IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,821

5 DCA CASE NO. 96-03182

PATRICIA SEIFERT, as Personal Representative of the Estate of ERNEST SEIFERT, Deceased, for the benefit of PATRICIA SEIFERT, surviving spouse,

Petitioner,

vs.

U.S. HOME CORPORATION and WOODY TUCKER PLUMBING, INC.,

Respondent.
_____/

RESPONDENT, U.S. HOME CORPORATION'S ANSWER BRIEF

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INTRODUCTION

Respondent, U. S. HOME CORPORATION will be referred to, throughout this brief, as U. S. HOME CORPORATION, U. S. HOME, or Respondent. Petitioner, PATRICIA SEIFERT, as personal representative of the Estate of Ernest Seifert, deceased, for the benefit of Patricia Seifert, surviving spouse, will be referred to as PATRICIA A. SEIFERT, SEIFERT, Petitioner, or Plaintiff. Woody Tucker Plumbing, Inc., although a Defendant in this case, is not a party to this appeal, nor was Woody Tucker a party to the appeal in the Fifth District Court of Appeal. Woody Tucker is identified on the title page, solely because the Petitioner identified Woody Tucker Plumbing, Inc. in its original caption. Woody Tucker shall be referred to solely, in lower case, as Woody Tucker.

"A" refers to the consecutively numbered appendix filed with the Amended Brief of Petitioner Seifert.

STATEMENT OF THE CASE AND FACTS

On July 21, 1994, ERNEST R. and PATRICIA A. SEIFERT entered into a Sales Agreement (A-26-27) (the "Sales Agreement") with U.S. HOME CORPORATION for the construction of a new home at 2135 Terrace View Lane, Timber Pines Subdivision, Spring Hill, Hernando County, Florida. Among other provisions, the Agreement contained an arbitration clause which stated as follows:

> "ARBITRATION. *Any Controversy or claim arising under or related to this Agreement or to the Property* (with the exception of "consumer products" as defined by the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §2301 et.seq., and the regulations promulgated under that Act) or with respect to any claim arising by virtue of any representations alleged to have been made by the Seller or Seller's representative, *shall* be settled and finally determined by mediation or by binding arbitration as provided by the Federal Arbitration Act (9 U.S.C., §§1-14) and similar state statutes and not by a court of law. The claim will first be mediated in accordance with the Commercial or Construction Industry Mediation Rules as appropriate, of the American Arbitration Association. If not resolved by mediation, the claim will be settled in accordance with the Commercial or Construction Industry Arbitration Rules, as appropriate, of the American Arbitration Association, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction of the matter; provided, however that if Seller's warranty plan establishes an alternative dispute resolution procedure, a claim covered by Seller's warranty will be determined in accordance with that alternative procedure prior to submission to binding arbitration, if necessary. Unless otherwise provided by law or Seller's warranty, the cost of initiating any of the foregoing proceedings shall be borne equally by the Seller and Buyer."

(emphasis supplied) (A-27). The house was built and the closing occurred on April 12, 1995. Naturally, an integral part of the house, and its improvements, was the air conditioning system which, the complaint alleges, was installed by Woody Tucker.

The circumstances giving rise to the Plaintiff's claim, as described by the Plaintiff in her Complaint, are as follows: On September 19, 1995, Ernest Seifert drove his vehicle into the garage and inadvertently forgot to turn off the car. After closing the garage door to the outside, Mr. Seifert apparently entered his home and was found dead sometime thereafter, inside the residence. It was subsequently determined that Mr. Seifert died of carbon monoxide poisoning, and the Plaintiff has

alleged that this carbon monoxide was "sucked into the house" through an allegedly defective air conditioning air handler, which was located in the garage.

Based upon these facts, PATRICIA A. SEIFERT, as the Personal Representative of the Estate of her late husband, brought a complaint against U.S. HOME CORPORATION, essentially alleging that her husband died because the air conditioner/air handler was defectively manufactured and installed, and that the home was improperly designed. Relying upon the Sales Agreement's arbitration clause which, as set forth above, clearly sets forth that arbitration "shall" resolve "any controversy or claim arising under or related to this Agreement or to the Property," U. S. HOME brought a Motion to Stay and Compel Arbitration.[1] Following the hearing before the Circuit Court of the Fifth Judicial Circuit in and for Hernando County, on October 7, 1996, the trial court denied U. S. HOME's Motion to Stay and Compel Arbitration. U. S. HOME then filed a timely appeal of the trial court's non-final order pursuant to Rule 9.103, Florida Rules of Appellate Procedure.

On September 19, 1997, in U.S. Home Corporation v. Seifert, 699 So.2d 787 (Fla. 5th DCA 1997), the Fifth District Court of Appeal found that, since the issues raised by SEIFERT arose under or were related to the Sales Agreement "or to the property," the Arbitration Clause in this particular case encompassed the issues raised by the lawsuit. Accordingly, the Court ruled that the trial court erred in refusing to require arbitration and remanded the cause for an order compelling the same. On September 25, 1997, the Petitioner moved the Fifth District Court of Appeal to certify that a conflict existed between the Court's decision in the instant case and the Fourth District Court of Appeal's decision in Terminix International Company, L.P. v. Michaels, 668 So.2d 1013 (Fla. 4th DCA 1996). On October 3, 1997, the Fifth District Court of Appeal denied the Petitioner's request for such a certification. Petitioner then filed its Notice of Intent to Invoke the Discretionary Jurisdiction of this Court, pursuant to Rule 9.030(2)(a), Fla.R.App.Proc., alleging that the Fifth

[1] In its Motion, U. S. HOME cited both §682.02, Fla. Stat. (1997), as well as 9 USC §§1-14 (1996), the Federal Arbitration Act, in support of its position.

District Court of Appeal's decision directly and expressly conflicted with the Fourth District Court of Appeal's opinion in Michaels. On January 26, 1998, this Court granted review.

SUMMARY OF ARGUMENT

In considering whether this Court should reverse the lower court's decision in U. S. Home Corporation v. Seifert, 699 So.2d 787 (Fla. 5th DCA 1997), this Court should be guided by three factors, all which militate strongly in favor of affirmation. First, this Court should recognize that both Florida and federal law strongly favor arbitration, and, in the face of a broadly worded arbitration clause, make clear that a claim should be excluded from arbitration only when either expressly excluded or forceful evidence exists of an intent to exclude it. Secondly, in examining the arbitration clause at issue against the claims alleged by the Petitioner, this Court should easily come to the conclusion that the arbitration clause at issue is extremely broad, and clearly covers SEIFERT's claim for personal injuries that arose from alleged construction defects in the house. Finally, this Court should recognize that the parties have failed to expressly exclude *any* claim, much less the type of claim brought by SEIFERT in her Complaint, and no evidence, whatsoever, exists which would lead the Court to conclude that either party had any intent to exclude personal injury claims from arbitration. Thus, in the face of no legislative enactment which would expressly exclude personal injury claims from the parameters of arbitration clauses, this Court, in following clear Florida and federal precedent, should affirm the decision of the Fifth District Court of Appeal.

ARGUMENT

A. Both Florida and Federal Law Favor Arbitration and Broadly Construe Arbitration Agreements.

The Federal Arbitration Act, 9 U.S.C. §§1-14 (1996) ("FAA") applies to any and all transactions that involve interstate commerce, including the construction of a residence such as the one at issue in the case before this Court. See McKee v. Home Buyers Warranty Corp., 45 F.3d 981 (5th Cir. 1995); Maxus v. Sciacca, 598 So.2d 1376 (Ala. 1992). This factor, as well as the express language of the arbitration clause at issue, clearly demonstrates that not only the Florida Arbitration Act, §682, Fla. Stat. (1997), and Florida case law applies to this Court's review of U. S. Home's arbitration clause, but also the federal statute as well as the body of federal substantive law that has developed on the issue of arbitrability. See Michelin Tire v. Todd, 568 F.Supp. 622 (D. Md. 1983) (the threshold question for a court to consider is whether or not the claim falls under the Federal Arbitration Act, in that the FAA creates a body of federal substantive law of arbitrability, which must be applied, under the supremacy clause, by all courts, state or federal, to any arbitration agreement within its coverage). Fortunately, both the Florida statute and Florida case law are directly in line with its federal counterparts, for the U. S. Supreme Court has decreed that, to the extent that any state statute or decision collides with the federal policy in favor of arbitration, state law is preempted and must yield to federal substantive law on the subject. See Southland Corp. v. Keating, 465 U. S. 1, 79 L.Ed.2d 1, 104 S.Ct. 852 (1984). Thus, in examining the applicability of the arbitration clause in question to the factual allegations of SEIFERT's Complaint, this Court should examine and apply the substantive law of both the State of Florida as well as that of the United States of America.

It is now well settled that, under both state and federal substantive law relating to arbitration, that:

> Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the

> language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). See also, Michael A. Hanzman, Prearbitration "Status Quo" Injunctions, Do They Protect the Arbitration Process or Impair Agreements to Arbitrate. *Fla. Bar J.* 20, 22 (March 1998). The policies and directives giving rise to these federal principles have been explicitly recited in Genesco, Inc. v. T. Kakiucki and Company, Ltd., 815 F.2d 840, 844 (2d Cir. 1987), as follows:

> The United States Arbitration Act (the Act), codified at 9 U.S.C. Secs. 1-14, reflects a legislative recognition of "the desirability of arbitration as an alternative to the complications of litigation." Wilson v. Swan, 346 U.S. 427, 431, 74 S.Ct. 182, 185, 98 L.Ed. 168 (1953). The Act, "reversing centuries of judicial hostility to arbitration agreements," Scherk v. Alberto-Culver Co., 417 U.S. 506, 510, 94 S.Ct. 2449, 2453, 41 L.Ed.2d 270 (1974), was designed to allow parties to avoid "the costliness and delays of litigation," and to place arbitration agreements "upon the same footing as other contracts ..." H.R.Rep. No. 96, 68 Cong., 1st Sess. 1, 2 (1924); see also S.Rep. No. 536, 68th Cong., 1st Sess. (1924). To achieve these goals, it provides that written provisions to arbitrate controversies in any contract involving commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. Sec. 2. Section 2 is "a congressional declaration of a liberal federal policy favoring arbitration agreements...." Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983). The Act also provides in Sec. 3 for a stay of proceedings where the court is satisfied that the issue before it is arbitrable under the agreement, and Sec. 4 of the Act directs a federal court to order parties to proceed to arbitration if there has been a "failure, neglect, or refusal' of any party to honor an agreement to arbitrate." Scherk, 417 U.S. at 511, 94 S.Ct. at 2453. These provisions are mandatory: *"[b]y its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed."* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 218, 105 S.Ct. 1238, 1241, 84 L.Ed.2d 158 (1985)

(emphasis supplied). Florida law is directly consistent with these federal principles, in that Florida courts have specifically adopted the premise of Moses H. Cone Memorial Hospital and its progeny to substantive Florida law on the subject. As set forth in Wylie v. Investment Management and Research, Inc., 629 So.2d 898 (Fla. 4th DCA 1993):

> With the contrary readings in equipoise, we are left with the Supreme Court's admonition that all doubts be resolved in favor of arbitration rather than against it.

Id. at 901 (citing Moses H. Cone Memorial Hospital v. Mercury, supra). See also EMSA Limited Partnership v. Richard Mason, 677 So.2d 105 (Fla. 4th DCA 1996); Jansen Properties of Florida, Inc. v. Real Estate Associates, Ltd. VI, 674 S.2d 210 (Fla. 4th DCA 1996); CSE, Inc. v. Barron, 620 So.2d 808, 809 (Fla. 2d DCA 1993); Ronbeck Construction Co., Inc. v. Savanna Club Corp., 592 So.2d 344, 346 (Fla. 4th DCA 1992).

Notwithstanding SEIFERT's policy argument to the contrary, the FAA has placed arbitration clauses on the same footing as any other contract, Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 S.Ct. 2449, 2453 (1974), and, unless SEIFERT can show some "special circumstances" that would relieve her of her obligations, she is bound by the contract that she signed. Genesco, Inc. v. T. Kakiucki, 815 F.2d at 845. Certainly as with other contracts, the party's intent controls the construction of the agreement, Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U. S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995), and, in determining such intent, the court should consider the language of the contract and the subject matter of the agreement, as well as its object and purpose. See American Home Assurance v. Larkin General Hospital, 593 So.2d 195 (Fla. 1992). However, as opposed to the construction advanced by SEIFERT in her Amended Brief, courts have consistently held that, when construing the applicability of an arbitration provision, a party's "intentions are generously construed as to issues of arbitrability, and, in light of the federal and state policy favoring arbitration, any ambiguity as to the scope of the arbitration clause must be resolved in favor of arbitration." See Key v. Home Buyers Warranty Corp. II, 45 F.3d 981, 984 (5th Cir. 1995). (citing Mitsubishi Motors Corp. v. Soler Chrysler - Plymouth, Inc., 473 U.S. 614, 626, 105 Sup. Ct. 3346, 87 L.Ed.2d 444 (1985); Volt Information Sciences, Inc. v. Stanford University, 49 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)). As this Court has made clear, in remaining consistent with substantive federal law, courts should apply "every reasonable presumption" to support the arbitration process. Roe v. Amica Mutual Insurance Company, 533 So.2d 279 (Fla.

1988). Thus, with these principles in mind, "both federal and state jurisprudence dictate that any doubt as to whether a controversy is arbitrable should be resolved in favor of arbitration." Key v. Home Buyers Warranty Corp. II, 45 F.3d at 985 (citing cases).

In her brief, SEIFERT seems to suggest that arbitration applies only to those claims specifically enumerated in an arbitration agreement.[2] Attempting to set arbitration provisions on the same footing as clauses that exculpate parties for their own negligence, which are expressly disfavored by law, Cox Cable Corporation v. Gulf Power Co., 591 So.2d 627 (Fla. 1992), SEIFERT urges this Court to adopt a narrow, restrictive view of the arbitration provision signed by SEIFERT. In so doing, she hopes to convince this Court to include, within the umbrella of the clause's expansive language, only those claims that are specifically identified, and to exclude all others. SEIFERT's argument, in this respect, clashes dramatically with long standing Florida and federal principles on the subject, for when, as in the case at hand, the arbitration clause is broad, arbitration should *never* be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. United Steel Workers of America v. American Manufacturing Company, 363 U.S. 564, 582, 583, 80 S.Ct. 1343, 1353, 4 L.Ed. 2d 1403 (1960); Seaboard Coastline Railroad Company v. National Rail Passenger Corp., 554 F.2d 657, 660 (5th Cir. 1977). See also, Emerald Texas V. Peel, 920 S.W.2d 398, 403 (Tx. 1st DCA 1996).

In formally granting deferential treatment to arbitration clauses, particularly those as broad as in the case at hand, both Florida and federal courts have consistently emphasized that only the

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[2] For example, in support of this proposition, Seifert cites First Options of Chicago v. Kaplan, 514 U.S. 938, 115 S.Ct. 1920 (1995). First Options, however, described a situation in which the court considered *who* should arbitrate the dispute, rather than *whether* the dispute should be arbitrated. Insofar as the latter issue is concerned, the court noted that the presumption in regard to whether the dispute should be arbitrated is exactly opposite to who should decide the question: the court or the arbitrator. In regard to *whether* it should be arbitrated, the law treats silence or ambiguity to presume that the matter *should* be arbitrated in stating that: "given the law's permissive policies in respect to arbitration, see, e.g., Mitsubishi Motors, supra, at 626, 105 S.Ct. at 3358, one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a particular matter." Id. at 1924 (emphasis in original).

"most forceful evidence of a purpose to *exclude* the claim from arbitration can prevail." Beaver Coaches, Inc. v. Revels Nationwide RV Sales, 543 So.2d 359, 362 (Fla. 1st DCA 1989) (emphasis supplied). SEIFERT's plea for an exclusionary construction of the arbitration clause, in this regard, is directly refuted by principles set forth in Zolezzi v. Dean Witter Reynolds, Inc., 789 F.2d 1447, 1449 (9th Cir. 1986), wherein the federal court addressed a similar argument as follows:

> Zolezzi argues that intentional tort claims are not arbitrable unless the arbitration agreement contains a clear statement that tort actions are included. There is no merit to this argument. The Supreme Court has held that tort claims are within the scope of arbitration agreements and that *express exclusion of tort claims in a broadly worded arbitration agreement is required*. See Prima Paint v. Flood & Conklin, 388 U.S. 395, 406-07, 87 S.Ct. 1007-08, 18 L.Ed.2d 1270 (1967); Steel Workers v. Warrior and Gulf Company, 363 U.S. 574, 581, 80 S.Ct. 1347, 1352, 4 L.Ed.2d 1409 (1960). NYSE Rule 347 is broad in scope and does not contain an express exclusion of tort claims.

(emphasis supplied). Thus, SEIFERT's argument notwithstanding, this Court must, in following the principles of Florida and federal law, interpret the span of the arbitration claim's umbrella widely, and refer this matter to litigation *only* if the tort claim at issue is expressly excluded.

B. A Review of the Arbitration Clause at Issue Against the Allegations of the Complaint Clearly Demonstrate That the Allegations Raised by Seifert Fall Within the Arbitration Provision.

Courts have made clear that the scope of the arbitration provision, broadly construed in favor of arbitration, determines whether or not the dispute must be submitted to arbitration. Florida Department of Insurance v. World Re, Inc., 615 So.2d 267 (Fla. 5th DCA 1993); G. Grektorp v. City Towers of Florida, Inc., 644 So.2d 613 (Fla. 2d DCA 1994). Consequently, with these broad federal and state policies favoring arbitration in mind, this Court should analyze the arbitration clause in the case at hand against the allegations set forth in the SEIFERT's Complaint. First, the Court should review the arbitration clause itself to see what types of claims are included. Next, the Court should

review the allegation contained within the Complaint to see if the agreement is susceptible of an interpretation that covers the asserted dispute. Beaver Coaches, Inc. v. Revels Nationwide R. V. Sales, 543 So.2d 359, 362 (Fla. 1st DCA 1989) (citing AT&T Technologies, Inc. v. Communication Workers of America, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)). Finally, the court should examine the clause to determine if the type of claim pled by SEIFERT is "expressly excluded," Zolezzi v. Dean Witter Reynolds, Inc., supra at 1449, or if, at a minimum, the most "forceful evidence" has been presented by SEIFERT "of a purpose to exclude the claim from arbitration." Beaver Coaches, Inc. v. Revels Nationwide R. V. Sales, supra at 362.

1. *The Arbitration Clause at Issue is Broad.*

From a review of paragraph 13 of the Sales Agreement betweeen U. S. HOME and the SEIFERTS (A-27), it is clear that the arbitration clause at issue is as broad as can reasonably be imagined:

> "ARBITRATION. *Any Controversy or claim arising under or related to this Agreement or to the Property* (with the exception of "consumer products" as defined by the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §2301 et.seq., and the regulations promulgated under that Act) or with respect to any claim arising by virtue of any representations alleged to have been made by the Seller or Seller's representative, *shall* be settled and finally determined by mediation or by binding arbitration as provided by the Federal Arbitration Act (9 U.S.C., §§1-14) and similar state statutes and not by a court of law. The claim will first be mediated in accordance with the Commercial or Construction Industry Mediation Rules as appropriate, of the American Arbitration Association. If not resolved by mediation, the claim will be settled in accordance with the Commercial or Construction Industry Arbitration Rules, as appropriate, of the American Arbitration Association, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction of the matter; provided, however that if Seller's warranty plan establishes an alternative dispute resolution procedure, a claim covered by Seller's warranty will be determined in accordance with that alternative procedure prior to submission to binding arbitration, if necessary. Unless otherwise provided by law or Seller's warranty, the cost of initiating any of the foregoing proceedings shall be borne equally by the Seller and Buyer."

(emphasis supplied). As noted by the Second District Court of Appeal, in CSE, Inc. v. Barron, 620 So.2d 808, 809 (Fla. 2d DCA 1993), the use of terminology such as "arising out of or relating to" signals language which courts should view as particularly all-encompassing. Perhaps more significantly, however, as will be discussed below, the arbitration provision in the U. S. HOME/SEIFERT Sales Agreement applies not only to matters which "arise out of or are related to" the *Sales Agreement*, but also apply to *any controversy or claim*[3] which "arises out of or relates to" the *property*, itself[4]. Consequently, through the use of a particularly broad arbitration provision, U. S. HOME has signaled its intention that *any* claim, whether, for example, based upon contract, trademark infringement, business tort, personal injury tort, or statutory claim, which might, in any way, "relate to" *either* the contract to construct SEIFERT's residence, *or* the property located at 2135 Terrace View Lane, Spring Hill, Florida (A-5), itself, shall not be resolved in a court of law, but referred to arbitration.

a. Seifert's claim arises out of or relates to the Sales Agreement.

In reviewing the allegations of SEIFERT's Complaint against this particularly broad language, case law makes clear, first, that SEIFERT's *claim* arises out of or relates the Sales Agreement, for, as set forth in Genesco, Inc. v. T. Kakiucki and Company, Ltd., 815 F.2d 840 (2d Cir. 1987), "[i]f the allegations underlying the claims 'touch matters' covered by the parties' sales agreements, then those claims must be arbitrated, whatever the legal labels attached to them." Id. at 846 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S.Ct.

[3] In Marschel v. Dean Witter Reynolds, 609 So.2d 718 (Fla. 2d DCA 1992), the Second District Court of Appeal also opined that the use of language such as "any controversy" and "shall be settled by arbitration" also identifies a "broad arbitration clause." Id. at 721. See also, Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 115 S.Ct. 1212, L.Ed.2d 76 (1995).

[4] The term "property" defined and discussed at page 16-17, infra, and includes "all improvements constructed on the land."

3346, 3353, 87 L.Ed.2d 444 (1985)). Although the injuries suffered by the Petitioner are based upon the death of her husband, the cause of Mr. Seifert's death, as asserted by the Petitioner, unquestionably relates to the construction defects she has alleged in her pleadings. In her Complaint, the Petitioner recites that the death of Mr. Seifert occurred based upon a breach of U. S. HOME's duty to "design, manufacture, assemble, build, develop, construct, and inspect new homes, including the subject home described above, in such a manner and with the exercise of reasonable care," so as to prevent the air conditioner from allegedly pulling air from the garage into the duct work of the house (A-11-12). In her brief before this Court, Petitioner, in her own language, claims that "the air conditioner was defective either because it was improperly installed or because it had a defective part that permitted the carbon monoxide to be sucked into the house or because it should not have been installed in the garage in the first place." See Petitioner's Amended Brief at 2, n. 1.

In essence, the allegations of SEIFERT's Complaint assert nothing more than defects in the design and construction of the *home*, which is the very soul of the Sales Agreement. As set forth in Emerald Texas, Inc. v. Peel, 920 S.W.2d 398 (Tx. 1996), "the duty to design and build the Peels' house without negligence and in a good and workmanlike manner . . . all arise from, and not independently of, the contract." Id. at 404. Thus, regardless of the legal theory upon which SEIFERT asserts her claim, or the category of damages sought, *all* of the allegations giving rise to SEIFERT's claim are based upon a fundamental allegation that the object of the Sales Agreement (i. e., the house) was defective. Accordingly, as in Peel, SEIFERT's reliance on a tort theory of recovery is not controlling; rather, inasmuch as the allegations of SEIFERT's Complaint arise from the performance of the contract, the claim is clearly arbitrable in that, although these claims may not raise issues of contract interpretation or performance, they clearly "have their genesis in the agreement." Sweet Dreams Unlimited, Inc. v. Dial A Mattress International, Ltd., 1 F.3d 639, 643 (7th Cir. 1993). ("keeping in mind the federal presumption in favor of arbitration, these claims, which have their genesis in the agreement, are related to the subject matter of the arbitration clause and are subject to arbitration").

Furthermore, Petitioner's assertion that arbitration clauses in the agreements do not apply to personal injury cases is completely without foundation. In Bachus & Stratton v. Mann, 639 So.2d 35 (Fla. 4th DCA 1994), for example, the plaintiff filed a lawsuit based upon, among other counts, *assault and battery*, intentional infliction of emotional distress, defamation, conspiracy to defame, invasion of privacy, and interference with business relationships. In that case, which arose from the plaintiff's employment with Bachus & Stratton Securities, Inc., the defendant corporation sought to invoke an arbitration clause which provided, in pertinent part, that the parties would

> "arbitrate any dispute, claim, or controversy that may arise between me and my firm, or customer, or any other person, that is to be arbitrated under the rules, constitutions, or bylaws of the organization with which I register."

Because the court concluded that the allegations made by the plaintiff involve "significant aspects of the employment relationship," id. at 36, the court held that the arbitration clause was sufficiently broad to cover all claims brought by the plaintiff. Reciting the well-recognized public policy of expediting claims, reducing litigation, and relieving overburdened courts, the court specifically rejected the claimant's position, similar to that of the SEIFERT in this case, that her tort claims[5] were not subject to arbitration. Thus, the court concluded that, as long as the complaint contained sufficient allegations to demonstrate that the claim arose "in connection with" the business operations of her former employer, all claims, including those sounding in tort, belonged in arbitration. Id. at 37.

In Chase Manhattan Investment Services, Inc. v. Miranda, 658 So.2d 181 (Fla. 3d DCA 1995), the Third District Court of Appeal addressed a clause which required arbitration for controversies which arose from the employment of the claimant. In that case, the claimant brought an action for the torts of conversion and invasion of privacy. Citing Moses H. Cone Memorial

[5] As noted, one of the tort claims was for assault and battery, the type of personal injury that the Plaintiff in this case would claim cannot be covered by this arbitration provision.

Hospital, the court recognized the "strong bias in favor of arbitration" under both federal and state law. Id. at 182. The court found that, however "allegedly horrendous" the defendant's actions appeared, they would not have occurred "but for" the employer-employee relationship. Id.[6] Consequently, the court concluded that the actions of the employer arose out of the relationship, requiring their resolution by arbitration. Id.

The Third District Court of Appeal once again addressed this issue in Royal Caribbean Cruises, Ltd. v. Universal Employment Agency, 664 So.2d 1107 (Fla. 3d DCA 1995). In that case, the plaintiff employment agency sought damages for "the alleged intentional torts of defamation, fraud, and business interference" in connection with plaintiff's claim that Royal Caribbean was obliged to accept crew members. In evaluating the proper forum for this dispute, the Third District Court of Appeal reviewed the hiring agreement, which contained a standard American Arbitration Association Clause providing as follows:

> any controversy or claim arising out of or relating to this agreement or the breach of any term or provision hereof shall be settled by arbitration in the City of Miami, State of Florida, USA in accordance with the rules of the American Arbitration Association.

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[6] The rationale for this conclusion is perhaps best set forth in the federal case of Aspero v. Shearson American Express, Inc., 768 F.2d 106 (6th Cir. 1985), where the court faced, and rejected, a similar argument that a tort claim, which arose even after her employment ended, was subject to the arbitration provision of her employment agreement. Discussing the Eighth Circuit case of Morgan v. Smith Barney, Harris Upham & Co., 729 F.2d 1163 (8th Cir. 1984), the court stated as follows:

> The Eighth Circuit in Morgan looked neither to the timing of the action nor to the legal basis of the action as tort or contract, but instead evaluated whether the lawsuit involved "significant aspects of the employment relationship, including but not limited to explicit contractual terms." Id. at 1167 When the employee's role as a broker or the brokerage house's role as an employer of brokers is the "specific source" from which a controversy arises, even a controversy that is not based upon contractual rights or duties will be subject to arbitration under Rule 347.

Aspero, supra at 108. See also, McGinnis v. E.F. Hutton and Co, Inc., 812 F.2d 1011 (6th Cir. 1987). Cf. Vukasin v. Davidson and Co., 785 P.2d 713 (Mont. 1990) (applying federal policies set forth in Aspero, McGinnis, and Zolezzi, supra, to find an assault charge to fall within an arbitration clause under Montana law).

The Court recited the "axiom" of federal and Florida law that arbitration clauses should be given the broadest possible interpretation to accomplish the salutary purpose of resolving controversies out of court, id. at 1108, and opined that the dispute clearly arose from the contract. Citing Chase Manhattan Investment Services v. Miranda, supra, the court also recognized not only that the controversy was directly related to, but that it would not have occurred "but for," the "relationship it established." Id. Accordingly, the court stated as follows:

> The dispute thus clearly had its "origin or genesis in the contract," Sweet Dreams Unlimited v. Dial-A-Mattress, Int'l, Ltd, 1 F.2d 639, 642 (7th Cir. 1993), and was both "directly related to, and ... would not have occurred but for" the relationship it established. Chase Manhattan Inv. Servs., Inc. v. Miranda, 658 So.2d 181, 182 (Fla. 3d DCA 1995). Since all this is true, in turn, this action - even though it sounds entirely in tort and neither claims a breach of the contract nor involves its performance or interpretation - must be deemed to be one *"arising out of* or relating to [the] agreement" within the meaning of the clause in question. In common with apparently every other court which has interpreted this language, we therefore conclude that the present action must be referred to arbitration.

Id. at 1108 - 1009 (emphasis in original) (citing cases).

Applying the reasoning pronounced by the courts in Chase Manhattan Investments Services and Royal Caribbean Cruises, Ltd., SEIFERT's claim that her husband died as a result of construction defects also clearly had its "origin and genesis," id., in the subject matter of the contract: the house that was constructed pursuant to the Sales Agreement.[7] As was the situation in both of these cases, the death allegedly would not have occurred, according to the SEIFERTS' theory, "but for" the relationship established by the contract. Thus, although the Plaintiff may premise her action upon tort theories, these cases make clear that tort causes of action fall within an arbitration clause as long as the factual predicate of the claim is sufficiently related to the subject matter of the

[7] This was not merely the resale of a completed home from one homeowner to another. The subject matter of this contract contemplates the construction and sale of a home directly from the builder.

contract.[8] Certainly, to the extent that the subject matter of the contract in the case at hand was the purchase of a house, all claims relating to alleged defects in the construction of the residence are necessarily included within its scope. Accordingly, all issues which relate to the design, construction, manufacture, and assembly of the home would necessarily relate to the contract, and therefore would be included in the arbitration provision for this reason as well.

b. Seifert's claim clearly relates to the property.

Even if, for some reason, this Court somehow did not reach the conclusion that the Plaintiff's claims are sufficiently related to the Sales Agreement to merit a referral to arbitration, this Court should clearly reach the inescapable conclusion that, at a bare minimum, each one of the Plaintiff's claims unquestionably "relates to . . . the property"[9]. As noted by the Fifth District Court of Appeal, the Sales Agreement includes, within the definition of the term property, "all improvements which have been or will be constructed on the land by the Seller." U. S. Home v. Seifert, 699 So.2d 787, 787 n. 1 (Fla. 5th DCA 1997). This definition, unquestionably, would include not only the house, itself, but the fixtures, such as the air conditioner, which was installed in the garage ceiling (A-6). Accordingly, the Plaintiff's allegations that U. S. HOME breached its duty to "design, manufacture, assemble, build, develop, construct, and inspect" either the Plaintiff's *house* or the *air conditioner*

[8] See also Rodgers Builders, Inc. v. McQueen, 331 S.E.2d 726 (N.C. App. 1985) ("courts have generally agreed that whether a claim falls within the scope of an arbitration clause and is subject to arbitration depends not on the character of the claim as tort or contract, but on the relationship of the claim to the subject matter of the arbitration clause.")

[9] With due respect to Judge Sharp's dissent in U. S. Home v. Seifert, 699 So.2d 787 (1997), recited by the Petitioner, the term "property" is used in the disjunctive, in that the agreement pertains to any claim or controversy relating to the contract ***or*** the property, and clearly is not limited only to contractual issues concerning the property. Nevertheless, even under *that* construction, this claim would still be arbitrable since Seifert's allegations relate to property defects.

can be construed in no way other than to conclude that SEIFERT's allegations relate to "the property" as well as the Sales Agreement, itself.[10]

C. Michaels Provides No Support for Seifert's Position.

Although, in support of her position, SEIFERT extracts principles of law from various Florida and federal cases, none of which even remotely apply to the case at hand,[11] the thrust of SEIFERT's position is based almost entirely upon Terminix International Company, L.P. v. Michaels, 668 So.2d 1013 (Fla. 4th DCA 1996) and the Arizona Court of Appeal case upon which it is premised: Dusold v. Porta-John Corporation, 807 P.2d 526 (Az.Ct.App. 1990).[12] In so relying, SEIFERT not only incorrectly states that these two cases are the only ones in the nation other than

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[10] The Plaintiff's entire argument relating to the phrase "to the property" is contained in footnote 12 on page 18 of her Amended Brief. In her argument, the Plaintiff repetitively asserts that, somehow, the term "to the property," in the arbitration clause, does not adequately satisfy U. S. Home's purported obligation to inform the Seiferts that any matter relating to the property is covered under the arbitration clause. But see Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148 (7th Cir. 1997) ("a contract need not be read to prove effective; people who accept take the risk that the unread terms in retrospect prove unwelcome.") She also incorrectly asserts that U. S. Home was "obligated" to specify that bodily injury claims are included, thereby reversing the well settled principle of law that, in the face of a broad arbitration clause, claims are included unless expressly excluded. See Zolezzi v. Dean Witter Reynolds, supra.

[11] For example, Plaintiff cites a case in which the arbitration clause was in a separate, and distinct contract from the one at issue in the case before the court, All American Semiconductor, Inc. v. Unisys Corporation, 637 So.2d 59 (Fla. 3d DCA 1994); another case in which the issue involved payment for "loss of use" of a damaged vehicle when the appraisal clause specifically applied to the appraisal of the vehicle, itself, Atencio v. U.S. Security Insurance Co., 676 So.2d 489 (Fla. 3d DCA 1996); and a case in which the promissory note sued upon contained no arbitration provision, whatsoever. Katzin v. Mansdorf, 624 So.2d 810 (Fla. 3d DCA 1993).

[12] Seifert also attempts to rely, as support for her position, on Fuller v. Guthrie, 656 F.2d 259 (2nd Cir. 1977), in which a claim against Arlo Guthrie for slander was deemed inappropriate for arbitration. The Fuller decision was rendered prior to the Supreme Court's expansive treatment of arbitration clauses, initiated in Moses H. Cone Memorial Hospital. Beyond this, however, the case is fully distinguishable in that not only is the arbitration clause at issue in Fuller entirely dissimilar, but, as noted in TAC Travel America Corp. v. World Airways, 443 F.Supp. 825, 828 (S.D.N.Y. 1978), the slander in Fuller concerned individuals outside the contract where the facts in this case, as well as TAC, involved only parties to the agreement.

the Fifth Circuit Court of Appeal's decision in Terminix International Co., LP v. Ponzio, 693 So.2d 104 (Fla. 5th DCA 1997), that involve bodily injury, but, additionally, further inaccurately asserts that Michaels holds that a "contractual arbitration clause does not require arbitration of torts that give rise to bodily injury."[13] As will be discussed, not only does SEIFERT entirely misconstrue the holding of Michaels, she further fails to acknowledge that both Michaels and Dusold are easily distinguishable in at least two major respects: (a) the scope of the arbitration clauses at issue in these cases are much narrower than in the case at hand; and (b) the nature of the legal relationship at issue in these cases is entirely dissimilar to the home builder/purchaser relationship established between U. S. HOME and the SEIFERTS.

[13] Petitioner's Amended Brief at 9.

1. *The scope of the arbitration clause at issue in this case is broader than that of Michaels and Dusold.*

In Michaels, Terminix was sued by the plaintiffs, who were the assignees of a termite protection plan when they purchased their home in 1990.[14] The plan contained an arbitration clause which provided in part as follows:

> The purchaser and Terminix agree that any controversy or claim between then arising out of or relating to *the interpretation, performance, or breach of any provision of* this agreement shall be settled exclusively by arbitration.

(emphasis supplied). Based upon this agreement, Terminix treated the plaintiff's home with chemical pesticides which, plaintiffs alleged, caused tangible and intangible personal injuries. Terminix moved to compel arbitration pursuant to the contract, and the trial court denied the motion.

On appeal, the appellate court affirmed the trial court, opining that the claim for personal injuries due to pesticide poisoning was not sufficiently related to the contract, itself. The court, however, did not rule out the viability of arbitration for personal injury claims based upon a clause which provides for arbitration of claims "arising out of or related to" a contract. In fact, in distinguishing its previous ruling in Bachus & Stratton, Inc. v. Mann, 639 So.2d 35 (Fla. 4th DCA 1994), the court acknowledged that an arbitration clause for a claim arising out of or related to a contract may include tort claims, when the allegations of the complaint sufficiently relate to the subject matter of the contract. In the Michaels case, however, the court believed that a personal injury claim, based upon the spreading of insecticides, formed an insufficient link to the subject matter of the contract to require the imposition of the arbitration clause.

Although U. S. Home submits that the Fourth District Court of Appeal reached an incorrect result in Michaels, this Court, in deciding the case at hand, can easily reach an appropriate legal

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[14] Although unstated, the original purchaser of the plan was obviously someone other than the Plaintiff, who assigned the plan to them two years prior to the incident.

result without expressly overruling Michaels, in that the Fourth District Court of Appeal's decision is easily distinguishable in two respects. First, the language of the arbitration clause in the instant case is *far* broader than that addressed in Michaels. As previously discussed, the U. S. HOME arbitration clause makes abundantly clear that *any* claim relating, in any manner, either to the Sales Agreement *or* to *the property,* whether based in contract, tort, or any other claim, is subject to arbitration. Secondly, in contrast to the remote circumstance addressed in Michaels, the allegations of SEIFERT's Complaint, as previously discussed, demonstrate that the facts alleged by the Petitioner in this case fall within the relationship created by the contract. Michaels considered the dissemination of pesticides, an ultra-hazardous activity, originating from a service agreement made several years prior with a remote purchaser who assigned the service agreement to the plaintiff.[15] SEIFERT, on the other hand, alleges defects in the design and construction of the *home,* which is the very soul of the Sales Agreement. Regardless of the legal theories which the Petitioner asserts or the category of damages sought, *all* of the allegations giving rise to SEIFERT's claim are based upon a fundamental allegation that the object of the Sales Agreement (i.e., the house) was defective.

2. *The Nature of the Relationship Also Distinguishes Terminix and Dusold.*

In her Amended Brief before this Court, SEIFERT attempts to carve out an exception for torts involving "bodily injury." Asserting, incorrectly, that Michaels held that personal injury claims are not subject to arbitration clauses, the Petitioner focuses upon the fact that damages arising from, among other things, an allegation of bodily injury were sought in Michaels, while damages relating to an alleged wrongful death are requested in the case at hand. SEIFERT then incorrectly states that Michaels and Dusold were the only two cases ever to consider a contractual arbitration clause in the context of a bodily injury claim, aside from the Fifth District Court of Appeal case in Terminix

[15] Although it is unknown when the contract was actually entered into with the original purchaser, the incident, itself, occurred two years after it was *assigned.*

International Company, L.P. v. Ponzio, 693 So.2d 104 (Fla. 5th DCA 1997). This Court, however, need only look to the case of Bachus & Stratton, Inc. v. Mann, 639 So.2d 35 (Fla. 4th DCA 1994), discussed previously, to find a case in which an assault and battery, clearly a bodily injury claim, was held to fall within the parameters of a contract's arbitration provision.[16] Not only does Bachus & Stratton involve an allegation of bodily injury, the claim was based upon an intentional tort, rather than the inadvertent harm alleged in Terminix, Dusold, and the case at hand.[17] Certainly no other support exists for Plaintiff's position that "bodily injury" claims should be excluded from the clear principles of law as set forth above, that "tort claims . . . are not automatically excluded from a contractual arbitration clause." H.S. Gregory, G.E. v. Electro-Mechanical Corporation, 83 F.3d 382, 384 (11th Cir. 1996).

Rather, the significant factor in both Michaels and Dusold, that removed these circumstances from an arbitration clause, was not the nature of the *claim,* but, rather, the nature of the legal *relationship* between the parties and the legal *duties* imposed by virtue of that relationship. Both Michaels and Dusold involved the dissemination of chemicals, an ultra hazardous activity upon which strict liability is based. In examining the legal relationships, the Fourth District Court of Appeal, in Michaels relied extensively upon the reasoning of Dusold, an Arizona Appellate Court case. In so doing, the court quoted as follows:

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[16] See also, Vukasin v. D. A. Davidson & Co., 785 P.2d 713 (Mont. 1990) (assault and battery referred to arbitration); Contract Construction v. Paver Technology Center Ltd. Partnership, 640 A.2d 251 (Md. 1994). As stated by one federal judge:

> The Plaintiff's contention that the matter should not be arbitrated because it is a tort case has no validity and requires no extended discussion. Hundreds of personal injury claims are arbitrated every day under the uninsured motorist provisions of standard automobile contract policies.

Coudert v. Paine Webber Jackson & Curtis, 705 F.2d 78, 84 (2nd Cir. 1983) (Weiss, J. dissenting).

[17] Certainly, if SEIFERT's assertion that bodily injury claims are, per se, exempt from arbitration clauses had any merit, whatsoever, a claim of intentional bodily injury would be more likely to fall within such an exception.

> If the contract places the parties in a unique relationship that creates new duties not otherwise imposed by law, then a dispute regarding a breach of a contractually-imposed duty is one that arises from the contract. Barmat v. John and Jane Doe Partners A-D, 155 Ariz. [519] at 523, 747 P.2d [1218] at 1222 [1989]. Analogously, such a claim would be one arising from the contract terms and therefore subject to arbitration where the contract requires it. If, on the other hand, the duty alleged to be breached is *one imposed by law in recognition of public policy* and is *generally owed to others besides the contracting parties*, then a dispute regarding such a breach is not one arising from the contract, but sounds in tort. Id. Therefore, a contractually-imposed arbitration requirement ... would not apply to such a claim.

Michaels, supra, at 1014 (quoting Dusold v. Porta-John Corporation, 167 Ariz. 358, 261-63, 807 P.2d 526, 529-31 (Ariz. Court App. 1990)) (emphasis supplied). In Michaels, the plaintiffs, sued Terminix based upon its failure to warn them of the dangerous and ultra-hazardous nature of the pesticide chemicals which it used. Thus, as noted by the Michaels court:

> In the instant case, the appellees alleged that their injuries occurred because of the appellants' failure to warn them of the dangerous nature of the chemicals which it used. The appellees allege both negligence and strict liability *based upon the ultrahazardous nature of the chemicals*. Therefore, the duty owed was a general duty imposed on the producer and distributor of hazardous chemicals, not one imposed by contract.

Id. at 1015 (emphasis supplied).

By the same token, the facts of Dusold, the Arizona case upon which Michaels was based, involved precisely the same type of relationship as the one examined in Michaels: a service business which used toxic chemicals, and its customer. The plaintiff, in that case, sued Porta-John Corporation for: a) failing to warn him of the dangerous and toxic nature of the chemicals; and b) failing to provide adequate instruction for their safe use. Dusold, supra, at 527. Focusing carefully upon the allegations of the complaint, the Court noted as follows:

> Applying that rationale to this litigation, we note that Dusold alleged that his personal injuries occurred because Porta-John failed to warn him of the dangerous and toxic nature of it chemicals and failed to

> properly instruct him as to their safe use. Dusold does not contend that these duties to warn or instruct arose out of any contractual obligation of Porta-John under the licensing agreement between them. *Rather, Dusold alleges that the duties to warn or instruct arose solely from Porta-John's obligations as a supplier of hazardous materials and such a supplier's duties are controlled by common law tort principles of products liability.* The Arizona Supreme Court has recognized that when an injured buyer maintains a tort action on a theory of strict liability, "the essential nature of the action sounds in tort," even if the parties' relationship was formed by a contract, because "the liability of the seller would exist even without a contract." *Barmat*, 155 Ariz. at 523 n. 1, 747 P.2d at 1222 n. 1. According to Dusold, the duties involved here would be owed to him by Porta-John even if he were a contractual stranger. We agree.

Id. at 531 (emphasis supplied). Accordingly, the Court ruled that, under those circumstances, the dispute was not subject to the contractual arbitration clause.

By stark contrast, SEIFERT has brought her action based upon allegations that the home bought by the SEIFERTS, pursuant to the Sales Contract, contained an air conditioner that was defectively manufactured, defectively installed, or "should not have been installed in the garage in the first place."[18] Accordingly, any duty owed by U. S. HOME to the SEIFERTS was not based upon any duty "imposed by law in recognition of public policy and generally owed to others besides the contracting parties," id., but, instead, was based purely upon obligations growing from the contract between U. S. HOME and the SEIFERTS in which U. S. HOME built and supplied a house for the Petitioner. Therefore, in light of the allegations of the Complaint, any duty owed by U. S. HOME to the SEIFERTS, even from the Petitioner's perspective, clearly is not a duty implied by law, "controlled by common law tort principles of products liability." Id.

In contrast to the factual scenario in Michaels, this Court has already determined that the type of action under which SEIFERT brings her Complaint is one in which strict liability principles do not apply. Essentially, SEIFERT alleges no more than U. S. HOME has breached its obligation by providing real estate which was defective. This Court, however, has long recognized that strict and

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[18] Petitioner's Amended Brief at 2, n. 1.

products liability principles simply do not apply to structural improvements to real estate. See Easterday v. Masiello, 518 So.2d 260 (Fla. 1988); see also, Craft v. Wet N' Wild, Inc., 489 So.2d 1221 (Fla. 5th DCA 1986); Jackson v. L.A.W. Contracting Corp., 481 So.2d 1290 (Fla. 5th DCA 1986). As noted by SEIFERT in her Amended Brief, the trial court has already determined that this case comes under this well recognized law, and has dismissed the Petitioner's count based upon strict liability.[19] Thus, by relying, as primary support for her position, upon cases which turned upon a legal relationship giving rise to the type of liability which clearly does not apply in this case, SEIFERT has left herself without any foundation, whatsoever, for her argument that this Court should reach the same result as did the Fourth District Court of Appeal in Michaels.

D. Unlike Michaels, the Fifth District's Decision in Ponzio is Consistent with Existing Federal and Florida Law.

The same factors that distinguish Michaels from the case at hand were also noted by the Fifth District Court of Appeal in Terminix International Company, LP v. Ponzio, 693 So.2d 104 (Fla. 5th DCA 1997), in which the Fifth District reached the opposite conclusion from the Fourth District Court of Appeal's decision in Michaels. In Ponzio, the Plaintiff filed a five count complaint against Terminix, alleging claims in negligence and breach of contract based upon bodily injuries from the dissemination of pesticide. Asserting an argument similar to that offered by the Petitioner in the instant case, the Ponzios defended Terminix's attempt to dismiss the complaint, based upon an arbitration clause, by asserting that, under the rationale of Michaels, personal injury claims were not arbitrable under the terms of Terminix's contract. The trial court apparently found Michaels

[19] The trial court's dismissal of Plaintiff's count for strict liability and breach of implied warranty of habitability occurred subsequent to the motion to compel arbitration and notice of appeal relating to the same. It is important to note, to avoid confusion, that the court heard these arguments and made these rulings based upon a stipulation (and order adopting the same) by all parties that, by allowing the court to proceed on the motion to dismiss, U.S. HOME had ***not*** waived its right to seek an order compelling arbitration through the appellate process.

persuasive and denied Terminix's motion to dismiss. On appeal, however, the Fifth District Court of Appeal confronted the issue by reversing the lower court decision.

Importantly, the Fifth District Court of Appeal noted that the Michaels arbitration provision applied only to matters which arose out of or related to the "interpretation, performance, or breach of the parties' contract." Id. at 106, 108. The clause at issue in Ponzio, the court noted, was couched in broader terms, requiring arbitration for "any controversy or claim between them arising out of or relating to *this agreement.*" Id. at 105, 108. Finding significance in Terminix's omission of any restriction, present in the Michaels situation, of arbitration only for claims arising from the "interpretation, performance, or breach of" the agreement, the Fifth District, after discussing the rationale of Michaels, found that personal injury claims were not barred from arbitration, per se. Thus, the court concluded in Ponzio, the arbitration clause was sufficiently broad to include personal injury claims as well.

Moreover, reciting the broad federal and state policy favoring arbitration, the Fifth District Court of Appeal noted as follows:

> The Fourth District has recently explained in Advantage Dental Health Plans, Inc. v. Beneficial Administrators, Inc., 683 So.2d 1133 (Fla. 4th DCA 1996) that Michaels should be "narrowly read and applied" and merely holds that a strict liability claim does not "arise out of or relate the interpretation, performance, or breach of any provision of the contract."

Id. at 107.[20] Thus, as noted by the Fifth District Court of Appeal, the Michaels decision has been limited even by the Fourth District, itself. In this regard, both the Fourth and Fifth District Courts

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[20] In a footnote, the Fourth District Court of Appeal, in Advantage Dental Health Plans, Inc. v. Beneficial Administration, Inc., 683 So.2d 1133, 1134, n. 1 (Fla. 4th DCA 1996), states as follows:

> The decision in *Terminix International Co. v. Michaels*, 668 So.2d 1013 (Fla. 4th DCA), *rev. denied*, 679 So.2d 774 (Fla. 1996), is distinguishable. It merely holds that there is no contractual ambiguity in the arbitration provision and that the strict liability claim did not "arise out of or relate to the interpretation, performance, or breach of any provision" of the contract. The opinion should be narrowly read and applied.

of Appeal have recognized that, to the extent that Michaels is not sharply limited to its own facts, the decision is in direct derogation of the long standing state and federal premise that "all doubts as to the scope of an arbitration agreement are to be resolved in favor of arbitration rather than against it." Id. (citing Advantage Dental Health Plans, Inc., supra). Consequently, the Fifth District Court of Appeal considered a final alternative: to the extent that Michaels is interpreted in a manner advanced by the plaintiff in Ponzio and the Petitioner in this case, *i.e.*, that bodily injury claims are not arbitrable, the decision is inconsistent with existing law, in that neither Florida nor federal courts have "hesitated to order arbitration where tort claims are involved." Id. at 108 (citing cases).

Analyzing the case at hand in the context of both the Ponzio and Michaels decisions, it becomes apparent that the distinguishing factors between Ponzio and Michaels are far more pronounced when the facts of Michaels are compared against the facts at issue in this case. First, U. S. HOME's arbitration clause not only fails to limit arbitration only to "interpretation, performance, or breach of" the agreement, found to be a significant distinction between Ponzio and Michaels, but, as discussed above, extends the scope of arbitration significantly to *any* claims relating either to the agreement *or* to the *property*. Moreover, if the court, in Ponzio, found the nature of the relationship between the parties in Michaels and Ponzio to be sufficiently different to warrant contrary results, this Court should easily reach the conclusion that the distinction between the parties' relationship in Michaels and this case is far greater. Finally, as displayed by the principles of law discussed above, to the extent that Michaels and Ponzio are deemed to be in conflict with each other, the decisions reached in Ponzio and followed by the Fifth District Court of Appeal's decision in U. S. Home v. Seifert, 699 So.2d 787 (Fla. 5th DCA 1997), as opposed to the Fourth District Court of Appeal's decision in Michaels, are consistent with established federal and "Florida law governing construction of arbitration provisions." Ponzio, supra at 108.

E. Neither the Arbitration Clause nor the Record Demonstrate Any Intent to Exclude Personal Injury Cases From Arbitration.

As both the United States Supreme Court and corresponding state courts have made clear, nothing in either the Federal Arbitration Act or state law limits a party's right to exclude certain issues from a contractual arbitration clause. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S.Ct. 3346 (1985); Raytheon Company v. Automated Business Systems, 882 F.2d 6 (1st Cir. 1989); Contract Construction, Inc. v. Power Technology Center Limited Partnership, 640 A.2d 251, 256 (Md. App. 1994). As noted by the court in Marschel v. Dean Witter Reynolds, Inc., 609 So.2d 718, 721 (Fla. 2d DCA 1992):

> Parties are free to limit the scope of their agreement to arbitrate or to designate that specific issues, such as statute of limitations questions or other time barred defenses, will not be arbitrable.

Id. at 721 (citing Volt Informational Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. University, 489 U.S. 468, 109 S.Ct. 1248, 1256, 103 L.Ed.2d 488 (1989)). Thus, the final point of analysis, for this court, is to determine if the parties in this case have expressly excluded personal injury claims from the scope of the arbitration clause. Clearly, the arbitration clause at issue is broad, all encompassing, and provides no express exclusion of *any* type of claim or controversy. SEIFERT's attempt, in her Brief, to interject representations as to her purported "intent," notwithstanding, neither the contract nor any aspect of the record reflects any evidence, much less "forceful evidence," to exclude personal injury or wrongful death claims from the arbitration clause's parameters.[21] Beaver Coaches, Inc. v. Revels Nationwide R.V. Sales, supra.

Nevertheless, in a last ditch effort, SEIFERT attempts to assert that "special circumstances"[22] exist, in the form of policy considerations, that should exempt her from the binding nature of the

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[21] Petitioner's Amended Brief at 7. As SEIFERT correctly suggests on page 18 of her Amended Brief, there is no specific reflection of the parties' intent, other than the words of the agreement, itself.

[22] See Genesco, Inc. v. T. Kakiucki & Co., Ltd., 815 F.2d 840, 845 (2nd Cir. 1987) ("under general contract principles, a party is bound by the provisions of a contract that he signs unless he can show special circumstances that would relieve him of such an obligation.")

arbitration clause. Citing a treatise on alternative dispute resolution, SEIFERT argues that the historical basis of arbitration contemplates a scenario in which merchants brought their "specialized business problems" to "fellow merchants with similar experience and training." Thus, SEIFERT suggests, experts in the subject matter who are familiar with industry customs are more "qualified" to resolve such disputes. Arbitration, she therefore offers, is a preferred method of resolving disputes of a technical nature by trained individuals who have more ability to resolve a technically based dispute than a judge or jury. See e.g., E.C. Ernest, Inc. v. Tallahassee, 527 F.Supp. 1141, 1144 (N.D. Fla. 1981).

In light of the clearly stated federal and state judicial policy favoring arbitration, which has recently emerged and abrogated the historical reluctance directed at arbitration, see Stephen L. Hayford, Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change, 31 Wake Forest L. Rev. 1 (1996), SEIFERT's plea, in this regard, is largely irrelevant. Nevertheless, in examining SEIFERT's position in respect to the subject litigation, it becomes clear that the claim brought by SEIFERT, herself, is the type of dispute that is consistent with the policies she recites in her Amended Brief. The Petitioner, in this case, has sued U. S. HOME, based *solely* upon alleged technical deficiencies in the design, installation, and testing of the air conditioning system which, she alleges, led to the death of her husband. Along these lines, U. S. HOME has every right to expect that its disputes will be resolved quickly with a minimal amount of appellate review.[23] Additionally, U. S. HOME also has the right to insure that *any* controversy or claim relating either to its contractual obligation to supply the SEIFERTS with a house, or to "the property," in any respect, will be decided by qualified individuals with proper credentials and expertise, who are "familiar with industry customs"[24] and may properly, and objectively, evaluate whether or not U. S. HOME breached the standard of care in the industry.

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[23] As stated by the Supreme Court in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U. S. at 628, arbitration "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."

[24] Petitioner's Amended Brief at 20.

Moreover, should this court find it advisable to carve out an exception to the longstanding judicial policy in favor of arbitration by excluding, as a matter of public policy, personal injury claims from such arbitration claims, the court should defer to the legislature for such a remedy.[25] As the United States Supreme Court has made clear:

> Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the . . . rights at issue.

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985). Apparently, other states, such as Kansas, Texas and Arkansas, have chosen to statutorily exclude personal injury claims from arbitration clauses. Nevertheless, as recognized by other state and federal courts, exclusions are enforceable only to the extent that no interstate commerce is implicated, in that such a provision would be inconsistent with and preempted by federal law. Miller v. Public Storage Management, 121 F.3d 215, 219 (Tx. 5th Cir. 1997); Beesar v. Erickson, 917 P.2d 901, 904, 22 Kan.App.2d 452 (1996).[26] Nevertheless, until and unless the Florida legislature sees fit to depart from the general judicial and legislative trend to divert disputes from the crowded court system, this Court cannot, and should not, abrogate the clear Florida and federal judicial policy that strongly favors arbitration.

CONCLUSION

[25] Cf., Rodgers Builders, Inc. v. McQueen, 331 S.E.2d 726, 734 (N.C. App. 1985) ("our legislature has not indicated that the arbitration of claims for punitive damages is against public policy as it has not exempted such claims from the Uniform Arbitration Act.")

[26] Thus, because the construction of a residence is deemed to implicate interstate commerce, see McKee v. Home Buyers Warranty Corp., 45 F.3d 981 (5th Cir. 1995), supra, and also because the U. S. Home arbitration provision specifically invokes the Federal Arbitration Act, any attempt, even by the Florida legislature, to exclude the arbitration clause in this case would be invalid as preempted by federal law. Southland Corp. v. Keating, 465 U.S. 1, 79 L.Ed.2d 1, 104 S.Ct. 852 (1984).

For the foregoing reasons, Respondent, U. S. HOME CORPORATION, respectfully requests this Court to affirm the Fifth District Court of Appeal's decision in U. S. Home Corporation v. Seifert, 699 So.2d 787 (5th DCA 1997) and order the trial court to stay the proceeding as to U. S. HOME CORPORATION and compel arbitration.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express to Jay Halpern, Esquire, Poses & Halpern, P.A., 150 West Flagler Street, Suite 2626, Miami, FL 33130; Joseph T. Patsko, Esquire, P. O. Box 2151, Tampa, FL 33601; Sharon Wolfe, Esquire, Cooper & Wolfe, P.A., 200 South Biscayne Blvd., Suite 3580, Miami, FL 33131-2316; Frank A. Lane, Esquire, Lane, Reese, Aulick, Summers & Field, P.A., Douglas Centre, Suite 304, 2600 Douglas Road, Coral Gables, FL 33134; this _____ day of March, 1998.

Respectfully submitted,

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