Arbitration Law And Jury Demands: Devil Is In The Details

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You are in federal court facing a motion to compel arbitration, and you reach for your well-worn copy of the Federal Rules of Civil Procedure in order to confirm how to go about your next step — demanding a jury trial for example. Better reach for your perhaps less well-worn copy of the Federal Arbitration Act first.

Federal Rule of Civil Procedure 81 tells you that procedures set out in the FAA supersede the corresponding Federal Rules. And then the courts weigh in and it gets complicated. For example, compare the U.S. Court of Appeals for the Eleventh Circuit's 2017 decision in Burch v. P.J. Cheese Inc.[1] with the U.S. District Court for the Eastern District of Tennessee's very recent decision in Garren v. CVS Rx Services.[2]

Regarding your demand for a jury trial, on the one hand, (a) Federal Rule of Civil Procedure 38(b) tells you that you must "serv[e] the other parties with a written demand — which may be included in a pleading — no later than 14 days after the last pleading directed to the issuer is served" and then file that demand in accordance with Federal Rule of Civil Procedure 5(d); *but* (b) FAA § 4 (9 U.S.C. § 4) says that:

> where ... an issue [a material fact in dispute] is raised, the party alleged to be in default [of an alleged arbitration agreement] may ... on or before the return date of the notice of application [to compel arbitration], demand a jury trial of such issue ...

What to do? Federal Rule of Civil Procedure 81 provides that:

> These Rules [i.e., the Federal Rules of Civil Procedure], to the extent applicable, govern proceedings under the following laws, *except* as these laws provide other procedures: ... (B) 9 U.S.C., relating to arbitration ...[3]

Thus, the Federal Rules apply only where the FAA is silent.[4]

Clearly, then, FAA § 4 determines the proper timing of your jury demand. But it may dictate its content as well. The courts are divided on that point. The FAA says that a proper party may demand a jury trial of "such issue," meaning one or more disputed issues of material fact concerning either (1) the making of the arbitration agreement or (2) the failure, neglect or refusal to perform the same. Therefore, a number of courts require that a demand for a jury trial concerning arbitrability must expressly identify the material issues to be tried.[5] Fewer courts hold to the contrary.[6]

In Burch, the Eleventh Circuit affirmed a lower court decision, in connection with a motion to compel arbitration, to hold a bench trial regarding an arbitrability issue despite the employee's general demand for a jury trial in his earlier judicial complaint.

The litigation had followed a conventional path. Ryan Burch sued his former employer (Cheese) for alleged discrimination violating federal statutes; the employer moved to compel arbitration based on an employment contract; but the employee denied that he had signed that agreement. The dispute regarding execution of the agreement was resolved via a bench trial.

The court found that the signature in question was valid, and so granted the employer's motion to compel and dismissed the employee's litigation claims without prejudice. On appeal, the principal issue was "whether the District Court erred in concluding that a general jury demand in an employee's complaint failed to preserve the statutory right to a jury trial under [FAA § 4], on the disputed questions of fact related to the authenticity of his signature on the purported arbitration agreement."[7]

Burch had brought suit on Aug.14, 2009, and included a demand in his complaint for a jury trial "on all claims so triable."[8] On Oct. 29, 2009, Cheese moved to compel arbitration, and on Nov. 23, 2009, Burch responded to the motion with an affidavit denying that the signature on the alleged arbitration agreement was his.[9]

He did not, however, demand specifically "that the authenticity of the signature on the agreement should be decided by a jury."[10] The district court held that "Burch's failure to request a jury trial on the signature issue 'on or before the return date of the notice of application' in accordance with Section 4 of the FAA operated as a waiver of his right to a

jury trial on that issue."[11] The court of appeals found no error and affirmed.

FAA § 4 provides that a motion to compel arbitration is to be considered under a "summary judgment-like standard,"[12] and that any residual genuine issues of material fact are to be taken "summarily" by the court to trial.[13]

In Burch, the court recognized that, where Federal Rule of Civil Procedure 38 controls, a party may specify the issues that it wishes to have tried by a jury, but that in the absence of such specificity, that party is deemed to have demanded a jury trial "on all the issues so triable."[14] However, if the FAA provides "other procedures" in that regard, they would control.[15] Hence, the Burch court undertook to determine whether FAA § 4 provides "other procedures" regarding the contents of a demand for a jury trial of an arbitrability issue.

The Burch court thus came to determine that FAA § 4 sets forth (1) *who* is entitled to make a jury demand; (2) *when* that party must make its demand; and (3) *how* that party must make its demand.[16] The "who" and "when" requirements do not seem to have been a problem for Burch. But the court took issue with "how" Burch had made his jury demand — that is, with its contents.

The court construed FAA § 4 to require a specific demand for a jury trial of "such issue,"[17] meaning "a specific issue relating to the 'making of the arbitration agreement or the failure, neglect or refusal to perform the same ...'"[18] The Burch court pointed out that the U.S. Court of Appeals for the Fifth Circuit (in an unpublished opinion) and the majority of federal district courts that had addressed the issue concurred.[19]

A party's failure to make a timely and proper demand for a jury trial constitutes a waiver of that right.[20] (For example, a jury trial is waived if a jury demand is not "properly served and filed."[21]) This rule is no different with regard to factual disputes concerning arbitrability. Burch's only jury demand had been a general one in his complaint. He had failed to demand a jury trial "on a specific issue relating to the making of the arbitration agreement," and he was thus deemed to have waived his right to a jury trial on that issue.[22]

In general, the Seventh Amendment of the U.S. Constitution does not create an absolute right to a jury trial in civil cases, but rather "preserves the right in the federal courts as it existed at common law in 1791, when the Amendment was ratified."[23] Indeed, the

Seventh Amendment preserves the right to a jury trial concerning legal claims, but not equitable ones.[24] A motion to compel arbitration is an “equitable defense.”[25] Hence, there is no Constitutional right to a jury trial concerning arbitrability.[26] The right in that regard arguably springs only from the FAA.[27]

So, returning to basics regarding Federal Rule of Civil Procedure 81(a)(6)(B), does the FAA provide “other procedures” regarding the contents of a demand for a jury trial, differing from the Federal Rules? The court in Burch thought so.

The district court in Garren subsequently adopted the opposite (minority) view; that is, it construed the FAA’s terms as simply creating a right of one party to a jury trial if timely demanded.[28] The Garren court recognized that the Federal Rules and the FAA do differ with regard to the deadline for making a jury demand.[29] And in that regard, the FAA governs.[30]

However, the Garren court found that “the Act does not otherwise provide ‘other procedures’ for demanding a jury.”[31] That is, it found that the Federal Rules specify how a demand is to be made — i.e., in writing, served on the other parties, and filed with the district court, see Federal Rule of Civil Procedure 38(b) — while the FAA is silent in that regard.[32] Thus, while the Burch court found that 9 U.S.C. § 4 “sets forth how a party must make its demand — with a specific ‘demand [for] a jury trial of *such* issue,’”[33], the Garren court disagreed emphatically.[34]

Rather, it found that FAA § 4 “does not contain any requirement that the party in default must affirmatively reference the ‘issue’ nor any other requirement about the content of the demand” for a jury trial.[35] Hence, the Garren court found sufficient a demand for a jury trial on “all issues ... triable” by a jury, because that included “issues triable by a jury pursuant to statutes such as 9 U.S.C. § 4.”[36] It determined that no further specificity was required.

Overall, with the courts divided on the issue as they are, the prudent practitioner will opt for specificity in a jury demand concerning issues under the FAA relating to arbitrability.

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[1] Burch v. P.J. Cheese, Inc., 861 F.3d 1338 (11th Cir. 2017).

[2] Garren v. CVS Rx Servs., 2019 U.S. Dist. LEXIS 4770 (E.D. Tenn. Jan. 10, 2019).

[3] Fed. R. Civ. P. 81(a)(6)(B) (emphasis added).

[4] E.g., Burch, 861 F.3d at 1348.

[5] See e.g., id. at 1350 & n. 20.

[6] See, e.g., Garren, 2019 U.S. Dist. LEXIS 4770 at *10.

[7] Burch, 861 F.3d at 1341.

[8] Id. at 1341.

[9] Id. at 1342.

[10] Id.

[11] Id. at 1344.

[12] Id. at 1346

[13] 9 U.S.C. § 4.

[14] Burch, 861 F.3d at 1348; Fed. R. Civ. P. 38(c).

[15] See id.

[16] Burch, 861 F.3d at 1349.

[17] Id.

[18] Id.

[19] See id. at 1350n. 20.

[20] Id. at 1348.

[21] Fed. R. Civ. P. 38(d).)

[22] Burch, 861 F.3d. at 1349-50.

[23] Id. at 1347.

[24] Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41-42 (1989); Burch, 861 F.3d at 1347.

[25] Burch, 861 F.3d at 1347, citing Shanferoke Coal & Supply Corp. v. Westchester Svc. Corp., 293 U.S. 449, 452 (1935).

[26] Id. at 1347, 1350 n. 20; Garren, 2019 U.S. Dist. LEXIS 4770 at *7-*8.

[27] Burch, 86 F.3d at 1347; see 9 U.S.C. § 4.

FAA § 4 refers only to a demand for a jury trial by a party that is allegedly in default of an arbitration agreement. It does not describe such a demand by a party seeking to compel arbitration, nor does it expressly prohibit it. However, it does provide that “if no jury trial be demanded by the party alleged to be in default [of the alleged arbitration agreement] ... the court shall hear and determine such issue.” Thus, Congress “did not grant this right [to a jury trial] to the party seeking to enforce an arbitration agreement,” Garren, 2019 U.S. Dist. LEXIS 4770 at *14.

[28] See, Garren, 2019 U.S. Dist. LEXIS 4770 at *10.

[29] Id. at *11.

[30] Id.; see Fed. R. Civ. P. 81(a)(6)(B).

[31] Id. at *12.

[32] See 9 U.S.C. § 4.

[33] See Burch, 861 F.3d at 1349 (emphasis in original).

[34] See Garren, 2019 U.S. Dist. LEXIS 4770 at *16-*18.

[35] Id. at *17.

[36] Id. at *19.