The United States Supreme Court Does *Not* Impose Arbitration, For Once, But Is That A Good Thing?

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Introduction

For many years now, the United States Supreme Court has sided with employers and other would-be defendants to impose arbitration on employees and other would-be plaintiffs seeking to enforce their rights. The conventional wisdom holds that this approach has favored would-be defendants at the expense of would-be plaintiffs.

Critics of arbitration argue that the process is essentially behind closed doors and provides better terrain for would-be defendants because, as repeat players, those parties benefit from institutional bias in their favor. In addition, these critics assert, the discovery process is more limited and, therefore, denies would-be plaintiffs of evidence necessary to prove their claims.

Advocates for arbitration on the plaintiff side argue that, unlike in court, the claims being arbitrated are ordinarily decided on the merits – based on a contested hearing with live testimony subject to cross examination. In other words, would-be plaintiffs in the arbitral forum do not normally have to face a costly and often fatal summary judgment motion. Moreover, advocates for arbitration assert that the process is less expensive and more expeditious while providing remedies that are largely the same as if the claims were litigated in court.

Whichever side one takes in the debate about the advantages and disadvantages of arbitration for employees and other plaintiffs, a recent Supreme Court ruling concerning arbitration is important. As outlined below, what seems like a victory for plaintiffs in that case could end up being a proverbial Trojan Horse.

I. The Supreme Court Ruling in *New Prime*

Contrary to the trend, the Supreme Court recently ruled that the Federal Arbitration Act ("FAA")[1] does not make mandatory arbitration agreements in the trucking industry enforceable. In that case, *New Prime, Inc. v. Oliveira*,[2] the Supreme Court decided whether the contract between the plaintiff, Dominic Oliveira, and the defendant, New Prime, was a contract of employment under the FAA given the contract described the plaintiff as an "independent contractor." The Supreme Court rejected the defendant's argument in the case, concluding that the FAA's exclusion of "contracts of employment" covers independent contractors as well as employees engaged in interstate commerce.

At face value, plaintiff counsel should welcome the ruling in *New Prime*. The way that the Supreme Court majority reached its decision, however, could mean trouble for future enforcement of protections under civil rights and employment statutes – whether through class actions, collective actions, multi-plaintiff cases, or individual cases.

II. The Potentially Negative Repercussions of the *New Prime* Decision

An incisive analysis of the *New Prime* ruling observed that the majority opinion based the ruling on what "contracts of employment" supposedly meant in 1925 – that is, when Congress enacted the FAA.[3] This rigid "originalist" approach to interpreting the law conflicts with the landmark decision in a sex harassment case authored by the original "originalist," Justice Antonin Scalia. In that case, *Oncale v. Sundowner Offshore Services, Inc.*,[4] Justice Scalia rejected a rigid "originalist" approach because "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils."[5]

The possible future trouble created by *New Prime* includes the potential for prompting courts to conclude, for example, that "sex" did not encompass either sexual orientation or gender identity in 1964 – that is, when Congress enacted Title VII.[6] If courts were to so conclude, gay, lesbian, bisexual, and transgender people would not have Federal civil rights protections in the workplace. This is not an abstract concern given a recent Fifth Circuit ruling argued at length that Title VII must be interpreted in this hyper-narrow way.[7]

Consequently, *New Prime* calls to mind the Supreme Court's decision upholding the legality of the Patient Protection and Affordable Care Act,[8] often known as Obamacare. Although the ruling in *National Federation of Independent Business v. Sebelius*[9] undoubtedly continues to benefit millions by increasing access to life-preserving and life-saving healthcare coverage, the majority opinion in that case questioned the validity of basing laws on the Commerce Clause of the United States Constitution.[10] The Commerce Clause provides the basis for nearly all civil rights and employment statutes, so attacking the validity of the Commerce Clause as a basis for law-making would undermine the validity of virtually all laws that govern the workplace.

Conclusion

New Prime has not resolved the debate about whether arbitration is positive for employees and other plaintiffs. Although the decision in that case provides an important victory for plaintiffs in the short-term, *New Prime* could help to trigger a detrimental shift in the law long-term. Plaintiff counsel must remain vigilant to help ensure that courts do not interpret *New Prime* in a way that could undermine or even preclude robust enforcement of workplace protections.

[1]9 U.S.C. §§ 1, *et seq.*

[2]https://www.supremecourt.gov/opinions/18pdf/17-340_07kq.pdf.

[3]https://onlabor.org/is-new-prime-a-poison-pill-for-title-vii/.

[4]523 U.S. 75 (1998).

[5]523 U.S. at 79.

[6]42 U.S.C. §§ 2000e, *et seq.*

[7]*Wittmer v. Phillips 66 Co.*, __ F.3d __, 2019 WL 458405, *4-11 (5th Cir. 2019).

[8]26 U.S.C. §§ 5000A, *et seq.*

[9]567 U.S. 519 (2012).

[10]U.S. Const., Art. 1, Sec. 8, Cl. 3.