The Arbitration Newsletter
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(John Allen Chalk, Sr., Editor)  
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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas, to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.1

NON-SIGNATORIES MUST ARBITRATE


In a per curiam opinion, the United States Court of Appeals for the Fifth Circuit held that the district court did not err in granting the non-signatory defendants’ motion to compel arbitration.2 Relying on equitable estoppel, the Court reasoned that provider agreements that included an arbitration provision were “bound up” with a Texas trade secret misappropriation claim.3 Since Plaintiffs’ patient information was given voluntarily, the only way to prove misappropriation was through Defendants exceeding the scope of the information’s permitted use in the provider agreements containing an arbitration clause to which the Defendants were non-signatories.4 Therefore, the Plaintiffs would need to prove the Defendants exceeded the scope permitted under the provider agreement.5

i. Pre-Crawford

The Plaintiffs were Texas-based independent retail pharmacies that had provider agreements with CVS.6 The provider agreements included arbitration provisions, choice-of-law clauses specifying Arizona law, and no non-party rights provisions.7 In this particular case, only one CVS Defendant entity was a signatory to a provider agreement that included the arbitration clause, but all

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1 Nothing in The Arbitration Newsletter is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of The Arbitration Newsletter is to inform generally. The application of the comments in The Arbitration Newsletter to specific questions and cases should be discussed with the reader’s independent legal counsel. My thanks to Macdonald A. Norman, a third-year law student at Texas A&M University School of Law, for his research and drafting assistance.


3 Id.

4 Id. at *2, 5.

5 Id. at *2.

6 Id. at *1.

7 Id. at *1–2, 5.
the Plaintiffs were signatories. In September 2010, the Texas Plaintiffs filed claims against various
CVS entities alleging racketeering, trade secret appropriation, and violations of the Texas Any
Willing Provider Law. With regard to the racketeering and trade secret claims, the Plaintiffs
alleged CVS used Plaintiffs' patient names and health information to market CVS services and
products to those patients. The Defendants, based on equitable estoppel, moved to compel
arbitration pursuant to the provider agreement.

Applying Arizona law, the magistrate judge recommended, and the district court adopted
the recommendation that the non-signatory defendants should not be compelled to arbitration. The
magistrate judge reasoned the claims could be litigated against the signatory Defendant without
referring to the provider agreements with the arbitration clauses. The district court compelled the
signatory Defendant into arbitration and stayed claims against the non-signatory Defendants until
the arbitration was completed.

In the first of two appeals, the Fifth Circuit held the district court did not abuse its discretion
in refusing to compel arbitration. The Plaintiffs never initiated arbitration against the signatory
Defendant, but, instead, moved to dismiss claims destined for arbitration against the lone signatory
once all appeal deadlines expired. The district court granted the dismissal and lifted the stay
against the other defendants.

ii. Crawford

In April 2014, the Fifth Circuit issued an opinion in Crawford Prof'l Drugs, Inc. v. CVS
Caremark Corp., a precedential opinion. The facts in Crawford closely mirror those in Muecke
Co. Inc. v. CVS Caremark Corp. including similarly situated plaintiffs with the same provider
agreements, with choice-of-law provisions specifying Arizona law, as in Muecke. The Crawford
court recognized the Supreme Court had held the FAA, under state-law contract theories, permits
equitable estoppel to compel non-signatories to arbitration. Since Arizona law applied, the
Crawford court followed the Arizona Supreme Court's direction to consider California law in the
absence of helpful, relevant Arizona law.

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8 Id. at *1.
9 Id. The Texas Any Willing Provider claim was later dismissed. Id. at *1 n.1.
10 Id. at *1.
11 Id.
12 Id.
13 Id.
14 Id.
16 Muecke Co., Inc., 2015 WL 501090, *1. But at the time of this dismissal, the district court warned the Plaintiffs that
if any issue was raised related to the provider agreements “the court would again compel arbitration even with regard to
the remaining non-signatory [defendants].” Id.
17 Id.
18 Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp., 748 F.3d 249 (5th Cir. 2014).
20 Crawford Prof'l Drugs, Inc., 748 F.3d at 255 (citing Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631 (2009)).
21 Id. at 260 (quoting e.g., Moore v. Browning, 50 P.3d 852, 859 (2002)) (“If Arizona law has not addressed an issue,
we ‘look approvingly to the laws of California,’ especially when interpreting a similar or identical statute,” so long as
the reasoning of the California case law is sound.”).
In turn, finding relevant California law, the Crawford court stated that the determination to apply equitable estoppel to an arbitration clause involves considering whether “claims against the [non-signatory defendants] are founded in and inextricably bound up with the obligations imposed by the agreement containing the arbitration clause.” The Crawford court held that the plaintiffs’ claims were “inextricably bound up” with obligations created by the provider agreements containing the arbitration clauses in question. The Crawford court reasoned that plaintiffs’ claim of trade secret misappropriation required defendants to prove the secrets were gained “through breach of a confidential relationship or discovery by improper means.” Since the information was given to CVS voluntarily, plaintiffs would have to prove defendants’ use of the information exceeded permitted use under the provider agreements.

**iii. Post-Crawford**

Relying on Crawford, the Defendants filed a motion for reconsideration of the district court’s decision not to compel arbitration. Finding Crawford was an intervening change in the law, the magistrate judge agreed and recommended reconsideration. In relevant part, the magistrate judge found the trade secret misappropriation claims, like those in Crawford, were likewise “inextricably bound up” with the provider agreements. The district court agreed and adopted all of the magistrate judge’s recommendations compelling all claims to arbitration.

Based on the Crawford analysis, the Fifth Circuit reasoned the non-signatory Defendants may compel arbitration based on equitable estoppel “because the elements of Plaintiffs’ claims are bound up with the provider agreements.” The parties must refer to the provider agreements in order to determine: 1) how the defendants received the information; and 2) how the defendants were allowed to use the information. Therefore, the Fifth Circuit held that the “district court did not err in granting the non-signatory defendants’ motion to compel arbitration.”

Furthermore, the Court reasoned that the no non-party rights provision did not affect the Crawford calculus. Equitable estoppel overrides a no non-party rights provision similar to an arbitration provision that only applies to disputes between parties. Since the Plaintiffs are suing Defendants and using the provider agreements to support Plaintiffs’ claims as if they were in contractual privity, the Plaintiffs are not allowed to claim Defendants are not parties to the rest of the contract but are subject to the no non-party provision in the provider agreement.

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22 Id. at 260 (quoting Goldman v. KPMG, LLP, 92 Cal. Rptr. 3d 534, 541–42 (Ct. App. 2009)).
23 Id. (quoting Goldman, 92 Cal. Rptr. 3d at 541) (internal quotations omitted).
24 Id.
25 Id. at 261 (quoting Block Corp. v. Nunez, No. 1:08—CV-53, 2008 WL 1884012, at *5 (N.D. Miss. Apr. 25, 2008)).
26 Id. This analysis is similar to that of Muecke Co, Inc. discussed above. See text discussed supra p. 1.
27 Muecke Co., Inc. v. CVS Caremark Corp., No. 14—41213, 2015 WL 5010908, at *3 (5th Cir. 2015).
28 Id.
29 Id.
30 Id.
31 Id. at *5.
32 Id.
33 Id.
34 Id. at *4—5.
35 Id. at *5.
36 Id.
OBSERVATIONS

1. *Crawford* is the definitive law applicable to the particular fact and procedural pattern in *Muecke*.

2. Both *Crawford* and *Muecke* support equitable estoppel as a way to compel non-signatories to arbitration whether Texas, Arizona, or California state law contract principles apply.

3. *Muecke* also clarifies the procedural versus jurisdictional nature of “law of the case” and “mandate rules” concepts in the Fifth Circuit.

4. If a claimant files a lawsuit against a non-signatory using a contract the adverse party did not sign but containing an arbitration clause, be aware of the potential equitable estoppel or other grounds on which a motion to compel arbitration by the adverse, non-signatory party could be granted against the claimant.