

## Arbitration in the Fifth - March 2020

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PRACTICES Litigation

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In television drama, there is nothing like a cliffhanger to keep the audience coming back. As discussed below, in March the Fifth Circuit may have left a clue suggesting the outcome of a recently filed appeal. Of course, we will have to wait for the outcome of that appeal to know for sure. As for the District Courts, they were busy as usual with motions to compel arbitration and review of awards.

***If a defendant waives arbitration as to a named plaintiff prior to class certification, is the defendant precluded from compelling arbitration with the unnamed putative class members?***

In March, the Fifth Circuit suggested an answer in *Cruson v. Jackson Nat'l Life Ins. Co.*, 18-40605, 2020 WL 1443531 (5th Cir. Mar. 25, 2020). *Cruson*, however, is not an arbitration case, rather it answers the question of whether a defendant that did not assert a personal jurisdiction defense in response to a named plaintiff's claim is barred from asserting that defense to non-Texas class members. *Cruson* found that the defense is still available reasoning that prior to certification, the nonresidents are not yet before the court, and their possible future claims are hypothetical. *Cruson's* relevance to arbitration is its reliance on *In re Checking Account Overdraft Litigation*, 780 F.3d 1031 (11th Cir. 2015). That case addressed whether a defendant, who had waived arbitration against named plaintiffs prior to class certification, should be precluded from compelling arbitration of claims by the unnamed putative class members. It concluded that there is no justiciable controversy between [the defendant] and the unnamed putative class members," who "[were] not yet before the court." *Id.* at 1037.

Will the Fifth Circuit continue to find support in *In re Checking Account Overdraft Litigation* and apply the rationale of *Cruson* in the context of arbitration? The *per curiam* decision *Vine v. PLS Fin. Serv. Inc.* (discussed below) might suggest the answer is no, but *Vine* may be distinguishable as its class definition appears to include the conduct that resulted in waiver. The clear answer to the question may come from the appeal of *Forby v. One Techs., LP*, No. 3:16-CV-856-L, 2020 WL 132310 (N.D. Tex. Jan. 13, 2020). *Forby* denied a motion to compel arbitration. In *Forby* the magistrate judge "recommended that 'the allegations of any putative class members subject to the Arbitration Agreement . . . should be stricken,' as Defendants did not, and could not 'have waived their arbitration rights as to putative class members because the class has yet to be certified.'" The court rejected the magistrate judge's findings and conclusions, though it did so on the basis that the arbitration clause did not authorize class arbitration, so waiver was irrelevant.

### Other Opinions of the Fifth Circuit

*Comm'n Workers of Am. v. Sw. Bell Tel. Co.*, 19-50686, 2020 WL 1482543 (5th Cir. Mar. 27, 2020). Confirmation of award affirmed. The arbitrator issued two awards. The first decided for the claimant union and the second, replacement award, decided for the respondent company. The analytical framework for the two awards was the same. The arbitrator found that he had committed a "technical error," and that the applicable AAA Rules allowed him to vacate the first award and issue the second. The arbitrator's interpretation of the AAA Rules was entitled to deference.

*Hiser v. NZone Guidance, L.L.C.*, 19-50353, 2020 WL 1487860 (5th Cir. Mar. 24, 2020) (per curiam and unpublished). Motion to compel arbitration by non-signatory denied.

*Vine v. PLS Fin. Serv. Inc.*, 19-40353, 2020 WL 1522438, (5th Cir. Mar. 30, 2020) (per curiam and unpublished). Motion to compel arbitration denied. A conflicting opinion by the Texas Supreme Court on a federal law question was not a substantive change impacting the “law of the case.” The class action waiver in the arbitration agreement did not waive class action litigation where the agreement to arbitrate had been waived.

## Opinions by United States District Courts

### Motion to Compel Arbitration

*Holts v. TNT Cable Contractors, Inc.*, CV 19-13546, 2020 WL 1046337 (E.D. La. Mar. 4, 2020). Motion to compel by non-signatory granted. Plaintiff did not distinguish between “joint employers” one of which was a signatory and the other not. By not differentiating between the wrongdoing by each defendant, plaintiff alleged interdependent claims.

*Leja v. Brousseau Mgmt. Co., L.L.C.*, CV 19-00269-BAJ-EWD, 2020 WL 1161435 (M.D. La. Mar. 10, 2020). Motion to compel arbitration denied. Defendants waived their right to arbitrate by ignoring correspondence that sought to initiate the arbitration proceedings.

*People Source Staffing Prof'l, LLC v. Robertson*, 3:19-CV-0430, 2020 WL 1494436 (W.D. La. Mar. 19, 2020). Unopposed motion to compel granted.

*Baria v. Singing River Elec. Coop.*, 1:19-CV-248-KS-JCG, 2020 WL 1277202 (S.D. Miss. Mar. 17, 2020). Reconsideration of order compelling arbitration granted and stay lifted. The parties' contract and application for service were not presented to the court.

*Piatt v. Dollar Gen. Corp.*, 3:18-CV-275-NBB-RP, 2020 WL 1539931 (N.D. Miss. Mar. 31, 2020). Motion to compel arbitration denied without prejudice. Plaintiff's evidence of her denial that she had agreed to arbitration was sufficient to require an evidentiary hearing.

*Kidd v. Lowe's Home Centers, LLC*, 1:19CV245-HSO-JCG, 2020 WL 1493464 (S.D. Miss. Mar. 27, 2020). Motion to compel individual arbitrations in collective FLSA action granted as to certain plaintiffs and denied without prejudice as to others. Certain plaintiffs presented evidence sufficient, under Mississippi law, to create a fact issue as to procedural unconscionability. Applying the Colorado unconscionability standard, another plaintiff failed to raise a fact issue. Other plaintiffs were compelled to arbitration.

*Sw. Airlines Co. v. Aircraft Mech. Fraternal Assoc.*, 3:17-CV-0431-N, 2020 WL 1455828 (N.D. Tex. Mar. 25, 2020). Dismissed in favor of compulsory labor arbitration of “minor dispute.”

*Qazi v. Stage Stores, Inc.*, 4:18-CV-0780, 2020 WL 1321538 (S.D. Tex. Mar. 17, 2020). Motion to compel arbitration denied. Motion to compel filed almost twenty months after the case was filed denied due to “litigation-conduct” waiver.

*McCann v. Am. Homes 4 Rent, L.P.*, 4:19-CV-1879, 2020 WL 1429494 (S.D. Tex. Mar. 19, 2020). Motion to compel arbitration granted. Although language in an employee handbook may generally recognize the existence of an arbitration agreement, that manual does not diminish the validity of a separate, stand-alone arbitration agreement.

*Flynn v. Sanchez Oil & Gas Corp.*, 5:19-CV-0867-JKP-ESC, 2020 WL 1083825 (W.D. Tex. Mar. 6, 2020). Motion to compel by non-signatory denied. Third-party beneficiary, direct benefits estoppel and equity arguments rejected.

*Commercial Flooring Sys., Inc. v. Hunt Constr., Inc.*, 1:19-CV-1012-RP-SH, 2020 WL 1520140 (W.D. Tex. Mar. 30, 2020). Motion to compel granted. Arbitration provision that allowed one party “sole and exclusive right determine whether any dispute . . . shall be submitted to a court of law for arbitrated” was not illusory under Texas law. Compliance with a condition precedent to arbitration was a procedural question for the arbitrator to decide.

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

*Ashton v. PJ Louisiana, Inc.*, CV 19-901, 2020 WL 1068161 (W.D. La. Mar. 3, 2020). Motion to confirm award granted. Confirmation granted even though the award was fully satisfied. Attorneys’ fees “incurred in the confirmation of the arbitration award” granted in an amount to be determined.

*Raymond James & Assoc., Inc. v. Barlow*, 3:19-CV-394-CWR-LRA, 2020 WL 1493465 (S.D. Miss. Mar. 27, 2020). Motion to vacate award denied. Assuming without deciding that “manifest disregard” of the law justifies vacatur under § 10(a)(4). Reliance on a state trial court opinion was criticized by the court, which explained that defendant’s counsel, who had represented defendant in the state trial court, “drafted [the] order that ruled against the [plaintiffs in that case], but then added a page of dicta designed to take out the [claimants in the present case] too.”

*Northrop Grumman Ship Sys., Inc. v. Ministry of Def.*, 1:02CV785-HSO-RHW, 2020 WL 1584378 (S.D. Miss. Mar. 31, 2020). Motion to confirm arbitration award granted. Venezuelan Commercial Arbitration Law permitted the arbitrators to change the legal seat of arbitration.

*Jackson v. Conifer Revenue Cycle Solutions, LLC*, 4:19-CV-256, 2020 WL 1242448 (E.D. Tex. Mar. 16, 2020) (Adopting Rpt. and Recc. of Mag. J.). Motion to vacate award denied. A party’s communication with the AAA to obtain an extension of its answer date was not evidence of partiality by the arbitrator. Likewise, the AAA’s decision, in conformance with its rules, on arbitration locale did not show partiality or corruption.

*Bldg. Materials Mfg. Corp. v. United Steelworkers Int’l Union*, 3:18-CV-02606-X, 2020 WL 1047895 (N.D. Tex. Mar. 3, 2020). Motion to vacate award denied. Action brought under 29 U.S.C. § 185 questioning an arbitrator’s decision on a labor contract dispute.

*Magee v. Nationstar Mortgage, LLC*, 5:19-MC-017-H, 2020 WL 1188445 (N.D. Tex. Mar. 11, 2020). Motion to vacate award granted, and order referred to the U.S. Attorney’s Office for the N.D. of Texas and to various states’ Attorneys General. Purported award related to a “Sitcomm Arbitration Association” vacated as procured by corruption, fraud or undue means.

*Wells Fargo Bank, Nat’l Ass’n v. Energy Prod. Co. LLC*, 3:19-CV-2014-S, 2020 WL 1493663 (N.D. Tex. Mar. 26, 2020). Motion to confirm granted. Defendant did not appear in the arbitration or the confirmation action.

*First Nat’l Petroleum Corp. v. OAO Tyumenneftegaz*, 4:19-CV-97, 2020 WL 1188447 (S.D. Tex. Mar. 12, 2020). Action to confirm award dismissed due to lack of personal jurisdiction.

*Int'l Energy Ventures Mgmt., LLC v. United Energy Group, LTD.*, CV H-17-2262, 2020 WL 1333163 (S.D. Tex. Mar. 20, 2020). Awards were vacated. Two arbitration awards by different arbitrators in separate arbitrations found waiver by litigation conduct. Both parties were found to have switched their position on the authority of the arbitrator to decide litigation-conduct waiver. This was taken as an indication that there was no prior agreement to delegate the decision.

## **Motion to Appoint Arbitrator**

*Llagas v Sealift Holdings Inc.*, 2:17-CV-00472, 2020 WL 1243313 (W.D. La. Mar. 13, 2020). Motion to appoint arbitrator granted to the extent that plaintiff was required to initiate specific proceedings relative to the dispute. A motion to compel arbitration was granted in prior orders under the “intertwined claims” doctrine. The plaintiff sought arbitration, but not consistent with the parties’ agreement. As the plaintiff failed to comply with the order compelling arbitration pursuant to an agreement, section 5 of the FAA “comes into play which permits the Court to appoint an arbitrator.”

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

*Moody Nat'l CI Grapevine S., L.P. v. TIC Texas Two 23, L.L.C.*, CV H-19-0711, 2020 WL 1130361 (S.D. Tex. Mar. 6, 2020). Defendant’s motion for summary judgment on plaintiff’s request to permanently enjoin arbitration denied.

## **Opinion by United States Bankruptcy Courts**

*Gaughf v. Parkland Legal Grp., PL*, No. 19-50947-KMS, 2020 WL 1271595 (Bankr. S.D. Miss. Mar. 12, 2020). Motion to compel arbitration granted. Trustee in Chapter 7 Bankruptcy was required to arbitrate claim of aiding and abetting alleged breach of fiduciary duty. Balancing the competing federal interests involved in bankruptcy and arbitration, the Trustee was required to arbitrate the non-core state law claim.