

## Arbitration in the Fifth - February 2020

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PRACTICES Litigation

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In February, the Fifth Circuit had a break from arbitration issues. The District Courts, however, were busy primarily addressing motions to compel arbitration. The District Courts' opinions, however, include answers to two questions that the courts indicate have not yet been considered by the Fifth Circuit:

### ***Are arbitration clauses in “sign-in wrap agreements” enforceable?***

Maybe. In *Walker v. Neutron Holdings, Inc.*, No. 1:19-cv-574-RP, 2020 WL 703268 (W.D. Tex. Feb. 11, 2020) (Hightower, Mag. J.) the court was faced with an arbitration clause that was contained in a “sign-in wrap” user agreement for a smartphone app and was asked whether the parties entered a valid, and enforceable contract when Plaintiff downloaded the app and clicked the word “NEXT” on the sign-in page? The existence of the arbitration agreement and its scope were not in dispute, but conspicuousness, and therefore notice, were. Walker found the layout of the app’s sign-in screen was sufficient to provide adequate notice to a reasonable viewer that the User Agreement was part of the transaction by clicking “NEXT.” Therefore, the arbitration clause was enforceable.

### ***Does section 7 of the Federal Arbitration Act provide an independent grant of federal jurisdiction?***

According to *Aetna Health Mgmt., LLC v. Benchmark Health Network, LLC*, 3:20-CV-00443-X, 2020 WL 980250 (N.D. Tex. Feb. 28, 2020), the answer is “no.” Section 7 of the FAA provides for enforcement of arbitral subpoenas, in part:

The arbitrators . . . may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case . . . [I]f any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator

In *Aetna Health Mgmt.*, the court was asked to enforce an arbitral subpoena. Prior to considering the request for relief, the court addressed the threshold question of subject matter jurisdiction and concluded that Section 7 does not bestow federal jurisdiction. Since diversity jurisdiction was also not shown, the action was dismissed for lack of subject matter jurisdiction.

## **Other Opinions by United States District Courts**

### ***Motion to Compel Arbitration***

*In re Chinese Manufactured Drywall Prod. Liab. Litig.*, MDL No. 2047, 2020 WL 836348 (E.D. La. Feb. 20, 2020). Motion to compel arbitration granted. A dispute among lawyers over the division of class action attorneys’ fees is arbitrable. Neither the court’s ancillary jurisdiction over funds placed in the registry nor Fed. R. Civ. P. 23 pose a legal constraint barring arbitration. Under Rule 23, the

court allocates and amends specific sums to attorneys involved. How the affected “parties choose to divide the sums amongst themselves is not the court’s concern.”

*Murray v. Waitr Holdings Inc.*, No. 6:19-cv-01143, 2020 WL 763038 (W.D. La. Feb. 14, 2020), adopting rpt. and recc., 2019 WL 7944814 (Nov. 14, 2109). Motion to compel arbitration granted.

*Mathews v. Dallas Ass’n of Credit Mgmt., Inc.*, No. 19-0210, 2020 WL 838247 (W.D. La. Feb. 19, 2020). Motion to compel arbitration granted. Argument that defendant waived arbitration by “allegedly avail[ing] itself of written discovery but fail[ing] to respond to plaintiff’s discovery” rejected.

*Willis v. Dixie Elec. Power Ass’n*, No. 2:18-CV-30-KS-MTP, 2020 WL 601389 (S.D. Miss. Feb. 5, 2020). Motion to compel arbitration granted. Plaintiffs were bound by arbitration clause incorporated into their agreement by reference.

*Insight Inc., LLC v. Icon Constr, Inc.*, No. 4:18-CV-00531-ALM-KPJ 2020 WL 906876 (E.D. Tex. Feb. 25, 2020) (Mem. Op. and Rpt. and Recc. of Mag. J.). Motion to compel arbitration by non-signatory denied. Equitable claim of lessor of property against sublessee was not subject to arbitration clause in agreement between lessee and sublessee.

*Rich v. Columbia Med. Ctr. Of Plano Sub.*, L.P., No. 4:19-CV-404, 2020 WL 954737 (E.D. Tex. Feb. 27, 2020). Motion to compel arbitration granted.

*Ideal Mfg., Inc. v. NGC Group, Inc.*, No. 1:19-cv-1641; 2-2- WL 826638 (S.D. Tex. Feb. 4, 2020) (Torteya, Mag. J.) adopted 2020 WL 824102 (Feb. 19, 2020). Motion to compel arbitration with non-signatory denied. Plaintiff, a materials and services provider to a wind farm, could not compel arbitration with the surety for general contraction. Neither the doctrines of “incorporation by reference” nor direct benefits estoppel supported Plaintiff’s motion to compel.

*CHCA Women’s Hosp., L.P. v. Rocky Mtn. Hosp. & Med. Serv., Inc.*, H-19-3256, 2020 WL 883269 (S.D. Tex. Feb. 24, 2020). Motion to compel arbitration with non-signatory denied. A contract that is silent about arbitrating claims against non-signatories does not unmistakably mandate arbitration of arbitrability. Therefore, the threshold of arbitrability is for the court.

*Velazquez v. Village Farms, L.P.*, No. EP-19-CV-258-PRM, 2020 WL 905540 (W.D. Tex. Feb. 25, 2020). Motion to compel arbitration granted. Arbitration agreement attached to a summary description of Employee Injury Benefit Plan, for which Plaintiff signed an acknowledgement was enforceable.

### ***Motion to Confirm/Vacate Arbitration Award***

*Credit Suisse Sec. (USA) LLC v. Carlson*, H-19-1470, 2020 WL 837428 (S.D. Tex. Feb. 20, 2020). Motion for reconsideration of order denying motion to vacate denied. The standard applicable in the Fifth Circuit to an allegation of evident partiality for failure to disclose requires movant to show that “a reasonable person would have to conclude that the arbitration panel was partial.”

### ***Motion to Confirm/Vacate Arbitration Award***

*Nichols v. U.S. Bank, Nat’l Ass’n*, No. 2:19-MC-162-KS-MTP, 2020 WL 888053 (S.D. Miss. Feb. 24, 2020). Motion to vacate granted. Following the court’s January order denying the motion to confirm a purported arbitration award involving “Sitcomm Arbitration Association,” the court granted sanctions for an “objectively frivolous argument” made seeking confirmation of the award “for which there was no underlying arbitration agreement.”

***Motions in Litigation Related to Prior Arbitration***

*Snyder v. L-3 Comm. Vertex Aerospace, LLC*, No. 1:19-CV-0340SA DAS, 2020 WL 869977 (N.D. Miss. Feb. 21, 2020). No weight given to an arbitrator’s decision. In its motion for summary judgment, employer sought to rely on an award issued in former employee’s dispute with her labor union. Based on the court’s analysis, no weight was given to the award.

*Travel Pass Group, LLC v. Caesars Entertainment Corp.*, No. 5:18-cv-153-RWS-CMC, 2020 WL 698538 (E.D. Tex. Jan. 16, 2020) (Craven, Mag. J.). Motion to compel discovery of documents produced in arbitration denied. Request that seeks “wholesale duplicates of discovery produced in other litigation is improper.”