ARBITRATION OF EMPLOYMENT DISPUTES - TEXTUALISM AS APPLIED TO "CONTRACTS OF EMPLOYMENT"

New Prime Inc. v. Oliveira, 586 U.S. ____(2019).

By Lori Caron Silveira, Esq., Adler Pollock & Sheehan P.C.

Introduction

On January 15, 2019, Justice Gorsuch, the self-described textualist on the U.S. Supreme Court, authored the opinion of the Court in the matter of New Prime Inc. v. Oliveira, interpreting the term "contracts of employment," as used in the Federal Arbitration Act (the "FAA" or the "Act"), as including relationships between businesses and independent contractors. Justice Gorsuch, writing for a unanimous Court, held that plaintiff Dominic Oliveira, a trucker driving for defendant New Prime, had the right to litigate his wage and hour claims in court, rather than have them decided by an arbitrator.

The Facts, the FAA, and Agreements to Arbitrate

New Prime operates trucks in interstate commerce. Oliveira drove for New Prime under agreements that characterized him – rightly or wrongly – as an independent contractor. The agreements between New Prime and Oliveira provided that any disputes arising out of the parties' relationship would be resolved by an arbitrator. The agreements explicitly included within the scope of issues to be determined by the arbitrator disputes over arbitrability of the claims asserted.

In the course of working for New Prime, Oliveira filed a class action lawsuit in federal court in Boston, alleging that New Prime does not pay its drivers minimum wage. New Prime responded to the class action suit by petitioning the U.S. District Court for the District of Massachusetts to invoke it statutory authority under the FAA to compel arbitration according to the terms of the parties' agreements.

Not so fast, said counsel for trucker Oliveira and his fellow members of the plaintiff class. The FAA does not always authorize a court to compel arbitration. Section 1 of the Act carves out from the Act's coverage "contracts of employment of . . . workers engaged in foreign or interstate commerce." Whether deemed an employee or independent contractor, Oliveira and his New Prime agreements qualified as a "contract of employment of a worker engaged in interstate commerce." Not so, said New Prime, reminding Oliveira and the Court that the parties had delegated not just the substantive disputes between them but also the issue of arbitrability to an arbitrator under the parties' agreement, and that, therefore, the Court was required to stay the federal court litigation and send both the arbitrability issue and Oliveira's wage claims to arbitration. New Prime further argued that Section 1 of the FAA had no application to Oliveira, as he was an independent contractor, and that Section 1, by its plain meaning, does not cover independent contractor agreements but only covers "contracts of employment."

The U.S. District Court and the First Circuit sided with Oliveira. The First Circuit held that under the Act, a court must first resolve whether the parties' contract falls under the Act or falls within its Section 1 exclusion. The First Circuit then concluded that Section 1 excludes not only contracts of employment but also excludes contracts between businesses and independent contractors. Accordingly, whether Oliveira was an independent contractor or an employee of New Prime, the parties' agreements were "contracts of employment," and the courts lacked authority under the Act to order Oliveira's wage claims, as well as the arbitrability of those claims, to arbitration. Undeterred, New Prime filed a petition for a writ of certiorari in the U.S. Supreme Court, which granted certiorari and reviewed the First Circuit's decision.

The Conditional Authority of Courts to Compel Arbitration

In analyzing New Prime's argument that the trial court should have compelled arbitration of Oliveira's wage claims, the Court first noted that the FAA does not require a court to compel arbitration in every case that involves a pre-dispute agreement to arbitrate. Even if the parties emphatically express a preference for arbitration, the court must first determine that the agreement between the parties does not come within the Section 1 exclusion of the Act.

To determine applicability of the Section 1 exclusion for "contracts of employment," the Court focused on the Act's "statutory sequencing." Simply put, Sections 3 and 4 of the FAA empower a court to stay litigation and compel arbitration, but if Sections 1 and 2 do not cover the agreement in question, then the court lacks authority to stay the litigation and compel arbitration. Working backward within the threshold "exclusion" sections, Section 2 provides that the Act applies only when the parties' agreement to arbitrate is set forth as a "written provision in any maritime transaction or a contract evidencing a transaction involving commerce." Section 1 of the Act limits the "commerce contracts" to which the Act will apply by excluding "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." According to Justice Gorsuch and the Court, in 1925 Congress excluded certain transportation workers from the Act because by that time, Congress had already prescribed alternatives to litigation of work disputes for those workers.

Despite the agreement between Oliveira and New Prime characterizing arbitrability as a threshold issue for the arbitrator, the Court agreed with the First Circuit that the statute trumps the parties' agreement, and that a court must, in the first instance, decide whether the Section 1 exclusion for "contracts of employment" applies before staying the litigation and sending the matter to arbitration. Put differently, the Act controls arbitrability, and the Section 1 exclusion must be heeded, even if the parties have provided otherwise by agreement.

Unwilling to "give up the ghost" on the parties' terms of engagement, New Prime cited the contractual "delegation clause" in

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the parties' agreement, as well as the severability principle, as additional support for submission of the arbitrability issue to an arbitrator. The parties' delegation clause explicitly conferred upon an arbitrator the authority to decide whether the dispute must be arbitrated. Applying the contractual severability doctrine, a court must treat a challenge to the delegation clause separately from a challenge to the validity of the entire agreement. If a party does not specifically challenge the validity of the agreement to arbitrate, then both parties may be compelled to arbitrate all of their disputes, including disputes regarding the substantive terms of their contract. New Prime argued that Oliveira had not specifically challenged the parties' delegation clause and that, therefore, any dispute must be submitted to arbitration.

In response to New Prime's delegation and severability arguments, the Court again emphasized that the Act is king. A court has jurisdiction to compel arbitration under the Act only if the arbitration clause is contained in a contract not excluded from the Act. Again, said the Court, it is for the court to decide if an arbitration clause falls within or without the boundaries of Sections 1 and 2 of the Act. Statutory sequencing – Sections 1 through 4 of the Act – either keeps a worker's claims in court or dispatches them to arbitration.

"Contracts of Employment" and Independent Contractor Agreements

Having articulated its statutory charge to compel arbitration only of agreements that fall within the boundaries of the Act, the Court then turned its attention to whether Oliveira's contract with New Prime constituted a "contract of employment of workers engaged in interstate commerce." Interestingly, both sides agreed that Oliveira qualified as a worker engaged in interstate commerce, and for purposes of the appeal, Oliveira also agreed to assume that his agreement with New Prime established only an independent contractor relationship and not an employer/employee relationship. The question, then, became whether Oliveira's work relationship with New Prime constituted a "contract of employment" that Congress had excluded from the Act.

Acknowledging the "fundamental canon of statutory construction" that "words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute," Justice Gorsuch cautioned that giving new meaning to old statutory terms would be unconstitutional, and that new interpretations would upset "reliance interests" in the subtle meaning of statutory language. Having declared the Court's intent to follow the "plain meaning" approach, the Court then concluded that the term "contract of employment," as used in the FAA by Congress in 1925, includes an agreement between a business and an independent contractor. In defense of this conclusion, the Court noted that as of 1925, the term "contract of employment" wasn't defined and was not (at least not yet, anyway) considered a term of art bearing some specialized meaning. Rather, all work performed by workers as employees, independent contractors, or otherwise, was treated as "employment." In reviewing dictionaries and legal authorities, the Court found no evidence that a "contract of employment" necessarily referenced a formal employer-employee or master-servant relationship. The Court also noted that Congress had used the word "workers," as distinguished from "employees," in Section 1 of the Act, noting that the term "employees" would have been the natural choice if Congress had intended the term "contracts of employment" to apply to employees only. While the Court did not find this dispositive, it considered use of the term "workers" as further evidence that Congress intended to use the term "contracts of employment" in a broader sense so as to exclude from court-compelled arbitration the claims of an independent contractor against a company.

Frustrated by the Court's inclination to apply Sections 1 through 4 of the Act sequentially to ignore the parties' agreed-upon terms, New Prime next focused on the distinction acknowledged today between employees and independent contractors. New Prime argued that by 1925, the words "employee" and "independent contractor" had already assumed distinct meanings, and that, therefore, Congress must have intended to exclude from the Act contracts of employment but not contracts with independent contractors. Oliveira disagreed, arguing that the word "employment" has a much longer history in the English language than the word "employee," which only made its first appearance in the 1800s. In analyzing and considering the history of the words "employment" and "employee," Oliveira and New Prime found common ground, essentially stipulating that the term "employee" has evolved to denote those who work for a wage at the direction of another, and further agreeing that the term "employee" may have influenced the development of the term "employment" in recent years. None of this persuaded the Court, however. Regardless of how the words "employee" and "employment" have evolved since 1925, the history of the Act and the use of the terms "employment" and "workers" made clear to the Court that a contract of employment was not necessarily limited to the master-servant relationship but also embraced independent contractor agreements.

In a last ditch effort to persuade the Court to narrowly define "contracts of employment" as including only contracts of employment and not independent contractor relationships, New Prime noted that in 1925, seamen and railroad employees were all traditional employees and not independent contractors. The Court dismissed this argument, indicating that a number of workers included within the terms "seamen and railroad employees" were, in fact, independent contractors, including shipboard surgeons and certain railroad workers.

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Policy Considerations Favoring Arbitration under the Federal Arbitration Act

Declaring New Prime unable to succeed as textualists at "squeez[ing] [any] more from the statute's text," the Court then turned to New Prime's argument based on the policy underlying the FAA to "counteract judicial hostility to arbitration and establish a federal policy favoring arbitration agreements." Here, the Court noted that legislative language is often a "hard-fought compromise," and that simply favoring arbitration and staying Oliveira's wage and hour class action litigation might constitute an unwarranted interpretation or "paving over" of "bumpy statutory texts" to advance the policy goal. The Court speculated that perhaps there were legislative compromises that must be honored, and that interpreting the Section 1 exclusion of "contracts of employment" narrowly might advance a policy goal at the expense of a Congressional compromise intended to exclude worker agreements like Oliveira's from the Act. The Court concluded, "by respecting the qualifications of Section 1 today, we 'respect the limits up to which Congress was prepared to go' when adopting the arbitration act."

Courts' Inherent Power to Compel Arbitration

Left with a depleted supply of arguments to remain in federal court on Oliveira's claims, New Prime argued that even if the Arbitration Act did not empower the Court to compel arbitration with independent contractor Oliveira, then the Court should compel arbitration anyway because courts have the inherent authority to stay litigation in favor of an ADR mechanism chosen by the parties. The Court steered clear of this argument, however, declining to "tangle with" an issue not addressed in the courts below. Cert was granted, said the Court, only to resolve existing confusion regarding whether the term "contracts of employment," as excluded from the Arbitration Act, refers also to agreements with independent contractors.

Textualism and the Evolution of Statutory Terms

Justice Ginsburg offered a short and sweet concurring opinion that agreed with the majority that words generally should be interpreted as having their ordinary meaning at the time Congress used them in enacting a statute. However, Justice Ginsburg noted, for future reference, that Congress also has the power to design legislation to govern changing times and circumstances. The language of the Sherman Act, for instance, was designed to evolve, as was the language of the Securities Exchange Act. Undoubtedly anticipating future cases in which Justice Gorsuch and others may seek to employ a "textualist" approach, Justice Ginsburg noted that sometimes, "[w]ords in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic."

Conclusion

The *New Prime* decision delivers a victory to litigants who would prefer to have their day in court, and this victory comes after a series of decisions in which a divided U.S. Supreme Court has compelled the "little guy" to arbitrate claims, rather than litigate them. It is likely that we have not seen the last of decisions challenging agreements to arbitrate. In this case, however, a textualist member of the U.S. Supreme Court authored an opinion in which the ordinary meaning of the term "contract of employment" was deemed to include the arguably different concept of an agreement with an independent contractor. An interesting twist on the application of textualism. Go figure.

Lori Caron Silveira is a shareholder at Adler Pollock & Sheehan P.C., where she represents corporate and governmental clients in both Rhode Island and Massachusetts in defending employment disputes, including sexual harassment, discrimination and retaliation claims, wage and hour matters, and termination of employment cases. Lori also handles traditional labor relations matters, including collective bargaining.