

2018

Arbitration

John Allen Chalk

Whitaker Chalk Swindle & Schwartz PLLC, jchalk@whitakerchalk.com

Follow this and additional works at: <https://scholar.smu.edu/smuatxs>

 Part of the [Dispute Resolution and Arbitration Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

John Allen Chalk, *Arbitration*, 4 SMU Ann. Tex. Surv. 3 (2018)
<https://scholar.smu.edu/smuatxs/vol4/iss1/2>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Annual Texas Survey by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

ARBITRATION

*John Allen Chalk, Sr.**

TABLE OF CONTENTS

I. INTRODUCTION	3
II. ARBITRATION AGREEMENT ISSUES	4
A. VALIDITY OF THE AGREEMENT	5
1. <i>Existence of Agreement to Arbitrate</i>	5
2. <i>Affirmative Defenses</i>	8
B. SCOPE OF THE AGREEMENT	10
1. <i>Court Determining Arbitrability</i>	10
2. <i>Arbitrator Determining Arbitrability</i>	12
III. NON-SIGNATORIES	13
A. INCORPORATION BY REFERENCE	13
B. ASSUMPTION	13
C. AGENCY	15
D. ALTER EGO	16
E. ESTOPPEL	17
1. <i>Direct Benefits Estoppel</i>	17
2. <i>Equitable Estoppel</i>	20
F. THIRD PARTY BENEFICIARY	21
IV. COURT INVOLVEMENT	22
A. FINAL ORDERS	22
B. EXPANSION OF JUDICIAL REVIEW	23
C. GROUNDS FOR VACATUR OR MODIFICATION	24
1. <i>Corruption, Fraud, or Undue Means</i>	25
2. <i>Evident Partiality</i>	25
3. <i>Failure to Postpone the Hearing, Hear Evidence, or Any Other Misbehavior that Prejudiced a Party</i>	25
4. <i>Exceeded Powers</i>	26
5. <i>Modification of Arbitration Awards</i>	26
D. WAIVER	27
V. CONCLUSION	29

I. INTRODUCTION

During this Survey period (December 1, 2016 through November 30, 2017), a number of state and federal courts issued opinions regarding ar-

* Member at Whitaker Chalk Swindle & Schwartz PLLC, B.S. Tennessee Tech University, M.A. Tennessee Tech University, J.D. University of Texas School of Law. My thanks to Aimee Kline, a third-year law student at Texas A&M University School of Law, for her research and drafting assistance.

bitration, including cases governed by the Federal Arbitration Act (9 U.S.C. § 1 *et seq.*) (the FAA) and the Texas Arbitration Act (Texas Civil Practices and Remedies Code ch. 171) (the TAA). Subjects discussed in these cases and addressed herein include: arbitration agreement issues; non-signatories; and court involvement. Validity and scope of the arbitration agreement, including delegation of arbitrability questions, continue to be submitted to courts by motions to compel. Unconscionability and illusory promises continue to be urged as defenses to motions to compel. The six different methods by which a non-signatory can either be compelled to arbitrate or can utilize arbitration are found in cases during this Survey period. What constitutes a final order or award, the expansion of judicial review, vacatur grounds, and modification of awards were also considered during this Survey period.

II. ARBITRATION AGREEMENT ISSUES

When assessing arbitration cases from this Survey period, it is important to remember the summary nature of the motion to compel. Two sections in the Texas Civil Practice and Remedies Code instruct the court to summarily decide disputes involving the existence of an arbitration agreement. First, § 171.021(b) states that “[i]f a party opposing an [arbitration] application . . . denies the existence of the agreement [to arbitrate], the court shall summarily determine that issue.”¹ Additionally, § 171.023(b) provides that “[i]f there is a substantial bona fide dispute as to whether an agreement to arbitrate exists, the court shall try the issue promptly and summarily.”² Several cases from this Survey period mention the summary nature of the motion to compel.³

One of these cases, *Fitness Entertainment Limited v. Hurst*,⁴ demonstrates that a trial court can conduct an evidentiary hearing at the same time as the hearing for the motion to compel. Fitness Entertainment was doing business as Planet Fitness. Planet filed a motion to compel Hurst to arbitrate. Hurst filed a response, which included an affidavit that stated that “he did not sign an arbitration agreement.”⁵ On appeal, Planet con-

1. TEX. CIV. PRAC. & REM. CODE ANN. § 171.021(b) (West 2011).

2. *Id.* § 171.023.

3. *Rocha v. Macy’s Retail Holdings, Inc.*, No. EP-17-CV-73-PRM, 2017 WL 4399575, at *2 (W.D. Tex. Oct. 3, 2017) (mem. op.); *Mayton v. Tempoe, LLC*, No. SA-17-CV-179-XR, 2017 WL 2484849, at *8, *10 n.1 (W.D. Tex. June 7, 2017) (noting in a footnote that since there are no facts in dispute the court can summarily decide the issue of whether a valid arbitration agreement exists); *Tantrum St. LLC v. Carson*, No. 05-16-01096-CV, 2017 WL 3275901, at *3 (Tex. App.—Dallas July 25, 2017, no pet.) (mem. op.); *Geo-Tech Found. Repair v. Leggett*, No. 02-16-00289-CV, 2017 WL 1173840, at *4 (Tex. App.—Fort Worth Mar. 30, 2017, no pet.) (mem. op.); *Doe v. Columbia N. Hills Hosp. Subsidiary, L.P.*, 521 S.W.3d 76, 81 (Tex. App.—Fort Worth 2017, pet. denied) (holding that since there were no genuine issues of material fact remand for an evidentiary hearing was not necessary); *Human Biostar, Inc. v. Celltex Therapeutics Corp.*, 514 S.W.3d 844, 848 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

4. 527 S.W.3d 699, 705 (Tex. App.—El Paso 2017, pet. denied).

5. *Id.* at 701.

tended that the trial court should have followed a “two-step procedure.”⁶ According to Planet, the court should have held a hearing on the motion to compel. Then, if an issue of material fact was raised during the hearing, the court should have conducted an evidentiary hearing. Instead, “the trial court viewed the hearing [for the motion to compel] as being evidentiary in nature.”⁷

The El Paso Court of Appeals held that since “Planet concede[d] that the parties’ competing affidavits created a dispute of material fact which required the trial court to hear evidence[,]”⁸ the trial court did not err when it conducted the evidentiary hearing.⁹ Planet did not seek a continuance to introduce evidence and waited until after direct examination ended to object.

A. VALIDITY OF THE AGREEMENT

Courts will not grant a party’s motion to compel if the underlying arbitration agreement is not valid and enforceable. The party seeking to compel arbitration must prove that an agreement to arbitrate exists.¹⁰ If the party seeking to enforce the arbitration agreement meets its initial burden, the party opposing arbitration must successfully raise an affirmative defense if it wishes to avoid arbitration. The first part of this section discusses cases from this Survey period that address whether the party seeking to compel arbitration met its initial burden to prove that an arbitration agreement existed. Next, this section provides a summary of cases from the Survey period where a party opposing arbitration raised an affirmative defense.

1. *Existence of Agreement to Arbitrate*

Often, the party opposing arbitration claims that there is not a valid arbitration agreement. Arguments range from absence of an authenticated document to inadequate notice of an employer’s arbitration policy.¹¹

In *Ladymon v. Lewis*,¹² homeowners sued Metro and Ladymon for construction defects. Metro and Ladymon were not able to produce the original contracts signed by the homeowners. Instead, Metro and Ladymon supported their motion to compel with copies of contracts the homeowners allegedly signed coupled with an affidavit. In the affidavit, Ladymon claimed that the homeowners executed at least two documents

6. *Id.* at 704.

7. *Id.*

8. *Id.*

9. *Id.* at 705.

10. *Ladymon v. Lewis*, No. 05-16-00776-CV, 2017 WL 3097652, at *3 (Tex. App.—Dallas July 21, 2017, no pet.) (mem. op.) (citing *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005)).

11. See *Ladymon*, 2017 WL 3097652, at *3; see also *Doe v. Columbia N. Hills Hosp. Subsidiary, L.P.*, 521 S.W.3d 76, 78 (Tex. App.—Fort Worth 2017, pet. denied).

12. *Ladymon*, 2017 WL 3097652, at *1.

that contained arbitration agreements. The homeowners objected and claimed that they “do not recall signing any documents . . . requiring [a]rbitration.”¹³

The Dallas Court of Appeals held that Ladymon and Metro established a valid arbitration agreement through the affidavit and contracts copies.¹⁴ The court of appeals noted the homeowners’ statements that they “did not ‘recall’ signing” an arbitration agreement lacked probative value because “an affiant’s belief about the facts is legally insufficient.”¹⁵ Further, “the absence of a party’s signature does not necessarily destroy an otherwise valid contract.”¹⁶

Other cases from this Survey period also illustrate that arbitration agreements can be enforced even in situations where the party opposing arbitration does not recall signing an arbitration agreement or claims that they did not sign an agreement.¹⁷

During this Survey period, many employees contested the validity of arbitration agreements that their employer sought to enforce. When an employer can prove that an employee had adequate notice of the employer’s arbitration policy, the employee will be bound to arbitrate the claims against the employer. For example, in *Valenzuela v. Crest-Mexico Corporation*,¹⁸ two employees brought a class action against their employers for violations of the Fair Labor Standards Act. The defendants moved to compel arbitration based on a 2014 arbitration agreement and a 2016 arbitration agreement. The defendants claimed that the agreements were hand-delivered as well as mailed to each of the plaintiffs.

The plaintiffs claimed that they “did not receive effective notice of the . . . [arbitration] Agreements.”¹⁹ All of the plaintiffs asserted that they did

13. *Id.* at *3.

14. *Id.* at *5.

15. *Id.*

16. *Id.* at *4.

17. See *Humphreys v. Houston Pizza Venture Rest. Grp.*, No. H-17-0935, 2017 WL 4351726, at *1, *4 (S.D. Tex. Sept. 29, 2017) (mem. op.) (determining that defendant could compel arbitration despite plaintiff’s claims that she did not sign an arbitration agreement or electronically agree to arbitrate her claims); *Thick v. Dolgencorp of Tex., Inc.*, No. 4:16-CV-00733, 2017 WL 108297, at *2, *3 (E.D. Tex. Jan. 11, 2017) (mem. op.) (holding that even though employee did not recall signing an arbitration agreement, the employer could enforce the arbitration agreement because the employer was able to prove that the employee electronically consented to the arbitration agreement.); *Wright v. Igloo Prods. Corp.*, No. H-16-202, 2016 U.S. Dist. LEXIS 182810, at *3–8, *10 (S.D. Tex. Dec. 13, 2016) (mem. op.) (allowing defendant to compel arbitration despite plaintiff’s claims that her signature was forged), *adopted by* 2017 WL 354239 (S.D. Tex. Jan. 24, 2017); *MiCocina, Ltd., v. Balderas-Villanueva*, No. 05-16-01507-CV, 2017 WL 4857017, at *1 (Tex. App.—Dallas Oct. 27, 2017, no pet.) (mem. op.) (holding that the plaintiff must arbitrate his claims even though he did not sign the arbitration agreement because the plaintiff signed an acknowledgement that specifically referenced the arbitration agreement); *Util. Trailer Sales Se. Tex., Inc. v. Lozano*, No. 04-16-00644-CV, 2017 WL 3045861, at *1 (Tex. App.—San Antonio July 19, 2017 pet. denied) (mem. op.) (holding that although the employee did not sign an arbitration clause at the start of his employment in 2013, the arbitration agreement he signed in 2010 when he was previously employed by his employer could be used to compel arbitration).

18. No. 3:16-CV-1129-D, 2017 WL 3311203, at *1 (N.D. Tex. Aug. 3, 2017) (mem. op.).

19. *Id.* at *2.

not receive one of the arbitration agreements, and one plaintiff maintained that he did not receive the other agreement. According to the plaintiffs, they did not receive notice by mail because the defendants could not provide proof that the agreements were mailed. Lastly, the plaintiffs asserted that they did not receive adequate notice because certified copies of the Spanish translation were not provided, and the plaintiffs do not speak English fluently. The U.S. District Court for the Northern District of Texas rejected each of these arguments because the “plaintiffs received notice of the 2016 Agreement and then continued to work and receive pay. [One of the defendants] avers that he delivered the 2016 Agreement to plaintiffs by hand and by mail, and he offers documentation of the mailing.”²⁰

Despite the plaintiff’s objections, the district court determined that the plaintiffs should be compelled to arbitrate because when “an at-will employee . . . receives notice of an employers’ arbitration policy and continues working [the employee] has accepted the policy as a matter of law.”²¹

If an employee does not receive adequate notice of the employer’s arbitration policy, the employee will not be bound to arbitrate. For example, in *Alexander Dubose Jefferson & Townsend LLP v. Vance*,²² Vance received an email that mentioned that the law firm that she worked for was updating its employment policies. The firm’s motion to compel arbitration was denied because Vance did not have notice of the arbitration policy.²³ The firm did not prove that Vance received express notice of the arbitration policy, because although the email mentioned that the firm’s dispute resolution policy was updated, the email did not “use the word ‘arbitration.’”²⁴ Further, the email did not include the arbitration policy as an attachment. Additionally, the firm did not prove that Vance had implied notice of the arbitration policy because the email did not “fairly suggest that the firm was implementing a binding arbitration policy.”²⁵

The notice must be unequivocal in order to bind the employee to arbitrate claims that arose prior to the notice. The U.S. District Court for the Southern District of Texas held that the notice provided in *Hernandez v. Air Resources Americas*²⁶ was not unequivocal notice. In that case, the employees signed an arbitration agreement. Later, the employer sent an email that limited the arbitration agreement to “prospective claims.”²⁷ The district court determined that the notice that the employer provided the employee was not unequivocal notice because of the contradiction between the email and the arbitration agreement.²⁸ Thus, the plaintiffs

20. *Id.* at *3.

21. *Id.*

22. No. 1:17-CV-133-RP, 2017 WL 2241538, at *2 (W.D. Tex. May 22, 2017).

23. *Id.* at *3.

24. *Id.* at *2–3.

25. *Id.* at *4.

26. No. H-17-689, 2017 U.S. Dist. LEXIS 185021, at *5–6 (S.D. Tex. Nov. 8, 2017).

27. *Id.* at *5.

28. *Id.*

could not be compelled to arbitrate their claims that arose prior to the date that the notice was signed.²⁹

Several other employees successfully defeated motions to compel during this Survey period by contesting the validity of the arbitration agreement.³⁰

2. *Affirmative Defenses*

If the party seeking to compel arbitration proves that a valid agreement to arbitrate exists, the party resisting arbitration can raise an affirmative defense. Two of the major arguments raised to defeat arbitration agreements in this Survey period were unconscionability and illusory promise. In many instances, the courts found that the arbitration agreement at issue was neither unconscionable nor illusory.³¹ Others seeking to compel arbitration were not so lucky.

Two cases from this Survey period found the arbitration agreement illusory. The U.S. District Court for the Southern District of Texas determined that an arbitration agreement between an employer and an employee was illusory in *Presta v. Omni Hotels Management Corporation*.³² Omni was permitted to modify the arbitration agreement “with respect to claims of which Omni is aware but which are not formally brought under the [p]rogram.”³³ The district court determined that the

29. *Id.* at *5–6.

30. See FC Background, LLC v. Fritze, No. 05-17-00277-CV, 2017 WL 5559594, at *2 (Tex. App.—Dallas Nov. 16, 2017, pet. dism’d) (mem. op.) (holding that there was no enforceable arbitration clause because the non-compete agreement that the employee signed contained a merger clause and did not contain an arbitration clause); Penn. Va. Oil & Gas GP, LLC v. De La Garza, No. 01-15-00867-CV, 2017 WL 2871784, at *5 (Tex. App.—Houston [1st Dist.] July 6, 2017, no pet.) (mem. op.) (determining that employee was not required to arbitrate through his employer’s dispute resolution program because the entity that wanted to compel arbitration could not take advantage of the program).

31. See Ruiz v. AH 2005 Mgmt., LP, No. EP-17-CV-197-PRM, 2017 WL 4639702, at *2–3 (W.D. Tex. Oct. 13, 2017) (mem. op.) (concluding that an arbitration agreement was not illusory because the employer had to provide notice to the employee before making changes to the policy); Valenzuela v. Crest-Mex Corp., No. 3:16-CV-1129-D, 2017 WL 3311203, at *4 (N.D. Tex. Aug. 3, 2017) (mem. op.) (determining that the arbitration agreement was not unconscionable because even though the plaintiffs could not speak English, Spanish translations were provided); Xome Holdings LLC v. Derbonne, No. 4:16-CV-00550-ALM, 2017 WL 2402578, at *3 (E.D. Tex. June 2, 2017) (mem. op.) (determining that an arbitration clause was not unconscionable because the plaintiffs negotiated the terms of the contract); Lockett v. Conn Appliances, Inc., No. 4:16-CV-703-ALM-CAN, 2017 WL 2129316, at *4 (E.D. Tex. Apr. 11, 2017) (holding that a delegation provision in an adhesion contract was not unconscionable), *adopted by* 2017 WL 2120010 (E.D. Tex. May 16, 2017); Seim v. HomeAway, Inc., No. 1:16-CV-479-LY, 2017 WL 3478488, at *9–10 (W.D. Tex. Jan. 18, 2017), *aff’d sub nom.* Arnold v. HomeAway, Inc., 890 F.3d 546 (5th Cir. 2018) (determining that the arbitration agreement was not unconscionable because both parties assented to the clearly stated terms); MiCocina, Ltd., v. Balderas-Villanueva, No. 05-16-01507-CV, 2017 WL 4857017, at *8–9 (Tex. App.—Dallas Oct. 27, 2017, no pet.) (mem. op.) (holding that an arbitration agreement was not unconscionable because there was no evidence that the employee was coerced to sign the agreement or mislead about the contents of the agreement. Further, the agreement was not illusory because the employer could only prospectively terminate the agreement).

32. No. 4:17-cv-0912, 2017 WL 3038219, at *7 (S.D. Tex. July 18, 2017) (mem. op.).

33. *Id.* at *6.

contract was illusory because Omni could modify the agreement after it received notice that an employee has a potential claim against Omni.³⁴ Thus, the employee could not be compelled to arbitrate.³⁵

The U.S. District Court for the Southern District of Texas reached a similar result in *Freeman v. Progress Residential Property Manager, LLC*.³⁶ The agreement to arbitrate was “not supported by consideration” because Progress could unilaterally revoke the agreement.³⁷

When a court determines that a portion of an arbitration agreement is unconscionable, the court can sever the unconscionable portion of the arbitration agreement and enforce the rest of the agreement. Two cases from this Survey period illustrate this point. First, a fee splitting provision in an arbitration agreement was unconscionable in *Gutierrez v. Community Action Corporation*.³⁸ Gutierrez sued her former employer for discrimination and wrongful termination. The arbitration agreement called for the parties to split the costs of arbitration evenly. Gutierrez established that she did not have the means to pay for arbitration costs except for the filing fee. Based on this information, the U.S. District Court for the Western District of Texas determined that the fee-splitting provision was unconscionable, and severed it from the rest of the agreement.³⁹

In *Edwards v. DoorDash*,⁴⁰ the U.S. District Court for the Southern District of Texas applied California law⁴¹ to determine that portions of an arbitration agreement were unconscionable.⁴² The agreement was procedurally unconscionable partly because the plaintiff lacked bargaining power.⁴³ Specifically, the plaintiff had to sign the agreement in order to work for the defendant (take-it-or-leave-it).⁴⁴

According to the district court, two provisions of the agreement were substantively unconscionable. First, the provision that stated that the arbitration will take place in Palo Alto was substantively unconscionable because the plaintiff resided in Houston.⁴⁵ It would be very costly for the plaintiff to arbitrate in Palo Alto.⁴⁶ Additionally, the provision that provided for cost splitting was unconscionable because the provision “imposes costs on [p]laintiff that he would not have to pay through utilization of the judicial process.”⁴⁷ The district court compelled arbitration after

34. *Id.*

35. *Id.* at *7.

36. No. 3:16-CV-356, 2017 WL 2954409, at *2 (S.D. Tex. July 10, 2017).

37. *Id.*

38. No. 2:16-CV-291, 2016 U.S. Dist. LEXIS 174680, at *7 (S.D. Tex. Dec. 19, 2016).

39. *Id.* at *7, *9.

40. No. H-16-225, 2016 WL 7852532, at *6 (S.D. Tex. Dec. 8, 2016) (mem. op.), adopted by 2017 WL 244862 (S.D. Tex. Jan 19, 2017).

41. “California law holds that an agreement must be both procedurally and substantively unconscionable in order to be considered unconscionable.” *Id.* at *6.

42. *Id.* at *14.

43. *Id.* at *8.

44. *Id.*

45. *Id.* at *10.

46. *Id.*

47. *Id.* at *11.

the district court severed the unconscionable provisions from the rest of the arbitration agreement.⁴⁸

B. SCOPE OF THE AGREEMENT

After the court determines that there is a valid arbitration agreement, the court normally determines whether the dispute is within the scope of the arbitration agreement. However, there are agreements that delegate arbitrability to the arbitrator.

1. Court Determining Arbitrability

The trial court must compel arbitration when the dispute is within the scope of the arbitration agreement. For example, in *S.P. v. N.P.*,⁴⁹ the parties signed a mediated settlement agreement during their divorce. The mediated settlement agreement provided for arbitration to resolve disputes between the parties about the divorce. The Fort Worth Court of Appeals held that the trial court erred when it signed a final divorce decree rather than compelling arbitration, because the disputes addressed in the decree fell within the scope of the arbitration agreement.⁵⁰ A few other cases illustrate that when the dispute falls within the scope of the arbitration clause, the court is required to compel arbitration.⁵¹

If an arbitration clause uses broad or expansive language, the “presumption of arbitrability is particularly applicable.”⁵² If the arbitration clause is broad, the court is more likely to compel arbitration.⁵³ However, even if an arbitration clause uses expansive language, the party seeking to compel arbitration cannot rely on conclusory statements to support their motion to compel.⁵⁴ Rather, that party must point to a specific dispute between the parties that falls within the scope of the agreement to arbitrate.⁵⁵ In *Terrell v. Price*,⁵⁶ the First Houston Court of Appeals held that the trial court properly denied arbitration. The party seeking to arbitrate

48. *Id.* at *12.

49. No. 02-16-00278-CV, 2017 WL 3821887, at *1–2 (Tex. App.—Fort Worth Aug. 31, 2017, no pet.) (mem. op.).

50. *Id.* at *6.

51. See *Shoebacca, Ltd. v. K-2 Corp.*, No. 3:17-CV-0473-G, 2017 WL 3115159, at *3, *5 (N.D. Tex. July 21, 2017) (mem. op.); *Stockade Cos., LLC v. Kelly Rest. Grp., LLC*, No. A-17-CV-143 RP, 2017 WL 1968328, at *5 (W.D. Tex. May 11, 2017); *Charging Bison, LLC v. Interstate Battery Franchising & Dev., Inc.*, No. 3:16-CV-3479-G, 2017 WL 1296454, at *3, *4 (N.D. Tex. Apr. 7, 2017) (mem. op.); *CRS Indus. v. MacDonald Sys.*, No. 01-16-00783-CV, 2017 WL 1881166, at *2, *3 (Tex. App.—Houston [1st Dist.] May 9, 2017, no pet.) (mem. op.); *MAPP Constr., LLC v. BlackAll Mech., Inc.*, No. 05-16-00703-CV, 2017 WL 1046770, at *4, *8 (Tex. App.—Dallas Mar. 20, 2017, no pet.) (mem. op.).

52. See *Terrell v. Price*, No. 01-16-00376-CV, 2017 WL 2980166, at *5 (Tex. App.—Houston [1st Dist.] July 13, 2017, no pet.) (mem. op.) (internal quotations omitted); see also *AdvoCare GP, LLC v. Heath*, No. 05-16-00409-CV, 2017 WL 56402, at *5–6 (Tex. App.—Dallas Jan. 5, 2017, no pet.) (mem. op.) (holding that a broad arbitration clause included an employee’s tort claims).

53. *Terrell*, 2017 WL 2980166, at *5.

54. *Id.* at *5–6.

55. *Id.*

56. *Id.* at *6.

relied on conclusory statements to support the motion to compel. These conclusory statements were not enough to warrant arbitration. The motion to compel was denied because it was impossible to discern whether the dispute fell within the scope of the agreement based only on conclusory statements.⁵⁷

The trial court should not compel arbitration if the party seeking to compel arbitration cannot prove that the dispute fell within the scope of the agreement. Several cases from the Survey period illustrate this point.⁵⁸ An arbitration clause that was limited to “dispute[s] . . . concerning the interpretation of the terms of [the a]greement” was the issue in *North American Deer Registry v. DNA Solutions*.⁵⁹ Deer Registry sought to litigate claims that did not “concern the interpretation of the [agreement]” and simultaneously sought to arbitrate a breach of contract claim.⁶⁰ DNA filed a motion to dismiss the case so the parties could arbitrate. The U.S. District Court for the Eastern District of Texas determined that the arbitration clause was “narrow.”⁶¹ The district court held that Deer Registry’s unfair competition claim should be retained by the district court because it did not involve contract interpretation.⁶² The district court also determined that the trade secrets claim did not fall within the scope of the arbitration clause after a hearing on the issue.⁶³ The district court reasoned that even though “the [c]ontract will be evidence of protection of the trade secrets . . . it is not dispositive of the entire trade secret history.”⁶⁴

One other interesting point to note concerning the scope of arbitration agreements is that a court’s order concerning the enforcement of an arbitration agreement cannot contradict the arbitration agreement. For example, in *Estate of MacDonald v. Reeder Road Saf-T-Loc*,⁶⁵ the Dallas Court of Appeals determined that the trial court abused its discretion by requiring the use of an arbitration process that was different from the process in the arbitration agreement. The arbitration agreement stated

57. *Id.*

58. See *United States ex rel. Fisher v. Homeward Residential, Inc.*, No. 4:12-CV-461, No. 4:12-CV-543, at *3, 2017 WL 841149 (E.D. Tex. Mar. 3, 2017) (mem. op.) (finding that since the issue was outside the scope of the arbitration agreement the motion to compel should be denied); *Balfour Beatty Constr., LLC v. Eagle Contr. Servs., LLC*, No. 03-15-00806-CV, 2017 WL 3471060, at *2 (Tex. App.—Austin Aug. 9, 2017, no pet.) (mem. op.) (determining that the motion to compel was properly denied because the arbitration agreement specifically excluded the dispute at issue); *Brittingham v. Mirabent*, No. 04-17-00028-CV, 2017 WL 2852627, at *3 (Tex. App.—San Antonio July 5, 2017 no pet.) (mem. op.) (holding that claims that were independent of the agreement fell outside of the obligation to arbitrate.).

59. No. 4:17-CV-00062, 2017 WL 2120015, at *3 (E.D. Tex. May 16, 2017) (mem. op.).

60. *Id.* at *3 (internal quotations and modifications omitted).

61. *Id.* at *4.

62. *Id.* at *6.

63. *N. Am. Deer Registry, Inc. v. DNA Sols., Inc.*, No. 4:17-CV-00062, 2017 WL 2402579, at *3 (E.D. Tex. June 2, 2017) (mem. op.).

64. *Id.*

65. No. 05-16-00960-CV, 2017 WL 1427693, at *5 (Tex. App.—Dallas Apr. 19, 2017, no pet.) (mem. op.).

that the parties should select an appraiser. The agreement further provided that if the parties could not agree on an appraiser, the parties should each select an appraiser, and then the two appointed appraisers would select a third appraiser. Instead of adhering to this process, the trial court ordered the Appraisal Institute to appoint a panel of appraisers. The court of appeals determined that this action was an abuse of discretion because the process was not authorized in the arbitration agreement.⁶⁶

2. Arbitrator Determining Arbitrability

Arbitration agreements may contain arbitrability delegation clauses. A court facing a delegation clause should ask “whether the parties clearly and unmistakably intended to delegate the question of arbitrability to an arbitrator.”⁶⁷ If so, the court should grant the motion to compel so that the arbitrator can decide arbitrability questions. Many cases from the Survey period illustrate this point.⁶⁸ The motion to compel arbitration should not be granted “if the argument that the claim at hand is within the scope of the arbitration agreement is ‘wholly groundless.’”⁶⁹ If the party seeking to compel arbitration cannot reasonably argue that the dispute falls within the scope of the arbitration agreement the court should deny the motion as “wholly groundless.”⁷⁰

One case from this Survey period provides an example of how the U.S. Court of Appeals for the Fifth Circuit determines whether a claim is “wholly groundless.”⁷¹ In that case, IQ argued that the district court

66. *Id.* at *5.

67. *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488, 490 (5th Cir. 2017).

68. *See* *Ambulatory Servs. of P.R., LLC v. Sankar Nephrology Grp., LLC*, No. 4:17-CV-230-A, 2017 WL 1954932, at *1 (N.D. Tex. May 9, 2017) (mem. op.); *Gemini Ins. Co. v. Certain Underwriters at Lloyd’s London*, No. H-17-1044, 2017 WL 1354149, at *6 (S.D. Tex. Apr. 13, 2017); *Hanchett v. Port of Houston Auth.*, No. 4:11-CV-1695, 2017 WL 1190881, at *4 (S.D. Tex. Mar. 31, 2017); *Fozard v. C.R. Eng., Inc.*, 243 F. Supp. 3d 789, 794 (N.D. Tex. 2017) (mem. op.); *Zorilla v. Uber Techs., Inc.*, No. 4:16-CV-615, 2017 WL 3278061, at *4 (S.D. Tex. Mar. 16, 2017); *Cubria v. Uber Techs., Inc.*, 242 F. Supp. 3d 541, 546 (W.D. Tex. 2017); *20/20 Commc’ns, Inc. v. Blevins*, Civil No. 4:16-CV-810-Y, 2017 WL 527959, at *2 (N.D. Tex. Feb. 7, 2017); *Edwards v. DoorDash, Inc.*, No. H-16-225, 2017 WL 7852532, at *14 (S.D. Tex. Dec. 8, 2016) (mem. op.), *adopted by* 2017 WL 244862 (S.D. Tex. Jan. 19, 2017); *Super Starr Int’l, LLC v. Fresh Tex. Produce, LLC*, No. 13-17-00184-CV, 2017 WL 4054395, at *4 (Tex. App.—Corpus Christi Sept. 14, 2017, no pet.) (mem. op.); *Dow Roofing Sys., LLC v. Great Comm’n Baptist Church, LLC*, No. 02-16-00395-CV, 2017 WL 3298264, at *5 (Tex. App.—Fort Worth Aug. 3, 2017, pet. denied) (mem. op.); *Trafigura Pte. Ltd. v. CNA Metals Ltd.*, 526 S.W. 3d 612, 613 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *Emp. Sols. McKinney, LLC v. Wilkerson*, No. 05-16-00283-CV, 2017 WL 1908626, at *1 (Tex. App.—Dallas May 10, 2017, no pet.) (mem. op.); *Gilbert v. Rain & Hail Ins.*, No. 02-16-00277-CV, 2017 WL 710702, at *4 (Tex. App.—Fort Worth Feb. 23, 2017, pet. denied) (mem. op.); *Human Biostar, Inc. v. Celltex Therapeutics Corp.*, 514 S.W.3d 844, 849 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

69. *Archer & White Sales*, 878 F.3d at 492 (quoting *Douglas v. Regions Bank*, 757 F.3d 460, 464 (5th Cir. 2014) (internal quotation and modifications omitted)).

70. *Id.*

71. *IQ Prods. Co. v. WD-40 Co.*, 871 F.3d 344 (5th Cir. 2017). Note that the Fifth Circuit cited to *IQ Prods.* in *Archer & White Sales, Inc. v. Henry Schein, Inc.* in support of the “wholly groundless” standard. *Archer & White Sales*, 878 F.3d at 492.

erred when it granted WD-40's motion to compel arbitration. The Fifth Circuit affirmed the district court's judgement, and held that "[i]n light of the 'exceptional' nature of the wholly groundless test and the competing, plausible interpretations of the 1996 Agreement's meaning and scope, we conclude that WD-40's assertion of arbitrability is *not* wholly groundless."⁷²

III. NON-SIGNATORIES

In the Survey period, parties often raised the issue of whether a non-signatory is bound by an arbitration agreement, and whether a non-signatory can enforce an arbitration agreement. Non-signatories can compel arbitration or be compelled to arbitrate based on six theories: "(1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) estoppel; and (6) third-party beneficiary."⁷³ All of these theories were raised during this Survey period.

A. INCORPORATION BY REFERENCE

In order for an arbitration clause to be enforceable under the incorporation by reference theory, "the contract that allegedly incorporates another, unsigned document must, in the first instance, be a signed, enforceable contract."⁷⁴ "The party seeking to compel arbitration must" show that the underlying contract is valid.⁷⁵ *International Corrugated & Packing Supplies v. Lear* illustrates this point. Lear purchased packing supplies from Corrugated. Lear claimed that the arbitration clause found on its website was incorporated by reference in purchase orders Lear sent to Corrugated. Lear could not prove that the purchase orders were valid contracts. Thus, the terms and conditions, which contain the arbitration clause, could not be incorporated by reference into the purchase orders, and Lear could not compel arbitration.⁷⁶

B. ASSUMPTION

Non-signatories can compel arbitration if an agreement that contains an arbitration clause is assigned to the non-signatory, or if the non-signatory is a successor to the agreement. "[U]nder Texas law, an assignee stands in the shoes of the assignor."⁷⁷ Thus, the assignee can assert any rights that the assignor would be able to assert.⁷⁸ If a non-signatory is

72. *IQ Prods.*, 871 F.3d at 352–53 (emphasis in original).

73. *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005). See *Sapic v. Gov't of Turk.*, 345 F.3d 347, 356 (5th Cir. 2003).

74. *Int'l Corrugated & Packing Supplies, Inc. v. Lear Corp.*, No. EP-15-CV-00405-DCG, 2016 WL 7410771, at *5 (W.D. Tex. Dec. 21, 2016) (mem. op.).

75. *Id.*

76. *Id.*

77. *Mason v. Regions Bank*, No. 1:16-CV-1299-RP, 2017 U.S. Dist. LEXIS 111458, at *5 (W.D. Tex. July 18, 2017) (quoting *Sw. Bell Tel. Co. v. Mktg. on Hold Inc.*, 308 S.W.3d 909, 921 (Tex. 2010)).

78. *Id.*

assigned a contract that contains an arbitration agreement, the non-signatory can compel arbitration. For example, in *Mason v. Regions Bank*,⁷⁹ the plaintiff purchased a car from a car dealership. Regions Bank was assigned the contract between the plaintiff and the car dealership, and Regions Bank sought to compel arbitration under the terms of the contract. The U.S. District Court for the Western District of Texas allowed Regions Bank to “invoke the dealership’s right to compel arbitration” because of the assignment.⁸⁰

Similarly, when a non-signatory is a successor to an agreement that contains an arbitration agreement, the non-signatory can compel arbitration. *Adams v. Energy Transfer Partners*⁸¹ illustrates this point. The plaintiff’s employer, Susser, merged with Energy Transfer Partners. The plaintiff signed an arbitration agreement with Susser prior to the merger. The plaintiff later sued Energy Transfer Partners for wrongful termination. The U.S. District Court for the Southern District of Texas allowed Energy Transfer Partners to compel arbitration because the arbitration agreement stated “it is binding on Susser and its successors.”⁸²

Under the assumption theory, the signatory must prove that the non-signatory was a successor to the contract, or was assigned the contract.⁸³ In *G.T. Leach Builders v. Sapphire Condominiums Association*, G.T. Leach sought to compel Sapphire to arbitrate its claims.⁸⁴ G.T. Leach did not meet its burden to prove that Sapphire was an assignee or a successor to the contract that contained an arbitration clause.⁸⁵ Thus, G.T. Leach could not compel arbitration.

In *Toll Austin, TX, LLC v. Dusing*,⁸⁶ Brodney Pool sold the Dusings a home. Pool purchased the home from Toll. The Dusings were not bound by an arbitration agreement between Toll and Pool. Toll claimed that the Dusings should be compelled to arbitrate because the assumption exception applied. The Austin Court of Appeals noted that “the assumption theory . . . only applies to contracts that have been assigned from one party to another.”⁸⁷ The theory did not apply in this instance because the agreement specifically stated that assignment was prohibited.

A non-signatory can be compelled to arbitrate if the non-signatory manifests an intent to arbitrate. In *Pavecon Holding Co v. Tuzinski*,⁸⁸ the U.S. District Court for the Western District of Texas held that Pavecon

79. *Id.* at *1.

80. *Id.* at *5.

81. No. 2:16-CV-400, 2017 WL 2349028, at *1 (S.D. Tex. Apr. 3, 2017) (mem. op.), adopted by 2017 WL 2347425 (S.D. Tex. May 30, 2017).

82. *Id.* at *2.

83. *G.T. Leach Builders, L.L.C. v. Sapphire Condos. Ass’n*, No. 13-16-00293-CV, 2017 WL 3878238, at *8 (Tex. App.—Corpus Christi Aug. 24, 2017, pet. denied) (mem. op.).

84. *Id.* at *2.

85. *Id.* at *9–18.

86. No. 03-16-00621-CV, 2016 WL 7187482, at *1 (Tex. App.—Austin Dec. 7, 2016, no pet.) (mem. op.).

87. *Id.* at *4 (internal quotations and emphasis omitted).

88. No. 4:16-CV-888-ALM-CAN, 2017 WL 2540581, at *4 (E.D. Tex. May 24, 2017), adopted by 2017 WL 2536145 (E.D. Tex. June 9, 2017) (mem.).

could not be compelled to arbitrate based on the assumption exception. Pavecon did not manifest an intent to arbitrate. “Pavecon did not agree to arbitrate” or take steps to comply with the arbitration agreement. Thus, the assumption exception did not apply.⁸⁹

C. AGENCY

Two cases from this Survey period illustrate that when a principal signs a valid arbitration agreement, its agents can compel arbitration even if the agent did not sign the agreement.⁹⁰ *Dargahi v. Handa* demonstrates this point. A contract between the Handas and Lakeway Custom Homes contained an arbitration clause. Lakeway Custom Homes was operated by Yekks. After a dispute arose, the Handas sued Yekks, Pejman, and Kamran. All of the defendants moved to compel arbitration. The Austin Court of Appeals allowed Pejman and Kamran to compel arbitration because they were agents of Yekk.⁹¹ The court of appeals noted that arbitration was proper because “[t]he Handas’ claims against both Pejman and Kamran are in substance claims against Yekk, and the alleged actionable conduct . . . occurred in connection with their performance under the contract as representatives of Yekk.”⁹²

*Waterstone on Lake Conroe, Inc. v. Williams*⁹³ provides another example of a situation where a non-signatory could compel arbitration by agency. The Williamses signed a purchase agreement for a new home with Virgin. Steve Bowen was the President of Waterstone and Virgin. The Williamses were not satisfied with the construction of the home, and filed suit against Bowen, Virgin, and Waterstone. The Beaumont Court of Appeals determined that Bowen could compel arbitration because “the arbitration agreement expressly provides that officers are non-signatories that are considered parties to the agreement.”⁹⁴

*Santander Consumer USA, Inc. v. Mata*⁹⁵ illustrates that principals cannot compel “agents to participate in arbitration based on an agreement signed by the principals and unknown to the agents.” A predecessor of Santander entered into a contract with Mata for the sale of a vehicle that contained an arbitration clause. When Mata did not pay, Santander repossessed the vehicle with the help of its agents, Redshift and Centroplex. Mata sued Santander, and in response, Santander filed cross-claims against Redshift and Centroplex. Santander attempted to compel Redshift and Centroplex to arbitrate. The Austin Court of Appeals deter-

89. *Id.*

90. *Dargahi v. Handa*, No. 03-17-00386-CV, 2017 WL 5247517, at *2–3 (Tex. App.—Austin Nov. 8, 2017, no pet.) (mem. op.).

91. *Id.* at *3–4.

92. *Id.* at *13.

93. No. 09-17-00071-CV, 2017 WL 3298234, at *1 (Tex. App.—Beaumont Aug. 3, 2017, no pet.) (mem. op.).

94. *Id.* at *4.

95. No. 03-14-00782-CV, 2017 WL 1208767, at *3 (Tex. App.—Austin Mar. 29, 2017, no pet.) (mem. op.).

mined that Santander could not use the agency theory to compel its own agents to arbitrate.⁹⁶

It is possible for a non-signatory to be bound to arbitrate based on the actions of an individual serving as the non-signatory's power of attorney. *Kindred Nursing Centers Limited Partnership v. Clark*⁹⁷ illustrates this point. Beverly Wellner served as Joe Wellner's power of attorney, and Janis Clark served as Olive Clark's power of attorney. Joe and Olive received nursing care in a Kindred nursing home, and their respective agents signed all of the intake documents, including an arbitration agreement. After Joe and Olive died, their estates sued Kindred, and Kindred moved to compel arbitration. The Kentucky Supreme Court denied arbitration, partly because both power of attorney documents did not clearly state that the agent could bind the principal to arbitration. The United States Supreme Court called this rule the "clear-statement rule."⁹⁸ On appeal, the Supreme Court determined that the clear-statement rule could not prevent arbitration, because arbitration agreements need to be "on an equal plane with other contracts."⁹⁹

The party seeking to compel arbitration must prove that the requisite "principal/agent" relationship exists. In *Albertson's Holdings, LLC v. Kay*,¹⁰⁰ Albertson's failed to show that Ruth Kay was acting as an agent for Frank Kay when she signed an arbitration agreement. Ruth and Frank were husband and wife. Ruth was employed by Albertson's and signed an arbitration agreement that attempted to bind Frank to arbitrate his claims against Albertson's. According to the Tyler Court of Appeals "[t]he marital relationship does not, in itself, make one spouse the agent of the other spouse."¹⁰¹ Albertson's could not compel Frank to arbitrate his claims because Albertson's did not establish that Ruth was acting as Frank's agent.¹⁰²

D. ALTER EGO

When the non-signatory is acting as an alter ego for a signatory the other signatory can compel arbitration. In order to use this theory to compel arbitration, the signatory seeking to compel arbitration must go further than merely proving that the signatory and non-signatory are related entities.

In *Pavecon Holding Co. v. Tuzinski*,¹⁰³ Pavecon sued Tuzinski and Kansas Asphalt. Pavecon leased its employees from a related company known as Labcon. While Tuzinski was employed by Pavecon, he was also

96. *Id.* at *7-9.

97. 137 S. Ct. 1421, 1429 (2017).

98. *Id.* at 1426.

99. *Id.* at 1427.

100. 514 S.W.3d 878, 884 (Tex. App.—Tyler 2017, no pet.).

101. *Id.* at 884.

102. *Id.*

103. No. 4:16-CV-888-ALM-CAN, 2017 WL 2540581 (E.D. Tex. May 24, 2017) (mem. op.), *adopted by* 2017 WL 2536145 (E.D. Tex. June 9, 2017).

a Labcon employee because Pavecon leased Tuzinski from Labcon. Tuzinski attempted to compel Pavecon to arbitrate its claims against Tuzinski based on an arbitration agreement contained in Labcon's employee manual. One argument that Tuzinski asserted was that Pavecon was an alter ego of Labcon. The U.S. District Court for the Eastern District of Texas determined that Pavecon was not an alter ego of Labcon because "while Labcon and Pavecon are closely related companies, there is no showing or allegation that they are the same entity and/or that their separate and distinct corporate statuses can be lawfully disregarded in the instant suit."¹⁰⁴ Thus, Tuzinski's alter ego theory failed.

E. ESTOPPEL

The most popular non-signatory theory raised during this Survey period was estoppel. Parties cited direct benefits estoppel and equitable estoppel to support their motions to compel. This section addresses direct benefits estoppel first, and equitable estoppel second.

1. *Direct Benefits Estoppel*

Under the theory of direct benefits estoppel, a plaintiff that accepts benefits of a contract cannot avoid an arbitration provision contained in the same contract. Note that in order for direct benefits estoppel to apply, there must be a valid contract. One case from this Survey period illustrates this point. In *Oak Crest Manor Nursing Home v. Barba*,¹⁰⁵ Barba's son was a resident at Oak Crest. Barba, acting as her son's guardian, sued Oak Crest for negligence relating to her son's care. Oak Crest moved to compel arbitration. Barba was able to establish that her son lacked capacity to contract.¹⁰⁶ Thus, Oak Crest could not rely on the doctrine of direct benefits estoppel, because it would be impossible for Barba or her son to seek benefits from a contract that did not exist.¹⁰⁷

Courts often reject the direct benefits estoppel theory when the non-signatories' claims are independent from the agreement that contained the arbitration clause. *Toll Austin, TX, LLC v. Dusing*,¹⁰⁸ provides an example of this point. As discussed previously, a subsequent purchaser of a home was not bound by an arbitration agreement between the original purchaser and seller. One argument that Toll Austin attempted to compel arbitration was direct benefits estoppel. The Austin Court of Appeals rejected that argument because the Dusings' claims were based on common law and statutory law and were not based on the contract.¹⁰⁹ The source

104. *Id.* at *3.

105. No. 03-16-00514-CV, 2016 WL 7046844, at *1 (Tex. App.—Austin Dec. 1, 2016, no pet.) (mem. op.).

106. *Id.* at *4.

107. *Id.*

108. No. 03-16-00621-CV, 2016 WL 7187482, at *4 (Tex. App.—Austin Dec. 7, 2016, no pet.) (mem. op.).

109. *Id.* at *3.

of the claims made direct benefits estoppel inapplicable.¹¹⁰

The First Houston Court of Appeals reached a similar result in *Steer Wealth Management, LLC v. Denson*.¹¹¹ John and Margaret Denson signed brokerage account agreements with LPL Financial. Steer Wealth and LPL Financial were related entities. Later, Margaret sued Steer Wealth for “breach of contract and fraud.”¹¹² According to Steer Wealth, direct benefits estoppel applied because Margaret was using her contract with LPL Financial to hold Steer Wealth liable. The court of appeals held that direct benefits estoppel did not apply because Margaret’s claims were not based on the Densons’ agreement with LPL Financial.¹¹³ Instead, her claims arose from a separate contractual relationship between the Densons and Steer Wealth.¹¹⁴

Patricia Rocha was not compelled to arbitrate in *Rocha v. Marks Transportation*.¹¹⁵ Patricia’s husband signed an arbitration agreement with Marks Transportation when he purchased a vehicle. After the purchase, Patricia took the vehicle to Marks Transportation to be serviced. Patricia slipped in the waiting area, and sued Marks Transportation based on injuries she sustained. The First Houston Court of Appeals held that direct benefits estoppel did not apply because Patricia’s claims were not based on the contract between Patricia’s husband and the dealership.¹¹⁶ Patricia sued Marks Transportation for premises liability, and not for breach of contract.

The U.S. District Court for the Eastern District of Texas determined that Pavecon was not required to arbitrate its claims in *Pavecon Holding Co. v. Tuzinski*.¹¹⁷ Pavecon sued Tuzinski for abuse of trade secret information. Pavecon was not required to arbitrate because “Pavecon’s claims do not seek to enforce terms within the [arbitration agreement], and the merits of Pavecon’s claims can be adjudicated without referring to that document.”¹¹⁸

Several cases from this Survey period illustrate that a non-signatory “cannot both have [their] contract and defeat it too.”¹¹⁹ When a non-signatory seeks to obtain benefits from a contract that contains an arbitration agreement, the non-signatory will be compelled to arbitrate. For example, in *Sam Houston Electric Cooperative, Inc. v. Berry*, the plaintiffs, Berry and Cano, were compelled to arbitrate their claims against

110. *See id.*

111. 537 S.W.3d 558, 571 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

112. *Id.* at 561.

113. *Id.* at 571.

114. *Id.*

115. 512 S.W.3d 529 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

116. *Id.* at 538.

117. No. 4:16-CV-888-ALM-CAN, 2017 WL 2540581, at *4 (E.D. Tex. May 24, 2017).

118. *Id.* at *4.

119. *Sam Houston Elec. Coop., Inc. v. Berry*, No. 09-16-00346-CV, 2017 WL 4319849, at *4 (Tex. App.—Beaumont Dec. 28, 2016, no pet.) (quoting *In re Weekley Homes, LP*, 180 S.W.3d 127, 135 (Tex. 2005)).

Sam Houston.¹²⁰ Berry and Cano's claims were all based on Sam Houston's 2012 Bylaws. The plaintiffs sought damages based on Sam Houston's breach of the Bylaws. Thus, the plaintiffs were required to comply with the arbitration clause in the Bylaws.¹²¹

*Deosaran v. Ace Cash Express*¹²² also illustrates this point. Deosaran and Goodwin sued Ace Cash Express after Ace Cash allegedly violated the Telephone Consumer Protection Act. Goodwin obtained a loan from Ace Cash, and signed an agreement that contained an arbitration clause. Deosaran did not sign any agreements with Ace Cash. Ace Cash attempted to compel Deosaran and Goodwin to arbitrate their claims. The U.S. District Court for the Northern District of Texas held that Goodwin could be compelled to arbitrate, but Deosaran could not be compelled to arbitrate.¹²³ Deosaran's claims existed separately from the contracts, and she did not seek to benefit from the contract.¹²⁴ Thus, she could not be compelled to arbitrate based on direct benefits estoppel.¹²⁵

Direct benefits estoppel allowed Lexington Insurance Company to compel Exxon to arbitrate its claims.¹²⁶ A fire occurred while Brock Services was performing work at an Exxon refinery. Exxon required Brock Services to list Exxon as an additional insured party through Lexington Insurance Company. In an attempt to recover under the policy, Exxon sued Lexington. On appeal, the Beaumont Court of Appeals granted Lexington's motion to compel arbitration because of direct benefits estoppel.¹²⁷ Exxon sought to benefit from the insurance policy, so Exxon could not avoid the arbitration provision.¹²⁸

Other cases in this Survey period illustrate that non-signatories can be bound by arbitration agreements when the non-signatory's lawsuit seeks to obtain a benefit from the contract.¹²⁹

120. *Id.* at *6–7.

121. *Id.*

122. No. 4:16-CV-00919-O-BP, 2017 WL 1518568, (N.D. Tex. Mar. 23, 2017), *adopted* by 2017 WL 1296453 (N.D. Tex. Apr. 7, 2017).

123. *Id.* at *3–4.

124. *Id.* at *3–4.

125. *Id.*

126. *Lexington Ins. Co. v. Exxon Mobil Corp.*, No. 09-16-00357-CV, 2017 WL 1532271, at *2 (Tex. App.—Beaumont Apr. 27, 2017, no pet.) (mem. op.).

127. *Id.* at *2, *8.

128. *Id.* at *2.

129. *See, e.g.*, *Diverse Enters., Co., LLC v. Beyond Int'l, Inc.*, No. SA-16-CV-1036-RCL, 2017 WL 4276832, at *1 (W.D. Tex. Sept. 22, 2017); *Petrobras Am. Inc., v. Cadenas*, 276 F. Supp. 3d 691, 698 (S.D. Tex. 2017); *Heritage Capital Corp. v. Christie's, Inc.*, No. 3:16-CV-3404-D, 2017 WL 1550514, at *6 (N.D. Tex. May 1, 2017) (mem. op.); *Bailey v. Healthsouth Corp.*, No. 9:15-CV-57, 2017 WL 664445, at *7 (E.D. Tex. Jan. 26, 2017); *Dargahi v. Handa*, No. 03-17-00386-CV, 2017 WL 5247517, at *7 (Tex. App.—Austin Nov. 8, 2017, no pet.) (mem. op.); *Saks v. Rogers*, No. 04-16-00286-CV, 2017 WL 3159712, at *8 (Tex. App.—San Antonio July 26, 2017, pet. denied) (mem. op.); *My Three Sons, Ltd. v. Midway/Parker Med. Ctr., L.P.*, No. 05-15-01068-CV, 2017 WL 2351082, at *7 (Tex. App.—Dallas May 31, 2017, no pet.) (mem. op.).

2. *Equitable Estoppel*

The doctrine of equitable estoppel also appeared during this Survey period. A signatory plaintiff cannot avoid arbitration when the plaintiff seeks to hold a non-signatory defendant liable under a contract that contains an arbitration clause.¹³⁰ As previously mentioned, in *Waterstone on Lake Conroe, Inc. v. Williams*,¹³¹ the Williamses sued Waterstone, Virgin, and Steve Bowen after a dispute arose about the construction of the Williamses' new home. Waterstone could compel arbitration under the doctrine of equitable estoppel because the claims against Waterstone were "intertwined with and dependent upon the purchase agreement."¹³² The Williamses could not determine who was responsible for the construction defect that formed the center of their complaint, and the Williamses argued that "the separateness" between Virgin and Waterstone "ceased."¹³³ Under these facts, Waterstone could compel arbitration based on equitable estoppel.¹³⁴

Equitable estoppel allowed Sears to compel arbitration in *Mayton v. Tempoe, LLC*.¹³⁵ Mayton went to Sears with the intent to purchase a mattress set, but according to Mayton, he did not know that he was actually entering into a lease agreement with Tempoe that contained an arbitration clause. When Mayton realized what happened he sued Sears and Tempoe. Sears could compel arbitration even though it was a non-signatory because Mayton treated Sears and Tempoe as "a single unit."¹³⁶ Also, Mayton's claims against Sears were based on Mayton's lease agreement with Tempoe. This led the U.S. District Court for the Western District of Texas to compel Mayton to arbitrate his claims against Sears.¹³⁷

The doctrine of equitable estoppel cannot be used to compel a non-signatory plaintiff to arbitrate his claims against a signatory defendant.¹³⁸ *Sentry Select Insurance Co. v. Ruiz*¹³⁹ illustrates this point. In that case, North American Capacity Insurance Company sought to compel Sentry to arbitrate its claims based on an arbitration agreement that was not signed by Sentry. The U.S. District Court for the Western District of Texas determined that equitable estoppel did not apply because Sentry was a non-signatory plaintiff.¹⁴⁰ The district court noted that equitable estoppel "only applies to keep a signatory from avoiding its arbitration

130. See, e.g., *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000).

131. No. 09-17-00071-CV, 2017 WL 3298234, at *2 (Tex. App.—Beaumont Aug. 3, 2017, no pet.) (mem. op.).

132. *Id.* at *5.

133. *Id.*

134. *Id.* at *6.

135. No. SA-17-CV-179-XR, 2017 WL 2484849, at *1 (W.D. Tex. June 7, 2017).

136. *Id.* at *6.

137. *Id.* at *6.

138. See *Sentry Select Ins. Co. v. Ruiz*, No. EP-16-CV-00376-DCG, 2017 WL 2692643, at *3 (W.D. Tex. June 20, 2017) (mem. op.); see also *Deosaran v. Ace Cash Express, Inc.*, No. 4:16-CV-00919-O-BP, 2017 WL 1318568, at *2 (N.D. Tex. Mar. 23, 2017).

139. *Sentry*, 2017 WL 2692643, at *3.

140. *Id.*

agreement.”¹⁴¹

F. THIRD PARTY BENEFICIARY

A non-signatory can compel arbitration if the non-signatory can prove that it is a third party beneficiary to the agreement that contains the arbitration clause. One case from this Survey period, *Athas Health, LLC v. Trevithick*,¹⁴² provides a good example. Paul Trevithick’s estate sued Athas after Trevithick died following a spinal procedure that Athas organized for Trevithick. The Dallas Court of Appeals determined that Athas was likely a party to the arbitration agreement,¹⁴³ but even if Athas was not a party to the contract, Athas could compel arbitration because Athas was a third party beneficiary.¹⁴⁴ The arbitration agreement contained the phrase “Dispute Resolution/Arbitration Between You and Athas.”¹⁴⁵ The court of appeals determined that Athas could enforce the arbitration agreement because this language showed a clear intent for Athas to benefit from the arbitration clause.¹⁴⁶

If the non-signatory cannot show that there was a clear intent for the non-signatory to benefit from the agreement the non-signatory cannot compel arbitration. *Steer Wealth Management, LLC v. Denson*¹⁴⁷ provides an illustration. As mentioned previously, John and Margaret Denson signed brokerage account agreements with LPL Financial. Steer Wealth claimed that it was a third party beneficiary to the agreements. The First Houston Court of Appeals determined that the agreement between the Densons and LPL Financial did not express a clear intent to benefit Steer Wealth.¹⁴⁸ Although the contract stated that the arbitration agreement applies to controversies “between [Denson] and LPL and/or your Representative(s) [.]” Steer Wealth did not meet the contractual definition of “Representative.”¹⁴⁹ Steer Wealth could not prove that it was a third party beneficiary because it could not establish that the Densons and LPL Financial intended to benefit Steer Wealth when the parties entered into the agreement.¹⁵⁰

141. *Id.* (quoting *US Health Grp., Inc. v. South*, 636 Fed. App’x 194, 199 (5th Cir. 2015) (per curiam)) (emphasis omitted).

142. No. 05-16-00219-CV, 2017 WL 655926, at *6 (Tex. App.—Dallas Feb. 17, 2017 no pet.) (mem. op.).

143. The motion to compel was based on two arbitration agreements: the “user agreement” and the “financial agreement.” The financial agreement indicates that Red River Spine is the medical provider and Dr. Will is the attending physician. However, the agreement does not limit the application of the agreement only to Red River Spine and Dr. Will. Thus, the court of appeals determined that Athas was likely a party to the contract, but the court of appeals went on to analyze the third party beneficiary argument. *Id.* at *3.

144. *Id.*

145. *Id.* at *4.

146. *Id.*

147. 537 S.W.3d 558, 571 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

148. *Id.* at 567–68.

149. *Id.* at 567.

150. *Id.* at 567–68

Additionally, a non-signatory who was an intended beneficiary of a contract can be compelled to arbitrate its claims against a signatory. In *Reliable Energy Solutions v. Amalfi Apartment Corporation*,¹⁵¹ Amalfi was compelled to arbitrate because it was a third party beneficiary to an agreement between Tremar and Reliable. Amalfi owned an apartment complex. Tremar and Amalfi entered into a general contract agreement for renovations to the property that Amalfi owned. Pursuant to this general contract agreement, Tremar and Reliable entered into a subcontractor agreement. The subcontractor agreement contained an arbitration clause. When Reliable did not receive payment, it sued Tremar and Amalfi. Tremar moved to dismiss the case or, in the alternative, to compel arbitration. Amalfi contended that since it did not sign the subcontract agreement it cannot be compelled to arbitrate. The U.S. District Court for the Southern District of Texas held that Amalfi was an intended beneficiary of the agreement after considering “the intention of the parties, and the nature of the contractual relationship.”¹⁵²

IV. COURT INVOLVEMENT

This section details two issues concerning court involvement that came up often in this Survey period’s arbitration cases. First, this section discusses what constitutes a “final order” in the context of arbitration cases. Second, this section discusses expansion of judicial review of arbitration awards.

A. FINAL ORDERS

Generally, appellate cases from this Survey period illustrate that the appellate court lacks jurisdiction when the trial court does not issue a final order.¹⁵³ *Green Tree Servicing, LLC v. Charles*¹⁵⁴ provides an interesting twist on what constitutes a “final order.” Plaintiff, Charles, sued Green Tree and various other entities. This case was removed to federal district court. Later, the defendants brought a separate case to compel arbitration. The district court compelled arbitration in that case and dismissed the case with prejudice, but the original case was still pending. The U.S. Court of Appeals for the Fifth Circuit held that it lacked jurisdiction to review the order compelling arbitration because “[a]n arbitration order entering a stay, as opposed to a dismissal, is not an appealable final or-

151. No. 4:16-cv-03346, 2017 WL 3412198 (S.D. Tex. July 3, 2017) (mem. op.), *adopted by* 2017 WL 3394613 (S.D. Tex. Aug. 7, 2017).

152. *Id.* at *4.

153. *Hobzek v. HomeAway.com, Inc.*, No. 17-50144, 2017 WL 3630286, at *1 (5th Cir. June 21, 2017) (per curiam); *Bordelon Marine, L.L.C. v. Bibby Subsea ROV, L.L.C.*, 685 Fed. App’x 330, 332 (5th Cir. 2017) (per curiam); *Galaxy Builders, Ltd. v. Globus Mgmt. Grp., LLC*, No. 05-17-00831-CV, 2017 WL 4349096, at *1 (Tex. App.—Dallas Oct. 2, 2017, no pet.) (mem. op.) (holding that the court lacked jurisdiction because the trial court order was not a final order even though it stated that it was a final order); *Chowdhury v. Tata Consultancy Servs. Ltd.*, No. 05-17-00351-CV, 2017 WL 2610661, at *1 (Tex. App.—Dallas, June 16, 2017, no pet.) (mem. op.).

154. 872 F.3d 637, 638 (5th Cir. 2017).

der.”¹⁵⁵ The Fifth Circuit considered both cases together, and determined that there was essentially an order compelling arbitration and a stay of the proceedings even though the order compelling arbitration and the stay occurred in two different cases.¹⁵⁶ The Fifth Circuit applied this reasoning to several additional cases involving Green Tree Servicing, LLC.¹⁵⁷

B. EXPANSION OF JUDICIAL REVIEW

During this Survey period, there were a few notable cases that applied the *Nafta Traders v. Quinn*¹⁵⁸ rule. In *Nafta Traders*, the Texas Supreme Court determined that, under the TAA, parties can contract for expanded judicial review by “clear agreement.”¹⁵⁹ The cases from this Survey period show that courts are strictly applying the *Nafta Traders* “clear agreement” rule. If there is not a clear agreement to expanded judicial review, the court will only allow for narrow judicial review. In each of the cases discussed below, a party unsuccessfully attempted to use a provision in the arbitration agreement to expand judicial review.

In *Forest Oil Corp. v. El Rucio Land & Cattle*,¹⁶⁰ the arbitration agreement allowed the arbitration panel “to award punitive damages where allowed by Texas substantive law.”¹⁶¹ Forest Oil argued that this language indicated that the parties contracted for expanded judicial review. The Texas Supreme Court held the language in the agreement did not express a “clear agreement” for expanded judicial review.¹⁶² Other sections in the agreement called for application of the Texas Rules of Civil Procedure, and allowed the district court to review the arbitrator’s actions using an “abuse of discretion standard.”¹⁶³ The section on exemplary damages did not contain the same provisions, so the supreme court did not expand judicial review regarding exemplary damages.¹⁶⁴

The Fourteenth Houston Court of Appeals determined that the parties did not clearly express an intent to provide for expanded judicial review in the arbitration agreement in *Denbury Onshore, LLC v. Texcal Energy S. Tex., L.P.*¹⁶⁵ Denbury cited to a statement in the agreement to argue that the parties sought to expand judicial review: “[a]n appeal from an order or judgment of the [p]anel shall be taken in the manner and to the

155. *Id.* at 639.

156. *Id.* at 639–40.

157. See *Green Tree Servicing, L.L.C. v. Miller*, 704 Fed. App’x 384, 385 (5th Cir. 2017) (per curiam); *Green Tree Servicing, L.L.C. v. Haynes (In re Haynes)*, 704 Fed. App’x 387, 388 (5th Cir. 2017) (per curiam); *Green Tree Servicing, L.L.C. v. Dove*, 701 Fed. App’x 385, 385–86 (5th Cir. 2017) (per curiam); *Green Tree Servicing, L.L.C. v. Ducksworth*, 701 Fed. App’x 384, 385 (5th Cir. 2017) (per curiam).

158. 339 S.W.3d 84 (Tex. 2011).

159. *Id.* at 101.

160. 518 S.W.3d 422 (Tex. 2017).

161. *Id.* at 432.

162. *Id.*

163. *Id.*

164. *Id.*

165. 513 S.W.3d 511, 517–18 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

same extent as from orders or judgment in civil cases under Texas law.”¹⁶⁶ The court of appeals determined that this language was not enough to expand judicial review.¹⁶⁷ In fact, the parties actually contracted for a more narrow form of judicial review because the agreement limited the grounds for vacatur to fraud or corruption.¹⁶⁸ The court of appeals noted that even if the choice to narrow judicial review was not enforceable, Denbury still did not meet its burden under the FAA or the TAA to show that the panel exceeded its authority.¹⁶⁹

In *Jones v. Carlos & Parnell*,¹⁷⁰ the Dallas Court of Appeals held that expanded judicial review was not applicable. The National Health Lawyers Association’s pre-existing rules were mentioned in the agreement. The rules allowed the arbitrator “to render any relief authorized by contract or applicable law that appears to be fair under the circumstances and to sign the award, in compliance with applicable state and federal law.”¹⁷¹ According to the court of appeals, this language does not clearly show that the parties intended for expanded judicial review to apply.¹⁷² Additionally, expanded judicial review was not warranted, even though Texas law controlled the agreement, and the arbitrator could use the Texas Rules of Procedure for guidance on discovery issues.¹⁷³ Those provisions were not enough to show that there was a clear intent to contract for expanded judicial review.¹⁷⁴

Lastly, in *Methodist Healthcare Systems, Ltd. v. Friesenhahn*,¹⁷⁵ Methodist cited to three sections of the agreement in support of its argument that expanded judicial review was contemplated. The San Antonio Court of Appeals held that the arbitration agreement did not contain “any language referencing judicial review or a standard applicable in a conventional judicial review.”¹⁷⁶ Each of the provisions Methodist cited simply illustrated the arbitrator’s power, and were not sufficient to expand judicial review.¹⁷⁷

C. GROUNDS FOR VACATUR OR MODIFICATION

A party to an arbitration can move to vacate an award under one of the four statutory grounds for vacatur.¹⁷⁸ A court will not vacate an arbitra-

166. *Id.* at 517–18.

167. *Id.* at 519.

168. *Id.*

169. *Id.* at 519–20.

170. No. 05-17-00329-CV, 2017 WL 4930896, at *3 (Tex. App.—Dallas Oct. 31, 2017, pet. denied) (mem. op.).

171. *Id.* (internal quotations and emphasis omitted).

172. *Id.*

173. *Id.*

174. *Id.*

175. No. 04-16-00824-CV, 2017 WL 4518284, at *3 (Tex. App.—San Antonio Oct. 11, 2017, pet. denied) (mem. op.).

176. *Id.*

177. *Id.*

178. 9 U.S.C. § 10(a)(1)–(4) (2002); see also TEX. CIV. PRAC. & REM. CODE ANN. § 171.088(a)(1)–(4) (West 2011).

tion award unless a party to the arbitration can successfully raise one of the four grounds for vacatur.¹⁷⁹ In order to successfully vacate an arbitration award, the party must object before the arbitration award is confirmed and final judgement is rendered.¹⁸⁰ The following section provides examples of cases where a party argued that an arbitration award should be vacated due to one of the statutory grounds for vacatur.

1. *Corruption, Fraud, or Undue Means*

Mistake of law is not enough to amount to undue means. *IOC Co., LLC v. City of Edinburg*¹⁸¹ illustrates this point. The City argued that the arbitrator did not apply a local government code correctly. The Corpus Christi Court of Appeals held that “[e]ven if the arbitrator made minor errors or misapplied [the code] to the facts of this case, as the City argues, such a mistake of law is not enough to amount to undue means.”¹⁸²

2. *Evident Partiality*

When the party seeking to vacate the award can prove evident partiality or corruption, the court should vacate the arbitration award. The plaintiff proved evident partiality in *Builders First Source South Texas LP v. Ortiz*.¹⁸³ The arbitrator did not disclose that Builders First’s attorney “appeared before her twice in the past.”¹⁸⁴ When the plaintiff’s attorney joined a telephone hearing phone call, “the conversation between [the arbitrator] and [Builders First’s attorney] was extremely friendly and appeared to joke about [the arbitrator’s] favorable decisions for [Builders First’s attorney] in past [a]rbitrations.”¹⁸⁵ This led the Fourteenth Houston Court of Appeals to determine that the arbitration award should be vacated due to evident partiality.¹⁸⁶

3. *Failure to Postpone the Hearing, Hear Evidence, or Any Other Misbehavior that Prejudiced a Party*

The arbitration panel refused to hear pertinent and material evidence

179. See *Brendel v. Meyrowitz*, No. 3:15-CV-1928-D, 2017 WL 1178244, at *6 (N.D. Tex. Mar. 30, 2017); *Valdes v. Whataburger Rests., LLC*, No. 14-16-00222-CV, 2017 WL 2602728, at *2–3 (Tex. App.—Houston [14th Dist.] June 15, 2017, no pet.) (mem. op.); *Guerra v. L&F Distributions, LLC*, 521 S.W.3d 878, 885 (Tex. App.—San Antonio 2017, no pet.).

180. See *Quickset Concrete, Inc. v. Roeschco Constr., Inc.*, No. 05-16-00509-CV, 2017 WL 4021113, at *4 (Tex. App.—Dallas Sept. 13, 2017, pet. denied) (mem. op.); see also *Dotcom Co. v. DP Sols, Inc.*, No. 12-16-00340-CV, 2017 WL 3224887, at *3 (Tex. App.—Tyler July 31, 2017, no pet.) (mem. op.).

181. No. 13-16-00117-CV, 2017 WL 3084293, at *4–5 (Tex. App.—Corpus Christi July 20, 2017, pet. denied) (mem. op.).

182. *Id.*

183. 515 S.W.3d 451, 460 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

184. *Id.* at 454.

185. *Id.* (internal quotations omitted).

186. *Id.* at 460.

in *Parker v. Interactive Brokers, LLC*.¹⁸⁷ The Parkers sued the trustee who was managing their trust fund, and initiated an arbitration proceeding against Interactive Brokers. A portion of the trust fund was located in a brokerage account at Interactive Brokers. During oral arguments, in the arbitration, the Parkers' attorney told the arbitrator panel that the trustee was going to file for bankruptcy. Later, Interactive Brokers attempted to introduce evidence that the trustee was not going to declare bankruptcy despite the Parkers' claims, but the panel refused to accept it. The First Houston Court of Appeals vacated the award.¹⁸⁸ The panel expressly considered the Parkers' statement that the trustee was going to file for bankruptcy, so the evidence that Interactive Brokers wanted to introduce to prove that the trustee was not going to file for bankruptcy was pertinent and material.¹⁸⁹

4. *Exceeded Powers*

When an arbitrator exceeds her power, the arbitration award should be vacated. The arbitrators exceeded their powers in *Higginson v. Martin*.¹⁹⁰ The attorneys representing both parties signed a proposed arbitration award. The arbitration panel did not accept the settlement agreement even though both parties agreed that the dispute was settled. Instead, the panel issued its own award. The Amarillo Court of Appeals held that vacatur was proper because the jurisdiction of the panel ended when the parties settled their dispute.¹⁹¹

In *Gilbert v. Rain & Hail Insurance*,¹⁹² the Fort Worth Court of Appeals held that the arbitrator did not exceed his powers. The arbitration agreement delegated arbitrability to the arbitrator. The parties agreed to arbitrate issues of arbitrability, so the arbitrator did not abuse his discretion when he overruled Gilbert's objections to arbitration.¹⁹³

5. *Modification of Arbitration awards*

*In re S.M.H.*¹⁹⁴ demonstrates that arbitration awards can be modified by the trial court in certain circumstances. In that case, the arbitration agreement called for the arbitrator to select either the mother's proposal or the father's proposal. The arbitrator did not have the authority to make any changes to either proposal. The arbitrator selected the mother's proposal but added a section on possession of the child. The Fourteenth Houston Court of Appeals determined that modification under the Texas

187. No. 01-15-00943-CV, 2017 WL 3597735, at *9 (Tex. App.—Houston [1st Dist.] Aug. 22, 2017, no pet.) (mem. op.).

188. *Id.* at *11.

189. *Id.*

190. No. 07-15-00343-CV, 2017 WL 603626, at *7 (Tex. App.—Amarillo Feb. 14, 2017, pet. denied) (mem. op.).

191. *Id.*

192. No. 02-16-00277-CV, 2017 WL 710702, at *4 (Tex. App.—Fort Worth Feb. 23, 2017, pet. denied) (mem. op.).

193. *Id.*

194. 523 S.W.3d 783, 786 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

Civil Practices and Remedies Code § 171.091(a)(2) was proper.¹⁹⁵ The parties agreed to arbitrate the support issue, the possession issue was not arbitrable, and it was possible to remove the possession portion from the award without affecting the rest of the award.¹⁹⁶

D. WAIVER

When considering whether a party waived its right to compel arbitration, courts require that the party opposing arbitration show more than inconvenient timing or long delay.¹⁹⁷ The cases that follow provide examples of situations where the judicial process was substantially invoked.

In *Vine v. PLS Financial Services*,¹⁹⁸ PLS loaned Vine and Pond money. PLS required Vine and Pond to give PLS “blank or post-dated checks.”¹⁹⁹ Despite the fact that PLS told Vine and Pond that the checks would never be cashed, PLS attempted to cash the checks when Vine and Pond defaulted. When the checks bounced, PLS filed worthless check affidavits with the district attorney’s office. The U.S. Court of Appeals for the Fifth Circuit held that PLS substantially invoked the judicial process.²⁰⁰ A key consideration in this case was that PLS used the worthless check proceeding as a way to avoid arbitration.²⁰¹ Indeed, PLS’s “strategy to collect on outstanding debt” was the use of the worthless check affidavits.²⁰² The Fifth Circuit determined that PLS waived the right to compel arbitration because PLS should not be given “a second bite at the apple through arbitration.”²⁰³

In *Janvey v. Alguire*,²⁰⁴ one of the defendants, Giusti, substantially invoked the judicial process when “Giusti participated in discovery and other pre-trial litigation” after he was sued in 2011. Later, in 2014, he moved to compel arbitration. The Fifth Circuit reasoned that a “primary justification[]” for arbitration is to avoid the cost of litigation, and since Giusti engaged in discovery he could not compel arbitration.²⁰⁵ The record demonstrated prejudice because there was a three year gap between the initiation of the suit and the motion to compel arbitration. This resulted in increased litigation costs and undue delay.

195. *Id.* at 788, 790.

196. *Id.* at 790.

197. *See, e.g.*, *Tom Wright Constr., LLC v. JDM Steel Constr., LLC*, No. 10-17-00124-CV, 2017 WL 4543651, at *4–5 (Tex. App.—Waco Oct. 11, 2017, no pet.) (mem. op.); *Tantrum St. LLC v. Carson*, No. 05-16-01096-CV, 2017 WL 3275901, at *6 (Tex. App.—Dallas July 25, 2017, no pet.) (mem. op.); *Fisher v. Carlile*, No. 01-16-00615-CV, 2017 WL 2774486, at *4 (Tex. App.—Houston [1st Dist.] June 27, 2017, no pet.) (mem. op.); *Legoland Discovery Ctr. (Dallas), LLC v. Superior Builders, LLC*, 531 S.W.3d 218, 222–23 (Tex. App.—Fort Worth 2017, no pet.).

198. 689 Fed. App’x 800, 801 (5th Cir. 2017) (per curiam).

199. *Id.*

200. *Id.* at 806.

201. *Id.*

202. *Id.*

203. *Id.*

204. 847 F.3d 231, 243–44 (5th Cir. 2017).

205. *Id.*

The U.S. District Court for the Northern District of Texas determined that the defendant substantially invoked the judicial process in *Forby v. One Technologies LP*,²⁰⁶ but did not waive the right to arbitrate. One Technologies invoked the judicial process because it did not attempt to compel arbitration until the district court ruled on its motion to dismiss with prejudice, successfully dismissed some of Forby's claims, and did not seek to compel arbitration until thirteen months after removal to federal court. The district court held that despite the fact that One Technologies substantially invoked the judicial process, the plaintiff was not prejudiced.²⁰⁷ The plaintiff could only point to delay as a source of prejudice, and this alone was insufficient to support waiver of the right to compel arbitration.²⁰⁸

The result in *Leal v. Sinclair Broad. Group, Inc.*²⁰⁹ is opposite the result in *Forby v. One Technologies, LP*. The defendants removed the case to federal court and filed a substantive motion to dismiss. Instead of granting the motion to dismiss, the U.S. District Court for the Western District of Texas allowed the plaintiff to amend his complaint. Then the defendants moved to compel arbitration. The district court determined that the defendant's actions that prejudiced the plaintiff resulted in waiver of the right to compel arbitration.²¹⁰

Parish waived her right to compel arbitration in *Parish v. Macy's Retail Holdings*.²¹¹ Parish did not mention arbitration during her "aggressive prosecution of her claims" against Macy's.²¹² She litigated for ten months and moved for arbitration after "she saw that things were not going as favorably to her in the litigation as she would like."²¹³ Macy's would have been prejudiced if the U.S. District Court for the Northern District of Texas granted the motion to compel arbitration, because Macy's incurred about \$175,000 to defend the suit, the motion came at a "crucial time in the litigation," and Macy's would have to re-litigate issues in arbitration that were "already successfully litigated" in the trial court.²¹⁴

Each of the cases in this section indicate that it was not just the timing of the motion to compel that caused the court to hold that the right to arbitrate was waived. Courts analyze all of the actions of the party that is seeking to compel arbitration, and must find prejudice to the party opposing arbitration by the movant's actions and omissions. This requirement aligns with the "strong federal policy in favor of enforcing

206. *Forby v. One Techs., LP*, No. 3:16-CV-856-L, 2017 WL 2930514, at *3-4 (N.D. Tex. July 10, 2017) (mem. op.).

207. *Id.* at *6.

208. *Id.* at *5.

209. No. A-16-CV-679 LY, 2017 WL 1458810, at *3-4 (W.D. Tex. Apr. 25, 2017).

210. *Id.* at *2-4.

211. No. 4:17-CV-120-A, 2017 WL 5484665, at *8 (N.D. Tex. Nov. 14, 2017) (mem. op.).

212. *Id.*

213. *Id.*

214. *Id.* at *9.

arbitration agreements.”²¹⁵

V. CONCLUSION

This Survey period found numerous state and federal courts asked to consider issues arising out of arbitration. The resulting reported cases contain no first impression holdings. The cases do provide additional clarification and amplification of well-known arbitration jurisprudence. A number of these cases also reflect involvement of counsel inexperienced with arbitration, and provide examples of poorly drafted pre-dispute arbitration agreements.

215. *Leal v. Sinclair Broad. Grp., Inc.*, No. A-16-CV-679 LY, 2017 WL 1458810, at *2 (W.D. Tex. Apr. 25, 2017) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985)).