



ALTERNATIVE DISPUTE RESOLUTION

by Susan Nassar

Arbitration clause in contingency fee agreement is enforceable under the Federal Arbitration Act even if the attorney-client relationship is terminated before conclusion of the representation.

Hall-Williams v. Law Office of Paul C. Miniclier, PLC, No. 09-30113, 2010 WL 148657 (5th Cir. Jan. 13, 2010) (per curiam).

This appeal involved a fee dispute between a law firm and a former client. The plaintiff hired the Law Office of Paul C. Miniclier, PLC (“Miniclier”) to represent her on a contingency-fee basis in a suit against Allstate Insurance Company to recover money for damages sustained to her home as a result of Hurricane Katrina. The contingency fee agreement included an arbitration provision. While employed by Miniclier, attorneys David Binegar and Tiffany Christian worked on the case. When Binegar and Christian left to form their own firm, Binegar Christian, LLC (“Binegar Christian”), the plaintiff terminated her relationship with Miniclier and retained Binegar Christian. Miniclier intervened in the suit against Allstate to protect its fee and filed a motion to stay pending arbitration, which was denied. On appeal, the Fifth Circuit rejected the plaintiff’s argument that, because she had terminated her relationship with Miniclier, the arbitration clause was not enforceable under the Federal Arbitration Act. The Court also disagreed that Miniclier had waived its right to arbitrate by intervening in the suit against Allstate. The court therefore vacated the order denying Miniclier’s motion to stay and remanded to the district court with instructions to refer the case to arbitration.

Award of attorney’s fees upheld despite Texas’s prohibition against the direct award of fees to counsel.

Institutional Capital Mgmt., Inc. v. Claus, No. 08-20710, 2010 WL 517687 (5th Cir. Feb. 11, 2010) (per curiam).

Leonard Claus entered into a verbal agreement to buy and sell bonds with an employee of Institutional Capital Management, Inc. (“ICM”). Claus purchased bonds intending to sell them to Sterling Financial Investment Group, Inc. (“Sterling”), but ended up selling them to another party for his original purchase price. Claus sued Sterling and ICM for negligence, breach of contract, and securities violations, and hired an attorney to represent him under a contingency-fee arrangement. The claims were arbitrated by a National Association of Securities Dealers arbitration panel. The panel awarded Claus \$25,000 in damages and his attorney \$70,000 in attorney’s fees. Sterling and ICM moved to vacate the award on the ground that the

panel exceeded its authority in awarding attorney’s fees directly to Claus’s attorney. A magistrate judge vacated the award and Claus appealed. The Fifth Circuit reversed and reinstated the arbitrators’ award. The court acknowledged that Texas law prohibited the award of fees directly to an attorney unless authorized by statute, but nevertheless concluded that Sterling and ICM did not have standing to challenge such an award. According to the court, any alleged error was harmless because it was irrelevant, as to Sterling and ICM, how Claus paid the fee award.

Nonsignatories to arbitration agreements may sometimes be compelled to arbitrate.

Todd v. Steamship Mut. Underwriting Ass’n (Bermuda) Ltd., No. 09-30177, 601 F.3d 329 (5th Cir. 2010).

This appeal involved the denial of a motion to compel arbitration by plaintiff Anthony Todd. In 2000, Todd was injured in Louisiana while working as a chef onboard the M/V American Queen, which was owned and operated by Delta Queen Steamboat Company. Todd obtained a judgment in Louisiana state court against Delta Queen in 2007. Todd subsequently sued Delta Queen’s insurer, Steamship Mutual Underwriting Association (“Steamship”), under Louisiana’s “direct action” statute, which authorizes injured parties like Todd to sue an insolvent tortfeasor’s insurer directly. After removing the case to federal court, Steamship moved to compel arbitration and sought a stay. Steamship argued that Todd was required to arbitrate under Delta Queen’s policy with Steamship, which included an arbitration clause. The district court denied the motion to compel arbitration based on the Fifth Circuit’s decision in *Zimmerman v. International Co. & Consulting, Inc.*, 107 F.3d 344 (5th Cir. 1997). In *Zimmerman*, an insurer’s motion to stay a seaman’s direct action suit pending arbitration was denied because the plaintiff was not a party to the arbitration agreement. The court concluded that the Supreme Court’s recent decision in *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009) had effectively overruled *Zimmerman*. *Carlisle* held that nonsignatories to arbitration agreements may sometimes be compelled to arbitrate. The Fifth Circuit therefore reversed and remanded with instructions to the district court to consider several nonexhaustive issues in determining whether Todd could be compelled to arbitrate despite his nonsignatory status.

When one party to an arbitration fails or refuses to pay its share of arbitration fees, the paying party's remedy lies with the arbitrator, not the court.

Dealer Computer Serv., Inc. v. Old Colony Motors, Inc., 588 F.3d 884 (5th Cir. 2009).

This case involved the dilemma in which one party to an arbitration fails or refuses to pay its share of the arbitration fees. Following the Ninth Circuit's lead in *Lifescan, Inc. v. Premier Diabetic Services, Inc.*, 363 F.3d 1010 (9th Cir. 2004), the Fifth Circuit concluded that the district court erred in compelling the nonpaying party to pay its arbitration deposit. In reversing the district court's order, the Fifth Circuit Court reasoned that "[p]ayment of fees is a procedural condition precedent that the trial court should not review ... conditions precedent to arbitration are for the arbitrator to decide ... [and] payment of fees seems to be a procedural condition precedent set by the

AAA The arbitrators are within their discretion to ask one or the other party to pay the entire fee, and tax the fee as part of the award, or, alternatively, suspend the arbitration." In both *Old Colony* and *Lifescan*, the arbitrators had requested the paying party to front the deposit owed by the nonpaying party, but the paying party refused. Because the parties had incorporated the American Arbitration Association's rules into their agreement, which gave the arbitrator discretion to require one party to pay all of the arbitration fees, the court found that the nonpaying party could not be found to have failed, neglected or refused to arbitrate because the arbitrators had full discretion and flexibility to reallocate fees or suspend the arbitration due to the nonpayment. Accordingly, because there was no basis to compel the nonpaying party to pay the fees, the court concluded that the paying party's remedy lies with the arbitrator, not with the court. ■

*I've made me a moon-catchin' net,
And I'm goin' huntin' tonight,
I'll run along swingin' it over my head,
And grab for that big ball of light.*

Shel Silverstein



REMEMBERING WHY: A Ruminantion on the Road To and From Law School

by Gretchen Sween

I recently read an article that began with the following dispiriting sentence: "These days, keeping your job at a law firm feels like a victory in and of itself, especially for younger attorneys who have seen their ranks decimated by layoffs and cutbacks."¹ Chronologically speaking, I do not qualify as a "younger attorney," despite having graduated from law school only seven years ago. Yet I can certainly relate to that sentiment. At the moment, simply having a law-firm job inspires a humbling sense of gratitude.

But aside from gratitude, I have also felt some free-floating guilt. Not just "survivor guilt" associated with having a job when many worthy peers within the profession have been cut loose. I have felt guilt remembering what had prompted me to go to law school in the first place. That is, *after* working hard for very little money for many years as a writer-teacher-thespian and *before* discovering that I actually enjoyed reading case law, drafting legal arguments, and managing client expectations and anxieties, I was drawn to law school for wholly cynical reasons; I was seduced by a set of facts offered up to me during a random coffee date by a friend whose son was then in the middle of law school:

Fact #1:

You get into a good law school, you make good grades, you get a summer job with a law firm or two paying \$1,800 a week.

Fact #2:

You work for these firms over the summer, you write well, they will likely make you an offer with a starting salary well over \$100,000.

Fact #3:

If you don't want to work for a law firm and decide to pursue public interest work, many schools will forgive your student loans.

Fact #4:

You can go to law school without knowing much because there are no prerequisites.

These were the "facts" that prompted me to abandon la vie

¹ *Law360 Names Rising Legal Stars Under 40*, available at <http://ip.law360.com/articles/156697> (New York, March 22, 2010).