Will High Court Resolve Circuit Split On Arbitration Issues?

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The U.S. Supreme Court will be presented with two important questions this fall in New Prime Inc. v. Dominic Oliveira.[1] Both questions relate to the Federal Arbitration Act's Section 1 exemption, which "provides that the act shall not apply 'to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.'"[2] The two questions before the court are (1) whether a dispute over the applicability of the Section 1 exemption must be resolved by the arbitrator or by a court and (2) whether the Section 1 exemption encompasses independent contractor agreements.

These questions could have major ramifications for the transportation industry where long-haul truckers, like Oliveira, often have arbitration provisions in their employment or independent contractor agreements. In addition, because the precise scope of the Section 1 exemption remains unclear, other types of commercial drivers — ride-sharing services and shipping companies, for example — will be paying close attention.

New Prime v. Oliveira

New Prime is an interstate trucking company that runs an apprenticeship training program. Graduates are given the option of working as New Prime employees or as independent contractors. After Oliveira graduated from the program, he was offered a $100 bonus to work as an independent contractor. New Prime representatives advised Oliveira to set up a limited liability company and assisted him in doing so. Later, Oliveira terminated his independent contractor relationship with New Prime and began working as an employee.

In 2015, Oliveira filed a class action lawsuit against New Prime, alleging violations of the Fair Labor Standards Act, which included his time working as an independent contractor. He alleged that he was always an employee because New Prime exercised significant control over his work, and the job responsibilities of employees and independent contractors were "substantially identical." New Prime moved to compel arbitration under the FAA. Oliveira opposed the motion, arguing that the contract falls under the Section 1 exemption. He also argued that the applicability of the exemption should be decided by the court, not the arbitrator. The district court denied the motion to compel and New Prime appealed. Last year, the First Circuit upheld the trial court's denial of the motion to compel.

Who Decides?

On appeal, the First Circuit rejected New Prime's contention that the arbitrator, rather than the court, should decide the applicability of the Section 1 exemption. The court adopted the Ninth Circuit's reasoning in In re Van Dusen — that because a "district court's authority to compel arbitration under the FAA exists only where the act applies, 'a district court has no authority to compel arbitration under Section 4 [of the FAA] where Section 1 exempts the underlying contract from the FAA's provisions.'"[3] The court held that this "antecedent

determination" by a district court is distinct from "gateway questions of arbitrability," such as "whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy."[4] The First Circuit specifically rejected the Eighth Circuit's holding that determinations regarding the applicability of Section 1 are "gateway questions" to be left to the arbitrator.[5]

Does the Section 1 Exemption Apply to Independent Contractors?

The First Circuit also addressed the scope of Section 1, holding that the term "contracts of employment" encompasses agreements both with employees and with independent contractors. In reaching this conclusion, the circuit court looked to historical usage of the term, noting that there were several common and legal uses of the term "contract of employment" describing more expansive relationships than just employer-employee.[6] The court also differentiated Oliveira, a truck driver, from the plaintiff in Circuit City Stores Inc. v. Adams, who was a sales contractor.[7] In Circuit City, where the plaintiff was not a transportation worker and thus not subject to the Section 1 exemption, the U.S. Supreme Court rejected an expansive interpretation of the phrase "engaged in commerce," holding that historically the term did not have the same legal meaning it has today.

In Oliveira, both parties cited numerous historical definitions of "contracts of employment" with sources dating all the way back to Blackstone. This makes sense given the history lesson contained in Justice Anthony Kennedy's majority opinion in Circuit City (seeking to define "engaged in commerce" in 1925). While both sides present compelling arguments, New Prime's own website, which requires both employees and independent contractors to fill out an "application for employment," highlights the inconsistent use of the terms "employment" and "contracts of employment" in modern times.

Conclusion

Assuming Judge Brett Kavanaugh is promptly confirmed to the Supreme Court, there is no reason to expect the court to reverse its recent pro-arbitration trend, including Epic Systems Corp. v. Lewis, (5-4 decision upholding the FAA's "liberal federal policy favoring arbitration agreements" even where in potential conflict with the National Labor Relations Act).[7] Judge Kavanaugh's D.C. Circuit jurisprudence consistently favored arbitration.[8] So while it is always difficult (and usually foolish) to predict how the Supreme Court will rule in a given case or the framework it will adopt, at least some signs seem to point toward reversal.

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[1] No. 17-340.

[2] See Oliveira v. New Prime Inc., 857 F.3d 7, 12 (1st Cir. 2017) (citing 9 U.S.C. § 1).

[3] Id. at 13 (citing In re Van Dusen, 654 F.3d 838, 843 (9th Cir. 2011)).

[4] Id. at 14 (citing Howsam v. Dean Witter Reynolds Inc., 537 U.S. 79, 83 (2002)).

[5] Id. (citing Green v. SuperShuttle Int'l Inc., 653 F.3d 766, 769 (8th Cir. 2011)).

[6] See id. at 22.

[7] Id. (citing Circuit City Stores Inc. v. Adams, 532 U.S. 105, 112 (2001)).

[8] 584 U.S. __ (2018).

[9] See, e.g., Nat'l Postal Mail Handlers Union v. Am. Postal Workers Union, 589 F.3d 437, 439 (D.C. Cir. 2009) ("[I]n light of the deference courts must afford to a labor arbitrator's contract interpretation — including an arbitrator's decision on arbitrability where, as here, the parties agree to present that issue to the arbitrator — we agree with the District Court that we must uphold the arbitrator's decision in this case.").