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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2014-2015

1131244

American Bankers Insurance Company of Florida

v.

Gladys Tellis

Appeal from Macon Circuit Court
(CV-14-900033)

1131245

American Bankers Insurance Company of Florida

v.

Sherry Bronson

Appeal from Macon Circuit Court
(CV-14-900025)

1131264

American Bankers Insurance Company of Florida

v.

Gwendolyn Moody

Appeal from Chambers Circuit Court
(CV-14-900022)

1131384

American Bankers Insurance Company of Florida

v.

Nadine Ivy

Appeal from Bullock Circuit Court
(CV-14-900015)

1131514

American Bankers Insurance Company of Florida

v.

Uneeda Trammell

Appeal from Chambers Circuit Court
(CV-14-900020)

1131244, 1131245, 1131264, 1131384, 1131514

STUART, Justice.

Gladys Tellis, Sherry Bronson, Gwendolyn Moody, Nadine Ivy, and Uneeda Trammell (hereinafter referred to collectively as "the policyholders") initiated separate actions against American Bankers Insurance Company of Florida ("American Bankers"), asserting generally that American Bankers had sold them homeowner's insurance policies providing a level of coverage they could never receive, even in the event of a total loss involving the covered property. American Bankers thereafter moved the trial court hearing each action to compel arbitration pursuant to arbitration provisions it alleged were part of the subject policies; however, the trial courts denied those motions, and American Bankers now appeals. We consolidated the five appeals for the purpose of writing one opinion. We reverse and remand.

I.

The facts underlying each of these five consolidated appeals are substantially identical. Sometime in 2012 or 2013 each of the policyholders renewed a homeowner's insurance policy he or she had previously obtained from American Bankers. Thereafter, each concluded that he or she was paying

excessive premiums inasmuch as the policies provided a level of coverage that allegedly far exceeded the value of the covered properties; in other words, the policyholders allege that they were overinsured inasmuch as they could never receive the policy limits even if the covered property was declared a total loss. In February 2014, the policyholders separately sued American Bankers, alleging breach of contract, several species of fraud, unjust enrichment, and negligence and/or wantonness.

American Bankers thereafter moved the trial courts in which these actions were filed -- the Bullock Circuit Court, the Chambers Circuit Court, and the Macon Circuit Court -- to compel arbitration pursuant to the following arbitration provision it alleged was contained in the policyholders' policies:

> "Any and all claims, disputes, or controversies of any nature whatsoever ... arising out of, relating to, or in connection with (1) this policy or certificate or any prior policy or certificate issued by us to you ... shall be resolved by binding arbitration before a single arbitrator. All arbitrations shall be administered by the American Arbitration Association ('AAA') in accordance with its Expedited Procedures of the Commercial Arbitration Rules of the AAA in effect at the time the claim is filed."

The policyholders opposed the motions to compel arbitration, arguing that they had never consented to arbitrate their claims, that they had not signed any documents containing an arbitration provision, and that the arbitration provision in the policies was unconscionable. The trial courts thereafter denied each of American Bankers' motions to compel arbitration, and American Bankers separately appealed those denials to this Court pursuant to Rule 4(d), Ala. R. App. P. This Court consolidated the appeals based on the similarity of the facts and the issues presented.

II.

Our standard of review of a ruling denying a motion to compel arbitration is well settled:

> "'This Court reviews de novo the denial of a motion to compel arbitration. Parkway Dodge, Inc. v. Yarbrough, 779 So. 2d 1205 (Ala. 2000). A motion to compel arbitration is analogous to a motion for a summary judgment. TranSouth Fin. Corp. v. Bell, 739 So. 2d 1110, 1114 (Ala. 1999). The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that the contract evidences a transaction affecting interstate commerce. Id. "[A]fter a motion to compel arbitration has been made and supported, the burden is on the non-movant to present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question." Jim Burke Automotive, Inc. v.

> Beavers, 674 So. 2d 1260, 1265 n. 1 (Ala. 1995) (opinion on application for rehearing).'"

Elizabeth Homes, L.L.C. v. Gantt, 882 So. 2d 313, 315 (Ala. 2003) (quoting Fleetwood Enters., Inc. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000)).

III.

In order to answer the ultimate question in these cases -- whether the trial courts erred in denying American Bankers' motions to compel arbitration -- we must address three issues: (1) whether the parties agreed to arbitrate the claims asserted in the policyholders' complaints; (2) whether the underlying transactions, i.e., the sale of the insurance policies, affected interstate commerce; and (3) whether the arbitration provision in the subject policies is unconscionable. With regard to the first issue, American Bankers submitted to the respective trial courts a copy of the policy allegedly issued to each of the policyholders. Included as part of those policies are basically two forms referencing arbitration: form AJ9821EPC-0608 and form N1961-0798.[1] Form AJ9821EPC-0608 is entitled "Arbitration Provision

[1]The policy issued to Moody, the plaintiff in appeal no. 1131264, included form AJ8654EXX-0604 instead of form AJ9821EPC-0608; however, those two forms appear to be

Alabama" and contains a general arbitration provision, part of which is quoted above. Form N1961-0798 is entitled "Important notice about the policy/certificate of insurance for which you have applied" and explains generally what arbitration is and states that the policy contains a binding arbitration agreement pursuant to which the insured and the insurer waive the right to trial in a court of law. Although form N1961-0798 contains a signature line for the applicant, a co-applicant, and a witness, it is undisputed that none of the policyholders executed this form. The policyholders have further executed affidavits swearing that they never received or signed either form -- or any other document related to their American Bankers' policies purporting to be an arbitration provision -- when applying for insurance or at anytime thereafter until the commencement of this litigation. They further state that they never would have purchased coverage from American Bankers had they been presented with the arbitration provision American Bankers now seeks to enforce.

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identical in all material ways. For convenience, we hereinafter include Moody's form in any reference to form AJ9821EPC-0608.

American Bankers concedes that the policyholders never signed form N1961-0798 or separate arbitration agreements, but it argues that they nevertheless assented to the arbitration provision in their policies. In support of its argument that an arbitration provision in an insurance policy can be effective even if not disclosed in the application and even without the insured's signature, American Bankers cites Southern United Fire Insurance Co. v. Howard, 775 So. 2d 156, 162-63 (Ala. 2000), which provides:

> "[The plaintiff] argues that he did not assent to the arbitration provision in the insurance policy because the arbitration provision was not included in the insurance application and because he did not sign the insurance policy. First, a contractual agreement to arbitrate may be found invalid only 'upon such grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. § 2. It is not a requirement of Alabama contract law that for a contract provision to be enforceable it must have appeared also in the application to enter into the contract. See Ex parte Foster, 758 So. 2d 516 (Ala. 1999). Thus, the arbitration provision need not have appeared in the application for insurance for the parties to be bound by it. Second, '[t]his Court is required to compel arbitration if, under "ordinary state-law principles that govern the formation of contracts," the contract containing the arbitration clause is enforceable.' Quality Truck & Auto Sales, Inc. v. Yassine, 730 So. 2d 1164, 1167 (Ala. 1999). Alabama's general contract law permits assent to be evidenced by means other than signature, and, thus, the contract of insurance and the arbitration provision contained in it can be

> enforceable by the parties in the absence of signatures, where the evidence establishes the existence of the agreement. [The defendant insurance company's] insurance policy is not subject to either of Alabama's Statutes of Frauds, see Ala. Code §§ 7-2-201 and 8-9-2, nor is it made contingent upon the condition precedent that it be signed by [the plaintiff]. [The plaintiff] accepted and acted upon [the defendant's] insurance policy, which contained the arbitration provision, by paying premiums, renewing the policy, and submitting a claim under the policy. Therefore, because [the plaintiff] ratified the policy, the absence of his signature does not render the policy, or the arbitration provision contained in it, unenforceable."

(Footnote omitted.) American Bankers similarly maintains that the policyholders have manifested their assent to arbitration in these cases by accepting and acting upon the insurance policies containing the arbitration provision.

Our caselaw supports American Bankers' position. Beyond Howard, this Court has considered multiple other appeals in which parties have sought to avoid arbitration provisions in insurance policies by claiming that the arbitration provisions were not disclosed to them or that they never received a copy of the policy containing the arbitration provision. In Ex parte Rager, 712 So. 2d 333, 335 (Ala. 1998), the plaintiffs argued that they never agreed to arbitrate their claims because their application for insurance did not mention

arbitration and because they did not sign the endorsement attached to the policy that contained the arbitration clause. This Court rejected those arguments, noting that "[m]any parts of an insurance policy are not mentioned in the application" and explaining further that the unsigned endorsement containing the arbitration clause was part of the issued policy because the policy expressly stated that "'[t]his policy with any attached papers is the entire contract between you and the [insurance] Company.'" 712 So. 2d at 335. See also Homes of Legend, Inc. v. McCollough, 776 So. 2d 741, 746 (Ala. 2000) ("Under state-law principles of contract interpretation, parties may be bound by documents incorporated by reference.").

It is unclear exactly what parts of the insurance policy the policyholders acknowledge receiving in this case; however, they have stated in their affidavits only that they did not receive the two identified forms specifically discussing arbitration or any other document purporting to be an arbitration agreement. Thus, they presumably received the rest of the policy American Bankers submits was issued to them, including the declarations page and the written insuring

agreement, which provides that "[t]his policy is not complete without the declarations page." The declarations page lists forms AJ9821EPC-0608 and N1961-0798 as part of the included "forms and endorsements."[2] Although the policyholders claim not to have received forms AJ9821EPC-0608 and N1961-0798, they had some duty to investigate the contents of those forms because the declarations page indicated that the forms were part of the policy. See, e.g., Alfa Life Ins. Co. v. Colza, 159 So. 3d 1240, 1249-50 (Ala. 2014) (noting that insurance policyholders have a duty to read the documents provided them and are charged with the knowledge such a reading would impute to them), and McDougle v. Silvernell, 738 So. 2d 806, 808 (Ala. 1999) (stating that a party to a contract that fails to inform himself or herself of extraneous facts or other documents incorporated into the contract is nevertheless "bound thereby" (quoting Ben Cheeseman Realty Co. v. Thompson, 216 Ala. 9, 12, 112 So. 151, 153 (1927))). We further note that this Court has also enforced arbitration provisions in

[2]The declarations page lists forms AJ9821EPC-0608 and N1961-0798 as forms "AJ9821EPC 06/08" and "N1961 07/98," respectively. With regard to Moody, the declarations page in her policy lists form AJ8654EXX-0604 as form "AJ8654EXX 06/04."

insurance policies where the plaintiffs claimed never to have received the written policies containing the provisions. See, e.g., Ex parte Southern United Fire Ins. Co., 843 So. 2d 151, 156 (Ala. 2002) (enforcing an arbitration provision even though it was claimed that "[the plaintiff] did not receive a copy of either the policy or the arbitration rules referenced in the policy"), and Philadelphia American Life Ins. Co. v. Bender, 893 So. 2d 1104, 1109 (Ala. 2004) (enforcing an arbitration provision in an insurance policy even though the plaintiff "claims that he did not receive a copy of the policy").

Finally, we note that this Court has, on other occasions, considered similar cases involving financial agreements other than insurance policies in which parties have challenged arbitration provisions they alleged were subsequently added to the agreements without their express consent or knowledge. We have uniformly recognized that a signature or express consent is not required to give effect to the new arbitration provisions; rather, we have held that the parties effectively manifested their assent to the added provisions by continuing the relationship after the arbitration provision was added.

We summarized some of these insurance and non-insurance cases as follows in Providian National Bank v. Screws, 894 So. 2d 625, 627 (Ala. 2003):

> "This Court has previously enforced an arbitration provision added to credit-card agreements by amendment. See Ex parte Colquitt, 808 So. 2d 1018 (Ala. 2001). Further, this Court has continually held that express assent is not required in order for an arbitration provision to be enforceable. SouthTrust Bank v. Williams, 775 So. 2d 184, 189 (Ala. 2000) (holding that an arbitration provision added to a customer's account agreement by notice was valid and enforceable); Woodmen of the World Life Ins. Soc'y v. Harris, 740 So. 2d 362, 367 (Ala. 1999) (holding that express assent to an arbitration provision is not required when the arbitration provision is added by amendment); Ex parte Rager, 712 So. 2d 333, 335 (Ala. 1998) (noting that the inclusion of an arbitration provision is not a material alteration to an insurance policy requiring a signed application); Southern Foodservice Mgmt., Inc. v. American Fid. Assurance Co. 850 So. 2d 316 (Ala. 2002)(same)."

We note that, like the policyholders in these cases, the plaintiffs in Ex parte Colquitt, 808 So. 2d 1018, 1021 n. 1 (Ala. 2001), and Woodmen of the World Life Insurance Society v. Harris, 740 So. 2d 362, 366 n. 6 (Ala. 1999), claimed not to have seen any notice that would have apprised them of the fact that an arbitration provision was made part of their agreements.

In sum, although the policyholders did not execute stand-alone arbitration agreements or necessarily even read or receive the insurance policies containing the arbitration provisions, they have nevertheless manifested their assent to those policies and, necessarily, the arbitration provisions in them, by accepting and acting upon the policies, inasmuch as they all affirmatively renewed their policies and paid their premiums, thus ratifying the policies. Howard, 775 So. 2d at 162-63. See also SouthTrust Bank v. Williams, 775 So. 2d 184, 189 (Ala. 2000) (stating that parties that "continued the business relationship after the interposition of the arbitration provision" "implicitly assented to the addition of the arbitration provision"). This holding is consistent with our previous caselaw interpreting arbitration provisions in insurance policies.[3] Because the policyholders assented to,

[3]We note that the policyholders have not asked us to overrule Howard, Ex parte Rager, Ex parte Southern United, Bender, or other cases in which this Court has reached similar holdings. Indeed, although American Bankers discussed most of these cases in the initial brief it filed with this Court, the policyholders have not responded to American Bankers' discussion of those cases or otherwise attempted to distinguish the cases in their response brief, much less asked us to overrule them. "Stare decisis commands, at a minimum, a degree of respect from this Court that makes it disinclined to overrule controlling precedent when it is not invited to do so." Moore v. Prudential Residential Servs. Ltd. P'ship, 849

and are therefore subject to, the arbitration provision in their insurance policies, we conclude that they agreed to arbitrate the claims asserted in their complaints inasmuch as those claims "aris[e] out of, relat[e] to, [and are] connect[ed] with" those insurance policies.

Having established that the policyholders at least ratified the insurance policies issued to them by American Bankers and that those policies call for arbitration, we must next address whether the sale of those policies affected interstate commerce so as to require enforcement of the policies' arbitration provision under the Federal Arbitration Act, 9 U.S.C. § 1 et seq. The policyholders wisely do not argue that American Bankers' sale of these insurance policies does not affect interstate commerce; rather, they argue only that American Bankers failed to put forth any evidence that would establish that fact. See, e.g., Service Corp. Int'l v. Fulmer, 883 So. 2d 621, 629 (Ala. 2003) (explaining that, in

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So. 2d 914, 926 (Ala. 2002). See also Clay Kilgore Constr., Inc. v. Buchalter/Grant, L.L.C., 949 So. 2d 893, 898 (Ala. 2006) (noting the absence of a specific request by the appellant to overrule existing authority and stating that, "[e]ven if we would be amenable to such a request, we are not inclined to abandon precedent without a specific invitation to do so").

light of decisions of the Supreme Court of the United States, "a trial court evaluating a contract connected to some economic or commercial activity would rarely, if ever, refuse to compel arbitration on the ground that the transactions lacked 'involvement' in interstate commerce"), and Potts v. Baptist Health Sys., Inc., 853 So. 2d 194, 199 (Ala. 2002) ("The burden of proof was on the [parties moving to compel arbitration] to provide evidence demonstrating that [the subject] contract, or the transaction it evidenced, substantially affected interstate commerce.").

It appears that, in at least some of these consolidated appeals, American Bankers made an additional evidentiary submission intended to establish that the sale to certain of the policyholders of these insurance policies affected interstate commerce once it became apparent that the policyholders would contest that issue; however, the trial courts thereafter struck those submissions as being tardy. Hence, the policyholders argue that American Bankers has failed to put forth evidence that would satisfy the interstate-commerce requirement. However, even without considering those submissions, it is clear from the undisputed

facts and the evidence in the record that these transactions affected interstate commerce. As evidenced by the copies of the insurance policies that are in the record in each case, the policyholders are all Alabama residents and the subject of each insurance policy is property located in Alabama. Those same policies also indicate that American Bankers -- the full corporate name is reflected on the policy as American Bankers Insurance Company of Florida -- has a Florida address and that the agent for each of the policies is shown as having either a Florida or a Minnesota address. This diversity of citizenship between the parties is sufficient to establish that the transactions between them affected interstate commerce. See, e.g., America's Home Place, Inc. v. Rampey, [Ms. 1130150, October 24, 2014] ___ So. 3d ___ n. 2 (Ala. 2014) (indicating that the interstate-commerce requirement is met when a contract showed on its face that the company constructing a house in Alabama "listed its place of business as being in 'Hall County, Gainesville, GA'"); DecisionQuest, Inc. v. Hayes, 863 So. 2d 90, 95 (Ala. 2003) ("'"[A]ll interstate commerce is not sales of goods. Importation into one state from another is the indispensable element, the test,

of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes such importation, whether it be of good, person, or information, is a transaction of interstate commerce."'" (quoting Uncle Ben's, Inc. v. Crowell, 482 F. Supp. 1149, 1154 (E.D. Ark. 1980), quoting in turn Furst v. Brewster, 282 U.S. 493, 497 (1931))); and Ex parte Dyess, 709 So. 2d 447, 450 (Ala. 1997) ("[T]he policy issued by American Hardware [Insurance Group, Inc.,] to Jack Ingram Motors[, Inc.,] involves interstate commerce because the policy was between corporations of different states. Therefore, the Federal Arbitration Act applies ....").[4]

Our final inquiry, therefore, is whether the arbitration provision in the subject policies is unconscionable. In

[4]We further note that the policyholders have filed stipulations indicating that they are not seeking, and will not accept, any award of damages that exceeds $74,999.99. These stipulations were presumably filed in recognition of the diversity of citizenship that exists between the policyholders and American Bankers and a desire to avoid the possibility of the underlying cases being removed to federal court pursuant to 28 U.S.C. § 1332 (granting federal district courts original jurisdiction over all civil actions involving citizens of different states where the value of the dispute exceeds $75,000).

Leeman v. Cook's Pest Control, Inc., 902 So. 2d 641, 645 (Ala. 2004), this Court stated:

> "'[T]here is nothing inherently unfair or oppressive about arbitration clauses,' Coleman v. Prudential Bache Sec., Inc., 802 F.2d 1350, 1352 (11th Cir. 1986), and arbitration agreements are not in themselves unconscionable, Ex parte McNaughton, 728 So. 2d 592, 597-98 (Ala. 1998). Instead, unconscionability is an affirmative defense, and the party asserting the defense bears the burden of proof. Conseco Fin. v. Murphy, 841 So. 2d 1241, 1245 (Ala. 2002)."

In support of their argument that the arbitration provision in their insurance policies is unconscionable, the policyholders cite Anderson v. Ashby, 873 So. 2d 168 (Ala. 2003), for the broad proposition that an arbitration provision is unconscionable when the terms of the provision are grossly favorable to a party that has overwhelming bargaining power, but they otherwise rely entirely upon an August 2013 order entered by an El Paso County, Texas, trial court finding a certain arbitration provision before it to be unconscionable. The arbitration provision in that case, Cardwell v. Whataburger Restaurants, LLC, case no. 2013DCV0910, similarly provided that arbitration would be administered by the American Arbitration Association ("the AAA"); however, the El Paso trial court declared the provision to be unconscionable

and refused to enforce it based on its belief that the fees charged by the AAA were too high, regardless of whether they were ultimately paid by the plaintiff or the defendant and that the defendant was essentially trying to purchase a more favorable forum for the dispute.

Of course, any precedential value of the El Paso County court's judgment is limited to its interpretation of Texas law. See, e.g., Pritchett v. State Farm Mut. Auto. Ins. Co., 834 So. 2d 785, 794 (Ala. Civ. App. 2002) ("Any precedential value of the Rhode Island Superior Court's judgment ... is limited to its interpretation of Rhode Island law."). However, even that limited precedential value evaporates if the judgment is reversed on appeal, and, in fact, that is the case with the El Paso court's judgment because, on October 24, 2014 -- well before briefs were submitted in these appeals -- the Texas Court of Appeals reversed the El Paso trial court's order based on "the trial court's clear failure to properly analyze and apply the law of unconscionability." Whataburger Rests. LLC v. Cardwell, 446 S.W.3d 897, 913 (Tex. App. 2014).

Moreover, to the extent the policyholders are arguing that the arbitration provision is unconscionable because of

the financial burden arbitration would impose upon them, their argument is not supported by the evidence in the record and, in many respects, is contradicted by the evidence in the record. First, there is no evidence in the record of the policyholders' financial status that would indicate that they can not afford to pay the costs of arbitration. See Leeman, 902 So. 2d at 651-52 (noting that there was no evidence in the record of the plaintiffs' income or wealth that would indicate that they would not be able to pay the fees and costs of arbitration and concluding that the plaintiffs accordingly "have not demonstrated that the arbitration provision in [their contract with the defendant] is unconscionable on that basis"). Second, the arbitration provision in the policyholders' policies expressly provides that "[t]he cost[s] of all arbitration proceeding[s] shall be paid by [American Bankers], with the exception of the cost of representation of [the policyholder]" and that arbitration proceedings in each case "shall be conducted in the county where [the policyholder] reside[s], unless another location is mutually agreed upon in writing."

In Commercial Credit Corp. v. Leggett, 744 So. 2d 890 (Ala. 1999), this Court considered an argument that an arbitration provision was unconscionable for financial-hardship reasons because it obligated the party initiating arbitration to pay $125, while the defendant company agreed to pay for the first eight hours of the arbitration proceedings, the losing party to then be responsible for paying the costs associated with any additional proceedings, if such proceedings were necessary. We stated:

> "It is difficult to see how a party who truly believes she has a meritorious cause of action can view these provisions as particularly onerous. [The plaintiff] would initially have to pay only $125.00 to commence the process. Subsequently, the defendants would pay for the first day of proceedings, regardless of the outcome. The losing party would then pay for the remainder of the proceedings. In fact, the only parties disadvantaged by these cost provisions are the losing parties -- whoever they might be.
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> "In short, th[is] arbitration provision[] [is] not 'unreasonably favorable to [the defendants],' nor [is it] 'oppressive, one-sided, or patently unfair.' Layne [v. Garner], 612 So. 2d [404,] 408 [(Ala. 1992)]."

744 So. 2d at 898. The arbitration provision in the instant cases places even more of the cost burden for arbitration upon American Bankers, and, in light of that fact and the record

before us, we find the policyholders' complaint of excessive costs to be disingenuous.[5] The policyholders have failed to meet their burden of proof as to unconscionability; accordingly, we decline to invalidate the arbitration provision on that basis.

IV.

The policyholders sued American Bankers, asserting various claims based on American Bankers' sale to them of insurance policies allegedly providing more coverage than the policyholders needed and could ever possibly benefit from. The trial courts thereafter denied American Bankers' subsequent motions to compel arbitration of the claims asserted against it by the policyholders. We now reverse those orders denying the motions to compel arbitration, based

[5]We recognize that the arbitration provision in these cases also authorizes the arbitrator to require the policyholder to pay all arbitration costs if it is determined that the policyholder's claim "is without substantial justification." However, similar authority is held by a trial court judge, who can require a party to pay not only court costs, but also attorney fees. See § 12-19-272(c), Ala. Code 1975 ("The court shall assess attorneys' fees and costs against any party or attorney if the court, upon the motion of any party or on its own motion, finds that an attorney or party brought an action or any part thereof, or asserted any claim or defense therein, that is without substantial justification ...." (emphasis added)).

upon our holdings that the policyholders manifested their assent to the arbitration provision in their policies by continuing to renew the policies, that the sale of the policies affected interstate commerce, and that the arbitration provision in the policies is not unconscionable. These causes are accordingly remanded for the trial courts to enter new orders granting American Bankers' motions to compel arbitration.

1131244 -- REVERSED AND REMANDED.

1131245 -- REVERSED AND REMANDED.

1131264 -- REVERSED AND REMANDED.

1131384 -- REVERSED AND REMANDED.

1131514 -- REVERSED AND REMANDED.

Bolin, Parker, Shaw, Main, and Wise, JJ., concur.

Bryan, J., concurs in the result.

Moore, C.J., and Murdock, J., dissent.

1131244, 1131245, 1131264, 1131384, 1131514

MOORE, Chief Justice (dissenting).

I respectfully, but strongly, dissent in these appeals involving predispute arbitration agreements. It is undisputed that the policyholders never signed the provision American Bankers Insurance Company of Florida ("American Bankers") seeks to enforce. Nevertheless, the main opinion holds that the policyholders ratified the arbitration provision because it was referenced on the declarations page of the policies and because the policyholders paid premiums to renew the policies. I cannot agree with that holding for two reasons. First, an application of the Federal Arbitration Act ("the FAA"), 9 U.S.C. § 1 et seq., which is the basis for enforcing the "purported" arbitration provision in this case, is unconstitutional under the Seventh Amendment to the United States Constitution. Second, because the right to a jury in this case is a right secured by the Seventh Amendment to the United States Constitution, any waiver of that right must be knowing, willing, and voluntary, and the policyholders' purported waiver in this case did not meet those requirements.

This Court now takes the crooked path of precedent in this case[6] and arrives at a truly erroneous conclusion.

I. Seventh Amendment

The Seventh Amendment to the United States Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Any law, statute, or rule that takes away the right of a trial by jury would violate the Seventh Amendment. It bears repeating that "a law repugnant to the constitution is void." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803). See also U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land ...." (emphasis added)). The FAA is no exception. See Ex parte Hagan, 721 So. 2d 167, 174 n.3 (Ala. 1998) ("Certainly, the

[6]See Lorence v. Hospital Bd. of Morgan Cnty., 294 Ala. 614, 618-19, 320 So. 2d 631, 634-35 (1975) (reproducing a poem by Sam Walter Foss to illustrate the absurdity of blindly following precedent and stating: "The quaint poetic lines of Sam Walter Foss put in perspective the philosophy of those courts which feel compelled to sacrifice their sense of reason and justice upon the altar of the Golden Calf of precedent.").

FAA and arbitration clauses cannot be given precedence over constitutional provisions, such as the Seventh and Fourteenth Amendments to the Constitution of the United States."). But in spite of the Constitution's protection of the right to a jury trial in civil cases, courts have interpreted the FAA to take away that most valuable right, even before a dispute arises or any injury or cause of action exists.

Such an interpretation of the FAA is erroneous because Congress, when it enacted the FAA in 1925, intended it to be a rule of procedure in federal courts (not applicable to state courts) involving only a specific class of contracts in interstate commerce.[7] I am not the only Justice, either on this Court or on the United States Supreme Court, to hold this view. In Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395 (1967), Justice Black, joined by Justice Douglas and Justice Stewart, argued in his dissent:

> "[I]t is clear that Congress in passing the [Federal Arbitration] Act relied primarily on its power to create general federal rules to govern federal

[7]I have explained elsewhere that Congress enacted the FAA under its Article III powers to prescribe rules of procedure for federal courts but that the courts have misinterpreted the FAA as an exercise of Congress' Article I power over interstate commerce. Selma Med. Ctr., Inc. v. Fontenot, 824 So. 2d 668, 677-91 (Ala. 2001) (Moore, C.J., dissenting).

courts. Over and over again the drafters of the Act assured Congress: 'The statute establishes a procedure in the Federal courts .... It rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts. So far as congressional acts relate to the procedure in the Federal courts, they are clearly within the congressional power.' And again: 'The primary purpose of the statute is to make enforcible in the Federal courts such agreements for arbitration, and for this purpose Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts.' One cannot read the legislative history without concluding that this power, and not Congress' power to legislate in the area of commerce, was the 'principal basis' of the Act. Also opposed to the view that Congress intended to create substantive law to govern commerce and maritime transactions are the frequent statements in the legislative history that the Act was not intended to be 'the source of ... substantive law.' As Congressman Graham explained the Act to the House:

> "'It does not involve any new principle of law except to provide a simple method ... in order to give enforcement .... It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts.' ...

"Finally, there are clear indications in the legislative history that the Act was not intended to make arbitration agreements enforceable in state courts or to provide an independent federal-question basis for jurisdiction in federal courts apart from diversity jurisdiction. The absence of both of these effects--which normally follow from legislation of federal substantive law--seems to militate against the view that Congress was creating a body of federal substantive law."

388 U.S. at 418-20 (Black, J., dissenting) (footnotes omitted).

Justice O'Connor, joined by then Justice Rehnquist, made the same argument in a dissent issued 17 years after Prima Paint was decided:

> "One rarely finds a legislative history as unambiguous as the FAA's. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts.
>
> "In 1925 Congress emphatically believed arbitration to be a matter of 'procedure.' At hearings on the Act congressional subcommittees were told: 'The theory on which you do this is that you have the right to tell the Federal courts how to proceed.' ...
>
> "....
>
> "If characterizing the FAA as procedural was not enough, the draftsmen of the Act, the House Report, and the early commentators all flatly stated that the Act was intended to affect only federal court proceedings. Mr. Cohen, the American Bar Association member who drafted the bill, assured two congressional subcommittees in joint hearings:
>
> > "'Nor can it be said that the Congress of the United States, directing its own courts ..., would infringe upon the provinces or prerogatives of the States .... [T]he question of the enforcement relates to the law of remedies and not to substantive law. The rule must be changed for the

> jurisdiction in which the agreement is sought to be enforced. ... There is not disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement.'"

Southland Corp. v. Keating, 465 U.S. 1, 25-27 (1984) (O'Connor, J., dissenting) (footnotes omitted).

Justice Thomas, in a dissent joined by Justice Scalia, argued the same 11 years after the Supreme Court issued its opinion in Southland:

> "Despite the FAA's general focus on the federal courts, of course, § 2 itself contains no such explicit limitation. But the text of the statute nonetheless makes clear that § 2 was not meant as a statement of substantive law binding on the States. After all, if § 2 really was understood to 'creat[e] federal substantive law requiring the parties to honor arbitration agreements,' then the breach of an arbitration agreement covered by § 2 would give rise to a federal question within the subject-matter jurisdiction of the federal district courts. Yet the ensuing provisions of the Act, without expressly taking away this jurisdiction, clearly rest on the assumption that federal courts have jurisdiction to enforce arbitration agreements only when they would have had jurisdiction over the underlying dispute. In other words, the FAA treats arbitration simply as one means of resolving disputes that lie within the jurisdiction of the federal courts .... [T]he reason that § 2 does not give rise to federal-question jurisdiction is that it was enacted as a purely procedural provision. ..."

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 291 (1995) (Thomas, J., dissenting) (citations omitted).

Finally, Justice Scalia, agreeing that Southland was wrongly decided, has told practitioners that he would overrule it if he were asked: "I shall not in the future dissent from judgments that rest on Southland. I will, however, stand ready to join four other Justices in overruling it, since Southland will not become more correct over time ...." Allied-Bruce, 513 U.S. at 285 (Scalia, J., dissenting).

As to Justices on this Court, Justice Almon, joined by Justice Shores, forcefully wrote in 1998:

> "I cannot see how the United States Supreme Court, which exists pursuant to the United States Constitution, can apply an Act of Congress so as to undermine the right of trial by jury in the states that guarantee that right in their state constitutions. The United States Constitution guarantees the right of trial by jury in the Seventh Amendment. That Amendment was adopted within the Bill of Rights as a limitation on the Federal Government. Furthermore, the Tenth Amendment provides: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.' ...
>
> "How can the Supreme Court, ignoring the Seventh and Tenth Amendments and state constitutional guarantees of the right of trial by jury, construe an Act of Congress beyond its original intent in such a way as to prevent citizens of the United

> States and the states from exercising their constitutional right to litigate in court? Neither the Supreme Court nor the Congress has that constitutional authority."

Ex parte McNaughton, 728 So. 2d 592, 601-02 (Ala. 1998) (Almon, J., dissenting).

Justice Cook, addressing the issue whether the Seventh Amendment would bar the application of the FAA in state courts, wrote:

> "The fact that the United States Supreme Court has never held the Seventh Amendment to be binding on the states through the Fourteenth Amendment, as it has certain other of the Bill of Rights guarantees, is irrelevant in this context. This is because the FAA is not a state law. Thus, the constitutional deprivation, where one can be shown, derives from an act of Congress, not a state legislature. The Seventh Amendment, like the other Bill of Rights provisions, was ratified as a limitation on the power of Congress. Clearly, Congress had no power to deprive a citizen of Alabama of his right to a trial by jury before the Fourteenth Amendment was ratified--a fortiori, it has none now. Therefore, whether the Seventh Amendment is binding on the states is entirely irrelevant in any consideration of the FAA."

Allstar Homes, Inc. v. Waters, 711 So. 2d 924, 934 (Ala. 1997) (Cook, J., concurring specially).

This Court as a whole has recognized that "any arbitration agreement is a waiver of a party's right under Amendment VII of the United States Constitution to a trial by

jury." Allstar Homes, 711 So. 2d at 929.[8] I have no doubt that my fellow Justices would agree that any law forcing a party to arbitration if that party had not previously agreed to arbitrate would be unconstitutional. But in this case, as in many other arbitration cases, American Bankers argues that the policyholders agreed, as a matter of contract, to go to arbitration if a dispute arose. Thus, the question is whether a party may validly bargain away his or her right to a trial by jury before the right accrues. As I explained in my specially concurring opinion in Ex parte First Exchange Bank, 150 So. 3d 1010, 1025-27 (Ala. 2013) (Moore, C.J., concurring specially):

> "I would hold that the right to a jury trial in civil cases may not be waived by a party before a lawsuit has been filed and the right accrues. Because, '[o]rdinarily, the right to a jury trial is determined by the cause of action stated,' Ex parte Western Ry. of Ala., 283 Ala. 6, 12, 214 So. 2d 284, 289 (1968), logically that right cannot be exercised before a lawsuit is filed. A maxim of the common law states that 'no right can be barred before it accrues.' Gould v. Womack, 2 Ala. 83, 88 (1841). See also Blackmon v. Blackmon, 16 Ala. 633, 636 (1849) (noting 'two maxims of the common law: 1st--that no

[8]Allstar Homes was criticized in the plurality opinion of Perry v. Hyundai Motor America, Inc., 744 So. 2d 859 (Ala. 1999). However, "[t]he precedential value of the reasoning in a plurality opinion is questionable at best." Ex parte Discount Foods, Inc., 789 So. 2d 842, 845 (Ala. 2001).

right can be barred before it accrues...."); Adams v. Adams, 39 Ala. 274, 281 (1864); Webb v. Webb's Heirs, 29 Ala. 588, 601 (1857). One cannot have full knowledge about what a right entails--about what, exactly, he or she is waiving--until one fully understands what is at stake by giving up the right. Allstar Homes, Inc. v. Waters, 711 So. 2d 924, 929 (Ala. 1997) (holding that a waiver of the right to a trial by jury must be made knowingly, willingly, and voluntarily).

> "....
>
> "'A man may not barter away his life or his freedom, or his substantial rights.... In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge.... In these aspects a citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions whenever the case may be presented.'

"Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445, 451, 22 L.Ed. 365 (1874). I articulated this principle in my special writing in Ex parte Allen, 798 So. 2d 668, 676-77 (Ala. 2001) (Moore, C.J., concurring specially), which involved a predispute arbitration agreement analogous to the predispute waiver of a jury trial:

> "'Predispute arbitration agreements are problematic [because they] ... are signed well before any dispute arises between the parties. These predispute agreements are often vague and give little notice to the signing parties of the kinds of conflicts that will subject them to arbitration proceedings and the specific rights they

> are surrendering. Because predispute agreements are entered into before the grounds on which the waiver of rights is based can be known, there is no real "meeting of the minds," as contract law requires between two parties who commit to a binding agreement.'

"Waiver of a jury trial, to be valid, must occur after a case has been initiated. 'Agreements entered into after a controversy arises avoid this problem [regarding full knowledge of the right being waived] because when they enter such agreements, the parties are aware of the kind of complaint they are allowing to proceed to arbitration in the place of a jury trial.' Allen, 798 So. 2d at 677 (Moore, C.J., concurring specially). ...

"Although outside the arbitration context no federal law attempts to preempt Alabama's constitutional right to a jury trial, that inviolate right does not accrue until a lawsuit is filed. No individual may waive a right to a jury trial in Alabama indefinitely into the future, for that right does not accrue if it depends upon future events that may or may not occur. If a person may not exercise a jury-trial right until he or she has been sued, it follows a fortiori that a person may not waive that right before he or she has been sued.

"A jury-trial right is analogous to the right to counsel, which cannot be waived until the initiation of legal proceedings. Art. I, § 6, § 10, Ala. Const. 1901; Davis v. State, 292 Ala. 210, 291 So. 2d 346, 350 (1974); Withers v. State, 36 Ala. 252 (1860). Other rights granted by the Declaration of Rights cannot be waived before they accrue. For instance, a person cannot contractually waive his or her right to sue until that right has accrued. Art. I, § 10, § 11, § 13, Ala. Const. 1901. A person cannot contractually waive his or her right to bail until after that right has accrued. Art. I, § 16, Ala.

> Const. 1901. Likewise, because § 11 declares the right to a jury trial to be inviolate, an individual may not waive that right before it accrues."

(Footnotes omitted.)

Based on the authorities cited in my specially concurring opinion in Ex parte First Exchange Bank, it appears to me that, at common law, one could not bargain away his or her right to a jury trial until a cause of action had accrued. This common-law history was not lost but was carried forward in the Seventh Amendment.

> "'The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.' ...
>
> > "'In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution.'"

Schick v. United States, 195 U.S. 65, 69 (1904) (quoting Smith v. Alabama, 124 U.S. 465, 478 (1888), and United States v. Wong Kim Ark, 169 U.S. 649, 654 (1898)). Parties certainly could have agreed to submit a dispute to arbitration once that dispute arose. See 3 William Blackstone, Commentaries *16-17. However, for the reasons stated above, I believe the Framers of the Seventh Amendment would have viewed any law that

attempted to enforce predispute arbitration agreements as void under the Seventh Amendment.

Time and time again, the United States Supreme Court has interpreted the FAA to be a valid exercise of Congress' power under the Commerce Clause and has therefore required state courts to apply the FAA. See, e.g., Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995); Southland Corp. v. Keating, 465 U.S. 1 (1984); and Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967). Justice Houston wrote in Ex parte Dan Tucker Auto Sales, Inc., 718 So. 2d 33, 38 (Ala. 1998) (Houston, J., concurring specially):

> "Although I disagree with the majority of the United States Supreme Court in its Allied-Bruce interpretation of the Federal Arbitration Act as it applies to state courts, a majority opinion of that Court is part of the law I have taken an oath to uphold. See the second paragraph of Article VI of the Constitution of the United States."[9]

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[9]However, the second paragraph in Article VI of the United States Constitution says that state judges are bound by the supreme law of the land, which consists of three things: (1) the Constitution itself, (2) laws of the United States made pursuant to the Constitution, and (3) treaties made under authority of the United States. A Supreme Court opinion is not the Constitution itself; it is not a law of the United States made pursuant to the Constitution; and it is not a treaty made under the authority of the United States--how then does Article VI bind state judges to uphold Supreme Court opinions?

I do not agree that the Supreme Court's interpretation of the FAA is a law I am required to apply, because that interpretation does not conform to the United States Constitution I am sworn to uphold and support. What if a state court is presented with a constitutional question the United States Supreme Court has not yet considered? As far as my research shows, the United States Supreme Court has not yet considered whether its interpretation of the FAA violates the Seventh Amendment. As stated above, a federal statute is void if it violates the Federal Constitution. Marbury, 5 U.S. at 180. As Chief Justice Marshall wrote in Marbury:

> "Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?"

Marbury, 5 U.S. (1 Cranch) at 180.

If we declined to apply the Seventh Amendment because doing so would undermine the United States Supreme Court's interpretation of the FAA, which is not even a law but merely a judicial opinion, then we would be violating the Supremacy Clause,[10] our oaths of office,[11] and every sound principle of

[10]The Supremacy Clause reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance

constitutional law. The Supreme Court's interpretation of a federal statute does not preclude all lower courts from considering constitutional questions the Supreme Court has never considered. Therefore, we must analyze the arbitration provision in this case by the Seventh Amendment, the Supreme Court's precedent interpreting the FAA notwithstanding.

II. Knowing, Willing, and Voluntary Waiver

If this Court still believes that predispute arbitration agreements are enforceable, the Seventh Amendment notwithstanding, then it should remember that, "regardless of the federal courts' policy favoring arbitration, we find nothing in the FAA that would permit such a [jury] waiver

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thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2 (emphasis added).

[11] "I, ..., solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States, and the Constitution of the State of Alabama, so long as I continue a citizen thereof; and that I will faithfully and honestly discharge the duties of the office upon which I am about to enter, to the best of my ability. So help me God."

§ 279, Ala. Const. 1901.

unless it is made knowingly, willingly, and voluntarily." Allstar Homes, 711 So. 2d at 929. This rule is a slight variation of a general rule in contract law that applies when parties agree in advance to waive their rights to a trial by jury.

> "In Gaylord Department Stores of Alabama v. Stephens, 404 So. 2d 586, 588 (Ala. 1981), this Court articulated three factors to consider in evaluating whether to enforce a contractual waiver of the right to trial by jury: (1) whether the waiver is buried deep in a long contract; (2) whether the bargaining power of the parties is equal; and (3) whether the waiver was intelligently and knowingly made."

Ex parte BancorpSouth Bank, 109 So. 3d 163, 166 (Ala. 2012). Gaylord Department Stores of Alabama v. Stephens, 404 So. 2d 586, 588 (Ala. 1981), required such a test because "Article I, § 11, Constitution 1901, provides that the right to trial by jury shall remain inviolate," describing the right to trial by jury as a "precious right."[12]

In this case, it is undisputed that the policyholders never signed an arbitration agreement. The main opinion holds

[12]This rule is not unique to Alabama. For a detailed discussion of how other courts apply this rule, or some slight variation of it, see Jean R. Sternlight, Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial, 16 Ohio St. J. on Disp. Resol. 669, 678-90 (2001).

1131244, 1131245, 1131264, 1131384, 1131514

that the "declarations page" of the policies notified the policyholders of the existence of the forms in question, noting that the written insuring agreement provided that "[t]his policy is not complete without the declarations page." However, there is no document entitled "declarations page" in the record. Although I do not dispute that the document relied upon by the main opinion is typically referred to as a "declarations page," there is nothing on the page itself that would alert the policyholders that this page is the critical document that has been referenced repeatedly throughout the policies.

Moreover, nothing in plain English on the declarations page indicates that the policyholders were waiving their rights to trial by jury. As the main opinion notes, the declarations page made a brief reference to forms AJ9821EPC-0608 and N1961-0798.[13] These combinations of letters and numbers appear among eight other similar references in a small space. There were only three words in English adjacent to these 10 mysterious combinations of letters and numbers:

[13]I realize that the number on one of the forms was different for Gwendolyn Moody, just as the main opinion does. See ___ So. 3d at ___ at n.1.

"FORMS AND ENDORSEMENTS." (Capitalization in original.) The main opinion reasons that this should have prompted the policyholders to investigate further, but nothing on the declarations page necessarily indicates that the referenced forms constitute part of the policy. There is no explanation of what these "forms and endorsements" are, or even whether they are part of the policy. Regardless of whatever American Bankers was thinking, I cannot agree that those references on the declarations page were sufficient to constitute a knowing, willing, or voluntary waiver of the policyholders' inviolate right to a jury trial.

I fear that the precedential effect of this case will be disastrous. The main opinion stands for the proposition that an insurance company may deprive policyholders of their constitutional rights without their express consent so long as a vague, mysterious, code-like reference to a form appears somewhere in the policy. Under this rationale, why would insurance companies even have to send arbitration forms to their policyholders? If the insurance company's failure to get the policyholders to sign the arbitration forms in this case was an accident, what is there to stop an insurance company

from doing the same thing intentionally in the next case? Policyholders are entitled to know in advance what their obligations are and whether they are expected to give up their rights, instead of being subjected to a game of insurance-company "peek-a-boo."[14]

III. Conclusion

The right to a trial by jury is a sacred and precious right. Sir William Blackstone called it the "best preservative of English liberty." 3 William Blackstone, Commentaries *381. The American Founders declared independence from King George III, in part, for depriving them of "the benefits of Trial by Jury."[15] The Declaration of Independence ¶ 20. The Framers included the right to trial by jury in our national Bill of Rights. The Alabama Constitution says that the right to trial by jury "shall remain inviolate." § 11, Ala. Const. 1901. Then Justice Rehnquist called the right to trial by jury "an

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[14]Cf. United States v. Virginia, 518 U.S. 515, 574 (1996) (Scalia, J., dissenting) ("The States and the Federal Government are entitled to know before they act the standard to which they will be held, rather than be compelled to guess about the outcome of Supreme Court peek-a-boo.").

[15]As Justice Almon observed in his dissent in McNaughton: "King George's denial of the right of trial by jury was one of the articles of the Declaration of Independence." McNaughton, 728 So. 2d at 602 (Almon, J., dissenting).

important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting).

How then has this Court held today that the right to trial by jury may be destroyed through such an inconspicuous means? I respectfully submit that this is the result of following bad precedent.[16] If the Supreme Court's precedent

[16]The main opinion notes that the policyholders did not invite us to overrule precedent and that this Court is not inclined to do so without an invitation. This does necessarily mean that it may not overrule controlling precedent without being asked to do so. See, e.g., Travelers Indem. Co. of Connecticut v. Miller, 86 So. 3d 338, 347 (Ala. 2011) (overruling a case while expressly noting that the Court had not been asked to do so). Likewise, this Court is not forbidden from addressing the Seventh Amendment issue or from considering Allstar Homes even though neither of the parties raised those claims. "[A] court may consider an issue 'antecedent to ... and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief." United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc., 508 U.S. 439, 447 (1993) (quoting Arcadia v. Ohio Power Co., 498 U.S. 73, 77 (1990)). See also Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 960 (Ala. 2004) ("'"Appellate review does not consist of supine submission to erroneous legal concepts even though none of the parties declaimed the applicable law below. Our duty is to enunciate the law on the record facts. Neither the parties nor the trial judge, by agreement or passivity, can force us to abdicate our appellate responsibility"'" (quoting Forshey v. Principi, 284 F.3d 1335, 1359 n.20 (Fed. Cir. 2002),

interpreting a federal statute conflicts with the United States Constitution itself, then our duty is not to predict the next bend in the crooked path by asking, "What would the Supreme Court do?" Instead, our duty, under oath, is to ask, "What does the Constitution say?" Here, that Constitution says the policyholders have a right to a jury trial. Furthermore, one may give up such an invaluable right, even in a case where an injury has already occurred and a cause of action exists, only when the waiver of that right is knowing, willing, and voluntary, and in this case it was not.

I respectfully dissent.

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quoting in turn Empire Life Ins. Co. of America v. Valdak Corp., 468 F.2d 330, 334 (5th Cir. 1972))). This is especially true when this Court affirms a ruling of a trial court, as I would do here. See Southern Energy Homes, Inc. v. Gregor, 777 So. 2d 79, 81 (Ala. 2000) ("[T]his Court can affirm the ruling of a trial court for any valid reason, even one not presented to or considered by the trial court.").