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Despite the first expansion of an exception to FAA arbitration in years, the sky is not falling

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This week, in *New Prime Inc. v. Oliveira*, No. 17-340, 2019 U.S. LEXIS 724 (U.S. Jan. 15, 2019), the United States Supreme Court unanimously affirmed a First Circuit decision holding that arbitration agreements with independent contractor truck drivers, not just with employee truck drivers, are excluded from enforcement under the Federal Arbitration Act (the "FAA", 9 U.S.C.A. §§ 1-16 (West 2019)). Interpreting the phrase "contracts of employment" in Section 1 of the FAA, which provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," *id.* § 1 (West 2019), Justice Gorsuch held that "[w]hen Congress enacted the Arbitration Act in 1925, the term 'contracts of employment' referred to agreements to perform work," not just agreements to be employees of a company. *New Prime,* 2019 U.S. LEXIS 724, at *23. Because the plaintiff in the *New Prime* case "is entitled to the benefit of that same understanding today," the arbitration clause in his independent contract with the defendant trucking company could not be enforced by FAA mechanisms. *Id.*

Overview

Last week we provided you with analysis of *Henry Schein, Inc. v. Archer and White Sales, Inc.*, No. 17-1272, 2019 U.S. LEXIS 566 (U.S. Jan. 8, 2019).[1] There, the Court held that, when the question is whether a *contract* provision excepts a matter from arbitration under the FAA, that question is often most appropriately answered by an *arbitrator* in the first instance. *See id.* at *5. This week, in *New Prime*, the Court's lesson is that when the question that arises is whether a *statutory* provision in the FAA excepts a matter from arbitration under the FAA, that question is most appropriately answered by a *court* in the first instance.

As a practical matter, however, the exclusion of certain workers' arbitration clauses from enforcement under the FAA may have less impact than some would expect. First, although Section 1 of the FAA excludes from the FAA's protections "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C.A. § 1

[1] *See* our January 9, 2019 Arbitration Alert, available here.

(West 2019), this does not apply to *all* workers in interstate or foreign commerce, "only contracts of employment of *transportation* workers" in such commerce. *Circuit City Stores v. Adams,* 532 U.S. 105, 119 (2001) (emphasis added).

Second, state arbitration laws are not identical to the FAA. For example, they typically lack, in their equivalent to FAA Section 1, any exception for transportation workers. *See, e.g.,* CAL. CIV. PRO. § 1281.2 (West 2019) (no transportation worker exception); D.C. CODE § 16-4404 (2018) (same); MASS. GEN. LAW. ch. 251, § 1 (2018) (same); N.H. REV. STAT. ANN. § 542:1 (2018) (same); N.Y. CIV. PRAC. L. & R. § 7501 (McKinney 2019) (same); N.C. GEN. STAT. § 1-569.4 (2018) (same); R.I. GEN. LAWS § 10-3-2 (2018) (same). Nor does the FAA preempt such state laws just because they are different. As the Supreme Court noted in *Volt Information Sciences v. Board of Trustees*, "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." 489 U.S. 468, 477 (1989). As a result, state laws that uphold arbitration clauses—such as arbitration clauses in contracts with independent interstate truckers—that are excepted from FAA coverage ought not be preempted by the FAA, because they do not *disfavor* arbitration. *Cf., e.g., Marmet Health Care Ctr., Inc. v. Brown,* 565 U.S. 530, 533 (2012) (FAA preemption of state law disfavoring arbitration); *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011) (same); *Preston v. Ferrer*, 552 U.S. 346, 359, (2008) (same); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995) (same); *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (same).

Some litigants might try to avoid state law enforcement of arbitration clauses for transportation workers that the FAA will not enforce by arguing that the exception in Section 1 of the FAA was intended to ensure a courtroom forum for resolution of claims for such workers. *Cf. Southland Corp. v. Keating,* 465 U.S. 1, 10 (1984) (FAA preempts *state* laws that "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."). We think this would not be correct. There is simply no good basis for complete preemption of state arbitration statutes upholding arbitrations excluded from FAA coverage. *See Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 595-96 (3d Cir. 2004). *See also, e.g., Diaz v. Mich. Logistics Inc.*, 167 F. Supp. 3d 375, 380-81 (E.D.N.Y. 2016); *Valdes v. Swift Transp. Co.,* 292 F. Supp. 2d. 524, 530 (S.D.N.Y. 2003).

Background

Dominic Oliveira worked as a truck driver for the New Prime trucking company under a contract that specified the relationship between the parties was that "of carrier and independent contractor and not an employer/employee relationship." *Oliveira v. New Prime, Inc.*, 857 F.3d 7, 10 (1st Cir. 2017). The contract also required that any disputes arising out of the parties' relationship be resolved by an arbitrator, including any disputes concerning the scope of the arbitrator's authority. *Id.*

Mr. Oliveira, believing that his employer had failed to pay him and others like him the minimum wages required by state and federal law, filed a class action in the United States District Court for the District of Massachusetts. In doing so, he alleged that he was an "employee" of New Prime.

New Prime immediately sought to enforce an arbitration clause in an agreement with Mr. Oliveira by filing a motion to stay, pursuant to Section 3 of the FAA, and to compel arbitration, pursuant to Section 4 of the FAA. The District Court denied both motions. *Oliveira v. New Prime, Inc.*, 141 F. Supp. 3d 125 (D. Mass. 2015). New Prime appealed to the United States Court of Appeals for the First Circuit, which affirmed the lower court's ruling. *Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017). The First Circuit held that the District Court had correctly decided to address the threshold question of whether the FAA applied to Mr. Oliveira's contract, rather than delegating that question to an arbitrator. *Id.* at 15. The First Circuit also agreed that, because of the interstate

transportation exception to the FAA, the District Court lacked any power under the FAA to compel workers like Mr. Oliveira to arbitrate. *Id.* at 22-24. Undaunted, New Prime sought and obtained Supreme Court review.

The Supreme Court's decision

The Supreme Court unanimously affirmed the First Circuit. Justice Gorsuch wrote the opinion of the Court, Justice Kavanaugh recused himself, and Justice Ginsburg submitted a concurring opinion.

In reaching its decision, the Court addressed two questions: (1) "[w]hen a contract delegates questions of arbitrability to an arbitrator, must a court leave disputes over the application of [FAA] § 1's exception for the arbitrator to resolve?" and (2) "does the term 'contracts of employment' [in §1] refer only to contracts between employers and employees, or does it also reach contracts with independent contractors?" *New Prime, Inc.,* 2019 U.S. LEXIS 724, at *6. The answer to both questions was "no."[2]

On the first question, Justice Gorsuch "stressed the significance of the [FAA's] sequencing[,]" noting that "[Sections] 1 and 2 define the field in which Congress was legislating" and "§§ 3 and 4 apply only to contracts covered by those provisions." *New Prime, Inc.,* 2019 U.S. LEXIS 724, at *11 (internal quotations omitted). That is, the enforcement mechanisms in Sections 3 and 4 can only be applied with respect to arbitration agreements that are not excepted from the application of the FAA by Section 1 or 2. (Section 2 limits the FAA's application to arbitration agreements that are set forth as a "written provision in any maritime transaction or a contract evidencing a transaction involving commerce . . . ." 9 U.S.C.A. § 2 (West 2019).) Thus, "[g]iven the statute's terms and sequencing," the Court agreed with the First Circuit that a trial court "should decide for itself whether § 1's 'contracts of employment' exclusion applies before ordering arbitration. After all, to invoke its statutory powers under §§ 3 and 4 to stay litigation and compel arbitration . . . a court must first know whether the contract itself falls within or beyond the boundaries of §§ 1 and 2." *Id.*

On the second question, of what "contracts of employment" means in the Section 1 exception to the scope of the FAA, Justice Gorsuch used both statutory construction and history to reach the Court's result. As noted earlier, the Court had previously interpreted the phrase "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C.A. § 1, to apply only to interstate and international *transportation* workers, and Justice Gorsuch adhered to that position. *See New Prime, Inc.*, 2019 U.S. LEXIS 724, at *11. Next, he applied the canon of construction that "words generally should be interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute." *Id.* at *14 (quoting *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018), a case involving the 1937 Railroad Retirement Act (and quoting *Perrin v. United States,* 444 U.S. 37, 42 (1979)). He then sought to discern what "contract of employment" meant in 1925, when the FAA was enacted, concluding that "[a]t that time, a 'contract of employment' usually meant nothing more than an agreement to perform work." *New Prime, Inc.*, 2019 U.S. LEXIS 724, at *15. In addition, by 1925, Congress had "already prescribed alternative employment dispute resolution regimes for many transportation workers[,]" and "'did not wish to unsettle' those arrangements in favor of whatever arbitration procedures the parties' private contracts might happen to contemplate." *Id.* at *10 (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001)). Thus, Section 1 of the FAA was meant in 1925 to exclude from the FAA's reach all "contracts of

[2] Several Justices had questioned during oral argument whether it made a difference if the parties included a company contracting for services with another company, rather than with an individual worker. The Court's decision is silent on this. In this case, the independent contractor agreement was between New Prime and a limited liability company formed by Mr. Oliveira, so technically the issue remains undecided.

employment" of transportation workers—such as Mr. Oliveira—whether those workers were employees or independent contractors, *id.* at *21, and that interpretation means that Mr. Oliveira's agreement to arbitrate falls outside the FAA today as well, *id.* at *23.

While Justice Ginsburg joined in the judgment and in the Court's opinion, she submitted a separate concurrence. In it, she agreed that, ordinarily, the canon of statutory construction cited by Justice Gorsuch that focuses on "ordinary . . . meaning . . . at the time Congress enacted the statute" is an appropriate tool. *Id.* at *23-24. But she also noted that Congress can, and at times has, purposefully designed legislation to shift with "changing times and circumstances." *Id.* at *24 (citing the Sherman Act, the Securities Exchange Act, and the Racketeer Influenced and Corrupt Organizations Act as examples). *Id.* While not affecting the outcome in *New Prime, Inc.*, clearly Justice Ginsburg is trying to preserve arguments for a broader approach in other cases.

Conclusion

The Supreme Court's decision means that the FAA will not govern the enforceability of arbitration agreements for transportation workers in interstate or foreign commerce. But it does not exclude the application of state law for the same purpose. Every state has an arbitration act that can be applied to seek to enforce written arbitration clauses with such transportation workers (although not always successfully, *see, e.g., Owner-Operator Indep. Drivers Ass'n v. C.R. England, Inc.,* 325 F. Supp. 2d 1252, 1258–59 (D. Utah 2004) (refusing to enforce arbitration agreement in transportation employment contract under Utah law)).

Unfortunately, this means that businesses must reassess their current arbitration clauses applicable to such workers. And there is a further catch: it may also be important to review such clauses in tandem with choice of law clauses to determine whether the parties may have selected *only* federal law to govern this question. While parties can opt out of the FAA with contract language demonstrating a clear intent to do so, *see, e.g., Oberwager v. McKechnie Ltd.,* 351 F. App'x 708, 711 (3d Cir. 2009); *Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 131 (2d Cir. 1997), and while the Supreme Court has also said the choice of state law in a general choice-of-law clause simply defines the substantive law to be applied to a case without necessarily displacing the FAA, *Mastrobuono,* 514 U.S. at 63-64; *see Smith Barney Shearson Inc. v. Sacharow*, 689 N.E.2d 884, 889 (N.Y. 1997), it is often less clear what happens if the clause in question is silent on the application of state arbitration law in the absence of applicable federal law. *But see, e.g., Kauffman v. U-Haul Int'l, Inc.,* No. 5:16-cv-04580, 2018 U.S. Dist. LEXIS 145717, at *13 (E.D. Pa. Aug. 28, 2018) ("despite the absence of a state law contingency provision, the arbitration clause may be enforced under Pennsylvania law" even though it could not be enforced because of Section 1 of the FAA).

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