# IN THE SUPREME COURT OF TEXAS

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NO. 07-0665
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IN RE MORGAN STANLEY & CO., INC.,
SUCCESSOR TO MORGAN STANLEY DW, INC., RELATOR

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ON PETITION FOR WRIT OF MANDAMUS
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**Argued October 15, 2008**

JUSTICE MEDINA delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE WAINWRIGHT, JUSTICE GREEN, JUSTICE JOHNSON, and JUSTICE WILLETT joined.

JUSTICE BRISTER filed a concurring opinion.

JUSTICE WILLETT filed a concurring opinion.

JUSTICE HECHT filed a dissenting opinion.

JUSTICE O'NEILL did not participate in the decision.

In this original mandamus proceeding, the relator seeks to compel arbitration in accordance with its agreement in the underlying case. The other putative party to the agreement resists arbitration on the ground that she lacked the mental capacity to assent to the contract. The question here is whether the court or the arbitrator should decide this issue of capacity. The trial court concluded that it was the proper forum. We agree and, accordingly, deny the petition for writ of mandamus.

I

Helen Taylor's estate was worth several million dollars in 1999, the year in which she was diagnosed with dementia. That year, she also transferred several of her securities accounts to Morgan Stanley. Each account agreement with Morgan Stanley included an arbitration clause.[1] Over the next few years, Taylor also signed a durable power of attorney in favor of her granddaughter, Kathryn Albers, and a trust agreement, naming Albers as trustee. During this period, Albers made gifts to her mother, her sister, and herself from Taylor's estate.

In 2004, a Dallas probate court appointed Nathan Griffin as guardian of Taylor's estate. By this time, the value of her estate had been significantly reduced. In May 2005, the guardian sued Taylor's granddaughters and others for violation of the Texas Uniform Fraudulent Transfer Act, civil theft, conversion, and for the imposition of a constructive trust. About a year later, Taylor's guardian added Morgan Stanley as a defendant, asserting breach of fiduciary duty, negligence and malpractice, unsuitability of investments, violations of the Texas Security Act, and breach of contract. Morgan Stanley moved to compel arbitration of the dispute. The guardian resisted the motion, arguing that Taylor lacked the mental capacity to contract when she signed the account agreements with arbitration clauses and that it was for the court, not an arbitrator, to decide this issue of capacity.

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[1] The arbitration provisions in the new account agreements stated:

ARBITRATION OF CONTROVERSIES

> You agree that all controversies between you or your principals or agents and Morgan Stanley Dean Witter or its agents (including affiliated corporations) arising out of or concerning any of your accounts, orders or transactions, or the construction, performance, or breach of this or any other agreement between us ... shall be determined by arbitration only ....

Taylor's guardian also subsequently nonsuited the breach of contract claim.[2] The trial court refused to compel arbitration.

Morgan Stanley petitioned the court of appeals for mandamus relief, but the court also declined to order the matter to arbitration. *In re Morgan Stanley & Co.,* 2007 Tex. App. LEXIS 5582, 2007 WL 2035128 (Tex. App.—Dallas July 17, 2007, orig. proceeding) (mem. op.). Morgan Stanley then petitioned this Court. We set the case for argument to consider whether a court or an arbitrator should determine the issue of mental capacity to contract.

II

The Federal Arbitration Act ("FAA") generally governs arbitration provisions in contracts involving interstate commerce. *See* 9 U.S.C. § 2; *see also In re L & L Kempwood Assocs., L.P.*, 9 S.W.3d 125, 127 (Tex. 1999). Where the FAA ostensibly controls, as it does here, an agreement to

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[2] Although the breach of contract claim has been nonsuited, the doctrine of direct benefits equitable estoppel may apply to compel the arbitration of other claims. A person who has not agreed to arbitrate may nevertheless be compelled to do so when the person "seeks, through the claim, to derive a direct benefit from the contract containing the arbitration provision." *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 741 (Tex. 2005); *see also In re Weekley Homes, L.P.*, 180 S.W.3d 127, 131 (Tex. 2005). Equitable estoppel is inapplicable, however, when the benefit is merely indirect; that is, when the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties, or federal law. *In re Kellogg Brown & Root,* 166 S.W.3d at 740-41; *see, e.g., R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n,* 384 F.3d 157, 162, 164 (4th Cir. 2004) (refusing signatory's request to apply equitable estoppel and compel arbitration against another signatory; the legal duties the signatory builder allegedly violated did not depend on the terms of the contract but arose from the common law and statute and thus signatory resisting arbitration was not seeking a direct benefit of the contract); *Intergen N.V. v. Grina*, 344 F.3d 134, 140, 145 (1st Cir. 2003) (refusing signatory's request to apply equitable estoppel to compel nonsignatory to arbitration because nonsignatory had relied upon misleading and inaccurate extra-contractual assurances and sustained losses; nonsignatory alleged state-law causes of action apart from the contract, including intentional deceit, negligent deceit, unfair trade practices, promissory estoppel, tortious interference with advantageous relations, and quantum meruit); *Westmoreland v. Sadoux*, 299 F.3d 462, 467 (5th Cir. 2002) (refusing nonsignatory's request to apply equitable estoppel to compel signatory to arbitration where that signatory's suit did not rely upon the terms of its shareholder agreement or seek to enforce any duty created by the agreement); *see also Mohamed v. Auto Nation USA Corp.,* 89 S.W.3d 830, 837 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (refusing nonsignatory's request to apply equitable estoppel and compel arbitration where suit against nonsignatory did not rely on employment contract to assert claims for race discrimination, intentional infliction of emotional distress, or negligent hiring, supervision, and retention); *cf. Fridl v. Cook*, 908 S.W.2d 507, 513 (Tex. App.—El Paso 1995, writ dism'd w.o.j.) (refusing to compel arbitration where signatory party resisting arbitration had alleged fraud claim independent of the contract).

arbitrate is valid except on grounds as exist at law or in equity to revoke the contract. 9 U.S.C. § 2. Section 2 of the FAA provides that courts shall compel arbitration on issues subject to an arbitration agreement. *Id.* Section 4 of the FAA provides that a court may consider only issues relating to the making and performance of the agreement to arbitrate. 9 U.S.C. § 4. Thus, once a party seeking to compel arbitration has established that there is a valid agreement to arbitrate and that the plaintiff's claims are within the agreement's scope, the trial court must compel arbitration. *Id.*; *In re Oakwood Mobile Homes, Inc.,* 987 S.W.2d 571, 573 (Tex. 1999) (per curiam).

Before 1967, however, courts often reasoned that any defense that would render the entire contract unenforceable or void was for the court to decide because if the underlying contract was invalid so too was the agreement to arbitrate. *See generally* Katherine V.W. Stone, ARBITRATION LAW at 242 (2003). The United States Supreme Court rejected that reasoning in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.,* 388 U.S. 395, 404 (1967).

The issue in *Prima Paint* was whether the court or an arbitrator should decide a claim of fraud in the inducement of the entire contract. *Id.* at 402. Relying on section 4 of the FAA, the Supreme Court held that a claim of fraud in the inducement of a contract generally, as opposed to the arbitration clause specifically, was for the arbitrator, not the court, to decide. *Id*. at 404 ("a federal court may consider only issues relating to the making and performance of the agreement to arbitrate"). *Prima Paint* thereby established the "separability" doctrine, explaining that an arbitration provision was separable from the rest of a contract under section 4 and that the issue of the contract's validity was to be determined by the arbitrator unless the challenge was to the agreement to arbitrate itself. *Id*. at 402-04.

Since *Prima Paint*, we have dutifully followed the separability doctrine that presumptively favors arbitration. *See Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984) (holding that federal arbitration law created by the FAA applies in state courts). We have held that defenses attacking the validity of a contract as a whole, and not specifically aimed at the agreement to arbitrate, are for the arbitrator, not the court. *See In re RLS Legal Solutions, LLC*, 221 S.W.3d 629, 631-32 (Tex. 2007). But we have also recognized that the presumption favoring arbitration arises only after the party seeking to compel arbitration proves that a valid arbitration agreement exists. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003). We have not, however, previously considered whether the defense of mental incapacity is an attack on the validity of the contract as a whole and therefore a matter for the arbitrator, as Morgan Stanley argues , or a gateway matter concerning the existence of an agreement that must be proven to the satisfaction of the court, as Taylor's guardian argues.

There is some disagreement about what *Prima Paint* requires in this situation. The Fifth Circuit in *Primerica Life Insurance Co. v. Brown*, 304 F.3d 469, 472 (5th Cir. 2002), has concluded that the arbitrator should decide a defense of mental incapacity because it is not a specific challenge to the arbitration clause but rather goes to the entire agreement. The Tenth Circuit reached the opposite result in *Spahr v. Secco*, 330 F.3d 1266 (10th Cir. 2003), concluding that the "mental incapacity defense naturally goes to *both* the entire contract and the specific agreement to arbitrate in the contract." *Id.* at 1273. Thus, under the Tenth Circuit's view, the mental incapacity defense places the "making" of the arbitration agreement at issue under Section 4 of the FAA, giving the court authority to determine whether the parties have actually agreed to arbitration. *Id.* The Supreme

Court has not yet settled this conflict but rather expressly reserved the question in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006).

*Buckeye* concerned the defense of illegality. The plaintiffs there claimed that the defendant's check cashing agreement "violated various Florida lending and consumer-protection laws," and was therefore void and illegal ab initio. *Id*. at 443. Applying Florida law, the Florida Supreme Court agreed that the contract was illegal and void, and refused to compel arbitration. *Id*. at 443, 446. Applying *Prima Paint's* doctrine of separability, the U.S. Supreme Court reversed the Florida Supreme Court. *Id.* at 449.

As it had done in *Prima Paint*, the Supreme Court rejected the notion that the enforceability of the arbitration agreement depended on the distinction between void and voidable contracts. *Id*. at 448. Instead, the Court reiterated three controlling principles of federal arbitration law. First, that an arbitration provision is severable from the remainder of the contract. *Id*. at 445. Second, that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Id*. at 445-46. Third, that federal arbitration law applies in state and federal courts. *Id*. at 446. The Court concluded that because the plaintiffs challenged "the [a]greement, but not specifically its arbitration provisions," the rule of separability applied, and the arbitration provisions were enforceable "apart from the remainder of the contract." *Id*. at 446.

Most importantly to our present case, however, was the distinction the Supreme Court drew between issues of validity and issues of contract formation. The Court noted that an illegality defense, raising the issue of the contract's validity, was different from a formation defense, raising

the issue of whether a contract was ever concluded:

> The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and does not speak to . . . whether the alleged obligor ever signed the contract, *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851 (C.A.11 1992), whether the signor lacked authority to commit the alleged principal, *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (C.A. 3 2000); *Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587 (C.A.7 2001), and whether the signor lacked the mental capacity to assent, *Spahr v. Secco*, 330 F.3d 1266 (C.A.10 2003).

*Id*. at 444 n.1. The Court thus excluded from its analysis several contract-formation-defense issues, including the defense in this case, that the signor lacked the mental capacity to assent.

Although the Supreme Court in *Buckeye* grouped illegality with fraudulent inducement for purposes of *Prima Paint*'s separability doctrine and expressly excluded the issue of mental capacity along with other contract-formation issues from that analysis, the Dissent here concludes that mental capacity is really more like fraudulent inducement, suggesting that the Supreme Court was wrong to include it with the other contract-formation issues. *Compare* ___ S.W.3d at ___ (Hecht, J., dissenting) ("seems to me, lack of capacity is closer to fraudulent inducement"), *with Buckeye*, 546 U.S. at 444, n.1. The Dissent reasons that incapacity is different from the other contract-formation issues distinguished in *Buckeye* because a contract signed by an incapacitated person exists subject to ratification or avoidance by the incapacitated person. ___ S.W.3d at ___. But the Dissent's analysis begs the question of whether a contract exists. As the Fifth Circuit has observed, "where the 'very existence of a contract' containing the relevant arbitration agreement is called into question, the federal courts have authority and responsibility to decide the matter." *Banc One Acceptance Corp. v. Hill,* 367 F.3d 426, 429 (5th Cir. 2004). And, when the issue of mental capacity is raised,

the "very existence of a contract" is at issue. *Id.* Because the Supreme Court has grouped mental capacity with the other issues of contract formation, we do so as well.

III

Several courts have read *Buckeye* to add a third discrete category to the *Prima Paint* analysis, which includes: (1) a challenge to the validity of the contract as a whole, (2) a challenge to the validity of the arbitration provision itself, and (3) a challenge to whether any agreement was ever concluded. *Prima Paint* reserves the first category for the arbitrator and the second category for the court. *Buckeye*, 546 U.S. at 446. Since *Buckeye*, the federal courts,[3] a state supreme court,[4] and other state appellate courts[5] have generally concluded that the third category involves a threshold

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[3] *See Sanford v. Memberworks, Inc.*, 483 F.3d 956, 962-64 (9th Cir. 2007) (holding that challenges to whether a contract was concluded must be determined by the court prior to arbitration); *Krutchik v. Chase Bank USA, N.A.*, 531 F. Supp. 2d 1359, 1363 (S.D. Fla. 2008) (holding that it is for the court to decide where "the initial formation or existence of a contract, including a disputed arbitration clause is legitimately called into question"); *Toledano v. O'Connor*, 501 F. Supp. 2d 127, 140 (D.D.C. 2007) ("[This circuit has not addressed] the propriety of district-court adjudication of challenges to the formation of a contract containing an arbitration provision (as opposed to challenges to the formation of the arbitration provision itself). [But, we have] long treated disputes over the formation of an agreement to arbitrate—i.e., whether the parties ever agreed to submit anything to arbitration in the first place—as properly before the district court.") (internal quotation marks omitted); *Foss v. Circuit City Stores, Inc.*, 477 F. Supp. 2d 230, 234-35 (D. Me. 2007) ("The distinction first articulated in *Prima Paint Corp.* regarding the appropriate role for the court and the arbitrator is not determinative on questions regarding the very formation of a contract. . . . [A] challenge to whether a contract was ever validly concluded is for the court, and not the arbitrator, to decide."); *Larson v. Speetjens*, NO. C 05-3176 SBA, 2006 U.S. Dist. LEXIS 66459, at *11-12, 2006 WL 2567873, at *3 (N.D. Cal. Sept. 5, 2006) ("The Supreme Court has distinguished between three categories of challenges to arbitration provisions . . . . First, if a challenge is to the contract as a whole, it must be decided by the arbitrator. Second, if a challenge is specifically to the arbitration provision, it must be decided by a court. Finally, if a challenge is to a party's signatory power to the contract, it must be decided by a court.") (internal citations omitted); *see also Fox Int'l Relations v. Fiserv Sec., Inc.*, 418 F. Supp. 2d 718, 723-24 (E.D. Pa. 2006) (concluding that "after the Supreme Court's *Buckeye* decision, it appears that there are three categories of challenges to arbitration provisions" and that a challenge to a party's signatory power falls under the third category and thus must be decided by a court).

[4] *Thompson v. Lithia Chrysler Jeep Dodge of Great Falls*, 185 P.3d 332, 338 (Mont. 2008) ("the court is the proper body to hear a challenge to the existence of a contract containing an arbitration provision").

[5] *See Bruni v. Didion*, 73 Cal. Rptr. 3d 395, 406 (Cal. Ct. App. 2008) ("A court, however, still must consider one type of challenge to the overall contract: a claim that the party resisting arbitration never actually agreed to be bound."); *Operis Group, Corp. v. E.I. at Doral, LLC*, 973 So. 2d 485, 488 (Fla. Dist. Ct. App. 2007) ("A challenge to the very existence of any agreement between the parties is thus distinguishable from a challenge to the validity of a

inquiry for the court. Even before *Buckeye*'s comment about contract formation, virtually every court refused to compel arbitration absent the existence of an agreement to arbitrate.[6]

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presumptively existing, signed document."); *Rowe Enters. LLC v. Int'l Sys. & Elecs. Corp.*, 932 So. 2d 537, 538-41 (Fla. Dist. Ct. App. 2006) (stating trial court is required to hold hearing on defendant's motion to compel arbitration when plaintiff's principal claimed that he had never seen document containing arbitration clause, and that his signature on that document had been forged); *Rhymer v. 21st Mortgage Corp.,*No. E006-00742-COA-R3-CV, 2006 Tenn. App. LEXIS 800, at *9, 2006 WL 3731937, at *3 (Tenn. Ct. App. Dec. 19, 2006) (holding that trial court is required to decide mental capacity challenge because federal courts "have generally reasoned that there is a difference between challenging a contract on the basis of a party's status (i.e. mental incapacity) and challenging a contract based on behavior/conduct of a party (i.e. fraudulent inducement)").

[6] *See Banc One Acceptance Corp. v. Hill,* 367 F.3d 426, 429-30 (5th Cir. 2004)(holding that federal courts have the authority and responsibility to decide matters where the challenge concerns the "very existence of a contract" or whether a contract with an arbitration clause was concluded) (internal quotation marks omitted); *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 218 (5th Cir. 2003)(holding that "[w]here the very existence of any agreement is disputed, it is for the courts to decide at the outset whether an agreement was reached"); *Spahr v. Secco*, 330 F.3d 1266, 1268, 1272-73 (10th Cir. 2003) (holding that courts hear a party's challenge to the whole contract based on the claim that the signor did not have mental capacity to sign); *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2001) ("[A]s arbitration depends on a valid contract[,] an argument that the contract does not exist can't logically be resolved by the arbitrator . . . ."); *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 100-01 (3d Cir. 2000) (refusing to compel arbitration where the party seeking arbitration asserted that "the agent who signed the agreement on its behalf lacked authority to do so" because *Prima Paint* presumes an underlying existent agreement); *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 855 (11th Cir. 1992) (stating that *"Prima Paint* has never been extended to require arbitrators to adjudicate a party's contention, supported by substantial evidence, that a contract *never existed at all*"); *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1136-42 (9th Cir. 1991) (refusing to compel arbitration where the plaintiffs claimed individual who signed the agreement lacked the authority to bind the plaintiffs because *Prima Paint* was "limited to challenges seeking to *avoid* or *rescind* a contract" and was inapplicable to "challenges going to the very existence of a contract that a party claims never to have agreed to"); *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 850 F.2d 756, 761 (D.C. Cir. 1988) ("if the parties disagree as to whether they ever entered into any arbitration agreement at all, the court must resolve that dispute") (internal citation omitted); *I.S. Joseph Co. v. Mich. Sugar Co.*, 803 F.2d 396, 400 (8th Cir. 1986) (holding that *Prima Paint* does not apply when a party challenges the whole contract based on the claim that the assignee cannot enforce the contract); *A.T. Massey Coal Co. v. Int'l Union, United Mine Workers of Am.*, 799 F.2d 142, 146 (4th Cir. 1986) (refusing to compel arbitration until district court decided question of existence of a contract to arbitrate); *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 55 (3d Cir. 1980) ("A party may, in an effort to avoid arbitration, contend that it did not intend to enter into the agreement which contained an arbitration clause."); *Interocean Shipping Co. v. Nat'l Shipping & Trading Corp.*, 462 F.2d 673, 676-77 (2d Cir. 1972) (holding that a party's assertion that it never entered into the contract containing the arbitration clause should be decided by the trial court); *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003) (stating that if a "party resists arbitration, the trial court must determine whether a valid agreement to arbitrate exists"); *Am. Med. Techs., Inc. v. Miller*, 149 S.W.3d 265, 270 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding) (stating that when a party seeks to compel arbitration, a trial court must first determine the existence of a valid agreement to arbitrate); *see also Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 53-54 (1st Cir. 2002) (reviewing cases "involving allegations that the contract with the arbitration clause *never* existed"); *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002) (holding that federal policy favoring arbitration does not apply to the determination of whether there is an agreement to arbitrate); *but see Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 472 (5th Cir. 2002) (holding that the *Prima Paint* rule does apply to mental capacity defenses).

The Fifth Circuit's decision in *Primerica*, that the defense of mental incapacity is an issue for the arbitrator, not the court, because it is an attack on the whole contract, stands in stark contrast to these authorities. Moreover, *Primerica* has been roundly criticized,[7] and we aware of no other court that has followed its reasoning, including the Fifth Circuit. Several months after *Primerica*, the Fifth Circuit, in fact, reached a decidedly different result in another case involving the issue of a contract-formation defense to an arbitration clause.

In *Will-Drill Resources, Inc. v. Samson Resources*, *Co.*, 352 F.3d 211 (5th Cir. 2003), Samson resisted arbitration on the grounds that all parties had not signed the agreement containing the arbitration clause. The case involved several sellers of mineral leases. *Id.* at 213. Some of the sellers had agreed to arbitrate any dispute, and some had never signed the underlying contract. *Id.* at 215. The Fifth Circuit concluded that whether the sellers had signed the agreement went directly to the "making" of the agreement and the party's consent to arbitrate. Noting that arbitration could not be forced upon a party "absent its consent," the court wrote:

> [W]here the very existence of an agreement is challenged, ordering arbitration could result in an arbitrator deciding that no agreement was ever formed. Such an outcome would be a statement that the arbitrator *never* had any authority to decide the issue. A presumption that a signed document represents an agreement could lead to this untenable result. We therefore conclude that where a party attacks the very existence of an agreement, as opposed to its continued validity or enforcement, the courts must first resolve that dispute.

352 F.3d at 219 (internal citation omitted). Similarly, we have concluded that whether an arbitration

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[7] *See, e.g.,* Stephen K. Huber, *The Arbitration Jurisprudence of the Fifth Circuit: Round IV*, 39 TEX. TECH L. REV. 463, 476 (2007) (disapproving *Primerica* as not "sensible" for ignoring the distinction between contract defenses and contract formation); Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 15-16 (2003) (criticizing *Primerica* as a "bizarre and inexplicable" misreading of the separability doctrine).

agreement binds a nonsignatory is a gateway matter to be determined by the court, rather than the arbitrator, unless the parties clearly and unmistakably provide otherwise. *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 130 (Tex. 2005); *see also In re Labatt Food Serv.*, *L.P.*, 279 S.W.3d. 640, 643 (Tex. 2009) (when "arbitration agreement is silent about who is to determine whether particular persons are bound by the agreement, courts, rather than the arbitrator, should determine the issue").

When deciding federal questions of first impression, we anticipate how the U.S. Supreme Court would decide the issue. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 658–59 (Tex. 1994). This analysis often draws on the precedents of other federal courts, or state courts, to determine the appropriate answer. Given the overwhelming weight of authority, it is apparent to us that the formation defenses identified in *Buckeye* are matters that go to the very existence of an agreement to arbitrate and, as such, are matters for the court, not the arbitrator. Although the Fifth Circuit reached a different conclusion in *Primerica*, we are not obligated to follow that decision. *See Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) ("While Texas courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court, in determining the appropriate federal rule of decision, they are *obligated* to follow only higher Texas courts and the United States Supreme Court."). Instead, we agree that *Primerica* misapplies *Prima Paint*'s separability doctrine:

> Despite casual assumptions to the contrary, *Prima Paint* does not merely preserve for the courts challenges that are "restricted" or "limited" to "just" the arbitration clause alone—this would be senseless; *it preserves for the courts any claim at all that necessarily calls an agreement to arbitrate into question.* To send a dispute to arbitration where "not only" the arbitration clause itself, but "also," in addition, the "entire" agreement is subject to challenge, is to lose sight of the only important question—which is the existence of a legally enforceable assent to submit to

> arbitration. Someone lacking the requisite mental capacity to contract cannot, I dare say, assent to arbitrate anything at all.

Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 17 (2003). We agree that *Prima Paint* reserves to the court issues like the one here, that the signor lacked the mental capacity to assent. Accordingly, the trial court did not abuse its discretion in declining to yield the question to the arbitrator.

Relator's petition for writ of mandamus is denied.

David M. Medina
Justice

**OPINION DELIVERED:** July 3, 2009