

# Bledsoe, Jacobson, Schmidt & Wright

## A Litigation Law Firm

### ARBITRATION LITIGATION: IT'S NOT AN OXYMORON

The title at first blush appears to contain contradictory terms i.e. an oxymoron. Unfortunately, this is not the case. While Florida courts have repeatedly stated that arbitration is a valuable right that is inserted into contracts for the efficient and effective resolution of disputes, a significant amount of litigation has been employed in Florida federal and state courts challenging whether arbitration clauses are valid and enforceable. The unfortunate result of this litigation has been increased costs and fees which has undermined that salutary effect of arbitration clauses.

Recently, the United States Court of Appeals for the Eleventh Circuit in *Terminix International v. Palmer Ranch Ltd.*, \_\_\_F.3d\_\_\_, 2005 WL 3445533 (11th Cir.

December 16, 2005), a case on appeal from a Florida federal court, noted this all too familiar litigation scenario involving arbitration clauses at the outset of its opinion stating: "This is another arbitration dispute in which the parties are litigating whether or not they should be litigating. The familiar scenario is that the parties agree in writing to arbitrate any disputes between them, but then one party files a lawsuit taking the position that the agreement to arbitrate is inapplicable, invalid, or unenforceable for one reason or another."

In *Terminix International*, Palmer Ranch sued Terminix in state court for, among others, numerous violations of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA),

various fraud and negligence, and criminal advertising. Terminix then filed an action in federal court seeking an order compelling arbitration based upon broadly worded arbitration clauses in 20 separate contracts. The contracts required arbitration in accordance with rules of the American Arbitration Association (AAA) and precluded the arbitrator from awarding punitive damages, damages for deceptive trade practices. Palmer Ranch claimed that the arbitration agreements were unenforceable because they illegally deprived it of statutory rights and remedies including punitive damages, treble damages, damages and injunctive and declaratory relief under the FDUTPA, and attorneys fees.

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### RESIDENTIAL CONSTRUCTION CONTRACTS: BEWARE OF BUILDER DRAFTED ARBITRATION CLAUSES

An issue seldom considered by purchasers when entering into a residential construction contract is whether any disputes with the builder arising under the agreement are subject to arbitration. Buyer beware! Builders are seeking to limit their potential liability in the event that there are disputes involving the project and are including comprehensive arbitration provisions which, among other things limit the authority of the arbitrator to award damages.

Courts have tended to enforce broad arbitration clauses even when the claims involve fraud and do not directly involve the construction contract.

Recently, the Second District Court of Appeals in *Kaplan v. Kimball Hill Homes*, \_\_\_ So.2d \_\_\_ (Fla. 2<sup>nd</sup> DCA Dec. 9, 2005) considered whether claims arising in connection with a residential construction contract are subject to arbitration. In *Kaplan*, the

Kaplans asserted claims for fraud in the inducement and fraud relating to repeated false statements by Kimball of its ability to complete the home within the time required by the contract and its failure to disclose drainage and runoff from an adjacent property and an obstructed golf course view due to landscaping. The contract contained a broad arbitration clause which provided, in pertinent part that

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## ARBITRATION LITIGATION

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The Eleventh Circuit noted that ordinarily when one party challenges the validity of an arbitration clause on the ground that it contains unenforceable remedial restrictions, the court must first determine whether those remedial restrictions are unenforceable either because they defeat the remedial purpose of another federal statute or because they are invalid under generally applicable state contract law. For example, Florida courts generally treat statutory treble damages as remedial. The Court then held that although the general rule is for the court to decide whether the parties have a valid arbitration agreement, the parties had agreed by incorporating the rules of the American Arbitration Association into the arbitration

agreements that the arbitrator would decide whether the arbitration clause, including the limitation on his authority i.e. remedial restrictions was valid.

The Court's holding has far ranging implications as many commercial and construction contracts typically require AAA arbitration and incorporate its rules including, American Institute of Architects (AIA) form contracts and American General Contractor form agreements. Arbitrators will now be called upon to decide the validity of arbitration clause under the Federal Arbitration Act including purported limitations on his/her authority.

The Eleventh Circuit's decision in *Terminix International* is binding upon Florida state courts in matters brought under the Federal Arbitration Act

(FAA) and should require the court to refer the issue of the validity of arbitration clauses to arbitrators for determination. It is unresolved whether an action to compel arbitration under the Florida Arbitration Code involving an arbitration clause incorporating the rules of the American Arbitration Association would be decided in accord with *Terminix International*. However, the Florida Supreme Court in *Raymond James Financial v. Saldukas*, 896 So.2d 707 (Fla. 2005) noted that Florida courts tend to interpret the Florida Arbitration Code consistent with the FAA. This suggests that if the issue of the effect of incorporating AAA rules into an arbitration provision is presented to a state court, *Terminix International* would likely be followed.

## RESIDENTIAL CONSTRUCTION CONTRACTS

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"any controversy or claim between the parties relating to this agreement or ... this Home" was to be arbitrated. The Kaplans primarily contended that the arbitration clause did not apply because: 1) their claims were independent torts that did not depend on the contract; and 2) there was no

"mutuality of contract".

The court held that where, as here, the agreement provided for arbitration of disputes relating to the contract, the Kaplans' fraud claims were dependent upon the existence of the contract and there was a sufficient nexus between their tort claims i.e. fraud to fall within the scope of the

arbitration provision.

On the issue of the "lack of mutuality" the court held that the Kaplans' attack was on the validity of the contract as a whole which was required to be determined by the arbitrators. The court noted that if the challenge was only to the arbitration provision then it would be decided by the court.

**Briefly noted:**

On December 19, 2005 the First District Court of Appeals in *Worm World Inc. v. Ironwood*

*Productions*, (Docket No. 1D05-0391) held that contracts entered into by unregistered fictitious name were valid and binding on only the party which

actually entered into the agreement and not the true owner of the registered fictitious name.