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ARBITRATION

A member at Mintz Levin discusses the recent ruling by the U.S. Supreme Court allowing employers to enforce individual arbitration agreements.

INSIGHT: SCOTUS Throws a Haymaker at 'Class Arbitration': Waiver In Employment-Related Agreement Is Enforceable

BY GILBERT SAMBERG

The majority of a divided (5-4) U.S. Supreme Court recently held that a waiver of ''class arbitration'' in agreed terms of employment is indeed enforceable. In doing so, the Court advanced the legal analysis of ''class arbitration'' that was begun several years ago by Justice Antonin Scalia, confirmed that arbitration is fundamentally a creature of contract, and concluded, among other things, that the National Labor Relations Act (NLRA) was not in conflict with and did not override or displace the Federal Arbitration Act (FAA).

The asserted tension between (a) the right of employees under the NLRA to engage in ''concerted activities,'' NLRA § 7, 29, U.S.C. § 157, and (b) the right of a contracting party under the FAA to enforce a bilateral arbitration agreement, was teed-up for consideration by the Supreme Court on Oct. 2, 2017, when oral argument was heard in three related cases—*Epic Systems Corp. v. Lewis*, No. 16-285; *Ernst & Young v. Morris*, No. 16-300; *NLRB v. Murphy Oil USA, Inc.*, No. 16-307. The Supreme Court held on May 21, 2018, that there was no such tension, and that an employment-related contractual waiver of class arbitration was enforceable. *Epic Systems Corp. v. Lewis,* 2018 BL 178768 (May 21, 2018). The Court relied in part on its prior comments concerning the fundamental nature of arbitration as a less formal method of bilateral dispute resolution.

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Issue Before the Court

Justice Neil Gorsuch, writing for the majority, and following a path blazed by Justices Scalia and Samuel Alito, framed the question before the Court as follows:

> Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?'' Slip Op. (Op.) at 1.

The Court granted that the relevant policies concerning these questions may be debated, but opined that the answer as a matter of law was clear. *See* Op. at 2, 25.

Specifically, the Court determined that Congress instructed in the FAA that arbitration agreements providing for individualized proceedings generally must be enforced by the federal courts and that neither the FAA's saving clause nor the NLRA suggest otherwise. *See* Op. at 2.

The roots of the alleged tension between statutes lay in the use by employers of arbitration clauses in their bilateral employment agreements, terms of employment, etc., in part in order to avoid class action litigation. The terms of a typical arbitration clause would seem to preclude ''class arbitration,'' if only due to its

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utter silence on the subject. But, in the lawyerly tradition of ''belt and suspenders,'' many employers added express waivers of class arbitration to their terms of employment. Employees seeking to engage the power of a class action proceeding cried foul, and targeted their attacks on the class arbitration waiver rather than on the arbitration clause as a whole, using the ''collective action'' provision of the NLRA (§ 7) as the tip of their litigation spear.

That argument was relatively new. The FAA (enacted 1925) and the NLRA (enacted 1935) had co-existed without controversy for 77 years until the National Labor Relations Board decided in *D.R. Horton*, 357 NLRB 2277 (2012), that the collective action provision of the NLRA ''effectively nullifies the [FAA]'' in cases like those before the Court. Op. at 3-4. *D.R. Horton* was invoked by employee-litigants broadly thereafter. The Federal circuit courts eventually split on the matter, with the Sixth, Seventh, and Ninth Circuits following *D.R. Horton*, and the Second, Fifth, Eighth, and Eleventh Circuits enforcing class arbitration waivers in employment-related agreements. SCOTUS has now ended the controversy.

The Court noted that Congress directed the judiciary to treat arbitration agreements as ''valid, irrevocable, and enforceable,'' Op. at 5, citing 9 U.S.C. § 2, and to ''respect and enforce the parties' chosen arbitration procedures,'' *id*., citing 9 U.S.C. §§ 3-4. Thus, the FAA requires courts to enforce arbitration agreements according to their terms, ''including terms that specify *with whom* the parties choose to arbitrate their disputes, and *the rules* under which that arbitration will be conducted.'' *Id*. at 5-6, *citing American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013). The arbitration agreements in question indicated an ''intention to use individualized rather than class or collective action procedures.'' *Id*. at 6.

But the respondent employees, relying on the FAA's ''saving clause'' (9 U.S.C. § 2), contended that their cases presented exceptions to the general FAA rules. The saving clause allows courts to decline to enforce arbitration agreements ''upon such grounds as exist at law or in equity for the revocation of any contract.'' Op. at 6. The employees argued in that regard that the NLRA renders the class/collective action waivers in their employment agreements ''illegal,'' and that such illegality is a ground for the revocation of their arbitration agreements, ''at least to the extent those agreements prohibit class or collective action proceedings.'' Op. at 6.

The Court found that that argument was errant, first because the saving clause defers only to defenses that apply to ''any'' contract—that is, ''generally applicable [state law] contract defenses such as fraud, duress, or unconscionability.'' Op. at 7, *citing AT&T Mobility v. Concepcion*, 563 U.S. at 339. In that regard, the Court reminded that it had previously taught that defenses that apply only to arbitration or target arbitration or interfere with the ''fundamental attributes of arbitration'' are not what was contemplated by the saving clause or otherwise supportable. Op. at 7, *citing Kindred Nursing Centers v. Clark*, 581 U.S. ____, ____ (2017), slip. op. at 5. Ultimately, the employees' defense was that a federal statute (the NLRA) rendered an agreement that bars employee class actions ''illegal'' under federal law, rather than ''unconscionable'' under state common law. The Supreme Court indicated that while illegality may be a generally applicable contract defense in many cases, ''an argument that a contract is unenforceable *just because it requires bilateral arbitration* is a different creature,'' one that ''impermissibly disfavors arbitration'' and that will not be supported. Op. at 9.

Furthermore, the employees' objections to their respective agreements targeted only the provision for bilateral arbitration and the exclusion of class or collective arbitration, and thus the employees sought to interfere with one of arbitration's ''fundamental attributes.'' Op. at 7. The premise that the bilateral nature of arbitration proceedings was fundamental was laid down in *Concepcion*, according to the Court, citing 563 U.S. at 338, 341. The Court pointed out that ''class arbitration'' procedures are by nature inconsistent with ''the virtues Congress originally saw in arbitration,'' including simplicity, speed, and cost effectiveness. Op. at 8. Indeed, importing class action procedures into arbitration would only make arbitration ''look[] like the litigation it was meant to displace.'' *Id.*

Justice Clarence Thomas provided a brief concurring opinion making the point that the FAA's saving clause refers only to defenses that would be grounds for *revocation* of the arbitration agreement. He pointed out that the employees argued that a class waiver is unenforceable because it is ''illegal'' under the NLRA, but that ''illegality'' is a public policy defense rather than a ground for the revocation of a contract due to improper formation.

(While relying on their showstopper, the Court pointed out other pertinent questions that it did not yet have to explore: (a) whether the FAA's saving clause was designed to save not only state law defenses but also defenses allegedly arising from federal statutes like the NLRA; (b) what defenses qualify as grounds for ''revocation'' of a contract; and (c) whether the NLRA actually renders class and collective action waivers ''illegal'' in any case. *See*, Op. at 6-7.)

Second, ''*Concepcion*'s essential insight remains: courts may not allow a contract defense to reshape traditional individualized arbitration by mandating class wide arbitration procedures without the parties' consent.'' Op. at 8, *citing Concepcion*, 563 U.S. at 344-351; *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684-87 (2010). The contractual waiver apparently reinforced the parties' agreement to bilateral arbitration. But the employees would have it that ''class arbitration'' could be compelled not only without the consent of the arbitral parties, but contrary to the express agreement of those parties. This was manifestly contrary to the ''central insight'' of the Court in *Concepcion*.

The majority also pointed out the Court's duty to construe statutory provisions so as to harmonize them, not to find conflicts between them. Among other things, it noted that the Court historically had rejected every effort to manufacture conflicts between the FAA and other federal statutes. Op. at 16, *citing American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, among others. (The cases before the Court seemed to it to present one more such effort.) But, the Court pointed out, the NLRA says ''nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum.'' Op. at 2. Therefore, even if the NLRA ''secures to employees rights to organize unions and bargain collectively,'' that does not put the NLRA at odds with the FAA. *See*, *id*.

Indeed, though the NLRA says nothing about collective legal actions, the Court has made clear that ''even a statute's express provision for collective legal actions does not necessarily mean that it precludes 'individual attempts at conciliation' through arbitration.'' Op. at 16.

Interestingly, each of the cases before the Supreme Court originated as employee claims under the Fair Labor Standards Act (FLSA). But that statute was irrelevant to the issues at hand. Rather, the employees argued that the NLRA should dictate the procedures applicable to claims under the FLSA, and that the NLRA should override the FAA with regard to its subject matter as well. ''It's a sort of interpretative triple bank shot, and just stating the theory is enough to raise a judicial eyebrow.'' Op. at 15.

Moreover, the Court observed that the NLRA and the FAA ''enjoyed separate spheres of influence'' for three quarters of a century, Op. at 2, and that the Court had never had reason to read a right to class actions into the NLRA. It declined to do so here.

Indeed, the Court had much more to say in support of its decision:

(1) its responsibility in harmonizing Congressional legislation was to give effect to both, especially where, as here, neither addressed the other;

(2) the identified ''concerted activities'' protected by § 7 of the NLRA concerned the right to organize unions and bargain collectively, did not mention class or collective judicial or arbitral actions, and concluded with a catch-all term (''other concerted activities for the purposes of . . . other mutual aid or protection'') that should be construed to protect only activities of the kind listed before (the *ejusdem generis* rule of statutory construction)—*i.e.*, ''things employees do for themselves when exercising their right to free association in the work-place'';

(3) Congress, which showed that it knew how to override the FAA and how to specify particular dispute resolution procedures, did neither in the NLRA;

(4) although the employees' underlying causes of action did not arise under the NLRA, but under the Fair Labor Standards Act (''FLSA''), the employees did not suggest that the FLSA displaced the FAA, probably because the Supreme Court had already held long ago that it did not;

(5) Congress ''does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions;'' and

(6) deference, under *Chevron U.S.A. Inc v. Natural Resources Defense Council*, 467 U.S. 837, to the NLRB's position on the issue was not required because, among other things, the NLRB was interpreting, but does not administer, the FAA.

In rebuttal, Justice Ruth Bader Ginsburg provided a lengthy, rousing, albeit policy-based, dissent on behalf of the minority.

Conclusion

The Supreme Court looked at the state of the law as it is, and found nothing in the NLRA that expressly or impliedly supervenes the FAA and no basis in the NLRA or the FAA to invalidate a class arbitration waiver in an arbitration agreement or otherwise to deem such a provision unenforceable. Moreover, the Court relied on its view of the fundamental nature of arbitration, as envisioned in the FAA, as a more informal bilateral dispute resolution mechanism. And the Court implied that the movement of a formal class action procedure from a courtroom into an arbitral meeting room was not something contemplated in the FAA.