

# RECENT DEVELOPMENTS

## ARBITRATION

### CLASS ACTION BAN IN ARBITRATION AGREEMENT INVALID

Scott v. Cingular Wireless, 161 P.3d 1000 (Wash. 2007).

**FACTS:** Plaintiffs Scott, Tabasinske, and Oishi purchased cell phones and plans from Cingular. The terms of the plan included an arbitration clause that was subsequently modified. The modified arbitration clause prohibited class action suits and stated that if any part of the clause was found to be unenforceable then the entire clause was null and void. The clause also stated that if the customer recovers at least the amount demanded, then Cingular would reimburse reasonable attorney's fees and expenses. The plaintiffs filed a class action suit claiming that Cingular had overcharged customers unlawfully with hidden long-distance and roaming fees.

Cingular moved to compel individual arbitration. The trial court granted Cingular's motion. The Supreme Court of Washington granted the plaintiffs' motion for discretionary review.

**HOLDING:** Reversed and remanded.

**REASONING:** The court agreed with the plaintiffs that the class action waiver was unconscionable and therefore unenforceable. First, the court found the waiver was a violation of public policy because class actions promote "efficiency, deterrence, and

access to justice." Second, the court found that the waiver undermined the Washington Consumer Protection Act ("CPA") because individuals would be unlikely to pursue a claim where the damage was nominal. The court also noted that individuals would not likely be able to retain an attorney to recovery such nominal damages.

Class action suits serve the CPA's

public interest purpose by protecting consumer rights. Finally, the court found the waiver effectively exculpated Cingular "from legal liability for any wrong where the cost of pursuit outweighs the potential amount of recovery." Cingular argued "that it ha[d] cured any concerns about access to remedy" because it would reimburse attorney fees and expenses when the consumer was awarded at least the amount demanded. This argument failed though because "[a] plaintiff could recover 99 percent of a claim and still not be awarded any attorney fees."

Cingular also argued that the Federal Arbitration Act ("FAA") required its class action waivers be enforced. While the court agreed that FAA favors arbitration of disputes, "[c]lass action waivers have very little to do with arbitration." The court repeated its exculpation finding that elimination of class action arbitration prevented consumers from bringing otherwise meritorious claims against Cingular. Because neither party argued to sever the class action waiver, the court held that the arbitration clause was unenforceable per the terms of the agreement.

### ARBITRATOR'S AWARD SATISFIED THE "ESSENCE" TEST, WHICH REQUIRES, THAT IN SOME LOGICAL WAY AN ARBITRATION AWARD BE DERIVED FROM THE WORDING OR PURPOSE OF THE PARTIES' CONTRACT

Apache Bohai Corp., LDC v. Texaco China, BV, 480 F.3d 397 (5th Cir. 2007).

**FACTS:** In the mid-1990s, Texaco entered into production sharing contracts ("PSCs") with the Chinese National Offshore Oil Corporation ("CNOOC") under which Texaco agreed to explore, develop, and produce petroleum from Blocks 9/18 and 11/19 in the Bohai Bay of China in exchange for a share of any petroleum produced. The PSCs divided the exploration period into three different phases and at the end of each phase, Texaco had to decide whether to relinquish its interest in the block or to continue exploring and relinquish only part of its interest. Texaco had until January 31, 1999, to decide to totally relinquish or continue exploring Block 9/18 and until June 30, 1999, for Block 11/19.

Texaco hired Apache Bohai so that it could meet its drilling commitments and entered into two farm-in agreements in which Apache agreed to assume Texaco's drilling commitments in exchange for a 50% share of future oil production. Apache committed to drilling Block 9/18 and 11/19 and a third block of Apache's choice. The agreements contained an exculpatory clause stating that neither party would be liable to the other party for any consequential loss or damage arising in either contract or tort resulting from the agreement. The agreement also contained an arbitration clause stating that any dispute arising out of or relating to the agreement, including any question regarding its existence, validity, or termination, which cannot be resolved by the parties, shall be settled through arbitration.

On June 14, 1999, Apache withdrew from the agreement and would not drill any of the three wells. Texaco had only sixteen days to make an election on Block 11/19 and had already agreed to drill Block 9/18. Apache tendered its 50% interest in the two blocks to Texaco, but Texaco demanded compliance and refused to accept the tender. Texaco initiated arbitration proceedings against Apache. The arbitrator determined that Apache had breached its commitment and invalidated the exculpatory clause awarding consequential damages. Apache brought suit to vacate the award.

**HOLDING:** Affirmed.

**REASONING:** The court applied the "essence" test to determine whether the arbitrator exceeded his power. The test requires that "the award must, in some logical way, be derived from the wording or purpose of the contract." *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 353 (5th Cir. 2004) (citing *Executone Info. Sys. v. Davis*, 26 F.3d 1314, 1324 (5th Cir. 1994)). Under the "essence" test, the "single question is whether the award, however arrived at, is rationally inferable from the contract." *Executone*, 26 F.3d. at 1325.

The farm-in agreement granted the arbitrator broad powers, including invalidating or terminating the agreement. Once the arbitrator determined the agreement was unenforceable, there was

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no barrier to awarding consequential damages where they were allowable. This result is rationally inferable from the contract, so

## MANDAMUS AVAILABLE WHEN ARBITRATION IS DENIED IN ACTION GOVERNED BY FEDERAL ARBITRATION ACT

In re Bank One, 216 S.W.3d 825 (Tex. 2007).

**FACTS:** J&S Air sued Bank One for honoring checks that had been forged by J&S employees. J&S received a default judgment when Bank One failed to answer the suit. The trial court granted Bank One's motion to set aside the default judgment and obtain a new trial. Bank One filed a motion to compel arbitration, citing the terms of its arbitration clause, which covers disputes "arising from or relating in any way" to the agreement or to the customer's account. The trial court denied this motion. Bank One petitioned the Ft. Worth Court of Appeals for mandamus relief, but was denied. Bank One then petitioned the Supreme Court of Texas for writ of mandamus.

**HOLDING:** Granted.

**REASONING:** The Supreme Court of Texas found that mandamus relief is appropriate when a contract is governed by the Federal Arbitration Act and a trial court denies a motion to compel arbitration regarding that contract. The court cited *EZ Pawn Corp. v. Mancias*, 934, S.W.2d 87, 88 (Tex. 1996) where the Supreme Court of Texas stated that mandamus relief had been found to be available to a party who was denied arbitration under an agreement incorporating the FAA. The Court also cited *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 130 (Tex. 2005), where the Supreme Court of Texas stated that "mandamus relief is proper to enforce arbitration agreements governed by the FAA." In the present case, the court conditionally granted the writ of mandamus and directed the trial court to vacate its denial of Bank One's motion and to enter an order compelling arbitration.

## COURT, NOT ARBITRATOR, SHOULD DECIDE QUESTION OF RES JUDICATA

Bryan County v. Yates Paving & Grading Co., Inc., 638 S.E.2d 302 (Ga. 2006).

**FACTS:** Pursuant to a public works contract, Yates Paving and Grading Co. agreed to construct and make improvements to public roads in a Bryan County subdivision. The county later ordered Yates to stop service and hired a third party to complete the work. Yates filed a demand for arbitration and, after a hearing, was awarded monetary damages. Three years later, Yates filed another demand for arbitration under the contract claiming that the county's wrongful action rendered Yates unable to bid on other government contracts. The county answered and cross-claimed that the new claims were barred by res judicata. The county then filed for summary judgment which the trial court granted. The court of appeals reversed, holding that because the res judicata effect of the first arbitration award fell within the scope of the parties' agreement to arbitrate, the arbitrator, not the court, should have decided whether the arbitration was barred by res judicata.

**HOLDING:** Reversed.

**REASONING:** Res judicata acts as a procedural bar to claims that were raised or could have been raised in a prior action. As a procedural bar, res judicata does not reach the merits of the claim. Where the claims presented are barred by res judicata, no arbitrable claims remain to be submitted to an arbitrator. No claims remained because arbitration had already taken place on the issues that were previously raised, therefore there was nothing left for an arbitrator to resolve relating to those same issues. Thus, the trial court here was not passing on the merits of appellee's underlying arbitration claims by applying res judicata. It was merely fulfilling its gatekeeping role to determine whether any arbitrable claim had been presented in the current action.

## ARBITRATION CLAUSE IN CONTRACT IS NOT UNCONSCIONABLE

TMI, Inc. v. Brooks, 225 S.W.3d 783 (Tex. App.—Houston [14th Dist.] 2007).

**FACTS:** Nineteen homeowners in the Woodwind Lakes subdivision of Houston learned that their properties were developed on or around an area where there had been prior oil and gas operations. Until the 1970s, ChevronTexaco and Amerada Hess Corporation conducted oil and gas exploration on the Woodwind Lakes property. During the development of the subdivision, Lakeland Development Company, the project manager, discovered portions of the property were contaminated from the oil and gas operations. The homeowners became aware of the potential contamination in 2003 when ChevronTexaco issued letters to them requesting permission to conduct research concerning the environmental conditions in the neighborhood. Tests revealed the presence of mercury, benzene, and other contaminants on individual lots and in common areas. Homeowners brought suit against Trendmaker Homes ("TMI") alleging negligence, various forms of fraud, violations of the Deceptive Trade Practices Act, negligent misrepresentation, nuisance, and civil conspiracy, and seeking damages of more than one million dollars per home. TMI answered, alleging inter alia, that the plaintiffs were barred from bringing the action because they had agreed to binding arbitration provisions in the purchase agreements for the homes. Eventually, the trial court found that the arbitration clause was procedurally and substantively unconscionable. TMI filed an interlocutory appeal and petition for writ of mandamus.

**HOLDING:** Reversed and remanded.

**REASONING:** With respect to procedural unconscionability, the court found the homeowners correctly directed their claim to the arbitration clause itself rather than the contract as a whole. But the court agreed with TMI that the homeowners offered no evidence that TMI made any misrepresentations regarding the arbitration clause. The only evidence offered by the homeowners were affidavits indicating their understanding of the arbitration clause. The court found that the homeowners' affidavits constituted no evidence because they (1) were not readily controvertible, (2)

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were not based on the affiants' personal knowledge, and (3) did not unqualifiedly represent that the alleged "facts" are true. The homeowners' affidavits indicated they were relying on statements, promises, conditions or stipulations not set forth in the purchase agreement, which was in direct conflict with the express language of the agreement. Thus, the affidavits constituted no evidence of justifiable reliance, a required element of the affirmative defense to arbitration.

As to substantive unconscionability, the court disagreed with the homeowners as to the cost of arbitration being so substantial as to preclude the homeowners from exercising their statutory right to seek redress. The homeowners brought affidavit evidence by an expert who attested that arbitration by the American Arbitration Association ("AAA") would cost over \$115,000. The homeowners also brought a fee schedule from AAA showing the estimated costs for arbitration to be between \$45,000 to \$120,000. The court found that the language in the arbitration clause did not mandate arbitration by AAA, but rather, the language only provided that any arbitration would be done "in accordance with" the Construction Industry of Arbitration Rules of the AAA. In addition, the court pointed out that the agreement authorized the trial court to appoint an arbitrator if one could not be agreed upon by the parties. Because the court determined there were less expensive alternatives available, the arbitration clause could not be found unconscionable.

## **DURESS MUST RELATE ONLY TO ARBITRATION CLAUSE BEFORE IT CAN BE A DEFENSE TO ARBITRATION**

In re RLS Legal Solutions, 221 S.W.3d 629 (Tex. 2007).

**FACTS:** In November 2001, Amy Cobb Maida was required to sign a new agreement by her employer, RLS Legal Solutions, L.L.C. Maida objected to the agreement which contained an arbitration clause, as well as other provisions concerning compensation, competition, and term. RLS communicated to Maida that she would not be paid if she continued to refuse to sign the agreement. After refusing to sign the agreement, Maida received only the commission portion of her compensation. Her weekly salary payment was not accounted for. After agonizing over the weekend, Maida signed the agreement but informed RLS that she was doing so under duress. She received her weekly salary check from RLS at that time.

Maida brought an action against RLS, and in her testimony indicated her objection to the new agreement. Maida alleged that RLS "improperly withheld her salary payment to force her to accept the arbitration provision." The trial court denied RLS's motion to compel arbitration due to their use of economic duress to force Maida's signature. RLS, in turn, petitioned the court for mandamus relief to compel Maida to bring any claims through arbitration. The petition was denied and RLS then petitioned the Supreme Court of Texas for mandamus relief.

**HOLDING:** Granted.

**REASONING:** The court sided with RLS in noting that Maida's claim of economic duress pertained to a general employment agreement, as opposed to a specific and separate arbitration provision. In *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001), the court held that in order to defeat arbitration,

duress must relate specifically to the "Arbitration Addendum itself, not the contract as a whole." While the court recognized that Maida was under duress, they refrained from providing an exception which could have comprised the *FirstMerit* rule.

There was no direct evidence that Maida was under duress exclusive to the arbitration agreement. In review of Maida's affidavit and trial testimony the court noted Maida's dissatisfaction with the compensation, commission, and non-compete provisions of the agreement as well as the arbitration clause. The court also agreed that RLS's decision not to release salary payment to Maida was not shown as an attempt to force Maida to agree solely to the arbitration agreement. Rather, RLS stated they would deny payment if she did not sign the entire agreement. Considering the above facts, the court suggested that Maida could have been in opposition to alternative provisions within the general agreement, therefore she must be held subject to the arbitration provision. The court stated that "... duress to force execution of an agreement containing an arbitration provision also forces consent to arbitration." Accordingly, the court granted the writ of mandamus and directed the trial court to compel arbitration.

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## **ARBITRATION AGREEMENT SIGNED BY SON IS VALID**

*Miller v. Cotter*, 863 N.E.2d 537 (Mass. 2007).

**FACTS:** Plaintiff, on behalf of his father, signed an agreement as part of his father's admission to Birchwood Care Center. Miller's father later died while a patient at Birchwood. Miller brought suit for negligence and wrongful death against the physician who examined his father at Birchwood.

The admission agreement contained an arbitration agreement that required "all claims, disputes, and controversies arising out of, or in connection with, or relating in any way to the Admission agreement . . . be resolved by binding arbitration." The arbitration agreement was presented as a separate document and was not a condition of admission to Birchwood, and was noted in capital letters at the top of the arbitration agreement. Miller was aware of the arbitration agreement and it was explained to him at the time of its execution. In addition, Miller had knowledge of arbitration agreements due to the type of work he performed. The agreement also contained a provision that allowed the admitted resident to rescind the arbitration agreement unilaterally by giving notice within thirty days of execution. Defendants moved to dismiss the complaint and to compel arbitration. The trial court judge denied the motion.

**HOLDING:** Reversed and remanded.

**REASONING:** The court held that the Massachusetts Arbitration Act ("MAA") should apply in this case. MAA states that an arbitration agreement "shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or equity for the revocation of any contract." Grounds for revocation include fraud, duress, or unconscionability. Only unconscionability was at issue in this case.

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The court reasoned that nothing in the setting of the arbitration agreement execution suggested that the agreement was procedurally unconscionable. Miller was an intelligent and educated man whose professional experience gave him sophistication when dealing with contracts. Additionally, he was familiar with admitting his father to a nursing home and he was not required to sign the agreement as a condition of admission. Furthermore, Miller had a unilateral right of rescission for thirty days after execution of the agreement. The court also distinguished other cases holding arbitration contracts unenforceable on the grounds that such cases involved clauses that were conditions of admission, whereas the contract in this case was not a condition of admission. The court held that the defendants are entitled as a matter of law to a judgment dismissing Miller's complaint and compelling arbitration.

## ARBITRATION CLAUSE DOES NOT COVER TORT CLAIMS

*Aiken v. World Finance Corp. of South Carolina*, 644 S.E.2d 705 (S.C. 2007).

**FACTS:** Richard Aiken obtained a series of consumer loans from World Finance beginning in 1997. Aiken paid off his last loan from World Finance in 2000. In order to apply for loans, Aiken was required to supply certain personal information such as his date of birth and social security number. Each approved loan was accompanied by an arbitration agreement that provided any disputes arising out of or in connection with the loan agreement were subject to arbitration. In late 2002, several World Finance employees conspired to use clients' personal information, including Aiken's, to obtain sham loans and embezzle the proceeds for personal benefit.

Aiken discovered the misuse of his personal information and filed suit against World Finance seeking damages for negligence, emotional distress, and unfair trade practices. World Finance filed a motion to compel arbitration. The trial court found that the arbitration agreement ceased when the relationship between Aiken and World Finance ended which was at the time Aiken paid off his last loan. The court of appeals affirmed the denial of the motions to compel arbitration. World Finance appealed.

**HOLDING:** Affirmed as modified.

**REASONING:** State and federal public policy favors arbitration of disputes. However, arbitration is a matter of contract and a party cannot be required to submit a dispute to arbitration if he has not agreed to submit it. Courts generally hold that broadly-worded arbitration agreements apply in disputes where a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained. The relationship between Aiken's tort claims and the parties' prior dealings under the loan agreements are not "significant."

As even the most broadly-worded arbitration agreement has limits founded in general principles of contract law, arbitration agreements will not be interpreted as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings. The theft of Aiken's personal information by World Finance employees was outrageous conduct that Aiken could not have foreseen when he agreed to do business with World Finance.

Thus, his tort claims are not within the scope of the arbitration agreement.

## ARBITRATION CLAUSE DOES NOT APPLY TO TORT

*Chassereau v. Global-Sun Pools, Inc.*, 644 S.E.2d 718 (S.C. 2007).

**FACTS:** Vicki Chassereau purchased an above-ground pool. Chassereau contends that the pool began malfunctioning and needed repair. After Global-Sun allegedly refused to remedy the problems, Chassereau stopped making payments on the pool. Subsequently, Ken Darwin ("Darwin"), an employee of Global-Sun, began to systematically harass Chassereau. Chassereau alleged that Darwin called her repeatedly at work; disclosed private information to friends, co-workers, and relatives; and also made false and defamatory statements.

Chassereau sued Darwin and Global-Sun for defamation, intentional infliction of emotional distress, and violation of S.C. Code Ann. §16-17-130 (2003). Global-Sun and Darwin moved to compel arbitration. The trial court denied the motion and the court of appeals affirmed. Global-Sun and Darwin appealed.

**HOLDING:** Affirmed.

**REASONING:** Arbitration is a matter of contract, and a party cannot be required to arbitrate any dispute which he has not agreed to arbitrate. In *Aiken*, this Court held that even the most broadly-worded arbitration agreement has limits founded in general principles of contract law, arbitration agreements will not be interpreted as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings. 644 S.E. 2d 705 (S.C. 2007). A reasonable person would not have foreseen and would not expect Global-Sun employees to commit acts historically associated with the common law tort of outrage in seeking to collect an overdue debt. *Aiken* provides that although these types of uncivilized acts often arise in the course of performance of contracts containing arbitration clauses, South Carolina will not interpret arbitration clauses to apply to such acts. Chassereau's tort claims are not covered by the arbitration agreement at issue.

## ARBITRATION TIME BAR DOES NOT APPLY TO CREDIT CARD DISPUTE

*Danner v. MBNA America Bank*, \_\_\_ S.W.3d \_\_\_ (Ark. 2007).

**FACTS:** This dispute arose out of Betsy Danner's non-payment of charges on her MBNA credit card. After Danner agreed to the original credit-card agreement, MBNA mailed an amendment to the agreement to Danner that required her to arbitrate any future dispute. The amended agreement, among other things, provided that claims could not be litigated in court. The end of the amendment stated that a credit card customer could reject the arbitration section, but had to do so in writing by January 25, 2000. After the dispute with Danner, MBNA submitted a claim to arbitration. On August 31, 2005, an arbitrator rendered an award in favor of MBNA in the amount of \$6,198.13. On December 13, 2005, MBNA filed a petition with the circuit court seeking to confirm the award, noting that under the Federal Arbitration

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Act (“FAA”), Danner’s time to challenge arbitration had passed. Danner responded, alleging that she had never entered into an arbitration agreement with MBNA, that she did not participate in the arbitration, and that she had never waived her due-process rights. MBNA then filed a motion for summary judgment that arbitration was proper. The district court granted the motion and confirmed the award.

**HOLDING:** Reversed and remanded.

**REASONING:** According to section 12 of the FAA, Danner had three months to challenge the arbitration award. Danner admitted that she only challenged the award when MBNA sought to confirm it, 104 days after issuance of the award. Danner argued, citing *MCI Telecomm. Corp. v. Exalton Indus., Inc.*, 138 F.3d 426 (1st Cir. 1998), that the time bar did not apply because she disputed entering into arbitration agreement. In *MCI*, the district court found that, based on section 4 of the FAA, an arbitration award is valid only if a written arbitration agreement exists. The court, agreeing with *MCI*, found that the arbitration time bar did not apply to this credit card dispute because the district court had not yet determined whether an arbitration agreement existed. It found that the time limit imposed by section 12 is not triggered unless a written agreement to arbitrate exists. Whether a written agreement existed is an issue of fact, thus summary judgment was improper.

## MOTION TO COMPEL ARBITRATION DENIED

Lewallen v. Green Tree Servicing, L.L.C., 487 F.3d 1085 (8th Cir. 2007).

**FACTS:** Lewallen obtained a consumer loan from Conseco Finance Servicing Corp. Conseco consolidated this loan and transferred its interest under a pooling and servicing agreement entered into with U.S. Bank. U.S. Bank obtained legal title to the pooled loan, while Conseco retained the right to service the loan. Lewallen’s loan agreement provided that the parties agree to submit their disputes to arbitration. Conseco filed for bankruptcy and Green Tree purchased the right to service the loan. At the time of transfer, Lewallen’s loan was in default.

Lewallen claimed that Green Tree had improperly increased monthly payments, assessed excessive late charges, failed to respond to inquiries on the account, refused to accept payment, and sent erroneous over-due notices. Green Tree began preparations to foreclose while Lewallen tried unsuccessfully to get refinancing. The day before the scheduled foreclosure sale, Lewallen filed a petition for bankruptcy under Chapter 13. The parties served discovery requests on each other in the bankruptcy court. Green Tree filed a motion to dismiss or compel arbitration citing the loan agreement provision. The bankruptcy court denied Green Tree’s motion because it had waived any claim to arbitration through its active participation in the trial process. On appeal, the district court affirmed that Green Tree waived its right to arbitrate. Green Tree again appealed the denial of the motion to compel arbitration.

**HOLDING:** Affirmed.

**REASONING:** In *Ritzel Comms. v. Mid Am. Cellular Tel. Co.*, 989 F.2d 966 (8th Cir. 2001), the court held that a party may be found to have waived its right to arbitration if it: “(1) knew of an existing right to arbitration; (2) acted inconsistently with that

right; (3) prejudiced the other party by these inconsistent acts.” After Green Tree conceded that they knew about the arbitration provision, the court examined the other two elements.

The court in *Ritzel* held that a party acted inconsistently with its right to arbitrate if that party substantially invoked the litigation machinery before asserting arbitration. In the present case, Green Tree had served an extensive discovery request on Lewallen, filed substantive motions, and participated in six hearings on its proof of claim before seeking arbitration. “To safe guard its right to arbitration, a party must ‘do all it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration.’” The court reasoned that Green Tree had several opportunities to seek arbitration but instead let each one pass and waited approximately eleven months to invoke arbitration.

Even if a party acted inconsistently with its right to arbitrate, it has not waived its right unless its actions prejudice the other party. The court held that Lewallen has been prejudiced by Green Tree’s late assertion of its right to arbitration. Lewallen would be forced to arbitrate issues that have already been presented in court and the time and expense that had been invested in preparing and serving discovery would have been overlooked. The court further explained that “indeed, because the parties had to litigate the motion to compel arbitration in the middle of Lewallen’s Chapter 13 proceedings instead of earlier the parties have been deprived of arbitration’s main purpose: efficient and low cost resolution of disputes.” The court concluded that Green Tree had waived its right to arbitration.

## ARBITRATION CLAUSE IN FRAUDULENTLY INDUCED CONTRACT IS ENFORCEABLE

Downer v. Siegel, 489 F.3d 623 (5th Cir. 2007).

**FACTS:** Linda and Hunt Downer (“Downers”) and Patrick and Dorothy Landry (“Landrys”) both entered into asset management agreements with Dain Rauscher, Inc. (“DR”). Each of the asset management agreements contained an arbitration clause. The Downers and the Landrys were convinced by a DR employee, Fred Siegel to invest in World Environment Technologie (“WET”). Both the Downers and Landrys were unhappy with the investment and each couple separately filed suit in federal court, which were later consolidated.

The defendants moved for arbitration, but, the Downers contested the arbitrability of the dispute. The district court stayed the actions pending arbitration. Siegel initiated arbitration and the plaintiffs filed a counterclaim. The arbitration panel ultimately dismissed the plaintiffs’ claims based on prescription. On the plaintiffs’ motion, the district court dismissed the arbitration award. Siegel appealed.

**HOLDING:** Reversed and remanded.

**REASONING:** A district court’s ability to set aside an arbitration award is limited to four grounds. The only one of those grounds applicable is whether the “arbitrators exceed their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.” 9 U.S.C. § 10(a)(4). The text of the arbitration clause at issue does not limit the circumstances to which it applies to those that fall within the scope of the employee’s employment. The broad language of the

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clause covers all controversies between the plaintiffs and former or current employees of DR. This conclusion is consistent with other circuits that have found fraud claims to be arbitrable under similar agreements. The arbitration panel did not exceed its powers and the district court improperly vacated the arbitration award.

## FAILURE TO PROMPTLY SEEK ARBITRATION RESULTS IN TAKE NOTHING JUDGMENT

*Gumble v. Grand Homes 2000, L.P.*, \_\_\_ S.W.3d \_\_\_ (Tex. App.—Dallas 2007).

**FACTS:** The Gumbles contracted with Grand Homes to build a single family home. The contract provided that all claims should be settled by arbitration. Within the first year of purchase of the home, the Gumbles discovered a variety of defects. Grand Homes failed to respond to numerous requests for repairs. The Gumbles made a formal written demand giving a deadline of 60 days for the repair of the defects. When Grand Homes did not respond again, the Gumbles filed suit. Grand Homes filed an answer and then moved for arbitration.

Ten months later, Grand Homes filed a motion to abate the proceedings and compel arbitration. The trial court granted the motion to compel arbitration. The arbitrator found that the Gumbles had failed to timely file their claim for arbitration and ordered they take nothing against Grand Homes. The trial court confirmed the judgment. The Gumbles appealed.

**HOLDING:** Affirmed.

**REASONING:** The Gumbles contend the trial judge erred in ordering the parties to arbitration because Grand Homes' motion to compel arbitration was untimely. The Gumbles should have raised this argument at the time the trial judge ordered the case to arbitration. Mandamus lies over an order granting a motion to compel arbitration. However, the Gumbles did not file a petition for writ of mandamus with respect to the trial court's order to compel arbitration, making their complaint untimely. Thus, the court affirmed the judgment of the lower court as to confirming the arbitrator's decision of a take nothing judgment.

## LAW FIRM'S ARBITRATION CLAUSE STRUCK DOWN

*Davis v. O'Melveny & Meyers LLP*, 485 F.3d 1066 (9th Cir. 2007).

**FACTS:** In August 2002, the O'Melveny & Meyers law firm notified its employees that a new Dispute Resolution Program ("DRP") would be instituted in three months. The terms of the DRP required that all O'Melveny employees consent to private, confidential arbitration for all claims and controversies arising out of employment with the firm. The DRP also required that employees submit written notice of a claim within one year; otherwise, the claim was forfeited.

Jacqueline Davis, a former paralegal for the Los Angeles, California, office of O'Melveny from 1999 to 2003, filed suit against the firm alleging employment-related violations of the Federal Fair Labor Standards Act ("FLSA") and the California Labor Code. Davis also sought declaratory relief and asked the district court to find the DRP unconscionable and O'Melveny's

enforcement of its DRP as an unfair business practice as defined under California's Unfair Business Practices Act. In response, O'Melveny sought and was granted a motion to dismiss Davis's suit and to compel arbitration. Davis appealed and challenged that the arbitration agreement was non-enforceable.

**HOLDING:** Reversed and remanded.

**REASONING:** The Ninth Circuit has previously held that the determination of enforceability of an arbitration clause is to be governed by state law principles of contract formation. Under California law, a contractual clause such as arbitration is unenforceable if it was both procedurally and substantively unconscionable. In its assessment of procedural unconscionability, the court focused on factors of contract adhesion, namely surprise and oppression. The court found no surprise or concealment of the arbitration agreement; its terms were conspicuous and bolded, and O'Melveny had made efforts that its lawyers would answer any questions about the agreement. However, the court found the DRP to be oppressive as a "take it or leave it" condition of employment. Although O'Melveny argued that the three months of notice provided employees ample time to pursue other employment, the court rejected that argument and noted that "few employees are in a position to forfeit a job and the benefits they have accrued."

In its examination of substantive unconscionability, the court examined several provisions of the DRP challenged by Davis. The court had previously ruled that a strict one-year limitation period found in the notice provision was substantively unconscionable because it was insufficient to protect its employees' rights and potentially barred employees from a "continuous violations" theory available in FEHA suits. The court also ruled that the confidentiality provision was substantively unconscionable because the firm would greatly benefit from preventing an aggrieved employee access to precedent and hindering their ability for discovery, while the firm learned how to negotiate and litigate future contracts. The DRP also contained a non-mutual provision that exempted O'Melveny from arbitration for "claims by the firm for injunctive and/or equitable relief for violations of the attorney-client privilege or work product doctrine or the disclosure of other confidential information". The court declined to examine whether a law firm's access to a judicial forum for limited purpose of injunctive relief to protect confidential attorney-client information constituted a legitimate business justification. However, the Court found this provision to be overly broad because its plain language would allow only O'Melveny to seek judicially imposed "equitable relief" for any "confidential information." Finally, the court found a DRP clause that prevented its employees to initiate or pursue "any lawsuit or administrative action" (other than administrative charges of discrimination) to be substantively unconscionable because it would force employees to forego certain substantive "public rights" under the FLSA and California Labor Code. The court found that such preclusion was contrary to both the public policies of the Department of Labor and the California Labor Commission; therefore, the DRP's prohibition of administrative claims was voided.

Finally, the court concluded that although an unconscionable clause could be severed from an employment contract, the DRP could not be salvaged from striking out the offending provisions. Given the scope of procedural and substantive unconscionability, the entire agreement was voided.