



## Alerts

### Florida Court Rules That Retainer Agreement Arbitration Provision is Enforceable and Severable From Agreement's Unenforceable Fee & Cost Shifting Provisions

**April 27, 2021**

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*Lemos v. Sessa*, No. 3D20-1362, 2021 Fla. App. LEXIS 4527 (Dist. Ct. App. Mar. 31, 2021)

#### Brief Summary

A Florida appellate court held that plaintiff was required to arbitrate her claims against the attorney and her law firm (defendants) that represented her in underlying divorce proceedings pursuant to an arbitration provision in the retainer agreement, despite other provisions being unenforceable. The court agreed with plaintiff that the retainer agreement's fee-shifting and cost-shifting provisions were unenforceable for violating public policy. However, plaintiff was still required to arbitrate her alleged claims because the agreement to arbitrate was severable.

#### Complete Summary

In 2018, plaintiff retained defendants to represent her in divorce proceedings. In 2019, plaintiff negotiated a marital settlement agreement with her husband to pay plaintiff two lumpsum payments. The second payment was wired to defendants' trust fund account in order for defendants to deduct fees and costs of representation before the remainder would be sent to plaintiff. However, either the plaintiff's or defendants' email was hacked, and defendants were provided with fraudulent wiring instructions for plaintiff. Consequently, defendants wire transferred the second payment to the hacker, who later disappeared with the funds.

Plaintiff then filed claims for negligence and breach of fiduciary duty against defendants. Defendants argued that the claims were subject to arbitration based on the retainer agreement arbitration clause, which stated, in part: "Any disputes relating to the quality of representation, fees and costs or any other issues pertaining to our representation of you shall be governed by the terms of this agreement and shall be arbitrated."

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The trial court denied defendants' motion to compel arbitration, holding that the agreement was ambiguous and did not encompass plaintiff's claims. The trial court also held that the fee-shifting and cost-shifting provisions were contrary to public policy and "serve only to chill the client's willingness to dispute any issue of the client's representation." Defendants appealed.

The court first determined that the retainer agreement arbitration provision was not ambiguous because it clearly required any dispute related to the representation to be arbitrated. Plaintiff then argued that the arbitration provision was not applicable because it only pertained to fee disputes and legal malpractice claims, but she brought a general tort claim. The court stated that the central inquiry is whether the tort claim had a "significant relationship" to the agreement to mandate arbitration. The "significant relationship," also referred to as a "contractual nexus," asks whether the issue in dispute "requires either reference to, or construction of, a portion of the contract." The court held that defendants' duty to secure the funds in their trust account was not distinct from the attorney-client relationship because it was not a duty that would be owed outside the contractual relationship. Further, defendants' representation of plaintiff was the only reason the funds were in the trust account. Thus, the issues were subject to the valid arbitration provision.

The court also considered whether the trial court erred in holding that the retainer agreement's fee-shifting and cost-shifting provisions violated public policy. The two provisions at issue were: (1) the provision requiring plaintiff to advance the costs of arbitration prior to the final adjudication; and (2) the provision requiring plaintiff to pay defendants' fees and costs regardless of the outcome.

The appellate court upheld the trial court's conclusion that these provisions were against public policy. The court first looked to the Florida Rules of Professional Conduct, which prohibit an attorney from entering into an agreement with a client that limits the lawyer's legal malpractice liability. The court concluded that these provisions were unenforceable and against public policy because they limited the client's ability to seek recourse against the attorneys. In doing so, the court reasoned that even if the client was successful, she would be responsible for paying all attorneys' fees and costs for conducting the arbitration. Because the valid arbitration provision was severable from the unenforceable provisions, the court held that the trial court should have granted defendants' motion to compel arbitration.

## Significance of Decision

The court held that a valid arbitration clause in a retainer agreement would be enforceable and severable even if portions of the agreement are unenforceable. Attorneys and firms should ensure that arbitration provisions in their retainer agreements are up to date if they hope to save themselves from the potential costs of litigation.