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PART 3 OF 3 – UNDERSTANDING THE SUPREME COURT'S LATEST DECISIONS ON THE FEDERAL ARBITRATION ACT

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The Federal Arbitration Act ("FAA") reflects the principle that contracting parties can choose to select the nature of dispute resolution of conflicts under the contract—including not only for substantive issues, but also for whether an arbitrator or a court can determine threshold issues. This third article of three wraps up our review of three FAA-related Supreme Court decisions issued between April 12 and March 23, 2024 interpreting the FAA.

This final article discusses the Supreme Court's decision in *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246 (2024)—which sought to resolve a three-way circuit split between the First, Second, and Eleventh Circuits—expanding the scope of the FAA's transportation exemption to cover employees that do not work in the transportation industry. *Bisonnette* represents yet another decision by the Supreme Court that arguably narrows the scope of the FAA in favor of judicial proceedings.

Bissonnette v. LePage Bakeries

On April 12, 2024, Chief Justice Roberts delivered the decision of a unanimous court in *Bissonnette*. The only issue before the court was whether a transportation worker must work for a company in the "transportation industry" to be exempt under § 1 of the FAA. In holding that the scope of the so-called "transportation exception" was not limited to transportation workers engaged in the "transportation industry," the Supreme Court reinforced the broad scope of the individuals who are **not** subject to arbitration under the FAA, while providing guidance to the lower courts (or arbitrators) who will address this question.

The plaintiffs in *Bissonnette* worked as distributors for Flower Foods, the second-largest producer of packaged bakery foods in the United States—including the Wonder Bread brand. Plaintiffs allegedly worked long hours delivering these products, but also engaged in other, non-transportation activities, including finding new retail outlets, advertising, setting up displays, and rotating inventory.

When the Plaintiffs filed a putative wage-and-hour class action against Flower Foods, Flower Foods moved to compel individual arbitration based on broad arbitration clauses in its contracts with the Plaintiffs. In response, the plaintiffs contended they fell within the so-called "transportation exception" in § 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." Both the district court and the Second Circuit agreed with Flower Foods, holding that the exception did not apply because the plaintiffs did not work in the "transportation industry."

The Supreme Court granted certiorari and reversed, reinterpreting a twenty-three-year-old precedent to hold that the key issue was not whether a company was in the "transportation industry." Instead, the Supreme Court adopted a practical approach, clarifying that whether a worker is "engaged in . . . commerce" depends on "what they do, not for whom they do it"—particularly, whether their employment shares the "characteristic of being transportation workers."

The Supreme Court clarified the scope of its decision, noting that transportation workers must be directly and "actively . . . engaged in transportation of . . . goods across borders via the channels of foreign or interstate commerce." As a result, the scope of §1's exception will not extend to reach workers whose duties are solely related to intrastate commerce or who are only secondarily involved in transportation duties.

Bissonnette's Impact

We expect that *Bisonnette* will have at least several key effects.

First, it will be up to the lower courts to determine the boundaries of *Bissonnette's* requirement that exempt workers must be directly and "actively . . . engaged in transportation of . . . goods across borders via the channels of foreign or interstate commerce." The Supreme Court did not explain how many hours must be worked or what tasks qualify for a worker to be "actively . . . engaged in transportation[.]" There is no indication as to whether this new definition applies only to drivers and laborers, or also dispatchers and supervisors, creating the potential for a patchwork of FAA coverage within a company, even one explicitly engaged in the logistics industry.

Charles (C.J.) Schoenwetter (left) and Eric D. Olson (right)

Second, companies (including manufacturers) who seek to limit their exposure to class actions by including arbitration clauses in their contracts requiring claimants to arbitrate their claims individually, rather than collectively, may now be exposed to class action liability if § 1's exemptions are applied to prevent mandatory arbitration of claims.

Third, to the extent employers and businesses rely on arbitration clauses to avoid litigation, the *Bissonnette* decision appears to broaden the class of "workers" who may be exempt from litigation. But employers may be able to avoid this limitation by accurately classifying workers as independent contractors, as §1's exception only applies to "contracts of employment," or by expressly disclaiming the FAA in favor of a specified state arbitration act that does not include a similar exception. Notably, a general choice-of-law clause within an arbitration provision will not trump the strong presumption that the FAA supplies the rules for arbitration. Application of state arbitration rules must be supported by clear evidence of the parties' intent to be bound by those rules and to displace the presumption that the FAA applies.

Fourth, the *Bissonnette* decision could increase the importance of a broad and specific delegation clause in an arbitration agreement. Delegation clauses direct the initial arbitrability determination to an arbitrator and deprive a court from deciding the issue of arbitrability even when the asserted claims are wholly groundless. This is important because arbitrators are historically more likely to find a dispute arbitrable than courts. Moreover, the factual findings of arbitrators are entitled to a high level of deference from courts.

Accordingly, by explicitly delegating the determination of facts related to the application of Section 1's exception to an arbitrator, a party preferring an arbitral forum may increase the likelihood of an arbitration clause being enforced initially and being upheld if subsequently challenged through the narrow grounds provided for challenging an arbitration award.

Bissonnette came only two years after the Supreme Court's last opinion on the scope of §1's transportation exception, showing the Supreme Court's interest in supervising the lower courts' interpretation. We look forward to the additional guidance provided by future decisions.

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