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## **Arbitration Update**

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## **I. Introduction**

We all know the spiel: Arbitration agreements are intended to expedite resolution of disputes that would otherwise be litigated in court. The goal is to achieve a speedy and final resolution in a forum which the parties can select while minimizing fees and costs.

Unfortunately, experience proves those goals are not always met. Appellate decisions in the last couple of years reveal a number of issues that have planted cases designed by agreement to be resolved outside of court right in the soil of trial and appellate courts, requiring their blessing or disapproval of the arbitration process given the circumstances of the case.

In a perfect world, most cases involving a dispute subject to an arbitration agreement would pend in a state or federal court only for a few months and only for purposes of starting the arbitration or validating its outcome. But many arbitrable disputes get held up in the judiciary system for years, for a variety of reasons. This paper provides a thematic overview of both Texas state and federal cases of interest requiring judicial intervention to resolve matters that one or more parties believed should be resolved without the need of a court's intervention.

## **II. Arbitration cases of interest**

### **A. Enforcement of arbitration policies set forth in an employee handbook**

***In re Whataburger Restaurants LLC*, \_\_\_ S.W.3d \_\_\_, No. 21-0165, 2022 WL 1194373 (Tex. Apr. 22, 2022) (orig. proceeding) (“Slip Op.”) (motion for rehearing pending)**

In February 2013, the plaintiff employee sued her employer, Whataburger Restaurants LLC, alleging she was injured while working as a dishwasher two months earlier when a heavy object fell from an upper shelf and hit her on the head. Slip Op. at 2. Whataburger moved to compel arbitration based on a two single-spaced paged arbitration policy contained in the Employee Handbook. In part, the policy stated:

All employees, by accepting employment or by continuing employment after the implementation of this Policy, shall be required to submit any legally recognized claim or dispute related to their employment, including workplace injury ..., to arbitration .... The duty imposed on both [Whataburger] and on employees to arbitrate ... shall continue beyond, and not be affected by, the termination of an employee's employment.... An Employee who chooses to continue employment for at least thirty (30) days after receiving written notice of an amendment or modification of the Policy shall be deemed to have consented.

With respect to amendments, the arbitration policy stated:

[Whataburger] shall have no right, once the facts giving rise to the legally recognized claim or dispute have occurred, to unilaterally amend or modify this Policy or otherwise avoid its obligation to proceed to arbitration if requested to do so in the absence of mutual consent of [Whataburger] and the Employee. Whataburger ... will not alter, modify or amend this Policy without first providing all employees with 30 days advanced written notice.

Slip Op. 2-3.

The plaintiff also signed an Acknowledgement containing the following two provisions, the latter of which the plaintiff also initialed:

**EMPLOYEE HANDBOOK:** I understand that the information provided in the Employee Handbook is intended to be used as a guide only. Its provisions are not conditions of employment and may be modified, revoked, changed or deleted by [Whataburger] at any time with or without notice. Nothing in this manual is intended to create, nor is it to be construed to constitute, a contract between Whataburger and any of its employees. I understand my employment with Whataburger is at-will and terminable-at-will... .

**ARBITRATION:** I understand that [Whataburger] will submit any legally recognized claim or dispute related to employment . . . including workplace injury ... to arbitration and by accepting or continuing employment I shall be required to submit any legally recognized claims or disputes to arbitration.

Slip Op. at 3.

The plaintiff opposed the motion to compel arbitration on multiple grounds, including her position that the policy does not constitute a valid agreement, is substantively and procedurally unconscionable, and is illusory. Slip Op. 3. The trial court agreed with the plaintiff, denying the motion on the ground that the arbitration agreement was unconscionable. With its order, the trial court issued findings of fact and conclusions of law, which the Texas Supreme Court later characterized as “mostly impertinent, personal disparagements of arbitration in general.” Slip Op. at 4.

The court of appeals reversed the trial court’s order, disagreeing with its decision that the arbitration agreement was unconscionable. It also rejected the plaintiff’s remaining arguments except that the arbitration policy is illusory because, at least according to the signed Acknowledgement, Whataburger could revoke it at any time. The court of appeals then remanded the case to the trial court to consider the illusory argument after consideration of the entire Employee Handbook, which was not submitted into the record. The court of appeals opined that “the juxtaposition of the [Policy] within the handbook and

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