IT'S EPIC: SUPREME COURT APPROVES CLASS-ACTION WAIVERS IN EMPLOYMENT AGREEMENTS

Date: 1 June 2018

U.S. Complex Commercial Litigation and Disputes Alert

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The U.S. Supreme Court has again emphasized that parties to arbitration agreements have great latitude in structuring their agreements, including the ability to require bilateral — as opposed to class — arbitration. In *Epic Systems Corp. v. Lewis*, [1] the Court made clear that employers may include class-action waivers in their arbitration agreements with employees. In a 5-4 decision, the Court held that such waivers are enforceable under the Federal Arbitration Act ("FAA"), and that nothing in the National Labor Relations Act ("NLRA") precludes enforcement of such waivers. The *Epic* decision resolves a circuit split, in which the Second, Fifth, and Eighth Circuits permitted employers to use class-action waivers, but the Sixth, Seventh, and Ninth Circuits had ruled class-action waivers violated substantive rights of employees under the NLRA. The Court, recognizing the import of the separation of powers between Congress and federal courts, examined the textual interplay between the FAA and the NLRA in concluding that Congress did not address arbitration in the NLRA, and thus that the NLRA provided no basis for invalidating class-action waivers in arbitration agreements.

BACKGROUND

The FAA provides that "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." [2] As such, "courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms," unless barred by a "generally applicable contract defense[]." [3] Because a state law barring class-action waivers in arbitration agreements is not such a defense, the FAA would preempt it. [4] A federal law, on the other hand, requires a different analysis, namely determining whether Congress intended the law — for instance, the NLRA — to preclude certain forms of arbitration agreements.

The federal courts of appeals that upheld the enforceability of class-action waivers in employment arbitration agreements concluded that the NLRA does not override the FAA. [5] Those courts relied on a lack of statutory text or legislative history that would permit an interpretation that the NLRA somehow displaces the FAA on this issue. [6] On the other hand, courts that held class-action waivers were unenforceable in employment arbitration agreements focused on the FAA saving clause. In those courts' view, the savings clause (allowing arbitration agreements to be invalidated when "grounds as exist at law or in equity" for doing so) opened the door to application of Section 7 of the NLRA, which states that it is illegal to prohibit an employee's right to participate in "concerted activities." [7]

THE COURT'S OPINION

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Justice Gorsuch, writing for the majority, stated that the "law is clear" — arbitration agreements are interpreted as written because Congress, through the FAA, wanted the agreements enforced as such. [8] Thus, in light of the Supreme Court's recent arbitration jurisprudence, parties are free to make use of class-action waivers. Furthermore, "[w]hile Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA — much less that it manifested a clear intention to displace the [FAA]." [9] The FAA's saving clause "recognizes only defenses that apply to 'any' contract." [10] Thus, the employees' objections to the "individualized nature of the arbitration proceedings" contemplated by their employment agreements do not fall into categories such as fraud, duress, or unconscionability, i.e., the bases of "generally applicable" contract defenses. [11]

In examining the purported tension between the FAA and the NLRA, the Court found none existed. "When confronted by two Acts of Congress allegedly touching on the same topic, this Court is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both." [12] As to the possibility that one statute replaces the other, there is a "heavy burden of showing a clearly expressed congressional intention that such a result should follow." [13] These notions are based on principles inherent in the separation of powers and without them, "judges [could] pick and choose between statutes," which "risks transforming [courts] from expounders of what the law is into policymakers choosing what the law *should* be." [14]

As such, the Court explained that the employees, in their reading of Section 7 of the NLRA, "ask us to infer a clear and manifest congressional command to displace the [FAA] and outlaw agreements like theirs." [15] Because the NLRA focuses on the right to "organize unions and bargain collectively" but "does not express approval or disapproval of arbitration," "that much inference is more than [the] Court may make." [16] The Court reasoned that the NLRA "does not even hint at a wish to displace the [FAA] — let alone accomplish that much clearly and manifestly, as our precedents demand." [17]

The policy discussions surrounding class actions and individual arbitration "are questions constitutionally entrusted not to the courts to decide but to the policymakers in the political branches." [18] The majority concluded by emphasizing the role of Congress in making economic policies. As an example, the Court pointed to the Consumer Financial Protection Bureau's promulgation of a rule prohibiting the use of class-action waiver provisions in arbitration agreements between consumers and financial services providers, "only to see Congress respond by immediately repealing that rule." [19] Just as the executive branch may not try to sneak policy choices past Congress, "[t]his Court is not free to substitute its preferred economic policies for those chosen by the people's representatives." [20]

THE DISSENT

In a 40-page dissent, Justice Ginsburg labeled the majority opinion as "egregiously wrong." [21] Justice Ginsburg, reading her dissent from the bench, noted the important role the NLRA plays in creating a level playing field for employees. In her view, Congress aimed to fix the "extreme imbalance [between employers and employees] once prevalent in our Nation's workplaces." [22] In addition to certain safeguards, the NLRA "protects employees' rights 'to engage in *other* concerted activities for the purpose of . . . mutual aid or protection.'" [23] Justice Ginsburg reasoned that class actions fit within the definition of "other concerted activities" and would have held that any prohibition on those rights is unenforceable in arbitration agreements. [24]

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CONCLUSION

In determining that class-action waivers in employee arbitration agreements are enforceable, the Supreme Court provided a clear pathway for employers nationwide to begin or continue using such agreements. Employers that do not have arbitration clauses in their employment agreements may want to review their employment agreements and consider whether it makes sense to add such clauses. Employers that already have arbitration agreements in their employment contracts may want to consider whether revisions to those agreements, such as adding class/collective action waivers, make sense in the wake of the Court's decision.

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[1] Epic Sys. Corp. v. Lewis, No. 16-285, 2018 WL 2292444 (U.S. May 21, 2018), consolidated with Ernst & Young LLP et al. v. Stephen Morris et al., No.16-300, and NLRB v. Murphy Oil USA Inc., No. 16-307.

[2] 9 U.S.C. § 2.

[3] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745–46 (2011).

[4] *See id*. at 1750–53.

[5] For more background on this issue see *The Supreme Court Hears Argument to Decide Whether Class-Action Waivers in Employment Arbitration Agreements Are Enforceable*, K&L Gates Alert (Oct. 2017), and *Arbitration Is Back on the Docket: The Supreme Court to Review the Enforceability of Class Action Waivers in Employment Arbitration Agreements*, K&L Gates Alert (Jan. 2017).

[6] D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 361 (5th Cir. 2013).

[7] Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1157 (7th Cir. 2016), *cert. granted*, (U.S. Jan. 13, 2017).

[8] Epic Sys. Corp. v. Lewis, No. 16-285, 2018 WL 2292444, at *17 (U.S. May 21, 2018).

[9] *Id.*

[10] *Id.*

[11] *Id*. at *6.

[12] *Id*. at *8 (internal quotations and citations omitted).

[13] *Id*.

[14] *Id*. (emphasis in original).

[15] *Id*. at *9.

[16] *Id.*

[17] *Id.*

[18] *Id*. at *16.

[19] *Id.*

[20] *Id*. For further discussion of Congress's repeal of the Bureau's arbitration agreements rule, see the K&L Gates Consumer Financial Services Watch blog.

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[21] Epic Sys. Corp. v. Lewis, No. 16-285, 2018 WL 2292444, at *18 (U.S. May 21, 2018) (Ginsburg, J. dissenting).

[22] *Id.*

[23] *Id*. at *21 (emphasis in original).

[24] *Id*. at *21–22.

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