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FAKE ARBITRATION: WHY FLORIDA'S NONBINDING ARBITRATION PROCEDURE IS NOT ARBITRATION WITHIN THE SCOPE OF THE FEDERAL ARBITRATION ACT

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Abstract

Does the Federal Arbitration Act (FAA) govern Florida's nonbinding arbitration procedure? At present, this question is unresolved. As its name suggests, the FAA generally governs arbitration agreements. But the FAA does not define "arbitration," and the U.S. Courts of Appeals have different standards for what constitutes arbitration under the FAA. This Note discusses those different standards and argues that the Eleventh Circuit provides the most logical test for determining whether a particular dispute resolution procedure is FAA arbitration. Finally, this Note argues that, under the Eleventh Circuit's standard, Florida's nonbinding arbitration procedure is not FAA arbitration.

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INTRODUCTION

This Note analyzes whether the Federal Arbitration Act (FAA) governs Florida's dispute resolution procedure called "nonbinding arbitration." The FAA generally governs the enforceability of parties' written agreements to arbitrate disputes.[1] However, the FAA does not define "arbitration."[2] Thus, it is unclear whether the FAA governs agreements to submit disputes to Florida's nonbinding arbitration procedure.[3] This issue is significant because, if the FAA governs nonbinding arbitration agreements, then courts will almost always enforce them regardless of their unenforceability on other grounds. Recent U.S. Supreme Court decisions dealing with various arbitration agreements make this clear.[4]

The U.S. Court of Appeals for the Eleventh Circuit has not decided whether the FAA governs Florida's nonbinding arbitration procedure. In *Advanced Bodycare Solutions, LLC v. Thione International, Inc.*,[5] the Eleventh Circuit addressed the enforceability "of a contract clause requiring an aggrieved party, prior to filing a lawsuit, to institute mediation or non-binding arbitration."[6] The court stated, "[I]f either mediation or non-binding arbitration is not FAA 'arbitration,' [the] agreement is not enforceable under the FAA."[7] The court ultimately held that the FAA did not compel enforcement of mediation agreements, so the court "reserve[d] for another day whether *non-binding* arbitration is

1. 9 U.S.C. § 2 (2012).

2. Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc., 524 F.3d 1235, 1238 (11th Cir. 2008) ("[T]he FAA does not define its key term, 'arbitration,' and courts have had a difficult time defining just what types of procedures are enforceable under the statute.").

3. *See, e.g.*, 1 ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE § 6:4 (Westlaw subscription required) ("[T]here is some debate whether the FAA applies to 'nonbinding arbitration.'").

4. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1749 (2011) ("[O]ur cases place it beyond dispute that the FAA was designed to promote arbitration. They have repeatedly described the Act as 'embod[ying] [a] national policy favoring arbitration,' and 'a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.'" (second and third alterations in original) (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006) and Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983))).

5. 524 F.3d 1235.

6. *Id.* at 1236.

7. *Id.* at 1238.

within the scope of the FAA."[8]

While the Eleventh Circuit did not decide whether nonbinding arbitration is within the scope of the FAA, it did state a bright-line rule outlining the characteristics of a dispute resolution procedure that meets the definition of arbitration under the FAA.[9] The court also looked to the FAA's statutory purposes to justify its decision.[10] Based on the Eleventh Circuit's bright-line rule and reasoning in *Advanced Bodycare*, this Note argues that Florida's nonbinding arbitration procedure is not within the scope of the FAA.

Part I of this Note gives a brief overview of the FAA. Part II chronologically discusses how different courts have addressed the issue of whether nonbinding arbitration is arbitration within the scope of the FAA. Based on that case law and how other credible sources define arbitration, this Note argues that the Eleventh Circuit has developed the best test to determine whether the FAA governs a particular dispute resolution procedure. Finally, Part III describes Florida's nonbinding arbitration procedure, analyzes whether it is arbitration within the scope of the FAA, and discusses the importance of resolving this issue.

I. WHAT IS THE FEDERAL ARBITRATION ACT?

For much of U.S. history, most federal and state courts strongly disfavored enforcing arbitration agreements.[11] Under the "revocability doctrine," many courts allowed parties to get out of arbitration agreements if one party to the agreement no longer wished to arbitrate.[12] This doctrine prevailed because many courts felt that contracts should not prevent parties from accessing the courts.[13] Eventually, businesses became disenchanted with courts' refusal to enforce arbitration agreements and lobbied for change.[14] In response to this lobbying, Congress passed the Federal Arbitration Act in 1925.[15]

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8. *Id.* at 1240–41.

9. *Id.* at 1239.

10. *Id.* at 1239–40.

11. Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 98 (2012).

12. *Id.* at 98–99.

13. *Id.* at 99.

14. *Id.*

15. *Id.* at 99–100; *see also* Dluhos v. Strasberg, 321 F.3d 365, 369 (3d Cir. 2003) ("Congress enacted the FAA in 1925 to offset the 'hostility of American courts to the enforcement of arbitration agreements.'" (quoting Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 111 (2001))); Sergio J. Campos, *Erie as a Choice of Enforcement Defaults*, 64 FLA. L. REV. 1573, 1621 (2012) ("The FAA was passed primarily to curb 'widespread judicial hostility to arbitration agreements.'" (quoting AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745 (2011))); Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427, 433 (2007).

Section 2 is the key provision of the FAA.[16] It states that the FAA governs written agreements to arbitrate disputes that arise from "any maritime transaction or a contract evidencing a transaction involving commerce."[17] Further, section 2 declares that such agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[18]

In passing the FAA, Congress sought to place arbitration agreements on "the same footing as other contracts."[19] Despite Congress's innocuous intentions, the Supreme Court's interpretation of the FAA has greatly empowered arbitration agreements.[20] Instead of enforcing arbitration agreements as traditional contracts, the Court has used the FAA to turn arbitration agreements into "super contracts."[21]

II. WHAT CONSTITUTES "FAA ARBITRATION"?

The FAA clearly governs arbitration agreements. However, arguing that an arbitration agreement is governed by the FAA because it is an arbitration agreement simply begs the question: What is arbitration? Since the FAA does not define this key term, courts have had to do so. The U.S. Circuit Courts of Appeal have struggled in this endeavor and have reached disparate conclusions regarding what constitutes FAA arbitration.[22] The Supreme Court has not resolved this disparity.

To analyze whether Florida's nonbinding arbitration procedure qualifies as FAA arbitration, one must first answer the question: What is FAA arbitration? Answering this question is essentially a matter of statutory interpretation—interpreting the meaning of arbitration as used in the FAA. When interpreting statutory text, courts generally start with the plain meaning of the text.[23] One statutory interpretation guide suggests looking first to primary sources such as case law to define statutory terms.[24] After looking at primary sources, one can look to secondary sources such as dictionaries to interpret specific words.[25]

16. Wilson, *supra* note 11, at 100.

17. 9 U.S.C. § 2 (2012).

18. *Id.*

19. H.R. REP. NO. 68-96, at 1 (1924).

20. Wilson, *supra* note 11, at 97.

21. *Id.*

22. Steven C. Bennett, *Non-Binding Arbitration: An Introduction*, DISP. RESOL. J., May/July 2006, at 1, 5 n.9, *available at* http://www.jonesday.com/files/Publication/266ff349-03e1-4610-a7c1-6cd0f951e8bb/Presentation/PublicationAttachment/1d047cae-3d31-4b6b-b280-71ed96efa8e5/Bennett,%20Steven%5B2%5D.pdf ("There are conflicting decisions on the applicability of the Federal Arbitration Act to non-binding arbitration.").

23. *E.g.*, KATHARINE CLARK & MATTHEW CONNOLLY, A GUIDE TO READING, INTERPRETING AND APPLYING STATUTES 3 (2006), *available at* http://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf.

24. *Id.*

25. *Id.*

Accordingly, this Part seeks to determine the correct standard for what qualifies as FAA arbitration. To do so, this Part first considers how courts have defined FAA arbitration, especially in cases that analyze whether nonbinding arbitration is FAA arbitration. Second, it considers how dictionaries and other credible secondary sources define arbitration. Based on this analysis, this Part concludes by proposing what courts should adopt as the correct definition of FAA arbitration.

A. *Judicial Interpretations of FAA Arbitration*

When interpreting a federal statutory term, courts can look to either federal or state common law to define the term, depending on the situation.[26] However, the general rule is that courts will apply federal common law to interpret a federal statute unless Congress has clearly indicated that courts should do otherwise.[27] The circuit courts are split on whether to define FAA arbitration using state or federal common law.[28] Four circuits have held that federal common law applies, while two circuits have held that state common law applies.[29] In addition to the four circuits that favor using federal common law, the Eleventh Circuit relied on case law solely from federal courts to interpret FAA arbitration in *Advanced Bodycare*, despite not explicitly stating that the federal common law applies.[30] This reliance suggests that the Eleventh Circuit also favors federal common law.

This Note assumes that federal common law dictates the definition of FAA arbitration for three reasons. First, more circuits have applied federal common law. Second, the circuits that favor federal common law have provided more compelling explanations to support their conclusion

26. *See* Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135, 707 F.3d 140, 143 (2d Cir. 2013) (holding that the U.S. Court of Appeals for the Second Circuit looks to federal common law for the definition of "arbitration" under the FAA, but acknowledging the differing approaches taken by other federal appellate courts, such as the U.S. Court of Appeals for the Fifth Circuit, which looks to state law), *cert. denied*, 134 S. Ct. 155 (2013).

27. *Id.*

28. *E.g.*, *id.* (citing Evanston Ins. Co. v. Cogswell Props., LLC, 683 F.3d 684, 693 (6th Cir. 2012), and decisions of other circuit courts).

29. *Id.* (holding for the Second Circuit "that federal common law provides the definition of 'arbitration' under the FAA" and noting that the U.S. Courts of Appeals for the First, Sixth, and Tenth Circuits have applied federal common law, while the U.S. Courts of Appeals for the Fifth and Ninth Circuits have applied state common law); *see also, e.g.*, Salt Lake Tribune Publ'g Co. v. Mgmt. Planning, Inc., 390 F.3d 684, 688–89 (10th Cir. 2004) (holding for the Tenth Circuit that federal common law dictates the definition of FAA arbitration).

30. *See* Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc., 524 F.3d 1235, 1239–40 (11th Cir. 2008) (using only federal case law to define a standard for determining whether a dispute resolution procedure is FAA arbitration).

than those that favor state law.[31] For example, "[t]he circuits that apply federal common law have relied on congressional intent to create a uniform national arbitration policy."[32] Contrarily, "the circuits that apply state law have 'articulated few reasons for doing so.'"[33] Furthermore, "[a]pplying state law would create 'a patchwork in which the FAA will mean one thing in one state and something else in another.'"[34] Third, the Eleventh Circuit appears to favor applying the federal common law.[35] Because this Note addresses Florida's nonbinding arbitration procedure, it follows the Eleventh Circuit's approach to resolve the circuit split.

Since this Note assumes that federal common law dictates the definition of FAA arbitration, the following Subsections summarize federal case law that addresses whether nonbinding arbitration is FAA arbitration. The first case, *AMF Inc. v. Brunswick Corp.*,[36] is from the U.S. District Court for the Eastern District of New York. Even though *AMF* is not an appellate decision, this Note considers it first because many appellate courts have relied on *AMF* to determine whether nonbinding arbitration is FAA arbitration.[37] The other cases all come from the circuit courts.

1. The Eastern District of New York

In *AMF*, the Eastern District of New York held that the following nonbinding dispute resolution procedure was FAA arbitration.[38] The parties (two companies) agreed to submit disputes to an advisory third party.[39] The third party would consider the dispute and issue an advisory opinion that did not bind either party.[40] Notably, the agreement did not mention the word arbitration.[41] Despite this omission, the court held that the dispute resolution procedure "should be characterized as one to arbitrate."[42]

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31. *See Bakoss*, 707 F.3d at 144 ("We agree with the *compelling analysis* of the circuits that have followed federal law in defining the scope of 'arbitration' under the FAA." (emphasis added)).

32. *Id.* at 143.

33. *Id.* at 144 (quoting Liberty Mut. Grp., Inc. v. Wright, No. DKC 12-0282, 2012 WL 718857, at *4 (D. Md. Mar. 5, 2012)).

34. *Id.* (quoting Portland Gen. Elec. Co. v. U.S. Bank Trust Nat'l Ass'n, 218 F.3d 1085, 1091 (9th Cir. 2000) (Tashima, J., concurring)).

35. *See Advanced Bodycare*, 524 F.3d at 1239–40 (using only federal case law to define a standard for determining whether a dispute resolution procedure is FAA arbitration).

36. 621 F. Supp. 456 (E.D.N.Y. 1985).

37. *E.g.*, Harrison v. Nissan Motor Corp. in U.S.A, 111 F.3d 343, 349–50 (3d Cir. 1997); *see also, e.g.*, Wosley, Ltd. v. Foodmaker, Inc., 144 F.3d 1205, 1208–09 (9th Cir. 1998).

38. *AMF*, 621 F. Supp. at 460–61.

39. *Id.* at 457–58.

40. *Id.* at 458.

41. *See id.* at 457–59.

42. *Id.* at 460.

In its decision, the court stated the following general rule: "If the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration. The arbitrator's decision need not be binding. . . ."[43] In analyzing whether the parties' particular dispute resolution procedure qualified as FAA arbitration, the court focused on whether the procedure would "settle" the parties' dispute and thus "provide an effective alternative to litigation."[44] Even though the third party's opinion would not bind either party, the court held that "[v]iewed in the light of reasonable commercial expectations the dispute will be settled by this arbitration."[45] The court likely found support for "reasonable commercial expectations" in its conclusion that "[v]oluntary compliance with [the third-party advisor's] decisions has been universal."[46]

2. The Third Circuit

In *Harrison v. Nissan Motor Corp. in U.S.A.*,[47] the U.S. Court of Appeals for the Third Circuit held that the following dispute resolution procedure found in an agreement between Nissan and its customers was not FAA arbitration.[48] According to the agreement, before the customer could file a civil suit, the customer had to submit the dispute to mediation.[49] If the parties could not resolve the dispute in mediation, they would next submit it to arbitration.[50] But the arbitrator's decision only bound the parties if the customer approved.[51] Hence, the arbitration was binding for one party and nonbinding for the other. If the parties did not resolve the dispute within forty days of submitting the claim, the customer had fulfilled its obligation under the dispute resolution procedure and could file a civil claim.[52]

In its opinion, the Third Circuit referenced *AMF*'s rule that "[i]f the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration."[53] However, the Third Circuit narrowed this rule somewhat, adding the requirement that the parties agree to arbitrate their dispute all the way to the arbitrator's issuance of a

43. *Id.*
44. *Id.* at 460–61.
45. *See id.*
46. *See id.* at 458.
47. 111 F.3d 343 (3d Cir. 1997).
48. *Id.* at 346, 351.
49. *Id.* at 345–46.
50. *Id.* at 346.
51. *Id.*
52. *Id.* at 345–46.
53. *Id.* at 350 (quoting AMF Inc. v. Brunswick Corp., 621 F. Supp. 456, 460 (E.D.N.Y. 1985)) (internal quotation marks omitted).

decision.[54] In other words, if the dispute resolution procedure allows the parties to submit their dispute to traditional litigation before the arbitrator has issued a decision, then the dispute resolution procedure is not FAA arbitration.[55]

The Third Circuit reasoned that the dispute resolution procedure in this case was not FAA arbitration mainly because parties would not arbitrate many claims to their conclusion.[56] Since many plaintiffs would be able to file a civil claim after forty days elapsed, the dispute resolution procedure would not proceed to an arbitrator's final decision in a number of cases.[57] Therefore, the procedure was not FAA arbitration.

3. The Ninth Circuit

In *Wolsey, Ltd. v. Foodmaker, Inc.*,[58] the U.S. Court of Appeals for the Ninth Circuit addressed for the first time whether nonbinding arbitration was FAA arbitration.[59] The Ninth Circuit held that the following three-step dispute resolution procedure was FAA arbitration.[60] First, the parties would meet and attempt to resolve the dispute.[61] If that failed, the parties would attempt to resolve the dispute in nonbinding arbitration.[62] If nonbinding arbitration also failed, the parties would litigate the dispute in federal court.[63]

The Ninth Circuit used *AMF* and *Harrison* to formulate a standard for determining whether nonbinding arbitration constitutes FAA arbitration.[64] The court referred to *AMF*'s ruling that "parties agree to submit to arbitration under the FAA when they 'agree[ ] to submit a dispute for a decision by a third party.'"[65] Referencing *Harrison*, the Ninth Circuit added that, "according to the Third Circuit's analysis, the parties must not only agree to submit the dispute to a third party, but also agree not to pursue litigation 'until the process is completed.'"[66] The

54. *Id.* ("[T]he essence of arbitration, we think, is that, when the parties agree to submit their disputes to it, they have agreed to arbitrate these disputes through to completion, i.e. to an award made by a third-party arbitrator.").

55. *Id.* ("Arbitration does not occur until the process is completed and the arbitrator makes a decision.").

56. *Id.* at 351.

57. *Id.*

58. 144 F.3d 1205 (9th Cir. 1998).

59. *Id.* at 1207–09.

60. *Id.* at 1206, 1209.

61. *Id.* at 1206.

62. *See id.*

63. *See id.*

64. *Id.* at 1208–09.

65. *Id.* at 1208 (alteration in original) (quoting AMF Inc. v. Brunswick Corp., 621 F. Supp. 456, 460 (E.D.N.Y. 1985)).

66. *Id.* (quoting Harrison v. Nissan Motor Corp. in U.S.A., 111 F.3d 343, 350 (3d Cir. 1997)).

Ninth Circuit also noted that neither *AMF* nor *Harrison* "held that the arbitrator[s'] decision must be binding for the FAA to apply."[67]

Based on this standard, the Ninth Circuit reasoned that the dispute resolution procedure at issue was FAA arbitration because it: (1) "clearly provide[d] for the submission of claims to 'a third party'"[68] and (2) "d[id] not explicitly permit one of the parties to 'seek recourse to the courts' after submitting claims for non-binding arbitration but before the 'process is completed and the arbitrator makes a decision.'"[69] Additionally, the court noted, "A final factor weighing in favor of viewing the dispute resolution procedures . . . as 'arbitration' is the presumption in favor of arbitrability created by the FAA."[70]

4. The Fourth Circuit

In *United States v. Bankers Insurance Co.*,[71] the U.S. Court of Appeals for the Fourth Circuit held that the following dispute resolution procedure was FAA arbitration.[72] A federal government agency and a private business agreed to arbitrate disputes that arose between them.[73] However, the arbitrator's decision was only binding if the government agency approved it.[74] In other words, the arbitration was binding for one party and nonbinding for the other party.

The Fourth Circuit did not definitively state the standard it used to determine whether the dispute resolution procedure was FAA arbitration.[75] Referencing *Wolsey* and *Harrison*, the Fourth Circuit first stated, "Some courts have chosen to focus on whether the arbitration process is likely to resolve the issues, and whether the parties 'agree not to pursue litigation until the process is completed.'"[76] Next, referencing *AMF*, the Fourth Circuit stated, "In evaluating a similar issue, [the Eastern District of New York] observed, 'The arbitrator's decision need not be binding . . . [as long as there are] reasonable commercial expectations [that] the dispute will be settled by this arbitration.'"[77] These brief statements were the extent of the court's explanation of a rule for

67. *Id.*
68. *Id.* at 1209 (quoting *AMF*, 621 F. Supp. at 460).
69. *Id.* (quoting *Harrison*, 111 F.3d at 350).
70. *Id.*
71. 245 F.3d 315 (4th Cir. 2001).
72. *Id.* at 317–25.
73. *Id.* at 317–18.
74. *Id.* (providing the specific text of the arbitration agreement, which stated that the arbitrator's decision was "binding *upon approval* by the [government agency]" (emphasis added)).
75. *See id.* at 322–23.
76. *Id.* at 322 (quoting Wolsey, Ltd. v. Foodmaker, Inc., 144 F.3d 1205, 1208 (9th Cir. 1998)).
77. *Id.* (second, third, and fourth alterations in original) (quoting AMF Inc. v. Brunswick Corp., 621 F. Supp. 456, 460–61 (E.D.N.Y. 1985)).

whether nonbinding arbitration is FAA arbitration.

The Fourth Circuit then conducted a brief two-paragraph analysis in which it acknowledged the legitimate possibility that the dispute resolution procedure might not resolve the parties' dispute.[78] Despite this possibility, the Fourth Circuit concluded that "because the [government agency] would presumably act reasonably and rationally, and would approve an arbitration award or decision that it found favorable, we are unable to conclude that arbitration proceedings would be futile."[79]

5. The Third Circuit Strikes Again

In *Dluhos v. Strasberg*,[80] the Third Circuit again analyzed whether nonbinding arbitration is FAA arbitration.[81] The Third Circuit held that the dispute resolution procedure in this case was also not FAA arbitration.[82] The contract at issue required one party "to submit to a 'mandatory administrative proceeding' before an approved dispute resolution service provider to resolve" certain disputes.[83] Despite contractual language asserting that the dispute resolution procedure was mandatory, the contract allowed parties to bring claims in court without participating in the dispute resolution procedure.[84]

The Third Circuit did not articulate a general standard for what constitutes FAA arbitration, but it did shed more light on what the correct analysis would entail. In explaining the concept of FAA arbitration, the Third Circuit first restated its previous conclusion from *Harrison*:

> [T]he essence of arbitration . . . is that, when the parties agree to submit their disputes to it, they have agreed to arbitrate these disputes through to completion, i.e. to an award made by a third-party arbitrator. Arbitration does not occur until the process is completed and the arbitrator makes a decision.[85]

But the Third Circuit then went on to minimize this rule saying, "Admittedly, this definition does little to assist us in determining which types of dispute resolution fall under the FAA and which do not."[86]

The Third Circuit seemed much more concerned with whether, in light of reasonable commercial expectations, the dispute resolution procedure

78. *Id.* at 322–23.

79. *Id.* at 323.

80. 321 F.3d 365 (3d Cir. 2003).

81. *Id.* at 366, 370.

82. *Id.* at 373.

83. *Id.* at 367 (quoting the relevant dispute resolution policy).

84. *See id.*

85. *Id.* at 369–70 (quoting Harrison v. Nissan Motor Corp. in U.S.A., 11 F.3d 343, 350 (3d Cir. 1997)) (internal quotation marks omitted).

86. *Id.* at 370.

would resolve the dispute (referencing *AMF*).[87] The Third Circuit's reasoning further shows the importance of the dispute resolution procedure's finality because each of the three reasons supporting its decision included the concept of finality.[88]

6. The Tenth Circuit

In *Salt Lake Tribune Publishing Co. v. Management Planning, Inc.*,[89] two media companies entered into an option agreement giving one of the media companies the future option to purchase a newspaper owned by the other.[90] The option agreement contained a rather complicated procedure for resolving any disputes between the parties related to the fair market value of the newspaper.[91] Eventually, the parties ended up in court, and the issue arose as to whether this procedure was FAA arbitration.[92] To determine whether this dispute resolution procedure was FAA arbitration, the U.S. Court of Appeals for the Tenth Circuit focused on whether the procedure would *definitively* settle the parties' dispute, not whether the procedure was *likely* to resolve the dispute.[93] Because the procedure would not definitively settle the parties' dispute, the Tenth Circuit held that it was not FAA arbitration.[94]

7. The Eleventh Circuit

In *Advanced Bodycare*, the Eleventh Circuit explicitly held that the FAA does not govern mediation.[95] While the court did not decide whether

87. *See id.* at 371–72.

88. First, the Third Circuit stated that the dispute resolution procedure "obviously contemplates the possibility of judicial intervention, as no provision of the policy prevents a party from filing suit before, after or during the administrative proceedings. . . . In that sense, this mechanism would not fall under the FAA because 'the dispute will [not necessarily] be settled by this arbitration.'" *Id.* at 371 (alteration in original) (quoting AMF Inc. v. Brunswick Corp., 621 F. Supp. 456, 461 (E.D.N.Y. 1985)). Second, the Third Circuit stated that the dispute resolution procedure resolves a "dispute only to the extent that a season-finale cliffhanger resolves a sitcom's storyline—that is, it doesn't." *Id* at 372. Third, the Third Circuit noted that the dispute resolution procedure clearly allowed the parties to seek judicial review of the third party's decision; therefore, "the FAA, which applies only to binding proceedings likely to realistically settle the dispute," did not govern the dispute resolution procedure. *Id.* at 372–73 (internal quotation marks omitted).

89. 390 F.3d 684 (10th Cir. 2004).

90. *Id.* 686–87.

91. *Id.* at 687.

92. *Id.* at 686.

93. *Id.* at 689–91.

94. *Id.* at 690–91.

95. Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc., 524 F.3d 1235, 1240 (11th Cir. 2008) (holding that mediation "is not 'arbitration' within the meaning of the FAA").

nonbinding arbitration is FAA arbitration,[96] it did set forth guidelines for determining whether a particular dispute resolution procedure is FAA arbitration. These guidelines are very useful in determining whether nonbinding arbitration in Florida is FAA arbitration.

When determining whether a particular dispute resolution procedure constitutes FAA arbitration, the Eleventh Circuit will consider whether the procedure possesses the common factors of traditional arbitration, which include "(i) an independent adjudicator, (ii) who applies substantive legal standards . . . , (iii) considers evidence and argument (however formally or informally) from each party, and (iv) renders a decision that purports to resolve the rights and duties of the parties, typically by awarding damages or equitable relief."[97] This is a flexible test because "[t]he presence or absence of any one of these circumstances will not always be determinative."[98]

In deciding *Advanced Bodycare*, the Eleventh Circuit focused mainly on the fourth factor and set forth the following bright-line rule regarding that factor: "If a dispute resolution procedure does not produce some type of award that can be meaningfully confirmed, modified, or vacated by a court upon proper motion, it is not arbitration within the scope of the FAA."[99] This rule, and the reasoning behind it, is particularly useful in determining whether nonbinding arbitration in Florida is FAA arbitration.

The court justified its bright-line rule with the FAA's statutory purposes. Specifically, the Eleventh Circuit noted, "The purpose of the FAA is to 'relieve congestion in the courts and to provide parties with an alternative method of dispute resolution that is speedier and less costly than litigation.'"[100] The FAA's purpose will only be met if the dispute resolution procedure in question "is an alternative to litigation, not an additional layer in a protracted contest."[101] Therefore, it only makes sense for the FAA to govern a particular dispute resolution procedure if that procedure produces some sort of meaningful, final award.[102] The

96. *Id.* at 1240–41 ("[W]e reserve for another day whether non-binding arbitration is within the scope of the FAA." (emphasis omitted)).

97. *Id.* at 1239.

98. *Id.*

99. *Id.* It is important to note, however, that the inverse of this rule is not true. *Id.* at 1239 n.3 ("The inverse is not true, however. The presence of an award does not by itself make a procedure 'arbitration' if the procedures that produce the award bear no resemblance to classic arbitration. The parties could not contract for a binding coin flip, with the winner to receive an award of his choice, and expect the agreement to be enforced under the FAA.").

100. *Id.* at 1239–40 (quoting AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc., 508 F.3d 995, 1001 (11th Cir. 2007)).

101. *Id.* at 1240 (quoting B.L. Harbert Int'l, LLC v. Hercules Steel Co., 441 F.3d 905, 907 (11th Cir. 2006), *abrogation recognized by* Gonsalvez v. Celebrity Cruises Inc., 750 F.3d 1195, 1197 (11th Cir. 2013)) (internal quotation marks omitted).

102. *Id*. at 1239.

Eleventh Circuit has noted that "the FAA presumes that the arbitration process itself will produce a resolution independent of the parties' acquiescence—an award which declares the parties' rights and which may be confirmed with the force of a judgment."[103] If the dispute resolution procedure in question does not bind a party, then compelling a party to partake in that procedure under the FAA may very well run counter to the FAA's goals.[104] That is, forced participation in arbitration may increase the amount of time and money spent resolving the dispute.[105]

B. *The Plain Meaning of "Arbitration"*

In addition to looking at case law when interpreting statutory text, it is also useful to consider secondary sources, such as dictionaries.[106] This Section examines how credible sources define arbitration. It does so by considering definitions from Black's Law Dictionary, the American Arbitration Association,[107] and the World Intellectual Property Organization.[108] Considering definitions from these sources clarifies three important characteristics of arbitration: (1) it produces a final and binding decision, (2) it is an alternative to litigation, and (3) one or more neutral third parties govern the proceeding.

First, arbitration clearly refers to dispute resolution procedures that produce a final and binding decision. Black's Law Dictionary defines arbitration as "[a] method of dispute resolution . . . *whose decision is binding*."[109] Likewise, the American Arbitration Association states that "[a]rbitration is the submission of a dispute . . . *for a final and binding*

103. *Id*. at 1240.

104. *Id*.

105. *Id*. ("Unlike submitting a dispute to a private adjudicator, which the FAA contemplates, compelling a party to submit to settlement talks it does not wish to enter and which cannot resolve the dispute of their own force may well increase the time and treasure spent in litigation." (emphasis omitted)).

106. *See* CLARK & CONNOLLY, *supra* note 23, at 4–5.

107. The American Arbitration Association "was founded in 1926, following enactment of the Federal Arbitration Act, with the specific goal of helping to implement arbitration as an out-of-court solution to resolving disputes." *AAA Mission and Principles*, AM. ARBITRATION ASS'N, http://www.adr.org/aaa/faces/s/about/mission (last visited May 1, 2015). Additionally, the American Arbitration Association "has a long history and experience in the field of alternative dispute resolution, providing services to individuals and organizations who wish to resolve conflicts out of court." *About the American Arbitration Association (AAA)*, AM. ARBITRATION ASS'N, http://www.adr.org/aaa/faces/s/about (last visited May 1, 2015).

108. The World Intellectual Property Organization is "a self-funding agency of the United Nations, with 188 member states" and "is the global forum for intellectual property services, policy, information and cooperation." *Inside WIPO*, WORLD INTELL. PROP. ORG., http://www.wipo.int/about-wipo/en/ (last visited May 1, 2015).

109. BLACK'S LAW DICTIONARY 119 (9th ed. 2009) (emphasis added).

decision, known as an 'award.'"[110] The World Intellectual Property Organization agrees that arbitration produces a final and binding decision.[111] The only indication that arbitration could possibly refer to a decision that does not produce a final and binding decision comes from the American Arbitration Association's statement that "[a]wards . . . are *generally* final and binding on the parties in the case."[112]

Second, arbitration clearly refers to dispute resolution mechanisms that are alternatives to courtroom litigation. The American Arbitration Association states that arbitration is a "cost-effective *alternative to litigation*."[113] Similarly, the World Intellectual Property Organization notes that "[i]n choosing arbitration, the parties opt for a private dispute resolution procedure *instead of going to court*."[114]

Finally, arbitration refers to dispute resolution mechanisms that neutral third parties govern. Black's Law Dictionary defines arbitration as "[a] method of dispute resolution involving one or more *neutral third parties*."[115] The American Arbitration Association states that "[a]rbitration is the submission of a dispute to one or more *impartial persons*."[116]

C. *The Correct Interpretation of FAA Arbitration*

This Note argues that the Eleventh Circuit has created the best standard for determining whether a particular dispute resolution procedure constitutes FAA arbitration. Specifically, it suggests that courts should follow the Eleventh Circuit's four-factor test and the bright-line rule related to the fourth factor of that test. Therefore, in the following Part, this Note uses the Eleventh Circuit's standard to analyze whether Florida's nonbinding arbitration procedure is FAA arbitration.

In *Wolsey*, the Ninth Circuit built on the reasoning of the Third Circuit and the Eastern District of New York to conclude that the dispute resolution procedure at issue was FAA arbitration.[117] However, the court missed the mark in that case because it focused too much on whether the dispute resolution procedure provided for submission of the claim to a third party and not enough on whether the procedure would produce a

110. *Arbitration*, AM. ARBITRATION ASS'N, http://www.adr.org/aaa/faces/services/disputeresolutionservices/arbitration (last visited May 1, 2015) (emphasis added).

111. The World Intellectual Property Organization states that arbitration produces "*a binding decision* on the dispute." *What Is Arbitration?*, WORLD INTELL. PROP. ORG., http://www.wipo.int/amc/en/arbitration/what-is-arb.html (last visited May 1, 2015) (emphasis added).

112. *Arbitration*, *supra* note 110 (emphasis added).

113. *Id.* (emphasis added).

114. *See What Is Arbitration?*, *supra* note 111 (emphasis added).

115. BLACK'S LAW DICTIONARY, *supra* note 109 (emphasis added).

116. *Arbitration*, *supra* note 110 (emphasis added).

117. *Supra* Subsection II.A.3.

final decision.[118] The Eleventh Circuit's standard places more emphasis on whether the dispute resolution procedure produces a final decision.[119] Given the FAA's purpose of increasing the efficiency of dispute resolution and ensuring that arbitration is "'an alternative to litigation, not an additional layer in a protracted contest,'"[120] the Eleventh Circuit's final decision standard is superior and better determines whether a particular dispute resolution procedure is FAA arbitration.

It also seems that the Ninth Circuit missed the mark in *Wolsey* with its reasoning that the dispute resolution procedure in question should be FAA arbitration because the FAA creates a presumption in favor of arbitration.[121] Although there is no question that the FAA creates a presumption in favor of arbitration,[122] it seems that the court misapplied this presumption. The presumption appears to favor enforcing agreements to arbitrate when it is clear that the parties agreed to undergo arbitration as governed by the FAA. Thus, when the parties have actually agreed to FAA arbitration, courts should presume that the agreement itself is enforceable or that the dispute or controversy at issue is within the scope of the agreement. It does not mean, however, that where it is unclear whether the parties agreed to a dispute resolution procedure within the scope of the FAA the court should presume that the dispute resolution procedure actually is FAA arbitration.

III. DOES THE FAA GOVERN FLORIDA'S NONBINDING ARBITRATION?

Now that this Note has determined (or at least argued for) the correct meaning of FAA arbitration, it can address its ultimate question: Does the FAA govern Florida's nonbinding arbitration? In other words, is Florida's nonbinding arbitration procedure FAA arbitration? To answer this question, this Part first describes Florida's nonbinding arbitration procedure. Next, this Part uses the Eleventh Circuit's standard for FAA arbitration[123] to analyze whether the FAA governs Florida's nonbinding arbitration procedure. This Part concludes by describing the importance of resolving whether the FAA governs Florida's nonbinding arbitration procedure.

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118. *See* Wolsey, Ltd. v. Foodmaker, Inc., 144 F.3d 1205, 1208–09 (9th Cir. 1998).

119. *See supra* Subsection II.A.7.

120. Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc., 524 F.3d 1235, 1239–40 (11th Cir. 2008) (quoting B.L. Harbert Int'l, LLC v. Hercules Steel Co., 441 F.3d 905, 907 (11th Cir. 2006), *abrogation recognized by* Gonsalvez v. Celebrity Cruises Inc., 750 F.3d 1195, 1197 (11th Cir. 2013)) (internal quotation marks omitted).

121. *See Wolsey*, 144 F.3d at 1209.

122. *E.g.*, *id.*

123. *Supra* Subsection II.A.7.

A. *Florida's Nonbinding Arbitration Procedure*

In Florida, nonbinding arbitration is a statutorily defined process governed by Florida Statutes § 44.103 and Florida Rules of Civil Procedure 1.800 and 1.820.[124] Florida Statutes § 44.103(1) authorizes the Florida Supreme Court to establish "rules of practice and procedure" for conducting nonbinding arbitration.[125] The Florida Supreme Court has done so in Florida Rules of Civil Procedure 1.800 and 1.820.[126]

In Florida, a chief arbitrator runs the nonbinding arbitration proceeding.[127] Before the proceeding, the arbitration tribunal sends a notice of arbitration to the parties explaining the nonbinding arbitration procedures.[128]

Compared to a traditional trial, nonbinding arbitration is relatively informal.[129] The Florida Rules of Civil Procedure instruct parties to minimize witness testimony.[130] Instead, the parties' attorneys do most of the talking.[131] Additionally, parties have a strong incentive to appear: even if a party is not present, "the chief arbitrator may proceed with the hearing and the arbitration panel shall render a decision based upon the facts and circumstances as presented by the parties present."[132]

Typically, the parties have thirty days to complete the proceeding.[133] If the parties need more time, they or the chief arbitrator may move for an extension.[134] At most, the court can grant the parties an additional thirty days to arbitrate.[135] Therefore, even with an extension, the parties must complete the proceeding within sixty days of the first proceeding.[136]

After the proceeding concludes, the arbitrator issues a decision regarding the dispute.[137] If there is a panel of arbitrators, a majority vote

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124. *See* Daniel Morman & Jonathan Whitcomb, *Navigating the Nonbinding Arbitration Minefield in Florida*, FLA. B.J., May 2007, at 18, *available at* http://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/A850836D44B9279E852572C90056C2BD.

125. FLA. STAT. § 44.103 (2013).

126. *See* FLA. R. CIV. P. 1.800 (detailing exclusions from arbitration); FLA. R. CIV. P. 1.820 (detailing hearing procedures for nonbinding arbitration).

127. FLA. R. CIV. P. 1.820(a).

128. *See* FLA. R. CIV. P. 1.820(b)(1)–(2).

129. *See* FLA. R. CIV. P. 1.820(c).

130. *Id.* ("Presentation of testimony shall be kept to a minimum.").

131. *Id.* ("[M]atters shall be presented to the arbitrator(s) primarily through the statements and arguments of counsel.").

132. FLA. R. CIV. P. 1.820(e).

133. FLA. R. CIV. P. 1.820(g)(1).

134. *Id.* ("Arbitration shall be completed within 30 days of the first arbitration hearing unless extended by order of the court on motion of the chief arbitrator or of a party.").

135. *Id.*

136. *Id.* ("No extension of time shall be for a period exceeding 60 days from the date of the first arbitration hearing.").

137. FLA. R. CIV. P. 1.820(g)(2) ("Upon the completion of the arbitration process, the arbitrator(s) shall render a decision.").

determines the outcome.[138] The arbitrator must notify the parties of the decision in writing no later than ten days after the proceeding concludes.[139] The arbitrator's written decision may "set forth the issues in controversy and the arbitrator('s)(s') conclusions and findings of fact and law."[140] Finally, "[t]he arbitrator('s)(s') decision and the originals of any transcripts shall be sealed and filed with the clerk at the time the parties are notified of the decision."[141]

As the name *nonbinding* arbitration suggests, the arbitrator's decision is not necessarily final. After the arbitrator issues the decision, parties may move for a new trial.[142] However, parties must do so no later than twenty days after service of the decision.[143] After twenty days, the decision is final.[144]

Florida Statutes § 44.103 seems to encourage parties to move for a new trial only if they think the arbitrator's decision is significantly unfair. Specifically, § 44.103 authorizes the court, upon a motion by either party, to "assess costs against the party requesting a [new] trial."[145] These costs include "arbitration costs, court costs, reasonable attorney's fees, and other reasonable costs."[146]

When the plaintiff requests a new trial, there are other potential consequences. If the plaintiff "obtains a judgment at trial which is at least 25 percent less than the arbitration award,"[147] then "the costs and attorney's fees . . . shall be set off against the award."[148] Further, "[w]hen the costs and attorney's fees pursuant to this section total more than the amount of the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and attorney's fees, less the amount of the award to the plaintiff."[149] When the court is determining whether to assess costs against the plaintiff, "the term 'judgment' means the amount of the net judgment entered, plus all

138. *Id.* ("In the case of a panel, a decision shall be final upon a majority vote of the panel.").

139. FLA. R. CIV. P. 1.820(g)(3) ("Within 10 days of the final adjournment of the arbitration hearing, the arbitrator(s) shall notify the parties, in writing, of their decision.").

140. *Id.*

141. *Id.*

142. *See* FLA. STAT. § 44.103(5) (2013); FLA. R. CIV. P. 1.820(h).

143. FLA. R. CIV. P. 1.820(h).

144. *Id.* (providing that if the parties do not meet the twenty-day deadline, "the [arbitrator's] decision shall be referred to the presiding judge, who shall enter such orders and judgments as may be required to carry out the terms of the decision as provided by section 44.103(5), Florida Statutes").

145. FLA. STAT. § 44.103(6).

146. *Id.* These "reasonable costs" include, but are not limited to, "investigation expenses and expenses for expert or other testimony which were incurred after the arbitration hearing and continuing through the trial of the case in accordance with the guidelines for taxation of costs as adopted by the Supreme Court." *Id.*

147. *Id.* § 44.103(6)(a).

148. *Id.*

149. *Id.*

taxable costs pursuant to the guidelines for taxation of costs as adopted by the Supreme Court."[150] It also includes "any postarbitration collateral source payments received or due as of the date of the judgment, and plus any postarbitration settlement amounts by which the verdict was reduced."[151]

When the defendant moves for a new trial, there are also potential consequences if the "judgment entered against the defendant . . . is at least 25 percent more than the arbitration award."[152] In such a situation, "the costs and attorney's fees pursuant to this section shall be set off against the award."[153] When the court is determining whether to assess costs against the defendant, "the term 'judgment' means the amount of the net judgment entered, plus any postarbitration settlement amounts by which the verdict was reduced."[154]

Thus, Florida's nonbinding arbitration procedures clarify that, while a nonbinding arbitration decision in Florida is not inherently binding, it has the potential to become binding if the parties do not adhere to a set of rather strict guidelines. Lawyers must pay close attention to procedural rules to ensure that *nonbinding* arbitration does not actually *bind* the parties.

B. *The FAA Does Not Govern Florida's Nonbinding Arbitration Procedure*

Based on the Eleventh Circuit's standard for FAA arbitration in *Advanced Bodycare*, nonbinding arbitration in Florida is not FAA arbitration. This is true even though Florida's nonbinding arbitration meets three of the four factors of the Eleventh Circuit's standard. Nonbinding arbitration's failure to meet the fourth factor—that the dispute resolution procedure results in a final award—outweighs its compliance with the first three factors of the Eleventh Circuit's standard.[155]

Nonbinding arbitration, as defined by Florida Statutes § 44.103, meets three of the four factors of the Eleventh Circuit's standard for FAA arbitration. Nonbinding arbitration meets the first factor—that the arbitration has an independent adjudicator[156]—because an independent chief arbitrator runs nonbinding arbitration.[157] It also meets the second

150. *Id.*
151. *Id.*
152. *Id.* § 44.103(6)(b).
153. *See id.* § 44.103(6)(a)–(b).
154. *Id.* § 44.103(6)(b).
155. *See* Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc., 524 F.3d 1235, 1239 (11th Cir. 2008).
156. *Id.*
157. *See* FLA. R. CIV. P. 1.820(a) ("The chief arbitrator shall have authority to commence and adjourn the arbitration hearing and carry out other such duties as are prescribed by section 44.103, Florida Statutes."); *see also* FLA. STAT. § 44.103(4) ("Any party to the arbitration may

factor—that the independent adjudicator apply substantive legal standards[158]—because the chief arbitrator must apply substantive legal standards in reaching the final arbitration decision.[159] Finally, nonbinding arbitration meets the third factor—that the chief arbitrator "consider[] evidence and argument (however formally or informally) from each party"[160]—because, although the process is informal, the arbitrator hears arguments and accepts evidence from both parties.[161]

Although nonbinding arbitration meets the first three factors, it does not meet the fourth factor—that the independent adjudicator "render[] a decision that purports to resolve the rights and duties of the parties, typically by awarding damages or equitable relief."[162] This is arguably the most important factor, and, even though nonbinding arbitration in Florida meets the first three factors, its failure to satisfy the fourth factor strongly supports a conclusion that nonbinding arbitration is not FAA arbitration.[163] The remainder of this Section discusses the reasoning behind that conclusion in more detail.

In *Advanced Bodycare*, the Eleventh Circuit decided that mediation was not FAA arbitration. In making its decision, the Eleventh Circuit only analyzed the fourth factor of its test—whether mediation "renders a decision that purports to resolve the rights and duties of the parties."[164] Because mediation did not meet this factor, the Eleventh Circuit decided that it was not FAA arbitration.[165] By deciding the issue based solely on the fourth factor, the Eleventh Circuit emphasized the importance of this factor and suggested that other courts could do the same regarding nonbinding arbitration. The fact that many other authorities define arbitration as a process that is final and binding also emphasizes the fourth factor's importance.[166] Therefore, if nonbinding arbitration does not "render[] a decision that purports to resolve the rights and duties of

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petition the court in the underlying action, for good cause shown, to authorize the arbitrator to issue subpoenas for the attendance of witnesses and the production of books, records, documents, and other evidence at the arbitration and may petition the court for orders compelling such attendance and production at the arbitration. Subpoenas shall be served and shall be enforceable in the manner provided by law.").

158. *Advanced Bodycare*, 524 F.3d at 1239.

159. *See* FLA. R. CIV. P. 1.820(g)(3) (explaining that in its decision, the arbitrator may "set forth the issues in controversy and the arbitrator('s)(s') conclusions and findings of fact and law").

160. *Advanced Bodycare*, 524 F.3d at 1239.

161. FLA. R. CIV. P. 1.820 ("The hearing shall be conducted informally. Presentation of testimony shall be kept to a minimum, and matters shall be presented to the arbitrator(s) primarily through the statements and arguments of counsel.").

162. *Advanced Bodycare*, 524 F.3d at 1239.

163. *See id.* ("Although we acknowledge that there are few clear rules in delineating the bounds of FAA arbitration, we believe there is one that controls this case. The FAA clearly presumes that arbitration will result in an 'award' declaring the rights and duties of the parties.").

164. *See id.*

165. *Id.* at 1240.

166. *See supra* Section II.B.

the parties,"[167] courts should not classify it as FAA arbitration.

Although not as clearly as with mediation, Florida's nonbinding arbitration procedure does not "render[] a decision that purports to resolve the rights and duties of the parties."[168] Unlike mediation, where the mediator does not deliver a decision at the conclusion of the mediation,[169] in nonbinding arbitration, the arbitrator does deliver a decision that may "set forth the issues in controversy and the arbitrator('s)(s') conclusions and findings of fact and law."[170] While the arbitrator technically "renders a decision," that decision does not "purport[] to resolve the rights and duties of the parties"[171] because the parties may move for a new trial within twenty days. If a party makes this motion, then there will be a new trial and the arbitrator's decision will have absolutely no weight in the outcome of the case. Judges in the new trial cannot even use the arbitration decision to guide their own decision because they are forbidden from seeing the decision.[172] The Florida Statutes specifically state that "[t]he [nonbinding arbitration] decision shall not be made known to the judge who may preside over the case unless no request for trial de novo is made as herein provided or unless otherwise provided by law."[173] Since the outcome of nonbinding arbitration in Florida does not necessarily bind the parties, it is not a dispute resolution procedure that purports to resolve the dispute. This strongly suggests that nonbinding arbitration under Florida's procedure is not FAA arbitration.

The Eleventh Circuit's bright-line rule regarding the fourth factor of its standard further supports the conclusion that nonbinding arbitration is not FAA arbitration. The Eleventh Circuit stated, "If a dispute resolution procedure does not produce some type of award that can be meaningfully confirmed, modified, or vacated by a court upon proper motion, it is not arbitration within the scope of the FAA."[174] Based on this rule, Florida's nonbinding arbitration procedure is clearly not FAA arbitration because nonbinding arbitration does not produce a final award.[175]

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167. *Advanced Bodycare*, 524 F.3d at 1239.

168. *Id.*

169. *Id.* at 1240.

170. FLA. R. CIV. P. 1.820(g)(3).

171. *Advanced Bodycare*, 524 F.3d at 1239.

172. FLA. STAT. § 44.103(5) (2013).

173. *Id.*

174. *Advanced Bodycare*, 524 F.3d at 1239.

175. Based on the bright-line rule set forth by the Eleventh Circuit regarding the fourth factor of its test, it might seem that there is strong support for the conclusion that nonbinding arbitration is within the scope of the FAA if one can prove, contrary to the arguments of this Note, that nonbinding arbitration does in fact produce a final award. However, this is not true. Even if nonbinding arbitration did meet the Eleventh Circuit's bright-line rule, that does not necessarily bring nonbinding arbitration within the scope of the FAA. The rule is one for determining whether

The Eleventh Circuit's reasoning behind its bright-line rule further supports the conclusion that nonbinding arbitration is not FAA arbitration. The Eleventh Circuit reasoned that a dispute resolution procedure that fails to produce a meaningfully confirmable award is not FAA arbitration because "[t]he purpose of the FAA is to 'relieve congestion in the courts and to provide parties with an alternative method of dispute resolution that is speedier and less costly than litigation.'"[176] If a particular dispute resolution procedure does not produce an award that can be meaningfully confirmed, then it is unlikely to alleviate congestion in the courts or produce a speedier dispute resolution.[177] That is because any party that is unhappy with the award can just disregard it and take the case to trial.[178] If the dispute resolution procedure does not contribute to the goals of the FAA, then it is simply illogical to think the FAA would govern it.[179]

When analyzing nonbinding arbitration in Florida in the context of this reasoning, it becomes abundantly clear that it is not FAA arbitration. While nonbinding arbitration does produce an award that is *technically* confirmable, it does not produce an award that is *meaningfully* confirmable. This is because a party that is unhappy with the outcome of the nonbinding arbitration can disregard the outcome and take the case to trial by following some minor procedural requirements. Therefore, if a party did not want to participate in nonbinding arbitration but had to do so, this would actually increase the amount of time and money spent in resolving the dispute.[180] This result runs completely counter to the intended purpose of the FAA. Thus, if a court construes nonbinding arbitration as FAA arbitration, there is a very real possibility that it would produce results opposite to Congress's intent. The likelihood of such a result clearly shows that nonbinding arbitration is not FAA arbitration.

FAA arbitration is meant to be "an alternative to litigation, not an

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a procedure is *not* within the scope of the FAA; it is not meant to determine by itself whether a particular dispute resolution procedure *is* arbitration within the scope of the FAA. The Eleventh Circuit made this clear in a footnote of its opinion in *Advanced Bodycare* when it stated the following about its bright-line rule: "The inverse is not true, however. The presence of an award does not by itself make a procedure 'arbitration' if the procedures that produce the award bear no resemblance to classic arbitration. The parties could not contract for a binding coin flip, with the winner to receive an award of his choice, and expect the agreement to be enforced under the FAA." *Advanced Bodycare*, 524 F.3d at 1239 n.3.

176. *Id.* at 1239–40 (quoting AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc., 508 F.3d 995, 1001 (11th Cir. 2007)).

177. *Id*.

178. *See id.*

179. *See id.*

180. *Id.* at 1240 ("Unlike submitting a dispute to a private adjudicator, which the FAA contemplates, compelling a party to submit to settlement talks it does not wish to enter and which cannot resolve the dispute of their own force may well *increase* the time and treasure spent in litigation.").

additional layer in a protracted contest."[181] However, nonbinding arbitration is not a true alternative to litigation. If the parties must engage in it against their wishes, then there is a significant possibility that it will simply be "an additional layer in a protracted contest." Therefore, nonbinding arbitration in Florida is clearly not FAA arbitration.

C. *Why All of This Matters*

Determining whether Florida's nonbinding arbitration procedure is FAA arbitration is important for two reasons. First, nonbinding arbitration is a relatively prevalent procedure in Florida. Therefore, courts may have to address this issue one day. Second, the FAA's governance of Florida's nonbinding arbitration procedure will significantly impact the enforceability of contractual provisions in which the parties stipulate nonbinding arbitration as a dispute resolution procedure.

1. The Prevalence of Nonbinding Arbitration in Florida

In Florida, parties can find themselves in nonbinding arbitration in a number of ways. For one, the trial court may order parties to submit their dispute to nonbinding arbitration before proceeding to a traditional trial.[182] Additionally, parties may contractually agree to submit disputes to nonbinding arbitration before a traditional trial.[183] Finally, various Florida statutes may require parties involved in "disputes relating to condominiums, cooperatives, homeowners associations, mobile home park lot tenancies, medical malpractice, and sign owners" to submit their disputes to nonbinding arbitration.[184]

Nonbinding arbitration appears to be prevalent in Florida's condominium industry as "[n]onbinding arbitration is a mandatory condition precedent to maintaining a civil action in matters involving certain disputes between condominium associations and unit owners."[185] Nonbinding arbitration also appears to be prevalent in cooperatives as "[t]he law regarding mandatory nonbinding arbitration for disputes involving cooperatives is the same for those related to condominiums."[186] It could also be prevalent in medical malpractice cases as "[a]ny party can move for referral to nonbinding arbitration pursuant to [Florida

181. *Id.* at 1240 (quoting B.L. Harbert Int'l, LLC v. Hercules Steel Co., 441 F.3d 905, 907 (11th Cir. 2006), *abrogation recognized by* Gonsalvez v. Celebrity Cruises Inc., 750 F.3d 1195, 1197 (11th Cir. 2013)) (internal quotation marks omitted).

182. *See* FLA. STAT. § 44.103(2) (2013) (authorizing a court to "refer any contested civil action filed in a circuit or county court to nonbinding arbitration").

183. *See* FLA. R. CIV. P. 1.800 ("A civil action shall be ordered to arbitration or arbitration in conjunction with mediation upon stipulation of the parties.").

184. Morman & Whitcomb, *supra* note 124.

185. *Id.*

186. *Id.*

Statutes § 766.107(1)]."[187]

2. The FAA's Impact on Enforceability

Relying on the FAA, the Supreme Court has developed a strong policy in favor of upholding agreements to arbitrate.[188] The Court has stated that the FAA reflects a "liberal federal policy favoring arbitration[] and the 'fundamental principle that arbitration is a matter of contract.'"[189] Further, "[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."[190]

Despite the arguably unconscionable nature of class arbitration waivers, the U.S. Supreme Court has followed the FAA's core principle that courts should enforce arbitration agreements according to their terms.[191] On this basis, the Court has enforced class arbitration waivers contained in consumer contracts.[192] Enforcing arbitration in such a situation exemplifies that when considering the validity of a particular dispute resolution agreement under the FAA, courts will almost always enforce the dispute resolution agreement. In other words, if parties make a dispute resolution agreement and a court considers that dispute resolution procedure to be arbitration within the scope of the FAA, the court will almost always enforce the agreement.

For example, in *AT&T Mobility LLC v. Concepcion*,[193] Vincent and Liza Concepcion agreed to a cell phone service contract with AT&T.[194] The contract contained a mandatory arbitration provision and a class action waiver.[195] Despite this waiver, the Concepcions filed a class action suit in a federal district court in California.[196] In response, AT&T moved to compel arbitration.[197] The Concepcions opposed AT&T's motion, citing to the saving clause in Section 2 of the FAA, which provides that arbitration agreements can be unenforceable "upon such grounds as exist

187. *Id.*; FLA. STAT. § 766.107 (2013) ("In an action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider . . . the court may require, upon motion by either party, that the claim be submitted to nonbinding arbitration.").

188. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747–48 (2011) (noting that the FAA preempts state-law rules eroding arbitration).

189. *Id.* at 1745 (citation omitted) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) and Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010)).

190. *Id.* at 1748.

191. *See, e.g.*, *id.* at 1745–48.

192. *See, e.g.*, *id.* at 1744–45, 1747–48, 1753.

193. 131 S. Ct. 1740.

194. *Id.* at 1744.

195. *Id.*

196. *Id.*

197. *Id.* at 1744–45.

at law or in equity for the revocation of any contract."[198] On the basis of California's *Discover Bank* rule,[199] which "classif[ied] most collective-arbitration waivers in consumer contracts as unconscionable,"[200] the Concepcions argued that the arbitration provision was "unconscionable . . . under California law because it disallowed classwide procedures."[201] Therefore, the Concepcions argued that the court should not enforce the agreement.[202] The district court agreed and denied AT&T's motion.[203] On appeal, the Ninth Circuit affirmed.[204]

The Supreme Court granted certiorari to consider "whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures."[205] The Court held that "California's *Discover Bank* rule [was] preempted by the FAA," thus upholding the validity of the class arbitration waiver.[206] The Court reasoned that the *Discover Bank* rule was preempted because it required the availability of classwide arbitration, which "interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA."[207]

Since the Court's decision in *Concepcion*, the Eleventh Circuit has upheld the validity of a class action waiver in a similar contract with a Florida consumer. In *Pendergast v. Sprint Nextel Corp.*,[208] Pendergast agreed to several consecutive cell phone service contracts with Sprint.[209] The contract at issue contained a mandatory arbitration provision, a class action waiver, and a nonseverability clause that voided the arbitration agreement if the court found that the class action waiver was unenforceable.[210] Pendergast filed a class action against Sprint in a federal district court in Florida.[211] In response, Sprint filed a motion to compel arbitration.[212] Pendergast argued that the class action waiver was "unconscionable and unenforceable under Florida law,"[213] and therefore,

198. 9 U.S.C. § 2 (2012); *Concepcion*, 131 S. Ct. at 1745, 1746.

199. The *Discover Bank* rule refers to the California Supreme Court's decision in *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by Concepcion*, 131 S. Ct. 1740.

200. *Concepcion*, 131 S. Ct. at 1746.

201. *Id.* at 1745.

202. *See id.* at 1745–46.

203. *Id.* at 1745.

204. *Id.*

205. *Id.* at 1744.

206. *See id.* at 1753.

207. *Id.* at 1748.

208. 691 F.3d 1224 (11th Cir. 2012).

209. *Id.* at 1226–28.

210. *Id.* at 1228.

211. *Id.*

212. *Id.* at 1229.

213. *Id.*

pursuant to the nonseverability clause, the arbitration provision did not apply and the court should deny Sprint's motion.[214] The district court disagreed and granted Sprint's motion, finding that the class action waiver and arbitration provisions in the contract were enforceable.[215]

Pendergast appealed and the Eleventh Circuit affirmed the district court's judgment granting Sprint's motion to compel arbitration.[216] In response to Pendergast's argument that the class action waiver was unconscionable under Florida law, the Eleventh Circuit stated, "[W]e need not reach the questions of whether Florida law would invalidate the class action waiver in the parties' contract because, to the extent it does, it would be preempted by the FAA."[217] Further, the court noted that, "[u]nder *Concepcion*, both the class action waiver and the arbitration clause must be enforced according to their terms."[218]

The decisions in both *Concepcion* and *Pendergast* reflect courts' inclination to enforce FAA arbitration agreements. These decisions show that courts will almost always enforce dispute resolution agreements that provide for arbitration within the scope of the FAA. Thus, it is important to determine whether nonbinding arbitration is within the scope of the FAA because this determination will have a strong impact on the enforceability of nonbinding arbitration agreements.

CONCLUSION

The Eleventh Circuit's decision in *Advanced Bodycare* provides the most logical standard for determining whether a particular dispute resolution procedure is FAA arbitration. The Eleventh Circuit's standard is most consistent with the FAA's purposes. Since this is the most logical standard, this Note uses it to determine whether Florida's nonbinding arbitration is FAA arbitration. Nonbinding arbitration in Florida does not necessarily produce an award that is final and binding on the parties. Therefore, under the Eleventh Circuit's standard, Florida's nonbinding arbitration procedure is clearly not FAA arbitration.

214. *Id.*
215. *Id.* at 1225.
216. *Id.* at 1226.
217. *Id.* at 1236.
218. *Id.*