Arbitration in the Fifth – July 2024

August 13, 2024 Odean Volker

PRACTICES Litigation, International Arbitration

In July 2024, the Fifth Circuit's Hines v. Stamos serves as a reminder that subject matter and personal jurisdiction must be satisfied for a court to decide a motion to compel arbitration. In Dickson v. Dexcom Inc., the Western District of Louisiana analyzed a clickwrap agreement noting that the onus is on the website owner to be clear about the intended scope of an arbitration clause. Both Farmers Rice Milling Co., LLC v. Certain Underwriters at Lloyd's London and Tex. Green Star Holdings LLC v. Landmark Am. Ins. Co., denied remand of claims against defendants that remained in the court following an order compelling arbitration as to other defendants.

Opinions of the Fifth Circuit

Hines v. Stamos, No. 23-30826, 2024 WL 3580618 (5th Cir. July 30, 2024). Order denying a motion to compel arbitration vacated and case remanded for the limited purpose of determining subject matter jurisdiction and personal jurisdiction over the defendants. Motions to compel arbitration are not one of the limited instances in which district courts have leeway to pretermit the resolution of jurisdictional challenges. A court cannot rule on a motion to compel arbitration without both subject matter and personal jurisdiction. When a party agrees to arbitrate in a particular state, the district courts of the agreed-upon state may exercise personal jurisdiction over the parties for the limited purpose of compelling arbitration.

Opinions of United States District Courts

Motions to Compel Arbitration

William B. Coleman Co., Inc. v. Certain Underwriters at Lloyd's London, No. CV 23-5892, 2024 WL 3595504 (E.D. La. July 30, 2024) (insurance). Motion to compel granted. The New York Convention is an exception to Louisiana's general bar on policy terms that deprive its state courts of jurisdiction and venue in actions against insurers. Section 22:868 "is preempted by the Convention." The selection of New York substantive law to govern the interpretation of the "policy does not empower the Court to disregard binding Fifth Circuit precedent interpreting the [Federal Arbitration Act], the [New York] Convention, or Section 22:868 in favor of Second Circuit precedent."

ADK Plaza-Centrum, LLC v. Indep. Specialty Ins. Co., No. CV 23-1405-SDD-EWD, 2024 WL 3375498 (M.D. La. July 11, 2024) (insurance). Motion to compel granted. Plaintiff's property insurance was underwritten by both domestic and foreign insurers. The arbitration agreement contained in the policy was subject to the New York Convention "through equitable estoppel."

Dickson v. Dexcom Inc., No. 2:24-CV-00121, 2024 WL 3417392 W.D. La. July 15, 2024) (medical device). Motion to compel denied. The arbitration clause was contained in a clickwrap agreement. The text next to the box to be checked to indicate agreement provided that plaintiff's "use of any Dexcom, Inc. website, mobile applications, or other software' is subject to the Terms of Use." The Terms of Use included an arbitration clause. The court reasoned that "this language only indicates that the user is consenting to arbitration for claims arising from her use of the app" and held that the language "does not advise her that use of the [device], which does not require the app, is also

subject to the [Terms and Conditions].” The “onus must be on website owners to put users on notice of the terms to which they wish to bind consumers.”

Xu v. CMH Homes, Inc., No. 1:23-CV-00319-MAC-ZJH, 2024 WL 3426770 (E.D. Tex. July 1, 2024) (Hawthorn, Mag. J.), report and recommendation adopted, 2024 WL 3488757 (July 19, 2024) (mobile home purchase). Plaintiff waived the arbitration agreement’s mediation condition precedent by filing a lawsuit without first attempting mediation. Procedural unconscionability refers to the circumstances surrounding the adoption of the arbitration provision. “Texas law requires unfair surprise or oppression for a court to find procedural unconscionability.” “[A] misrepresentation, without more, does not constitute ‘unfair surprise or oppression’ or ‘shocking’ circumstances sufficient to constitute procedural unconscionability.” The “only cases under Texas law in which an agreement was found procedurally unconscionable involve situations in which one of the parties appears to have been incapable of understanding the agreement.” The court held that the “fact that a party has signed an arbitration agreement creates a strong presumption that the party has consented to its terms.”

Clark v. The Charles Schwab Corp., No. 4:24-CV-00073-O-BP, 2024 WL 3402861 (N.D. Tex. June 27, 2024) (Ray, Jr., Mag. J.), report and recommendation adopted 2024 WL 3407684 (July 12, 2024) (investment advisor services). If the court finds that the parties agreed to arbitrate, the court then determines “whether the dispute is within the scope of that agreement.” “Where the arbitration clause is broad, it is only necessary that the dispute touch matters covered by the agreement to arbitrate.”

Marquez v. US Foods, Inc., No. 3:23-CV-2455-K, 2024 WL 3625674 (N.D. Tex. July 31, 2024) (workplace injury plan). Motion to compel granted. Plaintiff did not produce evidence to put the existence of the arbitration agreement “in issue.” The parties agreed that “[a]ny question or dispute concerning how [the Agreement] is formed, applied, interpreted, enforced, or whether the Plan is valid, reworkable, or fair, shall be subject to Arbitration as provided for by the Plan.” This language was considered to be “broad and unqualified” and “confirms that the delegation of arbitrability was intended to apply to all disputes between the parties.” The defendant did not waive arbitration by removing the case, participating in the court-order joint report and then filing a motion to compel arbitration.

Herod v. DMS Solutions Inc., No. 4:23-CV-04465, 2024 WL 3558385 (S.D. Tex. July 26, 2024) (Edison, Mag. J.) (FLSA). Motion to compel denied. Plaintiff was the owner of a limited liability company that entered int an “Independent Contractor Agreement” with defendant. Plaintiff signed the agreement, but not in his individual capacity. “The preposition ‘By,’ which precedes [plaintiff’s] signature and follows ‘Contractor’ (defined by the Agreement as [the Company]), creates the inference that [the Company] is the principal and [plaintiff] merely its agent.” The court explained that under Texas law, “signing a contract in a representative capacity does not bind the agent personally to the contract.” Intertwined claims estoppel did not apply since it “governs motions to compel arbitration when a signatory-plaintiff brings an action against a nonsignatory-defendant asserting claims dependent on a contract that includes an arbitration agreement that the defendant did not sign.” Here plaintiff was a nonsignatory.

Other Arbitration-related Decisions

Chubb Capital I Ltd. v. New Orleans City, No. CV 23-5806, 2024 WL 3457611 (E.D. La. July 18, 2024) (engineering design services). Motin to stay granted pending resolution of arbitration. The owner/consumer of design services brought a claim in arbitration against the service provider and its insurers. The insurers filed the instant action seeking a declaration that they were not required to

arbitrate and in injunction against the arbitration demand. The court previously granted the injunction. The owner then sought a stay of the litigation. The court held that the merits of the owner's claims against the insureds would be determined in arbitration and that other issues also depended upon the outcome of the arbitration proceedings. A discretionary stay pending resolution of arbitration was therefore justified.

Farmers Rice Milling Co., LLC v. Certain Underwriters at Lloyd's London, No. CV 21-503-SDD-SDJ, 2024 WL 3548313 (M.D. La. July 8, 2024) (Johnson, Mag. J.), report and recommendation adopted sub nom., 2024 WL 3543416 (July 25, 2024) (insurance). Motion to remand denied. The court had previously ordered certain parties to arbitration under the New York Convention and stayed the matter. Plaintiff sought to have the state law claims against the remaining defendants (those not compelled to arbitration). The matter was properly removed under the Convention. The "Convention gives rise to federal jurisdiction for the entire action, not just the claims that are subject to the arbitration clause. There is no need to show an independent basis of federal jurisdiction for state law claims."

Barnett v. Amer. Express Nat'l Bank, No. 3:20-CV-623-HTW-LGI, 2024 WL 3305999 (S.D. Miss. July 3, 2024) (Fair Credit Reporting Act). Motion to compel denied. Defendant filed a state court lawsuit to collect an alleged debt. The state court collections lawsuit substantially invoked the judicial process to the extent it sought to collect the debt made the basis of the claim defendant sought to arbitrate. As a result, defendant waived arbitration.

Ramirez v. Equifax Info. Services, LLC, No. 4:24-CV-94-SDJ-KPJ, 2024 WL 3259669 (E.D. Tex. July 1, 2024) (Fair Credit Reporting Act). Discovery stayed pending decision on the motion to compel. The "discovery procedures and requirements in arbitration do not prohibit discovery altogether, but rather, impose lesser requirements on the parties allowing for less intrusive discovery, the purpose of which is the more efficient and speedy resolution of the claims."

Tex. Green Star Holdings LLC v. Landmark Am. Ins. Co., No. 3:23-CV-2223-X, 2024 WL 3588548 (N.D. Tex. July 30, 2024) (insurance). Motion to remand denied. The court had previously compelled arbitration as to the insurer defendants, but claims against broker/agent defendants remained before the court. The court retained supplemental jurisdiction over the remaining claims.