Arbitration in the Fifth – August 2022

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PRACTICES Litigation, International Arbitration

August 2022 was a busy month in the courts of the Fifth Circuit. Particularly noteworthy is the dissent in Newman v. Plains All Am. Pipeline, L.P. following a tie vote on whether to hear the case en banc. The issue presented by employee Fair Labor Standards Act (FLSA) cases against the customers of their employers is not over. Yet to see the Fifth Circuit is Doucet v. Boardwalk Pipelines, L.P in which the Southern District of Texas reconsidered its prior opinion in light of the Newman decisions. In Lopez v. Cintas Corp, the Fifth Circuit applied the U.S. Supreme Court's recent Sw. Airlines Co. v. Saxon decision to determine whether local delivery drivers are covered by Section 1 of the Federal Arbitration Act.

Opinions of the Fifth Circuit Court of Appeals

Paradies Shops, L.L.C. v. Bros. Petroleum, L.L.C., No. 21-30225, 2022 WL 3134224 (5th Cir. Aug. 5, 2022) (per curiam) (airport concessions). Remanded for determination of whether there was an arbitration agreement. If a party opposing arbitration puts "the making of the arbitration agreement ... in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default ... the court shall hear and determine such issue." A party "must make at least some showing that under prevailing law, he would be relieved of his contractual obligation to arbitrate if his allegations proved to be true," and the party "must produce at least some evidence to substantiate" the factual allegations.

Robinson-Williams v. C H G Hosp. W. Monroe, L.L.C., No. 21-30659, 2022 WL 3137422 (5th Cir. Aug. 5, 2022) (per curiam) (employment). Dismissal affirmed. The district court compelled arbitration and dismissed the case with prejudice. Where the court did not err in compelling arbitration, the decision to dismiss, as opposed to stay, is reviewed for abuse of discretion. Dismissal is appropriate when all of the issues raised in the district court must be submitted to arbitration.

Newman v. Plains All Am. Pipeline, L.P., 44 F.4th 251 (5th Cir. 2022) (dissenting op.) (staffing/FLSA). Dissent from denial of rehearing en banc. In the en banc poll, 8 judges voted in favor of rehearing and 8 voted against. The dissent argued that the "panel opinion wrongly held "that, despite a delegation clause in the arbitration agreement, the 'gateway question'—whether the plaintiff's dispute with the non-signatory project owner is arbitrable—was not for the arbitrator." The dissent also argued that even if the decision was for the court, "the panel should have concluded that Texas law would compel arbitration with the non-signatory project owner as a matter of intertwined claims estoppel."

Lopez v. Cintas Corp., No. 21-20089, 2022 WL 3753256 (5th Cir. Aug. 30, 2022) (ADA). Local delivery driver sought to avoid an arbitration agreement with his employer by arguing that he belonged to a "class of workers engaged in foreign or interstate commerce" under Section 1 of the Federal Arbitration Act. Local delivery drivers are not so "engaged" in "interstate commerce" as Section 1 contemplates. The phrase "engaged in commerce" has "a more limited reach," and this narrower reading covers only "active employment" in interstate commerce. This means limiting its applicability to those "actively engaged in transportation of goods across borders," which is

something the class of local delivery drivers did not do. Once the goods arrived at the Houston warehouse and were unloaded, anyone that interacted with those goods was no longer engaged in interstate commerce. And "unlike either seamen or railroad employees, the local delivery drivers here have a more customer-facing role."

Opinions of United States District Courts

Motions to Compel Arbitration

Kronlage Family LP v. Indep. Specialty Ins. Co., No. CV 22-1013, 2022 WL 3444011 (E.D. La. Aug. 17, 2022) (insurance). Remand denied and Motion to compel granted. The McCarran-Ferguson Act permits states to reverse-preempt an otherwise applicable "Act of Congress" by enacting their own regulations of the insurance industry. However, the McCarran-Ferguson Act does not apply to a treaty, such as the New York Convention. Chapter 2 of the Federal Arbitration Act (FAA), as the New York Convention's implementing legislation, preempts state law.

Tra-Dor Inc. v. Underwriters at Lloyds London, No. 2:21-CV-02997, 2022 WL 3148980 (W.D. La. July 25, 2022) (insurance). Motion to compel granted. State insurance law prohibiting arbitration has no impact on arbitration agreements arising under the New York Convention. Arbitration requirement in insurance policy was not ambiguous nor was in adhesionary under Louisiana law.

Old Republic Sur. Co. v. J. Cumby Constr., Inc., No. 1:21CV126-GHD-DAS, 2022 WL 3438227 (N.D. Miss. Aug. 16, 2022) (insurance). Motion to compel granted. Where a nonsignatory to an agreement to arbitrate is involved, the court must find that the nonsignatory meets one or more of six theories in order to bind the nonsignatory to arbitrate a dispute: (1) incorporation by reference, (2) assumption, (3) agency, (4) alter ego, (5) estoppel, or (6) third-party beneficiary. Incorporation by reference was shown where "subcontract is by reference made a part hereof" and an agreement adopts the dispute resolution provision of another document. A clause requiring arbitration of "any and all disputes relating to this subcontract" is a narrow clause.

Stavis v. One Techs., LLC, No. 3:21-CV-2753-N, 2022 WL 3274533 (N.D. Tex. July 13, 2022) (credit monitoring). Motion to compel denied. Plaintiff initiated an arbitration with the American Arbitration Association (the "AAA"). The AAA declined the consumer case due to defendants "preexisting noncompliance with AAA rules." Plaintiff "availed himself of the right to initiate arbitration with AAA, and by the very rules incorporated into the parties' arbitration agreement, he was led back out of arbitration and into court." Accordingly, no basis existed under the Federal Arbitration Act to compel the plaintiff him back into arbitration before AAA or any other arbitrator.

Greenwood v. Cottonwood Fin., Ltd., No. 3:21-CV-2459-L, 2022 WL 3754706 (N.D. Tex. Aug. 30, 2022). Motion to compel granted. While the availability of class determination is not necessarily always decided by the arbitrator, the parties' arbitration agreement in this case required that the arbitrator decide the issues raised regarding the viability and arbitrability of plaintiff's class claims.

Doucet v. Boardwalk Pipelines, L.P., No. 4:20-CV-1793, 2022 WL 3572388 (S.D. Tex. Aug. 11, 2022) (Sheldon, Mag. J.) (FLSA). Motion to compel denied on reconsideration. Staffing company intervened in action by its employee against its customer. The court then granted the staffing company's motion to compel and enforced a delegation clause as to the claim against the customer. On reconsideration, the court explained that Newman I held "that (1) the court, not an arbitrator, should always decide if an arbitration agreement exists between two parties and that (2) the court's answer as to whether an arbitration agreement exists necessarily decides whether a given agreement is enforceable between the parties." Newman II, held "that 'any dispute about

whether [p]laintiffs must arbitrate with [a defendant] is a dispute over the existence of an agreement to arbitrate [with that defendant], not over the scope provisions or delegation clause in the arbitration agreement."

Thompson v. Glob. Fixture Services, Inc., No. CV H-22-0484, 2022 WL 3693453 (S.D. Tex. Aug. 25, 2022) (FSLA). Motion to compel granted in part and denied in part. Arbitration agreement provided that the parties would split the costs of arbitration. An arbitration agreement may render a contract unconscionable if the existence of large arbitration costs could preclude a litigant from effectively vindicating his or her federal statutory rights in the arbitral forum. Factors for this analysis under Texas contract law are: (1) the total costs of litigation compared to the total cost of arbitration; (2) whether that disparity is so great as to deter the bringing of claims (3) the actual cost of arbitration compared to the total amount of damages the claimant is seeking; and (4) the claimant's overall ability to pay the arbitration fees and costs. Evidence supported finding that the agreement was unconscionable. The court severed the unconscionable provision and ordered the parties to arbitrate with a different arbitration administrator.

Motion to Confirm or Vacate

McKinnon v. Hobby Lobby Stores, Inc., No. 218CV00179JRGRSP, 2022 WL 3042283 (E.D. Tex. June 21, 2022) (Payne, Mag. J.), report and recommendation adopted, 2022 WL 3036001 (E.D. Tex. Aug. 1, 2022) (employment). Award confirmed. To constitute misconduct requiring vacatur under section 10(a(3), an error in the arbitrator's determination must be one that is not simply an error of law, but which so affects the rights of a party that it may be said that he was deprived of a fair hearing. Arbitrator heard from witness that made inconsistent statements and refused to hear testimony from witnesses that could not testify to discrimination against the plaintiff. This did not prejudice plaintiff's ability to assert and support his claims.

Redmond v. PRLAP, No. CV 4:21-MC-006, 2022 WL 3141867 (E.D. Tex. Aug. 5, 2022) (Private Arbitration Association). Motion to confirm dismissed sua sponte. Plaintiff presented defendant with a "Conditional Acceptance for the Value/Agreement/Counter Offer to Acceptance Offer, Show of Cause Proof of Claim Demand," which he claimed formed an arbitration agreement. He then obtained an award from the "Private Arbitration Association." Nothing on the face of the purported arbitration agreement indicated that defendants legally entered into any agreement with plaintiff. The purported arbitration award was found to be is an "obvious sham and there can be no valid action based thereon." The lawsuit was referred to the U.S. Attorney's Office for investigation.

Redmond v. Wells Fargo Bank N.A., No. CV 4:21-MC-00005, 2022 WL 3142343 (E.D. Tex. Aug. 5, 2022). Dismissed sua sponte. See Redmond v. PRLAP, above.

Redmond v. Graham, No. CV 4:21-MC-00004, 2022 WL 3141866 (E.D. Tex. Aug. 5, 2022). Dismissed sua sponte. Dismissed sua sponte. See Redmond v. PRLAP, above.

Other Arbitration-Related Issues

Salzgitter Mannesmann Int'l (USA) Inc. v. Sun Steel Co. LLC, No. 3:22-CV-00030, 2022 WL 3041134 (S.D. Tex. Aug. 2, 2022) (Edison, Mag. J.). Motion for discovery in an award confirmation/vacatur proceeding. The arbitrator made a supplement disclosure that his daughter had accepted employment with a law firm representing one of the parties. The court allowed some discovery including the deposition of the daughter. Once that was concluded more discovery was sought. The court rejected "discovery-on-discovery," but required short declarations from certain employees of the law firm responding to the court's questions.

Hudnall v. State of Texas., No. EP-22-CV-36-KC-RFC, 2022 WL 3219423 (W.D. Tex. Aug. 9, 2022), report and recommendation adopted, 2022 WL 4077334 (W.D. Tex. Aug. 30, 2022) (roofing contract and arbitration). Dismissed. Among other defendants and causes, plaintiff sued an arbitrator and the AAA, alleging several causes related to decisions and rulings of the arbitrator. Arbitral immunity parallels judicial immunity in that it establishes immunity from civil liability for arbitrators, and their sponsoring organizations, in the performance of their arbitral duties. All claims stemmed from actions as arbitrator or actions as administrator of the arbitration agreement.