IN THE SUPREME COURT OF TEXAS

NO. 07-0665

IN RE MORGAN STANLEY & CO., INC.,
SUCCESSOR TO MORGAN STANLEY DW, INC., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued October 15, 2008

JUSTICE BRISTER, concurring.

Whether a person can avoid an arbitration clause by claiming she was mentally incompetent raises many difficult problems. As the Court notes, the federal courts cannot even agree whether judges or arbitrators should answer the question. I would not try to guess (as the Court does) how the United States Supreme Court may resolve this difficult issue because equitable estoppel renders it irrelevant in this case.

A person "cannot both have his contract and defeat it too."[1] Even those who had nothing to do with an arbitration agreement are bound by it if they seek to gain the benefits of the larger contract in which it is contained.[2] Accordingly, it is irrelevant whether Helen Taylor was mentally

[1] *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 135 (Tex. 2005).

[2] *Id.* at 131; *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 755 (Tex. 2001).

incompetent; even if she was, she is still bound to arbitrate because her legal guardian's suit depends entirely on account agreements that contain arbitration clauses.

Every claim Taylor asserts against Morgan Stanley (breach of fiduciary duty, negligence, malpractice, and violations of securities law) has no basis unless Morgan Stanley was her broker. Every legal duty Morgan Stanley owed Taylor arises from the account agreements. Because Taylor's guardian insists that Morgan Stanley violated duties it owed her as a client, he cannot "turn [his] back on the portions of the contract, such as an arbitration clause, that [he] finds distasteful."[3]

It is true that in response to the motion to compel arbitration, Taylor's guardian asserted for the first time that *all* her agreements with Morgan Stanley were unenforceable, not just the arbitration clauses. But that is not what her pleadings said either before or after the hearing. The only declaratory judgment she sought in her First Amended Petition is "that any and all *arbitration* agreements entered into by or on behalf of Helen Taylor are void and not enforceable." She did not seek rescission, which is her only remedy if the entire account agreements are invalid due to incompetence.[4] To the contrary, she seeks exemplary damages, statutory damages, and attorney's fees — relief not available with equitable remedies like rescission.

The question whether mental competence is an issue for courts or arbitrators is not as "straightforward" as JUSTICE WILLETT suggests. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, the United States Supreme Court held that a fraudulent inducement claim

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[3] *Weekley*, 180 S.W.3d at 135 (internal punctuation omitted) (citing *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001)).

[4] *See, e.g.*, *Oram v. Gen. Am. Oil Co. of Tex.*, 513 S.W.2d 533, 534 (Tex. 1974).

specifically directed at an arbitration clause is "an issue which goes to the 'making' of the agreement to arbitrate."[5] In *Buckeye Check Cashing, Inc. v. Cardegna*, the Court affirmed *Prima Paint*, describing it as a case involving a contract's validity rather than contract formation.[6] Because both contract formation and validity fall within "the making of the agreement for arbitration" in section 4 of the Federal Arbitration Act,[7] that section alone gives no definitive answer. For better or worse, there has been so much "judicial parsing or sprucing" in this area that there is no easy answer.

As the arbitration clauses here were embedded in each Morgan Stanley contract, Taylor cannot possibly have been incompetent as to one part but competent as to the rest. As her suit clearly relies on the contracts as a whole, she should have to comply with the arbitration clauses too.

I concede that Morgan Stanley did not assert direct-benefits estoppel in the trial court or on appeal. But of course nothing prevents it from doing so now. Arbitration can be waived by substantial litigation conduct, but there is a strong presumption against waiver and we have never suggested it occurs by initially asserting the wrong grounds.[8] As this case can be decided on clear estoppel lines rather than the murkier line between contract formation and contract validity, I would

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[5] 388 U.S. 395, 403-04 (1967)("Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it.").

[6] 546 U.S. 440, 445-46 (2006).

[7] *See id.* at 444 n.1.

[8] *See Perry Homes v. Cull*, 258 S.W.3d 580, 590 (Tex. 2008).

not hazard a guess that we may have to retract later. Instead, I would deny the petition and remand to the district court for reconsideration.

Scott Brister
Justice

OPINION DELIVERED: July 3, 2009