



Passion. Preparation. Persistence.

Volume 6, Issue 21

THE BASSETT BULLETIN™

THE ARBITRATION INVESTIGATION

Due to the sheer volume of cases that the Texas Courts put out on a daily basis dealing with arbitration, The Bassett Firm has decided that a quarterly newsletter detailing the recent decisions relating to arbitration would be very beneficial to our clients.

Without further ado, here is the first installment of “The Arbitration Investigation.”

IN RE: BROCK SPECIALTY SERVICES, LTD.

On May 29, 2009, the 13th Court of Appeals, arguably the most liberal appellate court in Texas, upheld a company’s arbitration agreement. *In Re: Brock Specialty Services, Ltd.*, 286 S.W.3d 649 (Tex.App.—Corpus Christi 2009, orig. proceeding).

Jose Espinosa worked as a forklift driver for Brock Specialty Services, Ltd. While in the course and scope of his employment, Espinosa was injured. Espinosa filed a workers’ compensation claim, and his employment was later terminated. Espinosa filed suit against Brock alleging that he was terminated in retaliation for filing his workers’ compensation claim. Brock filed its Motion to Compel Arbitration based on the employment contract entered into between Brock and Espinosa.

Brock contended that the arbitration agreement expressly required retaliation claims to be decided through arbitration. However, the trial court denied Brock’s motion because the arbitrator designated in the contract was a defunct corporation. Therefore, the agreement to arbitrate was impossible.

The Court of Appeals held that the Federal Arbitration Act dictates that in the event that a designated arbitrator is unavailable, the trial court has the duty to enforce the arbitration clause and choose another arbitrator.

Espinosa raised another issue at the trial court. Espinosa sought to avoid arbitration claiming that the arbitration agreement was unconscionable. However, the trial court did not rule on whether the arbitration agreement was unconscionable. Because the trial court did not analyze the unconscionable claim, the appellate court did not analyze it either.

Because the trial court erroneously denied Brock’s Motion to Compel Arbitration, the cause was remanded to the trial court with an order to direct the claims to arbitration.

IN RE: MACY'S TEXAS, INC.

On June 29, 2009, the Texas Supreme Court determined that an arbitration agreement between an employee and her employer's parent company was enforceable. *In Re: Macy's Inc.*, 2009 Tex. LEXIS 459 (Tex. 2009).

Erica Tomsic was an employee at a Macy's department store when she injured her back. Tomsic signed an arbitration agreement which covered all Texas employees of Federated Department Stores, Inc., Macy's West, Inc., and Federated Systems Group, Inc. acknowledging that the Plan required arbitration of on-the-job injuries against "the Company." The Plan defined "the Company" as "your particular employer." However, Tomsic brought suit against Macy's Texas, Inc. alleging Macy's Texas, Inc. was her employer.

When Macy's Texas, Inc. sought to compel this suit into arbitration, Tomsic argued that Macy's Texas, Inc. was not a party to the arbitration agreement she signed. Although the Court acknowledged that it was hard to believe that Macy's South and Macy's West were not affiliated with Macy's Texas, Inc., the definition of "the Company" provided that Tomsic's suit against her particular employer was to be heard in arbitration.

Tomsic could offer no explanation why she would sue anyone other than her employer or why should would enter into an agreement with someone other than her employer. Therefore, because Tomsic agreed to arbitrate with her employer and purported to sue her employer, she cannot avoid arbitration by raising factual disputes about her employer's correct legal name. Therefore, the Supreme Court ordered the suit to arbitration.

HOLMES V. GENTRY

On July 21, 2009, the Dallas Court of Appeals determined that a party's right to arbitration may be waived when a party substantially invokes the judicial process and the opposing party is prejudiced as a result. *Holmes v. Gentry*, 2009 Tex. App. LEXIS 5573 (Tex.App.—Dallas 2009, orig. proceeding).

In December 2003, Laurie Gentry retained Holmes, Woods, & Diggs (the Firm) to represent her in a family law matter. Gentry and the Firm executed a fee agreement in connection with the representation. The fee agreement contained an arbitration clause whereby any dispute would be decided by the American Arbitration Administration.

Needless to say, a dispute arose between the parties. On March 14, 2005, the Firm filed suit against Gentry claiming it was entitled to recover \$ 8,347.48, plus interest and reasonable attorney's fees. After being served with the lawsuit, Gentry attempted to file an Answer as a pro se litigant. Gentry then contacted the Firm and requested mediation or arbitration in accordance with the arbitration agreement. The Firm agreed to mediation or arbitration. Gentry's Answer to the lawsuit was never filed, but she believed Holmes was arranging dates for mediation or arbitration.

On September 21, 2005, the Court granted the Firm a default judgment on which the Firm then attempted to collect on. Gentry retained an attorney to prevent the Firm from executing on the default judgment. Settlement negotiations failed, and the Firm sought to execute on the default judgment. The trial court eventually set aside the default judgment, and the case was set on the jury docket.

A year and a half later, the Firm sought to remove this case to arbitration, per the arbitration agreement. The trial court denied the Motion to Compel Arbitration. An appeal followed. The Firm not only initiated the litigation, but initially agreed to arbitration. Despite its agreement, the Firm then elected to aggressively pursue litigation. Because the Firm substantially invoked the litigation process and Gentry suffered prejudice, the Court concluded that the Firm waived its right to arbitration.

JONES V. HALLIBURTON CO., ET AL.

On September 15, 2009, the United States Court of Appeals for the Fifth Circuit decided a case that ordered arbitration for some of the Plaintiff's claims, while her four remaining claims were not subject to arbitration. *Jones v. Halliburton Co, et al.*, 2009 U.S. App. LEXIS 20543 (5th Cir. 2009).

Jamie Leigh Jones began working for Halliburton in 2004 as an administrative assistant in Houston, Texas. During her employment, she alleged that she was sexually harassed by her supervisor, prompting a request for relocation. Jones then signed a contract with a wholly-owned subsidiary of Halliburton to be employed as a clerical worker in Baghdad, Iraq. As part of her employment, Jones signed an arbitration agreement to resolve all claims against Halliburton related to her employment, including termination, and any and all personal injury claims arising in the workplace.

While working in Iraq, Jones alleged that she was drugged, beaten, and gang-raped by several Halliburton employees in her bedroom. Subsequently, Jones filed a lawsuit against Halliburton, et al. and asserted claims for: negligence; negligent undertaking; sexual harassment and hostile work environment under Title VII; retaliation; breach of contract; fraud in the inducement to enter the employment contract; fraud in the inducement to agree to arbitration; assault and battery; intentional infliction of emotional distress; and false imprisonment. She also contended that Halliburton was vicariously liable for the torts committed by its employees.

The district court granted in part and denied in part Halliburton's Motion to Compel Arbitration. For the reasons that follow, the district court compelled arbitration for all claims, except: (1) assault and battery; (2) intentional infliction of emotional distress arising out of the alleged assault; (3) negligent hiring, retention, and supervision of employees involved in the alleged assault; and (4) false imprisonment.

The claims for assault and battery, emotional distress, negligent hiring, retention, and supervision, and false imprisonment were found not arbitrable. At issue was whether these claims were related to the employee's employment or constituted personal injury arising in the workplace, so as to render them arbitrable under the arbitration agreement. The employer argued that the claims were covered by the agreement because the alleged incident "related to" the employee's employment. The Court of Appeals disagreed. Sexual assault was not within the course and scope of employment. This was true even though the employee received workers' compensation benefits in connection with the incident, as the terms "course and scope of employment" were more narrowly defined under the agreement than in workers' compensation laws such as the Defense Base Act. That the employee lived in employer-provided barracks was inconsequential because she was off duty at the time, and the barracks were located away from the work place.

Thus, the cause was remanded to the trial court for the remaining "non-arbitrable" causes of action. In essence, Jones must maintain two separate and distinct lawsuits which cover the same events: the tort claims will survive in the trial court, and the employment claims will be decided in arbitration. It is unclear how the two lawsuits will be decided and resolved. The dissent in the opinion recognizes that "Jones's claims are inextricably connected because they arose from the same incident and the evidence of the claims will necessarily overlap. It seems inefficient to adjudicate these claims before different fora."

WHAT DOES THIS MEAN FOR YOU?

As we have reiterated in the past, Texas courts are eager to follow arbitration agreements and compel arbitration. However, from the previous four cases, be mindful of the following:

- (1) An arbitration agreement that specifies a now defunct arbitrator is still enforceable. The trial court will appoint another arbitrator. If you want to avoid an arbitrator of the court's choosing, it is advisable to designate several arbitrators in your arbitration agreement.
- (2) Review your arbitration agreements to ensure that the correct legal entities are listed in your arbitration agreement. Otherwise, the arbitration agreement may not be valid.
- (3) You can waive your right to compel arbitration by substantially invoking the judicial process. Once a lawsuit is filed, it is important to immediately request the Court order the cause to arbitration.
- (4) Finally, not all claims are subject to the arbitration agreement. Courts have the authority to split a cause of action into two separate and distinct cases. A tort cause of action may proceed in state court, while the employment claims may proceed through arbitration. Review your arbitration agreement to avoid a "split" decision.



The Bassett Firm

**Two Turtle Creek Village
3838 Oak Lawn Avenue
Suite 1300
Dallas, Texas 75219
(214) 219-9900 Telephone
(214) 219-9456 Facsimile
Toll Free: 1-800-310-9769
www.thebassettfirm.com**

ATTORNEYS

- **MIKE H. BASSETT**
- **JENNIFER R. ELDRIDGE**
- **CHRISTINE S. JOHNSON**
- **ROBERT L. MCGEE, JR.**
- **JAMIE J. MCKEY**
- **MICHAEL J. NOORDSY**
- **MATHEW SAMUEL**

Information regarding *The Bassett Bulletin*TM is available from **Angie Stevenson** (astevenson@thebassettfirm.com) at (214) 219-9900. ©2004 The Bassett Firm. All rights reserved.

*The Bassett Bulletin*TM is published twenty-six times a year, and is a complimentary publication of The Bassett Firm.
