



# ALTERNATIVE DISPUTE RESOLUTION

by Susan Nassar

## **Parties cannot agree by contract to expand TAA's statutory grounds for judicial vacatur or modification of arbitration awards.**

*Quinn v. Nafta Traders, Inc.*, 257 S.W.3d 795 (Tex. App.—Dallas 2008, pet. filed).

This case involved claims by Margaret A. Quinn (“Quinn”) against her former employer Nafta Traders, Inc. (“Nafta”). Quinn sued Nafta for violations of the Texas Commission for Human Rights Act. The trial court signed an agreed order compelling the parties to arbitrate pursuant to an arbitration provision in Nafta’s employee handbook. The arbitrator awarded Quinn \$203,341, including attorneys’ fees. Quinn moved to confirm the arbitration award and requested additional attorneys’ fees incurred to enforce the award, and Nafta moved to vacate the arbitration award. The trial court granted Quinn’s motion to confirm and denied Nafta’s motion to vacate. The trial court also denied Quinn’s request for additional attorneys’ fees. Both parties appealed.

Nafta argued on appeal that the parties’ arbitration agreement expanded the scope of judicial review authorized under the Texas Arbitration Act (“TAA”) to include grounds not expressly identified in the statute and that the award should be vacated or modified under the agreement’s expanded review. The Dallas Court of Appeals concluded that both parties’ issues were without merit and affirmed the trial court’s judgment. In addressing Nafta’s argument regarding expanded review, the court of appeals noted that the Texas Supreme Court had not addressed the issue of whether parties could contractually agree to enlarge judicial review of an arbitrator’s award beyond the statutory grounds set forth in the TAA. The court went on to explain, however, that when recently confronted with this same issue under the Federal Arbitration Act (“FAA”), the United States Supreme Court held that the FAA’s statutory grounds for judicial vacatur or modification of awards were exclusive and could not be supplemented by contract. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396, 1400, 170 L.Ed.2d 254 (2008). In extending the Supreme Court’s holding in *Hall* and reaching the same conclusion with respect to the TAA, the court of appeals reasoned that:

Like the FAA, the statutory grounds for vacating and modifying an award under the TAA are extremely narrow and there is no language allowing parties to contract for expanded judicial review.... A statute with no provision for expansion cannot permit contracting parties to supplement review for specific instances of egregious conduct or clerical error by additionally providing for judicial review

for any legal error. Moreover, section 171.087 addressing judicial confirmation is not written as a default provision in the event the parties’ contract is silent on this issue. On the contrary, the TAA specifically mandates confirmation in all cases except where statutory grounds are offered for vacation, modification, or correction.

The court of appeals therefore held that “parties seeking judicial review of an arbitration award covered under the TAA cannot contractually agree to expand the scope of that review and are instead limited to judicial review based on the statutory grounds enumerated in the statute.”

## **The right to arbitration is not waived absent evidence of prejudice to the other party.**

*In re Fleetwood Homes, L.P.*, 257 S.W.3d 692 (Tex. 2008) (orig. proceeding).

The question here was whether Fleetwood Enterprises, Inc. (“Fleetwood”), a manufacturer of mobile homes, impliedly waived arbitration by failing to pursue its arbitration demand for eight months while discussing a trial setting and allowing limited discovery. In January 2005, Fleetwood signed a dealer agreement with Gulf Regional Services, Inc. (“Gulf”) that included a provision requiring arbitration of “any dispute, controversy or claim among the Parties.” Fleetwood cancelled the agreement and Gulf filed suit in October 2005. Fleetwood filed an answer demanding arbitration, but did not move to compel arbitration until July 2006. Gulf argued that the motion should be denied because Fleetwood had waived its right to arbitration.

The Texas Supreme Court disagreed and conditionally granted Fleetwood’s petition for writ of mandamus and directed the trial court to compel arbitration. In doing so, it acknowledged but distinguished its earlier opinion in *Perry Homes v. Cull*, 258 S.W.3d 589, 590 (Tex. 2008), in which it held that “a party waives an arbitration clause by substantially invoking the judicial process to the other party’s detriment or prejudice.” Although Fleetwood had delayed eight months before moving to compel arbitration, the Court noted that it had only noticed one deposition that it subsequently cancelled, and it had served only one set of written discovery the day before it moved to compel arbitration. The Court also noted that Fleetwood had not waited until the eve of trial to compel arbitration. The Court concluded that, taken together, these actions were not sufficient to overcome the strong presumption against waiver. More importantly, Gulf had deposed three Fleetwood representatives and failed to explain how it was prejudiced in being allowed to do so.

## **Waiver-of-reliance provision precluded fraudulent inducement claim, with respect to arbitration clause.**

*Forest Oil Corp. v. McAllen*, 268 S.W.3d 51 (Tex. 2008).

In an interlocutory appeal, the Texas Supreme Court reversed the court of appeals’ judgment in this case and remanded to the trial court to compel arbitration. The specific issue at hand



## NEWS FROM THE BAR

by Les Hatch

was whether an unambiguous waiver-of-reliance provision in a commercial contract precluded a fraudulent inducement claim as a matter of law. The Court held that it did because the parties were sophisticated and represented by counsel in an arm's-length transaction, which resulted in a negotiated settlement agreement that included "clear and broad waiver-of-reliance and release-of-claims language." Because the agreement conclusively negated reliance on representations made by either side, the Court concluded that any fraudulent-inducement claim lodged to avoid an arbitration provision was contractually barred. The Court therefore enforced the parties' contract as written.

### **NASD arbitration applies to broker's extra-contractual wrongful discharge claim.**

*In re NEXT Fin. Group, Inc.*, No. 08-0192, 52 Tex. Sup. Ct. J. 112, 2008 WL 4891735 (Tex. Nov. 14, 2008) (orig. proceeding) (per curiam).

The issue in this mandamus proceeding was whether former securities broker Michael Clements ("Clements") was required to arbitrate his extra-contractual Sabine Pilot claim that his employer NEXT Financial Group, Inc. ("NEXT"), a securities brokerage firm, wrongfully discharged him for refusing to commit an illegal act. The Court held that the employee's Sabine Pilot claim was subject to arbitration and did not fall within an exception limited to statutory employment discrimination claims. The Court therefore conditionally granted mandamus relief and directed the trial court to vacate its order denying NEXT's motion to compel arbitration and enter an order compelling arbitration of Clements's claims.

In so holding, the Court reasoned that under the FAA's plain language, "an arbitrable dispute can arise out of either the contract containing the arbitration clause or a transaction evidenced by the contract." While Clements's wrongful termination claim did not arise out of a written employment contract, the Court concluded based on First Circuit precedent that "the creation of an employment relationship ... is a sufficient 'transaction' to fall within section 2 of the [Federal Arbitration] Act." The Court noted that in keeping with federal policy to liberally construe arbitration agreements, at least one other court had held that a tort claim arising from a securities broker's illegal conduct "arose out of" the brokerage firm's business and was subject to arbitration based on the arbitration provision in pre-1993 NASD rules. The Court reasoned that although Clements's retaliatory discharge claim was premised on NEXT's allegedly illegal activities, the alleged conduct involved "significant aspects" of NEXT's legitimate business activities, and thus brought the dispute within the scope of the NASD arbitration clause.

Clements also contended that his Sabine Pilot wrongful termination claim was excepted from arbitration as a "claim alleging employment discrimination ... in violation of a statute" under NASD. Clements attempted to distinguish his claim on the basis that NEXT's conduct in terminating him for refusal to commit a crime was a violation of the Texas Penal Code. The Court rejected Clements's interpretation as strained and contrary to the plain meaning and intent of the NASD Code, which the Court was required to give effect. ■

### **Report on Court Reorganization**

On Oct. 3rd, the SBOT Board of Directors accepted the report of the Court Administration Task Force appointed to consider proposals related to court reorganization introduced during the 2007 legislative session, as well as other topics. The report addresses the complexity, shared local and state responsibility, and decentralization in the Texas court system. It sets out a new three-tiered trial court structure with minimal overlapping jurisdiction, and addresses flexibility and excellence issues. The SBOT Board has not approved or considered the recommendations of the report. The executive summary of the report can be found on p. 888 of the December *Texas Bar Journal*. The full report, including appendices and minority reports, can be found at [www.texasbar.com](http://www.texasbar.com).

### **New Executive Director of State Bar of Texas**

Michelle Hunter became the Bar's executive director after a unanimous vote Oct. 3rd by the Board of Directors at its quarterly meeting in Midland. She had been the Bar's deputy executive director, also having previously served as finance division director, information manager, and corporate counsel.

### **Client Trust Accounts**

For an article on Client Trust Accounts and the Financial Crisis, see p. 906 of the December 2008 *Texas Bar Journal*. The article discusses the effect of a growing number of financial institutions failing or being taken over on client trust accounts. It concludes that lawyers must be extra vigilant about the safety of such accounts and FDIC insurance considerations.

### **Texas Gavel Awards: Journalistic Excellence**

The Texas Gavel Awards submission deadline is April 1, 2009. This award recognizes journalistic excellence that educates the public about the law and fosters public understanding of the law. See the "News and Publications" link at [www.texasbar.com](http://www.texasbar.com) for an application.

### **"Paid or Incurred" Debate**

There has been much debate over the meaning of one sentence in Texas Civil Practice & Remedies Code § 41.0105: "In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant." Articles on "Paid or Incurred" in the November 2008 (p. 812) and January 2009 (p. 16) *Texas Bar Journals* by Judge Randy Wilson and Judge Gisela D. Triana-Doyal represent differing views of the issue and are good reads on this hot topic. ■