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Can an Arbitrator Be Given the Authority to Decide Whether an Agreement to Arbitrate Is Enforceable?

CASE AT A GLANCE

Antonio Jackson, an employee of Rent-A-Center, West, Inc., brought a lawsuit against Rent-A-Center alleging race discrimination and retaliation. When Rent-A-Center asserted that the action was subject to an arbitration agreement, Jackson argued that the court and not the arbitrator should determine whether the arbitration agreement was unconscionable.

Rent-A-Center, West, Inc. v. Jackson
Docket No. 09-497

Argument Date: April 26, 2010
From: The Ninth Circuit

by Jay E. Grenig
Marquette University Law School

ISSUE

Must a district court rather than an arbitrator decide claims that an arbitration agreement is unconscionable even though the parties assigned this “gateway” issue to the arbitrator for decision?

FACTS

Respondent Antonio Jackson was an employee of Rent-A-Center West, Inc. On February 1, 2007, he filed a complaint in the U.S. District Court for the District of Nevada alleging race discrimination and retaliation by Rent-A-Center in violation of 42 U.S.C. § 1981. Rent-A-Center moved to dismiss the court proceedings and compel arbitration. Rent-A-Center relied on a Mutual Agreement to Arbitrate Claims that Jackson had signed as a condition of his employment when he was initially hired. The agreement specifically includes claims for discrimination in the list of claims that must be resolved by arbitration.

The Agreement also states:

The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.

Rent-A-Center argued that, in light of this provision, the threshold question of whether the arbitration agreement was valid and enforceable was for an arbitrator, not the court, to decide. In response, Jackson argued that the agreement was unconscionable—that is, that it was so unfair that a court must, in good conscious, refuse to enforce it. In particular, he contended that the agreement was substantively unconscionable because it contained one-sided coverage and discovery provisions and a provision specifying that the arbitrator’s fee was to be equally shared by the parties. Jackson also argued the

agreement was procedurally unconscionable because the form contract was presented to him as a nonnegotiable condition of his employment.

The district court granted Rent-A-Center’s motion to dismiss the judicial proceedings and to compel arbitration. The court found that the agreement to arbitrate “clearly and unmistakably provides the arbitrator with the exclusive authority to decide whether the agreement to arbitrate is enforceable.” The district court held that “the question of arbitrability is for the arbitrator.” The district court also held that even if it were to reach the merits of Jackson’s assertion that the agreement was unconscionable, Jackson had not demonstrated that the agreement was substantively unconscionable.

Jackson appealed to the U.S. Court of Appeals for the Ninth Circuit.

Rent-A-Center once again argued that the validity of the agreement to arbitrate must be determined by an arbitrator in accordance with the terms of the agreement. Jackson did not dispute that the language of the agreement clearly assigns the arbitrability determination to the arbitrator. He did dispute that he meaningfully agreed to the terms of the form agreement, which he contended was procedurally and substantively unconscionable.

In a 2-1 decision, the Ninth Circuit held that when a party specifically challenges arbitration provisions as unconscionable and hence invalid, whether the arbitration provisions are unconscionable is an issue for the court to determine by applying the relevant state contract law principles. 581 F.3d 912 (9th Cir. 2009). The court said this rule applies even if the agreement’s express terms delegate that determination to the arbitrator.

The Supreme Court granted Rent-A-Center’s petition for review. 130 S. Ct. 1133 (2010).

CASE ANALYSIS

The Federal Arbitration Act (FAA) provides that agreements to arbitrate disputes “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. While the FAA expresses a “liberal federal policy favoring arbitration agreements,” *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000) (internal quotation marks omitted), federal law “directs courts to place arbitration agreements on equal footing with other contracts.” *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002). In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985), the court said that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”

Pointing out that the FAA’s primary purpose is to enforce arbitration agreements in accordance with their terms, Rent-A-Center notes that Congress enacted the FAA to overcome historic judicial hostility to arbitration and replace that hostility with a liberal federal policy favoring arbitration agreements. Rent-A-Center argues that courts must enforce agreements to arbitrate in the manner provided for in the parties’ agreement. Where the parties clearly and unmistakably agree to delegate the issue of arbitrability to the arbitrator, their agreement must be honored. According to Rent-A-Center, the Ninth Circuit disregarded these principles in refusing to enforce the parties’ agreement, on a mere assertion of unconscionability, even though the agreement clearly and unmistakably referred the issue of contract enforceability to the arbitrator in the first instance.

Rent-A-Center asserts that courts must decide whether the parties objectively revealed their intent to submit the arbitrability issue to the arbitrator. If the parties in fact were crystalline in expressing their intention to have enforceability issues decided by the arbitrator, Rent-A-Center contends the courts should respect that judgment; otherwise, those statements of intent are meaningless and the numerous arbitration agreements that have been entered into in reliance on them have been rendered equally meaningless.

Jackson, however, argues that the FAA requires enforcement only of arbitration agreements that are valid under state law applicable to all contracts. Jackson claims the Supreme Court has rejected the proposition that there are no limits to what parties can agree to under the FAA. He contends the Court has emphatically held that parties cannot “contract out” of the important protections embedded in the text of the FAA, and that courts will not enforce provisions of arbitration agreements that are at odds with the textual features of the FAA.

According to Rent-A-Center, the argument that arbitrators cannot be trusted to rule on the validity of a contract to arbitrate runs contrary to the FAA’s rejection of the presumption of arbitral bias, which had enflamed judicial hostility to arbitration prior to the act’s passage.

Rent-A-Center notes that Congress has been completely comfortable allowing arbitrators to resolve issues concerning the enforcement of fundamental antidiscrimination statutes. It contends there is no reason to believe that an arbitrator would be less capable of deciding whether the contract was unconscionable than whether Jackson was the victim of race discrimination or retaliation. The whole point of

arbitration, Rent-A-Center concludes, is to provide a different forum for resolving the same substantive issues that courts decide.

Jackson responds that Rent-A-Center’s approach would prevent the courts from fulfilling their fundamental, statutorily required and time-honored role of ensuring that every arbitration clause they enforce meets the requirements of Section 2 of the FAA. To evade judicial scrutiny, a drafter could simply insert a provision stating that challenges to the arbitration clause’s validity are to be decided by the arbitrator, not the court.

Jackson further argues that, under Rent-A-Center’s theory, the sole criteria for judging the validity of such a clause would be its language. He claims this would mean an arbitration clause must be enforced even if it was signed under duress. All that would matter would be that the clause be “clear and unmistakable.” It is Jackson’s position that this approach not only does violence to the FAA but also runs afoul of the Supreme Court’s repeated teachings that determinations of the validity and enforceability of an arbitration clause (as opposed to the contract as a whole) are for the court to decide, not the arbitrator. Jackson declares that an arbitration agreement cannot stop a court from deciding whether the agreement is even valid.

In sum, Rent-A-Center concludes there is no dispute that (1) Jackson signed the Arbitration Agreement, (2) it covers his claims for relief, (3) it refers the issue of unconscionability to the arbitrator, and (4) it does so in clear and unmistakable language. Accordingly, Rent-A-Center asserts the Ninth Circuit erred in refusing to enforce the agreement in accordance with its terms, as required by the FAA.

Jackson, however, concludes that if Rent-A-Center were to succeed, there would be nothing to stop stronger parties from inserting similar language into other arbitration clauses that routinely appear in employment and consumer contracts. The result would be the wholesale elimination of the courts’ role in ensuring that arbitration clauses are valid and enforceable before enforcing them—a result that could not help but erode the public’s faith in the legitimacy and integrity of arbitration as a fair and just alternative dispute resolution mechanism.

Moreover, even if the Supreme Court were to determine that parties may “contract around” the FAA’s requirement that a court ensure the validity of an arbitration clause before enforcing it, Jackson asserts that Rent-A-Center has failed to demonstrate that its delegation clause complies with ordinary state-law principles governing contract construction or that there is clear and unmistakable evidence that the parties agreed to delegate the threshold question of the arbitration clause’s validity to the arbitrator.

SIGNIFICANCE

The Supreme Court has determined that “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). Thus when deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally should apply the ordinary state-law principles that govern the formation of contracts. Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question of “who has the

primary power to decide arbitrability” turns upon what the parties agreed about that matter.

The Supreme Court has held that, as a matter of federal substantive arbitration law, when a party challenges the validity of a contract between the parties, but “not specifically its arbitration provisions,” the challenge to the contract’s validity should be considered by an arbitrator, not a court. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). When, however, a party specifically challenges the validity of the arbitration provisions within a larger contract and apart from the validity of the contract as a whole, a court decides the threshold question of the enforceability of the arbitration provisions.

The rationale behind a rule requiring courts to make the threshold determination when the challenge specifically targets the validity of arbitration provisions is that arbitration is itself a matter of contract. “The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the ... agreement does in fact create such a duty.” *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964). A court may not compel arbitration until it is “satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue.” 9 U.S.C. § 4. In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the Court stated that “[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is [clear and unmistakable] evidence that they did so.”

If Rent-A-Center prevails, therefore, the process of submitting a case to arbitration will be streamlined—reducing the role of the judiciary in determining whether an arbitration agreement is unconscionable before deciding whether to compel arbitration. If Jackson prevails, employees and consumers will be encouraged to seek judicial review of arbitration agreements that they believe unconscionable.

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PREVIEW of United States Supreme Court Cases, pages 306–308.
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