No. 12-1429

In The Supreme Court of The United States

IMAD BAKOSS, M.D.,
Petitioner,
v.
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO POLICY NO. 0510135,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* FLORIDA CONSUMER ACTION NETWORK IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus Florida Consumer Action Network ("FCAN") is a grassroots organization with over 30,000 members, empowering citizens to influence public policy.[1] FCAN works to build coalitions, including environmental, church, labor, civic, and senior citizen groups. FCAN's efforts are focused on organizing and educating in areas where consumer voices are underrepresented, including insurance, energy, utilities, and healthcare.

While FCAN often takes part in national campaigns, the organization is an independent organization representing Floridians. FCAN's board members and staff are all Florida residents. Through its grassroots campaigns, FCAN speaks directly with hundreds of thousands of Florida citizens each year.

SUMMARY OF ARGUMENT

Consumers are more likely to be presented with arbitration clauses—and less likely to understand the arbitration clauses presented—than other contracting partners. Once consumers have entered into arbitration agreements, they are also significantly less likely to assert claims than if they

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[1] Pursuant to Rule 37.2, letters consenting to this *Amicus Curiae* filing are enclosed with this brief. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than Amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

had access to the courts. In an arbitration itself, consumers are exposed to "repeat player" bias, in which arbitrators rule more often in favor of the companies who regularly appear in arbitration. Expanding interpretations of arbitration to reach contract language with ADR provisions that are outside of the common understanding of arbitration will exacerbate these problems.

This brief argues that the Second Circuit's decision, cementing circuit splits regarding whether federal law applies to the question of whether an ADR clause is an agreement to arbitrate and whether any clause delegating decisions to a third party are arbitration agreements, contributes to the expansion of arbitration beyond the limits of consumer intent.

ARGUMENT

I. The Definition of Arbitration Is an Issue of Great Importance to Consumers

Studies suggest that 75% of consumer contracts contain arbitration clauses. Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. Mich. J. L. Reform 871, 882-83 (2008). Even social networking sites regularly mandate arbitration of disputes. Michael L. Rustad et al., *An Empirical Study of Predispute Mandatory Arbitration Clauses in Social Media Terms of Service Agreements*, 34 U. Ark. Little Rock L. Rev. 643, 653 (2012).

There is evidence, however, that structural aspects of arbitration make it disadvantageous to consumers. At the outset, businesses appear to choose arbitration in their contracts with consumers many times more often than in their contracts with other businesses. Eisenberg, *supra*, at 876 ("Over three-quarters of the studied companies' consumer agreements provided for mandatory arbitration of disputes. Yet less than 10% of their negotiated nonconsumer, non-employment contracts included arbitration clauses."). The authors of one study concluded that businesses choose arbitration in their agreements with consumers because it is "a way to save money by avoiding aggregate dispute resolution." *Id.* at 894-95. Others conclude that businesses insist on arbitration agreements with consumers because consumers are simply less likely to demand arbitration, and therefore no claims will ever be asserted. Rustad, *supra*, at 674.

Once consumers are in contracts requiring arbitration, there is evidence that arbitrators disproportionately rule against the consumers. The arbitrators favor the companies, who are the "repeat players" in arbitration and control future arbitration appointments. Nancy A. Welsh & David B. Lipsky, "*Moving the Ball Forward" in Consumer and Employment Dispute Resolution: What Can Planning, Talking, Listening and Breaking Bread Together Accomplish?*, 19 No. 3 Disp. Resol. Mag. 14, 16-17 (2013).[2] It is not surprising, then, that

[2] This article comes years after the Minnesota Attorney General was effective in forcing the National Arbitration Forum to stop arbitrating consumer cases. *See CompuCredit*

"consumers tend to perceive courts as fairer than arbitration." *Id.* at 16.

Because the use of arbitration clauses in consumer contracts is already widespread and empirical studies have shown that the result of ever-present arbitration agreements is fewer consumer claims and more bias against consumers, consumers have a vested interest in not expanding the universe of contracts deemed to constitute "arbitration" within the meaning of the Federal Arbitration Act. If a larger group of ADR clauses were found to constitute "arbitration," then those processes would receive the rigid enforcement and deference to decisionmakers afforded by the Federal Arbitration Act.

Corp. v. Greenwood, 132 S. Ct. 665, 677 n.2 (2012). Therefore, the repeat player bias is not confined to the National Arbitration Forum. The National Arbitration Forum had been accused of consumer fraud and deceptive trade practices. *Id.*; Complaint, *Swanson v. Nat'l Arbitration Forum, Inc. et al.* at 39-40, (filed July 14, 2009), available at http://www.ag.state.mn.us/PDF/PressReleases/SignedFiledComplaintArbitrationCompany.pdf (accessed July 1, 2013). One study had shown that consumers lost their cases 94% of the time in the National Arbitration Forum. Public Citizen, *The Arbitration Trap at 2, 4, 13, 17, 18* (Sept. 2007), http://www.citizen.org/documents/ArbitrationTrap.pdf.

II. The Court Should Grant Certiorari To Clarify That State Law Applies to the Question of Whether an Arbitration Agreement Has Been Formed

The first critical issue in this petition is whether the initial determination of whether a contractual clause constitutes an agreement to arbitrate should be decided under federal or state law.

A. Application of State Law Is Consistent with the Structure and Purpose of the Federal Arbitration Act

The Federal Arbitration Act ("FAA") was passed to "preclude[] States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)); *see also* 9 U.S.C. § 2. The FAA is silent with respect to what constitutes an arbitration provision. 9 U.S.C. § 1 et seq.

The Federal Arbitration Act was *not* intended to occupy the entire field of contract interpretation. In fact, case law interpreting the Federal Arbitration Act has consistently left questions of contract interpretation to state law, as long as that state law does not "stand as an obstacle to the accomplishment of the FAA's objectives." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2010).

For example, state law governs whether the parties reached any agreement at all with respect to arbitration. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Courts apply state law to determine issues of contract formation like whether the signing party was authorized and whether a document sent after a signature formed part of the parties' agreement. *E.g.*, *GGNSC Omaha Oak Grove, LLC v. Payich*, 708 F.3d 1024, 1026-27 (8th Cir. 2013) (finding an arbitration agreement was not enforceable under Nebraska law because the nursing home resident never signed it); *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 127-29 (2d Cir. 2012) (finding under both Connecticut and California law that no arbitration agreement had been formed when the arbitration provision was only emailed to the consumer *after* the consumer consented to the contract on-line).

If a court finds the parties reached an agreement to arbitrate, state law governs whether that agreement was valid and enforceable. *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987) (state law determines questions "concerning the validity, revocability, and enforceability of contracts generally"). In that phase, courts apply state law to determine, e.g., whether an arbitration agreement had sufficient consideration, or is unconscionable, or illusory. *Kilgore v. Keybank, Nat'l Assoc.*, Nos. 09-16703, 10-15934, WL 1458876, at *3-5 (9th Cir. 2013) (applying California law to determine whether arbitration agreements were unconscionable); *Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 609 (4th Cir. 2013) (finding arbitration agreement lacked consideration under Maryland law); *Carey v. 24 Hour Fitness,*

USA, Inc., 669 F.3d 202, 206 (5th Cir. 2012) (finding arbitration agreement illusory under Texas law).

Because state law governs the question of whether any agreement to arbitrate was ever reached, and whether that agreement to arbitrate is valid, state law should also govern the question of whether a particular agreement is an agreement to arbitrate at all. There is no qualitative difference between the question of whether the parties' clause constitutes an arbitration agreement and the other questions of contract formation and validity to which courts apply state law.

As the Second Circuit decision amply demonstrates, however, there is a deep circuit split with respect to whether state or federal law governs the question of whether a valid contract is an agreement to arbitrate. Nearly every circuit has taken a position with respect to this question, many of which positions are several decades old. The Court should grant *certiorari* to resolve this issue, which has significant impact on consumers' abilities to understand and consent to contracts presented by parties with significantly greater bargaining power and access to legal counsel.

B. Application of State Law Gives Consumers Superior Predictability

As demonstrated in Dr. Bakoss' Petition, applying federal common law to the question of whether an agreement is an agreement to arbitrate has not led to consistency in outcomes. Pet'r's Br. at 13-17. Rather, to the extent that state statutes clearly define what arbitration is—and is not—

consumers should be able to expect to rely on these laws.

In the majority of cases, it does not matter whether state law or federal common law applies to the question of whether a valid agreement is an agreement to arbitrate. In the vast majority of cases, a contract will use the words arbitrate or arbitration—plainly falling within the ambit of the FAA. However, the contract at issue here demonstrates the problem with determining *ab initio* that the FAA (and, therefore, federal law) applies to the question of whether an *arbitration* agreement has been formed: the agreement between Bakoss and Lloyd's of London does not use the word arbitration. In such situations, the determination of whether such a contract is in fact an agreement to arbitrate should be left to longstanding state common law.

Indeed, some states have spoken on this issue consistently for decades. Oregon's courts, for example, have long distinguished third-party appraisal from arbitration. *See Portland Gen. Elec. Co. v. U.S. Bank Trust Nat'l Assoc.*, 218 F.3d 1085, 1090 (9th Cir. 2000); *Shepard & Morse Lumber Co. v. Collins*, 256 P.2d 500, 502-03 (1953); *Budget Rent-A-Car v. Todd. Inv. Co.*, 603 P.2d 1199, 1201-02 & n.4 (Or. 1979).

On the other hand, Kansas courts define a third-party appraisal in an insurance contract as arbitration. *Friday v. Trinity Universal of Kan.*, 924 P.2d 1284, 1286-87 (Kan. 1996) (noting that Kansas decisions as early as 1911 conflate arbitration and appraisal). California also includes appraisals within its state definition of arbitration. *Waysil, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir.

1987) (citing Cal. Civ. Proc. Code § 1280(a) (West 1982)).

Without direction from this Court, more courts may decide to apply a federal definition of arbitration to an ADR clause that was not intended to be an arbitration agreement, thereby upsetting settled state law and the expectations of anyone relying on such law. Conversely, applying state law to determine what constitutes an arbitration agreement does not inject unnecessary unpredictability into contracting, because contracting parties can explicitly select which state's law applies.

III. The Court Should Grant Certiorari To Clarify That Not All Contractual Provisions Appointing Third Parties to Reach Decisions Are Arbitration Agreements

If this Court were to conclude that Federal substantive law should provide the definition of arbitration, then it should reverse the Second Circuit with respect to the definition of arbitration under the Federal Arbitration Act.

A. The Second Circuit's Decision Conflicts with the "First Principle" of Arbitration Law: Consent

As this Court emphasized again recently in *American Express Co. v. Italian Colors Restaurant*, the motivating purpose behind the Federal Arbitration Act is to enforce parties' contractual agreements to arbitrate. 570 U.S. __, __, No. 12–

133, slip op. at 3 (June 20, 2013). That abiding purpose of the Act comes from "the first principle that underscores all of our arbitration decisions: Arbitration is strictly 'a matter of consent.'" *Granite Rock Co. v. Int'l Brotherhood of Teamsters,* 130 S. Ct. 2847, 2857 (2010) (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)); *accord Oxford Health Plans LLC v. Sutter*, 569 U.S. __, __, No. 12-135, slip op. at 1 (June 10, 2013) ("[C]lass arbitration is a matter of consent.").

To interpret a contractual agreement, which lacks the word "arbitrate" or "arbitration" and merely agrees to submit a difference of opinion to a third person, as an agreement to arbitrate contradicts that first principle. Indeed, the Second Circuit's decision conflicts with the basic premise that arbitration is a matter of consent. The decision suggests that any time contracting parties agree to submit a dispute for a decision by a third party, it will constitute arbitration. Pet'r's App. at 6a-7a. The result is not limited to contractual clauses that specify the third-party decision is "binding" or otherwise final. Nor is it limited to clauses that inform contracting parties they are waiving their right to bring their disputes to a court of law.

The conflict between the Second Circuit's decision and the requirement of consent is especially prevalent in the consumer context. Experts recognize that "consumers are often unaware of their procedural rights and obligations until the realities of out-of-court arbitration are revealed to them after disputes have arisen." Michael L. Rustad et al., *An Empirical Study of Predispute Mandatory*

Arbitration Clauses in Social Media Terms of Service Agreements, 34 U. Ark. Little Rock L. Rev. 643, 664 (2012) (quoting from the American Arbitration Association's Statement of Principles of the National Consumer Disputes Advisory Committee). To allow silent arbitration clauses like the one at issue in this case would only exacerbate the problem.[3] It would be a rare person who would sign an agreement providing that a neutral third-party would provide a tie-breaking opinion on some issue and understand that to mean they had agreed to binding arbitration and had given up their right to a jury trial or even to an appeal on the merits of the tie-breaking opinion.

B. Consumers Would Lose Significant Legal Rights If Silent Arbitration Agreements Are Allowed

Because arbitration agreements carry with them many restrictions on consumers' legal rights, they should not be inferred lightly. A finding that the parties have an arbitration agreement severely limits what issues can be decided by a judge in state or federal court. For example, it means that an aggrieved party may not ask a court to determine the validity of the contract as a whole (*see Rent-A-*

[3] The type of language in Dr. Bakoss' certificate is especially ambiguous with respect to whether the parties agreed to arbitration within the meaning of the Federal Arbitration Act. There were two competing dispute resolution provisions within the agreement: one providing for a third-party decision (*see* Joint Appendix 250) and another providing for "legal action" in the courts (*see* Joint Appendix 255).

Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2778 (2010)), it means plaintiffs may only proceed as a class if the arbitration agreement demonstrates the parties' intent to allow that procedure (*Oxford Health Plans*, slip op. at 3, 6), and it severely limits the bases for overturning the decision of an "arbitrator" (*see* 9 U.S.C. § 10(a)). If all clauses appointing a third party to opine on the parties' dispute are construed as arbitration agreements, consumers will lose significant legal rights without ever even seeing the word "arbitration."

C. The Second Circuit Decision Creates Bad Incentives for Drafters of Consumer Contracts

As noted in Dr. Bakoss' Petition, there are already tie-breaking clauses in many common agreements. Pet'r's Br. at 29-32. If the Second Circuit decision remains good law, it creates an incentive for drafters of form consumer contracts who want disputes resolved as quickly and cheaply as possible to insert silent arbitration clauses into many more agreements.

Companies who contract with consumers have nimbly adjusted their arbitration clauses in response to the decisions of this Court in the last decades. Kevin E. Davis, *Contracts as Technology*, 88 N.Y.U. L. Rev. 83, 95-96 (2013). Like any rational contract drafter, companies draft arbitration clauses that will fall just on the enforceable side of the line dividing unconscionable from conscionable contracts, while still giving the company as much advantage as possible. *Id.* ("In the presence of asymmetric

information, better-informed parties have an incentive to propose innovative terms that redistribute value in their favor."); *see also* Michael H. Leroy & Peter Feuille, *Judicial Enforcement of Pre-dispute Arbitration Agreements: Back to the Future*, 18 Ohio St. J. on Disp. Resol. 249, 325 (2003) (suggesting that employer's arbitration agreements are "testing the limits of self-advantage").

It follows that some corporations will experiment with using tie-breaker clauses in their consumer contracts. For example, assume that a large internet retailer were to replace its current dispute clause with this simple statement: "In the case of any disputes arising under this agreement, we agree to give the dispute to a manager on duty at the closest Best Buy to you for decision." In this hypothetical, the rest of the agreement would not say anything about either arbitration or litigation or courts at all.

Under the Second Circuit's decision, the retailer could argue that sentence, standing alone, was an arbitration agreement, deserving of the full enforcement powers of the Federal Arbitration Act. And, in fact, the hypothetical silent arbitration clause *does* submit a dispute to a third party for decision. If the consumer wanted to attack the validity of that "arbitration clause," he or she would have to try and prove that single sentence was unconscionable (or otherwise invalid) under the relevant state law. *Rent-A-Center, West, Inc.* 130 S. Ct. at 2778. But how could the consumer show that a simplistic clause like this one is procedurally or

substantively unconscionable?[4] It is unclear even what the *substance* of the arbitration would be—what rules would apply, whether any information could be exchanged, what evidence could be presented, or whether there would be any fees associated with obtaining the decision. Without any substance to attack, a consumer may be hard-pressed to prevail in showing the clause is unconscionable, despite the fact that it provides for a decision by a friendly party and gives the consumer no certain rights to present evidence or otherwise fairly assert their claims at all. The hypothetical clause also gives the consumer no clear indication that he or she may be giving up their rights to a jury or to a court action.

The point of this hypothetical is simply to illustrate that if companies are incentivized to insert silent arbitration clauses in their consumer contracts, it could result in consumers being forced into numerous types of kangaroo courts without

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[4] Contrast this hypothetical arbitration clause (or the one at issue in Dr. Bakoss' certificate), with the stand-alone arbitration provision discussed in *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2778 (2010). Although the arbitration provision at issue in *Rent-A-Center* was a single sentence (forming a delegation clause), it used the word arbitrator and was contained within a document entitled "Mutual Agreement to Arbitrate Claims," which set forth the rules that would apply to the arbitration process. *Id.* at 2777 (quoting from the Agreement: "[t]he Arbitrator ... shall have exclusive authority to resolve any dispute relating to the ... enforceability ... of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.")

them ever having had a real opportunity to *consent* to giving up their legal rights.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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