

Implications Of The Rent-A-Center Decision

Law360, New York (August 04, 2010) -- Reading the U.S. Supreme Court's recent Rent-A-Center decision is a little like studying for the LSAT. The court essentially asked the question whether the parties agreed to arbitrate about whether the parties agreed to arbitrate. And who gets to decide this — the court or the arbitrator?

The starting point for reading the court's decision is to distinguish between an arbitration clause on one hand and a delegation clause on the other. An arbitration clause, for example, might provide that all disputes arising out of an employee's employment with the company shall be arbitrated.

A delegation clause on the other hand deals with arbitration of "gateway" questions such as the arbitrator's authority to decide whether the agreement to arbitrate was even enforceable, or whether there was unconscionability, or fraud or duress in the making of the agreement.

Thus, a delegation clause might provide that that "the Arbitrator, and not any court, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of the agreement, including any claim that all or any part of this agreement is void or voidable."

A delegation clause empowers the arbitrator to decide whether the agreement was even enforceable, and if the answer is no, then the arbitrator may conclude that the parties must not have agreed to arbitrate. The delegation clause therefore purports to answer a derivative question: that the arbitrator may decide whether the arbitrator may decide the dispute.

In Rent-A-Center, plaintiff Jackson filed an employment discrimination suit against his former employer, Rent-A-Center. The company moved to compel arbitration based on the Mutual Agreement to Arbitrate Claims which Jackson had signed. This agreement had an arbitration clause and a delegation clause.

The Supreme Court considered whether, under the Federal Arbitration Act, a district court may decide a claim that an arbitration agreement is unconscionable where the agreement (the delegation clause) specifically assigns that decision to the arbitrator.

The Supreme Court ruled that delegation clauses are enforceable even when the complaining party claims that the underlying agreement, or some part of it, is unenforceable. Because authority has been "delegated" to the arbitrator in these cases, the arbitrator will decide the gateway questions regarding enforceability of the agreement, including the arbitration clause.

However, there's an exception to the rule: If the complaining party specifically challenges the enforceability of the delegation clause itself (apart from the agreement as a whole or some other provision of it), then the enforceability of the arbitration agreement must be decided by the court.

In Rent-A-Center, the plaintiff-employee argued that his entire underlying agreement was unenforceable because, among other things, it required the parties to split the arbitrator's fees and because of limitations on certain discovery procedures in the event of a dispute. He never identified anything about the delegation clause in particular that was unenforceable. The court held as follows:

"Unless Jackson challenged the delegation provision specifically, we must treat it as valid ... leaving any challenge to the validity of the agreement as a whole for the arbitrator." To illustrate this point (and perhaps believing that more mental gymnastics are better than less), the court distinguished between limiting depositions as it affects the underlying discrimination claim, versus limiting depositions as it affects his challenge to the delegation clause.

The court explained as follows: "To make such a claim based on the discovery procedures, Jackson would have had to argue that the limitation upon the number of depositions caused the arbitration of his claim that the Agreement is unenforceable to be unconscionable."

What does this decision mean for employers? Rent-A-Center continues a long trend in the federal courts in favor of enforcing arbitration agreements under the FAA. Companies wishing to resolve disputes strictly in the arbitral forum should include arbitration clauses and delegation clauses in their employment and/or arbitration agreements.

Of course, Rent-A-Center does not allow an employer to escape gateway questions altogether, but it provides further support for arbitral resolution of these issues without detours into state or federal court.

Stay tuned for additional changes in the law governing arbitration. Next term, the Supreme Court will hear the case of AT&T v. Conception, which deals with the question of mandatory arbitration for cell-phone consumers. Many liberal lawmakers — already on record against the Rent-A-Center decision — may also be more inclined to push the Arbitration Fairness Act of 2009, proposed legislation that would ban predispute arbitration agreements in employment and consumer contracts.

The tension between the legislative and judicial branches suggests that the law governing arbitration may remain in flux for the foreseeable future.

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Foley & Lardner LLP has represented Rent-A-Center in some matters but not in connection with the case analyzed in this article.

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