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ALERT MEMORANDUM

U.S. Supreme Court Upholds Enforceability of Class Action Waivers in Arbitration Provisions of Employment Agreements

May 23, 2018

On May 21, 2018, the United States Supreme Court held that arbitration agreements between employers and employees which waive an employee's right to proceed through class or collective actions must be enforced. The Court held that under the Federal Arbitration Act, such arbitration agreements are to be enforced as written, rejecting arguments that the National Labor Relations Act ("NLRA") displaced the Arbitration Act in this context.

The Court added that a 2012 National Labor Relations Board opinion suggesting that the NLRA overrides the Arbitration Act is not entitled to *Chevron* deference. Justice Gorsuch, the author of the Court's opinion, is well known to be skeptical of the *Chevron* doctrine, and this may well presage an attempt to overrule *Chevron* in a case where the issue is squarely presented. To the extent there was any doubt before, the Court's ruling eliminates any question about the legality and enforceability of arbitration clauses that also waive class or collection actions.

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Background to *National Labor Relations Board v. Murphy Oil USA, Epic Systems Corp. v. Lewis,* and *Ernst & Young LLP v. Morris*

On January 13, 2017, the Supreme Court consolidated and granted certiorari in three cases: *National Labor Relations Board v. Murphy Oil USA, Epic Systems Corp. v. Lewis*, and *Ernst & Young LLP v. Morris*. Each of these cases concerned the enforceability of an employment contract's arbitration provision containing class action waivers.

In *Murphy Oil USA, Inc. v. National Labor Relations Board*, Murphy Oil employees signed employment agreements containing a clause which waived the employee's right to "pursue class or collective action claims in an arbitral or judicial forum."[1] When employees later filed a collective action against Murphy Oil under the Fair Labor Standards Act ("FLSA"), Murphy Oil moved to dismiss the action pursuant to the employees' arbitration agreements.[2] In response, the employees argued that the FLSA provided a "substantive right to collective action that cannot be waived" and that barred enforcement of the arbitration agreement, and that the arbitration agreement conflicted with their right to engage in protected concerted activity under Section 7 of the National Labor Relations Act ("NLRA").[3] Later, the employees amended their complaint to allege that Murphy Oil's effort to compel non-collective arbitration violated NLRA Section 8(a)(1).[4] The National Labor Relations Board ("NLRB"), agreeing with employees, then held that Murphy Oil had violated Section 8(a)(1) "by 'requiring its employees to agree to resolve all employment-related claims through individual arbitration, and by taking steps to enforce the unlawful agreements in [f]ederal district court.'"[5] Murphy Oil petitioned the Fifth Circuit to review the Board's decision, and the court held that Murphy Oil "did not commit unfair labor practices by requiring employees to sign its arbitration agreement."[6]

In *Lewis v. Epic Systems Corp.*, the employer, Epic, required its employees, as a condition of their continued employment, to agree that any disputes over wage-and-hour claims be settled via individual arbitration and to waive their right to participate in class and collective actions.[7] One employee, Lewis, brought suit against Epic in federal court, in contravention of the arbitration agreement, alleging violations of the FLSA. When Epic moved to dismiss the action and compel arbitration under the Federal Arbitration Act ("FAA"), Lewis alleged that the agreement "violated the NLRA because it interfered with employees' right to engage in concerted activities for mutual aid and protection and was therefore unenforceable."[8] The district court denied Epic's motion, and the Seventh Circuit affirmed, holding that "[b]ecause it precludes employees from seeking any class, collective or representative remedies to wage-and-hour disputes, Epic's arbitration provision violates Sections 7 and 8 of the NLRA."[9]

Finally, in *Morris v. Ernst & Young LLP*, employees were required to sign agreements containing "concerted action waivers" as a condition to their employment, which provided that employees could only pursue legal claims against Ernst & Young via individual arbitration.[10] Notwithstanding this provision of the arbitration agreement, Morris brought a class action suit under the FLSA against Ernst & Young in federal court.[11] Ernst & Young moved to compel arbitration, and the district court ordered individual arbitration and dismissed the case.[12] The Ninth Circuit reversed, relying on "a well-established principle: employees have the right to pursue work-related claims together" to hold that "the concerted

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[1] *Murphy Oil USA, Inc. v. National Labor Relations Board*, 808 F.3d 1013, 1015 (5th Cir. 2015).
[2] *Id.*
[3] *Id.* at 1015-16.
[4] *Id.* at 1016.
[5] *Id.* at 1017.
[6] *Id.* at 1015.
[7] *Lewis v. Epic Systems Corp.*, 823 F.3d 1147, 1151 (7th Cir. 2016).
[8] *Id.*
[9] *Id.* at 1161.
[10] *Morris v. Ernst & Young LLP*, 834 F.3d 975, 979 (9th Cir. 2016).
[11] *Id.*
[12] *Id.*

action waiver violates the NLRA and cannot be enforced."[13]

The U.S. Supreme Court's Decision

The Supreme Court upheld the arbitration agreements in each of these cases. In a 5-4 decision written by Justice Gorsuch, the Court held that arbitration agreements that provide for individualized proceedings must be enforced, and rejected arguments based on the Arbitration Act's 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,'"[14] and the NLRA.

The Court first rejected the employees' contention that the NLRA purportedly rendered the employees' collective action waivers illegal, which in turn provided a ground "at law" within the meaning of the saving clause for revoking such waivers.[15] The Court referred to its holding in a prior case, *AT&T Mobility LLC v. Concepcion*, to state that the saving clause only "'permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.''"[16] The Court held that the claim of illegality under the NLRA, even if correct, was not such a generally applicable contract defense, since it would apply only to arbitration and was not the sort of defense, such as fraud or duress, that would render *any* contract unenforceable. The Court held that the employees' argument, which attacked only the individualized nature of the arbitration proceeding, sought to interfere with one of arbitration's fundamental attributes.[17]

In any event, the Court also was not persuaded by the employees' NLRA argument.[18] Relying on Section 7 of the NLRA, which focuses on "the right to organize unions and bargain collectively," the employees "ask[ed] [the Court] to infer a clear and manifest congressional command to displace the Arbitration Act and outlaw agreements like theirs."[19] The Court rejected this argument, stating that Section 7 "does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand."[20] The Court further looked to the NLRA's structure and construction as well as the Court's general tendency to "reject[] efforts to conjure conflicts between the Arbitration Act and other federal statutes" to bolster its conclusion that the NLRA was not in conflict with the Arbitration Act.[21] Finally, the court noted that "[n]othing in our cases indicates that the NLRA guarantees class and collective action procedures."[22]

The employees, "[w]ith so much against them in the statute and our precedent . . . end[ed] by seeking shelter in *Chevron*," which counsels deference to federal agency interpretation of the statutes that they administer.[23] The employees sought deference to the NLRB's 2012 opinion, which, as discussed earlier, "suggest[ed] the NLRA displaces the Arbitration Act."[24] The Court rejected the notion that it owed *Chevron* deference to the NLRB's decision, because that opinion "sought to interpret [the NLRA] in a way that limits the work of a second statute, the Arbitration Act. And on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute [the Arbitration Act] it does not administer."[25]

When addressing the meaning of a statute not its own, the Court continued, an overzealous agency might "seek to diminish the second statute's scope in favor of a more expansive interpretation of its own— effectively ''bootstrap[ping] itself into an area in

[13] *Id*. at 980.
[14] *Epic Systems Corp. v. Lewis*, 584 U.S. __ (2018) (slip op., at 6).
[15] *Id*.
[16] *Id*. at 7.
[17] *Id*. at 7-9.
[18] *Id*. at 9-21.
[19] *Id*. at 11.
[20] *Id*.
[21] *Id*. at 16.
[22] *Id*. at 18.
[23] *Id*. at 19.
[24] *Id*.
[25] *Id*. at 20.

which it has no jurisdiction.’”[26] The Court next highlighted the fact that one of the *Chevron* Court’s core rationales for deference was that “policy choices” should be left to the Executive Branch.[27] In the instant case, though, the Executive Branch “sp[oke] from both sides of its mouth” by submitting “competing briefs” from the NLRB and the Solicitor General; the Court stated that in circumstances in which the Executive Branch “articulat[es] no single position on which it might be held accountable,” the Court “will not defer.”[28] Finally, relying on the *Chevron* Court’s reasoning that deference is not due unless there is ambiguity in a statute even after “‘employing the traditional tools of statutory construction,’” the Court concluded that the “canon against reading conflicts into statutes” was sufficient to resolve any ambiguity.[29]

Justice Ginsburg wrote an emphatic dissent, joined by Justices Breyer, Sotomayor, and Kagan, in which she decried the Court’s “subordinat[ion] of employee-protective labor legislation to the Arbitration Act” and made an “urgent” plea for “Congressional correction of the Court’s elevation of the FAA over workers’ rights to act in concert.”[30] The dissent did not address the majority opinion’s treatment of *Chevron*.

Conclusion

The Supreme Court’s decision marks the latest, and in some respects the most emphatic, of a line of cases upholding mandatory arbitration of federal statutory claims going back to at least *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[31] The Court has also so far consistently upheld enforcement of mandatory arbitration agreements that include provisions requiring waiver of class or collective arbitration and limit claimants to individual arbitration, regardless of the size of the claim or other factors that might make individual arbitration impracticable for claimants. The Court’s rejection of administrative action seeking to invalidate such waivers, and its treatment of *Chevron* deference in that context, provide further reason to believe that only Congressional action would lead to a different result in the future.

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[26] *Id.*
[27] *Id.*
[28] *Id.* at 20-21.
[29] *Id.* at 21.
[30] *Epic Systems Corp. v. Lewis*, 584 U.S. __ (2018) (Ginsburg, J., dissenting) (slip op., at 2).
[31] 473 U.S. 614 (1985).