The Arbitration Newsletter

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas, to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]

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"GAMING THE SYSTEM" DOES NOT SUBSTANTIALLY INVOKE THE JUDICIAL PROCESS

Henry v. Cash Biz, LP, 2018 Tex. LEXIS 164 (Tex. February 23, 2018)

Hiawatha Henry, Addie Harris, Montray Norris, and Roosevelt Coleman, Jr. (referred to as "the Borrowing Parties") received payday loans from Cash Biz.[2] Each of the Borrowing Parties gave Cash Biz post-dated checks, and signed arbitration agreements that contained a class-action waiver.[3]

Cash Biz tried to cash the post-dated checks after the Borrowing Parties defaulted, but the checks bounced.[4] The district attorney filed criminal charges against the Borrowing Parties after receiving information from Cash Biz about the worthless checks.[5] The Borrowing Parties filed a class action lawsuit against Cash Biz for "malicious prosecution, fraud, violation of the DTPA, and violation of Finance Code Section 393.301."[6]

The trial court held that the dispute fell outside the scope of the arbitration agreement because the Borrowing Parties' "allegations related solely to Cash Biz's use of the criminal justice system."[7] Additionally, the trial court determined that Cash Biz "waived its right to arbitration by substantially invoking the judicial process when it filed criminal charges against Plaintiffs,

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[1] Nothing in The Arbitration Newsletter is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of The Arbitration Newsletter is to inform generally. The application of the comments in The Arbitration Newsletter to specific questions and cases should be discussed with the reader's independent legal counsel. My thanks to Aimee Kline, a third-year law student at Texas A&M University School of Law, for her research and drafting assistance.

[2] Cash Biz, LP v. Henry, No. 04-15-00469-CV, 2016 Tex. App. LEXIS 7921, *5 (Tex. App.—San Antonio July 27, 2016) (mem. op.), *aff'd, Henry v. Cash Biz, LP*, No. 16-0854, 2018 Tex. LEXIS 164 (Tex. February 23, 2018).

[3] *Id.* at *3-5.

[4] *Id.* at *5.

[5] *Id.* at *5-6.

[6] *Id.* at *8.

[7] *Id.* at *8-9.

participated in criminal trials, obtained criminal judgements, and attempted to collect from Plaintiffs."[8]

The San Antonio Court of Appeals reversed.[9] The court of appeals held that the dispute fell within the scope of the arbitration agreement.[10] The arbitration agreement contained a "very broad definition of dispute[,]" and "the facts alleged in support of the asserted causes of action have a significant relationship to and are factually intertwined with the underlying Loan Contracts."[11] Cash Biz did not substantially invoke the judicial process because: (1) courts normally consider a party's actions after the underlying suit is filed rather than the party's actions before the underlying suit is filed; and (2) Cash Biz did not play an active role in the criminal prosecution.[12] The appeals court also upheld the class action waiver.[13]

The Texas Supreme Court affirmed.[14] The Borrowing Parties' claims were within the scope of the arbitration agreement because (1) state and federal policy favor arbitration;[15] (2) the scope of the arbitration agreement was very broad;[16] and (3) the Borrowing Parties' claims were "at least indirectly related to the contracts the Borrowers signed obligating them to repay the loans."[17]

Additionally, the Borrowing Parties did not prove that Cash Biz substantially invoked the judicial process.[18] The only evidence that the Borrowing Parties provided was that Cash Biz was the complainant in the criminal proceedings.[19] Cash Biz only provided information to the district attorney.[20]

The court recognized that its decision in this case is not in accord with *Vine v. PLS Financial Services*.[21] In that case, the Fifth Circuit, faced with very similar facts, held a lender substantially invoked the judicial process by filing worthless check affidavits.[22] The Texas Supreme Court noted this inconsistency, cited the *Vine* dissent, and held that even though some lenders may be "gaming the system . . . more is required for waiver of a contractual right to arbitrate."[23]

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[8] *Id.* at *9 (internal quotation marks omitted).
[9] *Id.* at *24.
[10] *Id.* at *14-15.
[11] *Id.* at *13-14.
[12] *Id.* at *21-23.
[13] *Id.* at *24-25.
[14] *Henry v. Cash Biz, LP*, No. 16-0854, 2018 Tex. LEXIS 164, *2 (Tex. February 23, 2018).
[15] *Id.* at *8-9.
[16] *Id.* at *9.
[17] *Id.* at *10.
[18] *Id.* at *15.
[19] *Id.* at *14-15.
[20] *Id.* at *16.
[21] *Id.* at *17.
[22] *Id.*; *see Vine v. PLS Financial Services*, Inc., 689 F. App'x 800, 801 (5th Cir. 2017).
[23] *Henry v. Cash Biz, LP*, 2018 Tex. LEXIS at *18.

OBSERVATIONS

1. The scope of the arbitration clause requires careful drafting.

2. The drafter of the arbitration clause should consider and describe all the kinds of disputes the parties agree to arbitrate.

3. Do the parties want to empower the arbitrator to consolidate separate arbitrations? If so, say so!

4. Do the parties want to delegate all the threshold, gatekeeper, arbitrability questions to the arbitrator? If so, delegate clearly and unmistakably to the arbitrator.

5. The short arbitration clauses, once favored and recommended, create many unanswered questions about the arbitration process.

6. The longer, more complex arbitration clauses may limit needed flexibility in the process and make the process less efficient.