A COURT'S AUTHORITY TO DETERMINE ARBITRABILITY BY LOOKING AT THE RELEVANCE OF AN UNDERLYING CONTRACT TO A CLAIM

By Andrea De La Rosa*

Douglas v. Regions Bank, 757 F.3d 460 (5th Cir. 2014).

It is for a court to determine gateway questions in arbitration.[1] However, the contractual natured of an arbitration agreement that requires the parties' intent was reinforced in *First Option of Chicago v. Kaplan*,[2] where the Court enforced the parties contractual agreement to have arbitrability determine by an arbitrator so long as there was "clear and unmistakable evidence" that the parties did so agree.[3] The Court enforced the contractual aspects of an arbitration agreement even when the validity of the underlying agreement is in question, requiring that a party specifically challenge the delegation clause in order to revert the question of arbitrability back to the court.[4] In *Douglas v. Regions Bank*,[5] the fifth circuit adopts a test that addresses the extent of the scope of a delegation clause in an arbitration agreement when the underlying agreement and the disputing claims have no connection.[6]

FACTS AND ISSUES

On August 2002, Shirley Douglas opened a checking account with Union Planters Bank ("Union").[7] At this time, Douglas signed a signature card agreeing to the terms of a Deposit Account Agreement and Disclosure, which contained the arbitration provision.[8] The terms of the arbitration provision included a delegation clause.[9] On May 2003, Douglas closed her

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[1] First Option of Chicago v. Kaplan, 514 U.S. 938 (1995).

[2] *Id.*

[3] *Id.*

[4] AT&T Techs. v. Communs. Workers of Am., 475 U.S. 643 (1986); Rent-A-Center West Inc. v. Antonio Jackson, 130 S.Ct. 2772 (2010) (addressing the "separability" doctrine).

[5] Douglas v. Regions Bank, 757 F.3d 460 (5th Cir. 2014).

[6] *Id.*

[7] *Id.* at 461.

[8] Douglas v. Trustmark Nat'l Bank, No. 3:12CV523–LG–FKB, 2012 WL 5400040, at *2 (S.D. Miss. Nov. 5, 2012). The arbitration agreement stated as follows:

> by using or maintaining your account, you agree, that in the event of any dispute, disagreement, claim or controversy . . . between you and us or any of our agents or employees, or our parent, subsidiary or sister corporations or their employees or agents, . . . will, at the election of you or us, be resolved through the process of binding arbitration.

Id. at 462, n.3.

[9] Douglas v. Regions Bank, 757 F.3d at 461. The arbitration agreement's definition of "dispute" contains the delegation clause, as italicized below:

> "Dispute" means . . . any claim, controversy or dispute arising from or relating in any way to (i) this Agreement, (ii) any related agreement (iii) any agreement that this Agreement super[s]edes, [and] (iv) the relationships, accounts or balances on the accounts resulting from this Agreement or such other agreements, *including the validity, enforceability, or scope of this Arbitration provision or any amendments or supplements to this Agreement*.

account with Union.[10] In June 2005, Union merged with Regions Bank ("Regions").[11]

In 2007, Douglas was in an automobile accident due to the negligence of the other driver, and obtained a settlement for $500,000.[12] In 2010, Douglas began to have financial difficulties and file a petition for relief pursuant to Chapter 13 of the United States Bankruptcy Code.[13] In order to obtain payment, Douglas's attorney in her personal injury suit hired Vann Leonard to have the $500,000 settlement approved in bankruptcy court.[14] Subsequent to the bankruptcy court approving the settlement, it entrusted the settlement funds to Leonard.[15] Leonard disbursed payment to Douglas's personal injury attorney and embezzled the rest of the settlement.[16] During these events, Leonard maintained client trust accounts with Regions and Trustmark National Bank ("Trustmark").[17] In 2012, Douglas sued Regions and Trustmark[18] "for negligence and conversion on the grounds that they had notice of [Leonard's] embezzlement and negligently failed to report that activity."[19]

Regions filed a motion to compel arbitration and stay the proceedings, making two arguments, (1) that Douglas's agreement to arbitrate any dispute with Union was still in effect, and (2) the determination of arbitrability must be submitted to the arbitrator as per the arbitration provision in the signature card.[20] Douglas claimed that she never agreed to arbitrate her dispute with Regions when she agreed to the arbitration provision in Union's signature card, and for that reason, the question of arbitrability could be addressed by the court.[21]

The district court denied Regions's motion stating that under Mississippi state law the parties did not have an agreement to arbitrate because a non-signatory (Regions) cannot invoke an arbitration agreement entered into by its predecessor.[22] It further stated that Regions did not have other grounds to enforce the arbitration provision—such as equitable estoppel—because the issue at hand did not related to the underlying agreement that contained the arbitration

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Id. at 462, n.3. The arbitration agreement further contains a survival clause—referenced by the dissent—that stated the arbitration agreement would remain effective and was irrevocable, even if Douglas closed her account(s) with Union. *Douglas*, 2012 WL 5400040, at *3.

10 *Douglas*, 2012 WL 5400040, at *3.

11 Douglas v. Regions Bank, 757 F.3d 460, 461 (5th Cir. 2014).

12 *Id.* at 461.

13 *In re* Douglas, No. 09-13893-DWH, 2011 WL 832501, at *1 (Bankr. N.D. Miss. Mar. 3, 2011).

14 *Id.*

15 *Id.*

16 *Id.*

17 *Douglas*, 2012 WL 5400040, at *3–4.

18 "The district court stayed proceedings with Trustmarks pending conclusion of any arbitration proceedings between Douglas and Regions." *Douglas*, 757 F.3d at 461, n.1.

19 *Id.*

20 Douglas v. Trustmark Nat'l Bank, No. 3:12CV523–LG–FKB, 2012 WL 5400040, at *4 (S.D. Miss. Nov. 5, 2012).

21 *Id.*

22 *Douglas*, 757 F.3d at 461–62. The fifth circuit court of appeals addressed the district court's improper application of state law, *see id.* at 462, n.2, and asserted that an agreement to arbitrate did exist between Douglas and Regions. *Id.* at 462.

provision.[23] Regions appealed the decision.[24]

On appeal, Douglas stated that she was not challenging Regions's rights as Union's successor-in-interest.[25] Rather, Douglas challenged the lack of relevance between the underlying contract to the arbitration agreement and her dispute with Regions.[26] The court of appeals addressed the issue of whether the arbitration agreement and its delegation clause were relevant to the dispute at hand.[27]

LAW & APPLICATION

The court held that even though the arbitration provision had a delegation clause, Regions's averment that Douglas's dispute with Regions fell within the scope of the arbitration provision was wholly groundless.[28] The court explains that a delegation clause is an agreement to have an arbitrator determine "gateway questions of arbitrability, such as . . . whether the . . . agreement covers a particular controversy."[29] However, the agreement to arbitrate arbitrability must be "clearly and unmistakably" stated in the parties' agreement, otherwise the determination is for the court.[30] If there is clear and unmistakable evidence of the parties' intent, the court stated that the existence of a delegation clause requires "an arbitrator to decide in the first instance whether a dispute falls within the scope of the arbitration provision."[31] Nevertheless, an arbitration agreement with a delegation clause "cannot . . . bind [a party] to arbitrate gateway question of arbitrability in all future disputes with the other party, no matter the origin."[32]

In coming to its holding, the court analyzed the federal circuit's two prong-test in *Qualcomm Inc. v. Nokia Corp.*[33] and the federal circuit's elaboration of the test in *InterDigital Commc'n, LLC v. Int'l Trade Comm'n.*.[34] The court stated that when an arbitration agreement has a delegation clause it does not automatically require that a claim to be sent to gateway arbitration.[35] The court noted that in its previous decision, *Agere Systems, Inc. v. Samsung Electronic Co.*,[36] it addressed a similar question, and although the facts of the case did not

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[23] *Douglas*, 2012 WL 5400040, at *17–18.

[24] *Douglas*, 757 F.3d at 461.

[25] *Id.* at 461–62.

[26] *Id.* at 462.

[27] *Id.*

[28] *Id.* at 464.

[29] *Id.* at 462 (citing Rent-A-Center W., Inc. v. Jackson, 561, U.S. 63 (2010)) (internal quotes removed).

[30] *Id.* (citing First Options of Chicago Inc. v. Kaplan, 514 U.S. 938, 944 (1995)).

[31] *Id.* at 462.

[32] *Douglas*, 757 F.3d at 462.

[33] Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366 (Fed. Cir. 2006).

[34] InterDigital Commc'n, LLC v. Int'l Trade Comm'n., 718 F.3d 1336 (Fed. Cir. 2013).

[35] *Douglas*, 757 F.3d at 463.

[36] Agere Systems, Inc. v. Samsung Electronic Co., 560 F.3d 337 (5th Cir. 2009). In *Agere*, the parties entered into an arbitration agreement that contained a delegation clause and subsequently entered into another agreement that did not contained the arbitration agreement. *Id.* 338-39. The court followed precedent that in "resolving doubts concerning coverage of a broadly worded arbitration clause," federal policy is in favor of arbitration. *Id.* at 340. The court decided to send the gateway question to the arbitrator because there was a legitimate possibility that the matter

present the need to adopt the *Qualcomm* test, its holding in *Agere* implicitly relied on it.[37]

The court noted that the *Qualcomm* test reflects the importance of the parties' intent in agreeing what matters should be arbitrated.[38] The *Qualcomm* test requires that the question of arbitrability to be addressed by the court if (1) there is a delegation clause in the arbitration provision; and (2) "the averment that the claim falls within the scope of the arbitration agreement is wholly groundless."[39] The test allows a court to stay a proceeding when the parties have clearly agreed to arbitrate arbitrability, "while also preventing a party from asserting any claim at all, no matter how divorced from the parties' agreement, to force an arbitration."[40] This test allows the court to make a more limited inquiry to determine if the claim of arbitrability is "wholly groundless."[41] This limited inquiry requires that the court "examine and . . . construe the underlying agreement" and determine its relevance to a dispute at hand. [42]

The court stated that it must give deference to the parties' contractual intent in entering into an arbitration agreement.[43] The court held that the parties did agree to arbitrate the gateway question and focused on the second part of test, whether the arbitrability claim is "wholly groundless."[44] Although it was evident that the parties intended to have arbitrability determined by an arbitrator, there was doubt as to the parties' intent to have all disputes, including those unrelated to the underlying contract, to be arbitrated.[45]

In examining and construing Douglas and Union's underlying agreement, the court questions whether Douglas intentions were to enter an arbitration agreement for all disputes relating to Union (or its successors) regardless of the relevancy of the dispute to the signature card.[46] The court analyzed the events that lead "to Douglas's claim[s against Regions]—a car accident, settlement, embezzlement from an account" held by a third-party—and concluded that Douglas's claims had nothing to do with the checking account she maintained with Union several years prior to this dispute.[47] The court dismissed Regions's argument that the arbitrability claim was not "wholly groundless" because the arbitration provision contained a delegation clause, stating that such assertion was circular and redundant.[48]

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should be arbitrated. *Id.*

[37] *Douglas*, 757 F.3d at 464.

[38] *Id.*

[39] *Id.*

[40] *Douglas*, 757 F.3d at 463 (citing InterDigital Commc'n, LLC v. Int'l Trade Comm'n., 718 F.3d 1336 (Fed. Cir. 2013)).

[41] *Id.*

[42] *Id.*

[43] *Id.* at 464.

[44] *Douglas*, 757 F.3d at 464.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

DISSENT

The dissent asserted that the application and adoption of the *Qualcomm* test was improper and contrary to the Supreme Court's authority.[49] The dissent noted that the Supreme Court has upheld delegation clause created by agreement between the parties to arbitrate the scope of an arbitration provision, so long as it is "sufficiently clear and unmistakable" that that was their intent.[50] Douglas did not dispute the existence of an arbitration agreement, or specifically challenged the delegation clauses, she argued that her claims against Regions were outside the scope of the arbitration provision, and, therefore, the claims were not subject to the arbitration provision.[51] According to the dissent, the purpose of agreeing to a delegation clause is to address whether a claim is within the scope of an arbitration agreement.[52]

Douglas argued that "the FAA requires that there be a connection between her dispute with Regions and the Agreement's arbitration provision."[53] Whereas, New York's arbitration statute allowed any subsequent disputes between the parties to be arbitrated despite the relevance of the dispute to the parties' contract.[54] The dissent addressed Douglas's comparison argument of the FAA and the New York arbitration statute the FAA was modeled after, by noting there is no other authority to support her interpretation of the statutes.[55] Rather, the dissent stated, the Supreme Court has made it clear that the parties must specifically challenge the delegation clause, and not the arbitration provision as a whole, in order to return the question of arbitrability back to the court.[56] Consequently, the dissent stated that Douglas's failure to challenge the delegation clause would require that an arbitrator determine the arbitrability question.[57]

Further, the dissent focused on the language of the arbitration provision which stated that the agreement would remain effective and was irrevocable even after Douglas closed her account with Union.[58] The dissent asserted that entering into an arbitration agreement does not obligate the parties to arbitrate any and all of their subsequent disputes, regardless of the connection between the dispute and the arbitration agreement.[59] Instead, the dissent explained that when the parties have entered into an agreement to arbitrate arbitrability, they should be bound by that agreement.[60]

The dissent stated that the fifth circuit did not adopt the *Qualcomm* test in its *Agere*

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[49] *Id.* (Dennis, J., dissenting).

[50] *Id.* at 465–66 (Dennis, J., dissenting) (citing Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63).

[51] *Id.* at 466 (Dennis, J., dissenting).

[52] *Id.* (Dennis, J., dissenting).

[53] *Id.* (Dennis, J., dissenting).

[54] *Id.* at 466-76 (Dennis, J., dissenting).

[55] *Douglas*, 757 F.3d at 467 (Dennis, J., dissenting).

[56] *Id.* at 467 (Dennis, J., dissenting) (citing Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, First Option of Chicago v. Kaplan, 514 U.S. 938 (1995)).

[57] *Id.* (Dennis, J., dissenting).

[58] *Id.* at 465 (Dennis, J., dissenting), *supra* accompanying text to note 9.

[59] *Id.* at 467 (Dennis, J., dissenting).

[60] *Id.* (Dennis, J., dissenting).

decision, but rather, only addressed it in acknowledgment of the parties' claims on appeal.[61] The dissent explained that the test is contrary to *AT&T Mobility LLC v. Commc'ns Workers of Am.*,[62] where the Supreme Court held that when a court is to address arbitrability of a claim it cannot look at the potential merits of the underlying claim, but must look solely at the parties' agreement to submit the claim to arbitration.[63] In *First Option*, the Supreme Court held that once the court has found that the parties agreed to a delegation clause, the court "must defer to an arbitrator's arbitrability decision."[64] The dissent asserted that, in following *AT&T* and *First Option*, once a court has found that there is a delegation clause the question of arbitrability should be submitted to the arbitrator, and the court must not consider the merits of the dispute.[65] The dissent noted that the second part of *Qualcomm* test requires a court to look at the merits of a claim in order to determine whether a claim of arbitrability is wholly groundless. This requirement, therefore, is contrary to precedent.

CONCLUSION

In adopting the *Qualcomm* test, the fifth circuit gives the courts the opportunity to look into the parties underlying contract to determine if the question of arbitrability is wholly groundless. A party cannot bind another party to arbitrate all disputes that arise between the parties when the dispute has no connection to the underlying contract for which the arbitration agreement is created, even though the parties have agreed to arbitration. The parties agreeing to have an arbitrator determine arbitrability—a delegation clause—is limited by what a court interprets to be a grounded claim in relation to the reason the parties entered into the agreement. Put simply, the test gives courts the authority to look at the merits of a claim in order to determine if it has any connection to the underlying contract that contains the arbitration provision, regardless of whether the parties agreed to leave the gateway question of arbitrability to the arbitrator.

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61 *Id.* (Dennis, J., dissenting).

62 AT&T Techs. v. Commc'ns. Workers of Am., 475 U.S. 643 (1986).

63 *Douglas*, 757 F.3d at 468 (Dennis, J., dissenting).

64 *Id.* (Dennis, J., dissenting).

65 *Id.* (Dennis, J., dissenting).