



The Weekly Update of Texas Insurance News  
**TEXAS INSURANCE LAW NEWSBRIEF**



[www.mdjwlaw.com](http://www.mdjwlaw.com)

A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.

Principal Office 808 Travis, Suite 1800 Houston, Texas 77002 713.632.1700 FAX 713.222.0101  
111 Congress Avenue, Suite 1070 Austin, Texas 78701 512.610.4400 FAX 512.610.4401  
900 Jackson Street, Suite 710 Dallas, Texas 75202 214.420.5500 FAX 214.420.5501

October 1, 2007

**APPELLATE COURT HOLDS THAT ARBITRATION AGREEMENT  
PROVISION TO APPEAL AN ARBITRATION AWARD WAS VALID**

Last week the Dallas Court of Appeals conditionally granted a petition for writ of mandamus holding a trial judge clearly abused her discretion in striking the appeals provision from the parties' arbitration agreement and staying the appellate arbitration proceedings. In *In re Hospitality Employment Group, L.L.C.*, 2007 WL 2757797 (Tex. App.—Dallas September 24, 2007), the court analyzed the unopposed arbitration proceedings emanating from a lawsuit filed by an injured employee. The employer initiated arbitration, which was governed by the Federal Arbitration Act ("FAA"), after the lawsuit was filed. The trial court ordered the parties to arbitration which resulted in an award in excess of \$600,000 in favor of the employee.

In accordance with the arbitration agreement, the employer filed a notice of appeal to the American Arbitration Association. In response, the employee filed a motion to dismiss the appeal. She also filed a motion for partial summary judgment in the trial court requesting a declaratory finding that the appellate provision was unconscionable. The trial court granted the employee's motion for partial summary judgment.

The Court of Appeals first reviewed well-settled procedure for challenging the submission of a claim to arbitration. Here, the employee did not oppose the employer's motion to compel arbitration. Further, the trial judge explicitly found that the arbitration agreement was valid and enforceable. The employee participated fully in the arbitration process, but waited until the appeals notice before asserting her unconscionability defense. Relying in part on an opinion issued by the 5th Circuit, the court held that the employee should have challenged the provision prior to participating in the arbitration proceedings. As a result, the appellate court directed the trial court to vacate the order granting the employee's motion for partial summary judgment.

**TEXAS SUPREME COURT RULES THAT INSURANCE CODE DOES NOT  
CREATE A GENERAL FIDUCIARY DUTY APPLICABLE TO THIRD-PARTY  
ADMINISTRATORS, RATHER A DUTY, IF ANY, IS ESTABLISHED BY  
CONTRACT**

Last Friday, the Texas Supreme Court held that the Texas Insurance Code does not create a general fiduciary duty applicable to third-party administrators; instead a fiduciary duty, if any, is governed by

an agreement between the parties. In *National Plan Administrators, Inc. v. Nat. Health Ins. Co.*, 2007 WL 2811130 (Tex. September 28, 2007), the Court addressed the duties that arose between an insurance carrier (National Health) and its independent contractor (NPA) pursuant to the Insurance Code and their agreement. In essence, NPA was hired by National Health to market and administer its cancer policies. Notably, NPA did not have an exclusive relationship with National Health to market and administer only its insurance policies.

Several years after the parties' original agreement was executed, National Health informed NPA that it intended to discontinue underwriting NPA marketed cancer policies. National health, however, offered NPA ninety days to find a buyer for the National Health policies allowing NPA to continue as the administrator. NPA approached Hartford about purchasing National Health's entire cancer policy business. To evaluate the offer, NPA sent Hartford sensitive information related to National Health's policyholders and premiums. Hartford declined to purchase National Health's entire book of cancer policies, but agreed to offer replacement policies to National Health insureds based on certain criteria. Ultimately, most National Health policies were replaced by Hartford policies. National Health then sued NPA (and Hartford) for, among other claims, breach of contract, breach of fiduciary duty, and fraud. A jury returned a verdict in favor of National Health for \$744,937 and an additional \$100,000 in punitive damages. NPA filed a petition for review and argued that it did not have a general fiduciary duty under the Insurance Code or its agreement with National Health.

In reaching its decision the court reviewed Texas law related to fiduciary duty and the statutory duties created under the Texas Insurance Code. The Texas Supreme Court disagreed with the appellate court that the scope of the Texas Insurance Code and the agreement between the parties gave rise to a general fiduciary duty. Next, the Court analyzed common law and concluded that a fiduciary duty arises by agreement. In this case, the agreement did not provide that NPA would generally act on National Health's behalf in all matters connected with their relationship. In conclusion, the court declined to impose a general fiduciary duty on NPA when the parties expressly agreed that NPA could take actions that would be in violation of such a duty. The Court reversed the judgment of the court of appeals and rendered judgment that National Health take nothing from NPA.

If you wish to discuss legal principles mentioned herein, reply to this e-mail or contact any of our lawyers at Martin, Disiere, Jefferson & Wisdom L.L.P.  
If you would prefer to receive this *Newsbrief* by fax rather than e-mail, or wish to unsubscribe, please reply to this e-mail with your request  
For past copies of the *Newsbrief* go to [www.mdjwlaw.com](http://www.mdjwlaw.com) and click on our Texas Insurance News page.