NEWS ALERT

On June 20, 2008, the Texas Supreme Court issued two *per curiam* opinions affirming a defendant's right to enforce an arbitration clause and a forum-selection clause.

In *In re Fleetwood Homes of Texas, L.P.*, a mobile home manufacturer and its dealer disputed the manufacturer's right to cancel their contract. Cause No. 06-0943, __ Tex. App. LEXIS __ (Tex. June 20, 2008). Notwithstanding the fact that the contract contained an arbitration clause, the dealer filed suit against the manufacturer in Texas state district court in October 2005. The manufacturer answered the lawsuit and filed a motion to compel arbitration. However, the manufacturer did not immediately set that motion for hearing; rather, it discussed a trial setting with the dealer, served one set of written discovery, and defended several depositions. Eight months after filing its motion, the manufacturer set a hearing on its motion to compel arbitration. The trial court denied the motion. After the court of appeals denied mandamus relief, the manufacturer filed a petition for writ of mandamus with the Texas Supreme Court.

The Texas Supreme Court addressed two issues:

1) whether discussing a potential trial setting and serving written discovery intentionally or impliedly waived the manufacturer's arbitration rights; and

2) whether the arbitration clause was unconscionable because it limited discovery for both parties.

The Supreme Court held that an e-mail discussion of the trial setting was not an express waiver of the manufacturer's right to arbitration because the communication did not rise to the level of an express waiver. The Court did not decide whether express waiver and implied waiver were governed by different rules. The Court then found that, under its previous precedents, the manufacturer's conduct did not rise to the level that would support an implied waiver because there was no showing of any prejudice by the dealer.

The Court held that the arbitration clause was not unconscionable because it provided for streamlined discovery since discovery was limited for both parties. The Court determined that one of the most distinctive features of arbitration was its limited discovery and that accepting the dealer's argument would mean that almost all arbitration agreements would be unconscionable. The Court emphasized that the clause limited discovery for *both* parties. Therefore, the Court granted the manufacturer's petition and compelled arbitration.

The interesting aspect of *In re Fleetwood Homes of Texas, L.P.*, is that the Court left open the issue of what standard to apply to a claim of express waiver – is that claim met by a different standard than implied waiver? Accordingly, the Court left open the door for plaintiffs to assert that the standard for proving a defendant expressly waived an arbitration agreement is less than the standard for implied waiver.

In *In re Lyon Financial Services Inc.*, a Texas imaging company ("MNI") entered into a lease with Lyon for the use of imaging equipment. Cause No. 07-0486, __ Tex. App. LEXIS __ (Tex. June 20, 2008). The lease agreement contained a forum-selection clause that stated that the state and federal courts of Pennsylvania had jurisdiction over all matters arising out of the lease, but that Lyon had the right to file suit in any jurisdiction where MNI, a surety, or the collateral resided or were located. Furthermore, there were three related schedules all incorporating by reference the equipment lease and a subsequent restructuring agreement incorporating the previous lease. The agreements also specified that Pennsylvania law would be used for interpretation. After a dispute arose concerning whether Lyon had improperly charged MNI for equipment, MNI sued Lyon in Texas state district court for usury and unjust

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enrichment. Lyon filed a motion to dismiss and asserted that the forum-selection clause mandated that MNI file suit in Pennsylvania. The trial court denied the motion, and the court of appeals denied Lyon's petition for writ of mandamus.

The Texas Supreme Court first stated that forum-selection clauses are presumptively enforceable. It then addressed MNI's arguments as to why the clause should not be enforced. First, MNI argued that the clause was a product of fraudulent misrepresentations. The Court held that fraudulent inducement to sign an agreement containing a forum-selection clause will not bar enforcement of that provision unless the specific forum-selection clause was the product of fraud or coercion. MNI had an affidavit from its representative that stated that he was misled, and that the forum-selection clause only applied to a schedule that he was not suing upon. The Court determined that this was insufficient because the agreements contained clauses that represented that they were the entire agreements between the parties and that there were no prior representations not contained in the agreements. The Court stated that a party who signs an agreement is presumed to know its contents, and that includes documents specifically incorporated by reference. Further, MNI's representative failed to state that he would not have signed the agreement absent the alleged misrepresentation. The Court found that there was no evidence that the forum-selection clause was secured by a misrepresentation or fraud.

Second, MNI argued that the clause should not be enforced because there was a disparity in bargaining power in that MNI's representative did not have legal advice, had no formal business school training, was not aware of the clause when he signed the agreement, and that the agreements were presented on a take-it-or-leave-it basis. The Court determined that these facts did not show unfairness or overreaching. The Court held that the agreements were not a result of unfair surprise or oppression because the forum-selection clause was in all capital letters. The Court also found that the clause was not unfair simply because the clause allowed Lyon to file suit in Texas or Pennsylvania and required MNI to solely file suit in Pennsylvania because these types of clauses do not require mutuality of obligation so long as adequate consideration is exchanged.

Third, MNI argued that Pennsylvania was an inconvenient forum and that enforcing the provision would produce an unjust result. MNI produced evidence that it was a small business and did not have the ability to pursue claims in Pennsylvania. The Court stated that by entering into the agreements both parties effectively represented to each other that the agreed forum was not so inconvenient that enforcing the clause would deprive either party of their day in court. The Court then held that Pennsylvania is not a "remote alien forum," and that there was no proof that an unjust result would occur in enforcing the clause.

Fourth, MNI argued that it would be unjust to enforce the clause because Pennsylvania does not allow a corporation to sue for usury. The Court held that MNI's inability to assert its usury claim does not create a public policy reason to deny enforcement of the clause. Texas law in an area does not establish public policy that would negate a contractual forum-selection clause, absent a statute requiring suit to be brought in Texas. Further, MNI made no showing that even using Pennsylvania law, that Pennsylvania would not apply Texas law in determining the parties' rights. Therefore, the Court conditionally granted the petition and ordered the trial court to grant the motion to dismiss.

There are several interesting points raised by *In re Lyon Financial Services Inc.* First, the Texas Supreme Court will make it very difficult for a plaintiff to argue that he was defrauded into entering into a forum-selection (or arbitration) clause where the agreement contains language that it is the final agreement and that there are no other representations outside of the agreement. This language is typical in most agreements and seemingly trumps a plaintiff's affidavit evidence to the contrary. Second, the Court seems very unwilling to find that a forum-selection clause is not enforceable simply because the plaintiff did not read it; it is contained in an "adhesion" contract; and/or it would be expensive for the plaintiff to litigate in the forum of choice.

One issue that was completely unaddressed in the opinion is what impact the choice of law clause had on the forum-selection clause. The contract stated that it would be interpreted according to the laws of Pennsylvania, and that presumptively included the forum-selection clause. The Court did not determine whether the forum-selection clause was enforceable under Pennsylvania law, but rather used Texas and federal precedents. The fact is that the parties likely never raised that choice-of-law issue with the Court. Even if they had, the Court may have decided that the choice-of-law clause was narrow and only applied to the "interpretation" of the forum-selection clause, which both parties agreed clearly mandated suit in Pennsylvania. Via the specific choice-of-law clause in this case, the parties did not agree to determine the "enforceability" or "effect" of the agreement under the law of Pennsylvania.