

Supreme Court and Appellate Alert

May 23, 2018

Key Points

- Class and collective action waivers in arbitration agreements are enforceable under the FAA and not prohibited by the NLRA.
- The NLRA concerns labor organizing and collective bargaining, but does not extend more broadly to how legal disputes outside the workplace should be tried in judicial and arbitral forums.
- The opinion suggests that the scope of the NLRA and the authority of the NLRB may be open to future challenge.



Supreme Court Decision Impacting Class and Collective Action Waivers in Employment Arbitration Clauses

Summary

On May 21, 2018, a closely divided United States Supreme Court held in *Epic Systems Corp. v. Lewis* that employers may require employees to resolve employment disputes with an employer through individual arbitration even if the arbitration agreements waive the right to proceed by class or collective action.

The case resolved a circuit split stemming from the Supreme Court's decisions in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2010), and *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), which upheld the validity of arbitration agreements that included class action waivers. In response to those decisions, plaintiffs in employment actions sought relief from the National Labor Relations Board (NLRB). They argued that such waivers violated Section 7 of the National Labor Relations Act (NLRA), which grants employees the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157.

In administrative proceedings, the NLRB repeatedly found in favor of the plaintiffs, striking down the class action waivers as a violation of the right to engage in "concerted activities." It rejected the argument from employers that the class action waivers are enforceable under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.* The FAA, with its strong policy favoring arbitration, overrides any countervailing provisions, such as Section 7 of the NLRA.

On review of the NLRB's rulings, the 2nd, 5th and 8th Circuits held that class action waivers are enforceable, while the 7th and 9th Circuits held that they are not. The Supreme Court granted certiorari in three of those cases (*Epic Systems*, *National Labor Relations Board v. Murphy Oil USA*, and *Ernst &*

Young LLP v. Morris); consolidated them for oral argument; and decided them jointly in the opinion issued on May 21.

The majority opinion, authored by Justice Gorsuch, ruled 5-4, that the FAA authorizes class and collective action waivers in arbitration agreements. The strong federal policy favoring arbitration “require[s] courts to respect and enforce agreements to arbitrate,” and the FAA requires “them to respect and enforce the parties’ chosen arbitration procedures.” Op. at 5.

The Court rejected the employees’ argument that the saving clause in Section 2 of the FAA, which permits courts to refuse to enforce arbitration agreements “upon such grounds as exist at law or in equity for the revocation of any contract[,]” 9 U.S.C. § 2, precludes enforcement of arbitration agreements containing class or collective action waivers. Justice Gorsuch reasoned that the “any contract” language of the statute meant that the saving clause would encompass only grounds that could be asserted generally against enforcement of contracts, such as “fraud or duress or in some other unconscionable way that would render *any* contract unenforceable.” Op. at 7 (original emphasis).

In addition, Justice Gorsuch rejected a reading of Section 7 of the NLRA to trump the earlier-enacted FAA. Relying on settled principles of statutory interpretation, he concluded that the strong policy against implied repeal and the principle that a party bears a heavy burden in arguing that statutes cannot be harmonized, and that a later-enacted statute displaces the previously enacted one. Op. at 10.

Section 7 of the NLRA did not impliedly repeal the FAA or satisfy the employees’ burden here because it does not mention arbitration, let alone class or collective actions, which largely were unknown at the time of the NLRA’s adoption. The “concerted activities” intended to be covered by the NLRA involve organization and collective bargaining, and activities closely related to them that are addressed in the NLRA’s regulatory scheme. Op. at 12-13. Those subjects do not include arbitration and class and collective actions. *Id.* Indeed, Justice Gorsuch advanced a narrow reading of the NLRA, holding that it “secures to employees rights to organize unions and bargain collectively, but it 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.

Justice Gorsuch also emphasized that its ruling in *Epic Systems* is consistent with a long line of cases that have considered and rejected efforts to create conflicts between the FAA and other federal statutes, including the Sherman and Clayton Acts, the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act. Op. at 16-21.

Throughout the opinion, Justice Gorsuch emphasized that Congress, not the courts, must make the policy decision as to whether class and collective action waivers should be enforceable.

The dissent, authored by Justice Ginsburg, argued that the NLRA is not as narrowly focused as the majority held because it protects employees’ rights “to engage in *other* concerted activities for the

purpose of . . . mutual aid or protection.” Dissent at 8. She rejected the majority’s “cramped construction of the NLRA” as inconsistent with the “embrasive purpose” behind the statute. *Id.* at 12. The dissent criticized the majority for retreating from a long line of cases, holding that the NLRA safeguards employees from employer interference when they pursue joint, collective and class suits related to the terms and conditions of their employment. *Id.* at 10-11.

Epic Systems has now decided one of the remaining questions following *AT&T Mobility* and *DIRECTV, Inc.* However, it has opened the door to more challenges to the authority of the NLRB by advocating a narrow construction of the NLRA.

The full text of the opinion and dissent can be found on the Supreme Court’s [website](#).

Akin Gump Strauss Hauer & Feld LLP was co-counsel in one of the three cases decided in the opinion, *Ernst & Young v. Morris*.

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