

First Circuit Enforces Delegation Clause in Arbitration Agreement

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On March 30, 2021, in [*Bossé v. New York Life Insurance Co. et al.*](#), the First Circuit Court of Appeals issued an important decision upholding the enforceability of an arbitration agreement that delegates the arbitrability of claims to an arbitrator, and not a court.

Background

New York Life Insurance Company (New York Life) hired Ketler Bossé as an agent in 2001. In 2004, Bossé was promoted to become a partner at New York Life and he entered into an employment agreement. The employment agreement contained an arbitration clause stating, in part, that the parties “agree that any dispute, claim or controversy arising between them, including those alleging employment discrimination (including sexual harassment and age and race discrimination) ... as well as any dispute as to whether such Claim is arbitrable, shall be resolved by an arbitration proceeding.” The employment agreement also provided that the arbitration clause would “survive termination” of the agreement. In 2005, Bossé transitioned back to working as an agent under a separate agent agreement, which did not have an arbitration clause.

In January 2016, New York Life terminated its business relationship with Bossé. Following that termination, Bossé filed a charge of racial discrimination and retaliation with the New Hampshire Commission for Human Rights (NH CHR) and argued that New York Life’s reason for terminating his contract had been pretextual. The NH CHR dismissed the charge for lack of jurisdiction after New York Life provided the agent agreement establishing that Bossé had not been an employee, but an agent.

Bossé then filed a lawsuit in the U.S. District Court for the District of New Hampshire against New York Life alleging race discrimination and retaliation under 42 U.S.C. §§ 1981 and 1985, and violations of New Hampshire state law. The insurance company responded by filing a motion to dismiss, or to stay proceedings and compel arbitration, based upon the 2004 employment agreement. The district court denied New York Life’s motion to stay proceedings and compel arbitration, finding that the arbitrability of the dispute was for the court, not an arbitrator, to decide. The district court held that there was “no ... relationship” between the employment agreement and Bossé’s claims, and therefore refused to enforce the arbitration agreement. New York Life appealed.

The First Circuit's Decision

Relying on two cases decided by the Supreme Court of the United States, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), and, more recently, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), the U.S. Court of Appeals for the First Circuit found that the district court had erred in not referring the dispute as to the arbitrability of the claims to an arbitrator.

In *Henry Schein*, the Supreme Court held that where the language in an arbitration provision clearly and unmistakably delegates arbitrability issues, a court's inquiry is limited to "determin[ing] whether a valid arbitration agreement exists ... [b]ut if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue." The First Circuit discussed whether arbitration provisions should be enforced where the parties "by clear and unmistakable evidence" delegate the issues of arbitrability to an arbitrator. Bossé did not challenge the validity of the arbitration clause, but he asserted that it did not apply to his particular claim. The First Circuit disagreed with the district court that this issue was for it, and not the arbitrator, to decide.

The First Circuit found that the district court had erred in not enforcing the agreement and not referring the dispute about whether Bossé's claims were arbitrable to the arbitrator because

- the arbitration agreement included an express delegation clause,
- the employment agreement also contained language "indicating the parties' 'clear and unmistakable intent'" to delegate issues of arbitrability to the arbitrator, and
- the Federal Arbitration Act (FAA) does not require an arbitration clause to have a relationship to the underlying agreement to be enforceable.

The First Circuit stated that Rule 6(a) of the American Arbitration Association (AAA) Employment Arbitration Rules and Mediation Procedures, which was referenced in the arbitration provision, "explicitly gives the issue of whether claims are arbitrable to the arbitrator to decide." The First Circuit stated that the incorporation of the AAA rules constituted "clear and unmistakable evidence" of the parties' intent to delegate the issues to an arbitrator. The employment agreement also expressed clear and unmistakable evidence through the inclusion of a survival clause.

Looking to *Henry Schein*, the First Circuit stated that in the arbitration provision, "[t]he question of the scope of the delegation clause cannot be separated from the question of the scope of the arbitration agreement." The First Circuit rejected the district court's finding that a court should consider whether a particular claim falls within the scope of an arbitration agreement and delegation clause in order to determine whether the dispute should be submitted to an arbitrator to determine its arbitrability. In reaching its conclusion, the district court had relied on several cases that lacked an express delegation clause. The First Circuit reasoned that having a court determine whether a claim falls within the scope of an arbitration agreement would render a delegation clause "meaningless" because the court would have already answered the question of arbitrability, which is "precisely the type of 'short-circuit[ing]'" that concerned the Supreme Court in *Henry Schein*.

The First Circuit further rejected the district court's determination that an arbitration clause needs to have a relationship or connection to the underlying agreement to "arise out of" the agreement. "The FAA reflects a 'liberal federal policy favoring arbitration agreements,'" the First Circuit stated. The court also stated that, under the FAA, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." The First Circuit stated that "[e]ven if there were some ambiguity, under *First Options*, [the court applies] the presumption in favor of arbitrability in determining the scope of the delegation clause."

Separately, the First Circuit also rejected Bossé's assertion that New York Life had forfeited its rights to arbitrate the claims due to judicial estoppel and waiver because the insurance company had not asserted its right to arbitrate before the NH CHR. The First Circuit found Bossé's position unpersuasive and held that "[t]here [was] no inconsistency and no undue delay from New York Life asserting the jurisdictional defense to the [NH CHR], rather than invoking the arbitration agreement." Accordingly, the First Circuit reversed the district court and ordered the district court to compel arbitration and issue a stay pending the claims in arbitration.

Key Takeaways

In recent years, employers have increasingly sought to include delegation clauses in an effort to avoid adverse holdings from judges on "gateway" issues such as arbitrability. With the decision in *Bossé*, employers operating within the First Circuit can be more confident that if their arbitration agreements contain delegation clauses that clearly and unmistakably manifest an intent to delegate issues of arbitrability to arbitrators, courts within the First Circuit will likely enforce the clauses.

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