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Equitable Tolling of the FAA's Deadline for Vacating an Arbitration Award

Judge Abraham J. Gafni (Ret.)
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The Federal Arbitration Act (FAA), 9 U.S.C. Section 10(a) authorizes a district court "upon the application of any party to the arbitration" to vacate an arbitration award under a limited set of circumstances, including "where the award was procured by corruption, fraud or undue means." Section 12 requires that "notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." Courts have generally been quite strict in holding that such notices be filed within the three-month period.

Are there circumstances, however, where the three-month period should be equitably tolled? This issue was recently considered by the U.S. Court of Appeals for the Eleventh Circuit in *Nuvasive v. Absolute Medical*, No. 22-10214, 2023 U.S. App. Lexis 15607 (11th Cir. June 21, 2023).

The plaintiff, a manufacturer of medical products, had an exclusive distribution agreement with the defendants. The agreement included noncompetition agreements which the plaintiff claimed were breached by the defendants when it started a competing company. The plaintiff's complaint included several claims, one of which was for breach of contract. The district court enforced the arbitration clause in the agreement relating to the breach of contract claim while staying the other claims. The arbitration panel found that the defendants had breached the agreement, but denied the plaintiff's claim for lost profits.

Following the arbitration, litigation resumed relating to the plaintiff's other claims. The defendants produced text messages during discovery reflecting that the principal of the defendants had been sending text messages to the defendants' sales representative concerning the subjects of his testimony, while he was testifying virtually before the arbitration panel. Upon receiving these text messages, the plaintiff

promptly moved to vacate the arbitration award on the ground that it had been procured by fraud. The defendants opposed the motion, arguing that it was not timely as it had been filed more than three months after the issuance of the final arbitration award.

The district court granted the motion to vacate the final award, finding that equitable tolling was available under the FAA and warranted in the case. It further denied the defendants' request that the breach of contract claim be remanded to an arbitration panel for rehearing or for consideration of how the texted messages may have affected the final award.

On appeal, the defendants raised four arguments, all of which the U.S. Court of Appeals for the Eleventh Circuit rejected.

- **The three month-deadline for seeking vacatur of an arbitration award may be equitably tolled.**

In affirming the district court, the Eleventh Circuit approved the district court's reliance on *Move v. Citigroup Global Markets*, 840 F. 3rd 1132 (9th Cir. 2016), and on *Boechler v. Commissioner of Internal Revenue,* 142 S. Ct. 1493 (2022), in which "the Supreme Court offered relevant guidelines about how to determine whether a statute's deadlines are jurisdictional, such that a court would be precluded from reviewing late filings." Based on these cases, the appellate court concluded that equitable tolling is available in the FAA context.

- **There was no error in equitably tolling the statutory deadline and considering the motion to vacate.**

The Eleventh Circuit next found that equitable tolling, while being applied sparingly, "is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence."

Such extraordinary circumstances were found here because the defendants' witness, before testifying, took an untruthful oath that no one was communicating with him.

The district court did not credit the sales representative witness's denial that he had read the text messages while testifying in light of the remarkable consistency between the text messages and the testimony. This included one instance where the witness revised his answer to comport with the suggestion in a text message.

The Eleventh Circuit further accepted the district court's finding that "it was clear that the defendants were intentionally attempting to run out the clock on the plaintiff's time to file a motion to vacate by failing to produce the documents that could show misconduct during the arbitration."

As to due diligence, the Eleventh Circuit found that the plaintiff could not have acted earlier as it could not have known about the text messages until they were produced; and it acted promptly upon their production. In particular, the appellate court rejected the defendants' argument that a diligent lawyer would have looked for fraud during the available ninety-day window. Rather, any purported delay or lack of diligence was entirely due to the defendants' misconduct, particularly because they "actively subverted discovery requests and a court order by failing to timely produce the requested communications."

In short, the defendants' actions presented extraordinary circumstances, and the plaintiff was diligent so that equitable tolling was warranted and the motion to vacate was timely.

- **The district court did not err by vacating the final award.**

For the reasons set out above, the Eleventh Circuit rejected the defendants' contention that the plaintiff failed to satisfy the first two parts of the three-part test to determine whether an arbitration award should be vacated for fraud. These are that the fraud be established by clear and convincing evidence and the fraud was not discoverable upon the exercise of due diligence prior to or during the arbitration.

The third part of the test is that the fraud materially relate to an issue in the arbitration. The defendants argued that the fraud was not material because the arbitration panel's decision not to award lost profits damages was based on a failure of proof as to loss causation and the amount of damages, which was not the subject matter of the sales representative's tainted testimony.

The Eleventh Circuit rejected this argument because the materiality element does not require that the movant establish that the result of the proceeding would have been different had the fraud not occurred. Accordingly, it was not necessary for the plaintiff to convince the court that, but for the fraud, it would have succeeded in proving the damages or even that the witness was testifying about causation or damages. The test is only whether the fraud was materially related to an issue in the arbitration. Here, as the tainted testimony primarily related to the primary liability issue in the arbitration, it warranted the vacating of the award.

- **The district court did not abuse its discretion by declining to direct a rehearing by the arbitration panel.**

But, the defendants argued, if the final award is to be vacated, why should the matter not be reheard by the arbitration panel which might consider whether any fraud took place, or for a rehearing on the original arbitrated claim? After all, this would not be prejudicial to the plaintiff, which had earlier agreed to a dispute resolution agreement mandating arbitration.

The Eleventh Circuit disagreed, noting that Section 10(b) of the FAA provides, "if an award is vacated … the court may in its discretion, direct a rehearing by the arbitrators." It read this to mean that the district court was granted "complete discretion about how to proceed." It further determined that the district court did not abuse its discretion in deciding to retain control over the entire case considering "the facts leading to the vacatur; the defendants' past misconduct throughout the litigation, including the intentional destruction of 'vast amounts of evidence' by defendants and their counsel … ; and finally, the unlikelihood that a remand to the arbitration panel could cure the harm from the defendants' misconduct."

That the plaintiff had earlier voluntarily agreed to arbitration was not controlling. Its current objection was not to "arbitration generally but to re-arbitration after the defendants' brazen serious misconduct."

The egregious fact pattern in this case certainly would appear to warrant vacatur. The acceptance of equitable tolling, however, suggests not only a future expansion of courts' ability and willingness to vacate or modify arbitral awards after the three-month statutory limit but also the likelihood that parties will increasingly consider whether the circumstances in their cases warrant seeking vacatur.

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