Appellate & Supreme Court

The Supreme Court Reaffirms The Reach And Force Of The Federal Arbitration Act, This Time In Employment Cases

By: Adam G. Unikowsky, Michael T. Brody, Carla J. Rozycki, Howard S. Suskin, and Gabriel K. Gillett

On May 21, 2018, the Supreme Court issued its long-awaited decision in the consolidated cases *Epic Systems Corp. v. Lewis*, No. 16-285; *Ernst & Young LLP v. Morris*, No. 16-300; and *NLRB v. Murphy Oil USA*, No. 16-307. In a 5-4 opinion by Justice Gorsuch, the Court held that courts must enforce arbitration agreements requiring employees to bring employment-related claims in individualized arbitration proceedings, and barring them from pursuing those claims as a collective or class action.[1] The Court explained that absent a contrary congressional directive, arbitration clauses are "valid, irrevocable, and enforceable" under the Federal Arbitration Act (FAA), which reflects "'a liberal federal policy favoring arbitration agreements.'"[2] The Court held that such arbitration agreements do not violate employees' statutory right under the National Labor Relations Act (NLRA) to "engage in other concerted activities for the purpose of … mutual aid or protection."[3] It concluded that the National Labor Relations Board (NLRB)'s contrary conclusion was not entitled to *Chevron* deference.[4] Therefore, the Court held that the provisions requiring individual arbitration of employment disputes were enforceable under the FAA.

The *Epic* decision represents a major victory for employers. It allows them to avoid burdensome class actions and instead take advantage of the cost and speed of individualized arbitration. The decision continues the Court's longstanding practice of enforcing the FAA according to its terms.

The *Epic* case began when Jacob Lewis filed a putative class and collective action in federal court against his former employer, Epic Systems Corp., alleging violations of federal and state wage-and-hour laws.[5] Epic moved to compel individual arbitration, arguing that under the terms of an agreement that Lewis had accepted as a condition of employment, Lewis was required to bring employment-based claims through individual arbitration and not as a collective or class action.[6] The district court held that the arbitration agreement was unenforceable, and the Seventh Circuit affirmed, deferring to the Board's conclusion that individualized arbitration agreements violated an employee's right to engage in concerted action under the NLRA.[7] The Seventh Circuit's decision conflicted with decisions from other circuits, which had held that the FAA required enforcement of such agreements according to their terms. The Court granted Epic's petition for certiorari, along with two other petitions raising the same question, and consolidated the three cases.[8]

After the petitions were granted, the administration changed—and the solicitor general's position changed along with it. During the Obama Administration, the solicitor general signed the Board's petition for certiorari in *Murphy Oil* arguing that the Board's view was entitled to deference. With the change in administration, however, the solicitor general changed positions and sided with the employer, while the Board—with a majority of its members still consisting of Democratic appointees—adhered to its prior position. Thus, in a rarely-seen event, two government lawyers—one from the solicitor general's office, and one from the Board—presented oral argument, taking opposite positions.

The Court Upholds Clauses Requiring Individual Arbitration

In a 5-4 decision, the Court held that clauses requiring individual arbitration of employment disputes were enforceable under the FAA. The majority opinion—written by Justice Gorsuch, and joined by Chief Justice Roberts and Justices Kennedy, Thomas and Alito—began by explaining that the FAA requires enforcement of the employees' arbitration agreements. The Court rejected the employees' argument

based on the FAA's savings clause, "which allows courts to refuse to enforce arbitration agreements 'upon such grounds as exist at law or in equity for the revocation of any contract.'"[9] The Court explained that the FAA's savings clause preserves "'generally applicable contract defenses, such as fraud, duress, or unconscionability,'" but does not preserve defenses that are specific to arbitration. Thus, the Court explained, the employees' arbitration-specific defense—that individualized arbitration conflicted with the NLRA—was not "saved" by the savings clause.[10]

Next, the majority addressed the interplay between the FAA's call for enforcing arbitration agreements according to their terms, and the NLRA's guarantee of an employee's right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[11] The Court found the statutes could be harmonized because the rights conferred by the NLRA say nothing to limit the right to agree to individualized arbitration. That reading was consistent with the history and structure of the NLRA, the Court explained, because the NLRA was enacted decades before the creation of modern class actions and because the NLRA centered on "activities" related to workplace association, not courtroom procedure. The Court relied on a line of cases in which it had held that the FAA was not displaced by other federal statutes.[12]

The majority then described "a few of the most obvious reasons" for rejecting the employees' argument that *Chevron* deference required the Court to accept the NLRB's 2010 judgment prohibiting clauses requiring individualized arbitration.[13] For one, *Chevron* deference applies when an agency interprets its own organic statute, but the NLRB sought to interpret the reach of a different statute—the FAA. For another, *Chevron* deference leaves space for the Executive Branch to make policy, but the Executive Branch could not decide which policy it favored—the solicitor general and the NLRB took conflicting positions. And finally, *Chevron* deference applies where traditional canons of statutory construction cannot resolve the issue, but the majority found those canons were "more than up to the job" this time.

The Court closed by noting that "[t]he policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written."[14]

Epic's Implications

Epic is the Court's latest in a string of decisions holding that the FAA requires enforcement of arbitration agreements according to their terms. As the Court observed, "in many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes."[15] The Court has also repeatedly rejected statutes and court decisions that "target[ed] arbitration either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration.'"[16] *Epic* continued that longstanding trend by holding that enforcement of individualized arbitration agreements does not conflict with the National Labor Relations Act.

Epic has important labor law implications. It appeared to close the door on any argument that the NLRA protects employees' right to access *any* particular procedures in litigation or arbitration. In *Eastex, Inc. v. NLRB*, 437 U.S. 556, 558 (1978), the Court had stated that the NLRA "protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums." But the Court gave *Eastex* a narrow read, characterizing its statement as dicta that did not "purport to discuss what *procedures* an employee might be entitled to in litigation or arbitration."[17]

Epic also has implications to arbitration law. The Court powerfully reaffirmed its prior holding in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), that class actions are inconsistent with a "fundamental attribute" of arbitration: "individualized and informal" proceedings.[18] The Court explained that if individualized arbitration agreements were unenforceable, "the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace."[19] The Court held that "*Concepcion*'s essential insight remains: courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent."[20] Disputes over class-action litigation under the FAA are hardy perennials at the Supreme Court—indeed, the Court has already granted certiorari in two cases for next Term in which federal appellate courts ruled in favor

of class-action plaintiffs seeking to bypass individualized arbitration agreements.[21] The Court's ruling makes clear that a majority of the Supreme Court will look upon such rulings with skepticism.

Finally, the Court's *Chevron* analysis broke new ground. As previously noted, the government did not speak with one voice: to the contrary, the solicitor general and the Board took conflicting positions. The Court held that the Board's position was therefore not entitled to *Chevron* deference, explaining that "whatever argument might be mustered for deferring to the Executive on grounds of political accountability, surely it becomes a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it might be held accountable.[22] The Court's decision opens the door for the Justice Department to avoid *Chevron* deference by disagreeing with an agency's view on a legal question. This may facilitate more rapid regulatory change upon a change of administration.

Our Arbitration Dispute Experience

Jenner & Block has substantial experience in arbitration-related disputes. For example, Partner Adam Unikowsky represented the Retail Litigation Center as *amicus curiae* at the Supreme Court, at both the certiorari and merits stage in *Ernst & Young* and at the merits stage in *Epic* and *Murphy Oil*. He has also represented the Retail Litigation Center and The Chamber of Commerce of the United States in arbitration-related cases in the US Court of Appeals for the Ninth Circuit. In addition, Partner Howard Suskin has represented many clients in efforts to enforce and limit arbitration clauses, and, as an arbitrator for the American Arbitration Association, FINRA, CBOE and NFA, has substantial experience interpreting the scope of arbitration clauses.

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[1] Slip op. at 1-2.

[2] *Id.* at 5-9, 22-23.

[3] *Id.* at 10-19, 23-25.

[4] *Id.* at 19-21.

[5] *Lewis v. Epic Systems, Inc.*, 823 F.3d 1147, 1151 (7th Cir. 2016).

[6] *Id.*

[7] *Id.* at 1154-60.

[8] 137 S. Ct. 809 (2017).

[9] Slip op. 6 (quoting 9 U.S.C. § 2).

[10] Slip op. 5-9.

[11] *Id.* at 9-14, 22-23.

[12] *Id.* at 16-19, 23-25.

[13] *Id.* at 19-21.

[14] *Id.* at 21-25.

[15] *Id.* at 16-17.

[16] *Id.* at 6-7 (citing *Kindred Nursing Centers L. P. v. Clark*, 137 S. Ct. 1421 (2017)); *see also id.* at 22-23 (describing the dissent as "rehashing" some cases that comprise "the mountain of precedent" related to the scope of the FAA).

[17] *Id.* at 18.

[18] *Id.* at 8.

[19] *Id.*

[20] *Id.*

[21] *See New Prime, Inc. v. Oliveira*, No. 17-340; *Lamps Plus Inc. v. Varela*, No. 17-988.

[22] Slip op. at 20.

Contact Us

Adam G. Unikowsky

aunikowsky@jenner.com | Download V-Card

Michael T. Brody

mbrody@jenner.com | Download V-Card

Carla J. Rozycki

crozycki@jenner.com | Download V-Card

Howard S. Suskin

hsuskin@jenner.com | Download V-Card

Gabriel K. Gillett

ggillett@jenner.com | Download V-Card