“NEW PRIME” AND THE VIABILITY OF STATE ARBITRATION ACTS

by Lise Gelernter, Teaching Faculty, University at Buffalo School of Law; Member NAA

In the New Prime decision, the Court was silent on the issue of the applicability of state arbitration acts to Federal Arbitration Act (FAA)-exempt arbitration agreements. Even though the Supreme Court confirmed that New Prime could not enforce its arbitration agreement under the FAA, it did not even mention the existence of state arbitration statutes that might allow for enforcement of the agreement. At least in the lower court decision that New Prime had appealed, the First Circuit Court of Appeals noted the possibility of state law enforcement by stating: “We emphasize that our holding is limited: It applies only when arbitration is sought under the FAA, and it has no impact on other avenues (such as state law) by which a party may compel arbitration.” Oliveira v. New Prime, Inc, 857 F.3d 7, 24, reh’g and reh’g en banc denied (1st Cir. 2017).

Many states have arbitration enforcement statutes which do not exempt employment contracts of any type and which allow for state courts to compel enforcement of arbitration agreements. See e.g.: Ca. Code Civ. Proc. §§ 1281, 1281.2 (2018); NY CPLR §§ 7501-7503 (2018); Revised Uniform Arbitration Act §§ 6, 7 (https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=cf35cea8-4434-0d6b-408d-756f961489af&forceDialog=0) (2000) (21 states have adopted the RUAA). The open question, as Imre Salzai noted, is whether those state statutes can be used to enforce arbitration clauses in the “contracts of employment” that are exempt from the FAA, or would the FAA preempt those state statutes?

The Supreme Court takes an expansive view of the reach of the FAA’s preemption power. In AT&T Mobility v. Concepción, the Supreme Court held that the FAA preempted the California Discover Bank rule, a California state law doctrine that provided that contractual waivers of the right to bring class actions were unconscionable. 563 U.S. 333 (2011). Because the Discover Bank rule stood “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” the Court found that the FAA preempted it.

It is not clear, however, that the same preemption rationale would apply to state arbitration law coverage. In the AT&T Mobility case, the Court was concerned that the Discover Bank rule would thwart the enforcement of arbitration agreements and contravene the “liberal federal policy of favoring arbitration.” 563 U.S. at 339, quoting Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (https://supreme.justia.com/cases/federal/us/460/1/). In
contrast, state laws that permit more arbitration than federal law by enforcing arbitration agreements in all “contracts of employment,” would not interfere with the federal policy of promoting arbitration. That was the Third Circuit Court of Appeals’ rationale in a pre-AT&T Mobility case, in which it held that the FAA did not preempt the enforcement of an arbitration agreement pursuant to Washington state’s arbitration law in a case involving an employee who was FAA-exempt but who was not exempt from the Washington arbitration law. Polcko v. Airborne Express, 372 F.3d 588, 596 (3rd Cir. 2004); see also Valdes v. Swift Transp. Co., 292 F.Supp.2d 524, 529 (S.D.N.Y. 2003) (FAA does not preempt enforcement under New York arbitration law for FAA-exempt employee).

Alternatively, however, the FAA exemption for “seamen, railroad employees” and other transportation workers could be viewed as establishing an additional federal policy of not enforcing arbitration agreements for particular workers that should have a preemptive effect. After all, if the FAA § 1 exemption did not preempt more expansive state laws, that would subject arbitration agreements in “contracts of employment of seamen, railroad employees . . .” to state law enforcement. But that would not be consistent with Congress’ adoption of specialized liability and labor relations statutes for seamen and railroad employees (the Jones Act, 46 U.S.C. Appx. § 688, and the Railway Labor Act, 45 U.S.C. §§ 151 et. seq.) which generally do preempt state law. Although there are no specialized liability or labor laws for the “other class of workers engaged in foreign or interstate commerce” who are FAA-exempt, there is not an obvious rationale for treating them differently from the “seamen, railroad employees” group for purposes of resolving preemption issues.

The preemption conundrum brings into sharper focus the many anomalous results of the Supreme Court’s decision in Circuit City v. Adams, 532 U.S. 105 (2001), in which it ruled that the FAA § 1 exemption applied only to employment contracts of seamen, railroad employees and other transportation workers rather than to all employment contracts in general. As Rick Bales points out, the question of who is a FAA-exempt transportation worker has led to a splitting of hairs over the types of things an exempt worker must actually transport. The Supreme Court may find that it needs to undo or reinterpret its prior decisions when it has to face the Circuit City fallout headon.