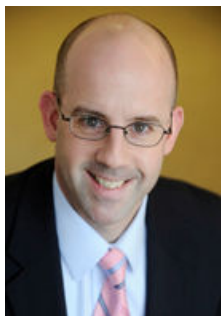


## U.S. Supreme Court: Arbitration Agreements Can Delegate Fairness Challenges to Arbitrators



By: Rafael P. McLaughlin

In a decision that will make it more difficult for consumers and employees to challenge the enforceability of arbitration agreements, a divided U.S. Supreme Court has held that if an arbitration agreement includes a clause that delegates fairness challenges to the arbitrator, the trial court must enforce the agreement and send the matter to arbitration if the consumer or employee failed to challenge the specific "delegation clause." In effect, the Court's 5-4 ruling in *Rent-A-Center, West v. Jackson*, has removed from judges the authority to decide challenges to the fairness of arbitration agreements, and placed them in the hands of the arbitrators.

*Jackson* arises from an employment-discrimination suit filed by Antonio Jackson against his former employer, Rent-A-Center, West, Inc. ("RAC"), in U.S. District Court for the District of Nevada. RAC filed a motion under the Federal Arbitration Act ("FAA") to dismiss Jackson's suit and compel arbitration pursuant to the arbitration agreement (the "Agreement") that Jackson had signed as a condition of his employment. The Agreement provided for arbitration of all "past, present, or future" disputes arising out of Jackson's employment with RAC, including "claims for discrimination." Additionally, the Agreement provided that the "Arbitrator, and not any federal, state, or local 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." Jackson opposed RAC's motion claiming that the Agreement was unconscionable. The District Court disagreed, and granted RAC's motion, finding that the Agreement gave the Arbitrator exclusive authority to decide whether the Agreement was enforceable. A divided Court of Appeals for the Ninth Circuit reversed the trial court, holding that conscionability challenges to an arbitration agreement are a threshold question for a judge, not an arbitrator.

On appeal, the issue before the Supreme Court was whether a court may decide a claim that an arbitration agreement is unconscionable, where the Agreement explicitly delegates that decision to the arbitrator. The Court, in an opinion written by Justice Antonin Scalia, ruled that where a party to an arbitration agreement specifically challenges the enforceability of the agreement's "delegation provision," the court will consider the challenge. However, if the party's challenge is to the enforceability of the arbitration agreement as a whole, then the arbitrator will consider the challenge. The Court reasoned that a delegation clause is an "additional antecedent agreement" to arbitrate "gateway questions" concerning enforceability, to which the FAA applies like any other arbitration agreement.

Use of delegation clauses is not common. However, *Jackson* will undoubtedly inspire companies to insert such provisions into their standard-form arbitration agreements. Predictably, the plaintiff's bar and "consumer advocates" have raised a hue-and-cry over *Jackson*, claiming that it will allow companies to impose one-sided terms and select biased arbitrators who will place self-interest above fairness when deciding challenges to the arbitration agreement. Notwithstanding these complaints, *Jackson* reflects the "national policy favoring arbitration" that the Supreme Court has endorsed in a growing string of cases. Nonetheless, there is no denying that *Jackson* gives businesses an edge in defending challenges to arbitration agreements. Ultimately, however, the benefits that employers and companies derive from *Jackson* could be short-lived. Currently pending in Congress is the Arbitration Fairness Act (H.R. 1020, S. 931), legislation that would eliminate arbitration agreements of consumer, employment, or franchise disputes unless made voluntarily and only after a dispute has arisen. H.R. 1020 has been discharged by the House Judiciary Committee's Subcommittee on Commercial and Administrative Law to the full House Judiciary Committee, which is expected to vote on the bill shortly. Assuming passage by the Judiciary Committee, a vote by the full Congress could take place this fall. Therefore, companies that rely on standard-form arbitration agreements are wise to keep an eye on the Arbitration Fairness Act, and enjoy the benefits of *Jackson* while they last.

Should you desire a full text of *Rent-A-Center, West v. Jackson*, or have any questions regarding arbitration agreements or their specific use in commercial transactions or employment relationships, please contact one of our Commercial Litigation Group members.

### Cleveland

Rafael P. McLaughlin  
[rmcLaughlin@reminger.com](mailto:rmcLaughlin@reminger.com)  
101 W. Prospect Ave.,  
1400 Midland Bldg.  
Cleveland, OH 44115  
Phone: 216-430-2171  
Fax: 216-687-1841

### Columbus

Michael G. Romanello  
[mromanello@reminger.com](mailto:mromanello@reminger.com)  
65 East State St., 4<sup>th</sup> Floor  
Capitol Square  
Columbus, OH 43215  
Phone: 614-232-2437  
Fax: 614-232-2410

### Cincinnati

Vincent P. Antaki  
[vantaki@reminger.com](mailto:vantaki@reminger.com)  
525 Vine Street,  
Suite 1700  
Cincinnati, OH 45202  
Phone: 513-455-4031  
Fax: 513-721-2553

### Akron

W. Bradford Longbrake  
[blongbrake@reminger.com](mailto:blongbrake@reminger.com)  
200 Courtyard Square  
80 South Summit St.  
Akron, OH 44308  
Phone: 330-434-6018  
Fax: 330-375-9075

### Toledo

Laurie J. Avery  
[lavery@reminger.com](mailto:lavery@reminger.com)  
One SeaGate,  
Suite 1600  
Toledo, OH 43604  
Phone: 419-254-1311  
Fax: 419-243-7830

### Youngstown

Robert S. Yallech  
[ryallech@reminger.com](mailto:ryallech@reminger.com)  
11 Federal Plaza Central,  
Suite 300  
Youngstown, OH 44503  
Phone: 330-744-1311  
Fax: 330-744-7500

### Lexington, KY

Shea W. Conley  
[sconley@reminger.com](mailto:sconley@reminger.com)  
269 West Main Street,  
Suite 700  
Lexington, KY 40507  
Phone: 859-233-1311  
Fax: 859-233-1312

### Louisville, KY

Justin N. Rost  
[jrost@reminger.com](mailto:jrost@reminger.com)  
One Riverfront Plaza  
401 W. Main St., Ste. 710  
Louisville, KY 40202  
Phone: 502-584-1310  
Fax: 502-589-5436