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MISSISSIPPI SUPREME COURT ISSUES IMPORTANT DECISION REGARDING ENFORCEMENT OF ARBITRATION AGREEMENTS

The Mississippi Supreme Court's recent decision in *Century 21 Maselle and Associates, Inc. and Cindy Smith vs. Smith* is the latest, and arguably the most important, decision of that Court on the subject of arbitration.

The Court reasserted the presumption which exists under the Federal Arbitration Act in favor of enforcing arbitration agreements; however, it went on to point out that the right to arbitrate may be waived if a bank either actively participates in or substantially invokes the litigation process to the detriment or prejudice of the other party.

The Court gave its "mandate" on the subject of waiver when it stated that:

. . . either active participation or substantial invocation of the litigation process which results in detriment or prejudice to the other party, or engaging in conduct inconsistent with timely enforcing the arbitration agreement, constitutes waiver.

The Court went on to say that there is no such thing as "routine" discovery.

Describing the conduct of the parties trying to enforce the arbitration agreement as "precipitously close" to triggering a waiver of the right to arbitration, the Court pointed out that there was no evidence that the other parties had suffered to their detriment or been prejudiced. The Court enforced the arbitration agreement.

The Court then provided very clear guidance to banks and their attorneys:

Parties seeking to enforce arbitration are to file a "Motion to Compel Arbitration and to Stay Proceedings Pending Arbitration" immediately upon discovery that the controversy or suit is subject to an arbitration agreement. All proceedings, including the filing of responsive pleadings (answer or otherwise) and discovery, in

prospective cases involving an arbitration agreement shall be suspended upon the timely filing and notice of a "Motion to Compel Arbitration and to Stay Proceedings Pending Arbitration."

Litigants are then instructed from this time forward to follow the procedure mandated by the Court by filing the Motion referred to above and promptly scheduling a notice and a hearing on that motion. Discovery, termed a procedural implement of the courts, should not be initiated.

Every attorney that handles litigation for the bank needs to be aware of this decision. The Court's plain directive may change the standard manner in which your attorney responds initially to a Complaint filed against the bank. Failure to follow this directive could result in waiver of any arbitration agreement that the bank may use.

The case has been attached to this e-mail for your convenience.

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