

IN RE CITIGROUP GLOBAL MARKETS, INC.: SUPREME COURT OF TEXAS HOLDS ARBITRATION WAS NOT WAIVED AND CONDITIONALLY GRANTS WRIT OF MANDAMUS

By Sarah Klebo* and Isaac Villarreal**

In a recent decision on a petition for a writ of mandamus, the Supreme Court of Texas held an investment company's actions were not sufficient to constitute a waiver of arbitration (expressly or impliedly) and contracts with the investment company's predecessor bound investors to arbitrate with the investment company. As a result, the court conditionally granted a writ of mandamus and directed the trial court to compel arbitration.¹

Robert and Natalie Nickell ("the Nickells") filed suit against Citigroup Global Markets, Inc. ("Citigroup"), a successor of Salomon Smith Barney, Inc., alleging fraud, breach of fiduciary duty, negligence, and violation of the state securities act.² The Nickells alleged they invested in WorldCom Inc. based upon reports provided by a Citigroup analyst and as a result lost more than \$4 million.³

Citigroup immediately removed the case to federal court based upon its relation to WorldCom Inc.'s bankruptcy proceedings.⁴ The Nickells subsequently moved to remand the case, while Citigroup moved to transfer the case to a federal multidistrict litigation court ("MDL") in New York that was managing similar WorldCom-related suits against Citigroup. Citigroup asked the federal court to stay the proceedings pending the MDL panel's decision, specifically reserving its defense "that Plaintiffs arbitrate, not litigate, their claims."⁵

The MDL panel conditionally transferred the case to the MDL court.⁶ The Nickells requested that the MDL panel vacate the transfer order.⁷ The panel denied the request before transferring the case.⁸ Once in the MDL court, a stay was ordered effectively excusing Citigroup from filing an answer or pleading any defenses. Once again, the Nickells moved to remand the case to state court, at which point Citigroup agreed.⁹ After a seven-month jurisdictional battle, the case was remanded to state court.¹⁰

Once the case was back in state court, Citigroup simultaneously filed an original answer and moved to compel arbitration.¹¹ The state trial court denied the motion to compel arbitration, and Citigroup filed a petition for writ of mandamus and an interlocutory appeal.

The court of appeals denied the writ and dismissed the appeal because it believed Citigroup waived arbitration by making statements in its filed motions indicating its intention to litigate.¹² Both parties agreed the Federal Arbitration Act applied to this case.¹³

As a basis for its decision, the court of appeals set forth the well-known rules that a party "waives an arbitration clause by substantially invoking the judicial process to the other party's detriment,"¹⁴ that waiver was a legal question for the trial court based on the totality of the circumstances, requiring a court to decide whether a party has substantially invoked the judicial process to an opponent's detriment,¹⁵ and that detriment means inherent unfairness caused by "a party's attempt to have it both ways by switching between litigation and arbitration to its own advantage."¹⁶

Upon considering the applicable facts, the court of appeals held that Citigroup expressly waived arbitration, not by its conduct transferring the case to the federal and MDL courts, but by statements in those motions to transfer that suggested it was doing so for the purposes of litigation, not arbitration.¹⁷

The Supreme Court of Texas agreed with the legal principles stated by the court of appeals, but contrary to the court of appeals, held that Citigroup never opposed arbitration and did not expressly waive its arbitration rights. The supreme court held that Citigroup had reserved its right to request arbitration early on and informed the Nickells of the reservation.¹⁸ Specifically, the latter court noted that Citigroup's statements in the various transfer pleadings about the case's similarity to others already transferred, the potential savings associated with consolidated discovery, and the potential convenience of parties and witnesses in consolidated proceedings were merely required by statute to justify transfer to the MDL court.¹⁹ The court further opined that Citigroup's statements about how much discovery could be avoided if the case was transferred to the MDL reflected an effort to avoid litigation rather than duplicate it.²⁰

Additionally, in response to the Nickells' argument that a transfer to an MDL court was inconsistent with seeking arbi-

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tration, the supreme court explained that arbitration is possible for consolidated actions as well as individual ones.²¹ The court reasoned that because courts can issue inconsistent orders on arbitration just as they can on discovery or other matters that MDL courts are designed to coordinate, Citigroup's transfer to the MDL court did not indicate it had abandoned arbitration.²² As such, the high court held that Citigroup did not expressly waive or object to arbitration.

The ultimate question for the court was whether Citigroup impliedly waived arbitration. In answering that issue, the court noted that Citigroup's actions and statements associated with the transfer to the MDL court clearly were factors to be considered in the totality of the circumstances test provided by the *Perry Homes* case.²³ However, the court held those actions and statements could not be taken out of the context in which they were made or taken independently from the remainder of Citigroup's litigation conduct.²⁴

Citigroup's actual litigation conduct was limited to jurisdictional transfers and not the merits, as evidenced by the lack of any discovery requests or responses, filing of motions (or even an answer) relating to the merits of the case before seeking arbitration. Moreover, Citigroup engaged in no litigation conduct other than transferring the case to the MDL court. The supreme court, therefore, held that Citigroup's statements about what discovery might be saved in the MDL court were simply not enough to show a substantial invocation of the judicial process.²⁵

Finally, in response to the Nickells' argument that their contracts bound them to arbitration with Citigroup's predecessors but not Citigroup, the court explained that each contract specifically provided it would "inure to the benefit of Smith Barney's present organization, and any successor organizations or assigns" and, therefore, because Citigroup had established it was a successor organization to Smith Barney, the Nickells were bound by the arbitration clauses with Citigroup.



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ENDNOTES

¹ *In re Citigroup Global Markets, Inc.*, 258 S.W.3d 623 (Tex. 2008) (per curiam).

² *Id.* at 625.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* (citing *Perry Homes v. Cull*, 258 S.W.3d 580, 589-90 (Tex.2007)).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 626.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* (citing *In re Serv. Corp. Int'l*, 85 S.W.3d 171, 175 (Tex. 2002) ("Realtor's efforts in moving to dismiss and staying discovery were to avoid litigation, not participate in it.")).

²¹ *Id.* at 626 (citing *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003)).

²² *Id.*

²³ *Id.*²⁴ *Id.* (citing *Perry Homes v. Cull*, 258 S.W.3d 580, 590-92 (Tex. 2007)).

²⁵ *Id.*

IN RE FLEETWOOD HOMES OF TEXAS, L.P.: TEXAS
SUPREME COURT RULES IN FAVOR OF PARTY
SEEKING TO ENFORCE ARBITRATION
AGREEMENT, DESPITE ASSERTIONS OF IMPLIED
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ENDNOTES

¹ 257 S.W.3d 692 (Tex. 2008).

² *Id.* at 694-95.

³ *Id.* at 693-94.

⁴ *Id.* at 693.

⁵ *Id.* at 693-94.

⁶ *Id.* at 693.

⁷ 258 S.W. 3d 580 (Tex. 2008).

⁸ *Fleetwood Homes*, 257 S.W.3d at 694 (quoting *Perry Homes*, 258 S.W.3d at 597).

⁹ 934 S.W.2d 87, 90 (Tex. 1996).

¹⁰ *Id.*

¹¹ *In re Fleetwood Homes of Texas, L.P.* 257 S.W.2d at 694.

¹² *Id.* at 695.

¹³ *Id.* (citing *In re Palm Harbor Homes, Inc.* 195 S.W.3d 672, 678 (Tex. 2006)).

¹⁴ *Id.*

¹⁵ *Id.*