

## SUPREME COURT CONTINUES TO GREENLIGHT EMPLOYMENT ARBITRATION

The U.S. Supreme Court continues to issue rulings favorable to arbitration agreements in the employment setting. Employers who have arbitration agreements with their employees, or those considering putting such agreements in place, should make sure their agreements are drafted and updated to take full advantage of developing Supreme Court precedent. The two most recent Supreme Court decisions and their implications for employers are addressed below.

### *Rent-A-Center*

This summer's *Rent-A-Center, West, Inc. v. Jackson* (June 21, 2010) decision holds that when parties agree that an arbitrator should decide whether an arbitration agreement is valid, the arbitrator – not a court – should make that decision. Plaintiffs' lawyers often attack mandatory arbitration agreements as unconscionable. Their strategy is to undo the agreement to arbitrate so that the dispute will be resolved in court. Historically, such attacks are made to a judge. But under *Rent-A-Center*, if the agreement delegates that decision to the arbitrator, then the arbitrator, and not a judge, will decide the agreement's validity.

In *Rent-A-Center*, the company required plaintiff Antonio Jackson to sign an arbitration agreement as a condition of employment. The agreement contained a delegation provision that specifically provided that the arbitrator would have the exclusive authority to resolve any dispute about the validity of the agreement.

After working for Rent-A-Center for some time, Jackson filed an employment discrimination lawsuit against the company. Rent-A-Center moved to dismiss or stay the suit pending arbitration. Jackson argued that the arbitration agreement was unconscionable and, therefore, unenforceable. The company noted that an unconscionability challenge was improperly before the court and should be decided by the arbitrator. The district court granted Rent-A-Center's motion, but the Ninth Circuit reversed on grounds that regardless of the delegation provision in the agreement, the question of unconscionability was for the court, not the arbitrator.

In a 5-4 decision, the Supreme Court ruled that by challenging the entire agreement as unconscionable, rather than specifically challenging the delegation provision, Jackson's argument was one that must be decided according to the terms of the agreement, *i.e.*, by the arbitrator. In other words, a challenge to the validity of the arbitration agreement as a whole was for the arbitrator to decide. This narrow decision will make it more difficult for plaintiffs to challenge the validity of agreements they signed.

## **Stolt-Nielsen**

In *Stolt-Nielsen S.A., et al. v. Animal Feeds Int'l Corp.* (April 27, 2010), the Supreme Court held 5-3 that the Federal Arbitration Act prohibits arbitrators from forcing parties to arbitrate matters as class actions, or class arbitrations, unless the parties have agreed to class arbitration. The arbitration agreement at issue was silent on whether parties could arbitrate as a class or would be forced to arbitrate individually.

*Stolt-Nielsen* was not an employment dispute. However, its holding clearly applies to employment arbitration agreements where claimants often seek to arbitrate wage/hour, discrimination and other disputes as a class against a single employer. The arbitration agreement at issue in *Stolt-Nielsen* was silent on whether class arbitration was available to claimants. The arbitrator in the case ruled that the case could proceed as one class of claimants in class arbitration instead of numerous individual, separate arbitration matters.

The company sought court intervention to prevent the class arbitration. Ultimately, the Supreme Court ruled that under the federal law, an arbitrator cannot compel a party to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.

This ruling is significant to employers with arbitration agreements because claimants who believe they have been legitimately wronged by their employers can be required to pursue their claims individually rather than by simply joining in a class arbitration.

### **Implications for Employers**

Based on these two recent opinions, employers who use or who are considering using an arbitration agreement should make certain that (1) the agreement contains a delegation provision clearly stating that challenges to the enforceability of the agreement will be decided by the arbitrator and not a court; and (2) the agreement contains no language indicating that class arbitration is a possibility.

### **But Stay Tuned . . .**

Sen. Al Franken (D-Minn.) was quick to criticize *Rent-A-Center*, stating, "Clearly this is a ruling that Congress needs to fix and I look forward to working with my colleagues to do so." Franken's comment alludes to the Arbitration Fairness Act of 2009 (S. 931), which is currently in committee along with its House companion bill (H.R. 1020). This proposed law provides: "[N]o predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer, franchise, or civil rights dispute." The result: employment arbitration would only be available if the parties agreed to submit a dispute to arbitration *after* the dispute had already arisen.

There has been no indication that Congress intends to make the Arbitration Fairness Act a priority this fall, whether the Democratic majority becomes lame duck or otherwise. Unless and until the bill becomes law, the Supreme Court continues to underscore the viability of employment arbitration agreements, albeit by narrow-margin opinions. For more information about whether your company may want to utilize employment arbitration provisions for employees, [click here](#) for the Nexsen Pruet article, "Mandatory Arbitration of Employment Disputes: Is it Right for Your Company?"

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