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# Tenth Circuit Holds That Questions of Arbitration Agreement Formation Can Only Be Decided by Court

## The Tenth Circuit held that a challenge to whether an arbitration agreement was ever formed can only be resolved by a court, even if the arbitration agreement delegates issues of arbitrability to the arbitrator.

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In *Fedor v. United Healthcare*, No. 19-2066, 2020 WL 5540551 (10th Cir. Sep. 16, 2020), the Tenth Circuit held that a challenge to whether an arbitration agreement was ever formed can only be resolved by a court, even if the arbitration agreement delegates issues of arbitrability to the arbitrator. The court also concluded that one of the grounds raised on appeal by the appellee, United Healthcare (UHC), would have enlarged its rights, and thus, should have been raised in a cross-appeal.

**Arbitration Provisions In UHC's Employee Policies**

Plaintiff Dana Fedor worked as a care coordinator for UHC. In 2017, Fedor filed a collective action complaint, alleging that UHC violated the Fair Labor Standards Act and New Mexico's wage law. After Fedor sued, eight other former employees joined.

UHC moved to compel arbitration, claiming that the plaintiffs were bound by UHC's arbitration policies (which changed from year to year) requiring employees to settle employment claims in arbitration. In response, Fedor and the other plaintiffs argued that the policies from years prior to 2016 were void as illusory and that, in any event, none of the plaintiffs ever saw or signed the 2016 policy, which contained a delegation clause, and which UHC sought to enforce.

The district court found that, while the pre-2016 arbitration policies were illusory, the 2016 policy was not, and it compelled arbitration based on the 2016 policy. But the district court did not examine whether the plaintiffs ever agreed to the 2016 policy. “Instead, it simply noted that Fedor challenged only the validity of the contract as a whole, and did not specifically challenge the delegation clause within the 2016 policy. *Id*. at *2. In coming to this conclusion, “[t]he court cited the Supreme Court's opinion in *Rent-A-Center, West, Inc. v. Jackson* to assert that unless the party opposing arbitration challenges the delegation provision specifically, as opposed to challenging only the validity of the contract as a whole, this

court must enforce it leaving any challenge to the validity of the Agreement as a whole for the arbitrator." *Id*. (quotations and alterations omitted).

**Only Courts Can Decide Arbitration Agreement Formation**

Fedor appealed, arguing that "even for arbitration policies containing delegation clauses—courts must first determine whether an agreement to arbitrate was formed before sending the case to an arbitrator." *Id*. The Tenth Circuit agreed.

The circuit court began by explicating U.S. Supreme Court case law on delegation clauses in arbitration agreements. "While courts typically resolve 'arbitrability' issues such as the validity, scope, or enforcement of an arbitration contract, delegation clauses within arbitration contracts can commit the determination of such issues to an arbitrator." *Id*. at *3 (citing *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287, 298 (2010), and *Rent-A-Center, West v. Jackson*, 561 U.S. 63, 70 (2010)).

"The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement." *Rent-A-Center*, 561 U.S. at 68–70. The Supreme Court has "recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Id*. "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Id*.

"But not all arbitrability issues can be delegated." *Fedor*, 2020 WL 5540551, at *3. Analyzing the Supreme Court's directives in *Rent-A-Center* and *Granite City*, the Tenth Circuit concluded that, "while issues such as the 'scope' and 'enforceability" of an arbitration clause can be committed to an arbitrator through a '[delegation] provision,' courts must 'always' resolve 'whether the clause was agreed to' by the parties." *Id*. at *4 (quoting *Granite Rock Co.*, 561 U.S. at 297, 299). "The issue of whether an arbitration agreement was formed between the parties must always be decided by a court, regardless of whether the alleged agreement contained a delegation clause or whether one of the parties specifically challenged such a clause." *Id*. at *3. "Courts must therefore first determine whether an arbitration agreement was indeed formed before enforcing a delegation clause therein." *Id*. at *2.

Here, because the district court did not address the predicate question, namely, whether Fedor and the other plaintiffs had ever agreed to arbitrate, the Tenth Circuit concluded that the district court erred in compelling arbitration. The circuit court vacated the judgment compelling arbitration and remanded for the district court to determine whether an arbitration agreement had been formed as between the parties.

**UHC's Other Arguments Should Have Been Raised in Cross-Appeal**

As an alternative ground for affirming the district court's order compelling arbitration, UHC argued that "the plaintiffs implicitly agreed to arbitrate any

claims against UHC by commencing employment with the company." *Id*. at *5. But UHC did not file a cross-appeal on this issue. Instead, UHC made the argument only in response to Fedor's appeal.

"While an appellee can generally seek affirmance on any ground found in the record, it must file a cross-appeal if it seeks to enlarge its rights and gain more than it obtained by the lower-court judgment. A cross-appeal is thus required where resolution of an issue could preclude future plaintiffs from bringing certain claims against the appellee." *Id*. (citations and quotations omitted).

The Tenth Circuit concluded that UHC's additional arguments—related to whether plaintiffs had implicitly agreed to arbitrate—should have been raised as a cross-appeal. By "affirming the district court's order based on the [voided as illusory] arbitration agreements, the court "would enlarge UHC's rights by precluding future plaintiffs from bringing FLSA claims against UHC in federal court." *Id*. "[U]nder the district court's order, employees who left UHC prior to 2016 can currently bring employment-related claims against UHC in federal court without having to adjudicate such claims through arbitration." *Id*. "However, if [the circuit court] were to disagree with the district court and find that the prior agreements were valid, then UHC could use its past agreements to compel employees (who left the company before 2016) to arbitrate employment-related claims rather than litigate them in court." *Id*.

Because such a holding would "enlarge" UHC's rights, the issue should have been raised in a cross-appeal. Absent a cross-appeal, the Tenth Circuit declined to review this issue.

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