Arbitration in the Fifth - November 2021

December 10, 2021 Odean Volker

PRACTICES Litigation, International Arbitration

November 2021 was an important month for arbitration-related opinions by the Fifth Circuit Court of Appeals. Gezu v. Charter Communications provides a guide to imposing arbitration agreements in existing at-will employment relationships in Texas, and ADT, L.L.C. v. Richmond considers "look through" jurisdiction in the context of diversity jurisdiction.

"Look through jurisdiction" – When not to "look through."

While many are watching to see the U.S. Supreme Court's reaction to the "look through" analysis in *Badgerow v. Walters*, 19-30766, 2020 WL 5524837 (5th Cir. Sept. 15, 2020), the Fifth Circuit considered another "look through" question in *ADT, L.L.C. v. Richmond,* 21-10023, 2021 WL 5228520 (5th Cir. Nov. 10, 2021). The question was the district court's diversity jurisdiction, and *ADT, L.L.C.* explains that this was not a time to "look through."

A federal court can hear a Section 4 suit to compel arbitration only if it could hear "a suit arising out of the controversy between the parties." 9 U.S.C. § 4. To determine whether it has jurisdiction, the federal court "looks through" the Section 4 petition to the parties' underlying substantive controversy. If a federal court could hear a suit arising from that "whole controversy," then the court can hear the Section 4 suit.

ADT, L.L.C. considers whether that "look through" should be applied when looking at the "parties" and assessing diversity jurisdiction. The district court had "looked through" the Section 4 suit to plaintiff's state court petition and determined that the parties to the state court action lacked diversity of citizenship. An individual had been sued in state court that was not a party to the Section 4 action. *ADT, L.L.C.* rejected this "look through" to the parties in the underlying proceeding.

Relying on the text of Section 4, *ADT, L.L.C.* determined that the only controversy that bears on jurisdiction is "the controversy between the parties." Those "parties" are only the parties to the Section 4 suit. Section 4 uses "'parties' to mean only the parties to the § 4 suit." Therefore, the district court should not have "looked through" to the state court petition to determine the identity of the parties for its jurisdictional analysis.

Opinions of the Fifth Circuit

Gezu v. Charter Communications, 17 F.4th 547 (5th Cir. 2021) (employment). Order compelling arbitration affirmed. Under Texas law, when an at-will employee is not initially subject to an arbitration agreement, but one is later imposed, the question becomes whether the arbitration agreement is a valid modification of the terms of employment. To show a valid modification, the employer must demonstrate that the employee: 1) received notice of the change and 2) accepted the change. An employer demonstrates notice by proving that it unequivocally notified the employee of definite changes in employment terms. Acceptance need not be anything more than continuing to work and accept wages. The mailbox rule applies when there is a material question as

© 2026 Haynes Boone

to whether a document was actually received. Under the mailbox rule, a sworn statement is credible evidence of mailing and creates a presumption of receipt.

ADT, L.L.C. v. Richmond, 21-10023, 2021 WL 5228520 (5th Cir. Nov. 10, 2021) (home security). Order dismissing action for want of jurisdiction vacated.

Nichols v. U.S. Bank, Nat'l Ass'n, 20-60185, 2021 WL 5323699 (5th Cir. Nov. 15, 2021) (per curiam) (Sitcomm Arbitration Association). Appeal dismissed as frivolous.

Opinions of United States District Courts

Motions to Compel

Amerigas USA, LLC v. Standard Capital SA, Inc., 3:21-CV-0072-B, 2021 WL 5052658 (N.D. Tex. Nov. 1, 2021) (finance). Motion to compel granted. The lender and the borrower signed their agreement, but the lender did not give notice that it had signed. By the agreement's terms, it was effective on the date of last signing, and had no terms requiring notice of acceptance. The borrower's attempt to cancel the agreement occurred after the lender had signed. Therefore, the agreement containing the arbitration clause was valid and enforced.

Can Capital Asset Servicing Inc. v. Bana Food Inc., 3:20-CV-03215-M-BT, 2021 WL 5436616 (N.D. Tex. Oct. 29, 2021) (Rutherford, Mag. J.), report and recommendation adopted, 2021 WL 5416602 (N.D. Tex. Nov. 19, 2021) (lending). Motion to compel granted. Courts perform a two-step inquiry when considering whether to compel arbitration. First, the court determines whether the parties agreed to arbitrate the dispute. This first inquiry involves answering two questions: 1) whether there is a valid agreement to arbitrate between the parties; and 2) whether the dispute in questions falls within the scope of the arbitration agreement. Contract formation is governed by ordinary state-law principles. Second, the court must determine whether any federal statute or policy renders the claims nonarbitrable.

Impact Fluid Solutions LP v. Bariven SA, 4:19-CV-00652, 2021 WL 5202103 (S.D. Tex. Nov. 9, 2021) (sale of drilling fluids). Motion to compel denied. Defendants, a Venezuelan company and a subsidiary of the Venezuelan national oil company, did not have access to certain documents. They speculated that the documents contained arbitration agreements. The mere possibility of an arbitration clause fails to create a genuine issue of material fact.

Motions to Confirm or Vacate an Award

Oviedo v. Admiral Linen & Unif. Serv. by ALSCO Inc., 3:19-CV-01636-X, 2021 WL 5505655 (N.D. Tex. Nov. 23, 2021) (employment). Motion to vacate denied. After granting a motion to compel, the court administratively closed the case. In arbitration, the respondent's motion for summary judgment based on limitations was granted. Plaintiff's motion to reopen the case and lift the administrative stay was treated as a motion to vacate the award.

Other Arbitration-related Opinions

Childers v. Rent-a-Center East, Inc., CV 21-960, 2021 WL 538621 (E.D. La. Nov. 18, 2021) (rental purchase agreement/identity theft). Motion to stay non-arbitrable claims granted. Three factors are considered in determining whether to stay non-arbitrable claims: 1) whether the same operative facts are involved in the litigation and arbitration; 2) whether the claims are inseparable; and 3) whether allowing litigation to proceed would affect arbitration. A district court has discretion to stay

© 2026 Haynes Boone

litigation among the non-arbitrating parties pending the outcome of the arbitration as a means of controlling its docket.

Amalgamated Transit Union Local 1546 v. Capital Area Transit Sys., CV 20-00888-BAJ-RLB, 2021 WL 5578040 (M.D. La. Nov. 29, 2021) (collective bargaining agreement). Motion to stay granted. While plaintiffs' claims "ultimately do not fall strictly within the scope of the agreement's arbitration clause, they nonetheless involve questions of fact" on which the arbitrator's findings may be dispositive. Therefore, the court found it "appropriate to stay the entire action under Section 3 of the FAA to allow the parties' parallel arbitral proceedings to run their course."

First Cash, Inc. v. Sharpe, 4:20-CV-1247-P, 2021 WL 5505565 (N.D. Tex. Nov. 24, 2021) (asset purchase agreement). When there are parallel proceedings involving the same parties and the same issues, the court applies the six factor "exceptional circumstances" test to determine whether to abstain from exercising jurisdiction. In this action to compel arbitration, a state court's order staying arbitration "arguably demonstrated indifference to [the Federal Arbitration Act]" and was considered in the "exceptional circumstances" analysis.

© 2026 Haynes Boone