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by
Mark W. Lerner
and
Jonathan L. Shapiro

Kasowitz Benson Torres LLP
New York, New York

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Commentary

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Mark W. Lerner
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[Editor's Note: Mark W. Lerner is a partner with the firm Kasowitz Benson Torres LLP and is head of the firm's Employment Practices and Litigation Group. Jonathan L. Shapiro is an associate with the firm and is a member of the Employment Practices and Litigation Group. Both have broad experience handling employment-related litigation and disputes before federal and state courts, administrative agencies, and alternative dispute resolution bodies. Any commentary or opinions do not reflect the opinions of Kasowitz Benson Torres LLP or LexisNexis®, Mealey Publications™. Copyright © 2018 by Mark W. Lerner and Jonathan L. Shapiro. Responses are welcome.]

On May 21, 2018, the United States Supreme Court decided *Epic Systems Corp. v. Lewis*,[1] resolving a split among the federal circuits whether class and collective action waivers in employment agreements are lawful. The Court held that employment agreements providing for individualized arbitration proceedings, precluding class and collective actions, are enforceable under the Federal Arbitration Act ("FAA") and do not violate the National Labor Relations Act ("NLRA"). This decision marks, at least in those jurisdictions which did not recognize such class and collective action waivers, a major shift in power from employees to their employers.

Background

In 2012, the National Labor Relations Board (the "Board"), for the first time in the 77 years since the NLRA's adoption, held that the NLRA – which permits workers to organize unions and to engage in other concerted activities – "effectively nullifies" the FAA in cases where there is an individual employment agreement with a class or collection action wavier.[2] Following the Board's decision, a circuit split developed, with some circuit courts agreeing with the Board's decision or choosing to defer to it (*e.g.*, the Seventh and Ninth Circuit Courts of Appeals), and others holding that such employment agreements remain lawful (*e.g.*, the Fifth Circuit Court of Appeals).[3] The Supreme Court granted *certiorari* to resolve the circuit split.

The Supreme Court's Decision

In the 5-4 majority opinion authored by Justice Gorsuch, in which Chief Justice Roberts and Justices Kennedy, Thomas and Alito joined, the Court held that under the FAA, courts must "enforce arbitration agreements according to their terms—including terms providing for individualized proceedings."[4]

Providing context for its opinion, the Court began by discussing the 1925 adoption of the FAA and reviewing the Court's precedent interpreting the act. The Court quoted prior cases holding that the FAA "establishes 'a liberal federal policy favoring arbitration agreements,'" and "requires courts 'rigorously' to 'enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted.'"[5] Previewing its holding, the Court stated that Congress, through the enactment of the FAA, "directed [courts] to respect and enforce the parties' chosen arbitration procedures."[6]

The Court then considered, and rejected, the employees' arguments. First, the Court addressed the employees'

contention that the FAA's "saving clause" creates an exception because it allows courts to refuse to enforce arbitration agreements "'upon such grounds as exist at law or in equity for the revocation of any contract.'"[7] In the employees' view, the NLRA renders their class and collection action waivers illegal because their waivers require individualized arbitration proceedings instead of class or collective ones, and illegality under the NLRA is an appropriate "ground" under the saving clause. The Court found that the saving clause "can't save their cause" because "the saving clause recognizes only defenses that apply to 'any' contract" – which means, under existing precedent, that agreements can be invalidated only by "'generally applicable contract defenses, such as fraud, duress or unconscionability.'"[8] The Court explained that the saving clause does not save defenses that "'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'"[9]

Second, the Court disposed of the employees' argument that the language in Section 7 of the NLRA represents a "clear and manifest congressional command to displace the [FAA] and outlaw agreements like theirs."[10] Section 7 of the NLRA, which was enacted in 1935, guarantees workers "the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[11] The Court, however, explained that because Section 7 does not express approval or disapproval of arbitration and does not even mention class or collective action procedures, the NLRA fails to display a "clear and manifest" intent to displace the FAA. The Court noted that "when Congress wants to mandate particular dispute resolution procedures it knows exactly how to do so" and has shown that it "knows how to override the [FAA] when it wishes."[12] The Court found that nothing in the NLRA can be read to conflict with the FAA.

Finally, the Court rejected the employees' argument that the Court should defer to the Board's recent interpretation of the NLRA in *D.R. Horton, Inc*. The Court explained that such deference is appropriate when there is a statutory ambiguity and the agency is "'implicit[ly]'" delegated to interpret the statute that it administers.[13] Here, however, the Court found that such deference would be inappropriate because the Board was not only interpreting the NLRA but also was seeking to limit the reach of the FAA.

The Court concluded by stating that although the "law is clear," "Congress is of course always free to amend this judgment."[14] In other words, if Congress wishes to override the FAA, it can do so.

Justice Ginsberg's Dissenting Opinion

Justice Ginsburg, joined by Justices Breyer, Sotomayor and Kagan, authored a dissenting opinion that criticized the majority opinion as "egregiously wrong."[15] The dissent explained that the NLRA was enacted to place employers and employees on a more equal footing, and that the FAA does not shrink the NLRA's protective sphere. According to the dissent, the employees' right to engage in collective employment litigation is firmly rooted in the NLRA's design. As the dissent stated, "[t]here can be no serious doubt that collective litigation is one way workers may associate with one another to improve their lot."[16] The dissent found that "the NLRA should qualify as 'an implied repeal' of the FAA," to the extent there is conflict between the two, because the NLRA is the more pinpointed legislation over the subject matter.[17]

The dissent also warned that the majority's decision will result in the under-enforcement of federal and state statutes designed to advance the well-being of vulnerable workers, predicted that employers will skirt their legal obligations (especially with respect to wage and hour laws), and cautioned that workers will be deterred from seeking redress for violations of law by their employers.

Responses to and Impact of the Court's Decision

Employers have lauded the Court's decision as a victory. The decision will almost certainly prompt a renewed effort by employers to require employees to sign such agreements. Employers should be mindful, however, that employees still can legally challenge their employment agreements under common law contract defenses such as duress or fraud.

Critics of the decision lament that employees who sign arbitration agreements will be prohibited from banding together in order to pursue class and collective actions, especially in wage and hour matters. Individuals and the attorneys who represent them often find that the expense of litigating a case on an individualized basis is impractical and cost prohibitive. Individual employees will need to carefully evaluate the costs and benefits of commencing a claim in arbitration.

As the Supreme Court noted, Congress could pass legislation to reverse in whole or in part the effect of the Court's decision. In December 2017, Senators Lindsey Graham (R-S.C.) and Kristen Gillibrand (D-N.Y.) introduced bipartisan legislation, the "Ending Forced Arbitration of Sexual Harassment Act of 2017," that would void arbitration agreements that require arbitration of sexual harassment and discrimination claims.[18] The bill currently has 17 co-sponsors. Similar bills have been introduced in the House of Representatives.

Notably, several states, New York among them,[19] have recently enacted laws that outlaw agreements requiring arbitration of sexual harassment cases, ensuring that plaintiffs can file such claims in court. It is only a matter of time before employers file motions to compel arbitration in such matters, arguing that state law is preempted by the FAA.

The Court's decision also impacts state and local decisions that followed the Board's *D.R. Horton* decision. For example, the New York Appellate Division for the First Department held in July 2017 that arbitration provisions prohibiting class and collective actions violate the NLRA and are unenforceable.[20] That decision is now abrogated.

Employees and their advocates will be looking to Congress to act promptly in response to *Epic Systems*. In the meantime, employers with class and collective action waivers in place are in a stronger position than ever to avoid such actions by their employees.

Endnotes

1. *Epic Sys. Corp. v. Lewis*, No. 16-285, 584 U.S. ___, (May 21, 2018).
2. *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012).
3. *Epic Sys. Corp.*, slip. op. at 4.
4. *Id.* at 2.
5. *Id.* at 5-6 (citations omitted).
6. *Id.* at 5.
7. *Id.* at 6 (citation omitted).
8. *Id.* at 7 (citations omitted).
9. *Id.* at 7 (citation omitted).
10. *Id.* at 11.
11. *Id.* (citation omitted).
12. *Id.* at 13
13. *Id.* at 19 (citation omitted).
14. *Id.* at 25.
15. *Epic Sys. Corp.*, slip. op. at 2 (Ginsberg, J., dissenting).
16. *Id.* at 9 (Ginsberg, J., dissenting).
17. *Id.* at 25 (Ginsberg, J., dissenting) (citation omitted).
18. S. 2203 – 115th Congress: Ending Forced Arbitration of Sexual Harassment Act of 2017.
19. *See* S 7507C, 2017-2018 Leg. Sess. Pt. KK, subpt. B §§ 1-2.
20. *Gold v. N.Y. Life Ins. Co.*, 153 A.D.3d 216 (1st Dep't 2017). ■

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1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
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