

## **Ronald Mann: Opinion analysis: Justices uphold arbitration exemption for transportation workers in rare victory for arbitration opponents**

Arbitration month at the Supreme Court continued this morning with the unanimous decision in *New Prime Inc. v. Oliveira* – following by a single week the unanimous decision in *Henry Schein v. Archer & White Sales*. *New Prime*, though, is anything but business as usual: Justice Neil Gorsuch’s opinion for a unanimous court rejects a claim for arbitration for the first time in a string of more than a dozen of the Supreme Court’s cases stretching back more than a decade. Indeed, I doubt the court has rejected such a claim in any previous decision since the turn of the millennium.

*New Prime* involves an exception to the rule in the Federal Arbitration Act that obligates courts to enforce arbitration agreements that involve interstate commerce. Specifically, under the “transportation” exclusion in Section 1 of the act, “nothing” in the act applies to “contracts of employment of ... seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” In this case, all agree that the truck drivers (including respondent Dominic Oliveira) driving trucks for petitioner New Prime are “workers engaged in foreign or interstate commerce.”

The question for the court is whether the lower courts should have sent this dispute to arbitration even though the drivers might work for New Prime as independent contractors rather than as employees. New Prime argued in the lower courts that the exception for “contracts of employment” applies only when the workers are employees; because New Prime endeavors to structure its relations with its drivers so that they are independent contractors rather than employees, New Prime argued that the act should apply notwithstanding the transportation exclusion.

The first question Gorsuch addresses is whether the lower courts should have been considering the exclusion at all. New Prime argues that because its contracts delegate questions of arbitrability to the arbitrator, the lower courts should have allowed the arbitrator to consider the application of the exception in the first instance. That argument should be familiar to readers of this blog – it was the central topic of the decision last week in *Henry Schein*. As I explained in my [discussion of that opinion](#), the *Henry Schein* court unanimously reaffirmed the rule that courts must enforce a contract that delegates “gateway” questions about arbitrability to the arbitrator; the specific holding in *Henry Schein* was that a court must send a case to an arbitrator even if the claim for arbitration strikes the court as wholly groundless.

In this case, however, the Supreme Court is calling for judicial assessment of the objection to arbitration. Gorsuch explains that the provisions of the act obligating courts to stay litigation and compel arbitration (Sections 3 and 4) apply only if the dispute is one to which the act applies under Sections 1 and 2. Because the act “warns that ‘nothing’ in the Act ‘shall apply’ to ‘contracts of employment’” in the transportation sector, “a

court should decide for itself whether § 1's 'contracts of employment' exclusion applies before ordering arbitration." For Gorsuch, "a court must first know whether the contract itself falls within or beyond the boundaries of §§ 1 and 2" before it can "invoke its statutory powers under §§ 3 and 4." In sum, even if the contract is "crystal clear and require[s] arbitration of every question under the sun, ... that does not necessarily mean the Act authorizes a court to stay litigation and send the parties to an arbitral forum."

It may be, as Gorsuch remarks, that "[n]othing in" that analysis "should come as a surprise." We would expect, though, perhaps a few words explaining the distinction between this case and the unanimous decision in *Henry Schein* a week earlier. It's not difficult to articulate a distinction. The most obvious difference is that the arbitrability dispute in *Henry Schein* involved interpretation of the contractual agreement, while the arbitrability dispute in *New Prime* involves the court's statutory authority. Indeed, Chief Justice John Roberts suggested such a distinction in the oral argument in *New Prime* (apparently referring back to the *Henry Schein* argument that the court had heard a few weeks before it heard *New Prime*).

But what is to explain the absence from the *New Prime* opinion of any reference to *Henry Schein*? It might have something to do with the timing of the two opinions. Because *New Prime* was argued earlier (in October rather than November), it would be natural for Gorsuch's opinion to omit any reference to *Henry Schein* – Gorsuch well might have circulated his opinion in *New Prime* before Justice Brett Kavanaugh circulated his opinion in *Henry Schein*. But *New Prime* has a brief concurring opinion from Justice Ruth Bader Ginsburg (more on that below); if the drafting of that concurrence delayed the release of *New Prime* beyond the release of *Henry Schein* it is easy to see that Gorsuch might not have thought it worth the effort to go back and amend his opinion to discuss the now earlier-decided *Henry Schein* matter. The natural person to call for a discussion would have been Kavanaugh (the author of *Henry Schein*), but he did not participate in *New Prime*.

In any event, having determined that the scope of the transportation exclusion is a question for the court, Gorsuch turned to that question. For him, the "key to the case" (foreshadowed by his trenchant comments on that subject at the oral argument) is that the statutory reference to "contracts of employment" must bear the meaning that phrase had "at the time Congress enacted the statute" (quoting his own opinion last term in *Wisconsin Central Ltd. v. United States*). "After all," he explains, "if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the 'single, finely wrought and exhaustively considered, procedure' the Constitution commands" (quoting *Immigration and Naturalization Service v. Chadha*).

Gorsuch notes *New Prime*'s central argument – that modern usage limits the term "employee" to the traditional "relationship between master and servant" that is antithetical to the independent-contractor relationship *New Prime* has tried to craft with Oliveira and the other drivers. Gorsuch rejects that argument, though, based on his conclusion that "at the time of the Act's adoption in 1925 ... most people ... would have understood § 1 to exclude not only agreements between employers and employees but also agreements that require independent contractors to perform work." Among other things, he cites dictionaries indicating that

“employment” was not “then a term of art,” but rather “more or less ... a synonym for ‘work,’” routinely applied “whether or not the common law criteria for a master-servant relationship happened to be satisfied.” In the same way, detailed footnotes support the view that the same usage pervaded the Supreme “Court’s early 20th-century cases ..., [m]any state court cases, ... a variety of federal statutes, ... [a]nd state statutes too.”

Gorsuch suggests that New Prime’s contrary arguments largely rest on an effort “to shift the debate from the term ‘contracts of employment’ to the word ‘employee.’” Acknowledging an “extended etymological debate” between the parties on exactly when “the words ‘employee’ and ‘independent contractor’ ... assumed [their modern] distinct meanings,” as well as “the common root and ... intertwined history” of “‘employee’ and ‘employment,’” Gorsuch emphasizes that “[t]he only question in this case concerns the meaning of the term ‘contracts of *employment*’ in 1925,” a topic he already has examined.

Finally, Gorsuch notes that New Prime, in his view “[u]nable to squeeze more from the statute’s text, ... is left to appeal to its policy.” Not surprisingly, he does not deny the vigor of the court’s embrace of a “liberal federal policy favoring arbitration agreements.” In this case, though, the text seems clear enough to persuade all of the justices to reject the claim for arbitration. With a characteristic rhetorical flourish, Gorsuch comments that “[i]f courts felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal, we would risk failing to take account of legislative compromises essential to a law’s passage.”

Notably, although Ginsburg joined Gorsuch’s entire opinion, she offered a brief concurring opinion summarizing circumstances in which “Congress ... may design legislation to govern changing times and circumstances,” suggesting that a rigorous adherence to the meaning of the text at the time of its enactment often might thwart rather than execute congressional intent.

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