

**ARBITRATING ISSUES YOU MIGHT NOT HAVE AGREED TO:  
*RENT-A-CENTER, WEST, INC. v. JACKSON***

*Carlo Marichal\**

**I. INTRODUCTION**

Parties agree to arbitration because disputes are resolved quickly and are cheaper than litigation in the courtroom.<sup>1</sup> Arbitration is cheaper because the rules of evidence are not strictly enforced during discovery and is quicker because the arbitrator conducts an informal hearing to evaluate the evidence and renders a binding decision.<sup>2</sup> However, arbitration remains controversial in the nonunion context because there is an unequal bargaining power between employer and employee.<sup>3</sup> In addition, it remains controversial because employers are forcing employees to arbitrate issues, such as employment discrimination, pursuant to a nonnegotiable arbitration agreement conditioned on employment.<sup>4</sup>

The Federal Arbitration Act (FAA) provides that agreements to arbitrate disputes “arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>5</sup> Congress enacted the FAA to avoid the expensive delays of litigation and to place arbitration agreements on the same ground as other contracts.<sup>6</sup> Courts are required to enforce arbitration agreements according to their terms so long as general contract defenses do not invalidate the agreement and when there is clear and unmistakable evidence the parties agreed to arbitrate the issue in dispute.<sup>7</sup>

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<sup>1</sup> See STEVEN L. WILLBORN ET AL., *EMPLOYMENT LAW: CASES AND MATERIALS* 1137 (4th ed. 2007).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 1138.

<sup>4</sup> *Id.*

<sup>5</sup> 9 U.S.C. § 2 (2006).

<sup>6</sup> *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974).

<sup>7</sup> See *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *Doctor’s*

One of the general contract defenses is unconscionability.<sup>8</sup> Unconscionability is a defense used against enforceability of a contract when there is a gross inequality of bargaining power between the parties, together with terms unreasonably favorable to the party with the higher bargaining power, leaving the weaker party with no meaningful choice.<sup>9</sup> When a court determines an arbitration clause to be unconscionable, the court can sever it from the entire contract.<sup>10</sup> Courts prefer to sever the clause rather than void the entire contract to prevent one party from gaining an undeserved benefit at the other party's expense and to preserve the contractual relationship.<sup>11</sup> However, when a court decides that the unconscionable clause is the central purpose of the contract, the entire contract is void.<sup>12</sup>

The recent U.S. Supreme Court case of *Rent-A-Center, West, Inc. v. Jackson* attempted to resolve the issue of whether, under the FAA, a district court may decide a claim that an arbitration agreement is unconscionable where the agreement expressly states that the arbitrator is to decide issues of enforceability.<sup>13</sup> This Note will discuss the majority's analysis and how it interpreted precedent to reach its decision.<sup>14</sup> Further, this Note will discuss the minority's rationale for believing it was the Court's duty to determine the contract's enforceability.<sup>15</sup> Lastly, this Note will present how the case should have turned out and why the majority came to the wrong conclusion.<sup>16</sup>

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*Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)); *see also* *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (quoting *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986)).

<sup>8</sup> *Doctor's Assocs., Inc.*, 517 U.S. at 687.

<sup>9</sup> RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1978).

<sup>10</sup> *See Buckeye*, 546 U.S. at 445.

<sup>11</sup> *See Nash v. Taylor*, 327 F. App'x 718, 720 (9th Cir. 2009) (holding that severing a clause to a contract would preserve the parties' contractual relationship); *see also Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 985 (Cal. 2003) (reasoning that severing a clause to a contract can conserve the contractual relationship absent illegality).

<sup>12</sup> *See Little*, 63 P.3d at 986; *see also Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019, 1024 (Fla. Dist. Ct. App. 2005) (holding that a contractual provision is severable so long as it is not the central purpose of the agreement).

<sup>13</sup> *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2775 (2010).

<sup>14</sup> *See infra* Part III.A-C.

<sup>15</sup> *See infra* Part III.D.

<sup>16</sup> *See infra* Part IV.

## II. FACTUAL AND PROCEDURAL BACKGROUND

Rent-A-Center, West, Inc. (Rent-A-Center) hired Antonio Jackson (Jackson), an African American, in 2004 on the condition that Jackson agreed to an arbitration agreement (agreement).<sup>17</sup> The agreement provided for arbitration of all disputes arising out of Jackson's employment, including discrimination claims, and gave exclusive authority to an arbitrator to resolve any dispute relating to the enforceability of the agreement.<sup>18</sup>

Jackson worked for Rent-A-Center for some time and later sought a promotion multiple times, but Rent-A-Center instead promoted non-African-Americans with less seniority for no apparent reason.<sup>19</sup> Rent-A-Center eventually promoted Jackson after he complained to several managers and to the human resources office.<sup>20</sup> Rent-A-Center quickly terminated Jackson, without cause, two months after the promotion.<sup>21</sup>

In 2007, Jackson filed an employment discrimination suit in the United States District Court for the District of Nevada.<sup>22</sup> Rent-A-Center filed a motion to dismiss or stay the proceedings pursuant to section 3 of the FAA and to compel arbitration citing section 4 of the FAA.<sup>23</sup>

Rent-A-Center argued that the agreement's terms granted the arbitrator the sole authority to resolve issues resulting from Jackson's employment, and that the mutual agreement barred Jackson from pursuing his claim in district court.<sup>24</sup> Jackson insisted the district court had juris-

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<sup>17</sup> Brief for the Petitioner at 1, 4, *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010) (No. 09-497), 2010 WL 711185, at \*1, 4.

<sup>18</sup> *Rent-A-Center*, 130 S. Ct. at 2777.

<sup>19</sup> Brief for the Respondent at 1, *Rent-A-Center*, 130 S. Ct. 2772 (No. 09-497), 2010 WL 1186482.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Rent-A-Center*, 130 S. Ct. at 2775.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

diction because the contract was unconscionable and unenforceable under Nevada law.<sup>25</sup>

The district court granted Rent-A-Center's motion to dismiss and to compel arbitration.<sup>26</sup> The district court held the agreement clearly gave the arbitrator "exclusive authority to decide whether the [a]greement is enforceable," and reasoned that Jackson failed to challenge the enforceability of the clause delegating the duty to the arbitrator.<sup>27</sup> The district court failed to address Jackson's substantive and procedural unconscionability arguments and only noted that it would have rejected Jackson's argument that the provision requiring the parties to share the cost of arbitration was unconscionable under Nevada law.<sup>28</sup> Jackson timely appealed to the Ninth Circuit Court of Appeals.<sup>29</sup>

The Ninth Circuit, without oral argument, reversed in part and affirmed in part.<sup>30</sup> It reversed the question of whether the court or the arbitrator had the authority to decide the agreement's enforceability<sup>31</sup> and held that when a party challenges an arbitration agreement as unconscionable, it is the court's duty to decide whether the party meaningfully assented to the agreement.<sup>32</sup> The Ninth Circuit also upheld the district court's finding that the split-fee provision was not substantively unconscionable and remanded so the district court could hear Jackson's other unconscionability arguments.<sup>33</sup> Judge Hall dissented, believing it

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<sup>25</sup> *Id.* at 2780.

<sup>26</sup> *Id.* at 2775 (holding the agreement clearly gave the arbitrator authority to decide enforceability of the contract).

<sup>27</sup> *Id.* at 2775-76.

<sup>28</sup> *Id.* at 2776. Under Nevada law, a clause is procedurally unconscionable when there is a gross imbalance of bargaining power, such as in contracts of adhesion. *D.R. Horton, Inc. v. Green*, 96 P.3d 1159, 1162 (Nev. 2004). A contractual provision is substantively unconscionable if the benefits that flow from the contract are grossly disproportionate; however, when there is excess evidence of procedural unconscionability, less evidence of substantive unconscionability is required. *Id.* at 1162-63.

<sup>29</sup> *See Rent-A-Center*, 130 S. Ct. at 2776.

<sup>30</sup> *Id.* (noting that Jackson failed to argue that the agreement did not authorize the arbitrator to decide the issue of arbitrability).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* Jackson unsuccessfully argued that the clauses requiring him to split the arbitration fees were unconscionable. *Jackson v. Rent-A-Center W., Inc.*, 581 F.3d

was the arbitrator's duty to decide the enforceability of the agreement because both parties clearly and unmistakably agreed to it.<sup>34</sup> The U.S. Supreme Court granted certiorari, and Justice Scalia, in a five-to-four decision, wrote the opinion for the majority.<sup>35</sup>

### III. ANALYSIS

#### A. *The Clear and Unmistakable Standard*

The general rule is that an arbitration agreement is a contract susceptible to judicial determination of its enforceability, and federal policy favors arbitration in the event the agreement is ambiguous as to whether the specific dispute is subject to arbitration.<sup>36</sup> If the parties clearly and unmistakably agreed to arbitrate the dispute in question, the contract precludes judicial determination.<sup>37</sup> The policy behind the clear and unmistakable standard is that courts should be hesitant to force parties to arbitrate when the agreement is silent or ambiguous as to arbitrability because forcing arbitration would deprive parties of their right to judicial enforcement.<sup>38</sup>

Courts apply the clear and unmistakable standard when they have to decide whether a party has agreed that arbitrators should decide arbitrability.<sup>39</sup> In that instance, courts require clear and unmistakable evidence that the parties agreed to arbitrability of that issue before sub-

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912, 919 (9th Cir. 2009). The Ninth Circuit remanded to the district court Jackson's two remaining arguments: the discovery procedures and the claim coverage were both substantively unconscionable. *Id.* at 920.

<sup>34</sup> *Jackson*, 581 F.3d at 921 (Hall, J., dissenting).

<sup>35</sup> *Rent-A-Center*, 130 S. Ct. at 2774.

<sup>36</sup> *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 83-84; *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995).

<sup>39</sup> *See AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986) (holding that the question of arbitrability is an issue for judicial determination unless there is clear and unmistakable evidence providing otherwise); *see also First Options of Chi., Inc.*, 514 U.S. at 944 (requiring courts to be satisfied that there is clear and unmistakable evidence that the parties agreed to arbitrate arbitrability before submitting the issue to the arbitrator).

mitting the issue to the arbitrator.<sup>40</sup> However, courts apply a less stringent standard when the question is “whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement.”<sup>41</sup> The less stringent standard presumes that the parties agreed to arbitrate that particular issue and requires courts to compel arbitration.<sup>42</sup>

Jackson conceded that he clearly and unmistakably agreed to arbitrate, but what he argued was that “it is not ‘clear and unmistakable’ that his agreement” to arbitrate was valid because it was unconscionable.<sup>43</sup> The majority, however, rejected Jackson’s argument and held Jackson misapplied the clear and unmistakable standard.<sup>44</sup> The Court cited *Howsam v. Dean Witter Reynolds, Inc.* and focused on the intent of the parties, holding that courts should use the clear and unmistakable standard as an interpretive tool to decide whether the parties would have generally thought the issue was for judicial determination.<sup>45</sup> In striking Jackson’s argument, the majority concluded that Jackson did not have to show that the agreement’s lack of unconscionability had to be clear and unmistakable in order for a court to decide its enforceability; rather, the actual intent to arbitrate the dispute had to be clear and unmistakable.<sup>46</sup>

### ***B. The Pleading Standard***

The majority prescribed two ways litigators can challenge the validity of arbitration agreements under section 2 of the FAA.<sup>47</sup> One

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<sup>40</sup> See *First Options of Chi., Inc.*, 514 U.S. at 944 (holding courts should not assume that parties agreed to arbitrate the issue at hand unless there is clear and unmistakable evidence to the contrary).

<sup>41</sup> *Id.* at 944-45 (emphasis omitted).

<sup>42</sup> See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (holding that when there is a question concerning whether the arbitration agreement covers the issue at hand, it should be resolved in favor of arbitration).

<sup>43</sup> *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2777 n.1 (2010) (emphasis omitted).

<sup>44</sup> *Id.* (holding that clear and unmistakable does not refer to the contract’s validity, but it refers to the parties’ manifestation of intent).

<sup>45</sup> *Id.* (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 2778.

way is to challenge the delegation clause or specific provision to arbitrate, and the other way is to challenge the agreement as a whole.<sup>48</sup> One may challenge the latter either “on a ground that directly affects the entire agreement . . . or on the ground that the illegality of one of the contract’s provisions renders the whole contract invalid.”<sup>49</sup> The majority held that only a challenge to a specific provision in an arbitration agreement gives a court, not an arbitrator, jurisdiction to determine the arbitration’s enforceability.<sup>50</sup> The majority relied on *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, *Buckeye Check Cashing, Inc. v. Cardegna*, and *Preston v. Ferrer* to decide what type of challenge was present in Jackson’s case.<sup>51</sup>

In *Prima Paint*, there was an agreement to transfer assets from one company to another, and it provided that the transferring party would consult, advise, and assist the other in return for a share of the profits.<sup>52</sup> In the contract, there was a provision to arbitrate “[a]ny controversy or claim arising out of or relating to [the] [a]greement.”<sup>53</sup> The plaintiff sought to rescind the contract in district court on grounds of fraudulent inducement, but did not specifically claim that the defendant fraudulently induced the plaintiff into agreeing to arbitrate.<sup>54</sup> The Court

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<sup>48</sup> *Id.* Here, the delegation provision read as follows:

The Arbitrator, and not any federal, state, or local court or agency, shall have *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.

Brief for the Petitioner, *supra* note 17, at 4-5.

<sup>49</sup> *Rent-A-Center*, 130 S. Ct. at 2778 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006)); *see also* *Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019, 1024 (Fla. Dist. Ct. App. 2005) (“As a general rule, contractual provisions are severable, where the illegal portion of the contract does not go to its essence, and, with the illegal portion eliminated, there remain valid legal obligations.”).

<sup>50</sup> *Rent-A-Center*, 130 S. Ct. at 2778.

<sup>51</sup> *Id.*

<sup>52</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 397 (1967). *Prima Paint* agreed to purchase Flood & Conklin Manufacturing’s paint business, and in exchange, Flood & Conklin agreed to consult *Prima Paint*, refrain from competing, and receive a percent of the receipts. *Id.*

<sup>53</sup> *Id.* at 398.

<sup>54</sup> *Id.* at 399 (finding *Prima Paint*’s argument that Flood & Conklin fraudulently induced *Prima Paint* to enter into the contract under the belief the business was

ultimately held that it would have considered the issue of enforceability if the claim of fraudulent inducement was directed at the arbitration clause itself, and that “a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.”<sup>55</sup>

*Buckeye* involved a class action suit in state court, wherein the plaintiffs alleged that the contract as a whole was facially criminal and invalid because the central purpose of the contract, interest rates, violated state laws.<sup>56</sup> The Court, however, held the issue was for an arbitrator, because the plaintiffs did not specifically challenge the arbitration clause and only relied on the fact that the contract was invalid under state law.<sup>57</sup> The Court also noted it had previously held that the FAA not only extends to federal arbitration law, but applies to state law as well.<sup>58</sup> This means that if there is a contract dispute in state court and the contract includes an arbitration clause, the FAA preempts the state court from determining the agreement’s enforceability.<sup>59</sup>

The Court in *Buckeye* also struck down the argument that the FAA assumed the validity of the contract before referring the parties to an arbitrator.<sup>60</sup> The Court reasoned that the final clause of the FAA used the word “contract,” and its use of the word included “contracts that later prove to be void.”<sup>61</sup> The Court further held Congress did not intend the word contract to mean a valid contract in the FAA context and relied on other statutes that refer to agreements, including illegal ones.<sup>62</sup>

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solvent, when in fact, the business was insolvent, was not aimed at the delegation clause).

<sup>55</sup> *Id.* at 403-04.

<sup>56</sup> *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). The respondents entered into a deferred-payments transaction with Buckeye in which the respondents would receive cash in exchange for a personal check in the same amount plus an illegal interest charge. *Id.* at 442-43.

<sup>57</sup> *Id.* at 443.

<sup>58</sup> *See id.* at 448-49.

<sup>59</sup> *See id.* at 445 (“We rejected the view that the question of ‘severability’ was one of state law, so that if state law held the arbitration provision not to be severable a challenge to the contract as a whole would be decided by the court.”).

<sup>60</sup> *Id.* at 447-48.

<sup>61</sup> *Id.* at 448.

<sup>62</sup> *Id.* at n.3 (citing 15 U.S.C. § 1 (2006)).



*Preston* involved a personal management agreement; the agreement included provisions for compensation, authorizations, extensions of services, and arbitration.<sup>63</sup> One party alleged a California law, requiring talent agents to attain a license, rendered the contract void and unenforceable.<sup>64</sup> The issue was whether the FAA preempted the state law granting primary jurisdiction to another forum other than the arbitrator.<sup>65</sup> The Court held that the FAA did,<sup>66</sup> and it reaffirmed the rule that the policy favoring arbitration applies in state and federal courts.<sup>67</sup> The Court further held that the FAA preempts any state legislative action that attempts to undermine an arbitration agreement's enforceability.<sup>68</sup>

The majority in *Rent-A-Center* noted the agreement at issue differed from the precedent in that it was not part of a greater contract, but was itself an arbitration agreement.<sup>69</sup> The majority, however, held that it made no difference whether the arbitration provision was part of a greater contract and that the "rule does not depend on the substance of the remainder of the contract."<sup>70</sup> Justice Scalia ultimately concluded the failure to challenge the specific delegation provision was fatal to Jackson's case and that the Court had to enforce the provision under the FAA.<sup>71</sup>

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<sup>63</sup> Joint Appendix at 8-18, *Preston v. Ferrer*, 552 U.S. 346 (2008) (No. 06-1463), 2007 WL 3276515.

<sup>64</sup> *Preston v. Ferrer*, 552 U.S. 346, 350 (2008). Ferrer is a former Florida trial court judge who currently appears as Judge Alex on a television show. *Id.* *Preston*, an entertainment attorney, sought fees allegedly due under the management contract. *Id.*

<sup>65</sup> *Id.* at 349.

<sup>66</sup> *Id.* at 349-50 ("[W]hen parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA.").

<sup>67</sup> *Id.* at 353.

<sup>68</sup> *Id.*

<sup>69</sup> *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2779 (2010) (differentiating from *Prima Paint*, *Buckeye*, and *Preston*).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* (holding that, due to Jackson's failure to challenge the specific delegation clause, the agreement is valid under section 2 of the FAA).

### C. Jackson's Unconscionability Argument and the Delegation Provision

Justice Scalia supported the district court's conclusion that Jackson failed to challenge the delegation provision and only challenged the contract as a whole.<sup>72</sup> The majority, however, reviewed the unconscionability claims to determine whether Jackson challenged the arbitration provision at all.<sup>73</sup>

The majority held that Jackson's procedural unconscionability argument did not attack the delegation provision, and it reviewed the substantive claims.<sup>74</sup> First, Jackson argued that the agreement was so one-sided that it only required arbitration for disputes that the employee would likely bring as opposed to the employer; the Court held that this argument did not attack the delegation provision.<sup>75</sup> Second, Jackson challenged the arbitration procedures that included the rules for discovery and the fee arrangement; these procedures applied to the delegation provision and to the disputes provision.<sup>76</sup> The majority, however, held Jackson's greatest flaw was that he failed to challenge the delegation provision by arguing the "common procedures *as applied* to the delegation provision rendered *that provision* unconscionable."<sup>77</sup>

The Court ultimately held that Jackson failed to make any arguments specific to the delegation provision but noted that, had Jackson argued the as-applied approach, the Court would have had jurisdiction

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<sup>72</sup> *Id.*

<sup>73</sup> *See id.* at 2779-81.

<sup>74</sup> *Id.* at 2780.

<sup>75</sup> *Id.* Some potential claims Jackson would be required to bring against the employer through arbitration, Jackson argued, would include tort claims, discrimination, or harassment based on sex, race, and disability. *Id.* However, the agreement would allow Rent-A-Center to circumvent arbitration and litigate claims, such as unauthorized disclosure of trade secrets, in court. Brief for the Respondent, *supra* note 19, at 2.

<sup>76</sup> *Rent-A-Center*, 130 S. Ct. at 2780. The discovery provisions had a limit of two depositions, and Jackson conceded that more depositions would be necessary to obtain evidence required for a discrimination claim. Brief for the Respondent, *supra* note 19, at 4.

<sup>77</sup> *Rent-A-Center*, 130 S. Ct. at 2780.

to determine the agreement's validity.<sup>78</sup> The majority noted that it would have been difficult to sustain an argument challenging the delegation provision on grounds that it was unconscionable without arguing the entire agreement was unconscionable.<sup>79</sup>

Jackson challenged the delegation provision in his brief to the Supreme Court.<sup>80</sup> He argued the delegation provision was unconscionable because he no longer had postarbitration judicial review pursuant to the Court's holding in a subsequent case.<sup>81</sup> However, the majority did not consider the argument because Jackson failed to supplement his brief to the Ninth Circuit during the year-and-a-half gap between the Court's decision of *Hall Street Associates, L.L.C. v. Mattel, Inc.* and the Ninth Circuit's judgment.<sup>82</sup>

The majority concluded that Jackson misapplied the clear and unmistakable standard when he argued the agreement was unconscionable.<sup>83</sup> The Court further reasoned that Jackson failed to challenge the specific delegation provision.<sup>84</sup> Finally, the majority noted that none of Jackson's unconscionability claims applied to the specific delegation provision.<sup>85</sup> The Court, in a decision that slightly tipped the scale to one side, ultimately held the issue of enforceability was for the arbitrator to decide and reversed the Ninth Circuit's decision.<sup>86</sup>

#### ***D. The Dissent's Opinion***

Justice Stevens led the dissent and criticized the majority's holding because it required that "[e]ven when a litigant has specifically challenged the validity of an agreement to arbitrate[,] he must submit that challenge to the arbitrator unless he has lodged an objection to the par-

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<sup>78</sup> *Id.* (finding Jackson failed to argue that the clause limiting the number of depositions rendered the agreement to arbitrate his claim unconscionable).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 2781.

<sup>81</sup> *Id.* (citing *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008)).

<sup>82</sup> *Id.* at 2781 n.5.

<sup>83</sup> *Id.* at 2777 n.1.

<sup>84</sup> *Id.* at 2779.

<sup>85</sup> *Id.* at 2780.

<sup>86</sup> *Id.* at 2781.

ticular line in the agreement that” delegates the duty to the arbitrator.<sup>87</sup> The dissent further argued that the subject matter of the arbitration agreement “makes all the difference in the *Prima Paint* analysis,”<sup>88</sup> thereby contradicting the majority’s conclusion that the “rule does not depend on the substance of the remainder of the contract.”<sup>89</sup> The dissent found it bizarre to send gateway issues, such as arbitrability and enforceability of an arbitration clause, to an arbitrator when they are subject to judicial review.<sup>90</sup>

The dissent focused on the plain reading of section 2 of the FAA that states arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>91</sup> Further, section 3 of the FAA requires a court to be satisfied that the agreement is enforceable before referring the parties to arbitration.<sup>92</sup> Based on a plain reading of the statute, Justice Stevens argued, a court must determine whether the contract or arbitration provision is valid and enforceable before it refers the parties to arbitration.<sup>93</sup>

Additionally, the dissent agreed that courts may vest an arbitrator with the duty to decide whether an arbitration agreement is unconscionable only in some circumstances, including when there is clear and unmistakable evidence that the parties intended to arbitrate the validity of the agreement.<sup>94</sup> However, it is still the court’s duty, the dissent argued, to determine whether the parties clearly and unmistakably intended to arbitrate the gateway issue of enforceability of the agreement before submitting the issue to the arbitrator.<sup>95</sup>

According to Justice Steven’s dissent, Jackson’s claim of unconscionability clearly and unmistakably evidenced he did not intend for an

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<sup>87</sup> *Id.* (Stevens, J., dissenting) (emphasis omitted).

<sup>88</sup> *Id.* (emphasis omitted).

<sup>89</sup> *Id.* at 2779 (majority opinion).

<sup>90</sup> *Id.* at 2782 (Stevens, J., dissenting).

<sup>91</sup> *Id.* (quoting 9 U.S.C. § 2 (2006)).

<sup>92</sup> *Id.* at 2783 n.2 (quoting 9 U.S.C. § 3 (2006)).

<sup>93</sup> *See id.* at 2784 (“[Q]uestions related to the validity of an arbitration agreement are usually matters for a court to resolve before it refers a dispute to arbitration.”).

<sup>94</sup> *Id.* at 2784.

<sup>95</sup> *Id.*

arbitrator to decide the agreement's validity; the underlying principle of unconscionability is that the party could not meaningfully assent to the terms of the agreement.<sup>96</sup> The dissent believed that, in determining whether the parties agreed to arbitrate a gateway issue, courts "should apply ordinary state-law principles that govern the formation of contracts."<sup>97</sup> The dissent noted that when a party challenges an arbitration agreement in good faith, courts must consider the challenge before sending it to the arbitrator.<sup>98</sup> The dissent believed that, if the agreement was unconscionable, it would be counterintuitive to send the issue of arbitrability to the arbitrator because Jackson clearly and unmistakably did not agree to arbitrate the validity of the agreement.<sup>99</sup> Therefore, the district court should have considered the unconscionability claim to decide whether there was a valid arbitration agreement before referring the issue to the arbitrator.<sup>100</sup>

Furthermore, the dissent agreed that an individual must challenge the arbitration provision of a greater contract to receive judicial determination of an agreement's validity.<sup>101</sup> However, the dissent criticized the Court's holding as a narrow reading of *Prima Paint* and stated "[c]ourts may now pluck from a potentially invalid arbitration agreement even narrower provisions that refer particular arbitrability disputes to an arbitrator."<sup>102</sup> Justice Stevens argued that a challenge to an arbitration agreement on the grounds of unconscionability attacks the formation of the arbitration agreement, thereby satisfying the clear and unmistakable standard.<sup>103</sup> The dissent further argued any challenge to an arbitration agreement is the same as challenging the arbitration clause in a contract with a greater underlying purpose.<sup>104</sup>

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<sup>96</sup> *Id.* at 2784-85.

<sup>97</sup> *Id.* at 2783 (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

<sup>98</sup> *Id.* at 2785.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 2786.

<sup>102</sup> *Id.* (emphasis omitted).

<sup>103</sup> *Id.* at 2785 (finding a court must solve disputes relating to the validity of an agreement before it can declare whether the parties clearly and unmistakably intended to arbitrate the validity of the arbitration agreement).

<sup>104</sup> *Id.* at 2786-87 ("[B]ecause we are dealing . . . with a challenge to an independently executed arbitration agreement—rather than a clause contained in a contract related to

Justice Stevens concluded by differentiating *Prima Paint* and *Buckeye* from the case at hand by noting that, in those cases, the courts would ultimately have decided the underlying merits in the dispute in an effort to decide whether the arbitration agreement was valid.<sup>105</sup> In *Rent-A-Center*, however, the issue was employment discrimination, and a preliminary review of the unconscionability challenge would only decide whether the court had jurisdiction to decide its validity and not the merits of the case.<sup>106</sup>

#### IV. COMMENT

The majority missed the big picture when it decided *Rent-A-Center*. A plain reading of the FAA would lead one to believe Congress intended arbitrators to resolve disputes so long as the agreement to arbitrate is valid,<sup>107</sup> and a court should not compel arbitration until the court is satisfied the parties formed the requisite intent to enter a valid agreement.<sup>108</sup> After all, the arbitrator's job is to resolve factual disputes regarding an enforceable agreement.<sup>109</sup>

In applying the clear and unmistakable standard, the Court focused on the intent of the parties.<sup>110</sup> Does it not follow that a party cannot form the requisite intent if he had no meaningful choice?<sup>111</sup> By challenging an agreement to arbitrate on grounds of unconscionability, one can infer that the challenging party did not clearly and unmistakably manifest the intent to arbitrate.

Justice Scalia's reliance on *Prima Paint* and *Buckeye* was misplaced. Those cases involved an arbitration provision in a contract deal-

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another subject matter—any challenge to the contract itself is also, necessarily, a challenge to the arbitration agreement.”).

<sup>105</sup> *Id.* at 2788.

<sup>106</sup> *Id.*

<sup>107</sup> See 9 U.S.C. § 2 (2006) (requiring an agreement to arbitrate be valid unless there are grounds that exist at law or in equity for revocation of the contract).

<sup>108</sup> See 9 U.S.C. § 3 (2006) (requiring courts to refer matters to arbitration only after the court is satisfied the issue is, in fact, referable to arbitration).

<sup>109</sup> *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 407 (1967) (Black, J., dissenting).

<sup>110</sup> *Rent-A-Center*, 130 S. Ct. at 2778 (majority opinion).

<sup>111</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1978).

ing with the sale of a business and interest rates respectively.<sup>112</sup> In *Rent-A-Center*, however, the contract's underlying purpose was arbitration, the very thing that Jackson failed to assent to.<sup>113</sup> Requiring a litigant to challenge a specific line within a specific arbitration agreement is superfluous. All *Prima Paint* required was a challenge to the formation of the agreement to arbitrate—nowhere in the case did it require a challenge to a specific line within the agreement to arbitrate.<sup>114</sup> Therefore, Jackson challenged the formation of the arbitration agreement when he claimed it was unconscionable.<sup>115</sup>

How can one challenge an arbitration provision in an arbitration agreement? Justice Scalia avoided this question and failed to provide litigators with any options to challenge a delegation provision, other than unconscionability.<sup>116</sup> The Court even noted that a successful challenge to the delegation provision would be more difficult to establish without arguing it affected the entire agreement.<sup>117</sup> It seems as though the Court purposefully left litigators in the dark in terms of providing ways to successfully challenge an arbitration agreement so that a court, not an arbitrator, can determine its enforceability.

Maybe the reason for the misinterpretation of this case is that the FAA is not clear as to whether the contract must be valid before it reaches an arbitrator. The issue of predispute arbitration has received much attention in Congress.<sup>118</sup> Members of Congress are attempting to enforce a stricter review on arbitration agreements in the employment context.<sup>119</sup> Moreover, a proposed amendment to the FAA seeks to prohibit the enforcement of arbitration provisions in agreements concerning employment and civil rights issues, but it allows the parties to arbitrate

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<sup>112</sup> See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 442 (2006); *Prima Paint*, 388 U.S. at 397-98 (majority opinion).

<sup>113</sup> *Rent-A-Center*, 130 S. Ct. at 2775.

<sup>114</sup> *Prima Paint*, 388 U.S. at 403-04.

<sup>115</sup> *Rent-A-Center*, 130 S. Ct. at 2775-76.

<sup>116</sup> See *id.* at 2780-81.

<sup>117</sup> See *id.*

<sup>118</sup> See Paul F. McCurdy & James M. Moriarty, *Arbitrator or Judge: Who Decides?*, 244 N.Y. L.J. 2 (2010) (discussing Justice Kagan's remarks to Congress, reminding its members that they have the authority to prohibit mandatory arbitration).

<sup>119</sup> *Id.* (noting the amendments of statutes prohibiting enforcement of arbitration provisions in employment contracts).

after the dispute has arisen if the parties agree.<sup>120</sup> In addition, the proposed version of the FAA would give courts the sole authority to decide any dispute that concerns the validity of an arbitration agreement.<sup>121</sup>

In sum, the Court failed to take into account that the underlying issue of the agreement was arbitration and that the Court would not have had to consider the merits of the case as it would have with the previous cases cited. Furthermore, the Court placed a higher burden on litigators by requiring them to go above and beyond what *Prima Paint* required. Employees deserve greater protection, especially in this economy where employment is scarce. The Court essentially gave employers the incentive to require arbitration for all issues, including discrimination and tort liability; this essentially precludes the employee from seeking redress from the courts. Employment contracts will be the next form of adhesion contracts unless Congress reconvenes to fix this issue.

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<sup>120</sup> *Id.* (referring to the Arbitration Fairness Act of 2009).

<sup>121</sup> *Id.*