON L. REV. 213, 216 (2009) ("In practice, compensatory mitigation has been problematic. . . . [W]etland compensatory mitigation projects [have] failed at various stages.").

252. *See generally* GUIDE TO WETLANDS, *supra* note 250.

253. It may require the assistance of an expert on the subject. *See, e.g.*, Fla. Dep't of Envtl. Prot., Ne. Dist., *Dredging and Filling in Wetlands*, MYFLORIDA, http://www.dep.state.fl.us/northeast/wetlands/PDF/wetlands_info_sheet.pdf (last visited Aug. 19, 2015) ("[Y]ou should contact a professional environmental consultant or the [Department of Environmental Protection] for assistance in determining whether or not your proposed work site is a wetland, and where its limits are."). Also, during certain times of the year, or just during dry periods in general, wetlands "may be difficult to recognize." *Id.*

254. *See* Worsham, *supra* note 247, at 33 ("Some public records are relatively easy to discern . . . . Others, however, sink to [a] level of obscurity, like . . . whether wetlands have been identified or documented on a property . . . .").

255. *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 10 (2000) ("Especially in private

thing radical by making a new rule regarding wetlands.[256] Just as the Florida Supreme Court attempted to do in the *Cardegna v. Buckeye Check Cashing* case, Florida courts could refuse to "breathe life into"[257] contracts that fail to disclose the presence of wetlands by strictly enforcing the duty to disclose as an important public policy. The courts could refuse to give any benefit of the bargain to sellers who fail to disclose the presence of wetlands.

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law—contracts, torts, and property—common-law courts are regarded as having inherent power to define basic legal principles and obligations. . . . The modern justification [for this] is that common-law courts exercise inherent policymaking authority with respect to private law, subject to legislative revision.") (citing MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 1–7 (1988); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 9–23 (1990)); *see also, e.g.*, Johnson v. Davis, 480 So. 2d 625, 627–28 (Fla. 1985) ("[W]e hold that where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer. This duty is equally applicable to all forms of real property, new and used."); Jensen v. Bailey, 76 So. 3d 980, 983–86 (Fla. Dist. Ct. App. 2011) (surveying holdings of other Florida courts to determine that the Florida rule is that sellers can only be liable for failure to disclose defects that they had knowledge of). *But see, e.g.*, 42 U.S.C. §§ 4851–56 (2012) (requiring disclosure of lead-based paints); FLA. STAT. § 689.261 (2014) (requiring that buyers be provided with a property tax disclosure).

256. A more radical approach would be for a court (or more likely, the legislature) to declare wetlands in Florida to be nontransferable. An argument for doing this would be that individual owners of wetlands do not properly value and protect those wetlands because they are not economically valuable to them as individuals, even though they may be very valuable to society as a whole:

> [T]he nature of wetland benefits are such that the *owners* of wetlands usually cannot receive a monetary gain from the use or sale of them. Flood protection benefits accrue to others who live downstream. The fish and wildlife that breed and inhabit wetlands migrate and are captured or enjoyed by others. It is difficult for an owner to exploit the water conservation, pollution control or sediment trapping benefits of the wetlands on his property. For the owner of a wetland to benefit from it, he often has to alter it, convert it and develop it. That is why, despite their value, wetlands are being eliminated.

GUIDE TO WETLANDS, *supra* note 250, at 13. So, banning the transfer of wetlands as a means of protecting them could also be justified in terms of market (in)efficiency—i.e., owners do not properly value wetlands. *Cf.* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1863 (1987) ("[I]nalienability is a means of controlling externalities that prevent the market from achieving an efficient result."). Another justification would be that sellers who transfer wetlands might be inflicting a "large-scale social cost" by transferring to a party who may destroy or pollute the wetlands. *See generally id.* at 1864–69. However, this note does not propose this argument, as it is probably impossible to implement due to Takings Clause jurisprudence. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) (holding that a regulation that denies "all economically beneficial use" of land is a taking that must be compensated, unless "the proscribed use interests were not part of [the] title to begin with"); Florida Rock Indus., Inc. v. United States, 45 Fed. Cl. 21, 25–26 (1999) (denial of permits to mine on a property that was surrounded by wetlands was deemed a taking that required compensation); *see also generally* U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

257. Cardegna v. Buckeye Check Cashing, Inc., 894 So. 2d 860, 864 (Fla. 2005).

VI. Conclusion

It is not known for sure the extent to which Florida courts are free to use state law and policy in deciding whether to compel arbitration in disputes over real estate contracts.[258] However, it does seem apparent that disputes between purchasers and a developer who has sold multiple homes, with materials, financing, and buyers coming from multiple states, will be determined to substantially affect interstate commerce.[259] Meanwhile, it seems likely the case that a sale of a vacant piece of land where the buyer and seller are both residents of the state where the land sits, as in *Jackson v. Shakespeare Foundation, Inc.*, is not something that courts will usually hold to be part of interstate commerce.[260] Particularly when the dispute is between the buyer and the seller and the dispute concerns the land sale contract. But it is unknown at what point the facts of a land sale dispute substantially affect interstate commerce.

The uncertainty of what set of facts in a land sale dispute rise to the level of substantially affecting interstate commerce would seem to make it difficult for Florida courts to know whether or not to apply the FAA when hearing motions to compel arbitration pursuant to a real estate sales contract. It could be that the Florida Supreme Court realized this difficulty would be present when they shifted course on past policy by announcing a new rule for Florida courts to use when implementing state law to decide whether arbitration should be mandated.[261] The Florida rule for deciding whether fraud in the inducement claims should be sent to arbitration, while expressed in different terms than the Federal rule, will produce the same result.[262] This could lead to the conclusion that the ruling in *Jackson v. Shakespeare Foundation, Inc.* was intended to ensure that Florida courts would not be in conflict—at least not in the end result—with the FAA when hearing motions to compel arbitration in cases where it may not be completely clear whether interstate commerce was present.[263]

Nonetheless, in seeking to avoid arbitration, it seems that parties who can provide evidence that they never assented to the container contract may have the issue of assent determined by a court before being referred to an arbitrator. However, this open window would not have been a winning argument had the issue of assent—in the form of lack of

258. *See supra* Part IV.

259. *See supra* Part IV.B.

260. *See supra* Part IV.B.2.

261. *See supra* Part III.B.

262. Fraud in the inducement claims will be sent to arbitration, unless the arbitration agreement is written to exclude fraud in the inducement claims.

263. For a discussion of *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, see *supra* notes 36–39 and accompanying text.

"meeting of the minds"—been raised in the *Jackson v. Shakespeare Foundation, Inc.* case.[264] This seemingly unfair result, where the existence of fraud in the inducement was apparent, is at least one of the sources of the "vigorous dissents"[265] and the many law journal articles that rail against the separability doctrine.[266] The *Jackson v. Shakespeare Foundation, Inc.* decision ensures that fraud in the inducement claims against contracts containing arbitration clauses will be heard by an arbitrator regardless of whether state or federal law applies,[267] unless, of course, the arbitration provision is written to exclude such claims.[268]

All may not be lost for litigants in a similar position as the plaintiff in *Jackson v. Shakespeare Foundation, Inc.* The Florida legislature amended the Florida Arbitration Code subsequent to the Florida Supreme Court decision in *Jackson*.[269] This amendment provides statutory language that might be read to allow courts to make exceptions to the general rule of enforcing arbitration provisions when there are reasons in equity to do so.[270] Further, both as a matter of equity and as a matter of state policy, litigants might be able to gain traction by arguing

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264. *See supra* Part V.A.2.

265. *See supra* note 17; *see also* Southland Corp. v. Keating, 465 U.S. 1, 25 (1984) (O'Connor, J., dissenting) ("Congress's Article III control over federal court jurisdiction would not by any flight of fancy permit Congress to control proceedings in state courts."); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 407 (1967) (Black, J., dissenting) ("The Court holds, what is to me fantastic, that the legal issue of a contract's voidness because of fraud is to be decided by persons designated to arbitrate factual controversies arising out of a valid contract between the parties. And the arbitrators who the Court holds are to adjudicate the legal validity of the contract need not even be lawyers, and in all probability will be nonlawyers, wholly unqualified to decide legal issues, and even if qualified to apply the law, not bound to do so.").

266. *See, e.g.*, Rueben, *supra* note 18, at 872–82 (calling for the Court to overturn the "separability" doctrine as applied to the FAA); Sternlight, *supra* note 18, at 9–10 ("The Court [is] far from engaging in neutral legal analysis that simply allows parties to contract for arbitration . . . [and] has in recent decisions stretched and twisted traditional canons of construction to favor arbitration over litigation. . . . [T]he Supreme Court's interpretation of the FAA as favoring arbitration over litigation is not merely bad as a matter of policy, but also is often inconsistent with the proper interpretation of the Constitution.").

267. *See supra* Part III.B.

268. *See* Fla. Dep't of Ins. v. World Re, Inc., 615 So. 2d 267, 268 (Fla. Dist. Ct. App. 1993) (holding that an arbitration clause governing disputes "as to the interpretation of this certificate" did not encompass claims for fraud in the inducement); *see also* Maguire v. King, 917 So. 2d 263, 267 (Fla. Dist. Ct. App. 2005) ("The provision in this case references '[a]ll controversies, claims, and other matters in question arising out of or relating to this transaction or this [c]ontract.' Such a broad provision often requires arbitration of tort claims, including issues of fraud.") (citing Stacy David, Inc. v. Consuegra, 845 So. 2d 303, 306 (Fla. Dist. Ct. App. 2003)). The Florida Supreme Court endorsed the *Maguire* rationale in *Jackson v. Shakespeare Foundation, Inc. See* 108 So. 3d 587, 596 (Fla. 2013).

269. *See supra* Part V.B.

270. *See id.*

that a failure to disclose the presence of wetlands should be treated with special scrutiny by Florida courts.[271]

271. *See supra* Part V.C.2.