IN THE SUPREME COU

NO. 2(

ANDRIA SA\
APPELLAN

VS

HERRIN-GEAR CHEVROLET CO., INC., AND
AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA
APPELLEES

2008 IA 1370 SCTE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following list of persons or parties have an interest in the outcome of this case. These representations are made in order that the judges of the Supreme Court may evaluate possible disqualification or recusal.

1. Honorable Robert W. Bailey, Circuit Judge

2. Timothy J. Matusheski and Eric Tiebauer, Counsel for Andria Sawyers

3. C. Michael Ellingburg and Brenda B. Bethany and the firm of Daniel Coker Horton and Bell, Counsel for Herrin-Gear Chevrolet Co., Inc.

4. Walter D. Willson, Rosemary G. Durfey and Kevin A. Rogers and the firm of Wells Marble & Hurst, PLLC, Counsel for American Bankers Insurance Company of Florida

5. Andria Sawyers, Plaintiff

6. Herrin-Gear Chevrolet Co., Inc., Defendant, and

7. American Bankers Insurance Company of Florida, Defendant.

Respectfully submitted,

Rosemary G. Durfey
Counsel of Record for American Bankers
Insurance Company of Florida

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American Bankers Insurance Company of Florida submits unto the Court that the decisional process would not be significantly aided by oral argument since the facts and legal arguments are adequately presented in the record and in the briefs filed by the parties.

STATEMENT OF THE ISSUES

I. The Court lacks jurisdiction over this appeal from a non-final order as it does not satisfy the jurisdictional prerequisites for interlocutory appeals under either the Mississippi Rules of Appellate Procedure or the Federal Arbitration Act.

II. The Arbitration Agreement between Herrin-Gear and Sawyers was not substantively unconscionable.

III. Herrin-Gear Chevrolet Co., Inc. ("Herrin-Gear") and American Bankers Insurance Company of Florida ("American Banker") are not involved in an illegal enterprise and do not form a holding company.

IV. GAP Asset Protection Debt Waiver ("GAP Waiver") contracts are not policies or certificates of insurance.

V. Due to the nature of the relationship between Herrin-Gear and American Bankers, the principles of equitable estoppel and agency allow American Bankers to enforce the Arbitration Agreement along with Herrin-Gear.

STATEMENT OF THE CASE

Statement of the Facts

On August 18, 2003, Sawyers purchased a 2002 Ford Explorer through Herrin-Gear in Jackson, Mississippi, which was financed by Nuvell Credit Corporation ("Nuvell"). RV2, 162. In connection with the Retail Installment Sales Contract, and as a part of her automobile purchase, Sawyers purchased GAP Waiver coverage through and with Herrin-Gear. RV2, 164-66. Under the GAP Waiver, if Sawyers' vehicle was damaged in an accident and deemed a total loss by her insurer, Herrin-Gear would pay the difference between the amount paid by the primary insurer and the debt owed to the lender, subject to certain limitations. *Id.* One of these

limitations is that additional charges incurred when a debtor fails to make timely payments under the note, such as for missed principal payments, extensions and late fees, would not be covered. *Id.*

As part of the transaction between Sawyers and Herrin-Gear, which included the GAP Waiver purchase, Sawyers also entered into an Arbitration Agreement which provides, in pertinent part, that controversies or claims arising out of or relating to the automobile purchase shall be resolved by binding arbitration administered by the Better Business Bureau ("BBB") in accordance with (1) BBB's Commercial Arbitration Rules; (2) the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*; and (3) the terms and conditions set forth in the agreement. [8]RV2, 163.

On December 14, 2007, Sawyers was involved in an automobile accident, and her automobile insurer concluded that her automobile was a total loss. The payment made by her insurer was insufficient to satisfy her debt with Nuvell and she filed a claim under the GAP Waiver. Upon review, amounts for additional debt incurred with the lender for missed principal payments and extensions, interest and late fees were subtracted, and American Bankers, on behalf of Herrin-Gear, issued payments to Sawyers in the amount of $686.43. American Bankers sent payment to Sawyers only as an agent for Herrin-Gear, pursuant to a separate contractual agreement with Herrin-Gear, and American Bankers never entered into any kind of contractual relationship with Sawyers. Sawyers asserts that this amount is insufficient under the GAP Waiver, but has never explained the basis for this contention. Instead, she filed this lawsuit against Herrin-Gear and American Bankers alleging that the Defendants had breached the GAP Waiver by failing to pay-off Sawyers' loan with Nuvell.

[8] Like the GAP Waiver purchase, the Arbitration Agreement is also part of the entire transaction. By its terms, the Arbitration Agreement applies to all disputes arising out of and related to the entire transaction, and Sawyers has never alleged that the purchase of GAP waiver does not fall under the scope of the Arbitration Agreement.

As set forth herein, because Sawyers' claims against American Bankers are so closely connected with the claims against Herrin Gear, and because American Bankers acted as Herrin-Gear's agent in sending payment pursuant to the GAP Waiver, Sawyers is required to arbitrate her claims against both Herrin-Gear and American Bankers under the Arbitration Agreement.

Proceedings Below

On April 24, 2008, Sawyers filed her Complaint against Herrin-Gear and American Bankers in the Circuit Court of Wayne County, Mississippi alleging breach of contract, bad faith, and fraud in the inducement. RV1, 4-13. On or about June 9, 2008, Herrin Gear moved to compel arbitration in accordance with an Alternative Dispute Resolution Agreement. RV1, 16-24. Thereafter, on or about June 23, 2008, American Bankers filed its separate motion to compel arbitration.

On July 22, 2008, the trial court heard argument on the motions to compel arbitration. On July 30, 2008, the court entered its order that arbitration should be granted as to all parties. RV2, 152-160. Sawyers subsequently filed her Petition for Permission to Appeal with this Court on August 12, 2008. Following briefing, the Court granted Sawyers' request for Interlocutory Appeal on September 17, 2008.

SUMMARY OF THE ARGUMENT

The Order compelling arbitration is a non-final order from which there is no right of appeal under the Mississippi Rules of Appellate Procedure. An appeal from the trial court's Order in this case is also contrary to the text and the policy of the Federal Arbitration Act ("FAA"). Therefore, the appeal should be dismissed.

With respect to the merits of this appeal, there is no question that the trial court's Order compelling arbitration should be affirmed. The Arbitration Agreement is not substantively

unconscionable. Sawyers' allegation that the Arbitration Agreement gives Herrin-Gear unlimited access to the courts while denying Sawyers' ability to do the same is simply incorrect. In actuality, the Arbitration Agreement provides a narrow, limited right for Herrin-Gear to seek judicial relief for actions to obtain possession or replevin of the vehicle, but, in all other respects, requires Herrin-Gear to arbitrate any claims against Sawyers. Under Mississippi law, even if the Arbitration Agreement creates different obligations of the parties, mutuality of obligations is not required law to enforce an Arbitration Agreement. Furthermore, the Arbitration Agreement does not restrict or limit damages as alleged by Sawyers. Moreover, while the Arbitration Agreement does require Sawyers to arbitrate her claims in Jackson, where she purchased her vehicle, no hardship can be or was demonstrated to this Court or the trial court.

Herrin-Gear and American Bankers are not involved in an illegal enterprise. The Mississippi Department of Insurance has opined that GAP Waiver contracts are not insurance. Therefore, the sale of GAP Waiver by Herrin-Gear is not a violation of any insurance or other laws within the State of Mississippi. Furthermore, Herrin-Gear and American Bankers do not form a holding company as alleged by Sawyers. They are merely two individual companies that do business with each other.

Finally, the theories of agency and equitable estoppel enable American Bankers to enforce the Arbitration Agreement in question as the claims against American Bankers are dependent upon the purchase of the GAP Waiver by Sawyers from Herrin-Gear during the transaction. Sawyers has no contractual relationship with American Bankers. American Bankers, as Herrin-Gear's agent, is being sued for its alleged failure to meet Herrin-Gear's obligations to Sawyers. Therefore, American Bankers should be entitled to rely upon Herrin-Gear's agreement

with Sawyers in defense of such claims as the "claims against Herrin-Gear and [American Bankers] are clearly inter-related and intertwined." RV2, 159.

For these reasons, which are elaborated herein, this Court should dismiss the appeal, or it should affirm the trial court's order which directed Sawyers to submit all of her claims to arbitration.

ARGUMENT

I. THE TRIAL COURT'S ORDER WAS NOT FINAL.

Two types of appeals are allowed in Mississippi from a trial court - an appeal as of right or an interlocutory appeal by permission. Only final judgments are appealable as of right under Mississippi law, and Miss. R. App. P. 4(a) provides the time within which such an appeal must be filed. However, Rule 4 does not apply in this case, because the order entered by the trial court was not final. Instead, Miss. R. App. P. 5 applies to this appeal, and provides, in pertinent part:

> An appeal from an interlocutory order may be sought if a substantial basis exists for a difference of opinion on a question of law as to which appellate resolution may:
>
> (1) Materially advance the termination of the litigation and avoid exceptional expense to the parties; or
>
> (2) Protect a party from substantial and irreparable injury; or
>
> (3) Resolve an issue of general importance in the administration of justice.

Miss. R. App. 5(a). In this case, the trial court granted Herrin-Gear's and American Bankers' motions to compel arbitration, but did not dismiss the action. As such, there has been no final order issued. Moreover, Sawyers acknowledges that the trial court's order is interlocutory and not final by seeking permission to appeal.

II. INTERLOCUTORY APPEALS ARE PROHIBITED BY THE FEDERAL ARBITRATION ACT.

Sawyers' interlocutory appeal is prohibited by the FAA, 9 U.S.C. § 16. In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the Supreme Court held that the substantive provisions of the FAA apply in state and federal courts. *Id.* at 12 (the FAA "creates a body of federal substantive law" which is "applicable in state and federal court") (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)).[1] Section 2 of the FAA applies where there is "a contract *evidencing a transaction* involving [interstate] commerce." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 277 (1995) (emphasis in original). The arbitration agreement at issue in this case evidences a transaction involving interstate commerce, and Sawyers has never alleged otherwise. Sawyers signed an agreement which contained language expressly invoking the FAA. RV1, 24. Specifically, the agreement contained the following language:

> ... shall be resolved by binding arbitration administered by the Better Business Bureau ("BBB") in accordance with (1) BBB's Commercial Arbitration Rules; (2) the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (1947, as amended).

Id. In addition to the acknowledged applicability of the FAA in the agreement, the transaction at issue involved interstate commerce because the Sawyers is a citizen of Mississippi, the transaction occurred in Mississippi, and Sawyers purchased a vehicle manufactured outside of Mississippi by Ford Motor Company and placed into the stream of commerce. *See Rollins, Inc. v. Foster*, 991 F. Supp. 1426, 1430 (M.D. Ala. 1998).

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[1] *See also Southland Corp.*, 465 U.S. at 15 ("[S]ince the overwhelming proportion of all civil litigation in this country is in the state courts, we cannot believe Congress intended to limit the Arbitration Act to disputes subject only to *federal* court jurisdiction. Such an interpretation would frustrate Congressional intent ...") (emphasis in original) (footnote omitted).

The appealability of arbitration orders under the FAA is governed by 9 U.S.C. § 16. "The broad purpose of section 16 was to implement Congress' 'deliberate determination that *appeal rules should reflect a strong policy favoring arbitration.*'" *Stedor Enterprises, Ltd. v. Armtex, Inc.*, 947 F.2d 727, 730 (4th Cir. 1991) (emphasis added). Congress effectuated this policy in two ways: "First, an order that favors litigation over arbitration....is immediately appealable, even if interlocutory in nature." *Stedor*, 947 F.2d at 930 (citing 9 U.S.C. § 16(a)(1) and (2)). Second, "*Congress sought to prevent parties from frustrating arbitration through lengthy preliminary appeals*" by providing that, if the trial court determines that arbitration is called for, "*the court system's interference with the arbitral process will terminate then and there*, leaving the arbitration free to go forward." *Id.* (citation omitted; emphasis added). Thus, section 16 "provides in general that *there may be no appeal* from the proarbitration determination until after the arbitration has gone forward to a final award." *Stedor*, 947 F.2d at 730 (emphasis added). As observed in *Filanto, S.P.A. v. Chilewich International Corp.*, 984 F.2d 58 (2d Cir. 1993), "the pro-arbitration tilt of the statute requires that, with respect to embedded actions, the party opposing arbitration must bear the initial consequence of an erroneous district court decision requiring arbitration." *Id.* at 61.[2]

As amended, section 16 of the FAA provides that:

> (a) An appeal *may be taken from*--
>
> (1) an order--
>
> (A) refusing a stay of any action under section 3 of this title,
>
> (B) denying a petition under section 4 of this title to order arbitration to proceed,
>
> (C) denying an application under section 206 of this title to compel arbitration,

[2] Unlike an "independent" arbitration action in which the sole issue in the litigation is arbitrability, an "embedded" action is one where, like here, the arbitrability issue is embedded in a broader action usually encompassing the merits of the parties' dispute. *See Stedor* 947 F.2d at 731.

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal *may not be taken from an interlocutory order--*

(1) granting a stay of any action under section 3 of this title;

(2) *directing arbitration to proceed under section 4 of this title*;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

9 U.S.C. § 16 (emphasis added).

Thus, section 16(b)(2) of the FAA ***expressly prohibits*** the appeal of an interlocutory order compelling arbitration. Consequently, the Mississippi Supreme Court has concluded that it does not have jurisdiction to entertain appeals of interlocutory orders granting motions to compel arbitration. *Banks v. City Finance Company,* 825 So.2d 642 (Miss. 2002). In *Banks*, the trial court compelled arbitration but did not dismiss the claims or end the litigation on its merits. Therefore, the Mississippi Supreme Court held that the order compelling arbitration must be considered interlocutory and not final. As such, the Court determined that the matter was not appealable.

Numerous other courts have held that orders compelling arbitration may not be appealed until final. *See e.g., Stumbo v. Phillip Morris, USA,* 244 S.W.3d 116, 120 (Ky. App. 2008) (order compelling arbitration and staying case was not final for purposes of appeal); *In re Palacios,* 221 S.W.3d 564, 565 (Tex. 2006) (order compelling arbitration appealable if order dismisses underlying litigation so it is final rather than interlocutory); *In re Pisgah Contractors, Inc.*, 117 F.3d 133, 135 (4th Cir. 1997) ("except as provided in 28 U.S.C. § 1292(b), an appeal may not be taken from an interlocutory order in favor of arbitration over litigation until after the

arbitration has proceeded to a final award"); *Humphrey v. Prudential Securities Incorporated*, 4 F.3d 313, 319 (4th Cir. 1993) (holding that the appellate court has no subject matter jurisdiction to review orders granting arbitration and staying the case); *Jeske v. Brooks*, 875 F.2d 71, 73 (4th Cir. 1989) (holding the appellate court lacks jurisdiction to review the trial court's order compelling arbitration of state law claims); *Purdy v. Monex International Ltd.*, 867 F.2d 1521, 1523 (5th Cir. 1989) (appellate court has no jurisdiction to review order compelling arbitration and staying the litigation); *Dakota Wesleyan University v. HPG International, Inc.*, 560 N.W.2d 921, 922 (S.D. 1997) (holding that state appellate court is without jurisdiction to review order compelling arbitration in embedded case); *Berger Farms v. First Interstate Bank of Oregon, N.A.*, 939 P.2d 64, 69 (Or. Ct. App. 1997) (section 16 of the FAA prohibits appeals from state trial court orders that favor arbitration over litigation and permits appeals from orders that favor litigation over arbitration), *rev'd on other grounds*, 995 P.2d 1159 (Or. 2000); *Marr v. Smith Barney, Harris Upham & Co.*, 842 P.2d 801, 804 (Or. Ct. App. 1992) ("[L]egislative history and the sense of the statutory scheme indicate that Congress intended to prevent *interlocutory* appeals from orders that favor arbitration over litigation.").

The result under state law is the same as that under federal law – this appeal should be dismissed. Even if there were a conflict, however, it is well established that the FAA would preempt any contrary state law. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (holding that the FAA preempts state law). Accordingly, any state procedure which allowed for the appeal of an interlocutory order compelling arbitration would directly conflict with and frustrate the objectives of the FAA and would therefore be preempted under the Supremacy Clause. *See Stout v. Byrider*, 228 F.3d 709, 715 (6th Cir. 2000) ("The FAA governs all aspects of arbitration procedure and preempts inconsistent state law.") (internal citations

omitted); *see also Felder v. Casey*, 487 U.S. 131, 138 (1988) (Although "[n]o one disputes the general and unassailable proposition ... that States may establish the rules of procedure governing litigation in their own courts," "[b]y the same token, however, where state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.") (citation omitted).

Therefore, under this authority, the Mississippi Supreme Court should dismiss Sawyer's interlocutory appeal. As in *Banks*, the trial court in the case at bar simply entered an order compelling arbitration. RV2, 152-160. It did not dismiss the matter or end the litigation on its merits. Therefore, the order compelling arbitration is not appealable as an interlocutory order under Mississippi law and the FAA. Accordingly, there is no question that an appeal in this matter should not be allowed and that Sawyer's appeal should be dismissed.

III. THE ARBITRATION AGREEMENT IS ENFORCEABLE AND NOT SUBSTANTIVELY UNCONSCIONABLE.

The FAA was enacted in order to establish a broad "federal policy favoring arbitration" mandating that courts "rigorously enforce agreements to arbitrate." *East Ford v. Taylor*, 826 So.2d 709, 713 (Miss. 2002) (citing *Shearson/Am. Exp. Inc. v. McMahon*, 482 U.S. 220, 226 (1987)). The Mississippi Supreme Court "has consistently recognized the existence of [the] 'liberal federal policy favoring arbitration agreements,' and has stated that '[it] will respect the right of an individual or entity to agree in advance of a dispute to arbitration or other alternative dispute resolution.'" *Terminix Int'l, Inc. v. Rice*, 904 So.2d 1051, 1054 (Miss. 2004). Therefore, "agreements to arbitrate . . . are to be liberally construed so as to encourage the settlement of disputes and the presumption will be indulged in favor of the validity of arbitration proceedings." *Id.* at 1054 (quoting *Russell v. Performance Toyota, Inc.*, 826 So.2d 719, 722 (Miss. 2002)). Thus, "any doubts concerning the scope of arbitrable issues should be resolved in favor of

arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Taylor*, 826 So.2d at 713 (citing *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1 (1983) at 24-25)). Accordingly, a party opposing arbitration bears the burden of establishing any and all defenses to enforcement of the arbitration agreement. *Norwest Fin. Mississippi, Inc. v. McDonald*, 905 So.2d 1187, 1193 (Miss. 2005) (citing *Green Tree Fin. Corp-Alabama v. Randolph*, 531 U.S. 79, 92 (2000)).

An arbitration agreement is enforceable under the FAA if there is a (i) written agreement to arbitrate claims, (ii) a nexus to interstate commerce, and (iii) coverage of the claims by the arbitration clause. 9 U.S.C. § 2. Under the FAA, courts generally conduct a two-pronged inquiry in determining whether claims should be compelled under an arbitration agreement. *Taylor*, 826 So. 2d at 713. The first prong of the inquiry considers, first, whether there is a valid arbitration agreement and, second, whether the dispute falls within the agreement. *Id.* The second prong of the inquiry considers "whether legal constraints external to the parties' agreement foreclosed arbitration of those claims" which include contractual defenses such as fraud, duress and unconscionability. *Id.* at 713

In this case, Sawyers does not dispute that there is a valid, written arbitration agreement or that his claims fall under the Arbitration Agreement.[9] Further, there is no dispute that the

[9] There is no question that scope of the Arbitration Agreement encompasses the claims alleged herein. The Arbitration Agreement uses broad language, requiring arbitration of "A]ny controversy or claim between Buyer(s)/Lessees(s) and Dealer arising out of or relating to (1) the Offer to Purchase or Lease Vehicle executed by Buyer(s)/Lessee(s) in connection with the purchase or lease of the Vehicle, (2) the related contract for the purchase or lease of the Vehicle and/or (3) any and all related finance, insurance, extended warranty and/or service agreements (hereinafter collectively referred to as the "Agreements"), or any breach thereof, and/or the Vehicle." Broad language, such as this, requires only that the dispute "touch" matters covered by the agreement. *Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F. 3d 1061, 1067 (5th Cir. 1998). Further, such language enjoys a presumption of arbitrability. *AT&T*

transaction did not have a nexus to interstate commerce.[10] His only claim that the Arbitration Agreement is unenforceable because it substantively unconscionable. Therefore, the only issue on appeal regarding the enforceability of the Arbitration Agreement is whether it is substantively unconscionable.

Sawyers alleges that the Arbitration Agreement is unenforceable because it is substantively unconscionable. Sawyers has the burden to prove substantive unconscionability. *Norwest Fin. Mississippi, Inc. v. McDonald*, 905 So. 2d 1187, 1193 (Miss. 2005). "Substantive unconscionability is present when there is a one-sided agreement whereby one party is deprived of all the benefits of the agreement or left without a remedy for another party's nonperformance or breach." *Vicksburg Partners, LLC, v. Stephens*, 911 So. 2d 507, 521 (Miss. 2005). Clearly, this is not the case with this Arbitration Agreement.

Sawyers raises four arguments regarding substantive unconscionability. First, Sawyers mischaracterizes the Arbitration Agreement, by implying that it gives Herrin-Gear an unfettered right to seek relief in court, while denying Sawyers that same right. As the circuit court recognized, the Arbitration Agreement provides a narrow, limited right for Herrin-Gear to seek

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Techs., Inc. v. Communications Workers, 475 U.S. 643, 650 (1986). Sawyers' claims regarding GAP Waiver coverage purchased from Herrin-Gear clearly fall under the scope of the Arbitration Agreement.

[10] The United States Supreme Court has noted that "it is perfectly clear that the FAA encompasses a wider range of transactions than those actually 'in commerce.'" *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 273 (1995). While the FAA references the term "involving commerce," such has been determined to be the equivalent of the term "affecting commerce," which indicates that the broadest permissible exercise of Congress' Commerce Clause power is intended. *Id.* at 273-74. Thus, the FAA's reference to transactions being "in commerce" encompasses financial transactions which are regulated by the federal government through its plenary powers under the Commerce Clause, including the subject transaction. Moreover, "a contract evidencing a transaction involving commerce should be read broadly to extend the Act's reach to the limits of Congress' Commerce Clause Power." *McKenzie Check Advance of Mississippi, LLC, v. Hardy,* 866 So. 2d 446, 450 (Miss. 2004) (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995)). See also *Russell*, 826 So.2d at 722. Therefore, courts have frequently found that transactions, such as the one in this case, have a nexus to interstate commerce and are governed by federal law. *McKenzie*, 866 So. 2d at 450-51.

judicial relief for actions to obtain possession or replevin of the vehicle, but, in all other respects, requires Herrin-Gear to arbitrate any claims against Sawyers.[4] RV2, 155. It does not allow Herrin-Gear an unqualified right to seek relief in court.

Further, this limited exception is not substantively unconscionable under Mississippi law. The circuit court noted that under Mississippi law, even if the Arbitration Agreement creates different obligations of the parties, mutuality of obligations is not required under Mississippi law to enforce an arbitration agreement, by relying on *McKenzie Check Advance of Mississippi, LLC, v. Hardy*, 866 So. 2d 446, 452 (Miss. 2004). Sawyers tries to undercut *Hardy* by recasting it as "dicta," but this is erroneous. The court in *Hardy* concluded that mutuality of obligations was not required to enforce an arbitration agreement; therefore, the trial court's ruling was reversed. This ruling cannot possibly be called "dicta," and Sawyers only refers to it as such because it does not support her position.

Additionally, the circuit court relied upon the vast federal authority upholding similar provisions. *New South Federal Savings Bank v. Anding*, 414 F. Supp. 2d 636, 643 (S.D. Miss. 2005); *Fidelity National Corp., v. Blakely*, 305 F. Supp. 2d 639, 643 (S.D. Miss. 2003); *Murphy v. AmSouth Bank*, 269 F. Supp. 2d 749, 752 (S.D. Miss. 2003); *Pridgen v. Green Tree Financial Servicing Corp.*, 88 F. Supp. 2d 655, 656 (S.D. Miss. 2000).[5] Sawyers tries to distinguish this

[4] In her brief, Sawyers presents an argument not made before the circuit court, and, therefore, waived. She now asserts that the only possible action that Herrin-Gear could bring against Sawyers would be to obtain possession or replevin of the vehicle. This is speculative and incorrect, because it assumes that Herrin-Gear's only possible claim against Sawyers could be for failure to make payments and the only relief sought would be replevin. In this case, any right to repayment would be asserted by the entity financing the purchase, which was Nuvell, not Herrin-Gear. Herrin-Gear would not have the right to seek replevin. Further, there could be a number of circumstances where Herrin-Gear might have cause of action for monetary damages against a purchaser; for example, if a buyer made misleading or fraudulent statements to induce the sale of the vehicle.

[5] The Court recognized that it is common for such provisions to be contained in an arbitration agreement where there is collateral or a security interest at state, because an arbitrator would not have authority to

body of authority by arguing that one of the cases relied upon therein, *Clinton Serv. Co. v. Thornton*, 100 So. 2d 863 (Miss. 1958), was misinterpreted by all of these courts. However, *Thornton*, at best, only stated that mutuality of obligation "***may*** be a prerequisite to the formation of a valid bilateral contract" and did not state that mutuality of obligation was required.[6] *Id.* at 866 (emphasis added). Accordingly, the circuit court's decision was supported by Mississippi state and federal court decisions, and because Sawyers has no authority in support of her position, she has failed to prove there is a substantial basis for a difference of opinion on this issue.

Second, Sawyers alleges that the lower court erred in enforcing the arbitration provision, because it precludes the arbitrator from awarding punitive damages, attorney's fees and consequential damages. This is without basis because the circuit court concluded, "[i]n this case, the parties have not agreed to limit any remedies that could be awarded in arbitration. Therefore, there is no limitation on remedies that can be awarded by the arbitrator under the applicable BBB Rules; and therefore, the Court finds that the Plaintiff has not shown that the Arbitration Agreement is unconscionable." RV2, 157.

Third, Sawyers alleges that the Arbitration Agreement is substantively unconscionable because it requires her to arbitrate her claims in the city where Herrin-Gear is located, which is Jackson, Mississippi. However, Sawyers drove from Waynesboro, Mississippi to Jackson to

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grant certain relief that only courts could give. RV2, 155. This would include any orders requiring action by a law enforcement official. In such a case, although an arbitrator might decide such an order is warranted, a court would have to issue the order, which obviously could make it difficult to levy on property by affording the possessor time to conceal or dispose of the collateral.

[6] As a side-note, the quoted statement is dicta, because the contract at issue in *Thornton* was a unilateral contract.

purchase the vehicle. She has not shown how it would be unfair for her to have to bring her claims in Jackson and has not provided any evidence of any kind of hardship.

Finally, Sawyers discusses the decision in *Pitts v. Watkins*, 905 So.2d 553 (Miss. 2005). The facts in *Pitts* do not begin to approach the facts in this case. In *Pitts,* the court found the arbitration agreement unenforceable where it only allowed the defendants to pursue claims in court, required that the plaintiffs pay costs associated with any collection attempt, limited the defendant's liability to $265, and an imposed a one-year limitation on bringing claims. *Id.* Subsequent to *Pitts*, the Mississippi Supreme Court concluded in *Vicksburg Partners, L.P. v. Stephens*, 911 So.2d 507, 525 (Miss. 2005) that the proper approach was to strike any substantively unconscionable terms and compel arbitration. Notably, Sawyers fails to mention this decision in her petition and brief. Therefore, Sawyers has failed to show that there is a substantial basis for a difference of opinion regarding whether the Arbitration Agreement is substantively unconscionable.

IV. HERRIN-GEAR AND AMERICAN BANKERS ARE NOT INVOLVED IN AN ILLEGAL ENTERPRISE.

In her petition and brief, Sawyers advances a fanciful conspiracy theory that the enforcement of the Arbitration Agreement would directly furnish aid and protection to further an "illegal enterprise of administering unregistered insurance."[11] Essentially, Sawyers claims that the GAP Waiver coverage is insurance and that enforcing the Arbitration Agreement allows Herrin-Gear and American Bankers to conceal their allegedly unlawful activities. This argument is unsubstantiated and ridiculous.

[11] Prior to her Petition for Permission to Appeal, Sawyers had not advanced the argument that Herrin-Gear and American Bankers were involved in an illegal scheme. Sawyers makes no such allegations within her Complaint.

A. GAP WAIVER COVERAGE IS NOT INSURANCE.

GAP Waiver is a contract between a lender/seller and a consumer wherein, in the event of a total loss of the collateral (i.e., an automobile, as in the instant matter), the consumer's obligation to pay the remaining indebtedness will be discharged after the primary property insurance benefits have been collected by the lender. *See* GARY FAGG AND JOSEPH FAIRCHILD, CREDIT-RELATED PROPERTY AND CASUALTY INSURANCE 205-220 (1998). Stated otherwise, a GAP Waiver contract is a contract under which a lender or seller agrees to cancel all or part of a consumer's obligation to repay an extension of credit from that lender or seller upon the occurrence of a specified event.

When a consumer purchases an automobile, he is usually expected, as a condition of his loan, to obtain automobile physical damage insurance (primary property insurance) to cover losses caused by theft or destruction of the automobile. Generally, insurance companies insure automobiles for their actual cash value. Therefore, when an automobile is stolen or determined to be a total loss, the automobile physical damage insurer will pay the consumer, or his lender, the actual cash value of the automobile. The consumer, however, is obligated to his lender for the full outstanding balance owed under the loan at the time of loss. The obligation under the consumer's loan may be greater than the actual cash value of the automobile. When this occurs, the consumer is obligated to pay the remaining amount, i.e. gap amount, to his lender. At the time of the automobile purchase, the consumer may be given the option to purchase a GAP Waiver contract wherein the lender agrees to waive, or cancel, the remaining obligation for the gap amount upon the occurrence of a total loss or theft. When this contract is sold and issued by the lender or seller of the automobile and the lender/seller is agreeing to waive or cancel the remaining obligation owed to it, the contract is not insurance. *See* RV2, 167-168.

GAP Waiver first appeared in 1985.[12] GARY FAGG AND JOSEPH FAIRCHILD, CREDIT-RELATED PROPERTY AND CASUALTY INSURANCE 205-220. GAP Waiver contracts are sufficiently distinctive from traditional insurance products to remove them from consideration as insurance because the contracts do not require lenders or sellers to take any investment risks or to make payments. *See First Nat'l Bank of Eastern Arkansas v. Taylor,* 907 F.2d 775 (8th Cir. 1990). As such, the primary and traditional concern behind state regulation of insurance companies, preventing insolvency, is not a concern. *Id.* Currently, the majority of state insurance and banking regulators consider debt protection products, including GAP Waiver, to be non-insurance products. In some instances, GAP Waiver and other debt protection products have been expressly declared exempt from state insurance laws by statute or by regulation, memoranda or opinions issued by state insurance or banking regulators or Attorneys General.[13] In states that have not issued formal opinions regarding debt protection products, Department of Insurance regulators have opined that the contracts are not regulated as insurance.[14]

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[12] GAP Waiver is a debt protection product that is also referred to as Guaranteed Asset Protection, Guaranteed Automobile Protect or Debt Cancellation Contracts.

[13] *See* ALA. ADMIN. CODE r. 482-1-111.03; Ala. Attorney Gen. Op. 2000-29; Ariz. Ins. Dept. Press Release, October 21, 2003; Ark. Ins. Dept. Bulletin 2-2008; *Automotive Funding Group v. Garamendi*, 7 Cal.Rptr.3d 912 (2003); CT Dept. of Ins. Opinion, April 18, 1997; FLA. STAT. ch. 520.02(7); GA. CODE ANN. § 33-63-2; IDAHO CODE § 28-41-106(5); LA. REV. STAT § 6:969.6(19); LA. ADMIN. CODE 46:5 § 7701 to 7713; ME. REV. STAT. ANN. Tit 24-A § 2851; Md. Code Ann, Com. Law § 12-601; MD Atty Gen. Op. 94-051; Mass. Dept. of Ins. Report on Credit Ins. In Mass. 2007(debt cancellation contracts not subject to state insurance laws or regulations); Neb. Dept of Ins. Bulletin CB-109; N.H. REV. STAT. § 415-C:1; NM Dept. of Ins. Bulletin 2004-001; N.Y. INS. LAW §1101(b)(3); N.D. CENT. CODE § 26.1-02.1-01(4); OKLA. STAT. tit. 15, § 140.1; PA. STAT. ANN. tit. 69 § 603(24); S.D. CODIFIED LAWS ANN. § 58-1-3; TENN. CODE. ANN. § 56-59-101 et seq.; VT. STAT. ANN. tit. 8, § 10408; WY Dept. of Ins. Memorandum 2-2004. *See also* 12 C.F.R. 37.1.

[14] States that have consistently held, without issuing formal opinions, that GAP Waiver and Debt Cancellation Contracts are not insurance include: Delaware, Hawaii, Indiana, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Ohio, Rhode Island, South Carolina, Virginia, Washington, and West Virginia.

In 2000, the Mississippi Department of Insurance established that GAP waiver products are not subject to insurance regulation. On February 7, 2000, the Mississippi Insurance Department issued Bulletin 2000-2, which initially concluded that GAP waiver coverage was insurance and subject to certain regulations. RV2, 169-170. However, on April 17, 2000, the Mississippi Insurance Department withdrew its prior Bulletin 2000-2 concerning GAP insurance and substituted a new bulletin. RV2, 167-168. In the replacement bulletin, the Mississippi Insurance Department stated, "At this time, the Mississippi Insurance Department has not determined whether a gap waiver product that is sold to the consumer is insurance. We are taking this issue under advisement and may propose legislation requiring certain disclosures to protect the consumer in the next legislative session." *Id.* The bulletin further stated that since the Mississippi Insurance Department took the position that GAP Waiver contracts sold by lenders, car dealerships, third-party administrators, etc. to consumers are not insurance, the Mississippi Department of Banking and Consumer Finance also chose not to regulate the amount charged for GAP Waiver contracts. *Id.* Since that time, the Mississippi Insurance Department has consistently declined to regulate GAP Waiver contracts as insurance.

As the circuit court recognized, since the issuance of the bulletin, neither the legislature nor the Mississippi Supreme Court has concluded that GAP waiver products are insurance; therefore, the GAP Waiver contract issued to Sawyers is not insurance. RV2, 152-160. Sawyers cites to absolutely no authority holding otherwise. Sawyers speculates that the reason that the Mississippi Supreme Court has not ruled on whether GAP Waiver is insurance is because entities selling this type of coverage force consumers to sign arbitration agreements. There is no proof supporting such an argument. Moreover, the fact that there has been no legislation or further regulatory opinion for nearly nine years supports American Bankers' position that the subject

coverage is not insurance and that the Mississippi Insurance Department is satisfied with the decision to not classify such products as insurance. Because GAP Waiver products are not insurance, there is no support for Sawyers' wild conspiracy theory.[15] Therefore, there is no substantial basis for a difference of opinion on this issue.

B. AMERICAN BANKERS AND HERRIN-GEAR DO NOT FORM A HOLDING COMPANY.

Sawyers argues, in her brief, that Herrin-Gear and American Bankers form an insurance holding company. Sawyers states that a holding company system consists of two or more affiliated persons, one or more of which is an insurer. MISS. CODE ANN. § 83-6-1(d). Sawyers fails, however, to further explain that "an 'affiliate of' or person 'affiliated' with a specific person means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified." MISS. CODE ANN. § 83-6-1(a). The insurance statue further states that "control" means "the possession of the power to direct or cause the direction of the management and policies of a person, whether through ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services or otherwise, unless the power is the result of an official position with or corporate office held by the person." MISS. CODE ANN. § 83-6-1(c).

Herrin-Gear and American Bankers are not, by definition or otherwise, affiliated companies. Neither directly or indirectly controls the other nor is either directly or indirectly under common control with the other. Neither company owns voting securities of the other and

[15] Additionally, American Bankers takes issue with Sawyers' insinuation in her Petition for Permission to Appeal that it is not regulated by the Mississippi Insurance Department. Sawyers attached a listing of cases involving American Bankers and other entities affiliated with American Bankers, asserting somehow that this listing proves that there is no regulation for these entities. American Bankers, and other affiliated entities doing business in Mississippi, are duly regulated by the Mississippi Insurance Department and fully and completely comply with Mississippi insurance regulations. Sawyers' contention otherwise is reckless, unsupported and improper and has no place in briefing filed in this Court.

neither can direct or cause the direction of the other through contracts or otherwise. Herrin-Gear and American Bankers are merely two companies that do business with each other. As such, Herrin-Gear is not required, as argued by Sawyers, to file a registration statement in accordance with MISS. CODE ANN. § 83-6-3. To argue otherwise, is a gross mischaracterization of the statutes as enacted by the Mississippi Legislature.

C. MISSISSIPPI DEPARTMENT OF INSURANCE HAS PRIMARY JURISDICTION.

Even if Sawyers' contentions are true, which they are not, her civil action is barred under the primary jurisdiction argument. This action impermissibly invades and encroaches upon the primary jurisdiction of the Mississippi Department of Insurance to consider whether GAP Waiver products are insurance, to approve insurance policies, and to consider whether Herrin-Gear is an insurance company or whether Herrin-Gear and American Bankers form a holding company. Therefore, the matter should be dismissed.

The doctrine of primary jurisdiction safeguards the legislatively determined allocation of authority between administrative agencies and the courts. Primary jurisdiction comes into play when a party seeks to invoke the original jurisdiction of a trial court by asserting an issue which is beyond the ordinary experience of judges and juries, but within an administrative agency's special competence, the court should refrain from exercising its jurisdiction over that issue until such time as the issue has been ruled upon by the agency. *Northwinds Abatement, Inc. v. Employers Ins. of Wausau*, 69 F.3d 1304, 1309 (5th Cir. 1995). Through primary jurisdiction, courts gain the benefit and expertise of an administrative agency when dealing with matters that they are not as familiar and, therefore, the integrity of the regulatory scheme administered by the agency is maintained and public policy remains consistent and uniform. *Id.* The primary jurisdiction doctrine assures that administrative agencies are not bypassed and that they are

allowed to carry out the specific regulatory responsibilities with which they have been charged. *Penny v. Southwestern Bell Tel. Co.*, 906 F.2d 183 (5th Cir. 1990).

The insurance industry is one of the most heavily regulated industries in Mississippi. Mississippi state regulators oversee virtually every aspect of the business of insurance. A comprehensive regulatory scheme is set out in the Insurance Code, regulations and administrative pronouncements which encompass, among other things, the marketing practices utilized by insurance companies, the relationship between insurers and insureds, the types and content of insurance policies, the premiums charged by insurance companies to their insureds, how insurance companies invest their assets and the management of insurance companies which become financially impaired (as an exception to federal bankruptcy laws).

Any collateral attack on contracts deemed by the Department to not be insurance must be rejected. The agency charged by the Mississippi legislature with jurisdiction over insurance determined that GAP Waiver is not insurance. Sawyers' misguided attempt to challenge the validity of the Department's Bulletin would completely undermine the authority of the Department and would open the door to countless additional lawsuits every time someone disagreed with Department's decision whether to regulate a contract. In addition, because Herrin-Gear and American Bankers relied on the Department's Bulletin, any judicial redetermination would be fundamentally unfair and would raise serious due process concerns not only for these entities but for all similarly situated entities in Mississippi involved with GAP waiver. For all of these reasons, Sawyers' attack on the GAP Waiver contract is prohibited.

Whether Herrin-Gear is an insurance company or whether Herrin-Gear and American Bankers form an insurance holding company is likewise a determination to be made by the Mississippi Insurance Department. In Mississippi, the Commissioner of Insurance (the

"Commissioner") is vested with broad powers over the regulation and enforcement of the Mississippi Insurance Code. The Mississippi Legislature has delegated to the Commissioner comprehensive authority to license and regulate insurance companies. MISS. CODE ANN. §§ 83-5-1. *See also* MISS. CODE ANN. §§ 83-6-1 through 83-6-43. The commissioner may promulgate and publish rules, regulations and orders which are necessary to accomplish matters such as the registration of insurance companies. MISS. CODE ANN. § 83-6-31. If the Commissioner finds that a company has violated any rule, regulation or order, he may file an action to enjoin the company from violating or continuing the violation of the rule, regulation or order. MISS. CODE ANN. § 83-6-33. Further, if the Commissioner determines that such violation is willful, he may bring criminal proceedings against the insurer. MISS. CODE ANN. § 83-6-35. Whenever it appears a person or company has continued operating as an insurer contrary to the interests of policyholders or the public, the commissioner may, after giving notice and an opportunity to be heard, suspend, revoke or refuse to renew such insurer's license or certificates of authority to do business in this state or both. MISS. CODE ANN. § 83-6-39. Persons aggrieved by the Commissioner's actions may appeal and seek judicial review of those actions. MISS. CODE ANN. § 83-6-41.[16]

[16] Furthermore, the Mississippi Legislature has given the Commissioner complete and exclusive authority to regulate unfair competition and deceptive practices in the insurance industry. MISS. CODE ANN. §§ 83-5-29 through 83-5-51. Section 83-5-33 of that Chapter discusses unfair methods of competition and deceptive practices and expressly prohibits conduct which is defined in other sections of the Chapter as being unfair methods of competition or unfair or deceptive acts or practices in the business of insurance. Section 83-5-35 defines certain conduct as being unfair or deceptive within the meaning of Section 83-5-33 and covers "any assertion, representation, or statement with respect to the business of insurance, or with respect to any person in the conduct of his insurance business, which is untrue, deceptive, or misleading." MISS. CODE ANN. § 83-5-35(b). If the Commissioner determines that the conduct of an insurance company is improper and continuing, the statute authorizes the Commissioner to file an action to enjoin such practice. MISS. CODE ANN. §§ 83-5-17; 83-5-45(2). The Commissioner of Insurance has the authority to enforce these sections by conducting examinations and investigations, holding hearings and issuing cease and desist orders. MISS. CODE ANN. §§ 83-5-37, 83-5-39, 83-5-41. Both the Federal Courts and the Mississippi Supreme Court have held that there is no private cause of action for conduct

The doctrine of primary jurisdiction has been applied by both federal and state courts to bar private suits challenging the conduct of an insurance company, where the state legislature has provided that the appropriateness of such conduct should be determined by the state department of insurance. *Northwinds Abatement, Inc.*, 69 F.3d at 1311; *Allen v. State Farm Fire & Cas. Co.*, 59 F. Supp. 2d 1217, 1224 (S.D.Ala. 1999); *Morris v. American Family Mut. Ins. Co.*, 386 N.W.2d 233 (Minn. 1986). Accordingly, the doctrine of primary jurisdiction is applicable here, where the Mississippi Legislature has clearly delegated regulation of the insurance industry to the Department of Insurance.

The primary jurisdiction doctrine is based upon common sense and constitutional principles. Once the people of a state, through their duly elected state legislative representatives, have decided to regulate specified conduct through a clearly defined administrative body, which is designed to develop special expertise in that area, the delegation of authority must be respected by the courts. *White v. National Old Line Ins. Co.*, 34 So.2d 234 (Miss. 1948) (judgment of Insurance Commissioner is entitled too much weight). Sawyers requests that this Court substitute itself for the Department of Insurance in the core areas of the Department's authority and expertise. She alleges no compelling reason for this Court to supplant the duly constituted administrative agency – there are no allegations of incompetence, fraud, or corruption on the part of the Department, or any other reason why the duly constituted and functioning administrative process cannot or should not resolve her complaints in the ordinary course of its operation.

Because Mississippi has unquestionably placed the alleged conduct of American Bankers and Herrin-Gear within the authority of the Insurance Department, private litigants – as well as

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which allegedly violates section 83-5-33. *Watson v. First Commonwealth Life Ins. Co.*, 686 F. Supp. 153 (S.D. Miss. 1988) (citing *Protective Service Life Ins. Co. v. Carter*, 445 So. 2d 215 (Miss. 1983)).

the courts – should defer to the Department's authority to regulate such alleged conduct. It is clear that a plaintiff should not be permitted to bypass the Department, and if this action is not dismissed outright, it should be stayed so that the matters raised may be brought to, and decided by, the Mississippi Department of Insurance.

D. EVEN IF SAWYERS' CLAIMS WERE TRUE, THE ARBITRATION AGREEMENT IS STILL ENFORCEABLE.

Although Sawyers argues vociferously that Herrin-Gear and American Bankers were engaged in an illegal enterprise, Sawyers never discusses what the effect of her contentions, even if true, should be. Sawyers does not do so, because, if Sawyers' contentions are taken to their logical conclusion, the end result is either that arbitration should be compelled, or that her lawsuit must be dismissed outright.

First, if Sawyers is correct that Herrin-Gear and American Bankers were engaged in an illegal enterprise, then the GAP Waiver coverage would be rendered void. Under Mississippi law, where a contract contains an illegal provision, that provision is void. *Russell v. Performance Toyota, Inc.,* 826 So.2d 719, 724-25 (Miss.2002) (quoting *Plaza Amusement Co. v. Rothenberg*, 159 Miss. 800, 131 So. 350, 357 (1930) ("If an illegal condition is annexed to a contract, it will not void the whole contract, but the illegal part will be treated as void."). Thus, only the alleged illegal part of the transaction is void, and the remainder of the transaction, including the Arbitration Agreement, is valid. *Id.* Accordingly, even if the GAP Waiver portion of the transaction was illegal and void, the Arbitration Agreement is still enforceable.

Second, if Sawyers is correct that the GAP Waiver coverage was illegal and void, then Sawyers has no claims against Herrin-Gear and American Bankers. Sawyers never plead anywhere in the Complaint that Herrin-Gear and American Bankers were engaged in an illegal scheme as she has alleged before this Court. Moreover, she has not cited to any statutory private

cause of action against Herrin-Gear and American Bankers entitling her to assert such claims. The only allegations against Herrin-Gear and American Bankers arise out of an alleged breach of the GAP Waiver. If the GAP Waiver is void, then there is no basis for any claim for breach of the GAP Waiver. Since Sawyers has not asserted any claims that are not dependent upon the validity the GAP Waiver, if the GAP Waiver is void, she would have no remaining claims in her Complaint against Herrin-Gear and American Bankers, and her Complaint must be dismissed. Therefore, if the GAP Waiver was illegal and void, then either Sawyers is still required to submit her claims to arbitration under the Arbitration Agreement, or Sawyers has no claims at all and her Complaint must be dismissed.

Furthermore, Sawyers cannot avoid her contention's problem by asserting that her claims regarding the effect of an illegal enterprise are based on fraud. First, under Miss. R. Civ. P. 9(b), claims of fraud must be plead with particularity. In this case, Sawyers' does not plead fraud against Herrin-Gear and American Bankers within her Complaint, nor did Sawyers allege fraud before the circuit court. However, even if Sawyers had plead fraud and raised the issue before the circuit court, and if the GAP Waiver was obtained by fraud, Sawyers ratified the GAP Waiver by failing to repudiate its terms.

Under *MacTools, Inc., v. Allen*, 671 So. 2d 636 (Miss. 1996), a contract obligation obtained by fraud is not void, but voidable, and "discovery thereof, the one defrauded must act promptly and finally to repudiate the agreement; however, a continuance to ratify the contract terms constitutes a waiver." *Id.* at 641 (quoting *Turner v. Wakefield*, 481 So.2d 846 848-49 (Miss. 1985)). *See also Estate of Reaves v. Owen*, 744 So.2d 799 (Miss. Ct. App. 1999) (stating that "where a party, with knowledge of facts entitling him to recision of a contract or conveyance, afterward, without fraud or duress, ratifies the same, he has no claim to the relief of

cancellation.) (quoting *Williamson v. Metzger*, 379 So.2d 1227, 1231 (Miss.1980)). Therefore, if the GAP Waiver was obtained by fraud, it is voidable. However, Sawyers has not repudiated the GAP Waiver, but instead, sought and continued to assert claims for breach of the GAP Waiver in this proceeding. Nowhere in this proceeding has she given any indication that she repudiates the GAP Waiver coverage. She cannot assert such inconsistent positions, and she cannot now void the GAP Waiver. Moreover, even if the GAP Waiver coverage was voidable, this does not mean that the Arbitration Agreement is voidable.

Finally, Sawyers cannot argue that the entire transaction, including the Arbitration Agreement, is void or voidable, because, under the FAA, any such claims must be referred to the arbitrator for resolution as they go to the underlying dispute and not specifically to the Arbitration Agreement. The United States Supreme Court has stated that challenges to the validity of arbitration agreements can be divided into two types - those that challenge specifically the validity of the agreement to arbitrate and those that challenge the contract as a whole. *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1208 (2006). In *Prima Paint Corp. v. Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967), the U.S. Supreme Court stated, "if the claim is fraud in the inducement of the arbitration clause itself - an issue which goes to the making of the agreement to arbitrate - the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally." Accordingly, in *Buckeye*, the Court reaffirmed the long-standing principle that "unless the challenge is the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." 126 S. Ct. at 1209. This rule has been repeatedly applied by courts within the Fifth Circuit. *See, e.g, Brown v. Pacific Life Ins. Co.*, 462 F.3d 384, 397 (5th Cir. 2006) ("Where claims of error, fraud or unconscionability do not

specifically address the arbitration agreement itself, they are properly addressed by the arbitrator, not a federal court.").

Plainly, if Sawyers asserts, in an attempt to invalidate the Arbitration Agreement, that the entire transaction is thereby void or voidable due to the GAP Waiver, this is a challenge to the underlying transaction as a whole. Under *Prima Paint* and its progeny, this is an issue for the arbitrator, and not for the Court to decide. Thus, Sawyers' claims regarding the alleged illegal enterprise between Herrin-Gear and American Bankers do not prevent the enforcement of the Arbitration Agreement.

V. AMERICAN BANKERS MAY ENFORCE THE ARBITRATION AGREEMENT.

In the final sections of her brief, Sawyers alleges that the circuit court erred in allowing American Bankers to enforce the Arbitration Agreement as a non-signatory. First she claims that because the Arbitration Agreement did not list American Bankers as a party, it cannot compel arbitration. Second, she claims that the circuit court erred in requiring her to arbitrate her claims against American Bankers on the basis of equitable estoppel and agency.

The question in this case is whether American Bankers may compel arbitration as a non-signatory to the Arbitration Agreement. It is irrelevant that American Bankers is not mentioned in the Arbitration Agreement, because, as discussed below, the doctrines of equitable estoppel and agency provide well-recognized exceptions to the general rule that Arbitration Agreements are usually limited to the parties. Further, nothing in the arbitration agreement specifically prevents a third-party from participating in arbitration or enforcing the terms of the arbitration agreement. Sawyers cites to two cases which supposedly limit American Bankers' ability to compel arbitration because it is not listed on the arbitration agreement, *Qualcomm, Inc. v. American Wireless License Group, LLC*, 980 So. 2d 261 (Miss. 2007), and *Andrews v. Ford*, 990

So.2d 820 (Miss. Ct. App. 2008), but neither case shows that equitable estoppel and agency may not be considered in this case.[17]

As set forth below, equitable principles and the agency relationship between Herrin-Gear and American Bankers support the circuit court's decision compelling arbitration. Sawyers ignores the nature of the claims in this case and the relationships between the parties. Her claims against Herrin-Gear are intertwined with her claims against American Bankers, and they cannot be separated. The GAP Waiver is between Herrin-Gear and Sawyers, and Sawyers does not have any contractual relationship with American Bankers. American Bankers, pursuant to a separate agreement with Herrin-Gear, and, acting as an agent of Herrin-Gear, paid Sawyers pursuant to the GAP Waiver. Therefore, Sawyers' only basis for a claim against American Bankers (if there is a valid legal basis) is that American Bankers failed to satisfy Herrin-Gear's obligations to Sawyers under the GAP Waiver.

Accordingly, the circuit court correctly found, "The Plaintiff's claims against Herrin-Gear and [American Bankers] are clearly inter-related and intertwined. The Court is of the opinion that it is logical to compel Plaintiff to arbitrate her claim against [American Bankers] along with those against Herrin-Gear." RV2, 159. Further, the circuit court's decision regarding equitable estoppel in this regard is reviewed for abuse of discretion. Although motions to compel arbitration are generally reviewed *de novo*, a lower court's application of equitable estoppel to a

[17] *Qualcomm*, as discussed below, actually supports American Bankers' position because it stands for the proposition that "a non-signatory could compel arbitration where there is a close legal relationship." 980 So. 2d at 269. Further, *Andrews* considered whether a signatory to an arbitration agreement (one of the members of the LLC) sought to compel the estate of a decedent member (a non-signatory to arbitration agreement) to arbitrate its claims. 990 So. 2d at 824. Thus, the court held that the estate could not be required to arbitrate claims because it had never agreed to arbitrate the dispute. *Id.* However, the situation at bar is the opposite of *Andrews*, because Sawyers signed the arbitration agreement that American Bankers is seeking to enforce, and the rationale in *Andrews* is inapplicable, because Sawyers cannot complain that she did not agree to the terms of the arbitration agreement. Moreover, there is no discussion of equitable estoppel or agency considerations in *Andrews*, and no indication that those considerations ever arose under the facts of *Andrews*.

motion to compel arbitration should be reviewed for abuse of discretion. See, e.g., *Brown v. Pacific Life Ins. Co.*, 462 F.3d 384, 398 (5th Cir. 2006) (stating that a lower court's application of equitable estoppel is reviewed under an abuse of discretion standard).[18] Because the circuit court did not abuse its discretion in granting American Banker's motion, its order should be affirmed.

A. EQUITABLE ESTOPPEL SUPPORTS THE CIRCUIT COURT'S ORDER COMPELLING ARBITRATION.

The doctrine of equitable estoppel has been widely applied as a matter of federal law to compel signatories to arbitration agreements to arbitrate with non-signatories. See, e.g., *American Bankers Ins. Group, Inc. v. Long*, 453 F.3d 623 (4th Cir. 2006); *CD Partners, LLC v. Grizzle*, 424 F.3d 795 (8th Cir. 2005); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942 (11th Cir. 1999). The seminal Fifth Circuit decision applying equitable estoppel in the arbitration context is *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524 (5th Cir. 2000).[19]

In *Grigson*, the Fifth Circuit held that a non-signatory could require a signatory to arbitrate claims against it on the basis of equitable estoppel, even though the non-signatory was not a party to the arbitration agreement. *Id.* at 527-528. *Grigson* stated that although arbitration is generally a matter of contract and that normally a signatory cannot be required to arbitrate with

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[18] In the cases that this Court has considered equitable estoppel in the context of a motion to compel arbitration, it does not appear that this Court has specifically considered whether a separate standard of review should apply where equitable estoppel is at issue. In *East Ford v. Taylor*, 826 So.2d 709, 713 (Miss. 2002), this Court stated that motions to compel arbitration should be reviewed *de novo*, and relied upon federal authority for this standard of review, by citing to *Webb v. Investacorp, Inc.*, 89 F.3d 252, 256 (5th Cir.1996). The standard in *East Ford* has been, in turn, cited by a number of other decisions by this Court. Because federal law also provides that where a court has applied equitable estoppel, the standard of review should be abuse of discretion, this standard of review should be applied to the Circuit Court's ruling.

[19] *Grigson* has been repeatedly applied by the Fifth Circuit and district courts within the Fifth Circuit. See, e.g., *Ford Motor Co. v. Ables*, 207 Fed. Appx. 443 (5th Cir. 2006); *Steed v. Sanderson Farms*, 2006 WL 2844546 (S.D. Miss. Sept. 29, 2006); *Pacific Life Ins. Co. v. Heath*, 370 F. Supp. 2d 539 (S.D. Miss. 2006); *Voyager Life v. Caldwell*, 353 F. Supp. 2d 748 (S.D. Miss. 2005).

a non-signatory, the signatory cannot "have it both ways" and "on the one hand, seek to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a non-signatory." *Id.* at 528 (citing *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) and *Hughes Masonry Co. v. Greater Clark County School Building Corp.*, 659 F.2d 836, 838-839 (7th Cir. 1981)). Thus, *Grigson* adopted two tests for when equitable estoppel may allow a non-signatory to compel a signatory to arbitrate a dispute: (1) when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against a non-signatory; or (2) when the signatory raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more signatories to the contract. *Id.* at 527.[20]

As recognized by *Grigson*, the "linchpin for equitable estoppel is equity-fairness." *Id.* at 528. Although Sawyers argues strenuously and misleadingly that this Court has not adopted *Grigson*, as addressed below, this Court has adopted the same equity considerations set forth in *Grigson* and its progeny. In *Terminix v. Rice,* 904 So.2d 1051 (Miss. 2004), this Court recognized that fairness considerations under the equitable estoppel doctrine required a non-signatory to arbitrate her claims because, "[t]o allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the

[20] *Grigson* also raised another relevant consideration, stating, "it would be especially inequitable where, as here, a signatory non-defendant is charged with interdependent and concerted misconduct with a non-signatory defendant [because] the signatory, in essence, becomes a party, with resulting loss, inter alia, of time of money because of its required participation in that proceeding.." *Id.* at 528. In the case at bar, because of the intertwined nature of the claims against Herrin-Gear, if Sawyers was not required to arbitrate her claims against American Bankers, Herrin-Gear would effectively become a party to any proceeding involving American Bankers, because of its connection to the dispute. In fact, American Bankers may effectively become a party to any arbitration proceeding involving Herrin-Gear, because of its involvement in the claim. This consideration weighs in favor of the application of equitable estoppel.

purposes underlying enactment of the Arbitration Act." *Id.* at 1058 (quoting *Washington Mutual Fin. Group, LLC v. Bailey*, 364 F.3d 260, 268 (5th Cir. 2004)).[21]

This is exactly what Sawyers is trying to do. Fairness dictates that arbitration should be compelled. Sawyers is trying to have it "both ways" and hold American Bankers liable for breach of the duties under the GAP Waiver, while at the same time refusing to comply with her obligations under the Arbitration Agreement. Equity demands that Sawyers be required to meet her obligations before claiming that American Bankers failed to meet its obligations. *Grigson* clearly requires arbitration of Sawyers' claims, and Sawyers does not argue that her claims are not arbitrable under the *Grigson* standard, but only argues, incorrectly, that *Grigson* is inapplicable law. Under *Grigson*, Sawyers must rely upon the terms the GAP Waiver to assert claims against American Bankers, and her claims raise allegations of substantially interdependent and concerted misconduct by both Herrin-Gear and American Bankers. Therefore, under *Grigson*, the circuit court correctly held that Sawyers was required to arbitrate her claims against both Herrin-Gear and American Bankers, and the circuit court did not abuse its discretion.

B. FEDERAL LAW GOVERNS THE APPLICATION OF EQUITABLE ESTOPPEL TO SAWYERS' CLAIMS AND REQUIRES SAWYERS TO ARBITRATE HER CLAIMS.

Sawyers does not argue that her claims should not be arbitrated under the *Grigson* standards themselves, but rather that the circuit court should not have applied *Grigson.* Sawyers argues that the reliance on *Grigson* was erroneous, because *Grigson* is not the Mississippi rule on equitable estoppel under this Court's decision in *B.C. Rogers Poultry, Inc., v. Wedgeworth*, 911

[21] See also *American Bankers Insurance Group v. Long*, 453 F.3d 623, 627 (4th Cir. 2006) (quoting *Wachovia Bank N.A. v. Schmidt*, 445 F.3d 762, 769 (4th Cir. 2006) and stating that the principle of equitable estoppel recognized in these decisions "rests on a simple proposition: it is unfair for a party to rely on a contract when it works to its advantage, and repudiate it when it works to its disadvantage.").

So.2d 483, 491 (Miss. 2005). Sawyers misreads the *B.C. Rogers* decision, and further, makes an unwarranted assumption regarding the law applicable to the application of equitable estoppel.

As previously established, Sawyers' claims in this proceeding are governed by the FAA, and the Supreme Court has held that the FAA "creates a body of federal substantive law" which is "applicable in state and federal court." *Southland Corp. v. Keating*, 465 U.S. at 12. Sawyers asserts that Mississippi law governs the application of equitable estoppel in this case, citing to decisions by the Fifth Circuit in *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 431 (5th Cir. 2004) and *Fleetwood Enterprises, Inc., v. Gaskamp*, 280 F.3d 1069, 1074 (5th Cir. 2002). These cases only stand for the well-recognized proposition that state law principles apply to the validity of an arbitration agreement, and that state law defenses to contract formation are applicable. As this Court has stated, "applicable contract defenses available under state contract law such as fraud, duress, and unconscionability may be asserted to invalidate the arbitration agreement without offending the Federal Arbitration Act." *East Ford v. Taylor*, 826 So. 2d 709, 713 (Miss. 2002) (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686 (1996)).

However, the application of equitable estoppel is not a challenge to the validity of an arbitration agreement itself, but instead, addresses who may compel arbitration under the agreement. Therefore, federal courts have held that a lower court's application of equitable estoppel to a motion to compel arbitration governed by the FAA is a matter of federal substantive law. *Washington Mutual Fin. Group, LLC v. Bailey*, 364 F.3d 260, 267 n.6 (5th Cir. 2004); *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417 n.4 (4th Cir. 2000); *Origen Financial, LLC v. Thompson*, 2007 WL 3407391 (S.D. Miss. Nov. 15, 2007); *Chew v. KPMG, LLP*, 407 F. Supp. 2d 790, 801 n.10 (S.D. Miss. 2006). Accordingly, whether Sawyers may be compelled to arbitrate her claims on the basis of equitable estoppel is

governed by federal law and *Grigson* applies.[22] Because the circuit court correctly determined that Sawyers was required to arbitrate her claims under *Grigson*, it did not abuse its discretion and its order should be affirmed.

C. UNDER MISSISSIPPI LAW, EQUITABLE ESTOPPEL REQUIRES SAWYERS TO ARBITRATE HER CLAIMS.

Nevertheless, even applying Mississippi law, a review of *B.C. Rogers* shows that this Court has not rejected the application of equitable estoppel under *Grigson,* and, further, that the circuit court's ruling compelling Sawyers to arbitrate is correct under Mississippi law. In addressing the dissent's assertion of the doctrine of equitable estoppel under *Grigson*, this Court stated:

> Even though the plaintiff's allegations are not dependent upon an agreement, state law principles might provide for the arbitration of disputes between a nonsignatory and a signatory to a contract, where there are allegations of substantially interdependent and concerted misconduct. A non-signatory should have standing to compel arbitration where there is a close legal relationship, such as alter ego, parent/subsidiary, or agency relationship, with a signatory to the agreement.

911 So. 2d at 491-492. (citations omitted). Further, this Court stated, "Absent allegations of substantially interdependent and concerted misconduct between a signatory and a non-signatory who have a close legal relationship, the Mississippi law of equitable estoppel should first be examined to determine if conditions are present where equity should allow a non-signatory to compel arbitration." *Id.* at 492. Thus, although this Court found that the Mississippi law of equitable estoppel did not apply in *B.C. Rogers*, this determination was based on the conclusion that there was no "substantially interdependent and concerted misconduct between a signatory and a non-signatory who have a close legal relationship." *Id.*

[22] It does not appear from its prior decisions that this Court has previously specifically considered in detail whether federal law should apply to the application of equitable estoppel; however, there is strong support for the application of federal substantive law.

Accordingly, the decision in *B.C. Rogers* does not stand for the conclusion that *Grigson* is inapplicable under Mississippi law. Instead, the Court found that at least the second test under *Grigson* – applying equitable estoppel where the signatory raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more signatories – could apply where there is a close legal relationship between the parties.[23] This holding is cited with approval by later decisions by this Court. See *Qualcomm, Inc. v. American Wireless License Group, LLC*, 980 So. 2d 261, 269 (Miss. 2007) (stating "a non-signatory may be able to enforce an arbitration agreement against a signatory where the non-signatory has a close legal relationship with a signatory of the agreement.") and *Grenada Living Center, LLC, v. Coleman*, 961 So.2d 33 (Miss. 2007) (Carlson, J., specially concurring and joined by the majority of the court) (quoting the principles set forth in *B.C. Rogers* allowing a non-signatory to compel arbitration). Thus, the definition of equitable estoppel under Mississippi law as stated by this Court in *Compere's Nursing Home v. Estate of Farish*, 982 So.2d 382, 384-385 (Miss. 2008), and quoted by Sawyers in her brief, is inapplicable where there are allegations of substantially interdependent and concerted misconduct between a signatory and a non-signatory who have a close legal relationship.

In this case, Sawyers' claims against Herrin-Gear and American Bankers are clearly intertwined as her claims are equally asserted under the GAP Waiver against both defendants, and because American Bankers acted as an agent for Herrin-Gear with regard to obligations owed to Sawyers under the GAP Waiver. As such, the circuit court's order requiring arbitration

[23] Moreover, the *B.C. Rogers* decision does not foreclose the applicability of the first test under *Grigson*, because the Court only focused its analysis on the second test since that was the test raised by the dissent. 911 So.2d at 491.

is supported by *Grigson*, as well as the principles set forth under *B.C. Rogers*, and affirmed by this Court in *Qualcomm* and *Grenada Living Center*.

Additionally, the circuit court's decision relies upon and is supported by *Fradella v. Seaberry,* 952 So. 2d 165 (Miss. 2007). RV2, 158-159. In *Fradella*, the Seaberrys purchased property which was listed for sale by Fradella and the real estate agency with which she was associated, and the Seaberrys entered into a real estate contract with the agency for the purchase of the property, containing an arbitration agreement covering any controversy or claim against the listing agent or selling company, with the sellers of the property. *Id.* at 166-167. Although Fradella was a non-signatory to the arbitration agreement, she was allowed to compel arbitration because the Seaberrys' breach of contract claim was "unquestionably intertwined with the duties Fradella was to perform under the terms of the real estate contract and, but for the real estate contract containing the arbitration clause, the Seaberrys could not bring a claim of breach of contract against Fradella. *Id.* at 175. Because the Seaberrys relied upon the real estate contract for their breach of contract claim, they could not deny Fradella the benefit of the arbitration clause. *Id.* This Court's decision in *Fradella* also supports the circuit court's ruling, because Sawyers likewise is seeking to hold American Bankers liable for a breach of duties under the GAP Waiver, and should not, at the same time, be allowed to deny American Bankers the right to enforce the terms of the GAP Waiver.

D. THE CIRCUIT COURT CORRECTLY FOUND THAT AMERICAN BANKERS MAY ENFORCE THE TERMS OF THE ARBITRATION AGREEMENT AS AN AGENT FOR HERRIN-GEAR.

The circuit court's ruling was based, in part, upon the conclusion that there was an agency relationship between Herrin-Gear and American Bankers. Sawyers asserts that the circuit court erred in concluding that there was an agency relationship between American

Bankers and Herrin-Gear, averring that neither offered any proof that American Bankers was Herrin-Gear's agent.

Sawyer's contention is incorrect. The facts of this case evidence that there is an agency relationship between Herrin-Gear and American Bankers. These two companies are unrelated, separate and distinct. Sawyers' GAP Waiver was with Herrin-Gear and there is no agreement with American Bankers; however, American Bankers sent payment to Sawyers for benefits due under the GAP Waiver. By implication, American Bankers was acting on behalf of Herrin Gear as its agent in seeking to satisfy Herrin-Gear's obligations to Sawyers under the GAP Waiver. American Bankers certainly was not acting on its on behalf, because it did not owe any obligation to Sawyers. There is simply no other rational explanation for American Bankers' actions, but that it was acting as an agent for Herrin-Gear, and Sawyers has never attempted to offer another explanation.[24] Moreover, as recognized by the circuit court, American Bankers' address is specifically listed on the GAP Waiver as the administrator's address, which provides direct documentation of the relationship with Herrin-Gear. RV2, 158. Therefore, the evidence is clear that American Bankers was acting as an agent for Herrin-Gear with regard to the GAP Waiver.

Furthermore, and detrimental to Sawyers' argument, is that Sawyers **never** raised this issue before the circuit court below. Under Mississippi law, a party who fails to raise an argument before the trial court cannot raise it for the first time on appeal. *Alexander v. Daniel*, 904 So. 2d 172, 183 (Miss. 2005). Moreover, there is a strong rationale for such a rule, because, if there was not such a rule, the trial court would be prevented from first considering the issue.

[24] BLACK'S LAW DICTIONARY, 7th Ed. 1999, defines agency as a "fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions." The plain facts make clear that American Bankers was undertaking an act on behalf of Herrin-Gear.

Hemba v. Mississippi Dept. of Corrections, 998 So.2d 1003, 1008-1009 (Miss. 2009). Sawyers never alleged that there was no proof of an agency relationship between American Bankers and Herrin Gear. In fact, had Sawyers raised the issue before the circuit court at or prior to the hearing, counsel for American Bankers would have introduced into evidence the relevant contractual agreement, and had planned to do so if Sawyers had disputed American Bankers' contention. Sawyers did not do so, therefore, the contract was not introduced.

Finally, Sawyers alleges that merely because there is an agency relationship, this does not necessarily mean that American Bankers should be able to compel arbitration. Sawyers quotes from the Fifth Circuit decision in *Westmoreland v. Sadoux*, 299 F.3d 462, 466-467 (5th Cir. 2002), which actually supports American Bankers' position. In that case, the court only noted that an agent may not be able to compel arbitration on the basis of an agreement with the principal if he is personally liable for an independent duty apart from the contract executed on behalf of the principal. Here, however, American Bankers did not breach an independent duty to Sawyers. The only basis for a claim against American Bankers is that it did not fully satisfy Herrin-Gear's obligation to Sawyers under the GAP Waiver. Therefore, this decision is inapplicable.

Accordingly, the circuit court's decision requiring Sawyers to arbitrate her claims against American Bankers is well-supported by both federal law and Mississippi law, and Sawyers should be required to arbitrate her claims against American Bankers. Sawyers' claims against American Bankers and Herrin-Gear raise allegations of substantially interdependent and concerted misconduct between Herrin Gear and American Bankers and there is close legal relationship between American Bankers and Herrin-Gear. Therefore, the circuit court did not abuse its discretion and its order should be affirmed.

CONCLUSION

For the reasons stated herein, the American Bankers Insurance Company of Florida respectfully request that this Court dismiss the appeal, or in the alternative, affirm the lower court's decision and compel Sawyers to submit her claims to arbitration.

AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA

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CERTIFICATE OF SERVICE

I, Rosemary G. Durfey, one of the attorneys for Defendant-Appellee, American Bankers Insurance Company of Florida, certify that a true and correct copy of the foregoing Brief of Appellee American Bankers Insurance Company of Florida has been served on the following counsel by depositing the same in the United States mail, first-class postage prepaid:

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This the 1st day of April, 2009.

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