IN THE SUPREME COURT OF TEXAS

NO. 04-1049

IN RE POLY-AMERICA, L.P., IND. AND D/B/A POL-TEX INTERNATIONAL, AND POLY-AMERICA GP, L.L.C., RELATORS

ON PETITION FOR WRIT OF MANDAMUS

Argued January 25, 2006

JUSTICE BRISTER, dissenting.

The hard thing about granting mandamus relief is knowing when to stop. This Court has tried over the years to set mandamus boundaries through various tests, all of which soon generated exceptions, and most of which were met with objections that the "established" boundaries of mandamus were being ignored.

Only two years ago, we held in *In re Palacios* that mandamus review was available for "orders that *deny* arbitration, *but not* orders that *compel* it."[1] We noted that this was a reversal of previous practice,[2] but was necessitated by the Supreme Court's 2000 opinion in *Green Tree Financial Corp. v. Randolph*, which said that orders compelling arbitration "would not be

[1] 221 S.W.3d 564, 566 (Tex. 2006) (emphasis added).

[2] *Id*. at 565 (noting abrogation of *Freis v. Canales*, 877 S.W.2d 283, 284 (Tex. 1994)).

appealable" unless they included final dismissal of the case.[3] Today the Court comes full circle, saying once again that mandamus review of orders compelling arbitration is "proper," though courts should be "hesitant" about it.[4] Apparently, so long as one expresses qualms, *Palacios* is a dead letter.

Of course, firm rules governing mandamus are made to be broken, as issuance of the writ is primarily a matter of judgment and prudence.[5] As the United States Supreme Court said in 2004, mandamus is appropriate if a party shows a clear right, no alternative remedy, and that mandamus is "appropriate under the circumstances."[6] This test (especially the last prong) defies precise application, but years of judicial effort have failed to produce a better one. As a result, reasonable judges will sometimes disagree whether mandamus is "prudent" or "appropriate under the circumstances," and sometimes decide differently in one case than the next. But departing from *Palacios* is neither prudent nor appropriate for at least five reasons.

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[3] 531 U.S. 79, 87 n.2 (2000).

[4] ___ S.W.3d ___, ___.

[5] *See, e.g.*, *CSR Ltd. v. Link*, 925 S.W.2d 591, 597 (Tex. 1996) ("Because of the size and complexity of the asbestos litigation, the most *prudent* use of judicial resources in this case is to permit a preliminary resolution of the fundamental issue of personal jurisdiction by writ of mandamus.") (emphasis added); *In re Dean*, 527 F.3d 391, 396 (5th Cir. 2008) ("The decision whether to grant mandamus is largely prudential."); *In re Atlantic Pipe Corp.*, 304 F.3d 135, 140 (1st Cir. 2002) (concluding mandamus was "prudent under the circumstances"); *In re Chimenti*, 79 F.3d 534, 539 (6th Cir. 1996) (noting availability of interlocutory appeal was merely one of several factors affecting court's "prudential considerations" regarding issuance of mandamus).

[6] *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380–81 (2004) (holding mandamus should issue when there is (1) no other adequate remedy, (2) a "clear and indisputable" right, and (3) "the writ is appropriate under the circumstances").

First, Congress amended the Federal Arbitration Act in 1988 so that it "permits immediate appeal of orders *hostile* to arbitration, . . . but bars appeal of interlocutory orders *favorable* to arbitration."[7] Texas law is to the same effect.[8] As the trial court's order here was favorable to arbitration, we should defer to the cost-benefit analysis already conducted by the federal and state legislatures.[9] We cannot simply substitute mandamus when interlocutory appeal is prohibited without running into serious Supremacy Clause problems;[10] "[f]requent pre-arbitration review would inevitably frustrate Congress's intent to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."[11]

Second, the trial court ordered these parties to arbitration five years ago. Had mandamus proceedings not intervened, this dispute would have long since been concluded. Surely the time and expense incurred arbitrating this case would have been less than that incurred in mandamus review. And now that mandamus review is concluded, the parties must go to arbitration anyway. Given our state's strong public policy favoring freedom of contract,[12] claims that a contract is unconscionable

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[7] *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 86 (2000) (construing 9 U.S.C. § 16) (emphasis added).

[8] *See* TEX. CIV. PRAC. & REM. CODE § 171.098; *In re Palacios*, 221 S.W.3d 564, 566 (Tex. 2006).

[9] *In re McAllen Med. Ctr., Inc.*, ___ S.W.3d ___, ___ (Tex. 2008) ("Although mandamus review is generally a matter within our discretion, our place in a government of separated powers requires us to consider also the priorities of the other branches of Texas government.").

[10] *See* U.S. CONST. art. VI, cl. 2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[11] *Perry Homes v. Cull*, ___ S.W.3d ___, ___ (Tex. 2008) (quoting *Preston v. Ferrer*, ___ U.S. ___, ___ (2008) and *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983)) (internal quotations omitted).

[12] *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 664 (Tex. 2008); *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 649 (Tex. 2007); *Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544, 553 (Tex. 2001).

are asserted far more often than they are sustained. After today's decision, it is hard to see how any arbitration cannot be stopped in its tracks by alleging unconscionability.

Third, today's opinion is purely advisory; if an arbitrator ignores it, there is little we can do. Both federal and state law require courts to enforce an arbitrator's decision, no matter what it is, with very few exceptions.[13] The allowable exceptions concern extrinsic or procedural matters like corruption, fraud, or refusing to hear evidence;[14] they do not include (as the Supreme Court just held) disregarding the law, even if a legal error is "manifest."[15] What is the benefit of mandamus review if the resulting order can be ignored?

Fourth, even if most arbitrators would comply with an appellate court's mandamus rulings, issuing them creates a hybrid procedure unknown to the arbitration acts. As already noted, those statutes commit matters concerning the law and the merits to the arbitrators and foreclose judicial review of the details of the result. This also appears to violate the parties' agreement in this case, which authorized the arbitrator to address unconscionability:

> Should any term of this Agreement be declared illegal, unenforceable, or unconscionable, the remaining terms of the Agreement shall remain in full force and effect. To the extent possible, both Employee and Company desire that the Arbitrator modify the term(s) declared to be illegal, unenforceable, or unconscionable in such a way as to retain the intended meaning of the term(s) as closely as possible.

Telling the arbitrators in advance what legal rulings they should make (as the Court does today) is an improper way to circumvent these restrictions.

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[13] *See* 9 U.S.C. §§ 9–11; TEX. CIV. PRAC. & REM. CODE §§ 171.087–171.088, 171.091.

[14] *Id*.

[15] *Hall St. Assocs., L.L.C. v. Mattel, Inc*., ___ U.S. ___, ___, 128 S.Ct. 1396, 1404 (2008).

Fifth and finally, the Court decides an important question in the abstract that the arbitration may render moot. The Court concedes that unconscionability of the fee-splitting and discovery-limiting clauses should be deferred to the arbitrator. But unconscionability of the remedy-stripping clause is just as fact-based, and just as speculative until all the facts are arbitrated. The fairness of such clauses is not as one-sided as the Court suggests; many employees might actually *prefer* cash for lost wages (and no appellate delays) rather than reinstatement or a long shot at punitive damages. As the Court notes, several courts have held that such "limitations of remedies are permissible."[16] Twice in 2003 the Supreme Court declined to hold that a remedy-stripping arbitration clause violates the FAA — each time deferring the question until after arbitrators had addressed it.[17] We should do the same here.

We have never held (as the Court holds repeatedly today) that an arbitration agreement is invalid unless an employee can "effectively vindicate his statutory rights."[18] We did not say so in *In re Halliburton Co.* (as the Court's citations aver), where that phrase appears only in a parenthetical describing an opinion by an intermediate appellate court in Michigan, an opinion we neither approved nor adopted.[19] Nor does the Court's judgment comply with this new standard.

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[16] ___ S.W.3d at ___.

[17] *See PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 406–07 (2003) (holding that "since we do not know how the arbitrator will construe the remedial limitations" barring treble damages, "the proper course is to compel arbitration"); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 454 (2003) (remanding for arbitrator to determine whether contracts prohibited class arbitration).

[18] ___ S.W.3d at ___, ___, ___, & ___.

[19] 80 S.W.3d 566, 572 (citing *Rembert v. Ryan's Family Steak Houses, Inc.*, 596 N.W.2d 208, 226 (Mich. Ct. App. 1999)).

Despite the remedy limits imposed here, an arbitrator could still award Johnny Luna 50 years of future lost wages, which would certainly seem to "effectively vindicate his statutory rights." Even more than the fee-splitting or discovery-limiting provisions, it is simply too early to tell whether the remedy-stripping provisions will be unfair to Luna at all.

Such an important and controversial question should not be decided in such an offhanded and abstract way. We should instead wait to see whether the arbitration award makes such a decision necessary; "if it is not necessary to decide more, it is necessary not to decide more."[20]

The Court overlooks all these problems on the ground that mandamus "has been broadly applied" by federal courts to review orders compelling arbitration.[21] But the string citations that follow do not support that claim. Of the five cases cited, three predated *Green Tree*,[22] and a fourth did not involve a trial court order favorable to arbitration.[23] The single case granting mandamus relief from an order favorable to arbitration was by the Ninth Circuit, the court widely recognized as the "most hostile,"[24] "far to the left of center,"[25] and "renegade" court in the country in

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[20] *PDK Labs. Inc. v. U.S. D.E.A.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring).

[21] ___ S.W.3d at ___.

[22] *Geourgiou v. Mobil Exploration & Prod. Servs., Inc. US*, 190 F.3d 538 (5th Cir. 1999); *Cofab Inc. v. Phil. Joint Bd., Amalgamated Clothing & Textile Workers Union*, 141 F.3d 105 (3d Cir. 1998); *McDermott Intern., Inc. v. Underwriters at Lloyds Subscribing to Memorandum of Ins. No. 104207*, 981 F.2d 744 (5th Cir. 1993).

[23] *Manion v. Nagin*, 255 F.3d 535, 540 (8th Cir. 2001) (involving injunction to obtain salary payments pending arbitration); *see also Cofab*, 141 F.3d at 110 (involving temporary stay of motion to enforce arbitration award pending NLRB review of related matter).

[24] *See* Adam Borstein, *Arbitrary Enforcement: When Arbitration Agreements Contain Unlawful Provisions*, 39 LOY. L.A. L. REV. 1259, 1275 (2006) ("This combination of finding unconscionability and favoring public policy over enforcement of the FAA has made the Ninth Circuit more hostile towards unlawful arbitration provisions than any other federal circuit."); Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005

employment arbitration cases.[26] Even so, mandamus was granted in that case only because arbitrating the single class representative's case could moot the class action he had brought, wiping it out without appellate review.[27] In short, there is no "broad" consensus for doing precisely the opposite of what Congress and the Texas Legislature intended.

It is certainly true that leaving matters like unconscionability to arbitrators will mean development of the law is "substantially hindered,"[28] but the same could be said of arbitration in *all* cases. It is hard to see the allure of a system in which decision-makers can ignore the law, unless of course one is planning to ignore the law oneself. Based on its popularity, few arbitrators apparently go that far. But even carefully selected judges and jurors make mistakes, and carefully selected arbitrators are surely no less fallible. Nevertheless, these are policy matters that only Congress can address or amend; we cannot disregard the express legislative limits on interlocutory

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J. DISP. RESOL. 61, 91-92 (2005)("[T]he conclusion that California courts—and the Ninth Circuit—are imposing their own biases against arbitration is inescapable."); Steven M. Warshawsky, *Gilmer, the Contractual Exhaustion Doctrine, and Federal Statutory Employment Discrimination Claims*, 19 LAB. LAW. 285, 303 n.180 (2004) ("The Ninth Circuit continues to be hostile to mandatory arbitration agreements."); Dennis R. Nolan, *Employment Arbitration After Circuit City*, 41 BRANDEIS L.J. 853, 890 (2003) ("[D]espite Congress's broad endorsement of arbitration in the FAA and the Supreme Court's repeated confirmation of that policy, many judges (not all of them on the Ninth Circuit) remain deeply skeptical if not openly hostile."); *Hai Jiang, Do We Allow Contract Law to Administer Civil Rights Remedies? Casenote on Haskins v. Prudential Insurance Co.*, 2003 L. REV. MICH. ST. U. DET. C.L. 251, 260 (2003) ("The Ninth Circuit is the most hostile to arbitration of employment discrimination claims among the circuit courts . . . .").

[25] *See* Earl Greene III, Note, *Armendariz v. Foundation Health Psychcare Services, Inc.: The California Supreme Court Searches For a Middle Ground*, 1 J. AM. ARB. 105, 108-09 (2001) ("On a mandatory arbitration agreement enforcement continuum, the Ninth Circuit would be sitting far to the left of center as it seems to be more concerned with protecting the statutory rights of employees than toeing the line with the Supreme Court.")

[26] *See* Jennifer LaFond, Notes, *The Private Enforcement of Public Laws in Armendariz v. Foundation Health Psychcare Servs*., 29 PEPP. L. REV. 401, 414 n.127 (2002) ("The Ninth Circuit is the renegade circuit with respect to . . . [whether] employees can be compelled to arbitrate statutory claims.").

[27] *Douglas v. U.S. Dist. Court*, 495 F.3d 1062, 1068-69 (9th Cir. 2007).

[28] ___ S.W.3d at ___.

review merely by calling it mandamus when we think the questions are important and the issues well-briefed.

While appeal from arbitration awards is very limited, that appeal is an adequate remedy unless the benefits of mandamus outweigh the costs.[29] Considering the costs expended so far, I doubt Johnny Luna would consider them outweighed by getting the right to seek reinstatement in arbitration (which employees rarely request) and punitive damages (which they rarely get). Accordingly, I agree with the Court that the court of appeals erred in reviewing and reversing the trial court's order compelling arbitration. But I disagree that we have any place reviewing those matters either. To that extent, I respectfully dissent.

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Scott Brister
Justice

OPINION DELIVERED: August 29, 2008

[29] *In re BP Products N. Am., Inc.*, 244 S.W.3d 840, 845 (Tex. 2008); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004).