

11th Circuit: District Courts May Equitably Toll FAA 3-Month Deadline to Challenge Arbitration Awards

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In a case of first impression, the Eleventh Circuit Court of Appeals, on June 21, 2023, in *NuVasive Inc. v. Absolute Medical LLC*, held that the three-month time limit for challenging arbitration awards under the Federal Arbitration Act is not jurisdictional and that district courts may apply the extraordinary remedy of equitable tolling when circumstances warrant. In so ruling, the Eleventh Circuit joined with the Seventh, Ninth, and Tenth Circuits. The Fourth and Fifth Circuits have taken the contrary position. Under section 12 of the FAA, a motion to vacate, modify, or correct an award must be served within three months after the award is filed or delivered. In *NuVasive*, the court was presented with compelling evidence to support equitable relief. The untimely motion to vacate the award was based on the late discovery, after the case had returned to the district court for litigation of non-arbitrable issues, that a deposition witness's testimony was influenced by text messages received during the testimony. The facts were not revealed, however, until after the three-month period had lapsed. The court thus affirmed the district court's vacatur of the arbitration award. The *NuVasive* court's rationale was two-fold. First, it voiced its agreement with and adoption of the Ninth Circuit's holding in *Move Inc. v. Citigroup Global Markets Inc.*, using the analysis for determining legislative intent set out in the U.S. Supreme Court's 2010 decision in *Holland v. Florida*. The Ninth Circuit in *Move* had determined, among other things, and the Eleventh Circuit agreed, that section 12's limitations period was neither sufficiently detailed nor technical in its language to preclude equitable tolling and that the availability of equitable tolling does not contradict the FAA's objective of efficiency and finality of arbitration awards. And the Eleventh Circuit held that litigants must still demonstrate extraordinary circumstances beyond their control and unavoidable, even with due diligence, to obtain equitable relief. Second, *NuVasive* rejected the argument that section 12's three-month period is jurisdictional, such as to preclude any equitable exceptions. The court relied for this holding upon the U.S. Supreme Court's guidance on jurisdictional limitations in its 2022 decision in

Boechler, P.C. v. Commissioner of Internal Revenue, requiring that the text of a statute must clearly mandate a jurisdictional reading, which section 12 does not. The *NuVasive* opinion emphasized, however, that the court's holding is limited to its FAA context and, at least implicitly, that this should not encourage litigants to seek equitable relief indiscriminately, because it represents an extraordinary remedy, available only where circumstances warrant. It remains to be seen, in light of the 4–2 circuit split, whether the issue will eventually be determined by Supreme Court, either by petition for certiorari in *NuVasive*, or otherwise. *This article was co-authored by Carlton Fields summer associate Marina Rubio.*

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