Arbitration in the Fifth - September 2021

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In September 2021, the Court of Appeals for the Fifth Circuit (in Butler v. Z&H Foods, Inc) addressed yet again the requirements to challenge the existence of an arbitration agreement, and in Forby v. One Techs., L.P, the Court considered the breadth of a waiver finding making clear that waiver is decided on a "claim-by-claim" basis.

Waiver of the right to arbitrate – a claim-by-claim analysis

Consideration of whether a party has waived its right to seek arbitration is a two-step inquiry. First, the court decides whether a party substantially invoked the judicial process and, second, whether it caused the other party prejudice. Having already found waiver as to certain claims, *Forby v. One Techs., L.P.*, 20-10088, 2021 WL 4167262 (5th Cir. Sept. 14, 2021) considers the breadth of the waiver and makes clear waiver is determined on a claim-by-claim basis. A party only invokes the judicial process to the extent it litigates *a specific claim* that it subsequently seeks to arbitrate.

In *Forby*, the defendant had been found to have waived its right to seek arbitration of certain state law claims. Subsequent to the finding of waiver, plaintiff amended her complaint adding federal law claims. The defendant did not attempt to litigate the new claims, and instead moved to compel arbitration. Since waivers of arbitral rights are evaluated on a claim-by-claim basis, the defendant's prior conduct did not result in waiver of its right to arbitrate the new federal claims.

Forby also grappled with the meaning of "claim" in this context of waiver analysis. Prior unpublished decisions of the Fifth Circuit considered "claim" to include "any allegation stemming from the same nucleus of operative facts, whatever the theory of recovery." *Forby* rejected this framework, finding that it was taken from the transactional test used in claim preclusion and that it fit awkwardly with the court's waiver precedent. Ultimately, *Forby* declined to adopt the "same nucleus" framework for evaluating whether a party has invoked the judicial process as to a "specific claim."

Opinions of the Fifth Circuit

Butler v. Z&H Foods, Inc., 21-20086, 2021 WL 4073110 (5th Cir. Sept. 7, 2021) (per curiam) (employment). Order compelling arbitration confirmed. Questions as to an arbitration agreement's validity and existence are governed by state law. To put the agreement's existence "in issue," the party resisting arbitration must make at least some showing that, under prevailing law, it would be relieved of its contractual obligations to arbitrate if its allegations proved to be true and it must produce some evidence to substantiate its factual allegations. Without corroborating evidence, self-serving affidavits will not suffice to entitle the nonmovant to a jury trial on the question of the existence of the agreement. The mere fact that a document can be falsified does not mean any given document actually was falsified. Plaintiffs' argument that an employee handbook's unilateral-modification provision trumped the arbitration agreement's mutual-modification provision making the arbitration agreement illusory was not supported by the text of the documents. Delaying nine months to file the motion to compel and responding to discovery did not constitute waiver.

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Forby v. One Techs., L.P., 20-10088, 2021 WL 4167262 (5th Cir. Sept. 14, 2021) (Credit Repair Organizations Act). Order denying motion to compel reversed. Waiver of right to compel arbitration is claim specific. Waiver finding as to state claims did not extend to later-pled federal claims.

Opinions of United States District Courts

Motions to Compel Arbitration

U.S. v. Citi Approved Enter. LLC, 6:21-CV-00386, 2021 WL 4076579, (W.D. La. Aug. 10, 2021) (Hanna, Mag. J.) report and recommendation adopted 2021 WL 4070929 (Sept. 7, 2021) (government contracting/construction). Motion to compel granted in part and denied in part. Plaintiff was a subcontractor to defendants on a U.S. Corps of Engineers project. Miller Act claims by a subcontractor for unpaid labor and materials are separate and distinct from those for general breach of contract. Motion to compel was granted as to contract claims and denied as to Miller Act claims.

Barnett v. Am. Express Nat'l Bank, 3:20-CV-623-HTW-LGI, 2021 WL 4188051 (S.D. Miss. Sept. 14, 2021) (Fair Credit Reporting Act). Motion to compel denied. A party seeking to compel arbitration waives its right to arbitrate when it (1) "substantially invokes the judicial process" and (2) thereby causes "detriment or prejudice" to the other party. Arbitration was waived by creditor's filing a collections action in state court, and not responding to alleged debtor's attempts to request arbitration of the disputed charges.

Fuel Husky, LLC v. Total Energy Ventures Int'l, S.A.S., CV H-19-4277, 2021 WL 4086226 (S.D. Tex. Sept. 8, 2021) (Nondisclosure agreement). Motion to compel granted. The New York Convention permits only four question "very limited inquiry" when considering a motion to compel: (1) whether there is a written agreement to arbitrate—and whether it is broad or narrow; (2) whether the seat of arbitration is in a signatory of the New York Convention; (3) whether the arbitration agreement arises out of a commercial legal relationship; and (4) whether one party is not a United States citizen. If all four questions favor arbitration, the court should compel arbitration, unless "the agreement is null and void, inoperative or incapable of being performed." The "null and void" clause encompasses valid defenses under the FAA that are applicable internationally, including fraud. A defense of fraudulent inducement requires a party to allege and prove that the arbitration clause itself was a product of fraud. To successfully allege fraud, a party must set forth "the who, what, when, where, and how" of the events at issue.

Anadarko E&P Onshore, LLC v. Calif. Union Ins. Co., CV H-21-1743, 2021 WL 4087611 (S.D. Tex. Sept. 8, 2021) (insurance coverage). Motion to compel granted. A service-of-suit clause was inconsistent with an arbitration clause because both operated as forum-selection clauses. Arbitration clause in a settlement agreement entered into after the insurance policy was issued controlled.

Sherrill v. S&D Carwash Mgmt., LLC, 4:20-CV-01475, 2021 WL 4212486 (S.D. Tex. Sept. 15, 2021) (Edison, Mag. J.) (employment). Motion to compel granted. The parties' agreement was executed electronically, but it was not clear who signed for the employer. The agreement did not identify a legal entity as the employer. Instead, it identified a tradename as the party to the agreement. Both potential employers were referred to arbitration. The question of whether an entity was the employer or whether the entities were an integrated enterprise went toward the merits and were questions for the arbitrator. The report and recommendation was adopted at 2021 WL 4480748 (S.D. Tex. Sept. 30, 2021) (whether defendants were or were not plaintiff's single employer was for the arbitrator to decide).

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Burgess v. Cole ABA Solutions, Inc., CV H-21-1954, 2021 WL 4295131 (S.D. Tex. Sept. 21, 2021) (employment). Motion to compel granted. An offer of at-will employment is valid consideration under Texas contract law as is a mutual agreement to arbitrate claims. Non-signatories may enforce arbitration provisions if they were intended third-party beneficiaries.

Motions to Confirm or Vacate an Award

TCSS Envtl. Techs. LLC v. Cavortex Tech. Int'l, LLC, 3:20-CV-2754-L, 2021 WL 4197240 (N.D. Tex. Sept. 14, 2021). Motion to confirm denied without prejudice. The Federal Arbitration Act is insufficient to invoke the court's jurisdiction to confirm or vacate an arbitration award. Leave granted to replead the basis for diversity of federal question jurisdiction.

TCSS Envtl. Techs. LLC v. Cavortex Tech. Int'l, LLC, 3:20-CV-2754-L, 3:20-CV-2754-L, 2021 WL 4319674 (N.D. Tex. Sept. 23, 2021). Motion to confirm granted. Arbitrators have authority to specify the rate of post-award interest. Arbitrators do not have authority to specify the rate of post-judgment interest unless authority to do so was granted by the parties. Request pursuant to the Texas General Arbitration Act that a deposit securing the award be required was denied “at this stage.” The court noted that movant had not objected to the finding that confirmation was governed by the Federal Arbitration Act.

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