ARBITRATION IS BACK ON THE DOCKET: THE SUPREME COURT TO REVIEW THE ENFORCEABILITY OF CLASS ACTION WAIVERS IN EMPLOYMENT ARBITRATION AGREEMENTS

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The United States Supreme Court recently granted certiorari in a trio of cases—*Epic Systems Corp. v. Lewis*, No. 16-285; *Ernst & Young LLP v. Morris*, No. 16-300; and *NLRB v. Murphy Oil USA Inc.*, No. 16-307—to decide on a consolidated basis whether mandatory arbitration agreements with individual employees containing class- or collective-action waivers are enforceable under the Federal Arbitration Act ("FAA"),[1] notwithstanding certain provisions of the National Labor Relations Act ("NLRA").[2]

The Court's decision to address this issue likely arises out of a relatively new split in authority among the federal courts of appeals. It also follows on recent Supreme Court decisions that rejected certain challenges to the enforceability of similar waiver provisions in other types of contracts, including consumer contracts.[3] The Supreme Court will likely decide, in effect, whether or not the rationale applied in those cases suffices to reject the subject challenges to the enforceability of such waiver provisions in employment arbitration agreements. In doing so, it is possible that the Court may have to delve further into the enforceability of class- and collective-waiver provisions than it has done to date.

Depending on the outcome of these consolidated cases, employers may be empowered to introduce employment arbitration agreements with class- or collective-action waivers to their work force (if they have not already done so), or employers may be required to revise existing agreements to remove such language. Of course, in the latter instance, employers may face the often significant cost associated with class- or collective-employment actions, either in arbitration or in the courts, depending on the structure of the surviving language of their arbitration agreements. Whatever the outcome, employers will undoubtedly benefit from a national standard governing the enforceability of class- and collective-action waivers in employment arbitration clauses, so that they can implement uniform practices for their workforce, irrespective of the state (or federal circuit) in which their employees work.

BACKGROUND: THE FAA AND NLRA

The FAA establishes "a liberal federal policy favoring arbitration agreements."[4] The relevant section of the FAA guarantees that "[a] written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract … shall be valid, irrevocable, and enforceable."[5] A carve-out to this provision, commonly referred to as the "saving clause," provides that such a

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contract is unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract."[6] The saving clause acts as an exception to the general rule of enforcing arbitration agreements, as does the principle that courts are not required to enforce arbitration agreements if the FAA is "overridden by a contrary congressional command."[7]

The NLRA addresses employee and employer rights, provides the rules for collective bargaining, and regulates private-sector employment practices. Importantly, nothing in the NLRA expressly prohibits or disfavors arbitration between employers and employees.[8] Congress enacted the NLRA to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing."[9] More specifically, Section 7 of the NLRA states that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and "to refrain from any or all of such activities."[10] Further, under Section 8, an employer engages in an "unfair labor practice" if it "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in [Section 7]."[11] Thus, reading Sections 7 and 8 together, prohibiting an employee from engaging in "concerted activities" could be an "unfair labor practice."[12]

THE CIRCUIT SPLIT

There is a growing split in authority among the federal courts of appeals regarding the enforceability of employment arbitration agreements containing class- or collective-action waivers. The Second, Fifth, and Eighth Circuits have held that provisions waiving class or collective arbitration in the employment context are enforceable under the FAA.[13] On the other side of the split, the Seventh and Ninth Circuits have held that Sections 7 and 8 of the NLRA render waivers of class or collective arbitration unenforceable under the FAA.[14] This issue is also currently pending before five additional circuits.[15]

Courts upholding the enforceability of class- or collective-action waivers in employment arbitration agreements have historically held that the NLRA does not contain a congressional command overriding the FAA. For instance, according to the Fifth Circuit, "[n]either the NLRA's statutory text nor its legislative history contains a congressional command against application of the FAA."[16] The Eighth Circuit has reasoned that because the FAA was reenacted after the passage of the NLRA, Congress must have intended for the FAA's arbitration provisions to remain intact.[17]

Rather than concentrating on whether the NLRA contains a "contrary congressional command," courts rejecting the enforceability of class- or collective-action waivers have focused on the FAA's saving clause. The Seventh Circuit has held that a contract provision that takes away an employee's right to engage in "concerted activities" is illegal under the NLRA and therefore meets the criteria of the FAA's saving clause for non-enforcement.[18] According to the Seventh Circuit, there was no reason to determine if the NLRA contained a "contrary congressional command" because the relevant provisions of the NLRA and FAA do not conflict with each other.[19] The Ninth Circuit has reached a similar conclusion.[20]

THE SUPREME COURT GRANTS CERTIORARI

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In the midst of this rapidly developing circuit split, the Supreme Court agreed to hear three cases involving the enforceability of class- or collective-action waivers on a consolidated basis next term.[21] Two of the three cases arise out of decisions from courts on the not-enforceable side of the split, while the third arises out of a decision from the Fifth Circuit, which has been the standard-bearer for the enforceability side.[22] Indeed, it was the Fifth Circuit that first overruled the National Labor Relations Board's finding that waiver clauses in employment arbitration agreements are unenforceable, in a decision that is a direct precursor to one of the three cases now before the Supreme Court.[23]

The Supreme Court's decision may ultimately depend on whether it analyzes the NLRA for evidence of a congressional command overriding the FAA or instead emphasizes the FAA's saving clause. In recent cases, however, the Court has recognized that the congressional mandate to enforce arbitration agreements strictly and consistently with their terms is not easily overcome.[24] It remains to be seen whether that trend continues in the trio of cases now before the Court.

Additionally, although the three cases that the Supreme Court will hear involve employment arbitration agreements containing express class- or collective-action waiver provisions, the Court's ruling may also reach agreements that contain implied waivers or are silent on the issue of class- and collective-arbitration. The Court has held that arbitration agreements that are silent on the issue of class arbitration provide no evidence that the parties intended to use the class mechanism to resolve their claims, such that they must resolve them through individual arbitration.[25] It is possible that the Court's prior holding on this issue may come into play as the Court decides the question of the enforceability of class- and collective-action waiver provisions in employment arbitration agreements under the FAA. Whether it does will become clearer after the parties submit merits briefing, oral argument occurs, and, of course, the Court renders its decision.

CONCLUSION

The Supreme Court's ruling on this issue may result in a significant decision both in the employment law context and that of arbitration agreements more generally. As the NLRB stated in its petition, "resolving [the issue of class- and collective-action waivers] will have a direct and immediate effect on countless employees and employers throughout the Nation, because individual-arbitration agreements have become so widespread."[26] Because the current dispute revolves around the tension between the FAA and U.S. labor law, it is unclear if the Court's decision will influence class- or collective-action waivers outside of the employment context, such as in consumer contracts containing arbitration agreements. It is possible, however, that the Court will need to address the FAA's impact on such waivers more generally to arrive at a decision, which could extend the impact of the Court's decision beyond the employer-employee context.

K&L Gates LLP will continue to monitor these cases and will post developments as they occur. Oral argument is likely to take place in late 2017 or early to mid-2018, and a decision will likely follow by June 2018 when the Court completes its next term.

Notes:

[1] 9 U.S.C. §§ 1, *et seq*.

[2] 29 U.S.C. §§ 151, *et seq*.

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[3] *See, e.g.*, *DIRECTV, Inc. v. Imburgia, --- U.S. ---, 136 S. Ct. 463, 468-71 (2015); Am. Express Co. v. Italian Colors Restaurant, --- U.S. ---, 133 S. Ct. 2304, 2309-12 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339-52 (2011).*

[4] *CompuCredit Corp. v. Greenwood*, --- U.S. ---, 132 S. Ct. 665, 669 (2012) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Congress enacted the FAA in 1925 in response to "widespread judicial hostility to arbitration agreements." *Concepcion*, 563 U.S. at 339.

[5] 9 U.S.C. § 2.

[6] *Id*.

[7] *CompuCredit Corp.*, 132 S. Ct. at 669 (quoting *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

[8] *See, e.g.*, 29 U.S.C. § 171 (stating that government facilities can be made available for "voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements" concerning various employment-related issues).

[9] 29 U.S.C. § 151.

[10] 29 U.S.C. § 157.

[11] 29 U.S.C. § 158.

[12] *E.g., NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 833 n.10 (1984) ("[A]n employer commits an unfair labor practice if he or she interferes with, or restrains concerted activity.") (internal quotations omitted).

[13] *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 361 (5th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 296-97 & n.8 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013). The Supreme Courts of Nevada and California have also upheld class- or collective-action waivers in employment arbitration agreements. *Tallman v. Eighth Jud. Dist. Ct.*, 359 P.3d 113, 123 (Nev. 2015); *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 142 (Cal. 2014).

[14] *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 984, 989-90 (9th Cir. 2016), *cert. granted*, (U.S. Jan. 13, 2017); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1155-56 (7th Cir. 2016), *cert. granted*, (U.S. Jan. 13, 2017). The National Labor Relations Board, the agency charged with enforcing U.S. labor law, has similarly held that employment arbitration agreements containing class or collective action waivers are unenforceable. See 357 NLRB No. 184, slip op. at 4-5 & fn. 7 (collecting cases).

[15] *See, e.g., The Rose Group v. NLRB*, Nos. 15-4092 and 16-1212 (3d Cir.); *AT&T Mobility Servs., LLC v. NLRB*, Nos. 16-1099 and 16-1159 (4th Cir.); *NLRB v. Entm't, Inc.*, No. 16-1385 (6th Cir.); *Everglades Coll., Inc. v. NLRB*, Nos. 16-10341 and 16-10625 (11th Cir.); *Price-Simms, Inc. v. NLRB*, Nos. 15-1457 and 16-1010 (D.C. Cir.).

[16] D.R. Horton, 737 F.3d at 361.

[17] *Owen*, 702 F.3d at 1053.

[18] *Lewis*, 823 F.3d at 1157.

[19] *Id*. at 1156.

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[20] *Morris*, 834 F.3d at 986-87.

[21] *See Epic Systems Corp. v. Lewis*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, No. 16-285 (U.S. Jan. 13, 2017); *Ernst & Young LLP et al. v. Stephen Morris et al*., 834 F.3d 975 (9th Cir. 2016), *cert. granted*, No. 16-300 (U.S. Jan. 13, 2017); and *NLRB v. Murphy Oil USA Inc*., 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, No. 16-307 (U.S. Jan. 13, 2017).

[22] *Morris*, 834 F.3d at 984, 989-90 (holding that class- or collective-action waivers in arbitration agreements between employers and employees are unenforceable); *Lewis*, 823 F.3d at 1155-56 (same); *NLRB v. Murphy Oil USA Inc*., 808 F.3d 1013, 1019 (5th Cir. 2015) (holding that class or collective action waivers in arbitration agreements between employers and employees are enforceable).

[23] *D.R. Horton*, 737 F.3d at 355-363.

[24] *See CompuCredit Corp*., 132 S. Ct. at 670-71; *Concepcion*, 563 U.S. at 341-51.

[25] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662, 684-87 (2010) (reasoning that because arbitration is a contractually-agreed-upon mechanism, a party cannot be compelled to participate in a class arbitration unless it has agreed to do so). For more information about Stolt-Nielsen, see the K&L Gates Alert Class Arbitration Waivers: Silence Reigns in Stolt-Nielsen, but the Courts Have More to Say.

[26] Petition for Writ of Certiorari at 22, *Murphy Oil USA*, No. 16-307 (2017).

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