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**Compelling Arbitration in the Trial Court**

A motion to compel arbitration is evaluated under a burden-shifting scheme akin to a motion for partial summary judgment, and it is subject to the same evidentiary standards. *In re Jebbia*, 26 S.W.3d 753, 756 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding). The process can be divided into three steps.

- **Step one: The party seeking to compel arbitration must establish the existence of an arbitration agreement and that the claims fall within the agreement.**

First, the party seeking to compel arbitration has the burden to establish that an arbitration agreement exists. *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 (Tex. 1999); *Wachovia Sec., LLC v. Emery*, 186 S.W.3d 107, 113 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding). This requires a showing that the agreement containing the arbitration clause “meets the requirements of general contract law,” such as offer and acceptance, but it does not require the movant to disprove the nonmovant’s potential affirmative defenses. See *In re Advanced PCS Health L.P.*, 172 S.W.3d 603, 606 (Tex. 2005); *USB Fin. Serv., Inc. v. Branton*, 241 S.W.3d 179, 184 (Tex. App.—Fort Worth 2007, no pet. h.). Submission of an authenticated copy of the agreement containing the arbitration clause generally will satisfy this initial burden. *In re H.E. Butt Grocery Co.*, 17 S.W.3d 360, 367 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding). Additional proof may be needed, however, if a party’s right to enforce the agreement is not obvious from the face of the agreement. See *Mohamed v. Auto Nation US Corp.*, 89 S.W.3d 830, 836 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding). For example, a non-signatory to an arbitration agreement should produce evidence that it is entitled to enforce the agreement. *Id.* at 836-38.

Next, the party seeking arbitration must show that the claims in dispute fall within the scope of the arbitration clause. *In re Oakwood Mobile Homes*, 987 S.W.2d at 573; *In re Autotainment Partners*, 183 S.W.3d 532, 534 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding). To determine whether a claim falls within the scope of an arbitration clause, courts look to the language of the clause and the factual allegations of the complaint (as opposed to the legal causes of action asserted). *In re Autotainment Partners*, 183 S.W.3d at 536. A broad arbitration clause, purporting to cover all claims, disputes, and other matters relating to the contract or its breach, creates a presumption of arbitrability. *American Realty Trust, Inc., v. JDN Real Estate-McKinney, L.P.*, 74 S.W.3d 527, 531 (Tex. App.—Dallas 2002, pet. denied). A court should not deny a motion to compel arbitration unless it can be said with positive assurance that the arbitration clause is not susceptible to an interpretation that would cover the dispute. *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 783 (Tex. 2006).

- **Step two: The party opposing arbitration must raise defenses to arbitration.**

Once the party seeking to compel arbitration has satisfied its initial burden, the burden shifts to the opposing party to raise defenses to arbitration. *Emery*, 186 S.W.3d at 113. The party opposing arbitration may attack his opponent’s “case-in-chief” by raising a fact issue on the existence of the arbitration agreement or arguing that the claims do not fall within the scope of the arbitration agreement. *Nabors Drilling USA, LP v. Carpenter*, 198 S.W.3d 240, 246 (Tex. App.—San Antonio 2006, orig. proceeding).

Alternatively, the party opposing arbitration may present evidence supporting an affirmative defense to enforcement of the arbitration clause, such as waiver, duress, unconscionability or fraud. *In re Oakwood Mobile Homes*, 987 S.W.2d at 573. To defeat arbitration, these defenses specifically must relate to the arbitration clause. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001). Under the “separability doctrine,” if the defenses relate to the entire agreement, then they must be adjudicated in arbitration, rather than by the trial court. *American Med. Tech., Inc. v. Miller*, 149 S.W.3d 265, 272 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

If the opposing party does not meet its burden of presenting evidence that would prevent enforcement of the arbitration clause, the trial court must compel arbitration and stay its own proceedings. *In re H.E. Butt Grocery*, 17 S.W.3d at 367.

- **Step three: A hearing is necessary if material fact issues remain.**

An evidentiary hearing is not required in every case, and a trial court may summarily decide whether to compel arbitration based on affidavits, pleadings, discovery, and stipulations. *In re Jim Walter Homes, Inc.*, 207 S.W.3d 888, 896 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding). But if issues of material fact remain as to whether there is an enforceable arbitration agreement, the trial court must promptly allow an evidentiary hearing on the matter. *In re Jebbia*, 26 S.W.3d at 757. Such an evidentiary hearing must be held “summarily.” *Trico Marine Servs., Inc. v. Stewart and Stevenson Technical Servs., Inc.*, 73 S.W.3d 545, 548 (Tex. App.—Houston [1st Dist.] 2002, orig. proceeding). The term “summarily” describes not only the procedure, but the speed with which a court should rule. *In re MHI P’ship Ltd.*, 7 S.W.3d 918, 922 (Tex. App.—Houston [1st Dist.] 1999, orig. proceeding).

Look for an analysis of the reviewability of an order granting or denying a motion to compel arbitration in a future posting.

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