

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1135

Florida Consumer and Small Business Arbitration Act

SPONSOR(S): Poppell

TIED BILLS: None

IDEN./SIM. BILLS: SB 2192

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Civil Justice & Courts Policy Committee		DeZego	De La Paz
2)	Insurance, Business & Financial Affairs Policy Committee			
3)	Criminal & Civil Justice Policy Council			
4)	Policy Council			
5)				

SUMMARY ANALYSIS

Arbitration is a process where a neutral third person or panel, called an arbitrator or arbitration panel, considers the facts and arguments presented by the parties and renders a decision which may be binding or nonbinding. Florida has traditionally encouraged the use of arbitration and enacted the Florida Arbitration Code in 1957. The Florida Arbitration Code is patterned after the Federal Arbitration Act of 1925.

This bill:

- Creates the Florida Consumer and Small Business Arbitration Act;
- Prohibits the use of arbitration agreements in all insurance policies;
- Prohibits any provision for mandatory or binding arbitration in regard to any pre-dispute arbitration agreement;
- Provides procedures to compel arbitration;
- Provides a process to select an arbitrator if the parties do not agree;
- Provides that arbitrators must make certain disclosures;
- Requires an arbitration to be fundamentally fair;
- Provides requirements for a written award;
- Provides when a court may vacate an award;
- Provides when a court may modify an award;
- Provides for certain disclosures on an arbitration agreement.

This bill appears to have an indeterminate minimal negative fiscal impact on state expenditures.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

##### Arbitration

Alternative Dispute Resolution (ADR) is a procedure for settling a dispute by means other than litigation, such as arbitration or mediation.<sup>1</sup> Arbitration is a process where a "neutral third person or panel, called an arbitrator or arbitration panel, considers the facts and arguments presented by the parties and renders a decision which may be binding or nonbinding."<sup>2</sup>

##### The Federal Arbitration Act

The right to resolve any dispute through binding arbitration is established under the Federal Arbitration Act (FAA).<sup>3</sup> The federal act was enacted with the goal of "revers[ing] the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements on the same footing as other contracts."<sup>4</sup> The FAA requires the state courts to enforce an applicable arbitration clause if the transaction involves interstate commerce.<sup>5</sup> The scope of the FAA is broadly interpreted to coincide with the reach of the Interstate Commerce Clause of the U.S. Constitution.<sup>6</sup>

Federal enactments usually preempt state laws by virtue of the Supremacy Clause.<sup>7</sup> However, the McCarran-Ferguson Act (MFA) provides that federal laws shall not "be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance."<sup>8</sup> Therefore under MFA, the business of insurance is under the exclusive power of the individual states.<sup>9</sup>

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<sup>1</sup> Garner, Bryan. Black's Law Dictionary, Second Pocket Edition, (St. Paul, Minn., 2001).

<sup>2</sup> Section 44.1011(1), F.S.

<sup>3</sup> 9 U.S.C. §§1-16; *United Ins. Co. of America v. Office of Insurance Regulation*. 985 So. 2d 665 (Fla. 1st Dist. Ct. App. 2008).

<sup>4</sup> Douglas J. Giuliano, *Parochialism in Arbitration?*, 81 Fla. B. J. 9, Feb. 2007 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20,24 (1991).)

<sup>5</sup> *Id.*

<sup>6</sup> *Allied-Bruce Terminix Cos., Inc. v. Dobson*. 513 U.S. 265, 281-282 (1995).

<sup>7</sup> Article VI, Clause 2, United State Constitution

<sup>8</sup> 15 U.S.C. § 1012(b)

<sup>9</sup> McCarran-Ferguson Act. 15 U.S.C. §§1011-1015.

## The Florida Arbitration Code

The Florida Arbitration Code is patterned after the Federal Arbitration Act of 1925. Florida has traditionally encouraged the use of arbitration and enacted the Florida Arbitration Code in 1957.

The code provides that:

- Two or more parties can enter an agreement to submit to arbitration any controversy.<sup>10</sup>
- Arbitration can be compelled if one party refuses to comply with the terms of the contract to resolve a dispute through arbitration.<sup>11</sup>
- Parties can agree to methods for appointing arbitrators or umpires<sup>12</sup> and that the court may appoint an arbitrator if for any reason the arbitrator fails to act.<sup>13</sup>
- Unless otherwise provided in an agreement, the majority of arbitrators in a case may exercise power by a majority.<sup>14</sup>
- Arbitrators shall appoint a time and place for the hearing and serve notice not less than 5 days before the hearing. Appearance at the hearing waives a party's right to the notice. The parties are entitled to be heard, to present evidence, and to cross-examine witnesses.<sup>15</sup>
- Parties are entitled to legal representation.<sup>16</sup>
- When arbitrators cannot agree to an award in a case, the arbitrators are authorized to issue subpoenas and take depositions of witnesses to seek out additional evidence.<sup>17</sup>
- Awards shall be in writing and signed by the arbitrators joining in the award. Notice of the award can be delivered personally or by registered or certified mail, or as provided in the agreement.<sup>18</sup>
- Arbitrators' fees and expenses are paid according to the terms in the award.<sup>19</sup>
- Awards can be confirmed by the court upon application of a party unless there are grounds for vacating or modifying the award.<sup>20</sup>
- Evidence of corruption, fraud, or other undue means in the procurement of an award or partiality by an arbitrator is grounds for vacating an award.<sup>21</sup>
- An applicant may request the court to modify or correct an award for mistakes in calculations, descriptions of evidence or witnesses, and issues not affecting the merits of the controversy.<sup>22</sup>
- Judgments or decrees on an award are entered and enforced like any other judgment or decree.<sup>23</sup>
- Appeals may be taken from orders:
  - denying applications to compel;
  - granting a stay;
  - confirming or denying confirmation of an award;
  - modifying or correcting an award;
  - vacating an award without rehearing; or
  - entering an award or judgment under the provisions of the act.<sup>16</sup>

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<sup>10</sup> Section 682.02, F.S

<sup>11</sup> Section 682.03, F.S.

<sup>12</sup> An umpire is an impartial person appointed to make an award or final decision, usually when a matter has been submitted to arbitrators who have failed to agree. Black's Law Dictionary, pg. 730. (Second pocket edition, 2001).

<sup>13</sup> Section 682.04, F.S

<sup>14</sup> Section 682.05, F.S.

<sup>15</sup> Section 682.06, F.S.

<sup>16</sup> Section 682.07, F.S.

<sup>17</sup> Section 682.08, F.S.

<sup>18</sup> Section 682.09, F.S.

<sup>19</sup> Section 682.11, F.S.

<sup>20</sup> Section 682.12, F.S.

<sup>21</sup> Section 682.13, F.S.

<sup>22</sup> Section 682.14, F.S.

<sup>23</sup> Section 682.15, F.S.

## Effect of Bill

### Creation Consumer and Small Business Arbitration Act

The bill creates the Florida Consumer and Small Business Arbitration Act (Act). The Act applies to consumer and small business arbitration agreements. This bill divides ch. 682, F.S., into two parts with Part I as the "Arbitration Code," and Part II as the "Consumer and Small Business Arbitration Act." This bill defines a "consumer" as an individual who seeks or acquires any goods or services. A consumer includes a child through his or her parent or legal guardian and the personal representative of the estate of a deceased individual. This bill defines a "small business" as an independently owned and operated business with no more than 200 full-time permanent employees which, along with its affiliates, has a net worth of \$10 million or less or has a Small Business Administration 8(a) certification.<sup>24</sup> In addition, this bill provides definitions for "arbitration agreement" and "court."

The Act does not apply to condominiums under ch. 718, F.S., or to an arbitrator governed by a securities self-regulatory organization approved by the United States Securities and Exchange Commission.

### Certain Arbitration Provisions Unenforceable

This bill prohibits the use of arbitration agreements in all insurance policies. This bill also provides that any provision which restricts a party from enforcing any right under the policy or limiting the time to do so is void and unenforceable. In addition, any provision for mandatory or binding arbitration in regard to any pre-dispute arbitration agreement is void and unenforceable, except to the extent federal law provides for its enforceability. Therefore, any arbitration agreement that is covered by the FAA would not be void under this bill.

### Proceeding to Compel Arbitration

This bill provides for procedures to compel arbitration and provides that the court must hear and determine applicability, including validity of the arbitration agreement. This bill provides that the court must take evidence and hear and determine the issues as soon as practicable. The court must grant the application if it is satisfied that:

- No substantial issue exists regarding the making of the agreement or provision;
- An arbitratable issue exists;
- The arbitration agreement is not void as against public policy; and
- The right to arbitration has not been waived.

### Appointment of Arbitrators

This bill provides that the parties may only select arbitrators or umpires within 30 days after the arbitration has been initiated. If the parties do not agree on the arbitration, then the party compelling arbitration must send a list of certified arbitrators to the responding party. The responding party must choose three arbitrators from the list within 15 days. The compelling party then must select one arbitrator from the three within 15 days.

The prospective arbitrator must disclose any facts which might affect or appear to affect his or her impartiality, including but not limited to the following:

- Any personal financial interest in the outcome of the arbitration proceeding.

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<sup>24</sup> SBA's 8(a) Business Development Program offers a broad scope of assistance to socially and economically disadvantaged firms. It was created to help eligible small disadvantaged businesses become independently competitive in the federal procurement market.

- Any existing or past relationship with:
  - Any of the parties to the agreement;
  - The parties' industry;
  - The parties' counsel or representatives;
  - Witnesses; or
  - Other arbitrators.
- The number of arbitrations conducted in the past five years involving either party, their industry, the attorneys or their firms, the outcomes of those arbitrations, and the dates of decision

Absent written consent from all parties, If an arbitrator fails to disclose within 10 days after notice of appointment, then he or she may not serve as an arbitrator. Any party may object to a prospective arbitrator within 10 days after receipt of his or her disclosures. If a party objects, then the parties must select another prospective arbitrator.

This bill provides that an arbitrator must comply with Canon 1 and Canon 3 of the Code of Judicial Conduct. Canon 1 of the Florida Code of Judicial Conduct provides that a judge must uphold the integrity and independence of the judiciary. Canon 3 provides that a judge must perform the duties of judicial office impartially and diligently. Failure to comply with these provisions is grounds for disqualification. In addition, a prospective arbitrator must provide an oath stating that he or she has reviewed and met all of the standards of the Act and must comply with those standards throughout the arbitration proceeding. A copy of the oath must be served on each party to the arbitration and other prospective arbitrators.

#### Arbitration Process

This bill requires arbitration to be fundamentally fair. Fundamental fairness includes due process, adequate and appropriate notice, and the opportunity to be heard, present relevant and material evidence, cross-examine witnesses, present arguments, and cite legal authority before unbiased decision makers.

This bill provides arbitrators and umpires may issue subpoenas, and have the power to administer oaths as would otherwise be allowed in a civil action. The scope of discovery and the procedure for any hearings is governed by the Florida Small Claims Rule 7.020,<sup>25</sup> unless the parties agree otherwise. Witnesses must be under oath during testimony and must serve without compensation. However, they are entitled to per diem and travel expenses.

A party may be represented by an attorney at arbitration. A waiver to be represented by an attorney at an arbitration or hearing is void. If the arbitration has more than one arbitrator or umpire, then all decisions must be made by a majority vote, unless the parties agree otherwise.

An arbitrator, notwithstanding any other provision of law, may not administer an arbitration when there is an agreement or rule which requires a consumer or small business to pay the fees and costs incurred by the opposing party if the consumer or small business does not prevail. In addition, this bill requires arbitrators and umpires to maintain a record of all activity in any arbitration proceeding.

#### Award, Opinion, and Judgment

An award must be in writing and must contain an opinion with findings addressing the issues and any damages awarded. The award must be issued no more than 60 days following the date of the final hearing, unless an extension is granted by the court for good cause. The parties may extend the deadline by written agreement, but a party may not disclose to an arbitrator that the other party refuses

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<sup>25</sup>Rule 7.020 provides in part that any party represented by an attorney is subject to discovery pursuant to Florida Rules of Civil procedure 1.280-1.380.

to agree to extend the deadline. The award must be signed by the arbitrators and a copy of the award must be delivered to each party personally or by registered or certified mail.

The arbitration agreement and written award must be entered into the court record by filing them with the clerk of court. If a file has not previously been opened, then the party seeking the entry of judgment must pay the applicable filing fee and file the documents before a judgment is entered.

The court must confirm an award after a party to an arbitration receives notice of the filing of the arbitration opinion, unless it is modified or vacated. An order directing a rehearing or confirming, vacating, modifying, or correcting an award must be entered and enforced like any other judgment or decree. In addition, the judgment must be recorded, docketed, and enforced like any other civil action.

### Remedies, Fees, and Expenses of Arbitration

This bill provides that arbitration fees and expenses must be reasonable and cannot be any more expensive than if the action was brought in a court of law. The circuit court must establish the amount of compensation, if any, that each arbitrator or umpire receives unless otherwise agreed to by the parties. In addition, the court may order that fees and expenses be apportioned between the parties in an equitable manner. An arbitrator must award reasonable attorney's fees and other reasonable expenses.

### Vacating an Award

This bill provides that the court must vacate an award when:

- The award was procured by corruption, fraud or undue means or
- The arbitrator failed to meet the standards of s. 682.504, F.S.

In addition, the court must vacate if:

- The arbitrator exceeded his or her powers;
- The arbitrator conducted the hearing contrary to the provisions the Consumer and Small Business Arbitration Act;
- The arbitration award is inconsistent with applicable law, violates public policy, is arbitrary or capricious or lacks a rational basis, or is not supported by substantial evidence;
- The arbitration was conducted in a manner that was not fundamentally fair.

Parties may not narrow or expand the grounds for vacating an award. A motion to vacate an award must be filed under Rule 1.540 of the Florida Rules of Civil Procedure, which provides for relief from judgments.

### Modification of an Award

This bill provides that upon application within 90 days after the date of delivery of a copy of the award to an applicant, the court must modify or correct the award if:

- There is an evident miscalculation of the figures or an evident mistake;
- The arbitrator has made an award on a matter not submitted to him or her; or
- The award is imperfect as a matter of form.

The court must modify and correct the award to effect its intent if the application is accepted. Otherwise, the court must confirm the award as made. An application for modification may be joined with an application to vacate the award in the alternative. However, filing a motion to modify or correct an award tolls the time for taking any other action.

## Appeals

A final appeal, or an interlocutory appeal may be taken from an appropriate court as a result of:

- An order denying or granting an application to compel arbitration;
- An order denying or granting an application to stay arbitration;
- A decision regarding the impartiality or lack of conflict on the part of an arbitrator;
- An evidentiary ruling after a final award or decision, except a ruling concerning evidentiary privileges or confidentiality rights of the parties;
- An order confirming or denying confirmation of an award; or
- A judgment or decree entered under the Consumer and Small Business Arbitration Code.

The following may be reviewed by a writ of certiorari:<sup>26</sup>

- A ruling concerning evidentiary privileges or confidentiality rights of the parties or
- A ruling concerning a protective order relating to the disclosure of privileged information, confidential information, or trade secrets.

## Disclosure Provisions

An arbitration agreement must provide in bold type no smaller than size 18 point font and on a separate sheet of paper:

- The filing fee for the arbitration proceeding;
- The average daily costs for the arbitrator, umpire, and hearing room;
- Any other charges;
- The proportion of each party's costs;
- A place where a consumer may choose not to arbitrate; and
- Any and all conditions precedent that must occur before a party may demand arbitration.

Failure to provide any of these disclosures constitutes a deceptive and unfair trade practice under the Florida Deceptive and Unfair Trade Practices Act. Upon a violation, any party or person, including the Attorney General, may petition the court to enjoin the party from violating the Consumer and Small Business Arbitration Act in the future. The violating party is liable to the person or entity who brings the action for reasonably attorney's fees and costs if the court issues an injunction or if the party voluntarily complies.

### B. SECTION DIRECTORY:

Section 1 re-titles the Arbitration Act as the Arbitration Code.

Section 2 amends s. 682.01, F.S., relating to the short title, the "Florida Arbitration Code."

Section 3 creates ss. 682.501, 682.502, 682.503, 682.504, 682.505, 682.506, 682.507, 682.508, 682.509, 682.510, and 682.511, F.S., relating to the consumer business arbitration act.

Section 4 provides an effective date of July 1, 2009.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

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<sup>26</sup> An extraordinary writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review. Black's Law Dictionary, pg. 91. (Second Pocket Edition, 2001).

2. Expenditures:

See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

To the extent that this bill requires more cases to be heard by the courts, the bill appears to have an indeterminate minimal negative fiscal impact on the court system.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

Article I, Section 10 of the Florida Constitution provides that "No... law impairing the obligation of contracts shall be passed." There are several factors, which a court looks at to determine whether there is an impairment of contractual obligations:

- Whether the law was enacted to deal with a broad economic or social problem;
- Whether the law operates in an area that was already subject to state regulation at the time the contract was entered into; and
- Whether the effect on the contractual relationship is temporary: not severe, permanent, immediate, and retroactive.

A court may find that this bill impairs contracts by prohibiting the use of arbitration agreements in all insurance policies already in existence. However, a court may find that it deals with a broad economic or social problem.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

This bill provides that a list of certified arbitrators must be sent to the parties if they do not agree on an arbitrator. However, the Florida Supreme Court does not currently certify arbitrators. Therefore, it is unclear what type of certification is required.

This bill requires arbitrators to comply with Canon 1 and 3 of the Code of Judicial Conduct. However, the judicial conduct rules were intended to apply only to the judiciary and, thus, reference the judiciary.

It might be more appropriate to provide that arbitrators must uphold the integrity and independence of arbitrators and perform the duties of arbitration impartially and diligently.

This bill does not specify who pays for serving a copy of a prospective arbitrators oath on each party. In addition, this bill does not specify how service of the copy is to be made.

Line 225 references "decisionmakers," which appears to be a typographical error.

#### **IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

N/A