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BACK TO *PRIMA PAINT CORP. V. FLOOD & CONKLIN MANUFACTURING CO.*: TO CHALLENGE AN ARBITRATION AGREEMENT YOU MUST CHALLENGE THE ARBITRATION AGREEMENT

Andre V. Egle

Abstract: The Federal Arbitration Act (FAA) requires courts to order parties in a dispute arising out of a commercial contract containing an arbitration provision to proceed to arbitration unless the formation or performance of the arbitration agreement itself is at issue. In 1967, the U.S. Supreme Court held in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* that under the FAA, courts, instead of arbitrators, should resolve claims for fraudulent inducement of arbitration agreements. However, courts were not permitted to resolve claims for fraud in the inducement of the underlying commercial contracts. The Court also held that when deciding whether to enforce an arbitration agreement, a court should only consider the issues related to making and performing that agreement. The federal circuit courts have applied *Prima Paint* in two ways. The Third, Ninth, and Eleventh Circuits have held that a court may consider a claim that a commercial contract containing an arbitration agreement is void, even if the party has not alleged that the arbitration agreement is invalid. In contrast, the Fifth and Sixth Circuits have held that alleging that a contract is void is not enough to put the contract's arbitration agreement at issue under the FAA and *Prima Paint*. This comment argues that to put an arbitration agreement at issue a party should specifically plead that it is invalid. A mere allegation that the underlying commercial contract is void is insufficient because federal law encourages arbitration and treats arbitration agreements as severable from the contracts in which they are included. Only if a court finds that an arbitration clause is merely a part of the underlying commercial contract should the court resolve a claim that the contract is void.

In 1925, Congress passed the United States Arbitration Law codified as the Federal Arbitration Act (FAA).[1] The FAA was Congress' response to the reluctance of federal courts to enforce arbitration agreements.[2] The FAA requires courts to order arbitration of a dispute arising out of a contract containing an arbitration provision unless the formation or performance of the arbitration agreement is not in issue.[3] Since then, arbitration of controversies arising out of maritime and commercial transactions has become an increasingly popular means of dispute resolution. However, it is common for the parties to arbitration agreements to challenge the validity of the agreements in a judicial forum. The challenges are especially common when a commercial or

1. 9 U.S.C. §§ 1–16 (2000).

2. *See* Julius H. Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 265 (1926) (noting that the FAA "reversed the hoary doctrine that agreements for arbitration are revocable at will and are unenforceable").

3. *See* 9 U.S.C. § 4; Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403 (1967).

maritime contract contains broad boilerplate language mandating arbitration of "any controversy or claim arising out of or relating to [the] contract."[4] In many cases, the party that wants to avoid arbitration asserts that the arbitration agreement is invalid merely because the underlying contract is deficient. Lower federal courts have reached different conclusions as to whether a federal court or an arbitrator should resolve these challenges in light of the relevant provisions of the FAA[5] and the U.S. Supreme Court's decision in *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*[6]

The FAA is a powerful statute that governs enforceability of the majority of commercial arbitration agreements throughout the nation and preempts any additional requirements for arbitration agreements imposed by states.[7] The FAA mandates that federal courts enforce an arbitration provision "in any maritime transaction or a contract evidencing a transaction involving commerce"[8] if the provision satisfies three conditions. First, it must be in writing.[9] Second, the arbitration provision must relate to a maritime transaction or a transaction involving interstate commerce.[10] Third, the arbitration agreement must be valid and able to withstand any legal or equitable grounds for the revocation of any contract.[11]

Many courts have addressed the FAA's requirement that, before a federal court may enforce an agreement to arbitrate, the agreement must be as valid as any other contract.[12] More specifically, courts have reached different conclusions regarding whether a court or an arbitrator should resolve challenges to the validity of an arbitration clause that is a part of a larger commercial contract. A partial answer to this question was provided by the U.S. Supreme Court in 1967 in *Prima Paint.*[13] There, the

4. *See, e.g.*, Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51, 53 n.1 (3d Cir. 1980).

5. *See* 9 U.S.C. §§ 2–4 (2000).

6. 388 U.S. 395 (1967).

7. *See* Southland Corp. v. Keating, 465 U.S. 1, 10–15 (1984) (explaining that the FAA has created a substantive federal law that preempts conflicting state law provisions as to enforceability of arbitration agreements involving interstate commerce and maritime transactions).

8. 9 U.S.C. § 2 defines "commerce" for FAA purposes as "commerce among the several States or with foreign nations." Section 1 further specifically excludes from "commercial contracts" under the FAA "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Id.* § 1.

9. *See* 9 U.S.C. § 1.

10. *See id.*

11. *See id.* § 2.

12. *Id.*

13. 388 U.S. 395 (1967).

Court held that when determining the validity of an arbitration agreement a federal court can only consider issues related to the formation and performance of the arbitration agreement itself.[14] The Court also stated that if a party challenges the arbitration clause itself as fraudulently induced, courts may proceed to resolve the challenge.[15] However, the Court did not settle the question of whether a claim that the entire contract, and thus an arbitration clause contained therein, is void and unenforceable should be resolved in court or in arbitration.

Prima Paint has prompted conflicting decisions in the federal Circuit Courts regarding the validity of arbitration agreements under the FAA.[16] The main point of controversy among the Circuit Courts relates to a situation where a party challenges the arbitration agreement by alleging that the underlying commercial contract is void, instead of voidable. A contract is voidable if it is generally valid, but one or more parties to the contract has the power to avoid the contractual relationship on grounds such as fraud in inducement of the contract, duress, or mistake.[17] In contrast, a contract is void if one of its essential elements, such as mutual assent, is missing.[18] A void contract is not a contract at all; it is a "promise" or "agreement" that is void of legal effect.[19] Circuit Courts for the Third, Ninth, and Eleventh Circuits have held that *Prima Paint*'s holding—that courts should only resolve allegations of the invalidity of an arbitration agreement itself—does not apply when the validity of the entire contract is challenged.[20] Therefore, these courts hold that judges—not arbitrators—should consider the contract's validity. In contrast, the appellate courts for the Fifth and Sixth Circuits have taken the position that even if a party to the contract claims that the contract is void, the party must specifically allege that the arbitration provision is invalid before the court may consider the challenges to the contract.[21]

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14. *Id.* at 404.

15. *Id.*

16. *See* Burden v. Check Into Cash of Ky., LLC, 267 F.3d 483, 488 (6th Cir. 2001) (summarizing approaches of Courts of Appeals to interpretation of *Prima Paint*).

17. *See* RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. b (1981).

18. *See id.* cmt. a.

19. *See id.*

20. *See, e.g.*, Sandvik AB v. Advent Int'l Corp., 220 F.3d 99, 107 (3d Cir. 2000); Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136, 1140 (9th Cir. 1991); Chastain v. Robinson-Humphrey Co., 957 F.2d 851, 854 (11th Cir. 1992).

21. *See, e.g.*, Lawrence v. Comprehensive Bus. Servs. Co., 833 F.2d 1159, 1161–62 (5th Cir. 1987); C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Secs. Corp., 912 F.2d 1563, 1567–68 (6th Cir. 1990).

This Comment argues that under *Prima Paint*, federal courts should determine the enforceability of an arbitration provision in a commercial or maritime contract only if a party to the contract specifically alleges that the provision should be revoked as invalid at law or in equity. A specific challenge to an arbitration clause is required even in situations where a party to the contract alleges that the entire contract is void. As an alternative, a party may challenge an arbitration clause by asserting the invalidity of the entire contract only if the arbitration clause is not severable from the contract. Part I explains that the FAA promotes enforcement of arbitration agreements and that, in most cases, the FAA and the courts treat arbitration agreements as severable from the rest of the contract. Part II discusses the U.S. Supreme Court's opinion in *Prima Paint*. Part III discusses Circuit Courts' interpretation of *Prima Paint* and describes the two major approaches used in the different Circuits. Part IV argues that the FAA and *Prima Paint* require parties who ask federal courts to resolve disputes arising under contracts containing an arbitration provision to specifically allege and prove that the provision is invalid.

I. THE FAA PROMOTES ENFORCING ARBITRATION AGREEMENTS AND DIRECTS FEDERAL COURTS TO ENFORCE THEM AS SEVERABLE FROM THE UNDERLYING CONTRACTS

Congress adopted the FAA to create an enforcement mechanism for otherwise valid arbitration agreements in commercial and maritime transactions.[22] The FAA was intended to further arbitration as a means of alternative dispute resolution that would eliminate the delays associated with judicial proceedings, avoid the expense of litigation, and promote decisions regarded as just in the business world.[23] Federal courts had in the past treated arbitration agreements as not binding and revocable at will.[24] However, Congress strongly encouraged courts to enforce arbitration agreements by explicitly stating in the FAA that written arbitration provisions in maritime transactions and transactions involving interstate commerce should be "valid, irrevocable, and enforceable."[25]

22. Cohen & Dayton, *supra* note 2, at 275–78.

23. *Id.* at 269.

24. *Id.* at 265.

25. 9 U.S.C. § 2 (2000).

The U.S. Supreme Court has also favored enforcing arbitration agreements in commercial contracts. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,[26] the Court determined that Congress declared a liberal policy favoring arbitration agreements in the FAA and created "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act."[27] Further, the Court stated that any doubts regarding the scope of arbitrable issues, such as construction of the contractual language or the defenses to arbitration, should be resolved in favor of arbitration.[28]

The FAA is a powerful substantive and procedural statute that preempts all inconsistent state laws and promotes uniformity in enforcement of arbitration agreements.[29] The Act applies to any arbitration agreements relating to interstate commerce or maritime transactions.[30] Significantly, the FAA treats arbitration agreements as severable from the contracts that contain them.[31]

A. The FAA Promotes Arbitration

Prior to the FAA's enactment, American courts acknowledged arbitration as an option but adhered to the traditional view that arbitration agreements are revocable at will and should not be enforced by courts.[32] As a result, a party that wanted to avoid an arbitration agreement only had to refuse to proceed and the court would not enforce the agreement.[33] Suing for damages arising out of the breach of the arbitration agreement generally could not adequately redress the aggrieved party's inability to arbitrate.[34] Thus, no meaningful remedy existed for the intentional breach of arbitration agreements. Congress passed the FAA to remedy courts' reluctance to enforce arbitration agreements.[35]

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26. 460 U.S. 1 (1983).

27. *Id.* at 24 (interpreting section 2 of the FAA codified as 9 U.S.C. § 2).

28. *Id.* at 24–25.

29. *See infra* Part I.B.

30. *See infra* Part I.B.

31. *See infra* Part I.C.

32. *See* Cohen & Dayton, *supra* note 2, at 270.

33. *See id.*

34. *Id.*

35. *See* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219 (1985) ("The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate.").

Section 2 of the FAA, passed in 1925, states that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable."[36] According to the statute, arbitration agreements may be enforced in two ways. First, under section 3 of the FAA, a party wishing to enforce an arbitration agreement related to ongoing litigation can apply for a stay of the litigation.[37] In this situation, the court where the law suit is pending, "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration . . . shall . . . stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement."[38] Second, under section 4 of the FAA, a party purporting to arbitrate a dispute *before* the other party files a law suit may petition the court for an order directing the parties to proceed with arbitration under the agreement.[39] Here, the court "upon being satisfied that the making of the agreement for arbitration . . . is not in issue . . . shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."[40]

Congress adopted the FAA to encourage the arbitration of contract disputes and to provide an enforcement mechanism for private arbitration agreements.[41] However, the foremost purpose of the FAA was to encourage courts to enforce arbitration agreements by ordering specific performance in situations where a party refuses to comply with the agreement's terms.[42] No such remedy existed in federal courts prior to enactment of the FAA.[43] In addition, Julius Henry Cohen, the American Bar Association's draftsman of the FAA, suggested that the purpose

36. 9 U.S.C. § 2 (2000).

37. *See id.*

38. *Id.*

39. *See id.* § 4.

40. *Id.*

41. *See generally* Cohen & Dayton, *supra* note 2; *see also* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219 (1985) ("The preeminent concern of Congress in passing the Act was to enforce private [arbitration] agreements into which parties had entered and that concern requires that [federal courts] rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute.").

42. *See* Cohen & Dayton, *supra* note 2, at 271–72.

43. *See id.* at 276 (explaining that prior to enactment of the FAA federal courts recognized the existence and validity of arbitration agreements, but refused to enforce them by way of specific performance); *see also Byrd*, 470 U.S. at 219–20 (pointing out that Congress adopted the FAA "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate").

behind the Act was in line with the threefold purpose of arbitration as a means of alternative dispute resolution.[44] First, arbitration would effectively eliminate the long delays usually incident to court proceedings.[45] Second, arbitration would help parties to avoid the expense of litigation.[46] Third, arbitration, rather than regular judicial proceedings, would provide a better means of reaching a decision regarded as just in the business world.[47] The third purpose is particularly important because courts mainly apply general rules that may not fit a particular commercial dispute.[48] Further, in an ordinary jury trial, a dispute may not receive an adequate analysis because of the jurors' lack of expertise in commercial matters, whereas an experienced commercial arbitrator can skillfully scrutinize a complex dispute.[49]

Consistent with arbitration's purpose to prevent long delays in court proceedings, the U.S. Supreme Court has stated on several occasions that the FAA's ultimate goal is to "move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."[50] For example, in *Moses H. Cone*, the Court explained that the liberal federal policy favoring the enforcement of arbitration agreements stems directly from section 2 of the FAA.[51] The Court declared that under the FAA, any doubts as to the scope of issues subject to arbitration should be resolved in favor of arbitration.[52] The lower federal courts have followed the Court's pro-arbitration policy.[53]

B. The FAA Preempts Inconsistent State Law

The FAA has both substantive and procedural components. It is substantive because it sets uniform requirements for the enforceability of

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44. *See* Cohen & Dayton, *supra* note 2, at 269.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *See id.*

50. *See, e.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 22 (1983); *see also* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995) (stating that when courts interpret arbitration agreements "due regard must be given to the federal policy favoring arbitration") (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989)).

51. *See supra* note 36 and accompanying text; *Moses H. Cone*, 460 U.S. at 24.

52. *Moses H. Cone*, 460 U.S. at 24–25.

53. *See, e.g.*, Doctor's Assocs., Inc. v. Distajo, 66 F.3d 438, 453 (2d Cir. 1995); Wilson Elec. Contractors, Inc. v. Minnotte Contracting Corp., 878 F.2d 167, 169 (6th Cir. 1989).

any arbitration agreements relating to certain types of transactions.[54] For example, section 2 of the FAA states that a written arbitration provision "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[55] However, the FAA is also a procedural statute because it spells out the procedures that federal courts must follow when enforcing valid arbitration agreements. Under the FAA, courts must "make an order directing the parties to proceed to arbitration" upon satisfaction that "the making of the agreement for arbitration or the failure to comply therewith is not in issue."[56] This procedural scheme ensures that valid arbitration agreements are properly enforced.

The U.S. Supreme Court has interpreted the FAA to have created federal substantive arbitration law[57] that preempts all state laws that set additional requirements and limitations on the enforceability of arbitration agreements.[58] The Court has held that the FAA governs the enforceability of arbitration agreements in both federal and state courts "notwithstanding any state substantive or procedural policies to the contrary."[59] Therefore, the FAA applies to any arbitration agreements relating to interstate commerce or maritime transactions, regardless of whether a party seeks to enforce the arbitration agreement in a federal or state court.[60]

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54. *See Moses H. Cone*, 460 U.S. at 24.

55. 9 U.S.C. § 2 (2000).

56. *Id.* § 4.

57. *See Moses H. Cone*, 460 U.S. at 25 n.32; Southland Corp. v. Keating, 465 U.S. 1, 11 (1984) (stating that "the FAA rests on the authority of Congress to enact substantive rules under the Commerce clause [of § 8 of Article I of the Constitution]," which implies that the substantive rules of the Act should bind both state and federal courts). *See also* Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 407 (2d Cir. 1959) (stating that Congress used its Article I, § 8, clause 3 power to enact § 2 of the FAA which is a "declaration of national [substantive arbitration] law equally applicable in state or federal courts"). *But see Keating*, 465 U.S. at 21–36 (O'Connor, J., dissenting) (arguing that the FAA is a merely procedural statute that Congress adopted through exercise of its power to control jurisdiction of lower federal courts under Article III of the Constitution, which grants to Congress no power to control proceedings in state courts); Cohen & Dayton, *supra* note 2, at 266 (noting that the FAA was intended to reverse "the hoary doctrine that agreements for arbitration are revocable at will and are unenforceable").

58. *See Keating*, 465 U.S. at 10–15.

59. *Moses H. Cone*, 460 U.S. at 24.

60. *See id.* at 14–15. The Court has emphasized, however, that the FAA does not create independent federal question jurisdiction under 28 U.S.C. § 1331. *Id.* at 25 n.32. The necessity of an independent ground for federal subject matter jurisdiction in suits to enforce arbitration agreements under the FAA is implicit in language of section 4 of the FAA providing that "any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the

C. *Arbitration Clauses are Severable Under the FAA*

According to section 2 of the FAA, arbitration clauses are severable from the contracts that contain them.[61] Section 2 states that a written arbitration provision in a contract "shall be valid, irrevocable, and enforceable."[62] Thus, the FAA provides that an arbitration clause may be separately enforced unless there are any legal or equitable grounds for its revocation.[63] This conclusion stems from the statute's specific focus on arbitration provisions as separate contractual units. Indeed, section 2 of the FAA specifically mentions the enforceability of an arbitration provision "in any maritime transaction or contract" as independent from the enforceability of the contract itself.[64] Thus, at least one circuit has held that the statute "does not purport to affect the contract as a whole."[65]

In addition, federal and state courts have always treated arbitration agreements as independent contracts.[66] For example, in *Hamilton v. Home Insurance Co.*,[67] the U.S. Supreme Court explicitly stated that "it is . . . well settled that the agreement [to arbitrate] . . . is collateral and independent; and that a breach of this agreement, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract."[68] Further, courts' treatment of arbitration agreements as severable contractual units has not been affected by the passage of the FAA. In the years following the adoption of the Act, courts have held that the illegality of part of the contract does not operate to nullify an agreement to arbitrate.[69] Finally, the Court in *Prima Paint* affirmed the position that, under the FAA, arbitration agreements are severable from the contracts in which they are embedded.[70]

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parties." *Keating*, 465 U.S. at 15 n.9 (quoting 9 U.S.C. § 4). Thus, before a federal court may issue an order compelling arbitration under § 4 of the FAA, there must be diversity of citizenship or some other independent basis for federal subject matter jurisdiction. *See Moses H. Cone*, 460 U.S. at 26.

61. *See* Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 409–10 (2d Cir. 1959).

62. 9 U.S.C. § 2 (2000).

63. *See id.*

64. *See id.* (emphasis added); *Robert Lawrence*, 271 F.2d at 409–10 (emphasis added).

65. *Robert Lawrence*, 271 F.2d at 409–10.

66. *Id.* at 410.

67. 137 U.S. 370 (1890).

68. *Id.* at 385.

69. *See generally* Lawrence v. Comprehensive Bus. Servs. Co., 833 F.2d 1159 (5th Cir. 1987); Wilko v. Swan, 201 F.2d 439 (2d Cir. 1953), *rev'd on other grounds*, 346 U.S. 427 (1953); Watkins v. Hudson Coal Co., 151 F.2d 311 (3d Cir. 1945).

70. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403 (1967); Snowden v. Checkpoint Cashing; Elite Fin. Serv., Inc., 290 F.3d 631, 637 (4th Cir. 2002) (noting *Prima Paint*'s

In sum, the FAA treats arbitration agreements as severable from commercial contracts that contain them and promotes their enforcement as long as the agreements satisfy the basic elements of any valid contract.[71] The U.S. Supreme Court has interpreted the FAA as creating a federal policy favoring arbitration.[72] Both substantive and procedural aspects of the FAA further the statute's main goal—to make specific performance of arbitration agreements available to aggrieved parties.[73]

II. IN *PRIMA PAINT*, THE COURT HELD THAT UNDER THE FAA, A COURT MAY CONSIDER CLAIMS FOR FRAUD IN THE INDUCEMENT OF AN ARBITRATION CLAUSE, BUT NOT FRAUD IN THE INDUCEMENT OF THE ENTIRE CONTRACT

In *Prima Paint* the U.S. Supreme Court interpreted section 4 of the FAA and held that when a person alleges that a contract containing an arbitration clause is invalid on grounds of fraudulent inducement, a federal court can only resolve challenges of fraudulent inducement concerning the arbitration clause itself.[74] Moreover, the Court emphasized that when ruling upon an application for stay of the action pending arbitration, "a federal court may consider only issues relating to the making and performance of the agreement to arbitrate."[75] According to the Court, challenges of fraud in inducement of the underlying contract should be reserved for an arbitrator.[76] Given the specific factual setting of the case,[77] the Court did not decide how to allocate the respective authorities of a court and an arbitrator in cases where a party asserts that the contract containing an arbitration clause is void from its

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holding that federal courts should consider only issues relating to the making and performance of arbitration agreements "has come to be known as the severability doctrine"); Stevens/Leinweber/Sullens, Inc. v. Holm Dev. & Mgmt, Inc., 795 P.2d 1308, 1312–13 (Ariz. App. 1990) (stating that under the concept of separability endorsed by *Prima Paint*, "an arbitration provision is considered to be an independent and separate agreement between the parties to the underlying contract").

71. *See* 9 U.S.C. § 2 (2000).

72. *See Moses H. Cone*, 460 U.S. at 24.

73. *See supra* notes 41–43 and accompanying text.

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

75. *Id.* at 404.

76. *Id.*

77. The plaintiff in *Prima Paint* alleged that the contract containing the arbitration provision was a result of fraudulent inducement, i.e., that it was voidable. *See id.* at 398.

very inception[78] and argues that the arbitration clause is automatically invalid as well.

Prima Paint was the first and only Supreme Court case to interpret the FAA in the context of the allocation of the respective powers of a federal court and an arbitrator. The ultimate issue in *Prima Paint* was whether a federal court or an arbitrator should resolve a claim of fraud in the inducement of a contract containing an arbitration clause.[79] The Court held that a federal court deciding whether to stay an action and order arbitration under section 3 of the FAA "may consider only issues relating to the making and performance of the *agreement to arbitrate*."[80] More specifically, the Court determined that if a party to the contract asserts a claim of fraud in the inducement of the arbitration clause itself, a federal court can adjudicate such a claim.[81] However, the FAA does not authorize a federal court to resolve claims of fraud in the inducement of the contract as a whole.[82]

Prima Paint involved a consulting agreement between two corporations.[83] This agreement followed the formation of a contract under which the plaintiff purchased the defendant's paint business.[84] The consulting agreement contained a broad arbitration clause providing that "any controversy or claim arising out of or relating to this Agreement, or breach thereof, shall be settled in arbitration in the City of New York."[85] After the defendant had filed a bankruptcy petition, the plaintiff refused to perform the consulting agreement and filed suit in a federal court seeking rescission of the agreement on the ground that the agreement was fraudulently induced by the defendant's misrepresentation of its solvency.[86] The district court granted the defendant's motion to stay the action pending arbitration,[87] holding that an allegation of fraud in the inducement of a contract containing an arbitration clause was a question

78. *See* Sandvik AB v. Advent Int'l Corp., 220 F.3d 99, 105 (3d Cir. 2000) ("[T]he Supreme Court in *Prima Paint*] did not grapple with what is to be done when a party contends not that the underlying contract is merely voidable, but rather that no contract ever existed.").

79. *Prima Paint*, 388 U.S. at 396–97.

80. *Id.* at 404 (emphasis added).

81. *Id.* at 403–04.

82. *Id.* at 404.

83. *Id.* at 397.

84. *Id.*

85. *Id.* at 398.

86. *Id.*

87. *Id.* at 399.

for the arbitrator and not for the court.[88] The U.S. Supreme Court affirmed.[89]

The Court emphasized that section 4 of the FAA allows federal courts to resolve only claims of fraud in inducement of an arbitration clause itself, not claims of fraud in the inducement of the underlying contract.[90] According to the Court, Congress's explicitly mandated such scheme.[91] This section 4 axiom prompted the Court to acknowledge the Second Circuit's position in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*[92] that as a matter of federal law arbitration clauses are separable from contracts where they are included.[93] Consequently, the *Prima Paint* Court agreed with the lower court's holding that the arbitration agreement was severable from the commercial contract for the purpose of evaluating claims of fraudulent inducement of the underlying contracts.[94]

Because of the case's factual setting, the *Prima Paint* Court focused solely on situations where a party challenges the entire contract as *fraudulently induced*,[95] i.e., where the party asserts that the contract is *voidable*. A contract is voidable even if it is generally valid, but one or more parties to the contract have the power to avoid the contractual relationship on grounds such as fraud in inducement of the contract, duress, or mistake.[96] The Court did not consider how the authority of a court and an arbitrator would be allocated in a case where a party asserts that a contract containing the arbitration clause was *fraudulently executed*,[97] i.e., that the contract is *void* from its very inception. A

88. *Id.* (noting that the arbitration clause in the agreement gave the arbitrator very broad authorities).

89. *Id.* at 407.

90. *Id.* at 403–04.

91. *Id.* at 403.

92. 271 F.2d 402 (2d Cir. 1959).

93. *See id.* at 409–10.

94. *See* Doctor's Assocs., Inc. v. Distajo, 66 F.3d 438, 452 (2d Cir. 1995) (noting that the U.S. Supreme Court in *Prima Paint* endorsed the Second Circuit's position that an arbitration clause is a separable part of the contract); *see also* Burden v. Check Into Cash of Ky., LLC, 267 F.3d 483, 488 (6th Cir. 2001) (stating that "[t]he Court in *Prima Paint* found that arbitration clauses were 'separable' from the contracts in which they were included").

95. Fraud in inducement occurs when there is a genuine mutual assent to the contract but one of the parties misrepresents certain facts, such as the quality of goods. *See* E. ALAN FARNSWORTH, CONTRACTS § 4.10, at 243–44 (3d ed. 1999).

96. *See* RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. b (1981).

97. As opposed to fraud in inducement of a contract, fraud in execution, also know as fraud in factum, occurs when the misrepresentation goes "to the very character of the proposed contract itself, as when one party induces the other to sign a document by falsely stating that it has no legal effect." *See* FARNSWORTH, *supra* note 95, at 243. If the other party neither knows nor has reason to

contract is void if one of its essential elements, such as mutual assent, is missing; a void contract is not a contract but merely a "promise" or "agreement" that is void of legal effect.[98] Nevertheless, in *Prima Paint*, the Court made it clear that a federal court should order arbitration once it is satisfied that "the *making of the agreement for arbitration* . . . is not in issue."[99]

In *Prima Paint*, the U.S. Supreme Court confirmed the FAA's mandate that a federal court should decide the validity of an arbitration agreement only if a party specifically puts the arbitration agreement at issue.[100] Under the Court's ruling in *Prima Paint*, an arbitrator should rule upon a party's claim for fraud in inducement of the underlying commercial contract, but a court should rule upon a claim of fraud in inducement of the arbitration clause.[101] The Court did not decide whether a court or an arbitrator should resolve a party's claim of fraud in the execution of the contract. Significantly, the Court treated the arbitration agreement and the commercial contract as separate and independent of one another.[102]

III. FEDERAL COURTS ARE DIVIDED AS TO HOW THE *PRIMA PAINT* RULE APPLIES WHERE A PARTY DOES NOT SPECIFICALLY CHALLENGE AN ARBITRATION PROVISION BUT ASSERTS FRAUD IN EXECUTION OF THE CONTRACT

The lower federal courts have applied *Prima Paint* in different ways. The Third, Ninth, and Eleventh Circuits have limited *Prima Paint*'s application to claims of fraud in the inducement of a contract containing an arbitration clause, i.e., claims where a party to a valid commercial contract seeks to avoid or rescind the contract by arguing that it is voidable.[103] These courts have held that if a party alleges that a contract

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know the character of the proposed agreement, the misrepresentation nullifies any effect of the contract or makes the contract void ab initio. *Id.*

98. *See* RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. a (1981).

99. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403 (1967) (emphasis added).

100. *Id.* at 404.

101. *Id.* at 403–04.

102. *See id.*

103. *See, e.g.*, Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136, 1140 (9th Cir. 1991) (holding that *Prima Paint* is limited "to challenges seeking to *avoid* or *rescind* a contract," and that *Prima Paint* does not apply to allegations that the contract containing an arbitration clause lacked assent) (emphasis in original); *see also* Burden v. Check Into Cash of Ky.,

with an arbitration clause was never legally formed because it lacked mutual assent, a court, not an arbitrator, should decide whether the contract is valid.[104] Thus, by alleging that the entire contract is void, a party may successfully avoid arbitration. In contrast, the Fifth and Sixth Circuits have held that a party purporting to avoid arbitration of disputes arising out of a commercial contract must specifically challenge the validity of the arbitration clause.[105] Thus, a party in the Fifth or Sixth Circuits cannot avoid arbitration by merely alleging that the entire contract is void.

A. *The Third, Ninth, and Eleventh Circuits Have Limited* Prima Paint *to Claims of Fraudulent Inducement*

The Third, Ninth, and Eleventh Circuits have held that *Prima Paint* does not apply to contracts that are fraudulently executed, such as in situations where a party asserts that the arbitration clause is invalid because the underlying contract is void from its very inception. The courts reason that a party alleging that it never assented to the contract with an arbitration provision challenges "the very existence of *any* agreement, *including the existence of an agreement to arbitrate.*"[106] The Ninth Circuit's decision in *Three Valleys Municipal Water District v. E.F. Hutton & Co.*[107] took the lead in developing this theory. The Ninth Circuit held that *Prima Paint* applies to arbitration provisions in voidable contracts, but does not apply to arbitration agreements in contracts void from their very inception.[108] Since *Three Valleys*, the Third and Eleventh Circuits have followed the Ninth Circuit's approach.[109]

In *Three Valleys*, the Ninth Circuit held that the *Prima Paint* rule is limited to claims of avoidance or rescission of a contract.[110] *Three*

LLC, 267 F.3d 483, 488 (6th Cir. 2001) (summarizing the cases where courts found that *Prima Paint* does not apply to allegations of non-existent contracts).

104. *See, e.g.*, Sandvik AB v. Advent Int'l. Corp., 220 F.3d 99, 107 (3d Cir. 2000).

105. *See* Lawrence v. Comprehensive Bus. Servs. Co., 833 F.2d 1159, 1162 (5th Cir. 1987); *Burden*, 267 F.3d at 488; C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Secs. Corp., 912 F.2d 1563, 1567–68 (6th Cir. 1990); Lawrence v. Comprehensive Bus. Servs. Co., 833 F.2d 1159, 1162 (5th Cir. 1987).

106. Chastain v. Robinson-Humphrey Co., 957 F.2d 851, 854 (11th Cir. 1992) (emphasis in original).

107. 925 F.2d 1136 (9th Cir. 1991).

108. *See id.* at 1140.

109. *See, e.g.*, *Chastain*, 957 F.2d at 855; *Sandvik*, 220 F.3d at 106–07.

110. *Three Valleys*, 925 F.2d at 1140.

Valleys involved arbitration clauses in securities accounts agreements.[111] The plaintiffs alleged that the district court could not compel arbitration because the defendant's representative who signed the agreements had no authority to do so.[112] Thus, the plaintiffs challenged the agreements as void from their inception based on a lack of the plaintiffs' assent. The Ninth Circuit agreed.[113]

Focusing on *Prima Paint*'s factual setting,[114] the Ninth Circuit reasoned that the ruling in *Prima Paint* authorized arbitrators to consider only claims for *fraudulent inducement* of a contract, as opposed to claims for *fraud in the execution* of a contract.[115] Thus, the Ninth Circuit limited the scope of *Prima Paint*'s rule to challenges "seeking to *avoid* or *rescind* the contract."[116] The court reasoned that if a party challenges the very existence of a contract in which the arbitration clause is embedded,[117] a district court should resolve such a claim because the challenging party may have never agreed to the authority of an arbitrator.[118]

Similarly, in *Chastain v. Robinson-Humphrey Co.*,[119] the Eleventh Circuit held that *Prima Paint* does not apply when a party contends that the contract containing an arbitration provision is void.[120] In *Chastain*, the plaintiff claimed that she never assented to either the arbitration agreement or the underlying contract.[121] The plaintiff's father opened a securities trading account with the defendant,[122] executing two customer agreements in connection with the account.[123] One of the agreements bore the plaintiff's name, but the plaintiff did not personally sign the agreement.[124] The second agreement bore the defendant's name only.[125] The plaintiff alleged that she had never authorized her father to open the

111. *Id.* at 1137.
112. *Id.* at 1138.
113. *Id.* at 1139–41.
114. *See supra* notes 83–88 and accompanying text.
115. *Three Valleys*, 925 F.2d at 1140.
116. *Id.* (emphasis in original).
117. *Id.* at 1137.
118. *See id.* at 1140.
119. 957 F.2d 851 (11th Cir. 1992).
120. *Id.* at 855.
121. *Id.* at 853.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*

account in her name.[126] Thus, the plaintiff alleged that both the arbitration agreement and the underlying contract were void from their very inception because the plaintiff's signature was forged. *Chastain* presented a factual situation upon which the U.S. Supreme Court in *Prima Paint* had not ruled: where a party to the commercial contract containing an arbitration clause asserts that the contract was void from its very inception.

The Eleventh Circuit concluded in *Chastain* that if a party disputes signing the contract that requires arbitration, then that party may not have agreed to proceed with arbitration at all.[127] In the court's view, alleging a lack of assent precluded resolving the dispute by arbitration.[128] The court considered the *Prima Paint* ruling to be distinguishable because it did not require "arbitrators to adjudicate a party's contention . . . that a contract never existed at all."[129] The court reasoned that alleging that a contract was invalid was enough to cast doubt on the validity of the arbitration agreement.[130]

In line with *Three Valleys* and *Chastain*, the Third Circuit held in *Sandvik AB v. Advent International Corp.*,[131] that under the Court's ruling in *Prima Paint*, an arbitrator's jurisdiction should be limited to resolution of claims of inducement of the contract containing an arbitrtation clause.[132] In *Sandvik*, the plaintiff claimed breach of a joint venture agreement containing an arbitration clause.[133] The defendant responded that the agreement was void because its agent lacked authority to sign the agreement.[134] At the same time, the defendant moved to compel arbitration under the FAA.[135] The defendant explained that its dispute of the existence of the contract does not automatically assume the dispute of the arbitration clause contained therein.[136] The district court

126. *Id.*

127. *Id.* at 854.

128. *Id.* (citing Cancanon v. Smith Barney, Harris, Upham & Co., 805 F.2d 998, 1000 (11th Cir. 1986)).

129. *Id.* at 855.

130. *See id.*

131. 220 F.3d 99 (3d Cir. 2000).

132. *Id.* at 106–07.

133. The arbitration clause provided that "[a]ny dispute arising out of or in connection with this agreement . . . shall . . . be finally settled by arbitration in accordance with the rules of the Netherlands Arbitration Institute." *Id.* at 101.

134. *Id.* at 100.

135. *Id.*

136. *See id.*

denied the defendant's motion to compel, reasoning that the challenge to the existence of the underlying contract was sufficient to put the validity of the arbitration agreement in dispute.[137] The Third Circuit affirmed.[138]

The court noted that *Prima Paint* did not consider the situation in which a party asserts that a contract underlying the arbitration agreement is not merely voidable, but non-existent.[139] Further, the Third Circuit reasoned that determining whether an arbitration agreement exists under the FAA may depend on the validity of the underlying contract.[140] Thus, before a district court compels arbitration it must first determine whether the underlying contract was valid.[141]

The Third Circuit noted, however, that although the defendant failed to show that the arbitration agreement was valid and severable from the underlying contract, an arbitration agreement can exist separately from a larger contract if such agreement independently meets the conditions of contract formation.[142] Further, the court acknowledged that in most cases where there is no defect in signatory power of a party, if one party promises to arbitrate in exchange for the other party's promise to arbitrate, each promise forms a sufficient consideration for the other.[143]

Thus, the Third, Ninth, and Eleventh Circuits recognize a distinction under *Prima Paint* between "void/fraud in execution" challenges and "voidable/fraud in inducement" challenges to a contract containing an arbitration agreement. In these Circuits, an allegation that a contract is void is sufficient to assert that the the arbitration agreement is invalid, thereby authorizing a court under *Prima Paint* to rule on the contract's validity. In contrast, alleging that a contract is merely voidable fails to put the arbitration agreement "in issue" under *Prima Paint* and an arbitrator will resolve the merits of the allegation.

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137. *See id.*

138. *Id.*

139. *Id.* at 105.

140. *Id.* at 106 (citing Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51 (3d Cir. 1980)).

141. "[W]e conclude that the doctrine of severability presumes an underlying, existent, agreement. Such an agreement exists, under the *Prima Paint* doctrine, even if one of the parties seeks to rescind it on the basis of fraud in the inducement. [Such agreement] . . . does not [exist] if no contract ever existed." *Id.*

142. *Id.* at 108. Formation of a valid contract is accomplished when the parties have expressed mutual assent to the contract's terms supported by adequate consideration. *See* RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981).

143. *Id.* (citing Sauer-Getriebe KG v. White Hydraulics, 715 F.2d 348, 350 (7th Cir. 1983)).

B. *The Fifth and Sixth Circuits Have Held that* Prima Paint *Requires a Specific Allegation of Invalidity of an Arbitration Agreement to Prevent its Enforcement*

The Fifth and Sixth Circuits have held that, although *Prima Paint* was decided in the context of fraud in the inducement of a contract, it pronounced a general rule that a party resisting arbitration must specifically challenge the arbitration provision in a commercial contract even if the party alleges that the entire contract is void.[144] The Circuit Courts have reasoned that the rule of *Prima Paint* should apply to allegations of fraud in the execution of the contract because the fraud in the inducement alleged in *Prima Paint* would pervade the entire contract containing the arbitration clause just as much as the fraud in the execution of the contract.[145] The most current representative cases supporting this approach are the Fifth Circuit's decision in *Lawrence v. Comprehensive Business Services*[146] and the Sixth Circuit's decision in *Burden v. Check Into Cash of Kentucky, LLC.*[147]

1. Lawrence v. Comprehensive Business Services: *An Arbitration Agreement May be Enforceable Even if the Underlying Contract is Illegal*

In *Lawrence*, the Fifth Circuit held that an arbitration agreement may be enforceable under the FAA even if the underlying contract is illegal.[148] The court opined that in order for a party to obtain a court ruling on the validity of an arbitration agreement, that party must assert the illegality of the arbitration clause itself.[149] Importantly, the court emphasized that the question of the validity of an arbitration agreement, as separate from the underlying commercial contract, is a matter of the federal law under section 2 of the FAA.[150]

144. *See, e.g.*, C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Secs. Corp., 912 F.2d 1563, 1567–68 (6th Cir. 1990).

145. *See, e.g.*, Lawrence v. Comprehensive Bus. Servs., 833 F.2d 1159, 1162 (5th Cir. 1987).

146. *Id.*

147. 267 F.3d 483 (6th Cir. 2001).

148. *See id.* at 1161–62.

149. *Id.* at 1162.

150. *Id.* (discussing preemption aspects of the FAA under Southland Corp. v. Keating, 465 U.S. 1, 10–13 (1984)).

The plaintiffs in *Lawrence* challenged an agreement containing an arbitration clause as illegal and therefore void.[151] Plaintiff Robert Lawrence, a Texas certified public accountant, entered into a franchise agreement with the defendant, allowing him to use the defendant's trade name.[152] The agreement required Lawrence to make periodic royalty payments to the defendant and contained an arbitration clause.[153] After signing the contract, the plaintiff learned that the Texas State Board of Public Accountancy had prohibited other franchisees from operating an accounting practice under the defendant's name.[154] The plaintiff advised the defendant that he could not carry out the contract because if he did, he would lose his license.[155] The plaintiff sued the defendant, seeking a judgment declaring the contract illegal and unenforceable.[156] In response, the defendant moved to stay the litigation and compel arbitration pursuant to the arbitration clause in the contract.[157] The plaintiff argued that ordering arbitration under the arbitration clause in an illegal contract is improper.[158] The Fifth Circuit rejected this argument and held that under the command of *Prima Paint*, an arbitrator should decide whether the franchise agreement between the parties was valid and legal because the plaintiff did not challenge the arbitration clause itself.[159]

The Fifth Circuit declined the plaintiff's invitation to recognize the difference between the *Prima Paint* plaintiff's claim of fraud in inducement of the contract[160] and the *Lawrence* plaintiffs' fraud in execution[161] argument, because fraud in inducement and fraud in execution have the same pervasive effect on the contract.[162] Moreover, the court stated that it read the *Prima Paint* decision as mandating courts to order arbitration even if a party asserts that the contract containing an arbitration clause fails to comply with certain state regulations and is

151. *See id.* at 1161.
152. *Id.* at 1160.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 1161.
157. *Id.*
158. *Id.*
159. *Id.* at 1162.
160. *See supra* note 95 and accompanying text.
161. *See supra* note 97 and accompanying text.
162. *Lawrence*, 833 F.2d at 1162.

therefore void.[163] Finally, the Fifth Circuit stated that the FAA established that, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[164]

2. Burden v. Check Into Cash of Kentucky, LLC: Prima Paint *Requires Specifically Challenging the Validity of the Arbitration Agreement*

In *Burden*, the Sixth Circuit strongly suggested in dicta that the FAA, as interpreted by the U.S. Supreme Court in *Prima Paint*, requires a specific challenge to the validity of the arbitration provision in the contract.[165] The plaintiffs in *Burden* were trustees for four bankruptcy estates and other numerous residents of Kentucky.[166] The main defendant was a creditor of the bankruptcy estates.[167] Plaintiffs alleged that the defendant violated Kentucky usury laws by loaning money to Kentucky residents at allegedly usurious interest rates.[168] The reverse side of each loan agreement at issue contained an arbitration clause providing that all claims, demands, or disputes "arising under this Agreement or the transaction in connection with which this Agreement has been executed" should be resolved by arbitration.[169] The plaintiffs contended that prior to December of 1997, the loan agreements had no arbitration clause on the reverse side of the form.[170] Further, the plaintiffs alleged that the defendants never informed them about the arbitration clause, and that the plaintiffs learned about the clause only when the defendant attached its copy to their motion to compel arbitration.[171] The plaintiffs claimed that the loan agreements containing arbitration clauses were invalid.[172] Finally, the plaintiffs relied on the theory that the court, not an arbitrator,

163. *Id.* (citing Mesa Operating Ltd. P'ship v. La. Intrastate Gas Corp., 797 F.2d 238, 244 (5th Cir. 1986)).

164. *Id.* at 1164 (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983)).

165. *Id.* at 491.

166. *Id.* at 486.

167. *Id.*

168. *Id.*

169. *Id.* at 487.

170. *Id.*

171. *Id.*

172. *Id.* at 489.

must consider their allegations that the loan agreements containing the arbitration clause were void from their very inception.[173]

The Sixth Circuit ruled that the district court should have compelled arbitration under the *Prima Paint* decision because the plaintiffs failed to identify any misrepresentation particular to the arbitration agreements and separate from the loan agreements.[174] The court noted that the *Prima Paint* rule commands a court, rather than an arbitrator, to adjudicate claims of fraud in the inducement only if such claims concern the arbitration clause itself.[175] The Sixth Circuit concluded that the plaintiffs' allegations that the arbitration agreements were part of the defendants' "fraudulent scheme" were arbitrable under *Prima Paint*.[176] In reaching that result, the court relied on the FAA's policy favoring enforcement of arbitration agreements.[177]

Although the *Burden* court acknowledged the Ninth and Third Circuits' void/voidable distinction, the court found that such distinction was improper under *Prima Paint* and its own precedent.[178] The court reasoned that the only question that a court should resolve when determining an arbitrator's authority is whether the issues in dispute involve "the making or the performance of the section 3 arbitration clause itself."[179] In light of the language of section 3 of the FAA,[180] the court decided to adhere to *Prima Paint*'s mandate that a court can only adjudicate an arbitration dispute if the claim of fraud relates to the making of the arbitration agreement.[181]

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173. *Id.*

174. *Id.* at 491; *see also* Showden v. Checkpoint Check Cashing; Elite Fin. Serv., Inc., 290 F.3d 631, 637–38 (4th Cir. 2002) (stating that the *Burden* court properly denied the plaintiffs' challenge to enforcement of arbitration clauses in loan agreements because the plaintiffs failed to specifically allege lack of their assent to the arbitration clauses, and instead challenged the substance of the loan agreements); Bess v. Check Express, 294 F.3d 1298, 1306 (11th Cir. 2002) (noting that the *Burden* court concluded that the plaintiffs' allegations that the loan agreements were void as illegal "constituted challenge to substance of loan agreements and should thus be decided by arbitrator rather than by court").

175. *Id.* at 488.

176. *Id.* at 491.

177. "As a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 488 (quoting Wilson Elec. Contractors, Inc. v. Minotte Contracting Corp., 878 F.2d 167, 169 (6th Cir. 1989)).

178. *See id.* at 489–91 (citing C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp., 912 F.2d 1563, 1566 (6th Cir. 1990)).

179. *Id.* at 489 (citing *C.B.S. Employees*, 912 F.2d at 1567–68).

180. *See* 9 U.S.C. § 3 (2000).

181. *Burden*, 267 F.3d at 489 (citing *C.B.S. Employees*, 912 F.2d at 1566).

Thus, the Circuit Courts' interpretation of the *Prima Paint* decision is split into two different approaches. The Third, Ninth, and Eleventh Circuits emphasize that because *Prima Paint* concerned fraud in inducement of the contract containing an arbitration clause, its holding should be limited to situations in which a contract is valid, but voidable.[182] On the other hand, the Fifth and Sixth Circuits have adhered to the Supreme Court's admonition in *Prima Paint* that a judicial forum can only resolve the validity of an arbitration clause if a party specifically challenges making or performing the clause itself.[183]

IV. PARTIES MUST SPECIFICALLY ALLEGE THAT AN ARBITRATION AGREEMENT IS INVALID TO BRING THE DISPUTE ARISING OUT OF THE CONTRACT WITHIN A COURT'S JURISDICTION

The Third, Ninth, and Eleventh Circuit Courts' rulings that the *Prima Paint* decision does not apply when an underlying contract may be void[184] ignore the FAA section 2's clear mandate that federal courts should enforce arbitration agreements independently from the contracts containing them.[185] Consequently, a court should not disturb an arbitrator's authority unless the validity of the arbitration agreement itself is at issue.[186] Because the FAA treats arbitration clauses as severable from the commercial contracts containing them,[187] a mere allegation that the underlying contract is void or unenforceable should not be sufficient to put the arbitration clause at issue under section 4 of the FAA[188] and deprive an arbitrator of jurisdiction over the contractual dispute.

Alleging that a contract containing an arbitration agreement is void or invalid should not be enough to put the validity of the arbitration agreement at issue under section 4 of the FAA. By holding that a claim of fraud in the inducement of a contract is not a claim directed at the "making" of the agreement to arbitrate, the U.S. Supreme Court, in

182. *See, e.g.*, Chastain v. Robinson-Humphrey Co., 957 F.2d 851, 855 (11th Cir. 1992).

183. *See C.B.S. Employees*, 912 F.3d at 1567–68.

184. *See supra* Part III.A.

185. *See supra* Part I.C.

186. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967).

187. *See supra* Part I.C.

188. *See* 9 U.S.C. § 4 (2000); *Prima Paint*, 388 U.S. at 404 (holding that if a party moves for stay pending arbitration, a federal court "may consider only issues relating to the making and performance of the agreement to arbitrate").

Prima Paint did not distinguish claims of fraud in the inducement from any other challenges to commercial contracts.[189] Instead, the Court emphasized that the FAA requires federal courts to consider only issues related to the making and performance of arbitration agreements.[190] The Third, Ninth, and Eleventh Circuits' position that alleging a contract is void is enough to put an arbitration agreement at issue misinterprets the rule set forth in *Prima Paint*.[191] Although these Circuits' classification of challenges as "void/fraud in execution" and "voidable/fraud in inducement" may help litigants that have failed to properly plead the invalidity of an arbitration clause, this distinction should be abandoned because it contradicts the clear language of the FAA and the strong federal policy favoring arbitration agreements.[192] The distinction should only be used to aid courts in determining whether a party has made a direct challenge to an arbitration agreement.

A. The FAA Requires Parties to Specifically Allege that an Arbitration Agreement is Invalid

Congress adopted the FAA to create an enforcement mechanism for arbitration agreements in commercial and maritime transactions by directing the courts to order specific performance of the agreements.[193] The FAA was intended to further arbitration as a speedy and efficient way to resolve commercial disputes.[194] Based on that congressional intent, the U.S. Supreme Court has declared that any doubts as to the scope of issues subject to arbitration should be resolved in favor of arbitration.[195]

Under the FAA, a written arbitration provision in a commercial or maritime contract is valid and enforceable unless it could be revoked on legal or equitable grounds as any other contract.[196] The FAA's language treats arbitration agreements as separate from the contracts in which they are included. This is evidenced by the FAA's provision that an

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

190. *See id.* at 404.

191. *See supra* Part II.

192. *See supra* Part I.A.

193. *See* Cohen & Dayton, *supra* note 2, at 276–78.

194. *See id.* at 269.

195. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983) (citations omitted).

196. 9 U.S.C. § 2 (2000).

arbitration provision contained within a commercial contract is independent from the underlying contract.[197] Consistent with this treatment, section 4 of the FAA provides that courts should order parties to proceed to arbitration as soon as the court is satisfied that "the making of the agreement for arbitration or the failure to comply therewith is not in issue."[198] Thus, for example, if a party claims that the arbitration agreement was fraudulently induced, the court may adjudicate that claim under section 4 of the FAA.[199]

The FAA's focus on the arbitration clause as a separate contractual unit strongly suggests that a party seeking to challenge the validity of an arbitration clause should directly challenge the arbitration clause.[200] It should not be enough for a party to a commercial contract to refuse to proceed with arbitration merely because the party asserts that the contract was void and therefore its every term, including the arbitration provision, is not binding. To the contrary, a party should specifically assert that an arbitration provision, as a separate agreement, is invalid on some legal or equitable ground.[201] Thus, a mere allegation that a contract is invalid should not remove the dispute from an arbitrator's jurisdiction unless the arbitration provision is not severable from the underlying contract.

B. *The* Prima Paint *Rule Should Apply to Allegations that the Contract Containing an Arbitration Agreement is Void*

A strong federal policy favoring arbitration supports the separate treatment of arbitration clauses from the contracts in which they are included.[202] In enacting the FAA, Congress created federal substantive arbitration law encouraging the enforcement of arbitration agreements.[203] The drafters of the FAA acknowledged that substituting judicial resolution of commercial disputes with arbitration would effectively eliminate the long delays incident to court proceedings, help parties to avoid the expense of litigation, and provide a better means of reaching a decision regarded as just in the business world.[204] In line with these

197. *See id.*; Burden v. Check Into Cash of Ky., LLC, 267 F.3d 483, 488 (2001) (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402 (1967)).

198. 9 U.S.C. § 4.

199. *Prima Paint*, 388 U.S. at 403–04 (1967).

200. *See* 9 U.S.C. § 2.

201. *Id.*

202. *See supra* Part I.

203. *See supra* Part I.B.

204. *See supra* notes 44–49 and accompanying text.

goals, the U.S. Supreme Court ruled in *Prima Paint* that an arbitrator should decide issues related to fraud in inducement of a contract containing an arbitration clause.[205]

Consistent with the FAA's meaning and policy, in *Prima Paint* the Court authorized federal courts to adjudicate allegations related only to invalidity of arbitration clauses.[206] However, the Court did not authorize the lower courts to consider claims that contracts containing arbitration clauses are generally void as illegal or as lacking mutual assent. Such claims should be normally arbitrated pursuant to the contract[207] because the arbitration clauses are in most cases severable from the commercial contracts in which they are embedded.[208] Thus, a party's claim that it did not assent to the contract does not necessarily mean that it did not assent to the arbitration clause. Consequently, by alleging that a contract containing an arbitration clause is void, a party in most cases fails to question the authority of an arbitrator and thereby fails to effectively put "the making of an arbitration agreement" at issue within the meaning of section 4 of the FAA.[209]

Courts should not consider allegations that an entire contract is void simply because the arbitration clauses are often embedded in contracts in a way that the parties fail to notice them. In cases where a person believes in good faith that he or she did not assent to an arbitration clause, the person may simply plead that the clause itself, not the underlying contract, is void. However, parties attacking arbitration clauses usually have no firm arguments that the arbitration clause should be revoked under the requirements of section 2 of the FAA.[210] Such parties attempt to get into court "through the backdoor," by alleging that the entire contract containing the arbitration clause is invalid.[211] Under the *Prima Paint* decision such a challenge should not be sufficient to

205. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04 (1967).

206. *Id.*; *see also* Snowden v. Checkpoint Cashing; Elite Fin. Servs., Inc., 290 F.3d 631, 637 (4th Cir. 2002) (noting that in *Prima Paint*, the Court held that section 4 of the FAA, and by implication, section 3 of the FAA, limits a federal court's jurisdiction to challenges to the arbitration clause itself").

207. *See* Lawrence v. Comprehensive Bus. Servs. Co., 833 F.2d 1159, 1162 (5th Cir. 1987).

208. *See supra* Part I.C.

209. *See* 9 U.S.C. § 4 (2000).

210. *See, e.g., Lawrence*, 833 F.2d at 1162–65 (declining the plaintiffs' direct challenge of the arbitration clause in the franchise agreement).

211. *See, e.g., id.* (The plaintiffs were unable to effectively challenge the arbitration clause itself, that is why they attempted to challenge the entire contract containing the clause as void).

require a court to resolve whether an arbitration agreement is valid under section 4 of the FAA.[212]

C. *Federal Courts Should Not Distinguish Between Void and Voidable Challenges to Contracts Containing Arbitration Provisions*

The Sixth Circuit in *Burden* correctly concluded that the *Prima Paint* rule applies in situations where a party contends that a contract containing an arbitration clause is void because it allegedly violates certain statutory provisions.[213] Likewise, in *Lawrence* the Fifth Circuit appropriately held that under *Prima Paint*, an arbitrator should decide whether the contract between the parties was valid and legal because the plaintiff failed to successfully challenge the validity of the arbitration clause.[214] Although *Prima Paint* did not specifically address this situation, the plain language of section 4 of the FAA[215] coupled with the principle of severability of arbitration clauses,[216] provide strong support for the conclusion that parties must specifically plead that the arbitration agreement is invalid. Where a party to a commercial or maritime transaction alleges that a contract containing an arbitration clause is void, the court should not consider the validity of the arbitration agreement unless a party specifically asserts that the arbitration clause is invalid as a separately standing agreement.[217] The *Burden* and *Lawrence* courts properly focused on the fact that the plaintiffs refusing to arbitrate had failed to challenge the validity of the arbitration agreement.[218] As the court pointed out, and as sections 2 and 4 of the FAA require, such a challenge is essential to overcome the FAA's presumption that arbitration agreements are enforceable in commercial contracts.[219]

The Sixth Circuit's approach in *Burden* and the Fifth Circuit's approach in *Lawrence* is sound because alleging that the underlying commercial contract is void does not necessarily assume that the

212. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04 (1967).

213. *See supra* Part III.B.2.

214. *See supra* Part III.B.1.

215. 9 U.S.C. § 4 (2000) provides, in pertinent part, that "[i]f the making of the arbitration agreement . . . be in issue, the court shall proceed summarily to the trial thereof."

216. *See supra* Part I.C.

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

218. Burden v. Check Into Cash of Ky., LLC, 267 F.3d 483, 491–92 (2001).

219. The existence of such a presumption follows from the structure of section 2 of the FAA providing that "[an arbitration provision] . . . shall be valid, irrevocable, and enforceable, save upon . . . [any legal or equitable] grounds . . . for the revocation of any contract." *See* 9 U.S.C. § 2.

arbitration agreement is likewise void for at least two reasons. First, the FAA, *Prima Paint*, and other cases decided after the adoption of the FAA treat arbitration clauses as separate contracts.[220] Second, parties to a commercial transaction containing an arbitration clause likely understand that they will forego a judicial forum if any dispute arises out of the contract.

In contrast, the Third, Ninth, and Eleventh Circuits' conclusion that a court should consider a party's claim that a contract containing an arbitration clause is void[221] is questionable because it automatically assumes that arbitration clauses are merely a part of the main commercial contract. The Circuits adhering to this approach have never explicitly considered the severability of arbitration clauses. By holding that alleging that a contract is void is sufficient to put an arbitration provision at issue within the meaning of section 4 of the FAA, the courts have erroneously implicitly assumed that arbitration clauses are not severable from the underlying contracts.[222] This assumption that an arbitration clause is merely a part of the underlying contract is flawed for two reasons. First, courts adhering to this approach assume a fact that is worth an independent determination—whether an arbitration provision stands separately from the contract. Second, the assumption that an arbitration provision is merely a part of the underlying contract flies in the face of the FAA's treatment of arbitration provisions as separate agreements,[223] which the Court in *Prima Paint* implicitly recognized.[224] Thus, the Third, Ninth, and Eleventh Circuits should reconsider their approach to claims that a commercial contract containing an arbitration clause is void, and allow courts to proceed to resolve such claims only upon an express finding that the arbitration clause is not severable from the allegedly void contract.

220. *See id.*; *see also* Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 409–10 (2d Cir. 1959) (summarizing the cases that treat arbitration clauses as separate agreements unaffected by invalidity of the underlying commercial contracts).

221. *See supra* Part III.A; Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136, 1140 (9th Cir. 1991).

222. *See supra* Part I.C.

223. *See* 9 U.S.C. § 2 (2000).

224. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402–04 (1967).

D. *The Void/Voidable Distinction is Only Appropriate if an Arbitration Provision is Not Severable from the Underlying Commercial Contract*

It is true that the void/voidable distinction can be useful in determining whether a party has in fact assented to an arbitration agreement. Federal courts, when faced with an allegation that a contract containing an arbitration clause is void from its very inception, should first ascertain whether the arbitration clause is separable from the contract. Given that the FAA treats arbitration provisions as severable from the underlying contracts,[225] courts should presume that an arbitration provision is severable unless a party proves the opposite.

If a court finds that the arbitration clause is merely a part of the underlying contract, the court should resolve the claim whether the contract is void. This would be consistent with the position of the Third, Ninth, and Eleventh Circuits that "a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the *existence* of an agreement to arbitrate."[226] However, if the court determines that the arbitration clause is severable from the allegedly void contract, the court should consider the enforceability of the arbitration clause only if a party puts the clause itself in issue.[227] This approach would help promote a uniform application of *Prima Paint*'s rule and avoid confusion related to the specificity of factual situations in which the challenges to the contract containing arbitration clauses arise. Further, it would be consistent with the plain meaning of the FAA and a federal policy favoring enforcement of arbitration agreements.[228]

V. CONCLUSION

In a dispute over the validity or performance of a contract containing an arbitration clause, a federal court, upon being satisfied that the subject matter of the dispute falls within the scope of arbitrable issues, should order the parties to proceed to arbitration unless any party to the contract specifically asserts that the arbitration provision is not enforceable. The

225. *Id.*

226. Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136, 1140–41 (9th Cir. 1991).

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

228. *See supra* Part I.A.

U.S. Supreme Court in *Prima Paint* expressed no opinion as to which forum, a court or an arbitrator, should adjudicate a party's allegation that an entire contract containing an arbitration clause is void. However, the Court made it clear that, under section 4 of the FAA, a specific challenge to an arbitration agreement is necessary in order to avoid its enforcement.

A federal court considering whether a contract containing an arbitration clause is void from its very inception should first ascertain whether the arbitration clause is separable from the contract. In view of the FAA's language and policy favoring enforcement of arbitration agreements, the court should presume severability of an arbitration provision unless there is proof to the contrary. Only if the court finds that an arbitration clause is merely a part of the underlying commercial contract should the court resolve a claim that the contract is void. This approach would promote uniform application of the *Prima Paint* rule to different factual settings. Further, it is consistent with the plain requirements of sections 2, 3 and 4 of the FAA and the strong federal policy favoring enforcement of arbitration agreements in interstate and international commerce.