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Alternative Dispute Resolution

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ALTERNATIVE DISPUTE RESOLUTION

*Will Pryor**

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TO the extent that by "alternative dispute resolution" one means "mediation," far and away the most popular alternative to litigating matters in our civil justice system, then this Survey year, like all years, reveals virtually no developments in appellate court opinions or

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legislative initiative. Again, this is as it should be. Mediation is an informal process. Informality and simplicity, the absence of rules and judicial supervision, are among the features that make mediation so popular and so effective. Judicial intervention, supervision, or even comment are not to be expected.

But when we consider that another alternative to litigation is "arbitration," then there are many developments to report. In the wake of the United States Supreme Court's 2008 ruling in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, holding that no longer shall such standards as "manifest disregard of the law" be a proper basis of setting aside arbitration awards,[1] appellate courts everywhere have had to reevaluate and reverse decades of appellate law that offered participants in arbitration some reassurance, however slight, that the proceedings and the result would ultimately have to conform to, or bear some slight resemblance to, the law. The notion that arbitrators are now essentially free to ignore the law and to ignore legal precedent, when combined with the still unyielding view of most courts that arbitration clauses should be recognized and enforced with only extremely rare exception, should give a society that values the rule of law reason to pause. *How far are we willing to go down a dual path that encourages parties, even those who resist, to exit our civil justice system, forced to accept an adjudication where the rule of law need not apply?*

I. MEDIATION

The sole contribution of note in this Survey year that touches upon mediation, and more particularly upon the role of the mediator, is from the Houston Fourteenth Court of Appeals. In *Moore v. Altra Energy Technologies, Inc.*,[2] the court of appeals examined a motion to disqualify a law firm from representation on the basis that a partner in the law firm had served as the mediator in the case prior to trial. In determining that the firm should be disqualified, the court of appeals relied on the Texas Disciplinary Rules of Professional Conduct. Rule 1.11(c) suggests that such a conflict can possibly be cured if the lawyer/mediator "is screened from participation in the matter and is apportioned no part of the fee therefrom," and "written notice is promptly given to the other parties to the proceeding." [3] The court of appeals concluded: "[B]ecause [the attorney/mediator] mediated this case, no other member of his firm could knowingly undertake or continue Moore's representation unless the requirements of subsection (c) were satisfied."[4]

The result is not surprising and underscores this author's observation that most full-time, professional neutrals in Texas are either "solo practi-

1. 552 U.S. 576, 584-85 (2008).
2. 295 S.W.3d 404, 405 (Tex. App.—Houston [14th Dist.] 2009, no pet.).
3. *Id.* at 406 n.1 (quoting the Texas Disciplinary Rules of Professional Conduct).
4. *Id.* (internal citation omitted).

tioners" or practice in a small group of other full-time neutrals for a reason—to avoid conflicts of interest and the appearance of such conflicts.

II. ARBITRATION

The Survey year once again saw growth in the sheer number of appellate decisions concerning arbitration. The majority of opinions can be readily placed in one of two categories. First are the decisions that address the "front end" of the process—whether an arbitration clause is enforceable and the parties can be required to arbitrate. Second are the decisions that deal with the "back end" of arbitration—whether an arbitration award should be confirmed or set aside.

A. Enforcing the Arbitration Clause

The vast majority of decisions testing the validity of a contractual arbitration clause result in enforcement of the clause and an order to arbitrate.

1. Non-Signatory Claims Brought by Survivors and Beneficiaries

A cluster of decisions addressed whether the claims of a surviving spouse and children must be arbitrated when the decedent employee had signed a binding arbitration agreement with his employer. This issue is one example of cases in which courts must decide whether non-signatories can be bound by an arbitration agreement.

In *In re Labatt Food Service, L.P.*,[5] the Texas Supreme Court addressed whether a wrongful death beneficiary is bound by a pre-death contractual arbitration agreement between the decedent and his employer. In *Labatt*, the agreement was an "occupational injury plan" in which employees could participate; the employer had opted not to subscribe to workers' compensation. The case turned on the derivative nature of the wrongful death claim.[6] Because the claim was derivative, the statutory beneficiaries were bound by the agreement. "If Dancy [the decedent] had sued Labatt [his employer] for his own injuries immediately prior to his death, he would have been compelled to arbitrate his claims pursuant to his agreement. His beneficiaries, therefore, must arbitrate as their right to maintain a wrongful death action is entirely derivative of Dancy's rights."[7]

Likewise, in *Graves v. BP America, Inc.*,[8] the Fifth Circuit ruled that "the statutory beneficiaries of a wrongful death action in Texas are bound by an arbitration agreement between the decedent and his employer."[9]

5. 279 S.W.3d 640, 642 (Tex. 2009).
6. *Id.* at 649.
7. *Id.*; *see also In re* Jindal Saw Ltd., 289 S.W.3d 827, 827 (Tex. 2009) (citing *In re Labatt* and ruling that "an arbitration agreement between a decedent and his employer requires the employee's wrongful death beneficiaries to arbitrate their claims").
8. 568 F.3d 221 (5th Cir. 2009).
9. *Id.* at 224.

Relying in part on the Texas Supreme Court's decision in *In re Labatt*,[10] the Fifth Circuit also stated, "This case does not require us to decide the choice-of-law issue because we, like other courts before us, can simply note that federal law and state law dovetail to provide the same outcome."[11] Because *In re Labatt* defined a Texas wrongful death action as entirely derivative of the decedent's rights, and because under federal common law "[t]he 'direct benefits' version of estoppel applies [to prevent] a nonsignatory from knowingly exploiting the agreement containing an arbitration clause," the Fifth Circuit concluded that a nonsignatory cannot sue under an agreement (the employment contract) and then avoid its arbitration clause.[12]

2. Other Non-Signatory Claims

In *Stanford Development Corp. v. Stanford Condominium Owners Ass'n*,[13] the issue was whether a condominium homeowners' association that brings suit against the condominium developer on behalf of its members was bound by the arbitration clauses found in the individual earnest money contracts between each of the members and the developer. In a helpful analysis, the Houston First Court of Appeals found that six theories had been previously recognized "that may bind nonsignatories to arbitration agreements: (1) incorporation by reference, (2) assumption, (3) agency, (4) alter ego, (5) equitable estoppel, and (6) third-party beneficiary."[14] Apparently relying on the fifth exception to the signatory rule, the court of appeals compelled arbitration of the Association's claims: "The Association's pleading clearly alleges that it is bringing suit on behalf of its constituent owners. . . . [I]ts rights are limited to those possessed by the people it represents. Because the homeowners are bound by arbitration agreements, and the Association has sued on their behalf, it, too, is bound by the agreements."[15]

3. Attorney–Client Contracts

In the context of written services and fee agreements between counsel and client, it is often argued that ethical duties and obligations of the attorney should render arbitration clauses unenforceable. On remand from the Texas Supreme Court, the Houston First Court of Appeals, with very little discussion of the legal ethics arguments, disagreed. In *Chambers v. O'Quinn*,[16] the former client asserted that "unlike ordinary commercial contractual relationships, the fiduciary nature of the attorney–client relationship dictates against an attorney's ability to im-

10. 279 S.W.3d 640.
11. *Graves*, 568 F.3d at 223 (internal citation omitted).
12. *Id.*
13. 285 S.W.3d 45, 46 (Tex. App.—Houston [1st Dist.] 2009, no pet.).
14. *Id.* at 48-49 (citing *In re* Kellogg Brown & Root, Inc., 166 S.W.3d 732, 739 (Tex. 2005)).
15. *Id.* at 50.
16. 305 S.W.3d 141 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

pose an arbitration condition on a client."[17] Because the arbitration clause at issue dictated, "This contract is subject to arbitration under the Texas general arbitration statute," the court of appeals seemed to view a statutory analysis as dispositive.[18] The Texas arbitration statute includes a special requirement that "personal injury" claims, to be subject to arbitration, require written acknowledgement that the client has received the independent advice of counsel.[19] Thus, the former clients of the late Houston attorney John O'Quinn argued that their legal malpractice claims were akin to personal injury claims. Acknowledging a split among the authorities on this issue, the court of appeals rejected the argument and upheld "the majority view that legal malpractice claims are not claims for personal injury, and, therefore, arbitration agreements are enforceable in the context of a legal malpractice suit."[20]

4. Discovery First, Then Arbitration?

The Texas Supreme Court, in *In re Houston Pipe Line Co.*[21] addressed the role of discovery and arbitration. The trial court, in a matter of considerable complexity, examined an arbitration clause that imposed a sixty-day limitation on the period for discovery in arbitration. Apparently thinking that limitation was impractical, if not unfair, the trial court ordered discovery in the lawsuit prior to ruling on a motion to compel arbitration to allow the parties sufficient time to identify potential proper parties and perform damages calculations.[22] The Texas Supreme Court, however, ruled that this was an abuse of discretion.[23] The supreme court noted that, although pre-arbitration discovery is authorized by the Texas Arbitration Act,[24] such discovery may pertain only to circumstances where the court lacks sufficient information to rule on a motion to compel, such as the proper scope of the arbitration.[25] "Motions to compel arbitration and any reasonably needed discovery should be resolved without delay."[26] Thus, the supreme court ruled that the trial court had abused its discretion by allowing discovery on substantive matters prior to ruling on the motion to compel.[27]

5. Miscellaneous

Must a former securities broker arbitrate his claim that his employer wrongfully discharged him for refusing to commit an illegal act? In *In re*

17. *Id.* at 147.
18. *Id.*
19. TEX. CIV. PRAC. & REM. CODE ANN. § 171.002(a)(3), (c)(1) (Vernon 2005).
20. *Chambers*, 305 S.W.3d at 148.
21. No. 08-0300, 2009 WL 1901640, at *1 (Tex. July 3, 2009).
22. *Id.*
23. *Id.* at *2.
24. TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.023(b), 171.086(a)(4), (6) (Vernon 2005).
25. *In re Houston Pipe Line Co.*, 2009 WL 1901640, at *2.
26. *Id.*
27. *Id.*

NEXT Financial Group, Inc., the Texas Supreme Court, relying on the National Association of Securities Dealers (NASD) Code that requires arbitration of all claims which arise out of "the business activities of [an NASD] member," determined that the former employee's whistleblower claims arose from such "business activities" and was not a statutory employment discrimination claim.[28] The latter would have qualified as an exception under the arbitration agreement and the NASD Code.[29]

In an unreported decision, the Corpus Christi Court of Appeals in *Nabors Wells Services, Ltd. v. Herrera* compelled arbitration in the face of these defenses: illusory contract, indefiniteness, unconscionability, and accessibility.[30]

Illusory? Courts have stated that "[a]n illusory promise is one that fails to bind the promisor because he retains the option of discontinuing performance without notice."[31] The court of appeals concluded that the agreement was not illusory because the employer's right to amend or terminate the agreement in *Nabors Wells* had qualifications (ten days' notice of any amendment or termination and no right to terminate or amend after initiation of the arbitration proceedings).[32]

Indefinite? Using traditional contract analysis, the court of appeals held that the arbitration program reflects a "meaningful agreement," because, considered as a whole, the program provides for the arbitration of disputes in "clear and definite language."[33]

Unconscionable? The court of appeals rejected on factual and evidentiary grounds the argument that the arbitration agreement allowed the employer to unilaterally select the arbitrator, and the argument that the costs of the arbitration were excessive or prohibitive.[34]

Equivalent, accessible forum? Finally, the employee suggested that the arbitration agreement impeded his ability to vindicate his statutory rights under the Texas Labor Code. To evaluate this contention, the court of appeals referred to the approach outlined by the Texas Supreme Court in its 2008 decision in *In re Poly-America, L.P.*[35] for evaluating arbitration procedures as applied to statutory claims. According to *In re Poly-America, L.P.*, the arbitration agreement is enforceable if the agreement "does not waive the substantive rights and remedies the statute affords and the arbitration procedures are fair, such that the employee may 'effectively vindicate his statutory rights.'"[36] The *Nabors Wells* court concluded that the employee had not made any such showing here; rather, the employee had complained only that the use of arbitration deprived

28. *In re* NEXT Fin. Group, Inc., 271 S.W.3d 263, 267, 269-70 (Tex. 2008).
29. *Id.* at 268.
30. Nos. 13-08-00397-CV, 13-08-00451-CV, 2009 WL 200987, at *4-7 (Tex. App.—Corpus Christi Jan., 27, 2009, no pet.) (mem. op., not designated for publication).
31. *Id.* at *4.
32. *Id.* at *5.
33. *Id.* at *6.
34. *Id.*
35. 262 S.W.3d 337, 349 (Tex. 2008).
36. *Id.* (quoting *In re* Halliburton, 80 S.W.3d 566, 572 (Tex. 2002)).

him of the right of trial by jury.[37]

B. When is an Arbitration Agreement Not Enforceable?

1. Waiver of Arbitration by Substantially Invoking Judicial Process

A window of opportunity for avoiding an arbitration agreement was pushed open in the previous Survey year by the Texas Supreme Court in the controversial and highly-publicized opinion in *Perry Homes v. Cull*.[38] The political controversy surrounding the decision aside, the supreme court in *Perry Homes* acknowledged a long list of activities by a litigant that other courts had previously suggested might constitute "substantially invoking the judicial process" amounting to waiver.[39] Then, seeming to hold its breath by noting, "To date, we have never found such a waiver," the supreme court found such a waiver.[40] Not surprisingly, several decisions in this Survey year elaborated upon suggestions that the judicial process had been "substantially invoked" for purposes of finding that the party seeking to compel arbitration was deemed to have waived its opportunity. Two Fifth Circuit opinions warrant attention.

In a mesothelioma case, *Nicholas v. KBR, Inc.*,[41] it was the widow, curiously enough, seeking to compel arbitration. The Fifth Circuit took notice of this, observing that the defendant in a lawsuit is ordinarily the party seeking to move the case to arbitration.[42] Further, the Fifth Circuit noted that it has not yet "expressly drawn a distinction between the waiver analysis when applied to a plaintiff and that applied to a defendant."[43] Yet, the Fifth Circuit continued, "we have recognized that the decision to file suit typically indicates a 'disinclination' to arbitrate."[44]

The record, though, revealed that the widow had done more than file suit. Rather, she had (1) filed suit in Texas state court; (2) resisted removal to federal court; (3) filed a first amended complaint; (4) filed a joint discovery/case management plan; (5) responded to written discovery requests; and (6) sat for her deposition, all without hinting at the possibility of arbitrating.[45] Despite all these actions, the decision appears to stand for the proposition that simply filing the lawsuit may have constituted waiver. The Fifth Circuit concluded that "the act of a plaintiff filing suit without asserting an arbitration clause constitutes substantial invocation of the judicial process, unless an exception applies."[46] The Fifth Cir-

37. Nabors Wells Servs., Ltd. v. Herrera, Nos. 13-08-00397-CV, 13-08-00451-CV, 2009 WL 200987, at *7 (Tex. App.—Corpus Christi Jan. 27, 2009, no pet.) (mem. op., not designated for publication).

38. *See* 258 S.W.3d 580 (Tex. 2008). *See* Will Pryor, *Alternative Dispute Resolution*, 62 SMU L. Rev. 843, 845-47 (2009) (discussing the *Perry Homes* decision).

39. *Perry Homes*, 258 S.W.3d at 589-90.

40. *Id.* at 590, 597.

41. 565 F.3d 904, 905 (5th Cir. 2009).

42. *Id.* at 908.

43. *Id.*

44. *Id.* (citing several decisions using the term "disinclination" in this context).

45. *Id.* at 906.

46. *Id.* at 908.

cuit went on to emphasize that, "short of directly saying so in open court, it is difficult to see how a party could more clearly 'evince[ ] a desire to resolve [a] . . . dispute through litigation rather than arbitration,' than by filing a lawsuit going to the merits of an otherwise arbitrable dispute."[47] The Fifth Circuit could have relied upon a litany of litigation activity in finding waiver, but instead seems to have suggested that merely filing suit is the new standard.

In *Petroleum Pipe Americas Corp. v. Jindal Saw, Ltd.*,[48] the Fifth Circuit considered the waiver argument when the underlying dispute concerned the enforceability of a previous settlement agreement between the parties. Among other things, one of the parties "(1) delayed seeking arbitration until a year after PPA filed suit; (2) removed the case to federal court; (3) filed counterclaims that relate to the Settlement Agreement; (4) participated in discovery and numerous discovery meetings; and (5) sought a ruling from the district court on the interpretation of the Settlement Agreement."[49] The prejudice of delay and expense to one party after the other has "substantially invoked judicial process" seems at the heart of most of these waiver decisions. But it was another kind of abuse that seemed to bother the Fifth Circuit in *Petroleum Pipe*. The record reflected that the district court, though not issuing a final order, had given a very clear indication of how the court intended to rule on the settlement agreement. This was crucial to the Fifth Circuit's decision. "The lack of a formal ruling does not convince us that [one party], having learned that the district court was not receptive to its arguments, should be allowed a second bite at the apple through arbitration."[50] In other words, it seemed fundamentally unfair to allow a litigant to proceed with litigation until the moment it became apparent that the result was going to be adverse to him, and then to allow the litigant to try an alternative, and hopefully rosier, path.

2. *Court, Not the Arbitrator, Decides Competency of a Party*

In another victory for a party seeking to avoid arbitration, this time a party claiming she was mentally incompetent to assent to a contract, the Texas Supreme Court concluded that the trial court, not the arbitrator, should decide the issue of capacity.[51] For decades, courts have wandered all over the road when trying to determine whether the court or the arbitrator should rule on a defense that an entire contract is unenforceable or

47. *Id.* (alterations in original) (omitting internal citation) (quoting Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co., 304 F.3d 476, 484 (5th Cir. 2002)).

48. 575 F.3d 476, 478-79 (5th Cir. 2009).

49. *Id.* at 481.

50. *Id.* at 482. Several other decisions address waiver arguments relating to substantial invocation of the litigation process. *See* Citizens Nat'l Bank v. Bryce, 271 S.W.3d 347, 556 (Tex. App.—Tyler 2009, no pet.); Holmes, Woods & Diggs v. Gentry, No. 05-08-00723-CV, 2009 WL 2152562, at *3 (Tex. App.—Dallas July 21, 2009, no pet.). Both opinions expressly follow *Perry Homes v. Cull*. Each case describes the extensive, aggressive litigation activity and explains that any result other than findings of waiver would have been curious.

51. *In re* Morgan Stanley & Co., 293 S.W.3d 182, 189 (Tex. 2009).

void, and whether the result should depend on "only" the validity of the arbitration clause or "also" the validity of the entire contract being challenged.[52] In *In re Morgan Stanley*, the Texas Supreme Court viewed the case as raising a federal-law question of first impression, thus requiring the Texas Supreme Court to "anticipate how the U.S. Supreme Court would decide the issue."[53] Quoting from an article by Professor Alan Rau, the supreme court concluded: "To send a dispute to arbitration where 'not only' the arbitration clause itself, but 'also,' in addition, the 'entire' agreement is subject to challenge, is to lose sight of the only important question—which is the existence of a legally enforceable assent to submit to arbitration."[54] As a result, the supreme court remanded the case to the trial court for a finding on the issue of competency.[55]

3. Disputes Not Covered by the Arbitration Agreement

Some cases find that an arbitration agreement is valid and binding, but that the underlying dispute falls outside the scope of the disputes contemplated by the parties when agreeing to arbitrate. For instance, *Jones v. Halliburton Co.*[56] required the Fifth Circuit to examine whether claims by an employee of Halliburton/KBR about being gang-raped by coworkers in her bedroom in employer-provided housing while overseas were arbitrable. The employer/employee agreement required arbitration of claims "related to [her] employment" or claims for personal injury "arising in the workplace."[57] The claimant raised an alternative argument: Even if the claims were otherwise covered by the arbitration agreement, the doctrine of unclean hands should preclude the equitable relief of specific performance of that clause. The district court deemed all of her claims arbitrable except the claims for assault and battery; intentional infliction of emotional distress; negligent hiring, retention, and supervision; and false imprisonment.[58]

In an extensive opinion relying on an elaborate recitation of the underlying facts, the Fifth Circuit affirmed, concluding that it need not reach the unclean hands argument.[59] "The one consensus emerging from this analysis is that it is fact-specific, and concerns an issue about which courts disagree."[60] The Fifth Circuit wrestled with the seeming contradiction that the claimant argued that her injuries were related to and within the scope of her employment for purposes of applying for workers' compensation benefits, but were not related to her employment or arising in the

52. *See id.* at 185-89 (discussing caselaw on these topics).
53. *Id.* at 189.
54. *Id.* at 190 (quoting Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 17 (2003)).
55. *Id.*
56. 583 F.3d 228, 230 (5th Cir. 2009).
57. *Id.* at 231 (quoting the agreement).
58. *Id.* at 233 (discussing the trial proceedings and the decision).
59. *Id.* at 242.
60. *Id.* at 240.

workplace for purposes of determining the scope of the arbitration agreement.

> In interpreting the arbitration provision at issue, . . . we conclude that the provision's scope certainly stops at Jones' bedroom door . . . . As such, it was not contradictory for Jones to receive workers' compensation under a standard that allows recovery solely because her employment created the "zone of special danger" which led to her injuries, yet claim, in the context of arbitration, that the allegations the district court deemed non-arbitrable did not have a "significant relationship" to her employment contract.[61]

In other words, the discrepancy or the inconsistency regarding the scope of her employment could be reconciled by the different legal standards applied in the separate inquiries.

4. Compliance Legally Impossible?

In an unreported decision from the San Antonio Court of Appeals, *Eastland v. Camp Mystic, Inc.*,[62] a commercial lease had a curious rent calculation formula that included multiplying one of four specified rates by the replacement cost of the demised premises on January 1 of each year. Finding nothing inherently wrong with an arbitration clause itself in the lease, the court of appeals agreed with the trial court that, because the "replacement cost" of real estate is not ascertainable, the arbitration agreement was not enforceable.[63] The court of appeals did not express the problem as one of legal impossibility, but that appears to be what it described.

C. The Back End: When Should an Arbitration Award Be Confirmed?

When a private judge (an arbitrator) signs an arbitration award, what happens next? What happens when one side wants to enforce the award? Conversely, what happens when one side wants the award vacated or set aside? Under federal, as well as state statutory schemes, either side can proceed in a local court of "competent jurisdiction" for relief. When a trial court either confirms the award or sets it aside, an appeal may result.

1. The Aftermath of Hall Street Associates v. Mattel

An avalanche of appellate decisions in the Survey year fall in line with the 2008 decision of the U.S. Supreme Court in *Hall Street Associates v. Mattel, Inc.*[64] A Fifth Circuit case, *Citigroup Global Markets, Inc. v. Bacon*,[65] arose from an arbitration panel's order that an investment advisor

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61. *Id.* at 239.

62. Nos. 04-08-00675-CV, 04-08-00741-CV, 2009 WL 260523, at *1 (Tex. App.—San Antonio 2009, pet. denied) (mem. op., not designated for publication).

63. *Id.* at *4.

64. *See* 552 U.S. 576 (2008).

65. 562 F.3d 349, 350 (5th Cir. 2009).

pay a former customer $256,000. The trial court, concluding that the arbitrator manifestly disregarded the law, granted the advisor's request to vacate the award.[66] In light of *Hall Street*, however, the Fifth Circuit disagreed and vacated the trial court's decision and remanded the case for further consideration.[67] As the Fifth Circuit reasoned, "[M]anifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA. *Hall Street* effectively overrules our previous authority to the contrary . . . ."[68]

After *Hall Street*, the specific, but exclusive, grounds for vacatur in the Federal Arbitration Act (FAA) remain.[69] Yet, as the unreported Fifth Circuit decision in *United Forming, Inc. v. FaulknerUSA, LP*[70] demonstrates, establishing any of these specific grounds is quite difficult. In *United Forming*, the appellant challenged the arbitration award by arguing that one of the arbitration panel members had failed to make proper pre-arbitration disclosures regarding a former law partner's previous representation of and service on the board of a predecessor to the appellant. In addition, the appellant accused two of the arbitrators of "actual bias" based upon statements and comments made during the hearing.[71] Finally, the appellant argued that the award constituted "misconduct" or "misbehavior" under the FAA because the award was so contrary to the law.[72] As the Fifth Circuit noted, the appellant "was careful not to use the phrase 'manifest disregard of the law' . . . mindful that we have held that *Hall Street* has overruled the use of that standard."[73] Finding insufficient evidence presented by the appellant to support the first two challenges, the Fifth Circuit concluded:

> We need not reach the question of whether an intentional complete disregard of the applicable law could constitute 'misbehavior' under the FAA because we conclude that such a situation is not presented here. Even if the AAA panel's decision was erroneous—a question we do not reach—it was at least debatable.[74]

Texas courts of appeals decisions also bear the imprint of *Hall Street*. In *Allstyle Coil Co. v. Carreon*,[75] a claimant prevailed against his em-

66. *Id.*
67. *Id.* at 358.
68. *Id.* at 350.
69. The exclusive grounds for vacatur in the FAA are: "(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a) (2006).
70. No. 09-50073, 2009 WL 3444285, at *1-2 (5th Cir. 2009) (not selected for publication in the Federal Reporter).
71. *Id.* at *1.
72. *Id.*
73. *Id.*
74. *Id.*
75. 295 S.W.3d 42 (Tex. App.—Houston [1st Dist.] 2009, no pet).

ployer in a workers' compensation non-subscriber case after the employer had insisted on arbitrating. The employer, disappointed with the result, contended that the arbitrator manifestly disregarded the law and failed to base his award on any recognizable legal standard. Relying on *Hall Street*, the Houston First Court of Appeals agreed with the trial court and affirmed the award.[76]

The unreported decision in *LeFoumba v. Legend Classic Homes, Ltd.*[77] also applies the *Hall Street* standard. This appeal from a trial court's affirmation of an arbitration award concerned a reduction by the arbitrator, in a modification requested by one of the parties, of the attorneys' fees awarded. The total amount of the reduction and the amount in dispute on the appeal was $190.[78] Appellant argued that the modified award should have been vacated because "(1) the modified award was procured by 'undue means,' (2) the arbitrator exceeded her authority, and (3) the modified award 'violates law and public policy.'"[79] The court of appeals dismissed the "public policy" complaint because it is not one of the four exclusive grounds for vacatur of an FAA award that remain after *Hall Street*.[80] The second argument, "undue means," was not supported by any proof, and "a mere mistake of law is insufficient to vacate an arbitration award on the basis of 'undue means.'"[81] Finally, the court of appeals rejected the "exceeded authority" argument: "[T]he appropriate inquiry is not whether the arbitrator decided an issue *correctly*, but instead whether she had the authority to decide the issue *at all*."[82]

2. *Finding of Fraudulent Inducement of the Underlying Contract*

There have been decades of inconsistency by courts trying to determine whether a trial court or an arbitrator should rule on a fundamental challenge as to whether the contract with the arbitration clause was fraudulently induced. But what is the correct result when an arbitrator finds that the contract was, in fact, fraudulently induced? Should the arbitrator, at that point, set down her pen and consider all other matters in dispute vitiated because there is no underlying agreement? The Houston First Court of Appeals addressed this question in *Fogal v. Stature Construction, Inc.*[83] In a helpful analysis, the court of appeals explained that, although "a contract induced by fraud is no contract at all because it lacks

76. *Id.* at 45.

77. No. 14-08-00243-CV, 2009 WL 3109875, at *2 (Tex. App.—Houston [14th Dist.] Sept. 17, 2009, no pet.) (mem. op., not designated for publication).

78. *Id.* at *1.

79. *Id.*

80. *Id.* at *2.

81. *Id.*

82. *Id.* at *3. (resisting the temptation to summarize each and every survey year decision expressly relying on *Hall Street*). *See also* Xtria L.L.C. v. Int'l Ins. Alliance Inc., 286 S.W.3d 583 (Tex. App.—Texarkana 2009, pet. denied); *In re* Chestnut Energy Partners, Inc., 300 S.W.3d 386 (Tex. App.—Dallas 2009, pet. denied); Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc., 294 S.W.3d 818 (Tex. App.—Dallas 2009, no pet.).

83. 294 S.W.3d 708 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

agreement of the parties . . . this does not affect arbitrability of the dispute."[84] Further, the fraudulent inducement alleged, if it is to be ruled upon by a court rather than the arbitrator, "must specifically relate to the Arbitration Addendum itself," not generally to the contract in its entirety.[85] So the arbitrator need not put down her pen. Quoting an earlier Fifth Circuit decision, the court of appeals agreed, "'[E]ven if the arbitrator concludes that the agreement was void, and the parties are returned to their pre-agreement positions *as if* the agreement never existed, the agreement existed long enough to give the arbitrator the power to decide the dispute."[86]

D. The Back End: When Should an Arbitration Award Be Set Aside?

By now you may be thinking that there certainly must not have been a circumstance or condition presented in the Survey year which caused an appellate court in Texas to vacate or set aside an award. Although these cases are rare, they do occur from time to time, and a few were decided during this Survey period.

1. Public Policy

In the unreported decision in *Symetra National Life Insurance Co. v. Rapid Settlements, Ltd.*,[87] the arbitrator had ordered one party to make structured settlement payments directly to another party, although the payment scheme had not been approved by a court. The appellants argued that the order violated the public policy of the state of Texas as set out in the Texas Structured Settlement Protection Act (SSPA).[88] This Act, as the Houston Fourteenth Court of Appeals explained, requires court approval of any transfer of a structured settlement payment.[89] Finding that the FAA did not preempt the SSPA because the statutes were not in conflict, the court of appeals held that the arbitration award violated the public policy of the state of Texas. "[T]he SSPA does[ ] not prevent the parties from agreeing to arbitrate or proceeding to arbitration; it only limits what can be accomplished through arbitration . . . ."[90]

2. Bias

In *Karlseng v. Cooke*,[91] the Dallas Court of Appeals held that a trial court abused its discretion in denying a request for a continuance to allow

84. *Id.* at 719.
85. *Id.*
86. *Id.* (quoting Will-Drill Res., Inc. v. Samson Res. Co., 352 F.3d 211, 218-19 (5th Cir. 2003)).
87. No. 14-07-00880-CV, 2009 WL 1057339, at *1-2 (Tex. App.—Houston [14th Dist.] Apr. 21, 2009, no pet.) (mem. op., not designated for publication).
88. *See* Tex. Civ. Prac. & Rem. Code Ann. § 141.004 (Vernon 2005).
89. *Symetra Nat'l Life Ins.*, 2009 WL 1057339, at *3.
90. *Id.* at *5.
91. 286 S.W.3d 51, 58 (Tex. App.—Dallas 2009, no pet.).

discovery in the face of evidence that one arbitrator had failed to disclose a prior relationship with lead counsel for one of the parties.[92] The appellant, with only three weeks notice after the award was issued, apparently scrambled to present evidence of the conflict. The trial court, however, denied the motion for continuance.[93] The court of appeals concluded that, at the "very least," the appellant had produced evidence "sufficient to raise a bona fide question" about whether the arbitrator "failed to disclose information he had a duty to disclose."[94] Further, the trial court could have answered this question only by granting the motion for continuance.[95] Thus, the court of appeals held that the trial court abused its discretion by denying the request for continuance.[96]

Karlseng is a notable exception to the pattern in many cases of alleged bias. Most challenges based on alleged bias fail, probably because there is virtually no evidence to support the bias contention other than suggestions concerning the conduct, demeanor, or comments of the arbitrators during the hearing, or an argument that the result was so misguided that bias is the only plausible explanation. In *Karlseng*, by contrast, the appellants were able to generate testimony from a former wife of one of the attorneys involved about the social relationship between the attorney and the arbitrator, an expert testified that certain information "absolutely" should have been disclosed, and an out-of-state lawyer testified about a previous arbitration hearing (undisclosed) that he had been involved in along with the attorney and the arbitrator whose relationship was being questioned.[97]

3. *Arbitrators Cannot Exceed Their Powers*

In *Townes Telecommunications, Inc. v. Travis, Wolff & Co.*,[98] a challenge to an arbitration award succeeded on the basis of one of the four bases for vacatur set out in the FAA. The arbitrators had allocated costs of the arbitration between the two parties in the face of an arbitration agreement which stated that costs "may not be allocated between the parties."[99] Citing *Hall Street*, the Dallas Court of Appeals pointed out that this situation satisfied one of the four statutory bases for vacatur—specifically, that the arbitrators had exceeded their powers.[100]

III. CONCLUSION

The popularity of mediation continues to rise. But while the total number of arbitrations being conducted appears to continue to rise from year

92. *Id.*
93. *Id.* at 52.
94. *Id.* at 58.
95. *Id.*
96. *Id.*
97. *Id.*
98. 291 S.W.3d 490, 491 (Tex. App.—Dallas 2009, pet. denied).
99. *Id.* at 494.
100. *Id.* at 493 n.1.

to year, the overall satisfaction level of participants in the process may be declining. The result in *Allstyle Coil Co. v. Carreon*[101]—rejecting a challenge to a $217,000 award for an employee of a non-subscribing employer—may suggest why. For the last several decades, the imposition of arbitration clauses in consumer and employment settings has come at the behest of product manufacturers, homebuilders, insurers, employers, and others. But sometimes a claimant prevails in arbitration—and prevails "big"—leaving the unhappy homebuilder, employer, etc. with virtually no avenue for a meaningful appeal. Coupled with caps on damages and other successful "tort reforms" lobbied to legislatures by these same interests over the same time period, the courts are no longer the menacing forum they once were. So the "success rate" of arbitration, when measured by the manufacturer/employer as the collective experience of a now significant number of arbitration awards, as well as the overall savings of legal fees and costs, may be in *decline*, at the same time that the court system, now layered with statutory and appellate protections, is no longer perceived as the home court for "plaintiffs' personal injury lawyers," "frivolous lawsuits," and "runaway juries." A significant reevaluation of arbitration by those who have been pursuing it for decades is taking place, and it will continue for years to come.

101. 295 S.W.3d 42, 42 (Tex. App.—Houston [1st Dist.] 2009, no pet.).