2018–19 Arbitration Update

The Good, the Bad, and the Ugly: A Plaintiff and Defense Perspective

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David R. Schlottman
Jackson Walker LLP
2323 Ross Avenue, Suite 600
214.953.6068
dschlottman@jw.com

Trang Tran
Tran Law Firm
2537 S. Gessner, Suite 104
Houston, Texas 77063
713.223.8855
Tran@tranlawllp.com

The past year has been an interesting one for the field of employment arbitration. At the nation's highest court, a conservative majority continues to broadly interpret the scope of the Federal Arbitration Act's preemption of state law and to limit the availability of class arbitration proceedings.

In the immediate wake of the Supreme Court's decisions this year, the Fifth Circuit resolved interesting ancillary questions such as who decides whether an arbitration clause authorizes class arbitration (presumptively the court, unless expressly delegated to the arbitrator) and whether employees who agreed to arbitration clauses with class waivers may receive notice of conditionally certified collective action proceedings (according to the Fifth Circuit, they may not).

The #MeToo movement was also affected. Some states have passed statutes banning arbitration of sexual harassment disputes. A district court in the Southern District of New York held that one such statute was preempted by the FAA.

At the state court level, the Texas courts of appeal continue to grapple with the question of whether an arbitration agreement was even formed. In particular, courts continue to confront disputes over electronically distributed arbitration agreements and the evidentiary standards for establishing proof that an employee electronically received the agreement.

Not to be left out, the National Labor Relations Board has also reinserted labor law considerations into the fray. The Board recently held that an arbitration agreement that could be reasonably construed by employees to prohibit the filing of ULP charges with the NLRB categorically violates Section 7 of the NLRA.

Below, we take a closer look at these cases.

United States Supreme Court

***Epic Sys. Corp v. Lewis*[1] – Employers and employees may lawfully agree to waive class or collective proceedings in an arbitration agreement.**

The blockbuster arbitration case of 2018 was *Epic Systems Corporation v. Lewis*. Resolving an ongoing split amongst the circuit courts of appeal, the United States Supreme Court held that parties may lawfully agree to arbitration contracts that prohibit class or collective proceedings.

Prior to this decision, the National Labor Relations Board and certain circuit courts of appeal had determined that it was a violation of Section 7 of the NLRA for an employer to include a class action waiver in an arbitration agreement. The reasoning was that such a waiver barred employees from participating in the "concerted activity" of pursing claims as a class or collective action. The thought process continued that because the saving clause in Section 9 of the FAA does *not* require enforcement of arbitration agreements that violate another federal law, an arbitration

[1] 138 S. Ct. 1612 (2018).

agreement with a class waiver was not enforceable. Other courts, however, reasoned that the scope of "concerted activities" protected by Section 7 of the NLRA was limited to workplace actions and was never intended nor understood to encompass procedural mechanisms in litigation.

The Supreme Court rejected the notion that Section 7 of the NLRA prohibits enforcement of class action waivers under the FAA on multiple grounds. First, the Court held that the employee-appellees misconstrued the effect of the saving clause in Section 9 of the FAA. According to the Court, the saving clause serves as a "sort of 'equal-treatment' rule for arbitration contracts,"[2] meaning that generally it "permits agreements to arbitrate to be invalidated by generally applicable defenses, such as fraud, duress, or unconscionability."[3] However, even if a defense is generally applicable to both arbitration and other contracts, "the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by interfering with fundamental attributes of arbitration."

Under these principles, even if the NLRA rendered class action waivers illegal, that defense would serve to target a fundamental attribute of arbitration—that is, efficiency and informality—and thus does fall within the saving clause. As the Court put it, "courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent."

Second, the Court disputed both of the fundamental assumptions of the employee-appellees' argument: (1) that class action waivers are prohibited under Section 7 of the NLRA; and (2) that the NLRA displaces the FAA. The Court observed that the NLRA does not express approval or disapproval of arbitration and makes no reference to class arbitration in any direct or explicit sense. Second, reading the text of Section 7 and the other provisions of the NLRA, the Court concluded that the NLRA was intended to regulate union and workplace matters rather than to dictate terms of procedure in litigation. In the words of the Court, "the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare [class waivers] unlawful."

***Lamps Plus, Inc. v. Varela* (2019)[4] – Ambiguity in an arbitration agreement is not a sufficient basis to demonstrate consent to class arbitration proceedings.**

In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*,[5] the Supreme Court held that class arbitration is not available unless the parties affirmatively consent. Silence is not consent. What if the agreement is not silent about availability of class arbitration, but is instead, ambiguous? The Supreme Court answered this question in *Lamp Plus, Inc. v. Varela*.

In yet another 5-4 decision on ideological lines, the Court held that ambiguity is an insufficient basis to find affirmative consent to class arbitration proceedings. To reach this

[2] *Id.*at 1622 (quoting *Kindred v. Nursing Ctrs. L.P. v. Clark*, 137 S. Ct. 1421 (2017)) (quotation marks omitted).
[3] *Id.* (quoting *AT&T Mobility v. Concepcion*, 563 U.S. 333, 339 (2011)) (quotation marks omitted).
[4] 139 S. Ct. 1407 (2019).
[5] 559 U.S. 662 (2010).

conclusion, the Court relied on its decisions in *Stolt-Nielsen* and *AT&T Mobility LLC v. Concepcion*.[6] Because of what the Court has previously characterized as fundamental differences between individual and class arbitration, "ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement to sacrifice the principal advantage of arbitration."

***New Prime Inc. v. Oliveira* (2019)[7] – The U.S. Supreme Court held that (1) the Federal Arbitration Act's Section 1 exemption may apply to a transportation worker, whether they are independent contractors or employees; and (2) A court (and not the arbitrator) must decide whether the exception to arbitration in Section 1 of the FAA applies.**

Under Section 1 of the Federal Arbitration Act, an employer may not compel arbitration of disputes involving "contracts of employment" of certain transportation workers. Specifically, the FAA provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[8] Interstate commerce in this context is narrower than the general meaning of that term under the Constitutions—it is more literal in focusing on crossing of borders.

Oliveira was a truck driver classified as an independent contractor by New Prime. He sued for wage and hour violations alleging misclassification. Oliveira signed an arbitration agreement that New Prime sought to enforce, and in ensuing litigation, the Supreme Court ultimately resolved two issues: (1) whether a court or an arbitrator must decide whether the exemption in Section 1 of the FAA applies; and (2) does the exemption, which applies to "contracts of employment," include a claim by an independent contractor.

On the first issue, the Court held that applicability of Section 1 of the FAA must be resolved by a court, not an arbitrator. The Court reached this conclusion even though the parties' arbitration agreement contained a delegation clause sending issues of arbitrability to the arbitrator. Since an agreement that an arbitrator must decide whether arbitration is available is *itself* an agreement to arbitrate, that agreement must be permitted by the FAA and not subject to the categorical exception from arbitration in Section 1 of the FAA. If it is exempted from the FAA, then an arbitrator has no authority under the delegation clause. Thus, a court must decide if the Section 1 exemption applies. In other words, the cart does not come before the horse.

Turning to the second question, the Court held that the exemption in Section 1 of the FAA applies to claims by independent contractors. "Employment" when the FAA was enacted had a more sweeping scope than it does now. While Section 1 refers to "contracts of employment," the Court noted that when the FAA became law, the term "employment" simply referred to "work," rather than the modern implications of the "employee" and "independent contractor" distinction. This conclusion was reinforced by Section 1's reference to "any other class of workers." Because

[6] 563 U.S. 333 (2011).
[7] 139 S. Ct. 532 (2019).
[8] 9 U.S.C. § 1.

the parties agreed that Oliveira was a "transportation worker," the Court held that Oliveira's misclassification claims were exempt from the FAA and that he could pursue his claims in court.

While *Oliveira* resolved some uncertainties concerning the scope of the exemption in Section 1 of the FAA, another question still looms: who is a "transportation worker" subject to the exception? Lower courts have debated the issue, and the precise boundaries remain disputed. In *Oliveira*, the Court alluded to this unresolved issue when it observed, "[h]appily, everyone before us agrees that Mr. Oliveira qualifies as a 'worker[ ] engaged in . . . interstate commerce.'"

More fundamentally, why does Section 1 of the FAA only apply to "transportation workers"? Recall that Section 1 provides, "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or *any other class of workers engaged in foreign or interstate commerce*." While the Supreme Court has previously interpreted this provision to encompass "transportation workers" who are "engaged in foreign or interstate commerce,"[9] Section 1 of the FAA could be read more broadly.

Section 1 is a categorical exemption from arbitration under *Oliveira* and, therefore, an exemption from class waivers contained in those arbitration agreements. Still, it is likely that plaintiffs seeking class treatment of claims will invoke the Section 1 exemption. *Oliveira* is not the end of the story and outer boundaries of the exemption will continue to be tested.

***Henry Schein, Inc. v. Archer & White Sales, Inc.* (2019)[10] – When the parties delegate determination of arbitrability to an arbitrator, a court must honor that delegation even if the proponent's argument is "wholly groundless."**

The Federal Arbitration Act permits parties to delegate questions of subject matter arbitrability to an arbitrator. Prior to *Henry Schein*, some courts (including the Fifth Circuit) held that even where parties made such a delegation, a court could still decline to enforce the delegation if the arbitration proponent's position is "wholly groundless." That precedent has been overruled.

In *Henry Schein*, the Supreme Court held that the FAA has no "wholly groundless" exception. Instead, a court must honor a delegation clause regardless of its view about the merits of the argument for arbitration. Speaking bluntly, the Court reasoned, "We must interpret the Act as written, and the Act in turn requires that we interpret the contract as written. When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract."

Henry Schein is an unsurprising decision. The Court's decision continues an ongoing line of decisions by the Supreme Court holding that parties are stuck with the arbitration agreement they made. Even if enforcing arbitration results in outcomes "unfair" to one party or the other, that is what the parties agreed to. The FAA and contract law have been consistently reinforced by the Supreme Court over challenges based on public policy and equity.

[9] *See Circuit City Stores, Inc. v. Adams*, 532 U. S. 105, 121 (2001).
[10] 139 S. Ct. 524 (2019).

United States Fifth Circuit Court of Appeal

***Archer and White Sales, Inc. v. Henry Schein, Inc*., 16-41674 (5th Cir. Aug. 14, 2019) –The Supreme Court reversed the Fifth Circuit in this case. In doing so, the Supreme Court 'reminded that "courts 'should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.'"**

The Fifth circuit previously held that the question of arbitrability was for the courts and not the arbitrator. However, the Fifth Circuit had applied a then-established narrow exception: where an assertion of arbitrability was "wholly groundless," a court was not required to submit the issue of arbitrability to an arbitrator. The Supreme Court reversed and eliminated the "wholly groundless" exception to arbitration and abrogated the Fifth Circuit's precedent in *Douglas v. Regions Bank*, 757 F.3d 460 (5th Cir. 2014). Tasked with interpreting the arbitration clause, the Fifth Circuit concluded that the district court had the power to decide arbitrability. The Fifth Circuit held that the parties did not "clearly and unmistakably" delegated the question of arbitrability to an arbitrator and affirmed the district court's holding that the case was not subject to arbitration.

***20/20 Commc'ns, Inc. v. Blevins* (5th Cir. July 22, 2019)[11] – A court must decide whether an arbitration clause permits class or collective proceedings unless the parties' arbitration agreement "clearly and unmistakably" delegates the issue to the arbitrator.**

Few issues have been the subject of legal ping-pong in the courts as much as the issue of who decides arbitrability: a judge or an arbitrator. In *Blevins*, the Fifth Circuit chimed in. Before *Belin*, it was known that a court must decide threshold or "gateway" issues of arbitrability unless there is "clear and unmistakable language" delegating the question to the arbitrator. Whether the availability of class or collective proceedings was one of these "gateway" issues presumptively for the court was unanswered in the Fifth Circuit before *Blevins*.

In *Blevins*, the Fifth Circuit for the first time held that the availability of class proceedings is a "gateway" issue of arbitrability. Thus, this determination must be decided by a court absent "clear and unmistakable language" delegating that issue to the arbitrator. The Fifth Circuit reasoned that, because class proceedings so fundamentally change the nature of arbitration—in terms of parties, cost, efficiency, and the interest of absent class members, the availability of class proceedings is a foundational issue of arbitrability. In so holding, the Fifth Circuit joined all other circuit courts to have decided the issue.[12]

[11] No. 18-10260, 2019 U.S. App. LEXIS 21765, 2019 WL 3281412 (5th Cir. July 22, 2019).

[12] *Herrington v. Waterstone Mortg. Corp.*, 907 F.3d 502, 506-07 (7th Cir. 2018); *JPay, Inc. v. Kobel*, 904 F.3d 923, 935-36 (11th Cir. 2018); *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972 (8th Cir. 2017); *Del Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 877 (4th Cir. 2016); *Eshagh v. Terminix Int'l Co., L.P.*, 588 F. App'x 703, 704 (9th Cir. 2014) (unpublished); *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013).

Because the arbitration clause in *Blevins* did not expressly delegate the availability of class proceedings to the arbitrator, the district court erred by confirming the arbitrator's clause construction award permitting class arbitration. The Fifth Circuit remanded the case to the district court to resolve whether the parties' arbitration clause allows for class proceedings.

While all circuits to have considered the issue agree that the availability of class arbitration is a gateway issue unless clearly delegated to the arbitrator, the circuits are split on what constitutes a "clear and unmistakable" delegation. Some courts hold that incorporation of the AAA or JAM arbitration rules is sufficient to delegate the question of class arbitration to the arbitrator.[13] Others, however, require more than incorporation of arbitral authority rules.[14] *Blevins* may well find its way back to the Fifth Circuit to weigh in on how the parties' intent to arbitrate class claims can be determined. The Supreme Court has not decided whether class arbitrability is such a gateway issue. See *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417(2019).

***In re JPMorgan Chase & Co.* (5th Cir. 2019)[15] – A district may not authorize notice of an FLSA collective action to putative collective members who are subject to arbitration agreements (unless the record shows the arbitration agreement would not prohibit participation in the collective).**

In *Epic Systems Corporation v. Lewis*, the Supreme Court approved class action waiver clauses in employee arbitration agreements. In a nod to the timeless adage "be careful what you ask for," plaintiffs have sought to turn what most consider to be a pro-management ruling into a potent worker-side litigation strategy. That strategy is to overwhelm an employer through serial filing of individual arbitration claims that otherwise might have been litigated collectively in the absence of a class action waiver. Practically though, whether this strategy works depends on the plaintiff's ability to obtain the identity and contact information of other employees potentially holding similar claims. In *In re JPMorgan Chase & Co.*, the Fifth Circuit appears to have foreclosed at least one avenue to do so.

The plaintiffs in this FLSA case sought to conditionally certify a collective of approximately 42,000 JPMorgan employees across the country. JPMorgan resisted because approximately 85% of the 42,000 potential collective members (roughly 35,000 employees) had agreed to arbitration contracts with class action waiver clauses. Regardless, the district court conditionally certified the 42,000 member collective anyway. After the district court denied a motion for interlocutory appeal, JPMorgan sought mandamus in the Fifth Circuit, arguing the district court clearly erred in allowing notice to putative collective members with arbitration agreements.

Before addressing the substantive merits of JPMorgan's petition, the Fifth Circuit addressed a procedural question—that is, whether conditional certification orders can be subject

[13] *See JPay, Inc. v. Kobel*, 904 F.3d 923 (11th Cir. 2018); *Wells Fargo v. Sappington*, 884 F.3d 392 (2d Cir. 2018)
[14] *See Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966 (8th Cir. 2017); *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746 (3d Cir. 2016); *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013).
[15] 919 F.3d 494 (5th Cir. 2019).

to mandamus. The court held that, at least in this case, the district court's conditional certification satisfied the procedural hurdles for mandamus relief: (1) that the error presented is "truly irremediable" on appeal; and (2) issuing the writ was "appropriate under the circumstances."

On the merits, the Fifth Circuit held that the district court erred in ordering notice to putative collective members who had agreed to arbitration contracts with class action waivers. The court reasoned that sending notice of the collective to individuals subject to such agreements would serve no legitimate purpose since those individuals would be unable to participate in the collective.

Trammell v. AccentCare, Inc. **(5th Cir. June 7, 2019) – An employee was entitled to a trial on the existence of an arbitration agreement by rebutting the mailbox rule presumption.**

A valid arbitration agreement can be formed when an employee continues employment following notice that a mandatory arbitration plan will take effect. This rule, however, is dependent on the employer demonstrating the employee actually received notice of the arbitration plan.

In *Trammell*, the employer mailed the arbitration plan to the plaintiff and sought to apply the "mailbox rule." This rule provides that a letter properly addressed, stamped, and mailed may be presumed to have been received by the address in the due course of the mail. This presumption is rebuttable. In response, the plaintiff denied ever receiving the plan, and stated in an affidavit that she had been having trouble sending and receiving mail from her home address, so much so that despite the fact she was a remote worker, she began driving employment-related documents to the employer's headquarters for fear of them being lost in the mail.

The Fifth Circuit held that the plaintiff's affidavit was sufficiently detailed to rebut the presumption of the mailbox rule. The court remanded the action to the trial court for a trial under Section 4 of the FAA to determine whether in fact an enforceable arbitration agreement had been formed.

Marriott Int'l, Inc. v. Danna **(5th Cir. May 6, 2019)[16] – An employer lacked standing to compel arbitration of: (1) a lawsuit that had not been filed or threatened; and (2) a lawsuit against a subsidiary entity that was filed prior to the employer's acquisition of the subsidiary.**

A motion to compel arbitration is often a reactionary measure. A lawsuit is filed, and in response, the defendant seeks to arbitrate. In this case however, the employer tried to use arbitration as a preemptive measure. The Fifth Circuit concluded that the employer's attempt was so preemptory that there was no actual or threatened injury at stake, which negated the court's subject-matter jurisdiction.

The facts of this case are unusual. In 2010, Danna was fired from the Ritz-Carlton. He sued the Ritz and its owner, Marriott International. He then got a job at Sheraton in 2013, where he signed an arbitration agreement. In 2016, Marriott acquired the Sheraton brand. Following the acquisition, Danna's former manager at the Ritz became his new manager at the Sheraton (meet

[16] No. 18-31036, 2019 U.S. App. LEXIS 13687, 2019 WL 1996585 (5th Cir. May 6, 2019).

the new boss, same as the old boss). At that time, Sheraton discovered that Danna had lied on his employment application by stating he had never been fired from a job. Sheraton knew this because Danna's new manager is the same person who had fired him from the Ritz. Sheraton fired Danna for dishonesty.

After his termination—and apparently before Danna filed any type of action against Marriott/Sheraton—Marriott filed a declaratory judgement action seeking a ruling that: (1) any claim Danna *might* file against Sheraton in the future was subject to arbitration; and (2) Danna's prior (yet still pending) claim against the Ritz needed to be arbitrated under Danna's agreement with Sheraton.

The Fifth Circuit was unimpressed with both requests and affirmed the district court's dismissal on grounds that Marriott lacked standing and had suffered no actual injury. On the first point, the Court's analysis essentially boiled down to the question of what is there arbitrate? Danna had not filed or even threatened to file a claim against Marriott/Sheraton. As to the second point, the Fifth Circuit could discern no legal avenue by which Sheraton or Marriott could compel arbitration of a dispute with a separate Marriott subsidiary that arose before Danna had even signed an arbitration agreement with Sheraton (which in any case was owned by Starwood at that time).

***Southwest Airlines Co. v. Local 555, Transp. Workers Union* (5th Cir. 2019)[17] – The arbitrator dispensed his own brand of industrial justice by ignoring the unambiguous terms of a collective bargaining agreement.**

Under the FAA, LMRA, or RLA, how limited are the grounds for vacating an arbitrator's award? The grounds to disturb an arbitration award under the RLA are "among the narrowest known to the law."[18] But, as *Southwest Airlines v. Local 555* demonstrates, narrow doesn't mean impossible.

The central dispute in this case was whether the effective date of a CBA between Southwest and TWU Local 555 was the date on which the CBA was: (a) ratified by Local 555; or (b) signed by the parties. The distinction mattered because it was dispositive as to the contractual timeliness of the union grievance at issue. If the CBA was effective on the date of ratification by Local 555, then the grievance was late. If, however, the CBA was effective on the date of signature by the parties, then the union's grievance was timely.

The arbitrator ruled that the CBA became effective on signature, and, thus, the grievance was timely. Despite the incredibly narrow standard of review under the RLA, the Fifth Circuit vacated the award because it determined the arbitrator ignored unambiguous language in the CBA establishing the contract became effective on ratification by the union (and not on the date of signing). Specifically, the CBA stated, "It is expressly understood and agreed that, when this

[17] 912 F.3d 83 (5th Cir. 2019).
[18] *Id.* at 844 (quoting *Cont'l Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 555 F.3d 399, 405 (5th Cir. 2009).

Agreement is accepted by the Company *and ratified by the membership of the Union*, it shall be binding on both the Company and the Union."

Because it was undisputed that Southwest had accepted the CBA prior to the union's ratification, the Fifth Circuit held the contract took effect upon union ratification. Thus, the arbitrator had dispensed his own brand of industrial justice by ruling that the CBA actually became effective when the parties later signed the agreement.

Forby v. One Techs., L.P. **(5th Cir. 2018)[19] – A defendant waived the right to arbitrate by litigating in court for almost two years before moving to compel arbitration.**

Forby filed suit in 2015. Over the ensuing two years, the defendants removed the case to federal court, filed two motions to dismiss (both denied), and a motion to transfer—all before subsequently moving to compel arbitration in April 2017. Forby opposed arbitration, claiming the defendant had waived it by substantially invoking the judicial process. On appeal, the Fifth Circuit agreed.

The defendant substantially invoked the judicial process by filing successive dispositive motions that sought full dismissal on the merits. Additionally, Forby would be prejudiced by this fact. Sending the case to arbitration at this point would effectively give the defendants a second bite at the apple to pursue merits arguments that the district court had already rejected.

Huckaba v. Ref-Chem, L.P. **(5th Cir. 2018)[20] – An employer could not compel arbitration because the express terms of the arbitration agreement required an employer signature for the contract to be effective, and the employer did not do so.**

Under Texas law, it doesn't matter sometimes if one party fails to sign a contract. Even without a signature, a contract can exist so long as the parties intend to be bound. This is true for arbitration agreements as well. In *Huckaba*, the Fifth Circuit reminds us that sometimes an old-fashioned John Hancock is required.

Huckaba worked for Ref-Chem and signed an arbitration agreement. However, despite having a signature block in the agreement, Ref-Chem did not sign it. The Fifth Circuit held that the particular language of the arbitration agreement at issue required Ref-Chem sign in order for the agreement to be effective. In particular, the court drew upon the fact that the agreement contained: (1) a statement that "[b]y signing this agreement the parties are giving up any right they may have to sue each other;" (2) a clause prohibiting modifications unless they are "in writing and signed by all parties;" and (3) a signature block for the employer, Ref-Chem.

[19] 909 F.3d 780 (5th Cir. 2018).
[20] 892 F.3d 686 (5th Cir. 2018).

Because the express terms of the arbitration agreement required both parties' signature to make the agreement effective, Ref-Chem's failure to sign precluded the creation of an enforceable contract to arbitrate.

Notable Federal District Court Decisions

Latif v. Morgan Stanley & Co. LLC **(S.D.N.Y. June 26, 2019)[21] — Federal Arbitration Act preempts a state-law statute banning arbitration of sexual harassment disputes.**

The rise of the #MeToo movement has led a number of state legislatures to propose laws banning arbitration of sexual harassment claims. The state of New York passed such a statute which was enacted in July 2018.[22] In *AT&T Mobility LLC v. Concepcion*, the United States Supreme Court reiterated the principle that "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the [Federal Arbitration Act]."[23] Given this line of reasoning, observers have questioned whether state laws banning arbitration of sexual harassment disputes are preempted by the Federal Arbitration Act.

In *Latif v. Morgan Stanley & Co. LLC*, Judge Denise Cote of the Southern District of New York held that it does—at least as to the New York law. Citing the Supreme Court's language from *Concepcion*, Judge Cote held that the New York law was a "'state law prohibiting outright the arbitration of a particular type of claim,' which as described by the Supreme Court [in *Concepcion*], is 'displaced by the FAA.'" Latif has appealed this decision to the United States Second Circuit Court of Appeals.

If Judge Cote's reasoning is upheld (which in all probability it will), then it is likely that any effective attempt to prohibit arbitration of sexual harassment disputes will have to made at the federal level. Senator (and current Democratic presidential candidate) Kirsten Gillibrand has introduced a bill (S.2203) in the Senate called the Ending Forced Arbitration of Sexual Harassment Act of 2017 which seeks to do just that. However, no action has been taken on the bill at this time.

[21] No. 18-cv-11528, 2019 U.S. Dist. LEXIS 107020, 2019 WL 2610985.
[22] N.Y. C.P.L.R. § 7515(b).
[23] 563 U.S. 333, 341 (2011) (citing *Preston v. Ferrer*, 552 U.S. 346, 353 (2008)).

NLRB Decisions

***Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, 2019 WL 2525342 (June 18, 2019) – An employer violates Section 7 of the NLRA by requiring arbitration agreements that could be reasonably be construed to prohibit employees from filing ULP charges with the NLRB.**

Many employers anticipated that, following *Epic Systems*, NLRA-related concerns over arbitration agreements would be a distant memory. Especially so considering the Board's present political composition. Given that view, *Prime Healthcare* is perhaps a surprise.

Applying the new *Boeing*[24] standard for review of work rules, the Board held that arbitration clauses that could be reasonably construed by employees to prohibit the filing of ULP charges with the NLRB categorically violate Section 8(a)(1) of the NLRA. The clause at issue broadly required arbitration of all-employment related disputes. It contained carve-outs for certain claims but did not exempt claims filed with government administrative agencies (such as the NLRB). According to the Board, such a clause falls under category 3 of the *Boeing* test—i.e., rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justification associated with the rule.

Notably, *Prime Healthcare* did not involve an arbitration clause with a "saving clause," exempting ULP charges and other administrative claims from arbitration. In a footnote, the Board observed that that the General Counsel had argued that such a saving clause would remediate any Section 7 concerns. Although the General Counsel's position is not law, it is perhaps an indication of Board rulings to come.

***Alorica, Inc., and its subsidiary/affiliate Expert Global Solutions, Inc.*, 368 NLRB No. 25, (July 25, 2019) -The Board found that the employer violated Section 8(a)(1) by maintaining its Agreement to Arbitrate.**

The Board relied on the framework found in *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10 (2019) and found a violation because employees would reasonably believe the Agreement restricts access to the Board and its processes. The employer violated Section 8(a)(1) by discharging two employees who refused to sign the Agreement, because it is unlawful to discharge employees for failing to sign an unlawful rule.

***Cordua Restaurants, Inc.*, 368 NLRB No. 43 (August 14, 2019)**

Cordua Restaurants is the Board's follow up to the Supreme Court's decision in *Epic*. The Board made three holdings:

[24] *The Boeing Company*, 365 NLRB No. 154 (2017).

- The NLRA does not prohibit employers from informing employees that failing or refusing to sign a mandatory arbitration agreement will result in their discharge.

- The NLRA does not prohibit employers from promulgating mandatory arbitration agreements in response to employees opting in to a collective action under the Fair Labor Standards Act or state wage-and-hour laws.

- The NLRA prohibits employers from taking adverse action against employees for engaging in concerted activity by filing a class or collective action, consistent with the Board's long-standing precedent.

Texas State Court Decisions

Hous. NFL Holding L.P. v. Ryans, No. 01-18-00811, 2019 Tex. App. LEXIS 6650 (Tex. App.—Houston [1st Dist.] Aug. 1, 2019) – Former NFL linebacker was required to arbitrate personal injury claims arising from non-contact injury suffered during game because such claims fell within the scope of an arbitration clause in the CBA between the NFL and the NFLPA.

Gray v. Ward, No. 05-18-00266-CV, 2019 Tex. App. LEXIS 6992, at *6 (Tex. App.—Dallas Aug. 9, 2019) – Ward, a majority shareholder leaves a partnership. A dispute arose about the value of his partnership shares. Ward brought two claims arising from his independent employer-employee relationship. One is a general wrongful termination claim, and the other is a defamation claim resulting from the manner of that termination. The trial court held that the plaintiff's breach of fiduciary duty and breach of contract claims were subject to arbitration, while the wrongful discharge and defamation claims were not. The Dallas court of appeals reversed the trial court's order denying arbitration on the wrongful termination and defamation claims, and ordered that all disputes between the parties proceed to arbitration. In the dissenting opinion, Judge Ken Molberg writes that arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute he has not agreed to so submit. The partnership contract does not describe the parameters of an individual employment relationship and therefore does not cover the wrongful termination claim.

HEB Grocery Co. LP v. Perez, No. 13-18-00063-CV, 2019 Tex. App. LEXIS 6320, 2019 WL 3331466 (Tex. App.—Corpus Christi July 25, 2019, no pet. hist.) – An employee's non-subscriber claims were subject to arbitration because of uncontroverted evidence that the employee electronically acknowledged receipt of the arbitration agreement and continued working thereafter.

Cielo Prop. Grp. LLC v. Mulcahy, No. 03-18-00587, 2019 Tex. App. LEXIS 5789, 2019 WL 3023312 (Tex. App.—Austin July 11, 2019, no pet. hist.) – Non-signatory entity was entitled to invoke an arbitration clause in an employment agreement because the entity was expressly designated as a co-employer of the plaintiff and a third-party beneficiary of the contract. Principals of the non-signatory entity were also entitled to invoke arbitration because the causes of action alleged against them were factually intertwined with the arbitrable causes of action.

Guillen-Chavez v. ReadyOne Indus., Inc., No. 08-17-00046-CV, 2019 Tex. App. LEXIS 4841, 2019 WL 2442876 (Tex. App.—El Paso June 12, 2019) – Employee was entitled to vacatur of

arbitration award because the arbitrator was not selected pursuant to the terms of the parties' Rule 11 agreement submitted prior to the arbitration proceedings.

Hi Tech Luxury Imps., LLC v. Morgan, No. 03-19-00021-CV, 2019 Tex. App. LEXIS 3429, 2019 WL 1908171 (Tex. App.—Austin Apr. 30, 2019, no pet.) – An employee was not required to arbitrate discrimination claims because the unambiguous language of the parties' arbitration agreement required the employer to sign the agreement for it to be effective, and the employer did not do so. "MY SIGNATURE BELOW ATTESTS TO THE FACT THAT I HAVE READ, UNDERSTAND, AND AGREE TO BE LEGALLY BOUND TO ALL OF THE ABOVE TERMS." Thus, both parties were to indicate their mutual assent to the terms of the arbitration agreement by signing the document and the employer did not sign it.

All. Family of Cos. v. Nevarez, No. 05-18-00622-CV, 2019 Tex. App. LEXIS 2728, 2019 WL 1486911 (Tex. App.—Dallas Apr. 4, 2019, no pet.) – An employee was not required to arbitrate claims arising from an alleged sexual assault outside of work by a principal of the employer because such claims did not fall within the scope of an arbitration clause in a confidentiality agreement the plaintiff executed as part of her employment. The arbitration agreement only covered claims "under" the agreement, and the employee's claims for sexual assault did not arise "under" the NDA.

Stagg Rests., LLC v. Serra, No. 04-18-00527-CV, 2019 Tex. App. LEXIS 1013, 2019 WL 573957 (Tex. App.—San Antonio Feb. 13, 2019, no. pet.) – Employee was not required to arbitrate non-subscriber claims because employer failed to establish that employee received notice of arbitration plan.

Red Bluff v. Tarpley, No. 14-17-00505-CV, 2018 Tex. App. LEXIS 10712, 2018 WL 6722346 (Tex. App.—Houston [14th Dist.] Dec. 21, 2018, no pet.) – Employer was not entitled to invoke arbitration under an injury plan maintained by its parent company because the employer failed to follow procedures specified in the plan to opt in to arbitration. The employer waived any argument it was a third-party beneficiary of its parent's arbitration plan by failing to raise it in the trial court.

Longoria v. CKR Prop. Mgmt., LLC, No. 14-18-00100-CV, 2018 Tex. App. LEXIS 10730 (Tex. App.—Houston [14th Dist.] Dec. 21, 2018, no pet.) – Employee was entitled to invoke arbitration of non-solicitation dispute because: (1) arbitration clause unambiguously covered such a dispute; and (2) in any case, the arbitration agreement delegating arbitrability to the arbitrator.

U.S. Money Reserve, Inc. v. Romero, No. 09-18-00052-CV, 2018 Tex. App. LEXIS 10270, 2018 WL 6542527 (Tex. App.—Beaumont Dec. 13, 2018) – Employees failed to establish that an arbitration agreement was unconscionable due to a fee sharing provision because the employees failed to present evidence that the cost of arbitration would be so significant as to deter enforcement of their rights. Employees also failed to show unconscionability due to a clause designating arbitrators chosen by the employer because there was no evidence that the specified arbitrators would be partial or unfair.

Vapro Supply LLC v. Zink, No. 04-18-00549-CV, 2018 Tex. App. LEXIS 10200, 2018 WL 6517151 (Tex. App.—San Antonio Dec. 12, 2018, no pet.) – Employee's personal injury claims

were subject to arbitration. Although employer waived any argument that the arbitrator should decide issues of arbitrability under a delegation clause by failing to raise it in the trial court, the scope of the arbitration clause unambiguously covered the employee's claims.

Alorica v. Tovar, 569 S.W.3d 736 (Tex. App.—El Paso 2018, no pet.) – The trial court was entitled to credit an employee's sworn testimony denying electronic receipt of an arbitration plan despite testimony from the employer's IT professionals that the employee's unique user ID had been used to log-in, view, and electronically acknowledge receipt of the arbitration plan.

In re Copart, Inc., 563 S.W.3d 427 (Tex. App.—El Paso 2018, no pet.) – An employee was not entitled to pre-arbitration discovery because the employee failed to establish that the requested discovery was reasonably necessary to assist the trial court in resolving unknown matters relevant to the employer's motion to compel arbitration.

In re Dish Network, L.L.C., 563 S.W.3d 433 (Tex. App.—El Paso 2018, no pet.) – An employee was not entitled to pre-arbitration discovery because (1) the employee failed to file a motion seeking such discovery; and (2) the employee failed to establish that the requested discovery was reasonably necessary to assist the trial court in resolving unknown matters relevant to the employer's motion to compel arbitration.

OEP Holdings, LLC v. Akhondi, 570 S.W.3d 774 (Tex. App.—El Paso 2018) – An "orientation instructor" was a "transportation worker" for purposes of the exemption from arbitration in Section 1 of the FAA. As an orientation instructor, the plaintiff was tasked with instructing truck drivers, which was sufficiently connected to the transportation of goods in interstate commerce to fall within the "transportation worker" exemption in Section 1 of the FAA.

Redi-Mix, LLC v. Martinez, No. 05-17-01347-CV, 2018 Tex. App. LEXIS 5683, 2018 WL 3569612 (Tex. App.—Dallas July 25, 2018, no pet.) – "Redi-Mix LLC" was not entitled to compel arbitration under an employee's arbitration agreement with "Redi-Mix, L.P." (a predecessor entity) because (under the court's abuse of discretion review) some evidence supported the trial court's determination that the misnaming of the employer in the arbitration agreement was not a misnomer.

Shillinglaw v. Baylor Univ., No. 05-17-00498-CV, 2018 Tex. App. LEXIS 4611, 2018 WL 3062451 (Tex. App.—Dallas June 21, 2018) – Former Baylor football coach waived arbitration rights by first seeking arbitration in response to defendants' claims for fees and sanctions after the coach non-suited his claims.

Wal-Mart Stores, Inc. v. Constantine, No. 05-17-00694, 2018 Tex. App. LEXIS 3023, 2018 WL 2001959 (Tex. App.—Dallas Apr. 30, 2018) – Deceased employee's claims against Wal-Mart were subject to arbitration because: (1) non-signatory relatives of decedent were bound by decedent-employee's agreement to arbitrate; (2) Wal-Mart's detailed evidence concerning employee's electronic receipt of the alternative dispute resolution plan conclusively established the existence of an arbitration contract; and (3) disparate bargaining power and sophistication were not sufficient to establish procedural unconscionability.

Adcock v. Five Star Rentals/Sales, Inc., No. 04-17-00531-CV, 2018 Tex. App. LEXIS 2690, 2018 WL 1831646 (Tex. App.—Apr. 18, 2018) – Employee was not entitled to compel arbitration where employee's counsel sent pre-suit demand stating that employer's failure to produce an arbitration agreement would constitute employer's consent to state court proceedings. After answering state court suit, the employer produced an arbitration agreement, but that at that point, the employee could not compel arbitration because the court found the parties had effectively agreed *not* to arbitrate through the employee's pre-suit demand correspondence.

Mission Petroleum Carriers, Inc. v. Dreese, No. 13-17-00102-CV, 2018 Tex. App. LEXIS 1736, 2018 WL 1192773 (Tex. App.—Corpus Christi Mar. 8, 2018) — The arbitrator (and not the court) was required to resolve an employee's dispute over the arbitrability of a non-subscriber claim because the nature of the employee's argument was to challenge the validity of the entire contract as a whole (rather than the arbitration clause specifically).