

March 25, 2010

**Our Access to Justice Campaign is fighting in the U.S. Supreme Court to preserve the role of courts in ensuring that arbitration agreements are not enforced against employees and consumers unless they meet basic legal standards.** The issue at stake in *Rent-A-Center, West, Inc. v. Jackson* is whether a corporation can impose a contract that ousts courts from that historic role and instead vests all power to decide the fairness and legality of an arbitration clause in the hands of the arbitrator himself.

Antonio Jackson, an African-American man who worked for Rent-A-Center in Nevada, claims that the company discriminated against him on grounds of race when it repeatedly denied him promotions and promoted non-African-American employees with less experience. When he sued in federal court alleging violations of federal civil rights laws, Rent-A-Center moved to compel arbitration under a contract it had required Jackson to sign as a condition of working for the company. The clause provides that the arbitrator, not a court, has "exclusive authority" to resolve any dispute, including a dispute about whether the arbitration clause itself is valid. Jackson fought enforcement of the clause, arguing that several of its provisions -- including terms requiring him to pay half of the filing fees and arbitration costs and limiting the discovery he could take to prove his case -- were unconscionable under state law. He also argued that the clause was one-sided and unenforceable because it permitted Rent-A-Center, but not its employees, to pursue its own claims in court. The district court granted Rent-A-Center's motion, enforced the clause, and held that any challenges to its validity were for the arbitrator to decide.

The U.S. Court of Appeals for the Ninth Circuit reversed, holding that under U.S. Supreme Court precedent, courts -- not arbitrators -- must determine the threshold question of whether an arbitration clause is valid and enforceable. The court explained that, because "arbitration is a matter of contract," no party can be ordered to arbitrate before a judicial determination that the arbitration clause creates a contractual duty to arbitrate. The U.S. Supreme Court granted Rent-A-Center's petition for *certiorari* and placed the case on an expedited schedule.

**Our brief urging the Supreme Court to affirm the Court of Appeals demonstrates that the Federal Arbitration Act bars parties from contracting around its requirement that a court determine an arbitration clause is "valid" and "enforceable" before it enforces that clause.** It is black-letter law that an arbitration clause is not enforceable if it runs afoul of generally-applicable state contract law such as unconscionability. For a court to enforce an arbitration clause without determining that it complies with state law would violate this basic principle. While the Court has stated that parties may permit arbitrators to decide issue of an arbitration clause's scope, the Court has never held that parties can contract around the FAA by removing courts from the equation entirely. Rather, the Court has consistently held that, where if a party challenges an arbitration clause -- as opposed to an underlying contract -- courts, not arbitrators, must review challenges to



the enforceability of that clause. The case will be argued on April 26, 2010.

"Rent-A-Center's position contradicts federal law and common sense," said Public Justice staff attorney Paul Bland, the primary author of Jackson's brief. "It is radical to suggest that courts should be stripped of their historic rule of policing the fairness of arbitration agreements and that the only parties to judge whether an arbitration clause is fair should be arbitrators. I would have thought that America's experience with the recent financial crisis would warn us against giving any persons the sole power to police themselves."

**To read our U.S. Supreme Court brief in *Rent-A-Center, West, Inc. v. Jackson*, [click here](#).**

Ian Silverberg of Reno, Nevada is Lead Counsel in the case. In addition to Bland and Silverberg, the plaintiff is represented on appeal by Public Justice's Budd-Kazan Fellow Matt Wessler; Staff Attorneys Leslie Brueckner and Leslie Bailey; Goldberg, Waters & Kraus Fellow Amy Radon; Brayton-Baron Fellow Melanie Hirsch, and me; Del Hardy of Reno, Nevada; and Scott Nelson and Deepak Gupta of Public Citizen.

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