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SECTION OFFICERS and COUNCIL MEMBERS

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FROM THE SECTION CHAIR

Dear Section Members:

As we enter 2009, I would like to update you on some of the more noteworthy Section activities that the Council has undertaken recently, as well as to preview upcoming events. On December 2, the Section held its CLE Teleconference, "Fall 2008: Antitrust and Business Litigation Developments and Updates." The program featured recent developments in the areas of Delaware fiduciary duty law, presented by Todd Murray, securities law, presented by Peter Stokes, RICO developments, presented by Randy Gordon and Sam Joyner, and options backdating, presented by Andy Yung and Alex Fernandez. Thanks to the presenters and everyone who helped to plan the teleconference and make it a success.

The Section also is in the process of uploading its recent CLE programs onto the Section's website. The programs will be available in both RealMedia and Windows Media formats. In addition, we continue to reproduce copies of the Texas Business Litigation Journal on the website. The address is www.tablit.org.

Speaking of the Journal, this issue features annual survey articles on arbitration developments by Paul Genender and Christopher Kratovil, antitrust developments by Leslie Hyman and expert witness developments by Paul Genender and Matthew Rinaldi. Thanks as always to the authors for their fine work.

Finally, the Section's Council is in the process of planning programs for 2009. Details to follow. Anyone with a suggestion for topics is encouraged to contact me.

Best regards,
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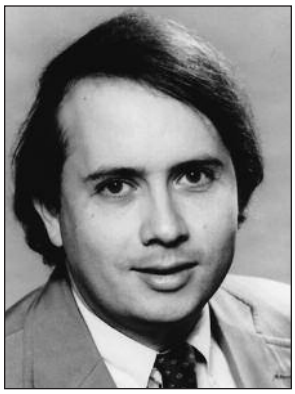

This issue of the Journal features the annual survey articles on antitrust, arbitration and expert witness developments.

As always, we solicit written contributions to the Journal. We currently have commitments for annual survey articles on antitrust, securities, RICO, business torts, arbitration, class actions, D&O and expert witness developments. If you have an idea for a survey article in another area of business litigation, or an article focusing on a particular aspect of or development in the law (even if it falls within one of the broad survey categories), contact me at 112 E. Pecan, Suite 1800, San Antonio, Texas 78205 (210) 554-5282; (210) 226-8395 (fax), amferril@coxsmith.com.

A. Michael Ferrill
Editor

Recent Developments in the Law of Arbitration

By Paul R. Genender and Christopher D. Kratovil[1]

Paul R. Genender

Christopher D. Kratovil

The past few months have witnessed a series of significant arbitration decisions from the United States Supreme Court, the United States Court of Appeals for the Fifth Circuit and the Texas Supreme Court. Taken as a whole, these recent decisions continue the long-running judicial trends of compelling the arbitration of disputes while rejecting judicial challenges to arbitration awards. Escaping an arbitration clause in favor of litigating in the courtroom and, after arbitration, judicially vacating an arbitration award have always been daunting tasks. Nonetheless, recent developments in federal and Texas case law even further reduce the odds of avoiding arbitration or successfully challenging the award that results from it.

I. Recent Arbitration Decisions from the United States Supreme Court

In its October 2007 term, the United States Supreme Court released two notable arbitration decisions, *Hall Street v. Mattel,* 128 S. Ct. 1396 (2008) and the so-called "Judge Alex" case, *Preston v. Ferrer*, 128 S. Ct. 978 (2008). The Supreme Court's opinions in these two cases are consistent with and, indeed, further strengthen the federal policies favoring the resolution of disputes through arbitration and the enforceability of arbitration awards.

A. The "Superbowl of Arbitration": *Hall Street Associates. L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008)

Prior to oral argument, Justice Breyer termed *Hall Street Associates, L.L.C. v. Mattel, Inc.* "the Superbowl of arbitration" and the arbitration "case of the century." Indeed, it is now clear that *Hall Street* is the most important arbitration decision released by the Supreme Court in at least a decade.

The facts of *Hall Street* are convoluted but largely irrelevant to the legal principles that the case stands for. Mattel leased a piece of property from Hall Street in Oregon for use as a manufacturing site. Mattel discovered that well water on the site was contaminated, and therefore broke its lease. Hall Street filed suit against Mattel in federal court. The district court sent the case to arbitration based on the parties' arbitration agreement. Critically, the arbitration agreement — like many modern arbitration clauses — provided for *de novo* judicial review of any legal errors made by the arbitrator, meaning that the losing party was contractually entitled to appeal the arbitration award to the district court under a much more generous standard of review than that provided by the Federal Arbitration Act ("FAA"), which permits the vacatur of arbitration awards only under very limited circumstances. See 9 U.S.C. § 10. The arbitrator found for Mattel, but Hall Street invoked the arbitration clause's expanded judicial review provision and challenged the arbitrator's award in the district court on the basis that the arbitrator had made substantive errors of law. Consistent with the arbitration agreement's *de novo* judicial review provision, the district court reviewed the arbitrator's application of the law *de novo* and reversed the arbitrator's award. However, the Ninth Circuit reversed, restoring the arbitrator's award in favor of Mattel on the basis that the parties could *not* contract for a different judicial standard of review for arbitration awards than the statutory standards established by the FAA. Hall Street sought certiorari on the question of whether the grounds outlined in the FAA are the only permissible bases for reviewing an arbitral award, or whether parties are permitted to contractually agree to different standards.

The Supreme Court granted certiorari in order to resolve a deep circuit split, wherein the First, Third, Fourth, Fifth and Sixth Circuits all concluded that "the central purpose of the FAA is to ensure that private agreements to arbitrate are

enforced according to their terms." In contrast, the Ninth and Tenth Circuits had rejected this view, reasoning that "[b]road judicial review of arbitration will jeopardize the very benefits of arbitration, rendering informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process." In other words, *Hall Street* asked the Supreme Court to resolve the tension between the private and contractual nature of arbitration and the terms of a federal statute, the FAA, governing how the courts are to review arbitration awards.

In a 6-3 opinion, the Supreme Court ruled that the FAA contains the exclusive grounds for vacating or modifying an arbitral award. Justice Souter's majority opinion squarely rejected the argument that parties may contractually agree to expanded grounds of review. After refusing to adopt the reasoning of the several circuit courts that permitted the contractual modification of the FAA's vacatur provisions, the Supreme Court majority concluded that the vacatur provisions of the FAA are exclusive:

> The Courts of Appeals have split over the exclusiveness of these statutory grounds when parties take the FAA shortcut to confirm, vacate, or modify an award, with some saying the recitations are exclusive, and others regarding them as mere threshold provisions open to expansion by agreement. . . . We now hold that §§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification.

In addition, *Hall Street* likely marks the end of the non-statutory or common law bases for vacating arbitration awards under the FAA. In *Hall Street*, the Supreme Court examined the "manifest disregard" language of its previous decisions and called into question whether "manifest disregard" does stand as an independent non-statutory ground for vacatur. The Supreme Court said:

> Maybe the term "manifest disregard" was meant to name a new ground for review, but maybe it merely referred to the [9 U.S.C.] §10 grounds collectively, rather than adding to them. Or, as some courts have thought, "manifest disregard" may have been shorthand for §10(a)(3) or §10(a)(4), the subsections authorizing vacatur when the arbitrators were "guilty of misconduct" or "exceeded their powers."

While the Supreme Court did not squarely decide the issue in *Hall Street*, the Fifth Circuit and other circuits will likely find that their previous recognition of "manifest disregard" as a non-statutory basis for challenging arbitration awards has been "implicitly overruled." The key *Hall Street* holding — that the statutory grounds for vacatur in the FAA are "exclusive" — appears to demand this result. Given the Fifth Circuit's somewhat grudging acceptance of non-statutory grounds for challenging arbitration awards in the first place, it is likely that a future panel of the Fifth Circuit will close the door on "manifest disregard" as an independent non-statutory ground for vacatur.

In dissent, Justice Stevens, joined by Justices Breyer and Kennedy, argued that the majority opinion "conflicts with the primary purpose of the FAA and ignores the historical context in which the Act was passed." Section 2 of the FAA makes arbitral agreements "valid, irrevocable, and enforceable," which was a departure from the common law and the core purpose of the statute. Therefore, Justice Stevens argued, the Court should err on the side of enforcing the terms of a negotiated agreement. In other words, the dissenters argued that the contractual nature of arbitration (as enshrined in 9 U.S.C. § 2) requires the judicial enforcement of non-standard vacature provisions agreed to by the parties, with the statutory vacatur provisions of 9 U.S.C. § 10 serving as off-the-rack standard where parties fail to craft their own vacatur provisions.

In the wake of the Supreme Court's decision in *Hall Street*, a party challenging an arbitration award under the FAA is limited to the four narrow statutory grounds established by 9 U.S.C. § 10. Because of this substantial change to the law, lawyers need to change the way they evaluate possible challenges to arbitration awards, abstaining from bringing such challenges unless a vacatur provision of 9 U.S.C. § 10 arguably applies. Counsel should also reevaluate existing arbitration agreements that provide for expanded judicial review or awards issued thereunder, as such provisions likely are no longer valid. Parties that wish to have an expanded appellate review of any arbitration decision may still do so by contracting for a *private* appellate arbitration panel (*i.e.*, contracting for and using appellate arbitrators provided by JAMS or AAA, rather than challenging the arbitration award in court under an improper expanded review provision) to review the arbitrator's decision. Indeed, the *Hall Street* decision may encourage more parties to roll the dice on a jury trial with a full-bodied appeal available rather than stake everything on a virtually unappealable arbitration. How this affects the number of cases going to arbitration remains to be seen, but the bottom line from *Hall Street* is that the already difficult task of challenging an arbitration award in federal court is even more difficult now.

B. *Hall Street's* Impact on Texas Law: *Quinn v. NAFTA Traders, Inc.*, 257 S.W.3d 795 (Tex. App.—Dallas 2008, pet. filed)

Although not bound by *Hall Street* when applying the Texas General Arbitration Act ("TAA") rather than the FAA, one Texas court of appeals already has adopted the reasoning of *Hall Street* and applied it to the TAA. While the Texas Supreme Court has not yet weighed in on this issue, the Dallas Court of Appeals concluded that the statutory vacatur provisions of the TAA are, like those of the FAA, exclusive and not expandable by agreement.

Quinn arose from an employment dispute in which Margaret A. Quinn prevailed in an arbitration under the TAA against her former employer, NAFTA Traders, and was awarded $203,341. The Texas trial court confirmed the arbitration award. NAFTA Traders appealed, seeking to vacate the arbitration award based on several alleged errors of law by the arbitrator. Just as in *Hall Street*, the arbitration clause at issue in *Quinn* featured an expanded scope of review provision that required the judicial vacatur of awards containing "a reversible error of state or federal law." In other words, just as in *Hall Street*, the arbitration agreement between the parties provided for *de novo* review of legal errors, and the Dallas Court of Appeals was called on to determine if this contractual expansion of the scope of judicial review of arbitration awards was permissible.

The Dallas Court of Appeals rejected NAFTA Trader's appeal. Although this case involved the TAA rather than the FAA, the Dallas Court of Appeals was guided by the U.S. Supreme Court's pronouncement weeks earlier that "the statutory grounds for judicial vacatur are exclusive and cannot be supplemented by contract." *Hall Street*, 128 S. Ct. at 1400. The Dallas Court of Appeals held that an identical analysis applies to the TAA, and that "parties seeking judicial review of an arbitration award covered by the TAA cannot contractually agree to expand the scope of that review and are instead limited to judicial review based upon the statutory grounds enumerated in the statute." Because NAFTA Trader's was unable to satisfy any of the TAA's statutory grounds for vacatur, its appeal was denied and the trial court's confirmation of the arbitration award affirmed.

NAFTA Traders has filed a petition for review with the Texas Supreme Court, which remains pending. Hence, it remains to be seen whether the Texas Supreme Court will render the reasoning of *Hall Street* applicable to all cases under the TAA.

C. The "Judge Alex" Case: *Preston v. Ferrer*, 128 S. Ct. 978 (2008)

Alex Ferrer is better as "Judge Alex", a television personality who presides over a *People's Court*-style legal reality TV show. In an odd role reversal, "Judge Alex" found himself as the respondent in a high-profile arbitration case before the United States Supreme Court.

A contract between "Judge" Alex Ferrer and his agent, California attorney Arnold M. Preston, required arbitration of "any dispute ... relating to the [contract's] terms ... or the breach, validity, or legality thereof ... in accordance with [American Arbitration Association] rules." Preston invoked this arbitration provision in an attempt to recover fees he allegedly was owed under the contract. Ferrer responded by petitioning the California Labor Commissioner for a determination that the contract was invalid and unenforceable under California's Talent Agencies Act (the "Act") because Preston had acted as a "talent agent" without the required license. Preston argued that whether he acted as an unlicensed talent agent in violation of the Act, as Ferrer claimed, or as a "personal manager" not governed by the Act, was a question for the arbitrator, not the California Labor Commissioner. After the Labor Commissioner denied Ferrer's motion to stay the arbitration, Ferrer filed suit in California state court seeking to enjoin arbitration, and Preston moved to compel arbitration. The California trial court denied Preston's motion to compel and enjoined him from proceeding before the arbitrator unless and until the Labor Commissioner determined she lacked jurisdiction over the dispute. Preston appealed, but the California Court of Appeals affirmed the trial court and held that the Talent Agencies Act vested the Labor Commissioner with exclusive original jurisdiction over the dispute, thereby preventing arbitration. The California Supreme Court declined review. However, because the arbitration was governed by the FAA, Preston sought and obtained review by the U.S. Supreme Court.

The Supreme Court granted certiorari in order to answer the following question: "Does the FAA override not only state statutes that refer certain state-law controversies initially to a judicial forum, but also state statutes that refer certain disputes initially to an administrative agency?" The Supreme Court answered this question in the affirmative, holding 8-1 that the arbitrator, rather that the Labor Commissioner, had primary jurisdiction over the dispute. Writing for the majority, Justice Ginsberg reasoned that: "When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative." 128 S. Ct. at 988. The Supreme Court noted, *inter alia*, that "[r]equiring initial reference of the parties' dispute to the Labor Commissioner would, at the least, hinder speedy resolution of the controversy" that the parties sought to achieve by agreeing to arbitration. More importantly, the Supreme Court reiterated that the FAA preempts conflicting state law:

> Section 2 [of the FAA] "declare[s] a national policy favoring arbitration" of claims that parties contract to settle in that manner. Southland Corp., 465 U.S., at 10, 104 S.Ct. 852. That national policy, we held in Southland, "appli[es] in state as well as federal courts" and "foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements." *Id.*, at 16, 104 S.Ct. 852. The FAA's displacement of conflicting state law is "now well-established."

The importance of *Preston* is that the Supreme Court confirmed that where parties have agreed to arbitrate a dispute, the arbitration will occur regardless of any conflicting state laws or demonstrative procedures. The right to arbitrate under the FAA displaces any conflicting state laws. As such, *Preston* makes it all the more difficult to resist a motion to compel arbitration where a valid arbitration clause exists and arguably encompasses the dispute.

II. Recent Fifth Circuit Arbitration Decision

A. The Confidentiality of Arbitration: *ITT Education Services, Inc. v. Roberto Arce*, 533 F.3d 342 (5th Cir. 2008)

This recent Fifth Circuit case confirms and reinforces the confidentiality of arbitration proceedings, which is one of the primary advantages offered by arbitration.

ITT provides for-profit technology-oriented degree programs. The Appellants were fourteen former ITT students and their common attorney, Betty S. Clark. Each student signed an Enrollment Agreement with ITT that contained an arbitration clause. In February 2005, thirteen of the students — all except for Joel Rodriguez — pursued arbitration against ITT ("the Arce arbitration"), represented by Ms. Clark. In June 2006, the arbitrator found in favor of the students, and ITT paid the amounts awarded under the arbitrator's decision. Pursuant to a provision in the arbitration agreement, the Acre Arbitration's results and proceedings were confidential.

In July 2006, Rodriguez, represented by Ms. Clark, demanded arbitration against ITT ("the Rodriguez arbitration"), and his claim was assigned to a different arbitrator. On November 17, 2006, Ms. Clark informed ITT that she planned to rely upon evidence and findings from the Arce arbitration during the new Rodriguez arbitration. Consequently, ITT filed a suit in federal district court for declaratory relief seeking: (1) a finding that the confidentiality provisions of the arbitration agreement were enforceable, and (2) a permanent injunction preventing the students from revealing any aspect of the Arce arbitration. Subsequently, ITT filed an *Ex Parte* Application for a Temporary Restraining Order because Ms. Clark intended to publicly file an unredacted copy of the arbitrator's findings with the district court. The district court granted the temporary restraining order, a preliminary injunction and, finally, a permanent injunction enjoining the students from "revealing any aspect of the Arce arbitration proceedings, including any rulings, decisions, or awards by the Arbitrator." The students and their common counsel, Ms. Clark, appealed this permanent injunction to the Fifth Circuit.

The students argued that the arbitrator's findings in the Arce arbitration constituted a finding of fraudulent inducement against ITT. Accordingly, they claimed that the entire Enrollment Agreement, including its confidentiality provision, was void under Texas law, such that the students could disclose the results of the Arce arbitration to Rodriguez for use in the pending Rodriguez arbitration.

The Fifth Circuit rejected the students' argument, holding that even if the Arce arbitration found that the Enrollment Agreement was fraudulently induced by ITT, the confidentiality provision was part of the arbitration provision itself and, thus, severable from the fraudulently induced underlying contract. The Fifth Circuit reasoned as follows:

> Under Appellants' theory of the case, an arbitrator's finding that an agreement was fraudulently induced would be extended so that, after the arbitration was completed, it is determined that the arbitration clause--including the confidentiality provision--was invalid. Consequently, the arbitrator would not have had jurisdiction in the first instance to arbitrate the dispute, and any findings would be void for lack of jurisdiction. Thus, the findings of the arbitrator would in essence strip the arbitrator of the jurisdiction to make such findings. . . . [U]nder the structure and content of the arbitration clause, *the clause should be considered "separable"* and any alleged finding of fraudulent inducement *does not taint the validity of the arbitration clause* as a whole or its confidentiality provision in particular.

The Fifth Circuit's holding in *ITT* is important because it dramatically confirms one of arbitration's primary advantages over litigation: confidentiality and the resultant assurance that a bad result in one arbitration will not be used against a company in a second arbitration. The confidentiality of prior arbitration proceedings contrasts markedly with the danger of a "bad precedent" in traditional litigation. *ITT* highlights the importance of confidentiality in arbitration, even as it protects that confidentiality.

III. Recent Texas Supreme Court Arbitration Decisions

A. Waiver of the Right to Arbitrate: *Perry Homes v. Cull*, 258 S.W.3d 580 (Tex. 2008)

In one of its few recent decisions holding against arbitration, the Texas Supreme Court recently made clear that while the right to invoke an arbitration clause is strong, it is not absolute and may be waived. In *Perry Homes*, Robert and Jane Cull sued their homebuilder, Perry Homes, alleging various construction defects in the new home that they purchased for $233,730. In a decision marked by three concurring opinions and two dissents, the Texas Supreme Court held that a "party cannot substantially invoke the litigation process and then switch to arbitration on the eve of trial." While the Supreme Court recognized the strong presumption against waiver of arbitration, it noted that it is *not* an irrebuttable presumption.

The Culls filed suit against Perry Homes and initially opposed arbitration. Indeed, the plaintiffs filed a 79-page response to Perry Homes' motion to compel arbitration. In resisting arbitration, the Culls rather melodramatically asserted that the American Arbitration Association ("AAA") "is incompetent, is biased, and fails to provide fair and appropriate arbitration panels." Strangely,

neither the Culls nor Perry Homes pressed for a ruling on the defendant's motion to compel arbitration, and the issue remained unresolved as the case progressed. Moreover, the Culls began seeking extensive discovery from Perry Homes through the traditional judicial process.

With most of the discovery completed and with the case set for trial, the Culls abruptly changed their minds and, in a sudden about-face, moved the trial court to compel arbitration. While the trial court expressed reservations about the context of the Culls' request (these plaintiffs had, after all, waited fourteen months and conducted extensive discovery before requesting arbitration on the eve of trial), the court ordered arbitration because Perry Homes failed to show that it would suffer prejudice as the result of the late shift from litigation to arbitration.

The parties spent a year in arbitration, with the arbitrator ultimately entering an $800,000 award in favor of the Culls (compared to the $233,730 purchase price for the house). Perry Homes moved to vacate the award based at least partially on the grounds that the "case should never have been sent to arbitration after so much activity in court." The trial court denied Perry Homes' motion to vacate and instead confirmed the award. The Fort Worth Court of Appeals affirmed the trial court's confirmation of the arbitration award. The Texas Supreme Court granted Perry Homes' petition for review.

In reviewing whether the Culls had waived the right to arbitrate, the Texas Supreme Court applied a "totality of the circumstances" analysis, concluding that the Culls had substantially invoked the judicial process and had, thereby, prejudiced Defendant Perry Homes and waived the right to arbitrate. The court, while recognizing the "difficulty of uniformly applying a test based on nothing more than the totality of the circumstances," defined no more specific test for "substantial invocation." The court held that, based on the totality of the circumstances, the Culls had waived arbitration, and identified the following factors as collectively constituting a waiver of the right to arbitrate: (1) the Culls' initial objection to arbitration; (2) the defendants' responses to requests for disclosure; (3) the Culls' five motions to compel production from Perry Homes, including 76 requests for production; (4) the defendants' two motions for protective orders, including requests for 67 categories of documents; (5) the plaintiffs' notices of depositions, including requests for 24 categories of documents; and (6) the fact that the plaintiffs moved for arbitration *fourteen months* after filing suit and shortly before the trial was set to commence. The Supreme Court concluded that the Culls took advantage of extensive discovery available through the trial process and then belatedly invoked arbitration in a purposeful and transparent effort to limit the appellate process available to Perry Homes.

Ultimately, the Supreme Court concluded that "a party should not be allowed purposefully and unjustifiably to manipulate the exercise of its arbitral rights simply to gain an unfair tactical advantage over the opposing party." The Supreme Court's analysis and holding suggest that while waiver of arbitration is strongly disfavored, under the right, albeit extreme circumstances, it can occur, and the Texas courts should not be so quick to kick a case out of its courtroom in favor of arbitration. Thus, in the final measure, *Perry Homes* provides a path to possible vacatur of an arbitration award, but only under unusual factual circumstances. Parties seeking to avoid possible waiver of the right to arbitrate should abstain from "substantially invoking" the judicial process.

B. Severing Unconscionable Arbitration Provisions: *In re Poly-America, L.P.*, —- S.W.3d ——2008 WL 3990993 (Tex. Aug. 29, 2008)

In *In re Poly-Americ*a, the Texas Supreme Court was called on to decide whether the right to arbitrate an employment dispute is waived if the arbitration provision contains unconscionable provisions. The Supreme Court reached a mixed result, concluding that a provision in the arbitration clause purporting to eliminate a fired employee's claims for reinstatement and punitive damages was void and unconscionable, but refusing to void the entire arbitration agreement.

Johnny Luna sued his former employer, Poly-America, for retaliatory discharge, alleging that Poly-America terminated him for filing a workers' compensation claim. Mr. Luna's employment contract with Poly-America contained an arbitration provision that required the employee to split arbitration costs with Poly-America up to a capped amount, limited discovery, eliminated punitive damages and reinstatement remedies available under the Texas Workers' Compensation Act, and imposed other conditions on the arbitration process. Mr. Luna nonetheless filed suit asserting claims for unlawful retaliatory discharge under the Texas Workers' Compensation Act. Claiming that Poly-America acted with malice, ill will, spite, or specific intent to cause injury, Mr. Luna sought both reinstatement and the imposition of punitive damages. Mr. Luna additionally sought a declaratory judgment that the arbitration agreement was unenforceable because, among other reasons, its provisions violated public policy and were unconscionable. Poly-America responded with a motion to compel arbitration which, after a hearing, the trial court granted.

Luna sought a writ of mandamus in the court of appeals, reasserting his argument that provisions of the arbitration agreement were substantively unconscionable. The Houston Court of Appeals (First District) held, in light of the fee-splitting provisions and limitations on remedies, the arbitration agreement as a whole was substantively unconscionable. Poly-America sought mandamus in the Texas Supreme Court, which held that the arbitration agreement's provision eliminating available remedies under the Workers' Compensation Act (specifically, reinstatement and punitive damages) was unconscionable and unenforceable. In striking down the arbitration provision's limitations on Luna's remedies, the Supreme Court reasoned as follows:

> An arbitration agreement covering statutory claims is valid so long as the arbitration agreement *does not waive substantive rights and remedies* of the statute and the arbitration procedures are fair so that the employee may effectively vindicate his statutory rights. . . . In this case, Luna contends Poly-America acted with actual malice in unlawfully discharging him, a claim for which the Workers' Compensation Act allows punitive damages. . . . *Permitting an employer to contractually absolve itself of this statutory remedy would undermine the deterrent purpose of the Workers' Compensation Act's anti-retaliation provisions*. In creating the Texas Workers' Compensation Act, the Legislature carefully balanced competing interests-of employees subject to the risk of injury, employers, and insurance carriers-in an attempt to design a viable compensation system, all within constitutional limitations. . . . . Were we to endorse Poly-America's position and permit enforcement of these remedy limitations, a subscribing employer could avoid the Act's penalties by conditioning employment upon waiver of the very provisions designed to protect employees who have been the subject of wrongful retaliation.
>
> (emphasis added).

However, the Supreme Court also held that these unconscionable limitations on remedies were severable from the arbitration agreement as a whole and that, as such, the dispute remained subject to arbitration. Notably, the Supreme Court did *not* deem to the arbitration agreement's provision requiring the costs of arbitration to be split between the employer and employee to be unconscionable, holding that "the trial court did not abuse its discretion in refusing to declare the contract's cost-splitting provision unconscionable and nullify the arbitration agreement." Because the Supreme Court deemed the unconscionable provisions to be severable, it conditionally granted Poly-America's petition for writ of mandamus, ordering the case arbitrated pursuant to the parties' arbitration clause but with the unconscionable limitations on remedies severed.

In re Poly-America is significant for several distinct reasons: (1) it shows the willingness of the Texas Supreme Court to use the extraordinary writ of mandamus to compel arbitration; (2) it confirms that the court is willing to, in extreme cases, strike down provisions of an arbitration agreement as void against public policy and unconscionable; and (3) it illustrates that even where a particular provision in an arbitration agreement is struck down, the presumption in favor of arbitration remains strong and the arbitration will go forward if the void provision can be severed. In sum, *In re Poly-America* provides a valuable new weapon to attorneys seeking to strike down individual provisions *within* an arbitration agreement, even as it reaffirms the strong presumption in favor of settling disputes by arbitration where the parties have agreed to some form of arbitration clause.

Conclusion

The U.S. Supreme Court, Fifth Circuit and Texas Supreme Court continue to make clear that there is a strong policy in favor of arbitration at both the federal and state levels. As the foregoing cases illustrate, there is a powerful presumption in favor of the enforcement of arbitration agreements and arbitration awards. Because of the long odds against escaping arbitration, clients should carefully weigh the risks and benefits of arbitration before entering into agreements to arbitrate. Given that the U.S. Supreme Court's decision in *Hall Street* (and its Texas analog, *Quinn*) has made it even more difficult to vacate arbitration awards, clients should be aware that by opting for arbitration they are sacrificing their appellate options in all but the most extreme cases. As the foregoing cases illustrate, both the initial decision to arbitrate and the results of arbitration are dauntingly final.

ENDNOTES

1 Paul R. Genender is a Partner in the Trial Section of K&L Gates LLP in Dallas and is a member of the Council of the State Bar Antitrust and Business Litigation Section. Christopher D. Kratovil is a senior associate in the Appellate Section of K&L Gates LLP in Dallas.

Expert Case Law Review 2007-2008

By Paul R. Genender and Matthew D. Rinaldi[1]

Paul R. Genender

Matthew D. Rinaldi

This article provides a survey of the noteworthy decisions issued by Texas state and federal courts in the past year relating to the expert witness gatekeeping function of the courts under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) and the use of expert witness testimony.

Expert Testimony on Causation Not Necessary In Medical Cases

***Guevara v. Ferrer*, 247 S.W.3d 662 (Tex. 2007).**

The general rule has long been that expert testimony is necessary to establish causation as to medical conditions outside the common knowledge and experience of jurors. The Texas Supreme Court, in *Guevara*, defined the limits of that rule.

In *Guevara*, the heir of an injured elderly motorist brought suit to recover damages allegedly arising out of a traffic accident caused by the defendant. The victim's daughter and the driver of the car in which the victim was a passenger at the time of the accident testified that the victim had been wearing a seatbelt at the time of the accident and that after the accident the victim was screaming, complaining about a stomach ache and moaning.[2] They testified without objection that he underwent abdominal surgery on the night of the accident, then had another surgery because the first was not healing properly.[3] No medical records from the hospitalization were introduced and no medical testimony was introduced.[4] The sole medical record introduced from his hospitalization was a note by a consulting physician, which listed the victim's chief complaint upon admission as shortness of breath.[5]

The jury found damages in the amount of over $1.1 million for the victim's medical expenses and $125,000 for his pain and mental anguish.[6] The defendant moved for judgment notwithstanding the verdict, arguing that there was no evidence that the conditions treated were caused by the accident.[7] The plaintiff argued that evidence of the victim's hospitalization following the accident combined with lay testimony about the accident and the victim having no abdominal problems or requiring a ventilator prior to the accident was sufficient to establish a causal relationship.[8] The trial court granted the motion and entered a take-nothing judgment.

The plaintiff appealed. Citing *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729 (Tex. 1984), the court of appeals reversed, holding that there was legally sufficient evidence of causation.[9] It noted the plaintiff's testimony that the victim "did not suffer from any of his post-accident injuries prior to the accident," that he was not in bad health prior to the accident, and that "[n]o great length of time passed between the accident and [Arturo's] death during which he was not in the hospital or receiving care at home."[10] The court of appeals concluded that this testimony "established a sequence of events which provided a strong, logically traceable connection between the event and the condition" so that a layperson could "determine, with reasonable probability, there was some evidence of the causal relationship between the event and the condition."[11] The court of appeals reversed and remanded for entry of judgment based on the jury's verdict.[12]

The Texas Supreme Court examined *Morgan's post hoc, ergo prompter hoc* reasoning in light of the rule that expert testimony of causation is required in cases involving complex medical conditions.[13] In *Morgan*, the Texas Supreme Court said "'[l]ay testimony is adequate to prove causation in those cases in which general experience and common sense will enable a layman to determine, with reasonable probability, the causal relationship between the event and the condition.'"[14]

"'Generally, lay testimony establishing a sequence of events which provides a strong, logically traceable connection between the event and the condition is sufficient proof of causation.'"[15]

> The court noted that the record contained lay testimony
>
> about [the victim's] pre-accident physical condition, his activities and other events leading up to the accident, the accident, an investigating police officer's report, and post-accident events including medical treatments. This type of evidence "establishing a sequence of events which provides a strong, logically traceable connection between the event and the condition" could suffice to support a causation finding between the automobile accident and basic physical conditions which (1) are within the common knowledge and experience of laypersons, (2) did not exist before the accident, (3) appeared after and close in time to the accident, and (4) are within the common knowledge and experience of laypersons, caused by automobile accidents. . . . [I]n limited circumstances, the existence and nature of certain basic conditions, proof of a logical sequence of events, and temporal proximity between an occurrence and the conditions can be sufficient to support a jury finding of causation without expert evidence.[16]

Thus, the court held non-expert evidence alone is sufficient to support a finding of causation in certain "limited circumstances where both the occurrence and conditions complained of are such that the general experience and common sense of laypersons are sufficient to evaluate the conditions and whether they were probably caused by the occurrence."[17]

Expert Testimony of Causation Not Necessary Where Limited Possible Causes of Injury

***Williams v. Remington Arms Co., Inc.*, No. Civ. A. 3:05-cv-1383-D, 2008 WL 222496 (N.D. Tex. Jan. 28, 2008)**

In *Williams*, a federal district court applied similar reasoning as *Guevara* outside the medical context. The plaintiff brought a products liability lawsuit against the defendant after a rifle manufactured by defendant discharged, injuring the plaintiff.[18] The plaintiff claimed that after his friend, the owner of the rifle, loaded a round into the rifle chamber, his friend attempted to close the bolt.[19] As he pushed the bolt forward and down, the rifle inadvertently discharged, striking the plaintiff.[20] The plaintiff brought suit alleging that the rifle was defective because it had a propensity to discharge without pulling the trigger.[21] In support of this claim, the plaintiff introduced the testimony of two experts who testified regarding the internal components that caused the rifle to fire.[22] The experts testified that the design of the rifle's firing components was defective because dirt, debris, or manufacturing scrap becoming lodged between the connector and the trigger could cause the rifle to fire without pulling the trigger when it is jarred or the bolt is closed.[23] They also testified that this design defect caused the rifle to fire, injuring the plaintiff.[24]

The defendant did not challenge the design defect opinion, but did bring a *Daubert* challenge seeking to exclude the opinion that this defect caused the plaintiff's injury.[25] The defendant then moved for summary judgment on the basis that, in the absence of this testimony, the plaintiff could not establish causation.[26]

The court denied the defendant's motion for summary judgment, citing *Morgan*, for the proposition that "'[l]ay testimony is adequate to prove causation in those cases in which general experience and common sense will enable a layman to determine, with reasonable probability, the causal relationship between the event and the condition.'"[27] The court stated that, if the jury finds that the rifle's firing mechanism is defectively designed, then absent any other explanation for why the rifle would have discharged on the occasion in question, it fired either because the trigger was pulled or because of the defective design.[28] The jury does not need expert opinion evidence to assist it in deciding whether the trigger was pulled.[29]

The court distinguished the well-known case, *Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131 (Tex. 2004).[30] *Nissan* was a products liability action arising from the unintended acceleration of an automobile.[31] The plaintiff alleged that the automobile's throttle cable was defective.[32] The Texas Supreme Court cited prior cases in which it had held that it was not enough that a vehicle accelerated when the claimants swore they had done nothing.[33] The court noted that it had consistently required competent expert testimony of a defect and objective proof that a defect caused the acceleration, holding that liability cannot be based on unintended acceleration alone, on lay testimony regarding its cause, or on defects not confirmed by actual inspection.[34] The mere occurrence of an unintended acceleration incident *alone* was no evidence that a vehicle was defective.[35]

Unlike in *Nissan*, the plaintiff in *Williams* introduced expert testimony of a defect. Thus, while expert testimony was not needed to show that this defect caused the plaintiff's injury, expert testimony was needed to show a defect existed that could have caused the plaintiff's injury.

Expert Testimony Not Admissible Merely Due to Prior Admission as Expert

***Chan v. Coggins*, No. 07-60792, 2008 WL 4441941 (5th Cir. Oct. 2, 2008)**

A lawyer must not fall into the trap of failing to properly develop the basis for an expert's opinion merely because the expert is well qualified, has previously testified as an expert, or because the theory on which the expert opines has been previously accepted by the courts. The record of each individual case must be developed

properly. If anything, *Chan* should serve as a warning to attorneys not to be complacent in developing the record.

The executor of a pedestrian's estate sued the driver of an 18-wheel tractor trailer and his trucking company for injuries sustained when rear wheels of the tractor trailer ran over the pedestrian while he was panhandling on the median of the road.[36] The plaintiff retained an accident reconstruction expert to testify as to how the pedestrian could have been struck by the tractor trailer without moving himself in front of the truck.[37] He planned to do so primarily through reference to the concept of "off-tracking," which refers to the extent to which the rear wheels of a truck deviate from the path of the front wheels while turning.[38]

The expert reviewed the depositions, the accident report and photographs related to the case.[39] He did not have access to the tractor-trailer, nor did he conduct any tests to reconstruct the events of the accident.[40] In his expert report and in deposition, the expert stated his conclusion that after the victim asked for money, he turned to his left but before he could step away from the truck, he was struck from behind by the truck because the defendant failed to maintain a proper lookout.[41] He acknowledged that he did not have any evidence to rely on that contradicted the defendant's testimony that he watched the victim step away from the vehicle before he started to move the truck forward.[42] He asserted that due to off-tracking, the defendant would have moved the truck to the left as he moved forward in order to correct for the trailer's off-tracking as he turned right.[43]

The district court granted the defendant's motion to strike the expert's testimony on the grounds that the "analytical gap" between the data and the opinion proffered was too great.[44] The plaintiff appealed, relying heavily on the fact that the expert had previously qualified as an expert on tractor trailers and that expert testimony of off-tracking had been admitted in other cases.[45]

The court of appeals held that the district court did not abuse its discretion in excluding the expert.[46] It held that being qualified as an expert in the circumstances of one case does not qualify one as an expert in all future cases.[47] Furthermore, it held that a theory being discussed in other cases is not persuasive on the issue of whether there is a sufficient scientific basis for an expert's opinion in the instant case.[48] The court of appeals stated, "Even if the concept is relevant, it does not necessarily follow that [the expert's] application of the concept to the facts of the case is a proper 'fit.'"

Tamez Decision Not Applied Broadly

***Transcontinental Ins. Co. v. Crump*, —- S.W. 3d —-, 2008 WL 4354708 (Tex. App. – Houston [14th Dist.] Aug. 26, 2008, no pet.)**

When *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572 (Tex. 2006) was decided by the Texas Supreme Court, it was unclear whether the appellate courts would view the decision as narrow and case specific or as a directive from the Texas Supreme Court that the *Robinson* multiple factor gatekeeping analysis must be used in conjunction with the *Gammill* "analytical gap" approach. Though the decision does not even mention *Tamez, Crump* appears to indicate that *Tamez* is narrow in its application.

In *Tamez*, survivors of a petroleum tanker driver who died when his truck burst into flames brought an action against the tanker manufacturer, claiming that diesel fuel from the truck's fuel system was ignited by the truck battery, which then initiated the fire.[49] The plaintiffs designated an expert to address the topic of post-collision, fuel-fed fires.[50] The expert concluded that the truck's battery, which he claimed was improperly located near the fuel tanks, ignited the truck's diesel fuel causing the fire.[51]

The trial court conducted a *Robinson* hearing at which the expert testified and explained his conclusions in general terms.[52] He did not develop his theories with a high degree of specificity and did not rule out other potential sources of the fuel for the fire.[53] Therefore, the trial court determined that the expert had provided insufficient support for his methodology to determine reliability and granted the defendant's motion to exclude the expert.[54]

The Corpus Christi Court of Appeals reversed the trial court's decision, concluding that the expert's opinion was based on the application of "his knowledge, training and experience to the underlying data in the case."[55] Interestingly, the court of appeals expressly rejected the use of *Robinson* factors in favor of the analytical gap test of *Gammill* because the expert's analysis did not involve pure science.[56]

The Texas Supreme Court reversed the decision of the court of appeals and clarified that in *Gammill*, the court "did not mean to imply that the trial court should never consider the *Robinson* factors when evaluating the reliability of expert testimony that is based on knowledge, training or experience, or that the factors can only be applied when evaluating scientific expert testimony."[57] Rather, the specific factors of reliability to be used for the court's gate keeping function depend heavily on the facts of the case and the area of expertise involved.[58] "Thus, a trial court should consider the factors mentioned in *Robinson* when doing so would be helpful in determining reliability of an expert's testimony, regardless of whether the testimony is scientific in nature or experienced-based."[59]

Although *Tamez* could be read to require that use of the analytical gap test by itself is improper, subsequent decisions by the courts of appeals have not interpreted the decision in this manner. For example, in *Crump*, the appellant sought judicial review of an award of worker's compensation death benefits to the appellee.[60] The court of appeals affirmed the trial court's judgment in favor of the appellee and, in doing so, upheld the trial court's ruling on the admissibility of the testimony of appellee's expert.[61] In evaluating the opinion of the expert, the court of appeals considered *only* the "analytical gap" test of *Gammill*:

To evaluate the reliability of [the expert's] causation opinion, appellant asserts we must apply the six factors first adopted by the Texas Supreme Court in *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995). We disagree. . . . Instead of applying the six Robinson factors, in this case, where Dr. Daller's opinion was based on his experience and training in his field, we consider whether there is an "analytical gap" between the expert's opinion and the bases on which the opinion was founded.[62]

The court of appeals went on to find that the expert's opinion did not contain an "analytical gap" between his opinion and the bases on which his opinion was founded.[63]

Conclusion

In the past year, Texas state and federal courts have issued noteworthy decisions regarding the use and admissibility of expert testimony. *Williams* and *Guevara* indicate that lay opinion testimony will be sufficient to establish causation in some complex medical and technical cases. *Chan* serves as a warning to attorneys who wish to rely on precedent and/or the expert's c.v. in lieu of developing a strong factual record. *Crump* appears to indicate that the Texas Supreme Court's 2006 *Tamez* decision may not be applied as broadly as originally thought.

ENDNOTES

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2 *Guevara v. Ferrer*, 247 S.W.3d 662, 664 (Tex. 2007).

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.* at 665.

7 *Id.* at 664-65.

8 *Id.* at 665.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.; see also Leitch v. Hornsby*, 935 S.W.2d 114, 119 (Tex. 1996); *Lenger v. Physician's Gen. Hosp., Inc.*, 455 S.W.2d 703, 706 (Tex. 1970).

14 *Guevara*, 247 S.W.3d at 666 (citing *Morgan*, 675 S.W.2d 729).

15 *Id.*

16 *Id.* at 667.

17 *Id.* at 668.

18 *Williams v. Remington Arms Co., Inc.*, No. Civ. A. 3:05-cv-1383-D, 2008 WL 222496 at *1 (N.D. Tex. Jan. 28, 2008).

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.* at *2.

25 *Id.*

26 *Id.*

27 *Id.* at *3 (citing *Morgan*, 675 S.W.2d at 733).

28 *Id.*

29 *Id.*

30 *Id.* at *6.

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

36 *Chan v. Coggins*, No. 07-60792, 2008 WL 4441941, at *1 (5th Cir. Oct. 2, 2008).

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.* at *2.

45 *Id.* at *3.

46 *Id.*

47 *Id.*

48 *Id.*

49 *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 575-76 (Tex. 2006).

50 *Id.* at 576.

51 *Id.*

52 *Id.* at 580

53 *Id.*

54 *Id.* at 576.

55 *Tamez v. Mack Trucks, Inc.*, 100 S.W.3d 549, 555-56 (Tex. App.—Corpus Christi 2003), *rev'd*, 206 S.W.3d 572 (Tex. 2006).

56 *Id.* at 556.

57 *Tamez*, 206 S.W.3d at 579.

58 *Id.*

59 *Id.*

60 *Transcontinental Ins. Co. v. Crump*, —- S.W. 3d —-, 2008 WL 4354708, at *1 (Tex. App. – Houston [14th Dist.] Aug. 26, 2008, no pet.)

61 *Id.*

62 *Id.* at *6-*7 (citations omitted).

63 *Id.* at *7.

Leslie Sara Hyman

Antitrust Review 2008

By Leslie Sara Hyman[1]

This was a slow year for substantive antitrust decisions in private litigation. Neither the United States Supreme Court nor the Texas Supreme Court decided any antitrust cases. The Fifth Circuit decided four cases, two of which involved challenges to orders of the Federal Trade Commission, and there was one reported decision from the Houston Court of Appeals involving a discovery dispute in a Texas Free Enterprise and Antitrust Act case.

Post Merger Divestiture

Chicago Bridge & Iron Company N.V. v. Federal Trade Commission, 534 F.3d 410 (5th Cir. 2008)

In a 23-page opinion the Fifth Circuit denied review of an order of the Federal Trade Commission requiring Chicago Bridge & Iron Company to divest assets acquired from its principal competitor. Chicago Bridge & Iron designs, engineers, and constructs field-erected storage tanks for liquefied natural gas, liquefied petroleum gas, and liquid atmospheric gases, as well as thermal vacuum chambers for testing aerospace satellites. Chicago Bridge & Iron and its competitor Pitt-Des Moines were, prior to 2001, the dominant suppliers in these four markets in the United States, in fact having a virtual duopoly in the markets.

In late 2000, Chicago Bridge & Iron notified the Federal Trade Commission that it intended to acquire all of Pitt-Des Moines's assets in the four markets. The Commission[2] notified Chicago Bridge & Iron that it had significant antitrust concerns about the acquisition and was conducting an investigation. After four months during which the Commission took no further action to halt the acquisition, the acquisition was consummated. Eight months later, the Commission issued an administrative complaint, charging that the acquisition violated Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. An evidentiary hearing was conducted by an Administrative Law Judge who issued an Initial Decision, concluding that Chicago Bridge & Iron had violated both Acts and ordering a divestiture of the assets. Upon review, the Commission affirmed the ALJ's determination of liability and issued a modified divestiture order. The Commission determined that because Chicago Bridge & Iron and Pitt-Des Moines had been the only competitors in the relevant markets for more than two decades, it was appropriate to measure market concentration with the Herfindahl-Hirshmen Index (HHI) over an extended time frame. Doing so resulted in a prima facie case that that the acquisition violated Section 7 of the Clayton Act and Section 5 of the FTC Act. This prima facie case was supported by qualitative evidence showing that the acquisition left Chicago Bridge & Iron as the only major player in the relevant markets and evidence of high entry barriers. Although Chicago Bridge & Iron pointed to several new entrants into three of the four relevant markets, the Commission determined that the new entrants lacked sufficient experience to compete effectively with Chicago Bridge & Iron and thus were unlikely to constrain Chicago Bridge & Iron in the foreseeable future.

On appeal, Chicago Bridge & Iron challenged the Commission's application of the legal standards for production of evidence and persuasion. Under the applicable burden-shifting framework, the Government is first required to establish a prima facie case that an acquisition is unlawful. The respondent may rebut the prima facie case by casting doubt on whether the Government's case is properly predictive of future anticompetitive effects. The respondent's rebuttal need not rise to the level of ultimately persuading the trier of fact that it is entitled to relief. When the respondent's rebuttal is sufficient, the burden of production shifts back to the Government and merges with the ultimate burden of persuasion. Chicago Bridge & Iron argued that the Commission erroneously subjected Chicago Bridge & Iron to the burden of persuasion in concluding that Chicago Bridge & Iron failed to rebut the government's *prima facie* case. Relying on cases from the Ninth Circuit and Eleventh Circuit holding that the burden-shifting analysis was a flexible framework rather than an air-tight rule, the Fifth Circuit concluded that the Commission need not shift the burden back to the Government if its analysis of the respondent's

rebuttal evidence, in light of the prima facie case, reveals that the respondent failed to rebut the Government's *prima facie* case. The Fifth Circuit further concluded that in determining whether the respondent's burden is met, "the Commission can judge whether the nexus between the rebuttal arguments and the proffered evidence is plausible so as to satisfy the burden of production as a matter of law." Applying these tests, the Fifth Circuit held that the Commission had properly concluded that Chicago Bridge & Iron had failed to satisfy its burden of production on rebuttal, thereby leaving the Government's prima facie case unchallenged.

Chicago Bridge & Iron next argued that the Commission erred in considering only whether there had already been new entrants sufficient to constrain Chicago Bridge & Iron from raising prices when the correct legal standard should have been whether entry would be sufficient to counteract a supracompetitive price increase. The Fifth Circuit rejected this argument, concluding that the Commission both addressed whether existing entry was sufficient to constrain Chicago Bridge & Iron from raising prices and determined, based upon existing entry and historical patterns, whether future entry would be able to counteract the anticompetitive effects of the acquisition. The court also rejected Chicago Bridge & Iron's claim that structural changes in the market rendered the history of actual entry distinguishable from evidence of potential entry, concluding that the Government's substantial evidence of barriers to entry that will continue to exist in the near future went unrebutted by Chicago Bridge & Iron.

Chicago Bridge & Iron further argued that the Commission had not relied on substantial evidence in making its factual findings based upon HHIs regarding probable future competitiveness in the markets, "nearly insurmountable" entry barriers, and alternatives to Chicago Bridge & Iron. The Fifth Circuit rejected each argument. Regarding the Government's use of HHIs, the Fifth Circuit held that while HHIs should be used with caution in markets with sporadic sales, they need not be ignored. Here, the Commission's use of an extended sales period due to the sporadic nature of sales in the relevant markets was appropriate and given the strength of the Government's prima facie case, the HHIs were not the dispositive factor in the Commission's finding a high market concentration. Regarding the evidence of entry barriers, the Fifth Circuit held that while post-acquisition evidence may be helpful in determining the possibility that new entrants would counteract the anticompetitive effects of an acquisition, if that evidence is subject to manipulation, such as by the respondent choosing not to aggressively oppose new entrants, its probative value is properly limited. Moreover, Chicago Bridge & Iron's arguments regarding potential new entrants was insufficient to rebut the Government's substantial evidence of high entry barriers and thus could not rebut the prima facie evidence of the anticompetitive nature of Chicago Bridge & Iron's acquisition. Finally, regarding customers' alternatives to Chicago Bridge & Iron, the Fifth Circuit held that Chicago Bridge & Iron had not produced sufficient evidence to rebut the Government's prima facie case that Chicago Bridge & Iron had successfully used its market power to force even large and sophisticated customers into sole source contracts without any bidding. And even when the "sophisticated customer" evidence is stronger than that proffered by Chicago Bridge & Iron, courts have not considered it independently adequate to rebut a prima facie case.

Chicago Bridge & Iron's final attack on the Commission's order related to the terms of the divestiture order, which required Chicago Bridge & Iron to divest sufficient assets of Pitt-Des Moines to create a competitor capable of competing on an equal footing, including assets unrelated to the construction of the products at issue. Chicago Bridge & Iron argued that those remedial provisions were overbroad and punitive. The Fifth Circuit rejected this attack as well, holding that particularly given the wide latitude granted to the Commission, the ordered divestiture was consistent with the Commission's goal of creating a viable competitor because the assets unrelated to the products at issue would provide a needed revenue stream.

Organizational Horizontal Price Fixing

North Texas Specialty Physicians v. Federal Trade Commission, 528 F.3d 346 (5th Cir. 2008)

The Fifth Circuit affirmed the Federal Trade Commission's conclusion that an organization of independent physicians had engaged in horizontal price-fixing but remanded for modification of the remedial order. The Fifth Circuit concluded that while the Commission's examination of the conduct at issue and its effects was "somewhat abbreviated," it was adequate and its conclusions were supported by substantial evidence.

Plaintiff North Texas Specialty Physicians is an organization of independent physicians and physician groups, including both specialists and primary care physicians, practicing in Tarrant county and surrounding areas. At the time of the FTC proceedings, NTSP's primary business model involved negotiating fee-for-service contracts between its members and payors. As part of that process, NTSP and its physicians executed Physician Participation Agreements, which provide that when NTSP enters into an agreement with a payor to disseminate contract offers, NTSP will send the offers to physicians, who may accept or reject them. NTSP negotiates a contract for the physicians if more than 50% of them agree to accept the offer. While the physicians are expected not to negotiate individually with a payor in negotiations with NTSP, if is not negotiating with a payor or does not have an agreement covering the physician's services, the physician may deal with that payor directly or through participation in other independent physician associations. NTSP sets the minimum fees-for-service acceptable to its physicians by polling them on an annual basis and using that data to calculate the mean, median, and mode of acceptable fees, which

are reported to participating physicians both at the time of calculation and in connection with the following year's solicitation of poll responses.

The FTC issued an administrative complaint, alleging that NTSP restrained competition among its physicians through horizontal price-fixing in violation of the FTC Act, 15 U.S.C. § 45(a). The Administrative Law Judge hearing the complaint found that NTSP's conduct did constitute horizontal price-fixing unrelated to any procompetitive justifications and issued a cease and desist order. Using an "inherently suspect" analysis, the Commission affirmed on appeal, rejecting the argument that NTSP was a sole actor and concluding that NTSP's conduct constituted concerted action among the physicians. The Commission rejected NTSP's proffered procompetitive justifications and entered a cease and desist order requiring NTSP to terminate existing contracts at the payor's request or at the earliest termination or renewal date.

Before the Fifth Circuit, NTSP challenged the Commission's jurisdiction, findings of concerted action, and breadth of the remedial order, and argued that use of the "inherently suspect" analysis was improper. The Fifth Circuit first addressed the jurisdictional challenge, rejecting NTSP's argument that its conduct was not "in or affecting commerce." The Fifth Circuit explained that under Supreme Court precedent, establishing jurisdiction requires an analysis of potential harm from the allegedly illegal agreement, not upon the actual consequences to date of the agreement. The evidence before the Commission included testimony from payors that an increase in costs for health care services in Tarrant county would affect overall insurance costs for national companies whose Tarrant county employees were covered by the contracts in question. The Fifth Circuit concluded that if NTSP's efforts to maintain physicians' fees were successful, the effects would be felt by out-of-state employers and payors. This effect created jurisdiction with the Commission.

The court then considered NTSP's argument that it was a memberless, non-profit corporation and that its actions are thus not the actions of individual physicians. The Fifth Circuit rejected this argument, concluding that the Commission had correctly held that antitrust liability does not depend upon a particular form of business structure and that "NTSP's status as a 'memberless' organization under state law or as an incorporated legal entity does not foreclose a finding of concerted action by the physicians who constitute, use, and control NTSP." Because the member physicians control NTSP through their election of board members and their responses to the polls regarding acceptable fees, the organization was properly considered to be a conspiracy of its members. The court rejected the NTSP's argument that the presence of different specialists on the board who did not compete with each other dictated a different result, concluding that each specialist competed with other NTSP members in the same specialty. Finally, the court agreed with the Commission's conclusion that authorizing the NTSP to take certain action on one's behalf, knowing that one's competitors were doing the same thing, constituted the required concerted action even in the absence of direct communication between the competitors.

The Fifth Circuit next considered the Commission's use of the "inherently suspect" analysis, which the Commission chose to use despite concluding that the conduct in question could be characterized as a per se violation of the antitrust laws. Citing *Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999), the Fifth Circuit explained the Supreme Court's approval of an "abbreviated" or "quick-look" analysis under the rule of reason when an "observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." The Commission's "inherently suspect" analysis was the same as the approved "quick-look" analysis that the Commission had properly tailored to fit the circumstances of the case before it. Such analysis was appropriate because the net anticompetitive effects of the NTSP's conduct were obvious and that the proffered procompetitive justifications could not plausibly result in a net procompetitive effect.

The Fifth Circuit also approved the Commission's conclusion that NTSP's conduct constituted horizontal price-fixing unrelated to any procompetitive activities. Specifically, the NTSP's practice of collecting data regarding minimum acceptable fees and then disseminating the mean, median, and mode of such data; the agreements between NTSP and its members that the members would not negotiate directly with a payor with whom the NTSP was negotiating, thereby delaying or foreclosing an agreement between a member and a payor for a lower fee; the evidence that NTSP actively encouraged members to reject offers below the minimum fees indicated in the polls; and the fact that the NTSP rejected offers that fewer than 50% of its members approved; and other behavior designed to indicate to payors that NTSP members would not negotiate directly with payors all reflected a concerted effort by NTSP physicians to increase their bargaining power that was likely to disrupt the proper functioning of the price-setting mechanism of the market. The Fifth Circuit rejected NTSP's proffered justifications for its behavior, which related to "spillover efficiencies" from NTSP's negotiations of fee-for-patient contracts for its members. The Commission had noted, and the Fifth Circuit agreed, that NTSP failed to address how its alleged efficiencies were dependent on its price-fixing activities. Nor had NTSP explained how its members' professional services were enhanced by the price restraint.

Finally, the Fifth Circuit considered NTSP's challenge to the breadth of the remedial order, which among other things required NTSP to cease and desist from "[e]ntering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any physicians with respect to their provision of physician services . . . to deal, refuse to deal, or

threaten to refuse to deal with any payor." The Fifth Circuit agreed with the ALJ's observation that such a provision "could have the effect of compelling Respondent to messenger contracts or become a party to contracts sent to it by payors, regardless of potential risks to Respondent, its member physicians, and its patients." The Fifth Circuit rejected NTSP's challenges to the portion of the remedial order requiring it to terminate existing contracts, reasoning that because such contracts could be terminated as late as their termination or renewal date, there was no valid concern regarding interruption of health care delivery. The Fifth Circuit also rejected NTSP's challenge to the remedial order on First Amendment grounds, holding that it only addressed speech concerning illegal activities, which is not protected in the commercial context.

Franchises and Tying Allegations

Schlotzsky's, Ltd. v. Sterling Purchasing and National Distribution Co., 520 F.3d 393 (5th Cir. 2008)

The Fifth Circuit affirmed a judgment as a matter of law dismissing a tying claim connected to franchise agreements. Schlotzsky's had sued a food distributor, which was the former non-exclusive supply chain manager for Schlotzsky's branded and proprietary products, for Lanham Act violations. The Distributor counterclaimed alleging that product purchasing agreements between Schlotzsky's and its franchisees setting two approved vendors constituted illegal tying arrangements. At trial, the jury found in favor of Schlotzsky's and the Distributor's counterclaims were dismissed under Federal Rule of Civil Procedure 50.

On appeal, the Distributor argued that Schlotzsky's illegally tied the right to use its trademark to the purchase of specific products, thereby forcing franchisees to purchase both proprietary and non-protected products on terms that they would not otherwise have accepted. Applying the standard set by the United States Supreme Court in *Illinois Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006), that a conclusion that an agreement constitutes unlawful tying "must be supported by proof of power in the relevant market rather than by a mere presumption thereof," the Fifth Circuit held that the arrangements in question did not constitute tying. The franchise agreement between Schlotzsky's and its franchisees permitted Schlotzsky's to require the franchisees' use of a single product distributor. Thus, Schlotzsky's ability to insist that it franchisees use the approved distributors stemmed from contractual power, not market power. The Distributor had also failed to present any evidence that a substantial amount of interstate commerce was affected by the agreements between Schlotzsky's and its franchisees setting two approved distributors. Finally, the distributor-use agreements arose after Schlotzsky's had filed for bankruptcy protection and were, in the Fifth Circuit's opinion, not anti-competitive but instead a benefit to competition by assisting the franchisees to return to profitability. Indeed, after the new distribution agreements were implemented, some franchisees experienced a 20% growth in sales. The Fifth Circuit concluded that "[c]ompetition in the market was improved by the exercise of Schlotzsky's contract power in its small part of the relevant market."

Conspiracy in the Standard Setting Context

Golden Bridge Tech, Inc. v. Motorolla., 547 F.3d 266 (5th Cir. 2008)

The Fifth Circuit held that communications between the members of a standard setting body were not themselves sufficient to establish a conspiracy. Absent other evidence of conspiracy, summary judgment for the defendants was appropriate.

Golden Bridge Technology developed technology for wireless networks that allowed electronic transmission between phones and base stations ("CPCH"). In 1999, a non-profit standard setting organization, Third Generation Partnership Project, included CPCH as an approved optional feature, which means that manufacturers did not have to use CPCH but if they chose to do so, they had to follow the set standard to ensure compatibility with other equipment and networks. Through a series of meetings and email communications starting in 2004, the members of Third Generation Partnership Project discussed simplifying the list of approved technologies. Ultimately, it was determined that CPCH would no longer be an approved optional feature. Although Golden Bridge Technology is a member of Third Generation Partnership Project, it did not attend the meeting at which the membership voted to remove CPCH from the approved technologies list.

Golden Bridge Technology sued, alleging a group boycott and arguing that the email communications between the members of Third Generation Partnership Project demonstrated a conspiracy. The Fifth Circuit first concluded that none of the emails or other evidence before the court showed an explicit understanding between the defendants to collude and unlawfully eliminate CPCH from the standard. Nor was there circumstantial evidence that tended to exclude the possibility that the defendants acted independently. Rather, the evidence indicated only that some of the defendants communicated their dislike of CPCH to each other, and that each defendant hoped CPCH would eventually be removed from the standard. As such, the evidence reflected, at most, an exchange of information followed by parallel conduct and did not refute the likelihood of independent action, particularly given that any standard setting must of necessity exclude some products and the defendants provided evidence that communication between the members of Third Generation Partnership Project was an important part of the standard setting activity. While Golden Bridge Technology proffered several possible motives for the alleged conspiracy, the court concluded that it was not sufficient "to simply propose conceivable motives for conspiratorial conduct; [the] evidence must tend to show that the possibility of independent conduct is *excluded*."

Discovery of Civil Investigatory Demand Materials

In re Memorial Hermann Healthcare System, __ S.W.3d. __, 2008 WL 4542720 (Tex. App.—Houston [14th Dist.] October 9, 2008, orig. proceeding)

The Houston Court of Appeals held that any privilege created by section 15.10(i) of the Texas Free Enterprise and Antitrust Act does not extend to materials provided to the Antitrust Division of the Texas Attorney General's office in response to a civil investigative demand held by the defendant in private antitrust litigation.

Following its quick demise, a hospital sued Memorial Hermann Healthcare System and Memorial Hermann Hospital System ("Memorial Hermann") under the Texas Free Enterprise and Antitrust Act ("TFEAA"), alleging that Memorial Hermann had arranged a boycott that precluded health insurance companies from contracting with the rival hospital. The Texas Attorney General also opened an investigation and served Memorial Hermann with a civil investigative demand ("CID"). In discovery in the litigation, the rival requested that Memorial Hermann produce copies of the roughly 87,000 pages of materials previously provided to the AG in response to the CID. Memorial Hermann argued that roughly 33,000 pages of the materials were privileged from discovery under section 15.10 of the TFEAA, which limits disclosure and use of materials produced in response to a CID. *See* Tex. Bus. & Com. Code § 15.10(i)(1). The trial court rejected the claim of privilege and ordered production.

Memorial Hermann sought a writ of mandamus, which was denied. Turning first to the plain language of the statute, the Houston Court of Appeals concluded that "[r]ead in context, section (i)(1) precludes the attorney general-but nobody else-from disclosing CID materials unless either (1) the producing person consents, or (2) the person seeking to examine the materials obtains a court order permitting access." This conclusion was deemed consistent with the legislative purpose of the statute because Memorial Hermann's position would render "every document produced to the attorney general . . . [unavailable] to a plaintiff who seeks to promote economic competition by enforcing the Act through a private antitrust suit." Finally, the court concluded that its construction of the TFEAA was in harmony with the federal antitrust laws, even though in this case the two schemes were not identical.

ENDNOTES

1 Leslie Hyman is a shareholder in the San Antonio office of Cox Smith Matthews Incorporated, and is the Chair-Elect of the Section.

2 Consistent with the Fifth Circuit's opinion, the term "Commission" refers to the FTC in its adjudicatory function, while the term "Government" refers to the FTC attorneys executing the FTC's investigatory and enforcement functions.

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By Gregory S.C. Huffman

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