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Another Pro-Arbitration Decision From the Supreme Court: Parties Can Designate Arbitrators – Rather than Courts – to Resolve Arbitrability Disputes

The US Supreme Court's June 21, 2010 opinion in *Rent-A-Center West v. Jackson*, No. 09-497, continues its recent trend of pro-arbitration decisions. In a 5-4 opinion, with Justice Scalia writing for the majority, the Court held that if parties to an arbitration agreement include a clause delegating authority to the arbitrator to resolve challenges to the enforceability of the arbitration agreement, when any such challenges arise, the clause must be enforced and the case sent to arbitration unless the party opposing arbitration specifically challenges the delegation clause (which, as a practical matter, is unlikely).

Rent-A-Center arose out of an employment discrimination lawsuit brought by a former employee. Rent-A-Center West (RACW) argued that the dispute should be resolved in arbitration pursuant to the parties' arbitration agreement. The former employee argued that the arbitration agreement was unconscionable – and therefore unenforceable – because it was non-negotiable, one-sided, limited discovery, and required an unfair fee-splitting arrangement. RACW argued that the former employee's unconscionability challenges must be resolved in arbitration pursuant to a clause in the arbitration agreement delegating exclusive authority to the arbitrator to resolve disputes regarding the enforceability of the arbitration agreement. The Court agreed. Because the former employee "did not make any arguments specific to the delegation provision" (slip

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op. at 10) of the arbitration agreement, the Court found that under the severability doctrine set forth in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395 (1967), and reaffirmed in *Buckeye Check Cashing v. Cardegna,* 546 U.S. 440 (2006), the unconscionability challenges must be resolved in arbitration.

For companies and parties drafting arbitration agreements, *Rent-A-Center* makes clear that if parties desire to have an arbitrator – rather than a court – resolve challenges (like unconscionability) to the arbitration agreement, they can agree to do so. However, under *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938 (1995),such delegation must be clear and unmistakable. *Rent-A-Center* will also likely impact a number of cases pending in federal and state courts across the country where employees and consumers have asked courts – rather than arbitrators – to resolve challenges to the enforceability of the arbitration agreements.

Rent-A-Center may also spur greater efforts in Congress to pass H.R. 1020 and S. 931. We have already seen increased efforts for Congressional action in the wake of the Court's decision to grant *certiorari* in *AT&T Mobility LLC v. Concepcion,* No. 09-893, 560 U.S. __ (May 24, 2010), a case involving challenges to a class action waiver in a consumer arbitration agreement.

Squire Sanders lawyers counsel clients in consumer and employment matters, both in litigation and arbitration, throughout the United States. We routinely litigate the enforceability of arbitration agreements. And before actual disputes ever arise, our lawyers anticipate the potential for challenges and craft effective arbitration clauses for our clients. If you have any questions about the effects of the *Rent-A-Center* case or need assistance crafting arbitration clauses, please contact your primary Squire Sanders lawyer or one of the lawyers listed in this Alert.