

## KT Client Success

# Texas Supreme Court Victory

On February 23, the Texas Supreme Court unanimously affirmed a split decision from the Fourth Court of Appeals sitting in San Antonio in a case of first impression in Texas state courts related to the application of the waiver and prejudice defense to the enforcement of contractual arbitration and class-action waiver provisions under the Federal Arbitration Act (FAA). *Henry v. Cash Biz, LP*, Cause No. 16-0854, \_\_\_ S.W.3d \_\_\_ (Tex., February 23, 2018). The winning party, Cash Biz, L.P. (Cash Biz), was represented by **Pat Gaas**, **Sam Arora**, and **Ed Hubbard** in our Houston office.

The suit was filed in state court in San Antonio by borrowers who had received short-term loans facilitated by a registered credit service organization, Cash Biz, often referred to as “payday loan” transactions. To secure such loans, borrowers provided post-dated checks to Cash Biz to be used to pay the loans upon their maturity if timely payment was not received from the borrower. When the plaintiff borrowers failed to pay their loans upon maturity, Cash Biz presented the checks, which were dishonored. The borrowers alleged that Cash Biz engaged in improper debt collection practices when, after the checks were dishonored, Cash Biz provided local district attorneys with information related to the borrowers, the checks, and the bank accounts, which led to investigations and criminal charges in certain cases. Based on this allegation, the borrowers brought statutory and common-law claims against Cash Biz for damages arising from the borrowers’ involvement in the criminal justice system, and they sought class-action certification under Texas law.

Cash Biz responded to the civil suit by moving under the FAA to enforce the broad-form arbitration and enforce the class-action waiver provisions contained in the loan contracts with the borrowers. The borrowers responded by claiming that their claims fell outside the scope of the provision, and that Cash Biz waived its right to enforce the provision when it became the “complainant” to local district attorneys.

## 5 Takeaways

1. The Federal Arbitration Act generally governs arbitration provisions in contracts involving interstate commerce, and the presumption in favor of arbitration “is so compelling that a court should not deny arbitration ‘*unless it can be said with positive assurance*’ that an arbitration clause is *not* susceptible of an interpretation which would cover the dispute at issue.”
2. With broad-form arbitration clauses, even if a borrower’s claims are not for breach of any specific obligation under the contract subject to the arbitration provision, a plaintiff’s claims fall within the scope of arbitration if they are related at least indirectly to those contracts.
3. As to whether a party waives its right to arbitrate by substantially invoking the judicial process, Texas courts look to the conduct of the parties to determine whether such conduct is inconsistent with its right to compel arbitration.
4. A party’s conduct of providing information of criminal conduct to the district attorney in a parallel criminal matter is nothing more than initiating litigation and does not amount to a substantial invocation of the judicial process or a waiver of the right to arbitrate.
5. While recognizing it is important to harmonize federal and state law, the Texas Supreme Court is not bound by a conflicting opinion in the federal Fifth Circuit.

The trial court denied Cash Biz’s motion, finding that the dispute was outside the scope of the broad-form provision, and that the plaintiffs’ allegations in their pleadings showed that Cash Biz had become so deeply involved in the criminal process that it had waived its right to arbitrate with the borrowers.

The issue of first impression in Texas under the FAA was whether, and to what extent, involvement in a criminal investigation or proceeding could waive the right to later arbitrate a separate civil proceeding. In a split-decision, the intermediate Fourth Court of Appeals reversed the trial court and found that the broad-form provision covered the dispute, and that the only legally sufficient evidence of waiver was Cash Biz’s uncontested status as the “complainant,” which was analogous to filing an initial civil pleading and such action does not waive the right to arbitrate. In another split decision, the full appellate court denied review en banc.

The Texas Supreme Court unanimously affirmed the decision and reasoning of the appellate court, and refused to follow a recent federal appellate decision obtained by another group of borrowers represented by the same plaintiffs’ counsel, which raised similar allegations against another credit service organization and had relied on the dissent against Cash Biz in the Fourth Court of Appeals to deny enforcement of a similar arbitration provision.

Pat Gaas and Sam Arora were litigation counsel for Cash Biz, while Ed Hubbard was the primary appellate counsel who argued the case to both appellate courts with critical assistance from Sam. This win followed another victory before the Texas Supreme Court in 2015 in the leading case on the standard for enforcing arbitration provisions under Texas law, for which Ed also was the primary appellate counsel for the winning party. See *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502 (Tex. 2015). The *Leach* decision was heavily cited by the Court in reaching its decision for Cash Biz.