NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

CHRISTOPHER HOLT and MATTHEW and DANIELLE BROLLINI, individually and on behalf of all others similarly situated, Appellants, v. O'BRIEN IMPORTS OF FORT MYERS, INC. d/b/a FORT MYERS MITSUBISHI, FORT MYERS DAEWOO, FORT MYERS SUBARU, FORT MYERS HYUNDAI, NAPLES HYUNDAI, NAPLES MITSUBISHI and BEST USED CARS, Appellees.	)	Case Nos. 2D02-3994 2D02-4038 CONSOLIDATED

Opinion filed July 2, 2003.

Appeal from the Circuit Court for Lee County;
James H. Seals and Jay B. Rosman, Judges.

William C. Bielecky of William C. Bielecky, P.A., Tallahassee, William L. Sundberg, of Sundberg & Hessman, P.A., Tallahassee, and
Jerome A. Sico of Goldberg, Racila, Sico & Noone, P.A., Fort Myers, co-counsel for Appellants.

Mark R. Kapusta of the Law Office of Bohdan Neswiacheny, Sarasota, for Appellees.

FULMER, Judge.

In these consolidated cases, Christopher Holt, Matthew Brollini, and Danielle Brollini, individually and on behalf of all others similarly situated, appeal orders that compel them to arbitrate their claims against O'Brien Imports of Fort Myers, Inc. We affirm in part and reverse in part.

Holt and the Brollinis (referred to here as the Buyers) purchased cars from O'Brien Imports. In the course of these transactions, the Buyers signed agreements to arbitrate "all disputes not barred by applicable statues [sic] of limitations, resulting from or arising out of the transaction entered into[.]" The arbitration agreements provided for attorney's fees and costs as follows:

> Any party to this agreement who fails or refuses to arbitrate in accordance with the terms of this predispute binding arbitration agreement shall, in addition to any other relief awarded through arbitration, be taxed by the arbitrator or arbitrators with all of the costs, including reasonable attorney's fees, of any other party who had to resort to judicial or other relief in compelling arbitration in accordance with the terms herein contained.

Notwithstanding the arbitration agreements, the Buyers filed multi-count complaints against O'Brien Imports seeking damages, injunctive relief, costs, and attorney's fees. Holt filed an individual action, and he was also a named plaintiff in the class action brought with the Brollinis.

The first three counts in both complaints alleged violations of chapter 520, Florida Statutes (2000). Count one alleged that O'Brien Imports violated section 520.07(1) by failing to provide the Buyers with a copy of the retail installment sales contract that included the essential provisions and financing disclosures before the

Buyers signed for and accepted credit. Count two alleged that O'Brien Imports violated section 520.07(3)(d) by failing to itemize the amount it charged for gap insurance. Count three alleged that O'Brien Imports violated section 520.13 by requiring execution of an "ON THE SPOT DELIVERY AGREEMENT."

The remaining counts did not allege violations of chapter 520. Count four in both complaints alleged that certain actions by O'Brien Imports were deceptive and unfair trade practices in violation of chapter 501, part II, Florida Statutes (2000). And count five in both complaints alleged that O'Brien Imports violated the Truth in Lending Act, 15 U.S.C. §§ 1632, 1638 (TILA). Holt's individual complaint included two additional counts alleging fraud and deceptive trade practices.

O'Brien Imports filed a motion to dismiss and compel arbitration. The trial court granted the motion, and the Buyers now appeal. They argue that the arbitration agreements are unenforceable because they defeat the remedial purposes of the statutes under which they sue and because they are unconscionable. "When deciding whether to compel arbitration, a court is limited to considering (1) whether the parties have entered into a valid arbitration agreement, (2) whether an arbitrable issue exists, and (3) whether the right to arbitration has been waived." Flyer Printing Co. v. Hill, 805 So. 2d 829, 831 (Fla. 2d DCA 2001).

As to the first three counts alleging violations of chapter 520, we conclude that the arbitration agreement is not enforceable because its attorney's fees provision conflicts with the prevailing party provision for attorney's fees in section 520.12, and this statutory provision is nonwaivable under section 520.13. See Flyer Printing Co., 805 So. 2d 829 (holding arbitration agreement unenforceable because it required employee

to pay half of the arbitration fees and costs, which was inconsistent with the applicable statutes setting a prevailing party standard). In the absence of a severability clause, we cannot simply strike the offending provision. Compare Healthcomp Evaluation Servs. Corp. v. O'Donnell, 817 So. 2d 1095, 1098 (Fla. 2d DCA 2002) (holding that "trial court erred when it failed to sever the unenforceable sentence from the arbitration clause" when the agreement contained a severability clause), with Flyer Printing Co., 805 So. 2d at 833 (rejecting Flyer Printing's offer to pay all arbitration costs even though agreement required parties to split the costs because court "not authorized to remake the parties' contract"). Accordingly, we reverse the order insofar as it compels arbitration on counts one, two, and three of both complaints.

The Buyers seek to invalidate the arbitration agreements in their entirety because they seek injunctive relief and class action status that is not permitted under the agreements. We conclude that the rights to seek this relief and to proceed as a class are waivable in the absence of a nonwaiver statute like section 520.13. See Randolph v. Green Tree Fin. Corp.-Ala., 244 F.3d 814 (11th Cir. 2001) (holding that arbitration agreement was enforceable even though it precluded plaintiff from pursuing class action under TILA). In this case, the Buyers can vindicate their personal claims without injunctive relief or class actions, and nothing in chapter 501 indicates that the right to injunctive relief is a nonwaivable right. Because the remaining counts did not allege violations of chapter 520, they do not trigger the nonwaivable attorney's fee provision in sections 520.12 and 520.13. Therefore, we affirm the order compelling arbitration on counts four and five of both complaints and on counts six and seven of Holt's individual complaint.

We are not persuaded by the Buyers' claim that the arbitration agreement is unconscionable. To invalidate a contract on this ground, the court must find that the contract is both procedurally unconscionable and substantively unconscionable. Estate of Blanchard ex rel. Blanchard v. Cent. Park Lodges (Tarpon Springs), Inc., 805 So. 2d 6, 9 (Fla. 2d DCA 2001). Procedural unconscionability relates to the way in which the contract was entered. Powertel, Inc. v. Bexley, 743 So. 2d 570 (Fla. 1st DCA 1999) (holding that contract modification adding arbitration clause was procedurally unconscionable when cellular telephone customers had no choice if they wanted to continue service in which they had invested and notice sent to customers failed to indicate that it contained new terms). Procedural unconscionability is not shown by the Buyers' failure to read the documents associated with their automobile purchases; there is no allegation that they were prevented from reading the documents or induced not to read them by O'Brien Imports. See Qubty v. Nagda, 817 So. 2d 952, 958 (Fla. 5th DCA 2002) (rejecting argument that party who sought to avoid arbitration did not know the contract terms in the absence of allegations that party was prevented or induced from reading it).

We likewise reject Holt's individual argument concerning whether the arbitration agreement was terminated. "Whether the contract terminated due to events subsequent to the making of the contract is an issue for arbitration, not for the trial court." Estate of Blanchard, 805 So. 2d at 8.

Affirmed in part; reversed in part; remanded.

ALTENBERND, C.J., and COVINGTON, J., Concur.