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## The Supremes Sing Yet Another Arbitration Love Song

In a 5-4 decision on May 21, the Supreme Court of the United States again handed down a significant win for employers and offered yet another boost to the general enforceability of arbitration agreements.

In *Epic Systems Corp. v. Lewis*, the Supreme Court was asked to resolve a Circuit Court split, and address whether employee arbitration agreements that waive an employee's right to class actions and collective proceedings are generally enforceable.

On one hand, employers argue that the Federal Arbitration Act ("FAA") requires that courts enforce the terms of arbitration agreements and apply the judicial procedures selected by the parties. However, on the other hand, the FAA contains a "saving 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." The employees in these cases argued that their employee arbitration agreements, which waived the employee's right to engage in class or collective arbitration and instead required individual arbitrations, violated the National Labor Relations Act ("NLRA") and Norris-LaGuardia Act ("NLGA"; a precursor to the NLRA), both of which broadly protect employees' right to engage in concerted activities for mutual aid and protection. The Court sided with the employers, once again confirming the court's reverence for arbitration agreements.

### How Did We Get Here?

This issue first arose in 2012 in the D.R. Horton case, when the National Labor Relations Board ("NLRB") took the stance that arbitration agreement provisions that required individual arbitration and waived the employee's right to class or collective proceedings violated the NLRA's protections that guaranteed employees the right to engage in

concerted activity for mutual aid or protection. The Board reasoned that by restricting the employees' right to collectively adjudicate their claims, the employer had effectively limited its employees from engaging in an important mode of concerted activity.

Until recently, every court to consider D.R. Horton, rejected this position (including the 2nd Circuit, 5th Circuit, the 8th Circuit, and the Supreme Courts of California and Nevada). However, this past year, two Circuits, the 7th Circuit and 9th Circuit, which includes Washington, sided with the NLRB and held that the provisions violated the NLRA's protections and were, therefore, unenforceable. These two cases, Epic Systems and Ernst & Young, along with Murphy Oil out of the 5th Circuit (which was decided in favor of enforceability), were consolidated for review.

**A Divided Court Sides with Employers.**

Justice Gorsuch wrote on behalf of the five-member majority, holding that the FAA protects employment arbitration agreements from judicial interference, and neither the saving clause nor the NLRA demands a different conclusion.

The majority explained that the saving clause only pertains to defenses that apply to "any" contract, and therefore, the court cannot save a contractual defense that targets arbitration either by name or by more subtle methods, such as by "'interfere[ing] with the fundamental attributes of arbitration.'" The Court concluded that the parties' right to choose the method of arbitration constituted one of those fundamental attributes. Thus, in cases such as these, the FAA still requires that courts enforce the parties' agreement to use individualized rather than class or collective action procedures. Moreover, the majority disagreed that the FAA and NLRA were in conflict, repeatedly noting that the two federal statutes had peaceably coexisted for 77 years, and no such conflict existed until the NLRB stumbled upon this new right to collective arbitration in D.R. Horton in 2012.

Justice Ginsberg, writing for the dissent in which Justices Breyer, Sotomayor and Kagan joined, passionately disagreed, noting that such arbitration agreements were inherently one-sided. In most circumstances, the employee will lack the bargaining power to meaningfully negotiate such terms, and the choice to use individualized arbitration will almost always benefit the employer, not the employee. Moreover, employees' individualized claims will often be too small relative to the expense and costs of arbitration. As Justice Ginsberg explained, this was precisely the type of problem the NLRA sought to redress. According to the dissent, the majority's decision harkens back to a time when employers were allowed to use "yellow dog" contracts (agreements by employees not to join a union - illegal since 1932) and other methods to stymy its employees' concerted efforts.

Yet, the majority's decision is not altogether surprising. For most following the court's recent precedent under the FAA, the writing was already on the wall. In a slew of recent cases—*DIRECTV, Inc. v. Imburgia*; *American Express Co. v. Italian Colors Restaurant*; *ComputCredit Corp. v. Greenwood*; and *AT&T Mobility LLC v. Concepcion*—the Court

has upheld the enforceability of arbitration agreements against a host of challenges, time and again confirming that arbitration and its inherent features will not be susceptible to attack.

**What Does this Mean for Employers and Employees?**

While perhaps not the hottest issue on the bench this term, its holding has some far-reaching implications for employers, especially those who have generally relied on such agreements to arbitrate.

For employers, this week's decision means that businesses can continue to rely on class-waiver provisions in their arbitration agreements. For larger employers in particular, a class-waiver can be an effective tool to inhibit a small single-claim from ballooning into a widespread collective action under the FLSA.

In turn, employees are advised to read the provisions of their employment contracts carefully. Seeking recourse through individual arbitration creates a significant additional hurdle to recovery, particularly where the potential claim itself may amount to only a few thousand dollars. In those scenarios, the cost of arbitration can quickly outpace the value of the claim. An alternative consideration, (as provided by Justice Kennedy during oral argument), employees can still reap many of the benefits of a collective action by utilizing the same attorney and pooling their resources.

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