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BRAZOS COUNTY, TEXAS

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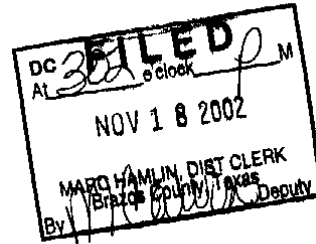
November 15, 2002

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Hon. Tom Matlock

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Hon. W. Steven Steele

VIA FACSIMILE (713) 223-9319
Hon. David Smith or Joe Roady

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Hon. Steve Milburn



RE: Cause No. 02-000192-CV-272; *Stacie Wright v. Bank One Texas and Latarsha Domonique Long Brown*, In the 272nd District Court, Brazos County, Texas

Dear Counsel:

I have reviewed a rough draft of the transcript of the hearing on the Motion to Compel, and have reviewed the legal authorities you have provided. Set forth herein is my evaluation of the law as it relates to this case.

I. Background

Previously, Plaintiff entered into a Depositor's Agreement with Bank One Texas, N.A. whereby she became a signatory party to an account belonging to (and that had belonged for some time to) her grandmother. Plaintiff asserts claims against the Defendants based on Ms. Brown's and other unnamed employees alleged intentional misuse of Plaintiff's personal and confidential financial information.

Plaintiff's claims against Defendant, Bank One Texas, N.A., are based on negligence and breach of fiduciary duty. Plaintiff claims that a conspiracy existed among the apparently felonious actors, but does not contend that Defendant Bank One Texas ratified the felonious conduct, nor does she contend that any of the actors were vice principals of Bank One Texas thereby rendering the criminal conduct the acts of Bank One Texas, itself. A fair reading of the pleadings (the Second Amended Petition) indicates that the Plaintiff's claims against Bank One Texas are rooted in negligence.

IV. A Brief Evaluation

At the outset, it is understandable that Plaintiff would regard as anguishing this whole ordeal she claims she endured as a result of Defendant's conduct. Indeed, in the words of Bard of Avon, "Who steals my purse, steals trash; 'tis something, nothing; 'Twas mine, 'tis his, and has been slave to thousands; But he that filches from my good name Robs me of that which not enriches him, And makes me poor indeed."

Without a detailed recap of all of the holdings of the cases cited by both sides, I set forth a brief evaluation. At the hearing, I questioned Mr. Roady about some hypothetical examples to determine the boundaries or extent to which tort claims could be subsumed under such an Arbitration clause. In Plato's *Republic*, when Socrates was implored by Glaucon and Adeimantus and their friends to expound upon the nature of justice and injustice, and about their relative advantages, he said:

.... that the enquiry would be of a serious nature, and would require very good eyes. Seeing then, I said, that we are no great wits, I think that we had better adopt a method which I may illustrate thus; suppose that a short-sighted person had been asked by some one to read small letters from a distance; and it occurred to some one else that they might be found in another place which was larger and in which the letters were larger --if they were the same and he could read the larger letters first, and then proceed to the lesser --this would have been thought a rare piece of good fortune.

(From Book II of Plato's *Republic*.)

To that end, Mr. Roady and I discussed a depositor's slip on a grape on the floor (brought in by a grocery store employee, no doubt) resulting in injury, a customer's deposit not being credited because a night deposit machine did not work properly allowing another opportunistic depositor to abscond with the deposit, a deposit not being credited because it had been embezzled by a bank employee, and a situation where a bank employee physically assaulted a depositor.

Upon further reflection and examination of the Depositor's Agreement, I do not think it is necessary to examine the extremes to discern the proper result in this case. Plaintiff cites, in support of her argument, *Dusold v. Porta-John Corporation*, 807 P.2d 526 (App. Ct. 1990), an action based in negligence and products liability against Porta-John Corporation where the plaintiff alleged he suffered personal injuries from chemicals supplied by Porta-John. Previously, the *Dusold* plaintiff began servicing and cleaning Porta-John's portable toilets in Phoenix under a licensing agreement. The service contract agreement contained a provision requiring arbitration in Michigan of "any controversy or claim arising out of, or relating to this agreement, or the breach thereof." Porta-John moved to dismiss *Dusold*'s complaint, and contended that the arbitration provision controlled, and that arbitration in Michigan was *Dusold*'s exclusive remedy for his personal injury tort claim. The *Dusold* court held that:

In our opinion, the better-reasoned cases start with the premise that, in order for the dispute to be characterized as arising out of or related to the subject matter of the contract, and thus subject to arbitration, it must, at the very least, raise some issue the resolution of which requires a reference to or construction of some portion of the contract itself. The relationship between the dispute and the contract is not satisfied simply because the dispute would not have arisen absent the existence of a contract between the parties.

Plaintiff validly points out that the *Dusold* Court concluded that because the plaintiff's injuries were alleged to have been caused by Porta-John's failure to warn, etc., the duty would exist *even without the contract*. (Plaintiff's Responsive Brief at p. 10). Similarly, the hypothetical where a customer or potential customer slips and falls and make a claim under a premise liability theory



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