Arbitration in the Fifth – May 2022

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PRACTICES Litigation, International Arbitration

May 2022 was a busy month in the Fifth Circuit for arbitration-related matters. In re A&D Interests, Inc. recognizes that there is more than one way to contractually limit class/collective actions, while Soni v. Solera Holdings, L.L.C. and Hinkle v. Phillips 66 Co. revisited the requirements to challenge an arbitration agreement and the complexities of arbitration agreements when a staffing company's employees sue the company's client. The U.S. Supreme Court also weighed in on another arbitration issue, and this time upended the widely accepted standard for proving waiver of arbitration.

Is a showing of prejudice required to prove litigation conduct waiver of arbitration?

In *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022), the Court firmly rejected the well-established requirement that prejudice was a required element to prove waiver of the right to arbitrate. The Court determined that the requirement to show prejudice was an arbitration-specific alteration of the elements of waiver. The Federal Arbitration Act's ("FAA") "policy favoring arbitration" does not authorize federal courts "to invent special, arbitration-preferring procedural rules." The federal policy is to make "arbitration agreements as enforceable as other contracts, but not more so." The directive in Section 6 of the FAA that a federal court treat arbitration applications "in the manner provided by law" for all other motions is simply a command to apply the usual federal procedural rules, including any rules relating to a motion's timeliness. Stated conversely, Section 6 is a bar on using custom-made rules, to tilt the playing field in favor of (or against) arbitration.

The Court left for another day a decision on:

- the role state law might play in resolving when a party's litigation conduct results in the loss of a contractual right to arbitrate; and
- whether an inquiry into the loss of a contractual right to arbitrate involves rules of waiver, forfeiture, estoppel, laches, or procedural timeliness.

Opinions of the Fifth Circuit Court of Appeals

In re A&D Interests, Inc., 33 F.4th 254, 258 (5th Cir. 2022) (FSLA). Mandamus granted with regard to order approving class notice to employees that signed arbitration agreements. Arbitration agreement providing "any dispute between [the parties] shall not be the subject of a class action lawsuit or arbitration proceeding" did not bar potential plaintiffs from joining the FLSA collective action. However, additional provision that "the only parties to the arbitration shall be [employer] and [the employee]" barred collective actions and multiple party actions.

Soni v. Solera Holdings, L.L.C., No. 21-10428, 2022 WL 1402046 (5th Cir. May 4, 2022) (per curiam) (employment). Order compelling arbitration affirmed. The party opposing enforcement of an arbitration agreement is required to "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". This "some showing" standard requires: "unequivocally denying entering the contract, and producing

evidence sufficient to substantiate that allegation." The "mandated unequivocal denial requires more than 'self-serving affidavits' containing 'hollow, bald assertions'".

Matter of Little River Healthcare Holdings, L.L.C., No. 21-50616, 2022 WL 1568367 (5th Cir. May 18, 2022) (per curiam). Federal law of collateral estoppel applied. If a prior case was decided by a federal court, then then the district court applies federal law even if that court was handling a state-law issue. Where an arbitration award is affirmed by a federal court, federal law is the appropriate law to apply to determine collateral estoppel.

Hinkle v. Phillips 66 Co., 35 F.4th 417 (5th Cir. 2022) (staffing/FLSA). Order denying arbitration affirmed. It is up to the court, not an arbitrator, to decide whether a nonsignatory can enforce an arbitration agreement. The issue is not whether a claimant has an arbitration agreement with anyone—it is whether the claimant has an agreement to arbitrate with the party he is suing.

Opinions of United States District Courts

Motions to Compel Arbitration

Hardaway v. Toyota Fin. Services, No. 4:21-CV-194-KPJ, 2022 WL 1667036 (E.D. Tex. May 25, 2022) (Johnson, Mag. J.) (consumer protection). Motion to compel denied. Plaintiff evinced a desire to resolve the dispute through litigation—and therefore substantially invoked the judicial process—when he filed the case in federal court.

Archie v. W. Coast Univ., No. 3:21-CV-1272-M-BH, 2022 WL 1528181 (N.D. Tex. Apr. 21, 2022) (Ramirez, Mag. J.), report and recommendation adopted, 2022 WL 1524122 (May 13, 2022) (ADA/employment). Unopposed motion to compel granted. Courts in the Fifth Circuit employ a two-step inquiry when determining a motion to compel arbitration under the FAA. The first step is to determine whether the parties agreed to arbitrate the dispute at issue. The second step of the inquiry is to determine whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims. While the two-step inquiry used to consider a motion to compel arbitration under the FAA is well-settled, "the quantum of evidence required to prove or disprove the existence of an agreement to arbitrate is not entirely clear in this Circuit."

Bobby Goldstein Productions, Inc. v. Habeeb, No. 3:21-CV-1924-G, 2022 WL 1642466 (N.D. Tex. May 24, 2022) (copyright). Motion to compel nonsignatory denied. While there are strong federal and state policies favoring arbitration, a court does not yield to these policies when making the initial threshold determination about the existence of an agreement to arbitrate. Six theories under which a court may compel a nonsignatory to arbitration are: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; (5) estoppel; and (6) third-party beneficiary. A non-signatory to an arbitration agreement, is "entitled to a presumption of independent status."

Mosby v. Cigna Ins. Co., No. 4:21-CV-00576, 2022 WL 1785267 (S.D. Tex. May 31, 2022) (employment). Motion to compel granted.

Direct Biologics, LLC v. McQueen, No. 1:22-CV-381-SH, 2022 WL 1693995 (W.D. Tex. May 26, 2022) (Hightower, Mag. J.) (appeal filed) (covenant not to compete/trade secrets). Motion to compel arbitration of request for preliminary injunction denied. A district court can grant preliminary relief before deciding whether to compel arbitration based on its equitable powers to preserve the status quo where the request for a preliminary injunction was filed before the motion to compel arbitration.

Other Arbitration-Related Issues

Clean Pro Carpet & Upholstery Care, Inc. v. Upper Pontalba of Old Metairie Condo. Ass'n, Inc., No. CV 20-1550, 2022 WL 1470584 (E.D. La. Apr. 25, 2022) (insurance). Motion to appoint Umpire. The arbitration clause provided that the party arbitrators and umpire shall be “persons employed or engaged in a senior position in insurance underwriting or claims” and required application of New York law. Former New York judge was found to be the “most appropriate candidate” based in part on extensive experience handling insurance-related cases as a judge and mediator. The language did not require that the umpire be employed by an insurance company.