Beware the Fine Print

Buried in the fine print of most contracts for cellphones, health insurance and credit cards is a clause requiring that all disputes be decided by binding arbitration, rather than a court. Businesses love these provisions, because arbitrators act quickly and almost always rule in their favor, and many employers are requiring new hires to sign similar agreements.

All of this sounds pretty unfair, but apparently not unfair enough for the Supreme Court, which has now made the arbitration process even more onerous. The court ruled last Monday there was nothing wrong with requiring that the fairness of an arbitration clause be determined by — an arbitrator. To appreciate the absurdity, consider the case at hand, which was brought by Antonio Jackson, a black account manager for Rent-A-Center in Nevada who tried to sue the company for racial discrimination after being denied repeated promotions.

Mr. Jackson had earlier signed an employment agreement saying that all employee discrimination claims had to be arbitrated but a host of claims brought by Rent-A-Center against employees could go before a judge. Any challenge to the fairness of the arbitration clause would also have to go before an arbitrator.

A federal judge dismissed Mr. Jackson’s lawsuit because of the arbitration clause, but the Ninth Circuit Appeals Court revived it, saying courts could rule when arbitration agreements were “unconscionable.” That decision was reversed by Justice Antonin Scalia and the four other conservative members of the Supreme Court.

By challenging the entire arbitration agreement as lopsided and unfair, the majority said, Mr. Jackson triggered the need for arbitration and could not seek court relief. Justice John Paul Stevens, in one of his final fervent dissents, described that notion as “fantastic.” If a contract is
invalid, he said, how can the arbitration clause it contains still be valid?

There are many ways in which an arbitration clause might be considered “unconscionable.” What if an employer inserts a provision that the employee has to pay all arbitration fees? Or that the employer gets to pick the arbitrator? In one famous case, a contract between the Hooters restaurant chain and its employees allowed the company to select two members of a three-arbitrator panel. That contract was struck down. Unless Congress changes the rules, these cases may never get back to the courts, where they have a chance for a fair resolution.