



Legal Alert: Supreme Court Holds that Arbitrator, not Court, Should Decide Issue of Unconscionability

6/21/2010

The U.S. Supreme Court has just issued a decision holding that under the Federal Arbitration Act (FAA) an arbitrator, not a court, should decide whether an arbitration agreement is unconscionable when the parties have delegated the determination of that issue to the arbitrator. See *Rent-A-Center West v. Jackson* (June 21, 2010). The Court's decision overturns that of the Ninth Circuit, which held that the court has exclusive jurisdiction to determine the issue of unconscionability, even though the parties' arbitration agreement gave the arbitrator that authority.

In this case, Rent-a-Center and Jackson entered into an arbitration agreement under which both parties agreed to submit to arbitration all claims they might have arising out of Jackson's employment with Rent-a-Center. The agreement also provided that the arbitrator had "exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." The Court referred to this provision as the "delegation provision," which it described as an agreement to arbitrate threshold issues concerning the arbitration agreement.

The Court held that an agreement to arbitrate a gateway issue is "simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce" and further held that the FAA operates on this additional arbitration agreement as it does on any other. Thus, the Court held that the delegation provision is valid under § 2 of the FAA "save upon such grounds as exist at law or in equity for the revocation of any contract."

Under § 2, there are two types of validity challenges: (1) challenges specifically to the validity of the agreement to arbitrate; and (2) challenges to the contract as a whole, either on a ground that directly affects the entire agreement (such as that it was fraudulently induced) or on a ground that the illegality of the one of the contract's provisions renders the whole contract invalid. The Supreme Court has previously held that only challenges to the validity of the agreement to arbitrate are relevant to a court's determination of whether the arbitration agreement at issue is enforceable. This is so because § 2 does not mention challenges to the validity of the contract in which the arbitration agreement is contained. Accordingly, a party's challenge to the contract as a whole or to another provision of the contract does not prevent a court from enforcing a specific agreement to arbitrate. "As a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."

In this case, the underlying contract was the arbitration agreement, while the provision Rent-A-Center sought to enforce was the delegation provision. Thus, Court held that unless Jackson challenged the delegation provision specifically, it must treat that provision as valid under § 2 and enforce it, leaving any challenge to the validity of the agreement as a whole, *i.e.* Jackson's unconscionability challenge, for the arbitrator.

The Court held that Jackson challenged only the validity of the contract as a whole, referring to his opposition to Rent-A-Center's motion to compel arbitration and arguments made to the Court, which argued that "the entire arbitration agreement, including the delegation clause, was unconscionable."

The Court did not consider the substance of Jackson's unconscionability claim because it was not directed at the delegation provision but at the arbitration agreement as a whole. The Court noted that if Jackson has challenged the arbitration agreement's fee-splitting arrangement and limitation on discovery as applied to the delegation provision, that challenge could have been considered by the court. The Court also acknowledged that such a challenge would be more difficult to sustain than an argument that the same limitations rendered arbitration of his employment discrimination claim unconscionable.

Employer's Bottom Line:

Because the Court found that Jackson's challenge was to the contract as a whole (the entire arbitration agreement) rather than the delegation provision, it reversed the Ninth Circuit's decision.

If you have any questions regarding this decision, please contact the Ford & Harrison attorney with whom you usually work.