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The Supreme Court Holds That Arbitrators, Not Courts, May Decide Challenges To The Enforceability Of Stand-Alone Arbitration Agreements

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Yesterday, in *Rent-A-Center, West, Inc. v. Jackson*, No. 09-497, the Supreme Court held 5-4 that a party seeking to avoid arbitration under a stand-alone arbitration agreement must challenge the specific provision delegating authority to the arbitrator to decide challenges to the agreement's validity, and not the agreement as a whole. The decision may prompt employers and business owners to use separate, stand-alone arbitration contracts to enhance the likelihood that challenges to the enforceability of the arbitration agreements will be heard first by arbitrators, not courts. In its decision, written by Justice Scalia, the Court reasoned that provisions contained within an agreement to arbitrate are themselves severable under *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), and thus challenges to the entire arbitration agreement—even in connection with threshold issues of arbitrability—are within the province of the arbitrator.

BACKGROUND

Rent-A-Center arose from a dispute between Antonio Jackson and his employer, Rent-A-Center, West, Inc. ("RAC"). In February 2003, Jackson and RAC entered into an arbitration agreement covering disputes arising from Jackson's employment relationship with RAC. The arbitration agreement expressly provided the arbitrator with exclusive authority to resolve any dispute relating to the enforceability of the agreement.

In 2007, Jackson sued RAC in the United States District Court for the District of Nevada pursuant to 42 U.S.C. § 1981. Jackson alleged that RAC first failed to promote him based on his race, and then promoted him but fired him within two months of that promotion in retaliation for Jackson's pre-promotion complaints that he had not been promoted as a result of his race. RAC moved to compel arbitration pursuant to the terms of the arbitration agreement, arguing that the FAA required arbitration of Jackson's claims of race discrimination and retaliation. Although Jackson conceded that he signed the arbitration agreement, he argued that the agreement was unenforceable because it was both procedurally and substantively unconscionable.

Granting RAC's motion to compel arbitration, the district court held that the arbitration agreement clearly and unmistakably vested the arbitrator with the exclusive authority to decide the enforceability of the arbitration agreement. On appeal, however, the United States Court of Appeals for the Ninth Circuit reversed on the question of who—the court or arbitrator—had the authority to decide whether the arbitration agreement was enforceable, reasoning that where "a party challenges an arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to the agreement,

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the threshold question of unconscionability is for the court." *Jackson v. Rent-A-Center, West, Inc.*, 581 F.3d 912, 917 (9th Cir. 2009). The Ninth Circuit based its decision on the principle 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." *Id.* (internal quotes omitted).

At oral argument on April 26, RAC repeatedly stressed that Section 4 of the FAA only allowed courts to examine issues that go to the "making" of agreements to arbitrate. Because unconscionability is a post-formation issue, RAC maintained that arbitrators may decide such challenges. Jackson, however, argued that Section 2 of the FAA requires courts to leave the door open for challenges under state contract law defenses, including unconscionability.

SUMMARY OF THE DECISION

In its opinion, written by Justice Scalia and joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito, the Supreme Court held that, where a stand-alone arbitration agreement includes a specific provision that an arbitrator shall determine the enforceability of the arbitration agreement, a challenge to the validity of the arbitration agreement as a whole is for the arbitrator to decide.

Recognizing that, under the FAA, arbitration is a matter of contract, the Court first analyzed the arbitration agreement at issue. The Court observed that there are "multiple 'written provision[s]' to 'settle by arbitration a controversy,'" but that two were relevant for discussion. First, the section titled "Claims Covered By The Agreement" provided for arbitration of all past, present, or future disputes arising out of Jackson's employment with RAC. Second, the section titled "Arbitration Procedures" provided that: "[t]he Arbitrator . . . shall have 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 second provision—an agreement to delegate to the arbitrator threshold issues concerning the arbitration agreement—is the arbitration provision at issue here.

"Application of the severability rule does not depend on the substance of the remainder of the contract."

OPINION OF THE COURT

The Court noted that there are two types of challenges to the validity of arbitration agreements: a litigant either can specifically challenge the validity of an agreement to arbitrate, or can challenge the validity of the contract as a whole. In *Prima Paint* and other cases unchallenged by the parties, the Supreme Court has held that "only the first type of challenge is relevant to a court's determination whether the arbitration agreement at issue is enforceable." Accordingly, "[i]f a party challenges the validity under §2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under §4."

Here, RAC sought to enforce the delegation provision that provided the arbitrator with "exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this Agreement." Although the underlying contract was, itself, an arbitration agreement, the Court held: "that makes no difference. Application of the severability rule does not depend on the substance of the remainder of the contract." The Court therefore reasoned: "unless Jackson challenged the delegation provision specifically, we must treat it as valid under §2 . . ., leaving any challenge to the validity of the Agreement as a whole for the arbitrator."

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OPINION OF THE COURT

Reversing the Ninth Circuit decision, the Supreme Court held that the "District Court correctly concluded that Jackson challenged only the validity of the contract as a whole." According to the Court, none of Jackson's arguments for procedural and substantive unconscionability was directed specifically at the delegation provision. The Court acknowledged that Jackson had argued in his Supreme Court brief that the delegation provision was itself substantively unconscionable in light of the Court's recent holding in *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), but the Court did not consider such challenge because it was brought "too late."

"Respondent's claim that the arbitration agreement is unconscionable undermines any suggestion that he 'clearly' and 'unmistakably' assented to submit questions of arbitrability to the arbitrator."

JUSTICE STEVENS, dissenting

Justice Stevens authored a dissenting opinion joined by Justices Ginsburg, Breyer, and Sotomayor. Justice Stevens agreed with the Court that threshold issues concerning the enforceability of an arbitration agreement can be delegated to an arbitrator under some circumstances, but observed that: "'[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.'" According to Justice Stevens, "Respondent's claim that the arbitration agreement is unconscionable undermines any suggestion that he 'clearly' and 'unmistakably' assented to submit questions of arbitrability to the arbitrator."

Justice Stevens further commented, "[i]n applying *Prima Paint*, the Court has unwisely extended a 'fantastic' and likely erroneous decision." *Prima Paint* concerns *how* parties challenge the validity of agreements to arbitrate: a party must specifically challenge the arbitration agreement in order for such claims to be heard by a court. But, he remarked, "[t]oday the Court adds a new layer of severability—something akin to Russian nesting dolls—into the mix: Courts may now pluck from a potentially invalid *arbitration agreement* even narrower provisions that refer particular arbitration disputes to an arbitrator." To Justice Stevens, however, "a general revocation challenge to a standalone arbitration agreement is, invariably, a challenge to the 'making' of the arbitration agreement itself, and therefore, under *Prima Paint*, must be decided by the Court."

IMPLICATIONS

In *Rent-A-Center*, the Supreme Court held that a provision within a stand-alone arbitration agreement that refers issues of the enforceability of the arbitration agreement to the arbitrator was severable from the arbitration agreement such that, unless a party claims that the specific provision was itself unenforceable, an arbitrator has the authority to hear such claims. The Court's decision may encourage employers and business owners to structure their arbitration agreements as separate, stand-alone arbitration contracts to enhance the likelihood that challenges to the enforceability of an arbitration agreement will be heard in the first instance by arbitrators rather than the courts. This, in turn, may make it more difficult for parties successfully to challenge the enforceability of specific terms of the arbitration agreement.

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