

Arbitration in the Fifth - October 2020

November 6, 2020 Odean Volker

PRACTICES Litigation

In October, the Fifth Circuit's *Robertson v. Intratek Computer, Inc.* explained what would be required of a whistleblower statute for that statute to displace an arbitration agreement. In the district courts, almost half of the decisions involved the Fair Labor Standards Act (FLSA), including opinions discussing the notice in collection actions. Finally, the Bankruptcy Court for the Northern District of Mississippi provided a somewhat rare look at a motion to compel in a bankruptcy setting.

When might a federal whistleblower statute render an arbitration agreement unenforceable?

When the whistleblower statute reflects a “contrary statutory demand” ousting the Federal Arbitration Act (FAA). *Robertson v. Intratek Computer, Inc.*, 976 F.3d 575 (5th Cir. 2020) tackles the question of whether 41 U.S.C. § 4712’s whistleblower protection rendered an arbitration agreement unenforceable. *Robertson* explains that courts are obligated to enforce arbitration agreements according to their terms unless the FAA’s mandate has been overridden by a contrary Congressional command. To show a contrary command, the party resisting arbitration must show that “Congress intended to preclude a waiver of a judicial forum” for the claims at issue. The absence of any specific statutory discussion of arbitration is an important and telling clue that Congress has not displaced the FAA. As to Section 4712, that it allows for a jury trial is not a “contrary statutory command.” “[T]he text and structure of § 4712 make clear that a jury trial is one way to vindicate a whistleblower’s statutory rights after the whistleblower exhausts administrative remedies; the jury trial is not itself a “right” or “remedy” created by § 4712.”

Opinions of the Fifth Circuit

Robertson v. Intratek Computer, Inc., 976 F.3d 575 (5th Cir. 2020) (employment). Order compelling arbitration affirmed in part and reversed in part. 41 U.S.C. § 4712 did not preclude arbitration of whistleblower claims. While nonsignatories may sometimes be compelled to arbitrate, plaintiff did not seek arbitration as to nonsignatories.

Sayers Constr., L.L.C. v. Timberline Constr., Inc., 976 F.3d 570 (5th Cir. 2020) (contractor/subcontractor). Dismissal of action to vacate affirmed. Action filed in Texas seeking vacatur of award entered in Florida dismissed for lack of personal jurisdiction.

Sabatelli v. Baylor Scott & White Health, 19-50047, 2020 WL 6164342 (5th Cir. Oct. 21, 2020) (per curiam) (employment). Finding that plaintiff waived arbitration was affirmed. After filing discrimination claims, and with a summary judgment pending, plaintiff filed an arbitration demand claiming breach of his employment agreement. Waiver applies only if the litigated claim is the “specific” claim the party seeks to arbitrate. A “claim” is any allegation stemming from the “same nucleus of operative facts” whatever the theory of recovery. All plaintiff’s claims related to the same event – the allegedly wrongful termination.

Salinas v. McDavid Houston-Niss, L.L.C., 20-20003, 2020 WL 6122780 (5th Cir. Oct. 13, 2020) (per curiam) (vehicle sales contract). Order confirming award affirmed.

Opinions of United States District Courts

Motions to Compel Arbitration

Barz Adventures Inc. v. Patrick, 4:20-CV-299-ALM, 2020 WL 6342951 (E.D. Tex. Oct. 29, 2020) (trade secret). Motion to compel denied. The parties' agreement contained an arbitration clause and a permissive option to pursue equitable relief in court. Read together the clauses required arbitration of legal claims and permitted equitable claims either in arbitration or litigation.

Cabrales v. Midland Credit Mgmt., Inc., 3:20-CV-01703-X, 2020 WL 6145110 (N.D. Tex. Oct. 7, 2020) (appeal filed Oct. 19, 2020) (Debt Collection Practices Act). Motion to compel granted. Debt collector sought to compel arbitration based on debtor's credit card agreement with the bank that had sold and assigned the account to the debt collector.

Harris v. Tucker Entm't, LLC, 3:20-CV-651-L-BK, 2020 WL 6370160 (N.D. Tex. Oct. 6, 2020) (Toliver, Mag. J.), report and recommendation adopted, 2020 WL 6363877 (Oct. 29, 2020) (FLSA). Motion to compel granted. Delegation clause was not unconscionable.

Orozco v. JP Morgan Chase Bank, N.A., CV H-20-1961, 2020 WL 6044332 (S.D. Tex. Oct. 13, 2020) (employment). Motion to compel granted. Agreement to arbitrate was enforceable even though employees did not "receive advance notice of what they were signing and neither remember[ed] signing the Agreements." Mandating arbitration of Title VII claims did not violate public policy.

Rhyan v. DW Direct, Inc., 4:19-CV-3599, 2020 WL 6130743 (S.D. Tex. Oct. 19, 2020) (FLSA). Motion to compel denied. The ambiguous employee handbook and arbitration agreement were construed against the drafter and interpreted as being illusory and unenforceable.

Moore v. Maverick Nat. Res., LLC, CV H-20-591, 2020 WL 6431905 (S.D. Tex. Oct. 15, 2020) (Bray, Mag. J.), report and recommendation adopted, 2020 WL 6392854 (S.D. Tex. Nov. 2, 2020) (FLSA). Motion to compel denied. Plaintiff was employed by an entity with whom he had an arbitration agreement. That entity provided personnel to the nonsignatory defendant. Delegation clause did not reflect clear intent to delegate arbitrability of claims against a nonsignatory.

Savage SE Operations, LLC v. Wartsila N. Am., Inc., 4:19-CV-01681, 2020 WL 6270942 (S.D. Tex. Oct. 26, 2020) (vessel repair contract). Motion to compel granted. Parties had operated under several service offers (containing arbitration agreements) and purchase orders. Communications "between the parties leading to the contractual services . . . were somewhat complicated." The relevant work was performed with the owner's knowledge and permission.

Motions to Confirm/Vacate

Neptune Shipmanagement Services (PTE.), Ltd. v. Dahiya, CV 20-1525, 2020 WL 6059647 (E.D. La. Oct. 14, 2020) (maritime personal injury). Award confirmed. A Louisiana court had compelled arbitration with nonsignatories. Claimant objected that the nonsignatories did not have standing to seek confirmation. Because claimant was obligated to arbitrate his personal injury claims against one party, he was equitably estopped from disclaiming the outcome and findings.

Shirley v. FMC Techs, Inc., A-20-CV-261-RP, 2020 WL 5995695 (W.D. Tex. Oct. 9, 2020) (Hightower, Mag. J.) (stock purchase agreement purchase price adjustment). Motion to confirm granted and motion to vacate denied. Respondent objected that arbitrator exceeded his authority by ruling on the working capital dispute, which under the terms of the SPA would normally have

been submitted to an independent accountant. The SPA's express incorporation of the CPR Rules established clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. Arbitrator clearly interpreted the SPA in determining jurisdiction.

Other Arbitration-Related Issues

Kibodeaux v. A&D Interests, Inc., 3:20-CV-00008, 2020 WL 6292551 (S.D. Tex. Oct. 27, 2020) (Edison, Mag. J.) (FLSA). Order approving notice of collection action. Notice to putative collective action members who had signed an arbitration agreement was allowed. Provision of the arbitration agreed prohibiting a "class action lawsuit or arbitration proceeding" determined not to address FLSA collective actions which the court distinguished from class actions. Defendants had not moved for arbitration with the named plaintiffs.

Ortiz v. Trinidad Drilling, LLC, SA-20-CV-00503-OLG, 2020 WL 6324393 (W.D. Tex. Oct. 28, 2020) (FLSA). Objection to notice to class members that had signed arbitration agreements not waived. "Class certification and notice are both integral parts of 'the conditional-certification stage' of FLSA collective action litigation." Defendants were permitted additional time after conditional class certification to provide the arbitration agreements.

Opinions of United States Bankruptcy Courts

In re: McCollum; Barkley v. Global Client Solutions, LLC, 19-15087-JDW, 2020 WL 6270572 (Bankr. N.D. Miss. Oct. 23, 2020) (debt relief services). Motion to compel granted. A bankruptcy court may decline to enforce an arbitration agreement when "the cause of action at issue is not derivative of the pre-petition legal or equitable rights possessed by a debtor but rather is derived entirely from the federal rights conferred by the Bankruptcy Code." A bankruptcy court may not refuse to compel arbitration if the matters in dispute do not involve core bankruptcy proceedings. A trustee is merely steps into the shoes of the debtor to prosecute a claim belonging to the estate and is bound by the arbitration agreement to the same extent as the debtor.