

## Arbitration in the Fifth - July 2021

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**PRACTICES** International Arbitration, Litigation

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*July 2021 was a relatively slow month for arbitration-related opinions from the District Courts within the Fifth Circuit. At the Fifth Circuit Court of Appeals, Gallagher v. Vokey took on the “not entirely clear” question of the quantum of evidence required to prove or disprove the existence of an agreement to arbitrate.*

### ***What is the quantum of evidence required to prove or disprove the existence of an agreement to arbitrate?***

Considering the number of arbitration agreements – particularly in employment litigation – where execution of the agreement is in dispute, one would have thought this question would have been definitively answered. In the words of *Gallagher v. Vokey*, 20-11000, 2021 WL 2772825 (5th Cir. July 1, 2021): “[t]he quantum of evidence required to prove or disprove the existence of an agreement to arbitrate is not entirely clear in [the Fifth Circuit].” While some other Circuits apply the summary judgment standard of Fed. R. Civ. P 56, that standard has not been adopted by the Fifth Circuit. *Gallagher* explains the Fifth Circuit approach as follow:

[T]he party resisting arbitration bears the burden of showing that he is entitled to a jury trial under § 4 of the Arbitration Act. Further, the 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 he must produce at least some evidence to substantiate his factual allegations. To put the making of the arbitration agreement in issue, a party is required to unequivocally deny that he agreed to arbitrate and produce some evidence supporting his position.

(internal quotes and citations omitted)

*Gallagher* declined to decide whether the “some evidence” standard is congruent with the summary judgment evidentiary standard of Rule 56. *Gallagher* concluded that, where competent evidence showing the formation of an agreement to arbitrate has been presented, § 4 requires a party resisting arbitration to produce some contrary evidence to put the matter in issue. A mere pleading is not sufficient to resist arbitration.

### **Opinions of the Fifth Circuit**

*Gallagher v. Vokey*, 20-11000, 2021 WL 2772825 (5th Cir. July 1, 2021) (legal services). Order denying motion to compel reversed. Movant provided adequate evidence to establish that he and respondent had entered into an enforceable arbitration agreement and that their billing dispute fell within the scope of that agreement. Respondent produced no evidence to contradict the enforceability of the agreement or put the formation of an agreement in issue.

*IMA, Inc. v. Columbia Hosp. Med. City at Dallas, Subsidiary L.P.*, 1 F.4th 385 (5th Cir. 2021) (health plan administration/unreimbursed medical fees). Order denying motion to compel non-signatory affirmed. Whether a party can compel a non-signatory to arbitrate on equitable grounds is determined by state law. Direct benefits estoppel applies to “non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract.” A non-signatory can “embrace” a contract containing an arbitration clause in two ways: (1) by knowingly seeking and obtaining direct benefits’ from that contract; or (2) by seeking to enforce the terms of that contract or asserting claims that must be determined by reference to that contract.

## **Opinions of United States District Courts**

### **Motions to Confirm or Vacate an Award**

*Accelerated Sols., LLC v. Star Med. Ctr., LLC*, 4:20-CV-499-SDJ, 2021 WL 3128540 (E.D. Tex. July 23, 2021) (service agreement). Motion to confirm granted. Default judgment is not available for motions to confirm arbitration awards. A motion to confirm an arbitration award is not a complaint in an independent civil action to which Fed. R. Civ. P. 55 applies.

*Ball Metal Beverage Container Corp. v. United Auto., Aerospace & Agric. Implement Workers of Am.*, 4:20-CV-00797-P, 2021 WL 3277270 (N.D. Tex. July 6, 2021) (notice of appeal filed) (labor). Motion to vacate granted. A district court may vacate an arbitrator’s award where the award fails to draw its essence from the collective bargaining agreement.

### **Other Arbitration-related Opinions**

*Clean Pro Carpet & Upholstery Care, Inc. v. Upper Pontalba of Old Metairie Condo. Ass’n, Inc.*, CV 20-1550, 2021 WL 2948923 (E.D. La. July 14, 2021) (construction). Motion to stay non-arbitrable claims granted. Plaintiff was the assignee of insurance proceeds, and its claim against the insurer had been compelled to arbitration. The owners motion to compel had been denied. Owner sought to have the claims against it stayed. Courts consider three factors in determining whether to stay non-arbitrable claims: (i) whether the same operative facts are involved in the litigation and arbitration; (ii) whether the claims are inseparable; and (iii) whether allowing litigation to proceed would affect arbitration. The question is not ultimately one of weighing potential harm to the interests of the parties not subject to arbitration, but of determining whether proceeding with litigation will destroy the right to a meaningful arbitration.