LITIGATING ARBITRATION: A 2007 TEXAS ARBITRATION REVIEW

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I. INTRODUCTION

Arbitration is usually characterized as a litigation alternative. Yet half of the Texas Supreme Court's recent mandamus docket involved arbitration and the United States Supreme Court has decided two arbitration cases—and has granted certiorari in two more—during this term alone.[1] Bills pending in Congress would also affect the contours and use of arbitration.[2] If anything is clear, it is that this "alternative" is becoming mainstream, shaped by traditional legal methods in the process.[3] Our focus here is on arbitration's development in Texas courts.

Following a "national policy favoring [arbitration],"[4] Texas courts have traditionally been hospitable towards agreements to arbitrate. In addition to the Texas Supreme Court's mandamus and regular appellate dockets, arbitration-related cases have kept many other Texas appellate courts busy. It's fair to ask why an alternative to litigation has resulted in so much litigation. Certainly arbitration has become more widely used. Arbitration clauses are routinely found in building contracts, employment agreements, health care policies, college enrollment forms, and many other commercial and consumer contracts. Texas courts and the Fifth Circuit have generally aligned with other courts enforcing arbitration agreements in a number of these areas and in fashioning rules that have supported its migration to others.[5] Of course, the courts of other states have often taken a different

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[1] *See* Hall Street Assocs., v. Mattel, Inc., 128 S. Ct. 1396 (2008); Preston v. Ferrer, 128 S. Ct. 978 (2008); 14 Penn Plaza LLC v. Pyett, 128 S. Ct. 1223 (2008) (mem.); Vaden v. Discover Bank, No. 07-773, 2008 WL 695625 (U.S. Mar. 17, 2008) (mem.).

[2] *See, e.g.*, *No Lawyers Please*, WALL ST. J., Apr. 5, 2008, at A8.

[3] "[A]n expansive view of the doctrine of freedom of contract," except when it expands the vacatur grounds embedded in the 1925 Federal Arbitration Act ("FAA"), is credited by some with triggering a potential "Congressional backlash." Joe Markowitz, *Pre-Dispute Arbitration Agreements in Consumer Cases: And Idea Whose Time has Come and Gone?*, CONFLICT MANAGEMENT, Spring 2008, at 15 (citing Hall Street Assocs. v. Mattel, Inc., 128 S. Ct. 1396, 1405 (2008)).

[4] *Hall Street*, 128 S. Ct. at 1402 (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2005)).

[5] *See* Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1284–85 (2005–06). *See generally* Donald R. Philbin, Jr. & Audrey Lynn Maness, *Alternative Dispute Resolution*, 40 TEX. TECH. L. REV. __ (2008) (forthcoming); Stephen K. Huber, *The Arbitration Jurisprudence of the Fifth Circuit, Round III*, 38 TEX. TECH L. REV. 535 (2006); Stephen K. Huber, *The Arbitration Jurisprudence of the Fifth Circuit, Round II*, 37 TEX. TECH L. REV. 531 (2005); Stephen K. Huber, *The Arbitration Jurisprudence of the Fifth Circuit*, 35 TEX. TECH L. REV. 497 (2004).

approach,[6] with mixed results.[7]

This Article reviews many of the Texas arbitration decisions in 2007 and picks up some earlier opinions for context. It follows the normal progression of an arbitration-related lawsuit: first addressing issues of arbitrability and then addressing judicial review of arbitration awards. We begin our discussion with a review of Texas procedure and of the interplay between the federal and state arbitration acts.

II. THE CASES AND RELATED DISCUSSION

A. Texas Procedure

There are two procedural mechanisms by which a party can appeal denial of a motion to compel arbitration. The first, provided for under the Texas Civil Practice and Remedies Code, allows for interlocutory appeal of an order denying arbitration under the Texas Arbitration Act (TAA).[8] However, because this applies only to the TAA and makes no similar provision for the Federal Arbitration Act (FAA),[9] a party to a contract implicating the FAA has no adequate remedy at law when a trial court erroneously denies the party the right to arbitrate.[10] In such situations, a

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[6] "In some states such as California, by contrast, the state courts have take a much less expansive view of the enforceability of arbitration agreements, for example by vigorously employing the doctrine of unconscionability to preclude enforcement of pre-dispute agreements that are perceived as one-sided or otherwise unfair. The California Supreme Court has also mandated elaborate procedural protections before arbitration agreements in the employment and other contexts may be enforced." Markowitz, *supra* note 3.

[7] *See generally* Preston v. Ferrer, 128 S. Ct. 978 (2008).

[8] TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a) (Vernon 2005 & Supp. 2007).

[9] This is not the case at all stages in the proceedings. "Some provisions of section 171.098(a) allow for an interlocutory appeal in cases governed by either the FAA or the TAA. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(3), (4), (5). Conversely, subsections (1) & (2) permit an interlocutory appeal only in proceedings governed by the TAA. *Id.* § 171.098(a)(1), (2). Therefore, for parties challenging the granting of an application to stay arbitration or the denial of an application to compel arbitration in proceedings governed by the FAA, mandamus is the appropriate remedy." Holcim (Tex.) Ltd. P'ship v. Humboldt Wedag, Inc., 211 S.W.3d 796, 801 n.2 (Tex. App.—Waco 2006, pet. granted).

[10] EZ Pawn Corp. v. Mancias, 934 S.W.2d 87, 91 (Tex. 1996). "When Texas courts confront procedural issues involving a case subject to the FAA, however, Texas procedural rules apply instead of federal rules." J.D. Edwards World Solutions Co. v. Estes, Inc., 91 S.W.3d 836, 839 (Tex. App.—Fort Worth 2002, pet. denied) (citing Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 272 (Tex. 1992) (orig. proceeding)).

party may petition an appeals court for a writ of mandamus. The writ will issue only to "correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy at law."[11]

As a brief aside, Texas state courts often find themselves interpreting and applying the Federal Act because the FAA itself does not confer jurisdiction on federal courts.[12] Rather, the parties must have an independent jurisdictional ground to get into federal court, whether it is diversity of citizenship or the fact that their claim hinges on some federal law.[13] Because these factors are often absent, state courts regularly hear cases that require application of the FAA.[14]

B. The TAA, the FAA, and Preemption

In order to determine whether mandamus or interlocutory appeal applies, one must first analyze whether a claim implicates the TAA or the FAA. This is not always clear.[15]

The Texas Arbitration Act (TAA) may at times be eclipsed (or at least complemented) by the Federal Arbitration Act (FAA). Because it is rooted in the Commerce Clause, the FAA is generally broad in its sweep, reaching even seemingly wholly state-based transactions.[16] Consider, for example, the 2005 Texas Supreme Court case *In re Nexion Health at Humble, Inc.*[17] There, plaintiff Marjorie Lyman executed an arbitration agreement with

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[11] Walker v. Packer, 827 S.W.2d 833, 839–40 (Tex. 1992). Because there is an "adequate remedy at law"—interlocutory appeal—when a motion to compel arbitration under the TAA is denied, mandamus review is generally not proper. *See, e.g.*, TMI, Inc. v. Brooks, 225 S.W.3d 783, 790–91 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

[12] *See* Smith v. Rush Retail Ctrs., Inc., 360 F.3d 504, 505 n.6 (5th Cir. 2004); Stephen K. Huber, *The Arbitration Jurisprudence of the Fifth Circuit, Round II*, 37 TEX. TECH. L. REV. 531, 537 (2005).

[13] Hall Street Assocs. v. Mattel, Inc., 128 S. Ct. 1396, 1402 (2008) ("As for jurisdiction over controversies touching arbitration, the Act does nothing, being 'something of an anomaly in the field of federal-court jurisdiction" in bestowing no federal jurisdiction but rather requiring an independent jurisdictional basis.").

[14] Stephen K. Huber, *The Arbitration Jurisprudence of the Fifth Circuit, Round IV*, 39 TEX. TECH L. REV. 463, 474 (2006).

[15] *See, e.g.*, Associated Glass, Ltd. v. Eye Ten Oaks Invs., Ltd., 147 S.W.3d 507 (Tex. App.—San Antonio 2006, no pet.).

[16] The FAA covers any contract "evincing a transaction involving commerce," that is, "commerce among the several states or with foreign nations," including territories and the District of Columbia. 9 U.S.C. §§ 1–2 (2000).

[17] 173 S.W.3d 67 (Tex. 2005) (per curiam).

Humble Healthcare Center (HHC). Marjorie's husband died later that month while in HHC's care, and she filed a claim for damages under the Texas Wrongful Death Act and the Texas Survival Statute.[18] The trial court refused to compel arbitration under the FAA (as well as the TAA), despite the fact that HHC had provided evidence that it had been reimbursed by Medicare—a federal program—for the services it rendered to Mr. Lyman.[19] The HHC petitioned the Texas Supreme Court for a writ of mandamus ordering the trial court to compel arbitration under the FAA.

The Texas Supreme Court granted the petition, rejecting Marjorie's argument that there was insufficient evidence of interstate commerce.[20] The Court reemphasized that the reach of the FAA is coextensive with that of the Commerce Clause,[21] and, "[b]ecause 'commerce' is broadly construed, the evidence of Medicare payments made to HHC on [Mr. Lyman's] behalf is sufficient to establish interstate commerce and the FAA's application in this case."[22]

The Court also explained that the FAA preempts the TAA in personal injury cases like Mrs. Lyman's. The FAA preempts the TAA when (1) the agreement to arbitrate is in writing, (2) it involves interstate commerce, (3) it can withstand scrutiny under traditional contract defenses, and (4) state law affects its enforceability.[23] Factor four, the only remaining issue in dispute, was resolved in favor of preemption because "[t]he TAA interferes with the enforceability of the arbitration agreement by adding an additional requirement—the signature of a party's counsel—to arbitration agreements in personal injury cases."[24]

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[18] *Id.* at 68.

[19] *Id.* This is an example of the now widely accepted rule that "[i]interstate commerce is broadly defined, and is not limited to the interstate shipment of goods, but includes all contracts 'relating to' interstate commerce." *In re* Heritage Bldg. Sys., Inc., 185 S.W.3d 539, 541 (Tex. App.—Beaumont 2006, no pet.). Because the Medicare funds used to pay for HHC's services travelled through interstate commerce, the contract between Mrs. Lyman and HHC for services "related to" some aspect of interstate commerce, even if only tangentially.

[20] *In re* Nexion Health, 173 S.W.3d at 69.

[21] *Id.* at 69 (citing *In re* L&L Kempwood Assocs., 9 S.W.3d 125, 127 (Tex. 1999) (per curiam)).

[22] *Id. See also In re* Palacios, 221 S.W.3d 564, 565 (Tex. 2006) (per curiam) (determining that the contract involved foreign commerce because the purchaser of a duplex gave her realtor power of attorney to purchase the property while she was in Mexico); *In re* Ghanem, 203 S.W.3d 896, 899 (Tex. App.—Beaumont 2006, no pet.).

[23] *Nexion Health*, 173 S.W.3d at 69 (citing 9 U.S.C. § 2).

[24] *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.002(a)(3), (c) (Vernon 2005)).

On another occasion, the Court suggested that the provisions of the FAA providing for appeal may preempt Texas procedures. In *In re Palacios*, the Texas Supreme Court was confronted with a petition for a writ of mandamus asking the court to effectively reverse the trial court's motion compelling arbitration and staying the court proceedings.[25] As explained in more detail,[26] both the Federal and Texas Arbitration Acts provide for interlocutory appeals of an order denying a motion to compel arbitration, but do not do so for orders granting motions to compel.[27] In fact, the Federal Act explicitly prevents appeals from such orders.[28] However, because interlocutory appeals are different than petitions for writs of mandamus,[29] and because neither the federal nor the state act addresses mandamus, litigants will often attempt to broaden limits on interlocutory appeals by petitioning for mandamus when faced with an order granting a motion to compel arbitration. The Texas Supreme Court curtailed this practice in *Palacios*, suggesting that the FAA procedures may preempt Texas mandamus practice. As the Court explained,

> There is little friction between the FAA and Texas procedures when state courts review by mandamus an order that the federal courts would review by interlocutory appeal. But it is quite another matter for state courts to review by mandamus an order that the federal courts could not review at all. Such review would create tension with the legislative intent of the FAA, which 'generally permits immediate appeal of orders hostile to arbitration,' but 'bars appeal of interlocutory orders favorable to arbitration.'[30]

Despite the apparent sweep of its statement, the Court declined to draw a bright line, explaining that it "need not decide today whether mandamus

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[25] 221 S.W.3d 564, 564–65 (Tex. 2006) (per curiam).

[26] *See infra* notes 186–95 and accompanying text.

[27] Unless a statute provides an exception to the general rule that appeals may be taken only from final judgments, appellate courts lack jurisdiction to review interlocutory orders. *See* Qwest Commc'ns Corp. v. AT&T Corp., 24 S.W.3d 334, 336 (Tex. 2000) (per curiam). Thus, Congress's exception in § 16—allowing a party to appeal a denial of arbitration but not a grant thereof—evinces a strong policy in favor of arbitration.

[28] *See* 9 U.S.C. §§ 16(b)(2) & (3) (2000).

[29] While interlocutory appeals are provided for by statute, mandamus is an extra-statutory remedy, that, when properly invoked, is used "to correct a clear abuse of discretion when there is no adequate remedy by appeal." Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992).

[30] *Palacios*, 221 S.W.3d at 565 (citations omitted).

review of an order staying a case for arbitration is entirely precluded," because, even if mandamus were available, petitioner did not demonstrate that mandamus was warranted.[31]

The *Palacios* decision has been criticized by at least one commentator for its suggestion that the FAA preempts the widely available mandamus procedure.[32] The criticism is essentially that, because the FAA does not address how states should handle appellate review of orders respecting arbitration, courts should not presume that the FAA trumps all inconsistent state procedures.[33] But this critique is itself subject to some criticism: since preemption often occurs even in the absence of an express statement,[34] courts regularly find preemption when the statute in question does not expressly address whether preemption is to occur.

Procedure and preemption were at issue on more than one occasion in the past couple years. In *In re D. Wilson Construction Co.*, the trial court denied a subcontractor's motion to compel arbitration under the FAA and TAA for construction defect claims, and the subcontractor appealed the decision as to the TAA ruling and petitioned for a writ of mandamus as to the FAA decision.[35] The court of appeals dismissed the interlocutory appeal involving the TAA for want of jurisdiction, determining that, because the subject matter of the contract involved interstate commerce and thus implicated the FAA, the TAA was inapplicable, or, in other words, preempted.[36]

The Texas Supreme Court reversed, beginning its explanation by noting that, while "[m]any courts of appeals wrongly view the FAA and the TAA as mutually exclusive, the United States Supreme Court and this Court have

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[31] *Id.* at 565–66.

[32] David M. Gunn, *Increasing Use of Federal Authorities*, at 5, PRACTICE BEFORE THE TEXAS SUPREME COURT, Apr. 27, 2007, Austin, Tex.

[33] *Id.*

[34] This has been expressly applied in the area of arbitration. As explained by the United States Supreme Court and reiterated by the Texas courts, "The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. But even when Congress has not completely displaced state regulation in an area, state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law—that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477–78 (1989) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

[35] 196 S.W.3d 774, 778 (Tex. 2006).

[36] *Id.*

held a different view for some time: the FAA only preempts contrary state law, not consonant state law."[37] The court reiterated the four-part test announced in *Nelson*, focusing once again on the fourth factor: whether state law affects the enforceability of the arbitration agreement, and explaining that, in order to find preemption, the court must look beyond the fact that the FAA is implicated by the agreement and find either that "(1) the TAA has expressly exempted the agreement from coverage, or (2) the TAA has imposed an enforceability requirement not found in the FAA."[38] Because neither of these elements were present in this case, the court held that both the TAA and FAA applied, and the court of appeals erred in determining otherwise.[39]

Though the *Wilson Construction* case indicates that preemption will not occur every time both the TAA and the FAA apply, it is clear that, when the implementation of the FAA would be frustrated by the TAA or other state policies, those state policies will be preempted. This was the case in *In re Heritage Building Systems, Inc.*[40] There, despite the fact that the FAA applied to the claims and required that the case be sent to arbitration, the trial court ordered the parties to mediation, citing Texas's policy in favor of settlement.[41] The court of appeals found otherwise, and determined that mediation would result in increased time and expenses, and thus would frustrate the expectations of the parties and the federal mandate that a case be ordered "to proceed to arbitration in accordance with the terms of the agreement."[42]

But in those instances where the FAA and TAA compliment each other, like in the *Wilson Construction* case, the parties have a choice in appealing a trial court's decision. The aggrieved party can petition for a writ of

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[37] *Id.* at 779.

[38] *Id.* at 780 (citations omitted).

[39] Note that the application of the TAA may be limited even in situations where the two laws compliment each other. This is the case when "the parties' contract provides that another state's substantive law applies." Myer v. Americo Life, Inc., 232 S.W.3d 401, 407 (Tex. App.—Dallas 2007, no pet. h.). The parties may also agree to apply the FAA rules, and, in such cases, the court need not find that the "interstate commerce" requirement is met. Teel v. Beldon Roofing & Remodeling Co., No. 04-06-00231-CV, 2007 WL 1200070, at *1 (Tex. App.—San Antonio Apr. 25, 2007, pet. denied) ("[W]hen there is an express agreement to arbitrate under the FAA, courts have upheld such choice-of-law provision even though the transaction at issue does not involve interstate commerce.").

[40] 185 S.W.3d 539, 540 (Tex. App.—Beaumont 2006, no pet.).

[41] *Id.*

[42] *Id.* at 542 (quoting 9 U.S.C. § 4).

mandamus to compel arbitration under the FAA, or the party can perfect an interlocutory appeal under the TAA. Or the party may do both.

C. *Arbitrability*

Though the FAA and the TAA are not identical, they do agree on the court's limited role in deciding issues of arbitrability. As under the FAA, preliminary judicial review under the TAA is limited to determining (1) whether a valid arbitration agreement exists between the parties before the court, and (2) whether the scope of the agreement encompasses the claims raised.[43] In deciding the former question, courts look to state law principles regarding the formation of contracts.[44] Thus, regardless of whether the FAA or the TAA or both are implicated, courts look to Texas contract principles to determine whether the parties assented to an agreement to arbitrate or whether state law provides a defense to a contract to arbitrate.[45]

1. Valid Agreement to Arbitrate: The Making of an Agreement

The former consideration—whether a party assented to an agreement to arbitrate—has been the subject of more than one case in recent years. For example, in *In re Dillard Department Stores, Inc.* (hereinafter *Dillard II*), an aggrieved employee argued that she was not bound by an arbitration agreement because she never agreed to the policy; that is, she never received the full text of the policy and/or signed an agreement.[46] But the court ultimately concluded that a signature and the full text of the agreement are not required under Texas law.[47] Rather, it is enough that the employee receives notice of the agreement and accepts it.[48] Continuing to

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[43] *In re* Oakwood Mobile Homes, Inc., 987 S.W.2d 571, 573 (Tex. 1999) (per curiam), *abrogated by In re* Halliburton Co., 80 S.W.3d 566 (Tex. 2002).

[44] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

[45] *See id.* at 574; *see also* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006).

[46] 198 S.W.3d 778, 780–81 (2006) (per curiam) ("*Dillard II*").

[47] *Id.* at 780. Of course, a party must still have authority to sign the contract. This was a factual issue precluding affirmance of an arbitration award in Sikes v. Heritage Oaks West Retirement Village, 238 S.W.3d 807, 809 (Tex. App.—Waco 2007, pet. filed). *Sikes* also notes, however, that a party without actual authority to sign the agreement may be estopped from making this argument if they acted with apparent authority. *Id.* at 810.

[48] *Dillard II*, 198 S.W.3d at 780 (citing *In re* Halliburton Co., 80 S.W.3d 566, 568 (Tex. 2002)). The notice requirement is met when notice "unequivocally communicates to the employee definite changes in the employment terms." *Id.* Here, notice came in the form of a summary of the new policy, a copy of the "Rules of Arbitration," and an acknowledgment page.

work for the company constitutes de facto acceptance under Texas law, and this is what the employee in the *Dillard's* case did.

The court was presented with a similar situation in *In re Dallas Peterbilt, Ltd.*[49] There the employee, seeking to avoid arbitration, argued that the only way to effectuate notice is to provide a copy of the arbitration agreement itself, and not merely a summary of the agreement.[50] The court disagreed, citing its holding in *Dillard II* and explaining that a summary is sufficient as long as it provides unequivocal notice of the underlying agreement and the terms therein.[51] The court disposed of the plaintiff's lack-of-acceptance argument in a similar fashion, again citing *Dillard II* and reiterating the rule that notice of the agreement and continued employment is enough to constitute acceptance.[52]

2. Valid Agreement to Arbitrate: Defenses

Both the *Dillard II* case above and an earlier case by the same name[53] demonstrate one way to invalidate an otherwise legitimate arbitration agreement: if an agreement is illusory, that is, if it allows one party "the unilateral, unrestricted right to terminate."[54] In the first of the two *Dillard* cases, the plaintiff argued that even though the agreement did not expressly grant Dillard a right to unilaterally modify its arbitration policy, it impliedly

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The acknowledgment page explained that employees accept the arbitration agreement by continuing their employment with Dillard's. *Id.*

[49] 196 S.W.3d 161 (Tex. 2006) (per curiam).

[50] *Id.* at 162.

[51] *Id.* at 163.

[52] *Id.* The *Peterbilt* case was, if anything, a stronger case of acceptance, for unlike the employee in *Dillard I*, the employee in *Peterbilt* actually signed an acknowledgment form indicating that he had received notice of the agreement and understood that continued employment constituted acceptance.

[53] *In re Dillard Department Stores, Inc.*, 186 S.W.3d 514 (Tex. 2006) (hereinafter "*Dillard I*") (per curiam).

[54] *See* J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 230 n.2 (Tex. 2003) (citing Dumais v. Am. Golf Corp., 299 F.3d 1216, 1219 (10th. Cir. 2000); Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 315–16 (6th Cir. 2000); Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 939 (4th Cir. 1999); Gibson v. Neighborhood Health Clinics, 121 F.3d 1126, 1133 (7th Cir. 1997)). While not technically a defense (because the party contesting arbitration is attacking the requirement of consideration), claims that an agreement is illusory are often raised (and treated) as if they were defenses. *See generally In re* Palm Harbor Homes, 195 S.W.3d 672 (Tex. 2006). Defenses to an agreement to arbitrate are, like the making of an agreement itself, based on state law. *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445–46 (2006).

did so because it could be interpreted as being contingent on the plaintiff's continued employment, and, because the plaintiff's at-will employment could be terminated at any time, so to could the agreement.[55] The court rejected this argument, noting that nothing in the agreement suggested such a contingency.[56] Indeed, it seemed to suggest the opposite—the agreement's primary purpose was to resolve disputes arising in connection with the employee's separation; that is, after the employment contract had terminated.[57]

The plaintiff in *Dillard II* also suggested that Dillard retained the right to unilaterally modify the arbitration agreement because it drafted a new arbitration policy in 2002 (the previous policy had been drafted and presented to the employees in 2000).[58] The plaintiff viewed the 2002 plan as unilaterally amending the 2000 plan, but the court found no evidence to support this contention.[59] In the absence of some contrary evidence, the court concluded that the 2000 plan remained in effect for those who did not receive notice of the 2002 policy.[60] This was the case with the plaintiff.

This argument was had previously appeared in *In re Dillard Department Stores, Inc.* (hereinafter *Dillard I*).[61] The court came to the same conclusion, emphasizing that the 2000 arbitration agreement did not expressly provide Dillard any right to modify the agreement and finding that the 2000 agreement, and not the 2002 version, applied to the plaintiff's claims.[62]

Another defense seen with some frequency in the courts is that of waiver. Frequency in appearance has not, however, correlated to success. This is primarily attributable to stated policy: "[t]here is a strong

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[55] *Dillard II*, 198 S.W.3d at 781. Generally speaking, a contract will not be illusory if supported by consideration, and sufficient consideration is met when both parties give binding promises to arbitrate. *Palm Harbor*, 195 S.W.3d at 676–77.

[56] *See Dillard II*, 198 S.W.3d at 782.

[57] *Id.* at 781.

[58] *Id.* at 780.

[59] *Id.* at 782.

[60] *Id.* ("Garcia envisions Dillard's 2002 policy as retroactively amending her preexisting agreement to arbitrate under the 2000 policy, yet nothing in the record supports this view. An employer may adopt a new policy or amend an existing one at any time, and the changes will not affect employees who do not receive notice of the changes and accept them.").

[61] 186 S.W.3d 514 (Tex. 2006) (hereinafter "*Dillard I*") (per curiam).

[62] *Id.* at 516 (citing Lopez v. Munoz, Hockema & Reed, L.L.P., 22 S.W.3d 857, 861 (Tex. 2000)).

presumption against waiver under the FAA."[63] Waiver occurs when a party has "substantially invoked the judicial process to its opponent's detriment;" merely taking part in litigation is not enough, and "[d]elay alone does not establish waiver."[64] Moreover, some degree of prejudice is essential to a finding of waiver.[65]

Because of this high bar, Texas courts have found no waiver when some discovery has been conducted, even if the parties have incurred substantial litigation expenses.[66] The courts generally discount (or at least marginalize) "self-inflicted" expenses,[67] and refuse to find waiver except in the most extreme circumstances.[68] Indeed, the court has allowed a party to default on a suit, move for new trial, answer the complaint and only then, eight months later, move to compel arbitration.[69]

Though not raised in recent Texas cases, other defenses include, but are not limited to, fraud in the inducement, duress, and unconscionability.[70] These claims have appeared in other jurisdictions in recent years, but have enjoyed limited success.[71] Texas courts have indicated that an unconscionability claim, under the right circumstances, might be viable.[72]

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[63] *In re* Vesta Ins. Group, Inc., 192 S.W.3d 759, 763 (Tex. 2006) (per curiam).

[64] *Id.* (quoting *In re* Serv. Corp. Int'l, 85 S.W.3d 171, 174 (Tex. 2002) (per curiam)). Waiver is generally proper only when a party has been allowed "to conduct full discovery, file motions going to the merits, and [has then sought] arbitration on the eve of trial." *Id.* Such conduct "defeats the FAA's goal of resolving disputes without the delay and expense of litigation." *Id.*

[65] *Id.* at 763 (citing *In re* Bruce Terminix Co., 988 S.W.2d 702, 704 (Tex. 1998) (per curiam)).

[66] *Id.* at 764.

[67] *Id.* at 763.

[68] *See, e.g., id.*; *see also* Steel Warehouse Co. v. Abalone Shipping Ltd. of Nicosai, 141 F.3d 234, 238 (5th Cir. 1998) ("There is a well-settled rule in this circuit that waiver of arbitration is not a favored finding, and there is a presumption against it.").

[69] *In re* Bank One, N.A., 216 S.W.3d 825, 826 (Tex. 2007) (per curiam).

[70] *See, e.g.*, Buckeye Check Cashing Inc. v. Cardegna, 546 U.S. 440, 444 (2006).

[71] *See, e.g.*, Overstreet v. Contigroup Cos., 462 F.3d 409 (5th Cir. 2006); Faber v. Menard, Inc., 367 F.3d 1048, 1053–54 (8th Cir. 2004); Parilla v. IAP Worldwide Services VI, Inc., 368 F.3d 269, 283–84 (3d Cir. 2004). *But see* Markowitz, *supra* note 3, at 15.

[72] Green Tree Financial Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000) ("[E]xistence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum"); *see also In re* Luna, 175 S.W.3d 315 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *In re* FirstMerit Bank, N.A., 52 S.W.3d 749, 756–58 (Tex. 2001); Karl Bayer, *Fifth Circuit Rules on Cost as a Basis for Not Arbitrating*, Aug. 24, 2006, *available at* http://www.karlbayer.com/blog/?p=85 (last visited Mar. 1, 2008). Claims of unconscionability, however, may be waived if they are not raised in a timely fashion. For example, after a litigant participates in arbitration without objection and receives a favorable award, she cannot later argue

Home buyers seeking to avoid arbitration with the third party manufacturer made an unconscionability argument in *In re Palm Harbor Homes, Inc.*[73] The buyers claimed that the arbitration agreement was substantively unconscionable because it forced the buyers to arbitrate with the manufacturer but did not bind the manufacturer to the same requirement.[74] The court rejected this argument, finding nothing "inherently unconscionable" with arbitration agreements made to benefit a third party.[75]

Justice O'Neill concurred in the result. She would have found the manufacturer's unrestricted right to invoke arbitration unconscionable, but she agreed that the buyers should be compelled to arbitrate because the additional claims equitably estopped them from avoiding arbitration with the manufacturer.[76]

Unconscionability was also raised in *In re U.S. Home Corp.*, along with a host of other contract defenses.[77] In conditionally granting the petition for mandamus, the Texas Supreme Court explained that an arbitration clause cannot be unconscionable merely because a party refuses to contract in the absence of such a clause.[78] And in a similar vein, a party cannot claim substantive unconscionability based on costs without some showing that they will be charged excessive arbitration fees.[79] The court also rejected plaintiffs' fraud claim, suggesting that a failure to read the entire agreement

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(in an effort to prevent an appeal) that the provision in the arbitration agreement providing for appeals is unconscionable. *In re* Hospitality Employment Group, LLC, 234 S.W.3d 832, 835 (Tex. App.—Dallas 2007, no pet. h.).

[73] 195 S.W.3d 672 (Tex. 2006).

[74] *Id.* at 678.

[75] *Id.* The court also noted that even if this were to be a contract of adhesion as the buyers argued, there is nothing *per se* unconscionable about such contracts. This is consistent with the court's other decisions on this topic. *See In re* U.S. Home Corp., 236 S.W.3d 761, 764 (Tex. 2007) (per curiam); *In re* AdvancePCS Health L.P., 172 S.W.3d 603, 608 (Tex. 2005) (per curiam) ("Adhesion contracts are not automatically unconscionable, and there is nothing per se unconscionable about arbitration agreements.").

[76] *Palm Harbor*, 195 S.W.3d at 679 (O'Neill, J., concurring).

[77] 236 S.W.3d 761, 763 (Tex. 2007) (per curiam).

[78] *Id.* at 764.

[79] *Id.* ("[B]oth the United States Supreme Court and this Court require specific evidence that a party will actually be charged excessive arbitration fees. It is not enough to present only a schedule of the American Arbitration Association's usual fees."). *See also Overstreet*, 462 F.3d at 413.

cannot provide a basis for later avoiding the agreement.[80] Likewise, the court also dismissed plaintiffs' claims that the contract was not supported by consideration.[81]

The only remaining issue in *U.S. Home Corp.* was whether mediation was a condition precedent to arbitration. The agreement provided that "[a]ny controversy or claim arising under or related to this Agreement. . .shall be determined by mediation or by binding arbitration as provided by the Federal Arbitration Act and similar state statutes and not by a court of law."[82] Though the court interpreted the agreement as contemplating mediation before arbitration, it saw no indication that the parties "intended to dispense with arbitration if mediation did not occur first."[83] The court also seemed persuaded by the fact that mediation had occurred during the course of litigation, without success.[84] Thus, the court rejected the plaintiffs' defenses and conditionally granted the writ of mandamus, directing the trial court to compel arbitration.[85]

The claim of substantive unconscionability has seen some success in the appellate courts. For example, in *Olshan Foundation Repair Co. v. Ayala*, the San Antonio Court of Appeals held that the contract to arbitrate was substantively unconscionable because of the fees associated with the potential arbitration.[86] The plaintiffs' success was due in large part to the evidence presented to the trial court; though both the United States Supreme Court and the Texas Supreme Court had "recognized the possibility that the excessive costs of an arbitration might, under certain circumstances, render an arbitration agreement unconscionable," those courts were presented by unsupported (and ultimately unsuccessful) claims of unconscionability.[87]

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[80] *Id.* ("[In support of their fraud claim, plaintiffs argue] only that the arbitration clause was on the back of their single-sheet contract . . . . Like any other contract clause, a party cannot avoid an arbitration clause by simply failing to read it.").

[81] *Id.*

[82] *Id.* at 763.

[83] *Id.* at 764.

[84] *See id.*

[85] The plaintiffs had also argued that arbitration was optional because the agreement provided that the parties "may" request arbitration. The court rejected this argument, explaining that nothing in the agreement "suggests arbitration was optional if either [party chose to invoke arbitration]; to the contrary, the clause constituted a binding promise to arbitrate if either party requested it." *Id.* at 765.

[86] 180 S.W.3d 212, 216 (Tex. App.—San Antonio 2005, pet. denied).

[87] *Id.* at 215 (citing Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91 (2000); *In re* FirstMerit Bank, N.A., 52 S.W.3d 749 (Tex. 2001)).

Having first been compelled to arbitration, the plaintiff presented evidence in a reconsideration hearing that included a bill from the American Arbitration Association for $33,150, evidence of the plaintiffs' salaries, and evidence of the value of the underlying contract.[88] The appeals court seemed swayed by the fact that the cost of arbitration amounted to 45 percent of Mr. Ayala's salary, and was almost three times the amount of the underlying contract.[89] The court concluded that "the disparity between the amount in controversy and the amount charged to arbitrate the controversy is so large that the trial court acted within its discretion when it ruled the arbitration agreement unconscionable."[90] That argument was not offset by the fact that Olshan would be required to match the Ayala's $33,150 contribution to arbitration costs.[91]

The plaintiffs were unable to show "some specific evidence" in the case of *TMI, Inc. v. Brooks*, and their claim of substantive unconscionability, unlike the Ayala's, was rejected.[92] But it was not that the plaintiffs failed to present any evidence; indeed, the homeowners there presented affidavit evidence by an expert who estimated the cost of arbitration, and signed their own affidavits stating that arbitration was economically unfeasible.[93] Though the homeowners attached a fee schedule from the AAA, they failed to submit any evidence of income or the amount at issue in the underlying claim—two points that seemed pivotal in the *Olshan* analysis.[94] In rejecting the homeowners claim, the Houston court also noted that the AAA rules allow for the AAA to reduce or defer some arbitration fees in the event that arbitration causes "extreme hardship" to any party, and referenced the defendant's evidence that similar claims had been arbitrated for much less than the plaintiff's expert had estimated.[95]

The end result appears to be that substantive unconscionability claims (based on financial hardship) are viable and recognized by the Texas and

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[88] *See id.* at 214.

[89] *Id.* at 216.

[90] *Id.*

[91] *Id.*

[92] 225 S.W.3d 783, 796 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

[93] *Id.* at 796.

[94] *Id.* at 796 n.12.

[95] *Id.* at n.13.

United States Supreme Courts,[96] but the success of the claim seems to turn on compelling evidence.[97]

A final note on defenses: duress was raised as a defense in the 2007 case of *In re RLS Legal Solutions, LLC*,[98] but the outcome went more to the contract as a whole rather than the arbitration clause standing alone. The plaintiff employee there refused to sign an employment agreement containing an arbitration clause, and her pay was withheld until she signed.[99] At the time of signing, the plaintiff told the company that she was signing because she was under duress.[100] When the company sought to arbitrate a later-arising dispute, the employee objected to the enforcement of the arbitration agreement, arguing that it had been procured through duress.[101] Though some portions of the plaintiff's affidavit suggested otherwise, the court reasoned that there was no evidence "that the arbitration provision was the only provision to which she objected, or that it was the only provision she was under duress to sign."[102] Because claims attacking the validity of a contract as a whole are for the arbitrator, the court conditionally granted the defendant's petition for a writ of mandamus resulting in compelled arbitration of the issue.[103]

3. Valid Agreement to Arbitrate: Binding Non-Signatories

"Absent unmistakable evidence that the parties intended to the contrary, it is the courts rather than the arbitrator that must decide 'gateway matters' such as whether a valid arbitration agreement exists."[104] And "[w]hether an arbitration agreement is binding on a nonparty is one of those gateway matters."[105] Though arbitration is generally a matter of expressed consent

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[96] *See generally* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000); *In re* FirstMerit Bank, N.A., 52 S.W.3d 749 (Tex. 2001).

[97] *See generally TMI*, 225 S.W.3d at 783; *In re* Luna, 175 S.W.3d 315 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

[98] 221 S.W.3d 629, 630 (Tex. 2007) (per curiam).

[99] *Id.*

[100] *Id.*

[101] *Id.* at 631.

[102] *Id.* The court relied on the plaintiff's testimony at trial, where she explained that "she was also dissatisfied with the compensation and commission provisions and the non-compete provisions of the new agreement." *Id.*

[103] *Id.* at 632.

[104] *In re* Weekley Homes, L.P., 180 S.W.3d 127, 130 (Tex. 2005).

[105] *Id.*

and involves parties to the contract, "under certain circumstances, principles of contract law and agency may bind a non-signatory to an arbitration agreement."[106]

Though usually not at issue, courts must decide as a preliminary matter whether an alleged non-signatory is indeed a stranger to the contract.[107] For example, in *In re H&R Block Financial Advisors, Inc.*, the court explained that a contracting party does not become a non-signatory simply because it changes its corporate name.[108] And, as explained below and by the *H&R* court, arbitration cannot be avoided by bringing a claim against a corporate agent instead of the corporation itself.[109]

In deciding whether a nonparty is bound in any given case, Texas courts apply Texas procedural and substantive law, while remaining cognizant of relevant federal law.[110] The Texas courts have done just this when considering whether nonparties are to be bound by an arbitration agreement.[111] In *Weekley Homes*, the court adopted a standard consistent with the federal law of "direct benefits estoppel," "holding that a nonparty may be compelled to arbitrate if it seeks, through the claim, to derive a direct benefit from the contract containing the arbitration clause."[112] This

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[106] *In re* Kellogg Brown & Root, Inc., 166 S.W.3d 732, 738 (Tex. 2005).

[107] *See generally* Contec Corp v. Remote Solution, Co., 398 F.3d 205, 209 (2d Cir. 2005).

[108] 235 S.W.3d 177, 178 (Tex. 2007) (per curiam) (citing Coulson v. Lake LBJ Mun. Util. Dist., 781 S.W.2d 594, 595 (Tex. 1989); Tex. Co. v. Lee, 157 S.W.2d 628, 630 (1941)).

[109] *See id.*

[110] *Weekley Homes*, 180 S.W.3d at 130–31 (noting that there is some confusion as to whether state or federal law should apply in determining whether a nonparty is bound by an arbitration agreement); *accord Kellogg Brown & Root*, 166 S.W.3d at 738.

[111] There seems to be an unspoken presumption against binding nonparties to an arbitration agreement. This is entirely logical given that arbitration is contractual in nature, and the FAA (and presumably the TAA) does "not require parties to arbitrate when they have not agreed to do so." Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478–79 (1989); *see also* Preston v. Ferrer, 128 S. Ct. 978, 981 (2008) ("[T]he Federal Arbitration Act establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution."); Intergen N.V. v. Grina, 344 F.3d 134, 142–50 (1st Cir. 2003) (explaining that federal courts have "been hesitant to estop a nonsignatory seeking to avoid arbitration").

[112] *Weekley Homes*, 180 S.W.3d at 131(internal quotation omitted) (Federal courts have recognized five other theories that may apply to bind non-signatories to an arbitration agreement: (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; and (5) third-party beneficiary) (citing Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) (incorporation by reference); *In* re FirstMerit Bank, N.A., 52 S.W.3d 749 (Tex. 2001) (assumption); Biggs v. U.S. Fire Inc. Co., 611 S.W.2d 624, 629 (Tex. 1981) (agency); *In re* Kellogg Brown & Root, Inc., 166 S.W.3d 732, 741 (Tex. 2005); TEX. BUS. CORP.

requires that courts look at the substance of the claim; thus, when "liability arises solely from the contract or must be determined by reference to it," the claim seeks a direct benefit from the contract.[113] This is contrasted with claims that are brought in tort where liability arises simply from general obligations imposed by law.[114] Where a claimant brings both tort and contract-based claims, the nonparty will generally be required to pursue all claims in arbitration.[115]

But the *Weekley Homes* case turned on more than this. The nonparty asserted claims only sounding in tort—namely, asthma induced by dust from repairs performed on her father's home.[116] But though her father was the signatory on the contract with the builder, the nonparty plaintiff had directed many of the repairs, received financial reimbursement for expenses incurred while the repairs were taking place, and had engaged in extensive negotiations with the builder.[117] And to further complicate matters, title to the home had been transferred to family trust in which the nonparty was named as the sole beneficiary.[118] As a beneficiary, the nonparty was sure to reap the benefits of any recovery resulting from the arbitration.[119] On these unique facts, the court concluded that the nonparty should be required to submit her claims to arbitration. As explained in its conclusion:

> [W]hen a nonparty consistently and knowingly insists that others treat it as a party, it cannot later turn its back on

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ACT. art. 2.21(A)(2) (2005) (alter ego); Stine v. Stewart, 80 S.W.3d 586, 590 (Tex. 2002) (third-party beneficiary)). The Fifth Circuit reaffirmed the direct benefit estoppel theory most recently in Hellenic Inv. Fund, Inc. v. Det Norske Veritas, 464 F.3d 514, 516 (5th Cir. 2006).

[113] *Weekley Homes*, 180 S.W.3d at 132.

[114] Not all tort claims will allow a party to avoid arbitration. As earlier courts have stated, "If a tort claim is so interwoven with the contract that it cannot stand alone, it falls within the scope of an agreement to arbitrate; if, on the other hand, a tort claim is completely independent of the contract and could be maintained without reference to the contract, it falls outside of an agreement to arbitrate." Zabinski v. Bright Acres Assocs., 553 S.E.2d 110, 119 n.4 (S.C. 2001).

[115] *See id.* Of course, this leaves a plaintiff with a choice, albeit an unfavorable one. The plaintiff can avoid arbitration by only pursuing their tort claims, but doing so will necessary waive their contract claims under the election-of-remedies doctrine. In the alternative, the plaintiff can preserve its contract claims, but must do so by assuming the risk that the case will be sent to arbitration. *Id.*

[116] *Weekley Homes*, 180 S.W.3d at 134.

[117] *Id.* at 129.

[118] *Id.*

[119] *Id.* at 134 ("[A]ny recovery will inure to her direct benefit as the sole beneficiary and equitable title holder of the home.").

> portions of the contract, such as an arbitration clause, that it finds distasteful. A nonparty cannot both have his contract and defeat it too. [Thus, w]hile Von Bargen never based her personal injury claim on the contract, her prior exercise of other contractual rights and her equitable entitlement to other contractual benefits prevents her from avoiding the arbitration clause here.[120]

The *Weekley Homes* case presents a broad application of direct benefits estoppel, requiring arbitration of claims that are unrelated to the benefits received under the contract. This extends previous cases where non-signatories are compelled to arbitrate when they seek to enforce the terms of a contract containing an arbitration provision,[121] and the extension creates tension with *In re Kellogg Brown & Root, Inc.*, decided by the same court earlier in 2005.[122]

In *In re Kellogg Brown & Root, Inc.*, a general contractor (MacGregor) had subcontracted fabrication work to another party, Unidynamics, who in turn contracted the work out to KBR.[123] KBR rendered services under the Unidynamic-KBR agreement, but was not paid.[124] When KBR sought payment from MacGregor under a quantum meruit theory, MacGregor moved to compel arbitration, arguing direct benefits estoppel.[125] The court rejected MacGregor's argument, explaining that:

> [A]lthough a non-signatory's claim may relate to a contract containing an arbitration provision, that relationship does not, in itself, bind the non-signatory to the arbitration provision. Instead, a non-signatory should be compelled to arbitrate a claim only if it seeks, through the claim, to

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[120] *Id.* at 135.

[121] *See, e.g.*, R.J. Griffin & Co. v. Beach Club II Homeowner's Ass'n, 384 F.3d 157, 161–64 (4th Cir. 2004); *see also In re* FirstMerit Bank, N.A., 52 S.W.3d 749, 757 (Tex. 2001) (requiring arbitration when plaintiff included a claim for breach of contract); *In re* Kellogg Brown & Root, Inc., 166 S.W.3d 732, 739–40 (Tex. 2005) ("If, however, a non-signatory's claims can stand independently of the underlying contract, then arbitration generally should not be compelled under [the direct benefits estoppel] theory.").

[122] 166 S.W.3d 732 (Tex. 2005).

[123] *Id.* at 735.

[124] *Id.*

[125] *Id.* at 736.

> derive a direct benefit from the contract containing the arbitration provision.[126]

The court reasoned that KBR's asserted right to payment stemmed directly from the KBR-Unidynamics contract, and had no relation to the Unidynamics-MacGregor subcontract.[127] While this conclusion has been criticized, a provision in the Unidynamic-MacGregor contract stating that "[a]pproved use of any subcontractor creates no contractual relationship between the subcontractor and MacGregor," appeared to be a pivotal fact.[128]

Reconciling these two cases may require that *Weekley Homes* be limited to its facts.[129] Indeed, the court has not expressly noted any inconsistency between the two, and has cited *Weekley Homes* in subsequent cases for the general proposition that a nonparty must arbitrate claims when liability arises from a contract, but generally is not required to do so when liability arises from general obligations imposed by law.[130] In *In re Vesta Insurance Group, Inc.*, a case decided after *Weekley Homes* and *Kellogg*, the court addressed whether a claim for tortious interference against a party's affiliates obligates the non-signatory affiliates to arbitration.[131] The court held that it did, suggesting that the question was close but reasoning that such claims "arise more from the contract than from the general law, and thus fall on the arbitration side of the scale."[132]

In so holding, the court relied on the rule from *Weekley Homes* and *Kellogg,* but not the underlying theory of direct benefits estoppel. Rather, the court rooted its opinion in agency law, noting that:

> When contracting parties agree to arbitrate their disputes "under or with respect to" a contract (as they did here), they

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[126] *Id.* at 741.

[127] *Id.*

[128] *Id.*

[129] It is difficult to square the clear rule in *Kellogg Brown & Root* that "a non-signatory should be compelled to arbitrate a claim only if it seeks, *through the claim*, to derive a direct benefit from the contract containing the arbitration provision," with the fact that the plaintiff in *Weekley* did not seek, at least *through her claim*, a direct benefit of the contract. *Id.* (emphasis added). *See also* Associated Glass, Ltd. v. Eye Ten Oaks Invs., Ltd., 147 S.W.3d 507, 512 (Tex. App.—San Antonio 2004, no pet.) ("A nonsignatory can be bound by the terms of an arbitration provision in an agreement only if the nonsignatory is asserting claims that require reliance on the terms of the written agreement containing the arbitration provision.").

[130] *In re* Vesta Group Inc., 192 S.W.3d 759, 761 (Tex. 2006) (per curiam).

[131] *Id.* at 760.

[132] *Id.* at 762.

> generally intend to include disputes about their agents' actions because "as a general rule, the actions of a corporate agent on behalf of the corporation are deemed the corporation's acts."[133]

Allowing the agents to avoid arbitration because they are non-signatories to the agreement would frustrate the purpose of the FAA and TAA, for "[i]f arbitration clauses only apply to contractual signatories, then this intent can only be accomplished by having every officer and agent (and every affiliate and its officers and agents) either sign the contract or be listed as a third-party beneficiary."[134]

Speaking of third party beneficiaries, consider the case of *In re Palm Harbor Homes, Inc.*[135] There the manufacturer of a home sought to compel arbitration against the buyer based on an arbitration agreement between the buyer and the retailer.[136] The manufacturer argued that it was a third party beneficiary to the contract, and therefore should be entitled to enforce the agreement against the buyer.[137] Under Texas law, "[a] third-party beneficiary may enforce a contract to which it is not a party if the parties to the contract intended to secure a benefit to that third party, and entered into the contract directly for the third party's benefit."[138] A third party need not provide any consideration to enforce the contract.[139] Because the contract in Palm Harbor expressly stated that it "inure[d] to the benefit of the manufacturer of the Home," the court concluded that the manufacturer was a third party beneficiary entitled to enforce the contract against the buyer.[140]

The court returned to agency principles in the recent case of *In re Kaplan Higher Education Corp.*[141] There a group of students claimed that they were fraudulently induced to sign up for a college vocational program, and brought suit against the college, its parent company Kaplan Higher Education Corp., the college's president Frank Jennings and the college's

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[133] *Id.* (quoting Holloway v. Skinner, 898 S.W.2d 793, 796 (Tex. 1995)).

[134] *Id.*

[135] 195 S.W.3d 672 (Tex. 2006).

[136] *Id.* at 675.

[137] *See id.* at 677.

[138] *Id.* (citing Stine v. Stewart, 80 S.W.3d 586, 589 (Tex. 2002)).

[139] *Id.*

[140] *Id.* at 674

[141] 235 S.W.3d 206 (Tex. 2007) (per curiam).

admission director Leticia Ventura.[142] After the defendants moved to compel arbitration, the students dropped the claims against the signatories to the arbitration agreement, the college and Jennings.[143] Though the claim of fraudulent inducement related to the contract, direct benefits estoppel was not available because "[c]laims of fraudulent inducement arise from general obligations imposed by law, not the underlying contract."[144]

Agency theory did provide the defendants with a remedy, however. As the court explained, Ventura was an employee of the college and thus and agent, and the parent company Kaplan could also be treated as an agent, given that it was acting on the college's behalf in enrolling students.[145] And the college essentially remained a party outside the court because it would be liable for any judgment against Kaplan or Ventura.[146] For these reasons, the court held that the non-signatory defendants could invoke the arbitration clause in the agreement between the students and the college.

But affiliates of a company that agrees to arbitrate will not always be so bound. In *In re Merrill Lynch Trust Co. FSB*, the court refused to compel arbitration of claims against Merrill Lynch's corporate affiliates even though Merrill Lynch had agreed to arbitration.[147] After receiving a substantial personal injury settlement, plaintiffs engaged Merrill Lynch (through its employee Henry Medina) to manage the funds.[148] A portion of the funds were used to purchase a life insurance policy from Merrill Lynch's affiliate, Merrill Lynch Life Insurance Co., and the life insurance res and other funds were placed in a trust held by another affiliate, Merrill Lynch Trust Co. as trustee.[149] The plaintiffs became unsatisfied with the management of their funds, and sued Medina, the trust affiliate, and the life insurance affiliate.[150]

The court first addressed the claims against Medina, and, after finding him to be an agent of Merrill Lynch, ordered that arbitration be compelled

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[142] *Id.* at 208.

[143] *Id.*

[144] *Id.* at 209 (citing Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 304 (Tex. 2006)).

[145] *Id.* at 209–10.

[146] *Id.*

[147] 235 S.W.3d 185, 196 (Tex. 2007). This case was followed a week later by a case with almost identical parties, an identical situation, and an identical result. *See generally In re* Merrill Lynch Trust Co. FSB, 235 S.W.3d 217 (Tex. 2007) (per curiam).

[148] *Merrill Lynch*, 235 S.W.3d at 188.

[149] *Id.*

[150] *Id.*

as to those claims.[151] The court referenced the *Vesta* case and explained that, because Medina was acting in the course and scope of his employment for Merrill Lynch, the claims against him were necessarily claims against his employer.[152] Under the broad arbitration agreement between Merrill Lynch and the plaintiffs, these claims were required to be submitted to arbitration.

The claims against the affiliates presented a more difficult question. The affiliates sought arbitration not under the theory of agency, but rather under concerted misconduct estoppel.[153] That theory suggests that a non-signatory may be bound if it engages in "interdependent and concerted misconduct" with a signatory.[154] However, the theory has not been widely adopted, and, at least in the Fifth Circuit, has only been mentioned when a secondary theory—like direct benefit estoppel—also suggests that arbitration should be compelled against the non-signatory.[155] And Texas courts have never adopted this theory. The court was disinclined to do so in this case, explaining:

> Conspiracy is a tort, not a rule of contract law. And while conspirators consent to accomplish an unlawful act, that does not mean they impliedly consent to each other's arbitration agreements. As other contracts do not become binding on nonparties due to concerted misconduct, allowing arbitration contracts to become binding on that basis would make them easier to enforce than other contracts, contrary to the Arbitration Act's purpose.[156]

The majority opinion was accompanied by two separate partial dissents. Justice Hecht, joined by Justices Medina and O'Neill, argued that the claims against Medina should not be sent to arbitration because "[e]ven if his actions as a financial analyst were generally within the course and scope of his employment, it is not clear whether the same can be said for his recommendation of a transaction illegal under Texas law."[157] The dissent

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[151] *Id.* at 190.

[152] *Id.* at 189–90.

[153] *Id.* at 191.

[154] *Id.*

[155] *Id.* at 193 (citing Grigson v. Creative Artists Agency L.L.C., 210 F.3d 524, 528–31 (5th Cir. 2000)).

[156] *Id.* at 194.

[157] *Id.* at 196 (Hecht, J., concurring in part and dissenting in part).

suggested that Medina could well be treated as an agent for the affiliates (rather than as an agent for the parent company) and claims against Medina in that light would escape the reach of the arbitration clause.[158] Justice Hecht also expressed concerns with the court's characterization of the "concerted misconduct estoppel" theory, suggesting that it may be more viable than the majority makes it out to be, but ultimately declining to reach the issue because of his view of the claims.[159]

Justice Johnson, joined by Justice Wainwright, dissented for the opposite reason. Johnson would apply the Fifth Circuit's concerted misconduct estoppel theory and compel all parties to arbitrate.[160] Justice Johnson focused on the court's previous pronouncements that, while the court applies state law to estoppel decisions, it remains mindful of consonant federal law.[161] Because federal law employs the concerted misconduct estoppel theory, Justice Johnson reasoned, so too should the state courts, and with equal force.[162] Doing so would, in Johnson's view, require arbitration of all claims.

Though non-signatories will not be compelled to arbitrate in the absence of one of these theories, the courts still seem to favor concurrent arbitration over litigation. In general, if one party is forced to arbitrate while the other is not, and both the litigation and the arbitration involve the same issues and same claims, the courts will stay litigation until arbitration has concluded.[163]

As a final note, like many state cases dealing with non-signatories and arbitration, these cases note that the holding is consistent with federal law.[164] Because the Supreme Court has not addressed the issue of which law—state or federal—applies in determining whether a non-signatory can be compelled to arbitrate, a degree of uncertainty continues to color *Vesta* and related decisions. That uncertainty, however, is minor. For even if it is later determined that federal law should apply to this determination, the

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[158] *Id.* at 196. Justice Hecht took issue with Medina's multiple roles. Not only was he an agent for Merrill, but he also was a licensed insurance agent, receiving separate compensation for his role in procuring the life insurance contract from the plaintiffs.

[159] *Id.* at 201.

[160] *Id.* (Johnson, J., concurring in part and dissenting in part).

[161] *Id.* at 202.

[162] *Id.* at 205–06.

[163] *See id.* at 202.

[164] *Id.*

Texas courts have been careful to align their state-law-based arbitration decisions with federal law to a great degree.[165]

4. The Dispute Comes Within the Scope of the Arbitration Agreement

Increasingly broad arbitration clauses permeate these decisions, and once the court finds that the parties have a valid agreement to arbitrate, uncertainties as to scope will be resolved in favor of arbitration.[166] Thus, it is rare for the scope of an arbitration agreement to not reach the claims in dispute.[167]

As a result, cases addressing the scope of an arbitration clause regularly tilt towards a finding of arbitrability. In *Peterbilt*, claims for race discrimination, retaliation, tortious interference, defamation, and intentional infliction of emotional distress were all found to fall squarely within the scope of an arbitration agreement that covered claims for tort, discrimination, wrongful termination, and violation of law.[168] And in *Dillard I*, the court determined that an arbitration clause covering claims for "personal injury" also covered a claim for defamation because Texas courts have previously interpreted the phrase "personal injuries" to include injuries to reputation.[169]

The *Dillard I* court also applied the presumption in favor of arbitration to the plaintiff's argument that her defamation claims did not "arise from" her employment or termination as required by the arbitration agreement.[170]

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[165] *See generally id.*

[166] *See, e.g.*, Prudential Sec. Inc. v. Marshall, 909 S.W.2d 896, 899 (Tex. 1995) (per curiam) (explaining that, after finding a valid agreement to arbitrate, a court should not deny arbitration "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue."). As one might expect, the presumption in favor of arbitration "arises only after the party seeking to compel arbitration proves that a valid arbitration agreement exists." J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 227 (Tex. 2003).

[167] One such rare case (though not a Texas state court case) is that of *Tittle v. Enron Corp.*, 463 F.3d 410, 419 (5th Cir. 2006). With the exception of this case, the Fifth Circuit consistently compelled arbitration in the cases before it in the 2007 term. *See generally* Positive Software Solutions, Inc. v. New Century Mortgage Corp., 476 F.3d 278 (5th Cir. 2007) (en banc).

[168] *In re* Dallas Peterbilt, Ltd., 196 S.W.3d 161, 163 (Tex. 2006) (per curiam).

[169] *Dillard I*, 186 S.W.3d 514, 516 (Tex. 2006) (per curiam) (citing Houston Printing Co. v. Dement, 44 S.W. 558, 560 (Tex. Civ. App.—Galveston 1898, writ ref'd); Brewster v. Baker, 139 S.W.2d 643, 645 (Tex. Civ. App.—Beaumont 1940, no writ)).

[170] *Id.*

The court explained that the employee's defamation claim was tied to her termination because of the timing of the alleged statements (which occurred near the time of termination) and because she alleged damages including "loss of earnings and earning capacity."[171] The court reasoned that a claim for such damages would not be available if it were not for the termination, and therefore the alleged defamation and related damages were intertwined with employment and termination.[172] Applying this presumption, the court determined that "any ambiguity as to whether 'arising from' should mean intertwined, or occurring as a direct result from, is resolved in favor of arbitration."[173]

D. Judicial Review of Arbitration Awards

Though the Texas Supreme Court did not take any appeals or issue any writs relating to post-award review during the 2006-07 term, the appellate courts remained active in this area. Of course, cases at this stage of litigation arrive at the court in a much different posture. A party may raise preliminary issues of arbitrability for the first time, and those issues will be judged under the same standard as if they were being presented prior to arbitration.[174] But challenges to the arbitration award itself face a much higher hurdle. In federal court, an arbitration award may be overturned only if an arbitrator exceeds his powers or demonstrates "manifest disregard" for the law.[175] This standard has been classified as

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[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *See generally* Holcim (Tex.) Ltd. P'ship v. Humboldt Wedag, Inc., 211 S.W.3d 796 (Tex. App.—Waco 2006, pet. granted).

[175] *See* Apache Bohai Corp. LDC v. Texaco China BV, 480 F.3d 397, 401 (5th Cir. 2007). In order to meet the "manifest disregard" standard, "the error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator," and the award must result in a "significant injustice." Myer v. Americo Life, Inc., 232 S.W.3d 401, 407 (Tex. App.—Dallas 2007, no pet. h.) (quoting Kergosien v. Ocean Energy, Inc., 390 F.3d 346, 355 (5th Cir. 2004)). These are the only two grounds on which the Fifth Circuit will review an arbitration award. Other circuits have developed additional non-statutory bases for vacating an award, but these are not universally accepted. *See id.* at 412 (noting that the Third, Eighth, and Ninth Circuits have recognized that an award may be vacated as completely irrational, and citing cases).

"extraordinarily narrow,"[176] and requires that the arbitrator "appreciate[d] the existence of a clearly governing principle but decided to ignore it."[177]

The standard in Texas courts is similarly narrow, allowing a district court to set aside an arbitrator's decision only if it is tainted with "fraud, misconduct, or such gross mistake as would imply bad faith, or a failure to exercise honest judgment."[178] A "gross mistake" is defined as one which "implies bad faith or a failure to exercise honest judgment and results in a decision that is arbitrary and capricious."[179] Presumptions are against the party contesting the award,[180] and when the party bearing the burden fails to present a complete record of the evidence presented to the arbitrator, courts hold that "there can be no appellate review of the arbitrator's decision."[181] This was the case in *Williams*.[182]

But one appeals court had appellate jurisdiction and used it to vacate an arbitration award in *City of Beaumont v. International Ass'n of Firefighters, Local Union No. 399*, holding that the arbitration award exceeded the authority conferred on the arbitrator by the arbitration agreement.[183] There the arbitrators altered binding terms of the contract in reaching their award.[184] Because the arbitrator's authority is derived from the terms of the

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[176] Teel v. Beldon Roofing & Remodeling Co., No. 04-06-00231-CV, 2007 WL 1200070, at *2 (Tex. App.—San Antonio Apr. 25, 2007, pet. denied).

[177] Prestige Ford v. Ford Dealer Computer Servs., Inc., 324 F.3d 391, 395 (5th Cir. 2003).

[178] Brown v. Eubank, 443 S.W.2d 386, 391 (Tex. Civ. App.—Dallas 1969, no writ).

[179] Statewide Remodeling, Inc. v. Williams, 244 S.W.3d 564, 568 (Tex. App.—Dallas 2008, no pet. h.).

[180] Anzilotti v. Gene D. Liggin, Inc., 899 S.W.2d 264, 266 (Tex. App.—Houston [14th Dist.] 1995, no writ).

[181] *Williams*, 244 S.W.3d at 568–69 (citing Gumble v. Grand Homes 2000, L.P., No. 05-06-00639-CV, 2007 WL 1866883 (Tex. App.—Dallas June 29, 2007, no pet. h.); Grand Homes 96, L.P. v. Loudermilk, 208 S.W.3d 696, 706 (Tex. App.—Fort Worth 2006, pet. filed) ("[T]he lack of a record of the arbitration proceedings prevents review of these issues."); GJR Mgmt. Holdings, L.P. v. Jack Raus, Ltd., 126 S.W.3d 257, 263–64 (Tex. App.—San Antonio 2003, pet. denied) ("Because we have no record [of the arbitration proceedings], we have no way of judging whether bad faith or failure to exercise honest judgment in fact occurred."); Jamison & Harris v. Nat'l Loan Investors, 939 S.W.2d 735, 737 (Tex. App.—Houston [14th Dist.] 1997, writ denied) ("Without a record of the arbitration proceedings, we are unable to determine . . . what evidence was offered before the arbitrator.")).

[182] *Id.*; *see also* Home Owners Mgmt. Enters., Inc. v. Dean, 230 S.W.3d 766, 769 (Tex. App.—Dallas 2007, no pet. h.).

[183] 241 S.W.3d 208, 216–17 (Tex. App.—Beaumont 2007, no pet. h.).

[184] *Id.* at 212.

contract, an arbitrator necessarily exceeds that authority when she attempts to alter those terms.[185]

E. Appellate Review

Like federal courts, Texas courts recognize that appellate review of orders relating to arbitrability is lopsided. For example, the FAA enables a court to immediately review an order denying a motion to compel arbitration, but does not do the same for an order granting such a motion.[186] The same is generally true under the TAA. The Texas statute allows a party to "appeal an order or judgment that either: (1) denies an application to compel arbitration made under section 171.021, or (2) grants an application to stay arbitration under section 171.023."[187] This means that litigants who have been wrongfully forced to arbitrate must wait until after an arbitrator's decision on the merits to appeal the otherwise-threshold issue of arbitrability.

Notably, neither the Texas Act nor the Federal Act makes any mention of mandamus as an alternative to the statutorily-sanctioned interlocutory appeal process.[188] The Texas courts have held, consistent with state and federal statutory provisions, that an order denying arbitration under the FAA is reviewable by mandamus.[189] And the courts have not entirely precluded the possibility that mandamus might be used to review orders

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[185] *See id.* at 216–17.

[186] *See* 9 U.S.C. § 16 (2000) ("An appeal may be taken from an order . . . denying a petition under section 4 of this title to order arbitration to proceed. . . . Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an order directing arbitration to proceed under section 4 of this title."). The exception occurs when a trial court grants a motion to compel arbitration and, instead of staying the litigation, dismisses the case. Such a dismissal constitutes a final order under 28 U.S.C. section 1292(b) and, as with all final orders, is immediately appealable. *See also* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 89 (2000).

[187] Chambers v. O'Quinn, 242 S.W.3d 30, 31 (Tex. 2007) (per curiam) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(1)–(2) (Vernon 2005 & Supp. 2007)).

[188] *See supra* note 27.

[189] *In re* Weekley Homes, L.P., 180 S.W.3d 127, 130 (Tex. 2005). As the Texas Supreme Court later noted, "[t]here is little friction between the FAA and Texas procedures when state courts review by mandamus an order that the federal courts would review by interlocutory appeal." *In re* Palacios, 221 S.W.3d 564, 565 (Tex. 2006) (per curiam) (citing Jack B. Anglin Co., Inc. v. Tipps, 842 S.W.2d 266, 272 (Tex. 1992)).

granting arbitration and staying court proceedings.[190] But the courts have been cautious.

In *Chambers v. O'Quinn*, the court addressed whether a litigant could re-raise an issue in a petition for mandamus after a similar petition had been denied earlier in the proceedings.[191] In answering in the affirmative, the court explained that a denial of a petition for writ of mandamus is not "an adjudication of, nor even a comment on, the merits of a case in any respect," and therefore cannot deprive another appellate court from considering the matter in a subsequent appeal.[192] Though the court did not address the burden a party must meet in order to demonstrate that mandamus is warranted, it suggested that mandamus is an option for a party aggrieved by an order granting arbitration.[193] However, it was careful to note that, because this particular petition arose from a final order, it was not addressing whether "an order compelling arbitration under the FAA can be reviewed by mandamus in Texas courts."[194] As a result, the availability of mandamus still remains an open question.[195]

More established are the standards an appeals court employs in reviewing either an issue of arbitrability or an affirmance (or rejection) of an arbitration award. When it comes to issues of arbitrability, *de novo* review is proper, given that most issues of arbitrability—the making of an agreement, the applicability of a defense to a contract to arbitrate, the scope

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[190] *See Palacios*, 221 S.W.3d at 565–66.

[191] *Chambers*, 242 S.W.3d at 30–31.

[192] *Id.* at 32 (quoting *In re* AIU Ins. Co., 148 S.W.3d 109, 119 (Tex. 2004)).

[193] *Id.*

[194] *Id.*

[195] The Texas Supreme Court has previously suggested that mandamus is available even when the FAA and TAA do not provide for interlocutory appeal. In *Palacios*, the court noted that a party may be able to obtain a writ if they "can meet the 'particularly heavy' mandamus burden to show 'clearly and indisputably that the district court did not have the discretion to stay the proceedings pending arbitration.'" 221 S.W.3d at 565–66 (quoting Apache Bohai Corp., LDC v. Texaco China, B.V., 330 F.3d 307, 311 (5th Cir. 2003)). While recognizing the one-sidedness of both the FAA and the TAA, the Court also explained that mandamus review of an order staying a case for arbitration may not be "entirely precluded." *Id.* at 565. Rather, the burden necessary to warrant mandamus may simply just be greater than in situations where a motion to compel arbitration has been denied. *Id.* In any event, neither *Palacios* nor *Chambers* prevent the ability of a party to petition for mandamus relief, and *Chambers* indicates that courts are required to hear the merits of the petition. The question of whether a petition will ever be granted in this situation remains unresolved.

of the arbitration clause—are questions of law.[196] Likewise, "[a] review of a trial court's decision to confirm an arbitration award is de novo and the appellate court reviews the entire record."[197] But, like the trial court, courts of appeal review arbitration awards on the same grounds employed by the district court, a review that is repeatedly referred to as "limited."[198]

And appellate courts may be precluded, at least temporarily, from reviewing some trial court decisions regarding arbitration awards. For example, though the TAA permits interlocutory appeals from orders vacating an arbitration award, it does so only when the district court fails to direct a rehearing.[199] The TAA also allows appeal from a district court order denying confirmation of an award,[200] but this is limited when the denial is included in an order vacating and directing rehearing.[201] When a trial court both denies confirmation and vacates the award while directing a rehearing, the prevailing party at arbitration may not appeal.[202] This may in practice render at least a portion of section 171.098(a)(4) superfluous.[203].

Of course, when courts have jurisdiction to review an arbitration award, Texas courts and the Fifth Circuit have allowed parties to alter the scope of this review.[204] But this is no longer allowed under the Supreme Court's recent decision in *Hall Street Associates v. Mattel Inc.*.[205]

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[196] *See* J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 227 (Tex. 2003) (explaining that whether a valid arbitration agreement exists is a legal question subject to de novo review); Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd., 940 S.W.2d 587, 589 (Tex. 1996) (stating the existence of a contractual ambiguity is a question of law).

[197] Statewide Remodeling, Inc. v. Williams, 244 S.W.3d 564, 567 (Tex. App.—Dallas 2008, no pet. h.).

[198] *Id.* at 568.

[199] TEX. CIV. PRAC. & REM. CODE ANN. § 171.098(a)(5) (Vernon 2005 & Supp. 2007).

[200] *Id.* § 171.098(a)(3).

[201] Thrivent Fin. for Lutherans v. Brock, Nos. 01-07-00356-CV, 01-07-00484-CV, 2007 WL 3227620, at *4 (Tex. App.—Houston [1st Dist.] Nov. 1, 2007, no pet. h.).

[202] *Id.* at *6.

[203] *Id.* (suggesting that confirmation depends (at least at times) on whether "grounds are offered for vacating . . . the award" and, because of this, the "denial of confirmation [i]s subsidiary to the trial court's vacatur of the award").

[204] *See* Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 996 (5th Cir. 1995) ("[C]ontractual modification [of the standard of review] is acceptable because, as the Supreme Court has emphasized, arbitration is a creature of contract."), *abrogated by* Hall Street Assocs. v. Mattel, Inc., 128 S. Ct. 1396 (2008).

[205] 128 S. Ct. 1396 (2008).

Hall Street, Mattel's landlord, sued the toy company over a disagreement arising from the property lease.[206] After the suit was filed, the parties agreed to arbitrate under the FAA.[207] The agreement was unique in providing that a district court could overturn an arbitrator's decision if the "conclusions of law" were "erroneous."[208] This standard of review was broader than that provided by the FAA, which allows for reversal of an arbitration award only in cases of corruption, fraud, evident partiality, misconduct and the like.[209]

The district court employed the standard of review set forth in the arbitration agreement, and determined that the arbitration award in favor of Mattel contained erroneous conclusions of law.[210] The court returned the case to arbitration, and a decision was rendered for Hall Street and confirmed by the district court.[211] The Ninth Circuit reversed, ordering that the arbitrator's decision in favor of Mattel be reinstated.[212] The Ninth Circuit had (in a previous case) adopted the view that the grounds on which federal courts may review an arbitrator's decision were limited to those set forth by statute, and "private parties may not contractually impose their own standard on the court."[213]

In *Kyocera*, the Ninth Circuit joined three other circuits—the Tenth, Seventh, and Eighth—in concluding that parties may not contract for more expansive judicial review of arbitration awards.[214] The First, Third, Fourth, Fifth and Sixth Circuits had held otherwise, allowing the parties to contract for expanded judicial review in part because "the purpose of the FAA is to give full effect to the parties' agreement to arbitrate as written."[215]

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[206] *Id.* at 1400.

[207] *Id.*

[208] *Id.* at 1400-01.

[209] *See* 9 U.S.C. § 10 (2000).

[210] *Hall Street*, 128 S. Ct. at 1401.

[211] *Id.*

[212] *Id.*

[213] Hall Street Assocs. v. Mattel, Inc., 113 Fed. Appx. 272, 237 n.3 (9th Cir. 2004) (mem.) (quoting Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 994 (9th Cir. 2003) (en banc)).

[214] Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 999–1000 (9th Cir. 2003) (en banc).

[215] Petition for a Writ of Certiorari at 12, Hall Street Assocs. v. Mattel, Inc., 128 S. Ct. 1396 (2008) (No. 06-989).

At oral argument, Justices Ginsburg and Kennedy led with questions for the petitioner, expressing skepticism towards Mattel's argument and suggesting that contracts for expanded judicial review rendered section 9 of the FAA superfluous, at least in some instances.[216] Justice Scalia weighed in on the flip side, asking the respondent to reconcile her argument with the Court's earlier decisions in *Wilko* and *W.R. Grace*.[217] And Chief Justice Roberts' questions suggested that the FAA may not even be applicable in this case; rather, it may simply be an issue governed by state contract law.[218] This line of questioning was followed by a request for supplemental briefing two weeks after the argument.

The opinion tracked the questions raised at oral argument. The Supreme Court affirmed the Ninth Circuit, rejecting the practice of the Fifth Circuit and the majority of other circuits that allow parties to augment the FAA's limited standards of review.[219] The Court found that the "manifest disregard" language in section 9 of the FAA was limited to the types of conduct specifically listed.[220] As the Court explained, the tenor of the FAA goes to "outrageous" conduct, and the parties cannot contract around this statutory purpose.[221] And the mandatory language of section 9—the arbitrator "must grant" the order confirming arbitration unless vacated or modified under sections 10–11—further suggests that parties cannot modify the court's standard of review.[222] The Court concluded that sections 9–11 "substantiat[e] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."[223]

But Chief Justice Roberts' questioning (and the additional briefing) resulted in the Court remanding the case for consideration of additional issues.[224] Since the arbitration agreement had been drafted and entered into in the course of litigation, the Court considered whether "the agreement should be treated as an exercise of the District Court's authority to manage

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[216] Transcript of Oral Argument at 2–3, Hall Street Assocs. v. Mattel, Inc., 128 S. Ct. 1396 (2008) (No. 06-989).

[217] Transcript of Oral Argument at 27–28, *Hall Street*, 128 S. Ct. 1396 (2008) (No. 06-989).

[218] Transcript of Oral Argument at 31–32, *Hall Street*, 128 S. Ct. 1396 (2008) (No. 06-989).

[219] *See* Hall Street Assocs. v. Mattel, Inc., 128 S. Ct. 1396, 1403 n.5 (2008).

[220] *Id.* at 1404–05.

[221] *Id.*

[222] *Id.* at 1405.

[223] *Id.*

[224] *Id.* at 1407–08.

its cases under Federal Rules of Civil Procedure 16."[225] Though the Court received supplemental briefing on the issue, it chose to leave the decision to the court of appeals.[226] *Hall Street* was not the only arbitration case on the Court's docket this term. *Ferrer v. Preston* was also decided this spring.[227] The case has a California flair: it arises from a dispute between television personality "Judge Alex" Ferrer and his manager, Arnold M. Preston.[228] Preston filed an arbitration demand after Ferrer allegedly failed to pay Preston's management fees.[229] Ferrer sought to avoid arbitration by filing a petition with the California State Labor Commission, asking the Commission to declare the contract void because Preston was acting as an unlicensed talent agent in violation of California law.[230] The Commissioner denied Ferrer's motion to stay arbitration, and Ferrer sought review of the decision in state court.[231] The trial court reversed the Commissioner's decision, and the appellate court affirmed, concluding that the FAA did not preempt the Talent Agencies Act, and therefore it was for the agency to decide contract validity, and not the arbitrator.[232]

As many expected,[233] the Court followed *Buckeye* and held that the issue of the validity of a contract as a whole is for the arbitrator to decide in the first instance.[234] Though the parties' agreement presented a statutory right, by arbitrating "Ferrer relinquishes no substantive rights the TAA or other California law may accord him. But under the contract he signed he [could]not escape resolution of those rights in an arbitral forum."[235]

III. CONCLUSION

Arbitration has become a widely used litigation alternative. Perhaps ironically but not surprisingly, arbitration litigation has expanded too. Some even credit a potential "Congressional backlash" to "a number of

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[225] *Id.* at 1407.

[226] *Id.* at 1407–08.

[227] *See generally* 128 S. Ct. 978 (2008).

[228] *Id.* at 981–82.

[229] *Id.* at 982.

[230] *Id.*

[231] *Id.*

[232] *Id.*

[233] *See, e.g.*, Michael E. Johnson & Piret Loone, *Court's Second '07-'08 ADR Case Challenges Arbitrator Supremacy*, ALTERNATIVES, Vol. 26, Jan. 2008.

[234] *Preston*, 128 S. Ct. at 989.

[235] *Id.* at 987.

[United States Supreme Court] cases decided in the last several decades [] push[ing] the pendulum far beyond a neutral attitude and endorsing a policy that strongly favors private arbitration."[235] But a review of that legislation is beyond our scope. Courts governing Texas practice continue to be generally supportive of arbitration, whether it is under the TAA or the FAA, but not without exception. Of course, such litigation injects variability into the arbitration process, which itself keeps practitioners busy litigating arbitration.

[235] Markowitz, *supra* note 3, at 15.

		Case Name	Case Summary	Compel Arbitration?					
				Trial Court		Court of Appeals		Supreme Court	
				Yes	No	Yes	No	Yes	No
Pre-Arbitration Challenge	Preemption	*In re* Nexion Health at Humble, Inc., 173 S.W.3d 67 (Tex. 2005) (per curiam).	After the trial court refused to compel arbitration under either the TAA or the FAA, the healthcare provider petitioned the Supreme Court for a writ to compel arbitration under the FAA. The Supreme Court granted the writ, finding that the FAA applied because the Medicare funds received by the provider had travelled in interstate commerce, and holding that the FAA preempted the TAA because the TAA's prerequisites to arbitration are more stringent in personal injury cases.		√			√	
		In re Palacios, 221 S.W.3d 564 (Tex. 2006) (per curiam).	Suggesting that the FAA procedural rules may preempt Texas mandamus practice when mandamus is used to challenge a trial court's order compelling arbitration.	√				√	
		In re D. Wilson Constr. Co., 196 S.W.3d 774, 779 (Tex. 2006).	The FAA preempts contrary, not consonant, state law.		√		√	√	
		In re Heritage Bldg. Sys., Inc., 185 S.W.3d 539 (Tex. App.—Beaumont 2006, no pet.).	The FAA preempts Texas's policy in favor of mediation and settlement; thus, a trial court cannot first compel the parties to mediate when the FAA applies and requires that the parties arbitrate.		√	√			
	Agreement Formation	*In re* Dillard Dep't Stores, Inc., 198 S.W.3d 778, 780 (Tex. 2006) (per curiam).	A signature is not necessary to indicate acceptance of an agreement. Rather, it is enough that an employee receives notice of the agreement and accepts it by continuing to work for the company.		√		√	√	

		In re Dallas Peterbilt, Ltd., 196 S.W.3d 161, 162 (Tex. 2006) (per curiam).	The "effective notice" requirement is met when an employee receives a summary of the arbitration agreement; the employee need not receive a copy of the entire agreement.		√		√	√	
		In re American Nat'l Ins. Co., 242 S.W.3d 831, 834–35 (Tex. App.—El Paso 2007, no pet. h.).	An employee cannot be forced to arbitrate her claims when the arbitration agreement is between the employer and the union and the union may pursue the employee's claim at its sole discretion. The court reasoned that the union cannot presumptively waive the employee's right to pursue her claim in any forum.		√		√		
	Scope	*In re* Igloo Prods. Corp., 238 S.W.3d 574, 578–79 (Tex. App.—Houston [14th Dist.] 2007, *mandamus denied*).	Surviving spouse's wrongful death claim did not fall within the scope of her deceased husband's arbitration agreement with his employer because the parties had not attempted mediation. The agreement provided that the arbitration procedure "shall not be invoked unless the party seeking arbitration has first mediated the dispute with the other party."		√		√		
	Defenses	*In re* Dillard Dep't Stores, Inc., 186 S.W.3d 514, 516 (Tex. 2006) (per curiam).	An agreement cannot be unilaterally terminated simply because an employee has an at-will relationship with their employer. Changes to the agreement will only be effective as to that employee if the employee received notice of the changes.		√		√	√	

		In re Vesta Ins. Group, Inc., 192 S.W.3d 759, 763 (Tex. 2006).	A party does not waive his right to compel arbitration just because he initiates discovery; rather, the party must "substantially invoke the judicial process" in order to waive their right to arbitrate.		√		√	√	
		In re Bank One, N.A., 216 S.W.3d 825, 827 (Tex. 2007) (per curiam).	A party who waits eight months to move to compel arbitration after answering the complaint does not waive their right to arbitration so long as they have not engaged in extensive discovery or have otherwise "substantially invoked the judicial process."		√		√	√	
		Structured Capital Res. Corp. v. Arctic Cold Storage, LLC, 237 S.W.3d 890 (Tex. App.—Tyler 2007, no pet. h.).	Party did not waive right to invoke arbitration by depositing contested funds with the court and by propounding four discovery requests on the opposing party.		√	√			
		In re RLS Legal Solutions, LLC, 221 S.W.3d 629, 632 (Tex. 2007) (per curiam).	Duress is a valid defense, but a claim of duress that goes to the entire contract, and not just the arbitration clause, is a matter for the arbitrator to decide.		√		√	√	
		UBS Fin. Servs., Inc. v. Branton, 241 S.W.3d 179, 188 (Tex. App.—Fort Worth 2007, no pet. h.).	Plaintiff attempted to avoid arbitration by arguing that he signed the contract and the blanks were filled in after the fact. The appellate court held that this was an issue for the arbitrator to decide, since it went to the enforceability of the contract as a whole and not to the enforceability of the pre-printed arbitration language.		√	√			

	Binding Non-parties	*In re* Cutler-Gallaway Servs. Inc., No. 04-07-00216-CV, 2007 WL 1481999, (Tex. App.—San Antonio May 23, 2007, no pet. h.) (mem op., not designated for publication).	Non-signatory engineering subcontractor compelled to arbitration initiated by project owner against the general, both of which were parties to an arbitration clause.	√		√			
		In re Weekley Homes, L.P., 180 S.W.3d 127, 131 (Tex. 2005).	When a non-signatory seeks a benefit under the contract or acts with the same authority as the contracting party, courts may require the party to arbitrate under the clause in the agreement.		√			√	
		In re Kellogg Brown & Root, Inc., 166 S.W.3d 732, 741 (Tex. 2005).	A second-tier subcontractor had no right to compel arbitration when the contract clearly states that "approved use of any subcontractor creates no contractual relationship between the subcontractor and [the project owner]."		√	√			√
		In re Vesta Group, Inc., 192 S.W.3d 759, 762–63 (Tex. 2006) (per curiam).	A claim for tortious interference against a party's affiliates is arbitrable because such claims arise more from the contract than from an independent tort.		√		√	√	
		In re Kaplan Higher Educ. Corp., 235 S.W.3d 206, 209 (Tex. 2007) (per curiam).	An agent of a party to an arbitration agreement may be bound by the arbitration clause when they act on the party's behalf and in relation to the contract.		√		√	√	
		In re Merrill Lynch Trust Co., FSB, 235 S.W.3d 185, 194 (Tex. 2007).	Non-signatory affiliates of a party will not be bound by an agreement to arbitrate under a "concerted misconduct estoppel" theory; such a theory has not been recognized by Texas courts and has not been fully adopted by the Fifth Circuit. (But claims against an employee of a		√		√		√

			party were sent to arbitration under the agency theory).						
		In re Bayer Materialscience, LLC, No. 01-07-00732-CV, 2007 WL 3227662, at *6 (Tex. App.—Houston [1st Dist.] Nov. 1 2007, *mandamus denied*).	Plaintiffs of a construction company were injured while working on a Bayer-owned plant. The plaintiffs' employment contracts provided that all claims between employees and the employer's clients were to be submitted to arbitration. The appellate court held that Bayer could not be treated as a third party beneficiary under the contract, in part because the contract did not refer to Bayer by name and did not expressly grant Bayer the right to sue under the contract.		√		√		
		In re SSP Partners, 241 S.W.3d 162, 169 (Tex. App.—Corpus Christi 2007, *mandamus filed*).	A parent who agrees to arbitrate her personal injury claims does not bind her minor children to arbitration if they do not sign the agreement and she does not sign on behalf of the children.		√		√		
	Unconscionability	*In re* Palm Harbor Homes, Inc., 195 S.W.3d 672, 678 (Tex. 2006).	Agreements made to benefit a third party are not "inherently unconscionable."		√		√	√	
		In re U.S. Home Corp., 236 S.W.3d 761, 764 (Tex. 2007) (per curiam).	In order to invalidate an arbitration agreement using an unconscionability argument, the party challenging the agreement must show that the fees to be charged are excessive. Also, an agreement will not be found unconscionable simply because a party disagrees with the arbitration clause.		√			√	
		Olshan Found. Repair Co. v. Ayala, 180	After initiating arbitration and discovering that the		√		√		

		S.W.3d 212 (Tex. App.—San Antonio 2005, no pet.).	estimated costs of the proceeding were three times the original contract price, the plaintiff moved for reconsideration of the trial court's order compelling arbitration. Finding that the costs associated with the arbitration agreement rendered it substantively unconscionable, the trial court denied the motion to compel. The court of appeals affirmed.						
		TMI, Inc. v. Brooks, 225 S.W.3d 783, 787 (Tex. App.—Houston [14th Dist.] 2007, no pet. h.).	A fee schedule from the AAA and affidavits from homeowners were not enough to substantiate a claim of substantive unconscionability.		√	√			
		In re Mission Hosp., Inc., No. 13-07-543-CV, 2007 WL 3026604, at *4 (Tex. App.—Corpus Christi Oct. 18, 2007, no pet. h.) (mem. op., not designated for publication).	When a plaintiff fails to provide specific evidence of the cost of arbitration or his alleged inability to pay, the court cannot find that an agreement is substantively unconscionable.		√	√			
		In re Weeks Marine, Inc., 242, S.W.3d 849 (Tex. App.—Houston [14th Dist.] 2007, *mandamus filed*).	Plaintiff claimed that the agreement to arbitrate his personal injury claims was substantively unconscionable. In support of his claim, plaintiff submitted an affidavit explaining that he would not be able to pay the costs of arbitration, whatever it might be. The appellate court rejected this argument, noting that, even if it treated plaintiff's evidence of financial hardship as sufficient, there was no evidence that plaintiff would actually have to pay anything—in fact, the defendant averred		√	√			

			that it would bear the entire cost of the arbitration.							