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Supreme Court Resolves Circuit Split Over Arbitration Clauses in Employment Contracts

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On May 21, 2018, the U.S. Supreme Court ruled that the Federal Arbitration Act ("FAA") permits an employer to require an employee to arbitrate employment-related disputes individually. The FAA's command that a written agreement to arbitrate "shall be valid, irrevocable, and enforceable"[1] prevails over the rights of employees under the National Labor Relations Act ("NLRA") to join together and "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[2] In its 5-4 opinion, the Court decided three consolidated cases.

The Decisions of the Courts of Appeals

Epic Systems Corp. v. Lewis,[3] *Ernst & Young LLP v. Morris,*[4] and *National Labor Relations Board v. Murphy Oil USA, Inc.*[5] arrived at the Court from the Seventh, Ninth, and Fifth Circuit Courts of Appeals, respectively, and were consolidated before the Supreme Court.

In *Ernst & Young LLP v. Morris*, the Ninth Circuit followed the Seventh Circuit's holding, in *Epic Systems Corp. v. Lewis*, that an arbitration agreement requiring individual resolution of employment-related disputes illegally impaired collective, representative, and class legal remedies and was therefore unenforceable. Ernst & Young required employees, including Stephen Morris and Kelly McDaniel, to sign agreements specifying that they would pursue any legal action against the firm only through individual arbitration. Nonetheless, Morris brought a class and collective action against the firm in federal court (which McDaniel later joined), claiming that Ernst & Young had misclassified him and similarly situated employees to avoid paying them overtime wages.

A divided panel of the Ninth Circuit concluded that the employees were not required to arbitrate individually against Ernst & Young because the arbitration agreement violated the NLRA. The panel majority characterized the dispute as a labor case, not an arbitration case, holding that the agreement was invalid because it prohibited employees from pursuing concerted legal action regarding employment disputes in any forum. The majority

explained that limiting dispute resolution to a particular forum and requiring individual proceedings in that forum was unlawful under the labor laws, no matter whether "the contract require[s] disputes to be resolved through casting lots, coin toss, duel, trial by ordeal, or any other dispute resolution mechanism."[6] In other words, the problem with Ernst & Young's arbitration agreement was not that it required arbitration, but that it "defeat[ed] a substantive federal right to pursue concerted work-related claims."[7] Like the Seventh Circuit in *Epic Systems*, the Ninth Circuit majority relied on the FAA's provision that unlawful arbitration agreements will not be enforced.

On the other side of split was the Fifth Circuit.[8] In *National Labor Relations Board v. Murphy Oil USA, Inc.*, the Fifth Circuit ruled in favor of Murphy Oil, which required employees to agree to resolve employment-related disputes through binding arbitration and to waive the right to pursue class or collective claims in arbitration or in court. Sheila Hobson and three other employees sued Murphy Oil for alleged violations of the Fair Labor Standards Act. Hobson also filed an unfair labor charge with the National Labor Relations Board (the "Board"), in which she claimed that the arbitration agreement she signed with Murphy Oil interfered with her rights to collective or concerted action under the NLRA. The Board concluded that Murphy Oil's arbitration agreement violated the NLRA, and Murphy Oil petitioned the Fifth Circuit for review.

The Fifth Circuit concluded that Murphy Oil "committed no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing the arbitration agreement at issue."[9] To the Fifth Circuit, this was an arbitration case, and arbitration agreements are upheld under the FAA unless there is a contrary congressional command in another statute. According to the court, neither the text, nor the history, nor the purpose of the NLRA evinced such a contrary congressional command.

Supreme Court Precedent

Two recent pro-arbitration Supreme Court decisions set the stage for oral argument, which was held on October 2, 2017. In 2011, the Court, in a 5-4 decision, ruled in *AT&T Mobility LLC v. Concepcion* that the FAA preempts state law that prohibits parties from limiting the availability of class-wide arbitration procedures in their arbitration agreements. The late Justice Antonin Scalia wrote for the majority that "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[10] Two years later, Justice Scalia wrote again for a five-member majority in *American Express Co. v. Italian Colors Restaurant*.[11] There, the Court held that: (1) the relevant antitrust laws contain no contrary congressional command preventing waiver of class arbitration; and (2) the fact that individual arbitrations—rather than class arbitration—against American Express would be economically infeasible for merchants who accept American Express credit cards did not deny the merchants their right to pursue statutory remedies under the antitrust laws.

In both *Concepcion* and *Italian Colors*, Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas, and Samuel Alito joined Justice Scalia in ruling for the parties seeking to enforce contractual waivers of class arbitration. Justices Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan dissented in both cases. Justice Sonia Sotomayor joined the dissenters in *Concepcion*, and did not participate in *Italian Colors*.

The Court's Decision

The Court issued its opinion in *Epic Systems* and the other consolidated cases on May 21, 2018. Justice Neil Gorsuch—joined by the Chief Justice and Justices Kennedy, Thomas, and Alito—wrote for a 5-4 majority that the FAA required the Court to enforce the arbitration agreements at issue. The employees argued that the FAA's saving clause allowed courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." The court rejected this argument, observing that "courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent." The majority then explained that the NLRA "does not even hint at a wish to displace

the [Federal] Arbitration Act—let alone accomplish that much clearly and manifestly, as [the Court's] precedents demand."[13]

The majority also refused to defer to the Board's interpretation of the NLRA on the grounds that the agency "hasn't just sought to interpret its statute . . . in isolation; it has sought to interpret this statute in a way that limits the work of a second statute, the [Federal] Arbitration Act."[14] Under the *Chevron* doctrine of administrative deference, the majority found no implicit delegation to the agency "to address the meaning of a second statute it does not administer."[15] Moreover, the majority noted that no deference was due in light of the unambiguous nature of the text.[16] The majority then critiqued the dissent, characterizing many of the dissent's points as policy disagreements better left to Congress.[17]

Justice Ginsburg wrote for the four dissenting Justices. She stated that "[s]uits to enforce workplace rights collectively fit comfortably under the umbrella 'concerted activities for the purpose of . . . mutual aid or protection.'"[18] Justice Ginsburg cited authority for holding the arbitration agreements illegal and unenforceable under the FAA. In the alternative, the dissent determined that the later-in-time NLRA impliedly repealed the FAA, "to the extent of any genuine conflict."[19] The dissent also warned that the majority's decision would risk "underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."[20]

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[1] 9 U.S.C. § 2.

[2] 29 U.S.C. § 157.

[3] 823 F.3d 1147 (7th Cir. 2016).

[4] 834 F.3d 975 (9th Cir. 2016).

[5] 808 F.3d 1013 (5th Cir. 2015).

[6] *Morris*, 834 F.3d at 985.

[7] *Id.*

[8] The Fifth Circuit decision actually predated the decisions from the Seventh and Ninth Circuits. In addition to the Fifth Circuit, the Second and Eighth Circuits had also ruled in favor of employers on this issue. *See, e.g., Sutherland v. Ernst & Young LLP,* 726 F.3d 290 (2d Cir. 2013) (per curiam)*; Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013). Several state courts of last resort had also opined on the issue, deepening the split in authority.

[9] *Murphy Oil*, 808 F.3d at 1018.

[10] 563 U.S. 333, 348 (2011).

[11] 570 U.S. 228 (2013).

[12] *Epic Sys. Corp. v. Lewis*, No 16-285, slip op. at 8 (U.S. May 21, 2018).

[13] *Id.* at 11.

[14] *Id.* at 20.

[15] *Id.* at 20.

[16] *Id.* at 21.

[17] Justice Thomas joined the Court's opinion in full, but wrote separately to emphasize an alternative ground for why the saving clause of the FAA did not apply.

[18] *Epic Sys. Corp. v. Lewis*, No 16-285, slip op. at 9 (U.S. May 21, 2018) (Ginsburg, J., dissenting).

[19] *Id.* at 25.

[20] *Id.* at 26.

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