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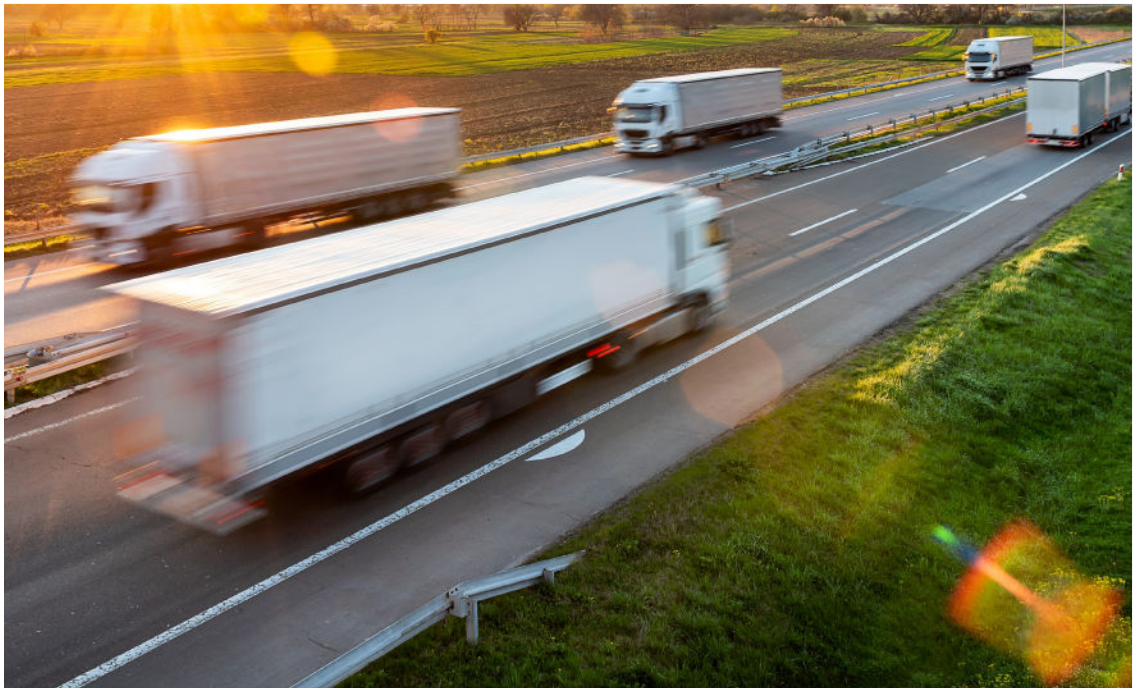
Bakery case before Supreme Court shows knead for clarity of FAA exemption

By Rex Darrell Berry



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Mandatory arbitration of employment disputes has been litigated nearly to death, but the issue is still very much alive. The U.S. Supreme Court will now wade into the fray once more. In a case involving delivery drivers for a bakery, the nation's top court has agreed to decide the scope of an arbitration carve-out established under the Federal Arbitration Act (FAA).

In *Bissonnette v. LaPage Bakeries*, the Court will address whether, to be exempt from the FAA, "a class of workers that is actively engaged in interstate transportation must also be employed by a company in the transportation industry." Simply put, the issue to be considered is whether an odd exemption found in Section 1 of the FAA for certain types of workers should be construed broadly or narrowly.

The issue might sound like a geeky question of statutory interpretation, but it has substantial real-world implications for workers across the country. If the Supreme Court broadly construes the Section 1 exemption, millions of workers may no longer be required to sign mandatory arbitration agreements. If the Court construes the Section 1 exemption narrowly, its decision would have the opposite effect.

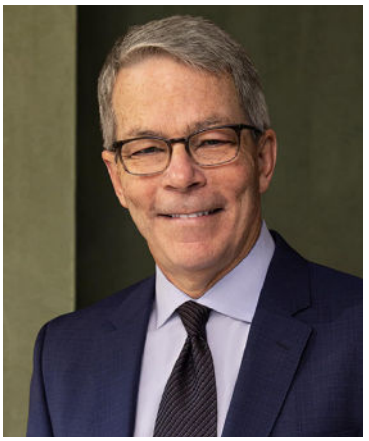
The FAA Section 1 exemption

When it enacted the FAA in 1925, Congress recognized what it believed to be a strong pro-arbitration public policy that favored resolving civil disputes through arbitration rather than lawsuits. The FAA was designed to support business contracts that called for alternative dispute resolution. It required courts to stay litigation, upon motion, when a dispute involved a contract with a written arbitration clause.

The law presupposed that parties to the contract would understand its terms, would be in a position to negotiate those terms, and would have willingly and knowingly agreed to those terms. Supporters of the law believed that arbitration was a fair forum where disputes could be adjudicated more quickly and more economically than in litigation.

Over time, concerns were raised about the application of the law to consumers, employees, and others who may not understand or be able to negotiate the terms of mandatory arbitration agreements. The Supreme Court has consistently ruled that the FAA preempts all arbitration carve-outs, unless they have been enacted by Congress. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which became effective in 2022, is one such Congressional carve-out.

Rex Berry *is a mediator and arbitrator with Signature Resolution.*



Another is Section 1 of the FAA. Included in the 1925 law, this section expressly carves out "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Workers who did not fall within this exemption would be covered by the FAA and subject to its pro-arbitration public policy.

The Economic Policy Institute and the Center for Popular Democracy predict that by 2024, almost 83% of the country's private, nonunionized employees will be subject to mandatory arbitration, an increase of 56% since 2017. By signing these agreements, workers waive the right to pursue covered disputes in civil court.

But which employees are actually covered by the FAA? The *LaPage Bakeries* case should finally help clarify which workers are exempt from its coverage.

The LaPage Bakeries issue

When LaPage Bakeries' drivers sued for state and federal wage/hour violations and alleged misclassification as "independent contractors," their employer sought to compel arbitration based on mandatory arbitration agreements. The workers argued they were exempt from the FAA because they were "transportation workers" subject to the Section 1 exemption.

The district court didn't buy it. The plaintiffs, it said, were not transportation workers because "[their] contract characterized them as independent businesses that performed other tasks in addition to transportation." The Second Circuit eventually upheld the district court's decision. The plaintiffs, it ruled, did not qualify as "transportation workers" because La Page Bakeries was a bakery, not a transportation company. Their lawsuit should be compelled into arbitration.

In their petition for certiorari to the Supreme Court, the workers cited a host of conflicting decisions on the issue from the First, Seventh and Eleventh Circuit Courts of Appeal. The Supreme Court accepted review on September 29, presumably to help resolve the split among the Circuits. The issue to be reviewed is as follows: "To be exempt from the Federal Arbitration Act, must a class of workers that is actively engaged in interstate transportation also be employed by a company in the transportation industry?"

To understand the implications of the LaPage Bakeries case, we should revisit a milestone Supreme Court decision issued more than two decades ago: *Circuit City Stores, Inc. v. Saint Clair Adams* (532 U.S. 105 (2001)).

Is the past prologue?

Guessing what the Supreme Court will decide in any pending case is a fool's errand, but the earlier case could signal where the Court may be going. In *Circuit City*, the Court considered whether the Section 1 exemption applied to a mandatory arbitration agreement between Circuit City and an employee named Saint Clair Adams.

In the 1980s and 90s, Circuit City helped lead the charge to implement mandatory pre-dispute arbitration for workers. When Adams sued the company in 1997 for a variety of workplace claims, it moved to compel the arbitration pursuant to the FAA. The federal district court held that the dispute fell within the FAA and compelled it to arbitration. The Ninth Circuit reversed the district court, holding that the arbitration agreement between the parties was a "contract of employment" that fell within the Section 1 exemption to the FAA.

Circuit City sought review by the Supreme Court, arguing that the Ninth Circuit misinterpreted the plain text of the Section 1 exemption when it decided that *all* employment contracts were excluded from the FAA's coverage. Circuit City also noted that every other appellate court considering the issue found that contracts of employment were subject to the FAA.

Notably, the battleground was whether all contracts of employment were exempted from coverage under the FAA. The more narrow question of who qualified as a "transportation worker" was not before the Court.

In a 5-4 decision authored by Justice Anthony Kennedy, the Court reversed the Ninth Circuit's expansive reading of the Section 1 exemption. "We now decide that the better interpretation is to construe the statute, as most Courts of Appeals have done, to confine the exemption to [employment contracts of] transportation workers." The majority opinion highlighted four primary points that offer insight as to how the current Supreme Court may analyze the issue before it.

First, the majority took a strict textualist approach to the wording of the Section 1 exemption. The terms "seamen" and "railroad employees," it held, should be controlled and defined "by the reference to the enumerated categories of workers which are recited just before it." Thus, the Section 1 exemption applied "only to contracts of employment of transportation workers."

Second, the majority focused on the historical context of the FAA. By 1925, Congress had already enacted legislation providing for the arbitration of disputes between seamen and their employers, and other grievance procedures existed for railroad employees under federal law. Passage of legislation providing for arbitration of disputes for railway labor issues also was "imminent." According to Justice Kennedy, "It is reasonable to assume that Congress excluded "seamen" and "railroad employees" from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers."

Third, the majority noted that Congress made no effort since 1925 to amend the FAA's exclusionary language. The Court had no basis on which to adopt "by judicial decision rather than amendatory legislation" a broader construction of the Section 1 exemption.

Finally, the majority expressly recognized the pro-arbitration public policy of the FAA. Citing *Gilmer v. Interstate/Johnson Lane Corp.*, Justice Kennedy observed "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." Based on these factors, the majority found no basis to limit the application of the FAA beyond the specific text of Section 1.

And the winner is……?

Mining prior decisions of the Supreme Court for nuggets of guidance is better than reading tea leaves, but not by much. The Court is very different now from what it was in 2001. Times are different, and two decades of jurisprudence now exist since *Circuit City v. Adams*.

But while reasonable minds can differ, precedent still means something. Noting the limiting tenor of the *Circuit City v. Adams* decision, the Supreme Court may continue to take a limiting view of the FAA Section 1 exemption. This would retain the FAA's broad application to the American workforce. The Court could also prod Congress to amend the FAA if it deems it necessary, as was done with the Ending Forced Arbitration Act.

To prevail, the *LaPage Bakeries* plaintiffs will need an arguably more conservative Supreme Court than that of 2001 to expand the definition of "transportation worker," thus limiting the scope of the FAA. The task is substantial, but not insurmountable. Get your popcorn ready.

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