THE SUPREME COURT HEARS ARGUMENT TO DECIDE WHETHER CLASS-ACTION WAIVERS IN EMPLOYMENT ARBITRATION AGREEMENTS ARE ENFORCEABLE

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By: Andrew C. Glass, Robert W. Sparkes, III, April Boyer, Todd L. Nunn, Michael R. Creta, Roger L. Smerage

Employers that have class- or collective-action waivers in their employee arbitration agreements (or are contemplating implementing them) need not wait much longer for the U.S. Supreme Court to decide whether such waivers are enforceable under the Federal Arbitration Act ("FAA"), [1] notwithstanding certain provisions of the National Labor Relations Act ("NLRA"). [2] On October 2, 2017, the first day of its new term, the Court heard argument on that question in a consolidated trio of cases — *Epic Systems Corp. v. Lewis,* No. 16-285; *Ernst & Young LLP v. Morris,* No. 16-300; and *NLRB v. Murphy Oil USA Inc.*, No. 16-307. The Court's decision could resolve a split in authority among the federal courts of appeals, and it will likely impact how employers approach class- or collective-action waivers with their employees.

BACKGROUND

The FAA guarantees that where a contract provides for settling controversies arising out of the contract through arbitration, such provision "shall be valid, irrevocable, and enforceable." [3] At the same time, a court is not required to enforce an arbitration agreement if Congress has overridden the FAA by excluding a statutory cause of action from its reach. [4]

Section 7 of the NLRA states that "[e]mployees shall have the right to . . . engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." [5] Further, under Section 8, an employer engages in an "unfair labor practice" if it "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in [Section 7]." [6] Thus, reading Sections 7 and 8 together, prohibiting an employee from engaging in "concerted activities" could be an "unfair labor practice." [7]

The Supreme Court granted *certiorari* to address how the interplay between the FAA and the NLRA affects the enforceability of class- or collective-action waivers in arbitration agreements. In particular, the Court reviewed the question of whether class- or collective-action waivers in employment arbitration agreements are enforceable under the FAA, notwithstanding Sections 7 and 8 of the NLRA. [8]

ORAL ARGUMENT

Former Solicitor General Paul Clement, counsel for the employers, argued in favor of enforcing class- or collective-action action waivers in employee arbitration agreements notwithstanding the NLRA. Mr. Clement asserted that "the FAA will only yield to a contrary congressional command" and that the "FAA should not yield" to

the NLRA because it lacks such a command. [9] Counsel for the United States, which appeared as *amicus curiae* on behalf of the employers, [10] argued that the NLRA does not contain a "clear congressional command" overriding the FAA because it "doesn't say anything about arbitration or class or collective treatment." [11] According to the employers, there is "nothing sinister" about enforcing individual (sometimes called "bilateral") arbitration provisions; such provisions are simply an "effort by the employer and the employee to agree to set the rules for the forum of arbitration." [12]

The liberal members of the Court expressed some skepticism regarding the employers' position. Justice Kagan indicated that this type of employment agreement involves employees waiving their right under the NLRA to engage in concerted activities for the purpose of mutual aid or protection. [13] Justice Sotomayor shared this concern and stated that "the very act of saying this can only be an individual arbitration" prevents employees from participating in concerted activities. [14] According to Justice Ginsburg, employment arbitration agreements with class- or collective-action waivers have all of the essential features of a "yellow dog" contract because there is no true "liberty to contract" for employees. [15] And Justice Breyer commented that the employers' position would involve overturning labor law that goes to the "entire heart of the New Deal." [16]

NLRB General Counsel Daniel Griffin argued that employers cannot force employees to waive their right to act collectively. In response to a hypothetical posed by Chief Justice Roberts about contracts incorporating arbitral rules that restrict class or collective proceedings (rather than express waivers), which Mr. Griffin acknowledged he might have misunderstood, [17] Mr. Griffin suggested that an arbitral forum could prohibit an employee from engaging in class or collective action. During the argument he explained that this was because the NLRA provisions only "run[] to employer interference," not outside forces. [18] In response, Justice Alito asserted: "[I]f that's the rule, you have not achieved very much because, instead of having an agreement that says . . . no class arbitration, you have an agreement requiring arbitration before the XYZ arbitration association, which has rules that don't allow class arbitration." [19]

Daniel Ortiz, counsel for the employees, likewise argued that employers cannot demand the waiver of concerted rights. At apparent odds with the NLRB's position, however, he contended that an arbitral forum cannot prohibit an employee from engaging in class or collective action through its rules, even if the employment agreement calls for application of those rules. [20] In responding to a question from Justice Alito, Ortiz conceded that the NLRA is not violated "as long as joint legal action is available in one forum" because the "arbitral forum is equivalent to the judicial forum." [21] Chief Justice Roberts and Justice Kennedy also asked questions that expressed some skepticism with the positions of the NLRB and the employees. Neither Justice Thomas nor Justice Gorsuch asked any questions during the argument.

After the hearing, Mr. Griffin submitted a letter to the Court with respect to the apparent difference between the position of the NLRB and the employees regarding whether arbitral forum rules can prohibit an employee from engaging in class or collective action through incorporation of those rules in the arbitration agreement. Mr. Griffin corrected his "inaccurate" response to Chief Justice Roberts' hypothetical and expressed that there was "no disagreement" between the NLRB and the employees regarding the above position. Presumably then, the NLRB would agree that although an arbitrator can find that a putative class or collective action does not meet the standard for certification set by the arbitral forum (through application, for example, of the Fed. R. Civ. P. 23 test or otherwise), an employer's incorporation of a blanket rule by the forum prohibiting class or collective arbitration in its arbitration agreement with employees would violate the NLRA.

CONCLUSION

Regardless of the outcome, the Supreme Court's decision will likely impact employers and employees across the country. According to counsel for the employees, approximately 25 million employees nationwide have employment arbitration agreements with class- or collective-action waivers.[22] Depending on the Court's decision, employers either could be encouraged to increase the use of such waivers or could be required to remove invalid and unenforceable language from employment agreements. Additionally, although the consolidated cases primarily concern the potential conflict between the FAA and U.S. labor law, depending on the scope of the Court's decision, its ruling could impact the use of class- or collective-action action waivers in other types of arbitration agreements such as consumer contracts.

K&L Gates LLP will continue to monitor these cases and will post developments as they occur. A decision may come as early as late 2017 or early 2018 but is expected by June 2018, at the latest, when the Court completes its term.

NOTES:

[1] 9 U.S.C. §§ 1, *et seq.*

[2] 29 U.S.C. §§ 151, *et seq.* The NLRA governs most private sector employers but does not govern employers who only employ agricultural workers or employers governed by the Railway Labor Act.

[3] 9 U.S.C. § 2.

[4] *CompuCredit Corp. v. Greenwood,* 565 U.S. 95, 98 (quoting *Shearson/Am. Express Inc. v. McMahon,* 482 U.S. 220, 226 (1987)).

[5] 29 U.S.C. § 157.

[6] 29 U.S.C. § 158.

[7] *E.g., NLRB v. City Disposal Sys. Inc.,* 465 U.S. 822, 833 n.10 (1984) ("[A]n employer commits an unfair labor practice if he or she interferes with, or restrains concerted activity.") (internal quotations omitted).

[8] For more information about the FAA, NLRA, and the split in authority on this issue, please see the K&L Gates Alert titled *Arbitration Is Back on the Docket: The Supreme Court to Review the Enforceability of Class Action Waivers in Employment Arbitration Agreements*.

[9] Transcript of Oral Argument ("Transcript") in *Epic Systems Corp. v. Lewis*, No. 16-285 (U.S. Oct. 2, 2017), *Ernst & Young LLP v. Morris,* No. 16-300 (U.S. Oct. 2, 2017), and *NLRB v. Murphy Oil USA Inc.*, No. 16-307 (U.S. Oct. 2, 2017) at 4, *available* at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-285_1qm2.pdf.

[10] Originally, the Obama administration supported the positions of the National Labor Relations Board ("NLRB") and the employees that class- and collective-action waivers are invalid and unenforceable under the NLRA. The Trump administration, however, switched to supporting the employers' arguments. Consequently, the NLRB, an independent government agency, advocated for the employees, while the Solicitor General advocated for the employers.

[11] Transcript at 23–24.

[12] *Id.* at 19.

[13] *Id.* at 19–20.

[14] *Id.* at 27.

[15] *Id.* at 11.

[16] *Id.* at 67.

[17] *Id.* at 47–48.

[18] *Id.* at 45, 48.

[19] *Id.* at 50.

[20] *Id.* at 60.

[21] *Id.* at 65.

[22] *Id.* at 54–55.

KEY CONTACTS

ANDREW C. GLASS
PARTNER

BOSTON
+1.617.261.3107
ANDREW.GLASS@KLGATES.COM

APRIL BOYER
PARTNER

MIAMI
+1.305.539.3380
APRIL.BOYER@KLGATES.COM

MICHAEL R. CRETA
PARTNER

BOSTON
+1.617.951.9101
MICHAEL.CRETA@KLGATES.COM

ROBERT W. SPARKES, III
PARTNER

BOSTON
+1.617.951.9134
ROBERT.SPARKES@KLGATES.COM

TODD L. NUNN
PARTNER

SEATTLE, SAN FRANCISCO
+1.206.370.7616
TODD.NUNN@KLGATES.COM