

Rent-A-Center vs.





the Supreme Court

The court. It is not what you think. Over the years, the highest court in the land has been supremely uninterested in issues relating to the rent-to-own transaction itself. It has routinely “*denied cert.*” whenever Rent-A-Center or anyone else has petitioned the court to hear a rent-to-own case. That is how it works. The Supreme Court *has* to take certain kinds of cases—if one state sues another state, for example—but, for the most part, the court gets to decide which cases it wants to get in on and which ones it wants to ignore. Most often, the court takes cases that raise an issue of how the U.S. Constitution should be interpreted. The court will take cases where there is a split of opinion among the 11 U.S. Circuit Courts of Appeal—but not always. The court can decide disputes over how to interpret federal statutes, which is one of the issues in a Rent-A-Center case that the Supreme Court has chosen to hear this summer.

By ED WINN III

Litigants who lose in lower courts, usually federal courts of appeal, can ask the Supreme Court to consider the case. They do so with a petition for a *writ of certiorari*. The court does not have to accept the petition and, in fact, denies 99 percent of them, a good number from prisoners claiming that their constitutional rights have been violated in some grievous way—not enough books in the prison library or not enough food choices in the prison cafeteria, for example. When a petition is filed, it is circulated among all nine of the justices and their clerks. Then, the justices meet and vote on which cases to consider. If four of the nine want to consider a case, the court grants the petition, notifies the parties and sets the case for oral argument during one of the two official sessions per year when the court sits as a body. When the court denies a petition, it means that the ruling in the lower court stands—and that is the law. It does not necessarily mean that the Supreme Court agrees with that ruling; it means that the issue is not important enough for the Supreme Court to take up its time with it.

When the court takes up a case, presumably one with some issue of national importance, the litigants brief the issue and most often these days, other groups that are interested in the issue also submit briefs as a “friend of the court,” *amicus curiae*, trying to persuade the justices to rule one way or the other. After reading the briefs and listening to tightly timed oral arguments, the court issues a ruling, often with lengthy explanations from several of the justices in an effort to settle some area of the law, not only for the particular parties in the lawsuit, but also for everybody else who has—or who in the future might have—a similar issue. Supreme Court justices have lifetime appointments in order to remove them from political pressure. They never have to get re-elected or re-appointed. Occasionally, the court’s decisions are unanimous, but more often these days, the decisions are split along ideological lines.

Getting a case heard by the U.S. Supreme Court is heady stuff, for lawyers, at least. It is the top of the legal food chain—quite literally the court of last resort.



The Rent-A-Center facts. The Rent-A-Center case involves employment, arbitration and the doctrine of unconscionability. Rent-A-Center hired Antonio Jackson to work in a Nevada store. At the hiring, Jackson was presented with, and was required to sign, the usual panoply of employment documents, similar to those used by any big company. Among those documents was an agreement for both Rent-A-Center and Jackson to arbitrate any disputes, “past, present or future,” that might arise between

them, instead of going to court. Agreeing to arbitrate is no small matter, as it involves waiving one’s constitutional right to a trial by jury in all civil matters when the amount in controversy is \$20 or more. The Rent-A-Center arbitration agreement gave proper notice to Jackson that he was waiving this important right. The agreement went on to provide the following language, which is at the heart of the Supreme Court case:

The Arbitrator, and not any federal, state, or local court or agency shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement, including, but not limited to, any claim that all or any part of this Agreement is void or voidable.

The agreement also provided Jackson with the chance to consult with a lawyer before signing. Jackson did sign and went to work for Rent-A-Center. He was promoted within the company, but was terminated two months after his promotion. One might suppose that Rent-A-Center had good reasons to fire Jackson, since good rent-to-own employees always are in high demand; however, the circumstances surrounding Jackson’s termination are not at play in the case before the Supreme Court. Jackson—as is often the case these days among the class of employees who have been persuaded by the entitlement culture that the world owes them a living, and a good one at that—filed suit in a Nevada federal district court against Rent-A-Center, claiming that his termination was due to racial discrimination and retaliation and had nothing to do with any performance failures.

Rent-A-Center filed a motion to have the lawsuit dismissed and compel arbitration, arguing that the arbitration agreement both parties had signed controlled. Jackson countered that the arbitration agreement was unconscionable and, therefore, unenforceable. The initial question before the district court and the question that has made its way to the Supreme Court is: Who decides whether the arbitration agreement is enforceable or not—the court or the arbitrator?



The law and the lower court rulings. In 1925, Congress enacted the *Federal Arbitration Act*, intended to encourage the use of arbitration among disputing parties as a fair, economical and efficient means of resolving disputes that could assist in preventing overcrowded court dockets. That law, among other things, provides that arbitration agreements “shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or equity for the revocation of

any contract.” Previous courts have ruled that this language means that courts retain the power to decide whether there ever was really an agreement formed between the parties. Courts retain the power to rule on defenses to contract formation such as fraud, duress, forgery, lack of capacity and the like. So, a party to an arbitration agreement can argue to a court that there never was an arbitration agreement to begin with because someone forged a name, or forced a signature at gunpoint, or that the party was too young, or mentally deranged when signing, etc. However, the courts have ruled in a couple of cases that the parties can agree to arbitrate even issues of contract formation and affirmative defenses to contracts as long as they do so “clearly and unmistakably” in the arbitration agreement. Time and again, courts have emphasized that arbitration is fundamentally a matter of contract. The rules and limits of arbitration are what the parties have agreed to, neither more nor less.

The federal district court took note of the *Federal Arbitration Act* and its many court interpretations and concluded that the language in the Rent-A-Center agreement cited above was, indeed, “clear and unmistakable” and that the parties had agreed to arbitrate the issue of arbitrability. The court dismissed Jackson’s lawsuit and ordered arbitration. Jackson appealed to the Ninth Circuit Court of Appeals.

The circuit court reversed and held that, when a party challenges an arbitration agreement as unconscionable and thus asserts that he could not meaningfully assent to the agreement, the threshold question of unconscionability is for the court to determine. The decision was 2 to 1, with a vigorous dissent. In essence, the Ninth Circuit Court of Appeals ruled that, when a party alleges that an arbitration agreement is unconscionable, a court must resolve that issue no matter what the agreement says.

The politics of arbitration. It is true that the business world often prefers arbitration to going to court. It is not so much because the fix is in and the business community expects to win more often with an arbitrator than with a judge or a jury. Rather, it is because arbitration is a cheaper, quicker and more private way to resolve disputes. It is quicker because discovery rules are often streamlined and there is never a jury to pick. The process is less formal and therefore more flexible. It is cheaper because it is quicker and attorneys bill by the hour. Finally, win or lose, the decision is not a matter of public record and will not be in the headlines

of tomorrow’s newspaper, which is the risk when in court. That is one of the chief criticisms of arbitration. One of the reasons courtrooms are open to the public and judicial decisions are a matter of public record is because the common law—i.e., the law that is made when judges in courts make

decisions—is part of what guides behavior. It is a part of the ever-evolving law of the land. People learn what is lawful and what is not by learning, among other things, how judges rule on issues. When arbitration rulings are private, then the public has less information about the rules that govern them. Such lack of information, the detractor’s contend, breeds uncertainty at best; chaos at worse.

In addition, consumer advocates have long keened that mandatory consumer arbitration is fundamentally unfair to consumers for many reasons, but mainly because arbitrators have a bias in favor of business and therefore consumers get a raw deal in arbitration. Arbitration itself is a business and arbitrators get paid to hear and decide cases.

Consumer advocates argue that most of the money that funds the arbitration industry comes from businesses and arbitrators know it. Since they want that flow to continue, they generally rule in favor of businesses over consumers lest they quit getting calls to arbitrate. Last summer the National Arbitration Forum (NAF), a major national firm involved in business-to-consumer arbitrations, was sued by the Minnesota attorney general for alleged bias in its rulings. NAF settled with the attorney general by agreeing to get out of the business of mandatory consumer arbitrations altogether. On the heels of the NAF settlement, the American Arbitration Association announced that it was getting out of the mandatory consumer arbitration business until the rules governing the process were revised to assure fairness. Shortly after that, the Bank of America announced that it was no longer going to enforce the mandatory consumer arbitration provisions in its customer contracts, since its customer polling information indicated that consumers did not like the process.

When the Supreme Court agreed to consider the Rent-A-Center appeal, immediately the case took on great importance in the world of mandatory arbitration for employees and consumers. The Equal Employment Advisory Council and the U.S. Chamber of Commerce submitted briefs in support of Rent-A-Center’s position. The following groups jumped in with briefs on the side of Jackson: The American Federation of Labor, Congress of Industrial Organization, Lawyers’ Committee for Civil Rights under Law, Alliance for Justice, Asian American Justice Center, Constitutional Ac-

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countability Center, National Partnership for Women and Families, National Women's Law Center, National Association of Consumer Advocates, American Association for Justice, AARP, National Consumer Law Center, Consumer Action, Service Employees' International Union, Legal Aid Society, National Employment Lawyers' Association and National Employee Rights Advocacy Institute for Law and Policy. To read the *amicus curiae* briefs from these groups, one would think that the future of arbitration in America—nay, the sanctity of American jurisprudence and the future of American workers—was at stake in this case. It is not.



A word about unconscionability. Unconscionability is a legal doctrine that allows a court to nullify a contract if its terms are so one-sided as to “shock the conscience of the court.” An unconscionable contract is one “of such gross inequality as no man in his senses and not under delusion would make.” The standard is not much more specific than this. Unconscionability is, ultimately, what a judge says it is. In court, the issue of unconscionability must always be decided by the judge to avoid the possibility of a decision based on the passions of jurors. An unconscionability ruling must be based on evidence of both procedural and substantive unfairness. A very unfair, one-sided deal—one that is substantively unconscionable, struck between two competent and thoughtful parties, both possessed of all of the facts and neither under any compulsion to act—cannot legally be unconscionable. Only one prong of the test has been met. Procedural unconscionability involves some gross unfairness in getting the deal done. Often there will be evidence of physical infirmity, ignorance, illiteracy, other disability or dire necessitous circumstances to support a finding of procedural unconscionability. There must be a finding of both kinds of unconscionability before a court can undo a contract based on this doctrine.

Ordinarily, the law does not concern itself with the issue of the adequacy of consideration in a contract. The law is not concerned with whether one agrees to pay \$2,000 or \$5,000 for the thing, because the law has neither the time nor the resources to be in the business of deciding upon the value of all things and services. It would overwhelm the system to have to do that. Only if the price paid is so grossly unfair that it shocks the judge—maybe \$20,000 for the thing—will allow a court to step in and rule the contract unconscionable and, even then, only if there is also evidence of procedural wrongdoing, the aggrieved party having been tricked or duped or otherwise taken advantage of in order to have agreed to the grossly excessive term (price).

In the Rent-A-Center case, Jackson alleged both procedural and substantive unconscionability. The procedural

aspect was that the employment contract, including the arbitration agreement, was presented on a “take-it-or-leave-it” basis,” with Rent-A-Center refusing to negotiate any aspect of it. Jackson argued that the arbitration agreement was substantively unconscionable for three reasons: 1) the coverage was one-sided, because Rent-A-Center retained the right to go to court to protect its trade secrets and its non-compete; 2) discovery was limited in time and number of depositions—although the arbitrator had the ability to enlarge the discovery process if deemed necessary to a fair adjudication; and 3) the arbitration fee was to be split equally between the parties—unless the law required otherwise—which might cause an undue hardship for Jackson.

The trial court, after it had ruled that the arbitration forum was the proper avenue to resolve the issue of arbitrability, noted that it did not see any evidence of substantive unconscionability because the excessive cost argument was mere speculation. The Ninth Circuit Court of Appeals, in reversing, told the district court that it must examine the other two substantive allegations to see if either was met.

Rent-A-Center's argument is that the unconscionability issue must indeed be resolved, but that the parties, by clear and unmistakable language, had agreed for an arbitrator to decide the question. The arbitrator might well find the arbitration agreement to be unconscionable, thus ending his authority over the case, but there is nothing to suggest that an arbitrator is unwilling or unable to make such a decision. Interestingly, the dissenting judge in the Ninth Circuit case wrote: “This case concerns an arbitration agreement more favorable to the employee than most this court sees... [W]hat we have, then, is an arbitration agreement more favorable than most and unconscionability allegations that are thinner than most.”



The real fight in the Rent-A-Center case is between the Supreme Court's consistent support of arbitration as a fair and reasonable means of resolving disputes, relying heavily on the *Federal Arbitration Act* and some lower courts that mistrust arbitration and are skeptical of its fairness. These courts, including California state courts that have ruled mandatory consumer or employee arbitration is always unconscionable, are ever on the lookout for ways to erode the use of consumer arbitration. In this country, the Supreme Court has the last word, which is why Rent-A-Center will win. Rent-A-Center expects a ruling this summer. *

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