New Guidance on Arbitration Clauses and Invoking Them

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At both the federal level and in Michigan, public policy favors enforcement of arbitration clauses. Arbitration is perceived as a faster, more flexible, less expensive way of having subject-matter experts resolve disputes, with limited appellate rights to promote finality. So, when your company contracts for these benefits, it important that your business agreements make it clear for the court just which disputes you intend to be arbitrated—some of them, those arising from events in the past, present, or future, or all of them.

On January 23rd, in *Solo* v. *United Parcel Service*, No. 17-2244; — F.3d — (6th Cir. 2020), a case originating from Michigan and applying Michigan law, the U.S. Court of Appeals for the Sixth Circuit ruled that, despite broadly-worded language which suggested that all claims would be subject to arbitration, an arbitration agreement between UPS and its customers only applied to shipments sent after the arbitration agreement became effective.

Customers purchased shipping insurance and shipped goods before December 30, 2013, when amended contract terms that added an arbitration clause became effective. Before that, there was no arbitration clause. The clause provided that "any controversy or claim, whether at law or equity, arising out of or related to the provision of services by UPS, regardless of the date of accrual of such dispute, shall be resolved in its entirety by individual (not class-wide nor collective) binding arbitration."

From this, UPS argued that all disputes were subject to arbitration. But the court held that introductory language to the contract required a different result: "[T]he shipper agrees that the version of the Terms … in effect *at the time of shipping* will apply to the shipment and its transportation." Because the dispute was over whether UPS charged the correct price for the *transportation* of the customers' insured *shipments*, this meant that the shipment date controlled whether a particular dispute

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needed to be arbitrated, regardless of how broadly UPS had written the arbitration clause itself.

The Sixth Circuit also reminded contracting parties that they must timely invoke a right to arbitration or they waive that right. A defendant in a lawsuit cannot try to litigate the merits of the dispute and, if the court rules against them, demand arbitration under the contract. Except in unusual circumstances, your first response to a lawsuit should be a motion to compel arbitration, not a motion to dismiss on the merits. Otherwise, the courts might rule that you waived your right to arbitration, and you will lose all of the benefits that you contracted for.

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