

June 24, 2010

The U.S. Supreme Court has just allowed companies to limit court scrutiny of mandatory arbitration. The 5 to 4 decision in *Rent-A-Center, West, Inc. v. Jackson*, written by Justice Scalia, holds that companies can force their employees and customers into mandatory arbitration using form agreements with a "delegation clause" that delegates decisions on the validity of the arbitration agreement itself *to the arbitrator!*



The majority held that courts retain the authority to determine whether the delegation clause is *itself* valid -- and still have their historic role of reviewing the validity of arbitration agreements without delegation clauses. The decision also left open several avenues for challenging the validity of both delegation clauses and typical arbitration agreements in future cases. But the Court's ruling lets companies decrease access to justice.

Public Justice was co-counsel before the Court for Antonio Jackson, an African-American man who says that a Nevada Rent-A-Center store discriminated against him when it repeatedly denied him promotions and promoted non-African-American employees with less experience. He sued in federal court and Rent-A-Center moved to compel arbitration under the mandatory arbitration agreement it required Jackson to sign as a condition of working for the company. The agreement says that the arbitrator, not a court, would have "exclusive authority" to resolve any dispute, including a dispute about whether the arbitration clause itself is valid. Jackson fought enforcement of the clause, arguing that several of its provisions -- including terms requiring him to pay half of the filing fees and arbitration costs and limiting the discovery he could take to prove his case -- were unconscionable under state law. He also argued that the clause was one-sided and unenforceable because it permitted Rent-A-Center, but not its employees, to pursue some claims in court. The district court granted Rent-A-Center's motion, enforced the clause, and held that any challenges to its validity were for the arbitrator to decide. The U.S. Court of Appeals for the Ninth Circuit reversed, holding that under U.S. Supreme Court precedent, courts -- not arbitrators -- must determine whether an arbitration clause is valid and enforceable *before they enforce the clause*. The U.S. Supreme Court granted review.

Our brief urged the Supreme Court to hold that the Federal Arbitration Act ("FAA") bars parties from contracting around its requirement that a court determine an arbitration clause is "valid" and "enforceable" before it enforces that clause, and that enforcing an arbitration clause by permitting the arbitrator to decide enforceability-without first determining that the clause complies with state law-would violate this basic principle. The Court agreed in part, holding that "[i]f a party challenges the validity under [the FAA] of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement." However, the Court held that the "precise agreement to arbitrate at issue" in this case is the delegation clause --"an agreement to arbitrate threshold issues concerning the arbitration agreement." Such a delegation clause, the Court held, can be severed from the remainder of the arbitration clause and separately enforced. Because it found that Mr. Jackson had challenged Rent-A-Center's arbitration clause "as a whole" and had *not* argued that the delegation clause was itself invalid until the case got to the Supreme Court, the Court held that the district court correctly enforced the delegation clause.

Justice Stevens, in dissent, said, "Neither [party] urged us to adopt the rule the Court does today" and "whether the parties have a valid arbitration agreement ... is an issue the FAA assigns to the courts." He noted that the decision will impose a new, higher burden on any party seeking to challenge an arbitration agreement.

To read the Supreme Court's decision in *Rent-A-Center, West, Inc. v. Jackson*, [click here](#).

To read our brief in the case, [click here](#).

The *Rent-A-Center* decision will make it harder for employees and consumers in future cases to seek redress in court. Whenever an arbitration agreement contains a delegation clause, a court will be required to treat the delegation clause as a separate and distinct agreement to arbitrate threshold issues. Then, unless a plaintiff can first persuade the court that the delegation clause itself is unenforceable, he or she will be unable to challenge the validity of the arbitration agreement in court. Both arbitration agreements and delegation clauses will, however, still be subject to challenge. And, for example, where a party could not fairly or effectively challenge an arbitration clause's validity in arbitration (because of the cost involved or because the arbitrator's own rules or bias are at issue), courts should not enforce delegation clauses. Public Justice will be devoting significant time and resources to ensuring that the best possible arguments are put forward to preserve access to justice in cases potentially affected by *Rent-A-Center*.

Ian Silverberg of Reno, Nevada argued the case. The plaintiff was also represented on appeal by Public Justice's Senior Attorney Paul Bland; Budd-Kazan Fellow Matt Wessler; Staff Attorney Leslie Bailey; Senior Attorney Leslie Brueckner; Goldberg, Waters & Kraus Fellow Amy Radon; Brayton-Baron Fellow Melanie Hirsch, and me; Del Hardy of Reno, Nevada; and Scott Nelson and Deepak Gupta of Public Citizen. We are grateful for everyone's great work.

We must keep fighting. Together, we can -- and must -- preserve access to justice for all.

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