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ARBITRATION

Expert Analysis

SCOTUS to Tackle Interaction of FAA, NLRA on Arbitration Agreement Issue

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On Oct. 3, 2017 the U.S. Supreme Court heard arguments in *Epic Systems v. Lewis*, No. 16-285 (consolidated with *Ernst & Young v. Morris*, No. 16-300 and *NLRB v. Murphy Oil USA*, No. 16-307).

These cases deal with employees who were required to sign arbitration agreements as a condition of their employment promising to resolve disputes with their employers through arbitration and waiving their rights to bring class or collective arbitrations. At their core, these cases concern how two federal statutes—the Federal Arbitration Act (FAA) and the National Labor Relations Act (NLRA)—interact. They also raise the basic question whether the National Labor Relations Board (NLRB), the agency responsible for enforcing the NLRA, has authority to regulate arbitration agreements in the nonunion sector.

The FAA provides that an agreement to settle a controversy by arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Section 7 of the NLRA provides employees with 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. The employers argue that "the FAA will only yield in the face of a contrary congressional command," and in the cases at bar, no such contrary congressional command exists. See *CompuCredit v. Greenwood*, 132 S. Ct. 665 (2012). The NLRB and the employees argue that §7 of the NLRA is such a contrary congressional command. 29 U.S.C. §157.

The National Labor Relations Board (NLRB) first articulated this position in *D.R. Horton*, 357 NLRB No. 184 (2012), which required the agency to hold that §7 secures not only the right to pursue whatever rights employees have in courts and other statutory fora but also the right to be free of "employer-imposed limitations" contained in otherwise enforceable arbitration agreements. The agency reaffirmed its view in *Murphy Oil*, where the district court agreed that that the use of such an arbitration agreement was an unfair labor practice under the NLRA. The Fifth Circuit reversed. In *Epic Systems*, the lead case, the Seventh Circuit sided with the NLRB, and held that a non-union employee's agreement to waive "the right to participate in or receive money or any other relief from any class, collective, or representative proceeding" violated his §7 rights. (For our prior coverage of this issue, please see "Arbitration Provision Barring Class Action Void," NYLJ, July 18, 2016.) In *Ernst & Young*, the Ninth Circuit followed the NLRB

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and the Seventh Circuit and ruled that arbitration agreements requiring non-union employees to bring claims in "separate proceedings" violated their §7 rights.

At argument, the Department of Justice (DOJ) argued that the right to engage in a class or collective action is procedural. The NLRA, therefore, cannot convert the right into a substantive and non-waivable right. Counsel for Epic Systems further argued that the Court has had at least four cases involving employment arbitration where no one asserted there was a contrary §7 right. Moreover, in the company's view, the §7 right was only a right against retaliation for seeking to engage in concerted activity, not a right to countermand arbitration agreements with nonunion employees. The NLRB countered that long-standing precedent bars the enforcement of contracts that interfere with employee's rights to engage in concerted action, and that to enforce the arbitration agreements would violate express provisions of the NLRA. It conceded to the validity of certain bilateral arbitration agreements, asserting that "individuals can agree to arbitrate individually, so long as there is … a forum in which they can proceed collectively," arbitral or judicial.

It is unclear at this juncture how the court will rule. Four Justices—Justices Stephen Breyer, Ruth Bader Ginsburg, Elena Kagan and Sonia Sotomayor—seemed to agree with the NLRB and the employees that class action waivers had to give way to the §7 right to engage in concerted activity. For example, Justice Ginsburg compared the arbitration agreements to "yellow dog" contracts, a type of contract in which, as a condition of employment, the employee agrees not to become a member of a labor union. She noted that these are prohibited under the Norris-LaGuardia Act, and observed that with respect to the arbitration agreements at issue

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"there is no true liberty to contract on the part of the employee." Justice Breyer expressed similar concerns. Justice Kagan asked if a discriminatory arbitration agreement, such as one that said the employer would pay arbitration costs for men but not women, would be enforceable. She noted that Title VII of the Civil Rights Act of 1964 does not contain language about arbitration, and yet all parties would agree that it would prohibit such an agreement. She asked why §7's prohibition on interference with concerted activity should not also function as a clear congressional command that would render such an arbitration agreement unenforceable.

Three Justices—Chief Justice John Roberts and Justices Anthony Kennedy and Samuel Alito—appeared to agree with the employers and the DOJ. Justice Kennedy proposed that even if the employees were unable to proceed with a class arbitration, that their right to concerted action would not be infringed, as they would still be able to act collectively in seeking the representation of the same attorney with whom they would share information, and who could represent them in each of their individual arbitrations. Perhaps most tellingly, Chief Justice Roberts seemed troubled by the estimated 25 million employment contracts that would be invalidated were the court to rule in favor of the employees.

Justice Clarence Thomas and Justice Neil Gorsuch remained silent throughout the argument. Given the apparent disagreement among the Justices, the ultimate decision is likely to be split. It is also unclear what would happen if the court agreed with the NLRB, but the agency later ruled that it did not have the authority to regulate nonunion arbitration agreements.

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