STATE BAR LITIGATION SECTION

NEWS for the BAR

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Chair's Message: Not an "Alternative"

by Fred Bowers

Some of us know what it's like to see our losing efforts in print. This online newsletter contains a summary of ***In re Golden Peanut*** in Susan Nassar's Alternative Dispute Resolution Update. The case was also originally in Kirsten Castañeda's article about State Appellate Courts. I was on the losing side of that Texas Supreme Court decision after being on the winning side in the trial court and in the Eastland Court of Appeals. I hate losing, but what concerns me most is that binding arbitration is becoming more and more entrenched in our civil justice system.

Fifteen or twenty years ago arbitration was an example of ADR – Alternative Dispute Resolution. More and more there's no "alternative" about it; it is too often the only method of resolution. In my opinion the notion that binding arbitration does not take away any rights but simply provides the specific forum would have our Founders shaking their heads in disbelief. These are my beliefs, and I could be wrong.

I point this out to show that your Litigation Section has members who think for example that pre-injury binding arbitration is the best thing since sliced bread. Others think that the oath we took to get our Bar license requires us to challenge this anti-right-to-jury-trial mechanism at each opportunity. Most Section members are somewhere in the middle. It starts with a better understanding of the developing law on this issue and the many issues coming to the forefront of our practices. *News for the Bar* is one of our efforts to make your Section membership more relevant and more useful. Thank you to Geoff Gannaway and the Editorial Board for putting together another great product. I also encourage you to visit our Section's website, www.litigationsection.com. And I want to hear from you at fbowers@nts-online.net. I'll do my best to respond to every message right away because I've gotten back on that horse. ■

ADR Update

by Susan Nassar

Equitable claims expressly excluded in arbitration provision may still be subject to arbitration.

Texas Petrochemicals LP v. ISP Water Mgmt. Servs. LLC, No. 09-09-00168-CV, --- S.W.3d ---, 2009 WL 4669938 (Tex. App.--Beaumont Dec. 10, 2009, no pet. h.).

In this case, the Beaumont Court of Appeals was asked to determine whether the trial court erred in refusing to compel arbitration of certain equitable claims. Texas Petrochemicals LP ("TPC") and ISP Water Management Services LLC ("ISP") jointly own a dock that TPC operates under the terms of a written agreement. ISP sued TPC seeking to partition the dock on the grounds that TPC had breached the terms of the written agreement by asserting exclusive control over the dock and then utilizing that control to preclude ISP from using the dock. TPC moved to compel arbitration of ISP's claims, and ISP resisted, contending that claims for equitable relief were not arbitrable under the parties' agreement. The arbitration provision at issue provided that:

> 9.2 All controversies or claims among the parties hereto (other than those involving claims for equitable relief) arising out of [the] interpretation of this Agreement or performance thereof shall be settled by one or more arbitrators under the rules of the American Arbitration Association in effect at the time.

The trial court denied TPC's motion to compel arbitration. On appeal, the court of appeals held that ISP's claims fell within the scope of the parties' arbitration agreement, because ISP's claim for partition was factually intertwined with the breach of

1 Chair's Message
1 ADR Update
4 Federal Update
7 Appellate Update
16 Those Who Can, Do; Those Who *Really* Can, Teach: Insights at the Intersection of Teaching and Practice from Professor Tracy Walters McCormack
19 Evidence & Discovery Update
21 News from the Bar
22 A View from the Bench: Judge Jennifer Walker Elrod

contract dispute and could not be decided without reference to the contract. For support, the court relied on *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 271 (Tex. 1992) for the proposition that claims not otherwise arbitrable can become arbitrable when factually intertwined with arbitrable claims. In addition, the court noted that the arbitration agreement at issue did not specify the types of claims the parties intended to exempt from arbitration. Thus, although the arbitration provision in the parties' contract expressly excluded equitable claims, they were held to be arbitrable.

Section 406.033(e) of the Texas Labor Code, which prohibits pre-injury waivers of personal injury or wrongful death claims, does not make an arbitration agreement void or unenforceable.

In re Golden Peanut Co., LLC, --- S.W.3d ----, 2009 WL 3969428, 53 Tex. Sup. Ct. J. 149 (Tex. Nov. 20, 2009) (orig. proceeding) (per curiam).

This case arose after Grant Drennan ("Drennan"), an employee of Golden Peanut Company, LLC ("Golden Peanut"), was killed on the job. Instead of subscribing to worker's compensation insurance, Golden Peanut provided its employees with an Employee Injury Benefit Plan under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461. Attached to the benefit plan was an arbitration agreement, requiring arbitration of any and all claims or controversies concerning or relating to Drennan's employment, including claims for personal injury and wrongful death.

After Drennan's death, his estate applied for and received plan benefits. Drennan's widow subsequently sued Golden Peanut under Texas's survival and wrongful death statutes on behalf of herself, their children, Drennan's parents and Drennan's estate (collectively, "the Drennans"). After Golden Peanut moved to compel arbitration, the Drennans dropped the Drennan estate as a party, leaving only the wrongful death claims. The trial court denied Golden Peanut's motion to compel arbitration.

Golden Peanut petitioned the court of appeals for mandamus relief. On appeal, the Drennans argued that their claims were not subject to arbitration, because they did not sign the arbitration agreement. They also argued that the arbitration agreement was unenforceable because it violated section 406.033(e) of the Texas Labor Code. The court of appeals held that the agreement to arbitrate did not violate Texas Labor Code § 406.033(e), which prohibits pre-injury waivers of personal injury or wrongful death claims. Without the benefit of the Texas Supreme Court's decision in *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640 (Tex. 2009) (orig. proceeding), the court of appeals also concluded the arbitration agreement was valid but the Drennans were not bound it, because they were not signatories.

In *Labatt*, the Texas Supreme Court held that a decedent's pre-death arbitration agreement is binding on the decedent's wrongful death beneficiaries although they were not signatories to the arbitration agreement, because a wrongful death claim is entirely derivative of the decedent's rights. *Id.* at 646. Relying on its holding in *Labatt*, the Court held that the trial court abused its discretion in refusing to compel arbitration and directed the trial court to enter an order compelling arbitration of the Drennans' wrongful death claims. The Court also disagreed with the Drennans' contention that the arbitration agreement was nevertheless unenforceable because it violated section 406.033(e) of the Texas Labor Code. Relying on United State Supreme Court precedent, the Court held that section 406.033(e) did not render the arbitration agreement void, because "an agreement to arbitrate is a waiver of neither a cause of action nor the rights provided under section 406.033(a), but rather an agreement that those claims should be tried in a specific forum." *Citing and quoting Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

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The following individuals are on the editorial board of **News for the Bar**, and provided invaluable help in planning, editing, and producing this issue.

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Employee's agreement to arbitrate can survive the dissolution of an underlying contractual relationship.
In re Polymerica, LLC, 296 S.W.3d 74 (Tex. 2009) (orig. proceeding) (per curiam).

In this case, employee Angelica Soltero sued her former employer Polymerica, L.L.C. d/b/a Global Enterprises, Inc. ("Global") for wrongful termination and retaliation for reporting sexual harassment. In 2002, Global contracted with third party Dickason Staff Leasing Company ("Dickason") to manage its human resources department. Dickason issued a Dispute Resolution Plan ("Plan"), which was signed by Dickason and Soltero. Although Global was not a signatory, the Plan stated that it applied to any dispute between Dickason, Global and any "applicant for employment, employee or former employee, including legal claims such as discrimination, wrongful discharge or harassment." The Plan included a mandatory process for resolving disputes, including arbitration under the Federal Arbitration Act. The Plan further provided that it was "a condition of employment and of continued employment" and that "employment or continued employment after the effective date of this Plan constitutes consent by the Employee to be bound by this Plan."

Global subsequently distributed an employee handbook and required all of its employees, including Soltero, to acknowledge they received the handbook. The acknowledgment stated that the handbook "takes precedence over, supercedes, and revokes any previous memo, bulletin, policy or procedure issued prior to [July 6, 2003], by Global Enterprises on any subject discussed in the Handbook." The handbook also included an arbitration provision, which required all disputes with Dickason and Global to be arbitrated.

Shortly after ending its agreement with Dickason and resuming management of its human resources department, Global terminated Soltero's employment. Soltero sued Global under the Texas Labor Code for wrongful termination based on her national origin and retaliation for reporting sexual harassment. Global filed a motion to compel arbitration, which was denied by the trial court. On appeal, the court of appeals held that only claims that arose before the Global/Dickason contract ended were subject to arbitration. For support, the court relied on *In re Neutral Posture, Inc.*, 135 S.W.3d 725, 730 (Tex. App.--Houston [1st Dist.] 2003, no pet.). To avoid arbitration, Soltero nonsuited her claims that arose before the Global/Dickason contract ended and took the position that none of her claims were arbitrable. The trial court agreed and lifted the previously ordered stay.

Global appealed to the Texas Supreme Court, contending that all of Soltero's claims were subject to arbitration. Soltero responded that although the Plan was binding, the handbook nullified the prior Plan. The Court disagreed because the handbook did not cover contracts like the Plan's arbitration agreement. The Court also rejected Soltero's argument that Global could not enforce the Plan's arbitration agreement because it was not a signatory. The Court further concluded that *Neutral Posture*, the case relied on by the court of appeals, was distinguishable. Unlike the arbitration agreement in that case, there was no condition that the Global/Dickason relationship must still exist in order to enforce the Plan's arbitration agreement. Additionally, the Plan explicitly covered former employees. The Court therefore concluded that the arbitration agreement survived the dissolution of the Global/Dickason relationship, and Soltero's promise to arbitrate included all of her claims against Global.

Texas Arbitration Act (TAA) does not abrogate the common law rule that arbitration awards must be final to be legally enforceable and subject to judicial review.
Collins v. Tex Mall, L.P., 297 S.W.3d 409 (Tex. App.--Fort Worth 2009, no pet.).

The primary issue in this case involved a matter of first impression – whether a trial court may review and confirm an interim or "partial final" arbitration award that does not dispose of all matters submitted to arbitration. The partial final award entered by a panel of arbitrators in favor of the appellees was based on the arbitrators' determination that the appellant had failed to raise a material fact issue regarding the property and lis pendens at issue in order to avoid summary judgment. After the trial court confirmed the partial final award, appeal was taken.

The appellant argued on appeal that the trial court erred in confirming the partial final award, because it did not dispose of or determine all matters submitted to arbitration. Appellees responded that because section 171.086(b)(6) of the TAA permitted parties to file an application for a court order confirming an award "during the period an arbitration is pending," it authorized courts to confirm an interim or partial award. The court of appeals disagreed that any language in the TAA specifically authorized a trial court to enter an order confirming a partial arbitration award or an award that does not resolve all matters submitted to arbitration. The court of appeals explained that:

> While section 171.086(b) may contain language that permits a party to "file an application for a court order" confirming a partial award (in addition to other forms of relief) while the arbitration is pending, that language is purely procedural and does not grant the trial court the power to conduct judicial review of partial awards before the arbitrator's decision becomes final. The mere fact that the legislature chose to allow parties to apply for confirmation of a partial award while arbitration is pending does not, in our view, demonstrate a legislative intent to abrogate the existing common law rule that arbitration awards must be final to be legally enforceable and subject to judicial review.

Because the partial final award did not resolve all matters submitted to arbitration, the court of appeals reversed and vacated the trial court's confirmation order and remanded the case for further proceedings. ■