The Arbitration Newsletter

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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]

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WATCH YOUR AWARD LANGUAGE!

The Fifth Circuit Court of Appeals has found that a multi-million-dollar arbitral award containing a "disclaimer" has preclusive effect based on the doctrine of collateral estoppel.[2]

James McAllen won a multi-million-dollar arbitral award in 2020 against his former attorney and son-in-law, Jon Amberson.[3] Amberson attempted to file for bankruptcy, and McAllen objected and moved for summary judgment.[4] McAllen had two main arguments, only one of which the court analyzed. The first argument was under 11 U.S.C. section 523(a) that the award granted had already found all of the elements of that statute were met.[5] The second, and the one the court went on to analyze, was that the award is "entitled to preclusive effect based on the doctrine of collateral estoppel."[6] The bankruptcy court granted summary judgment for McAllen and the district court affirmed.[7] Amberson appealed.[8]

Amberson attempted to argue that a "disclaimer" in the award prevents the application of collateral estoppel.[9] The court recognized that arbitral awards do have preclusive effect and defined what collateral estoppel is.[10] Collateral estoppel under federal law is issue preclusion, meaning one cannot litigate the same issue after a judgment has been entered, if the issue is identical to one in an earlier action, the issue was actually litigated in the previous action, and the

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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 Kaid Walters, a third-year law student at Texas A&M University School of Law, for her research and drafting assistance.

[2] Amberson v. McAllen (in re Amberson), 73 F.4th 348, 352 (5th Cir. 2023).

[3] Amberson, 73 F.4th at 350.

[4] *Id*.

[5] *Id*.

[6] *Id*.

[7] *Id*.

[8] *Id*.

[9] Amberson, 73 F.4th at 350.

[10] *Id*. at 350-351.

determination of the issue was a "necessary part of the judgment" in that action.[11] The court notes that Amberson failed to address if the disclaimer negates any of the elements of collateral estoppel. He instead argued that collateral estoppel should not apply where an arbitral award comes with a disclaimer.[12] The court states that it is not deciding if a disclaimer "could ever render collateral estoppel inappropriate" but that the specific disclaimer in this case did not.[13]

The disclaimer in the arbitral award highlights that the award should not be taken as formal Findings of Fact and Conclusions of Law, but emphasizes that the award is a "reasoned" award, which means it has much more detail than a "standard" award.[14] Additionally, the arbitrator emphasized that careful thought and consideration of all the arguments and evidence had been put into making the determination.[15] Amberson maintains that no one can understand why the arbitrator made such a disclaimer and indicates that there were errors in the arbitrator's fact-finding process.[16] Amberson also argued that the disclaimer is "an express instruction" to future tribunals that they must not give collateral estoppel effect to the award."[17]

The court was unconvinced of Amberson's arguments.[18] The court reasoned that the arbitrator's disclaimer was due to the nature of the requested reasoned award, and that nothing in the disclaimer "suggests that the arbitrator had doubts about his fact finding."[19] The arbitrator emphasized that he carefully considered all arguments by both sides, and cites the fact that the hearing was ten and a half days long and the award is 53 pages, singled spaced.[20] The court ultimately found that there is no "express instruction" that the award does not have a preclusive effect, so the court affirms the district court's decision.[21]

OBSERVATIONS

1. The losing party described the arbitrator's explanation of the type of the award to be a "disclaimer" that negated the court's use of collateral estoppel.

2. The arbitrator's unnecessary language in the award that explained why the award was "reasoned" as opposed to "findings of fact" and "conclusions of law" was used by the losing party to attempt to defeat the winning party's collateral estoppel argument.

3. Twice in the 53-page award the arbitrator explains why the award is "reasoned" versus "findings of fact" and "conclusions of law", which prompted the losing party to label the arbitrator's language as a "disclaimer" and to assert this language created "an inference

[11] *Id*. at 351.
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] Amberson, 73 F.4th at 351.
[16] *Id*.
[17] *Id*.
[18] *Id*. at 351-352.
[19] *Id*. at 351.
[20] Amberson, 73 F.4th at 352.
[21] *Id*.

that there were flaws in [the arbitrator's] fact-finding process which he acknowledged with the disclaimer."

4. The Fifth Circuit found these arguments to be legally and factually incorrect and affirmed the trial court's confirmation of the award.

5. Write your awards concisely and clearly.

6. Consider carefully the unintended consequences of unnecessary language.