NEUTRAL NOTES

THE JACOBS CENTER FOR JUSTICE AND ALTERNATIVE DISPUTE RESOLUTION™

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7th CIRCUIT REJECTS ARBITRATION PROVISIONS—VIOLATES NLRA

The Seventh Circuit, in Lewis v. Epic Systems Corporation, found the arbitration clause in clear violation of Section 7 of the National Labor Relations Act and thereby invalidated the arbitration provision for Epic employees.

The Court of Appeals acknowledged that its position was the polar opposite of the Fifth Circuit in D.R. Horton and that, indeed, there was a split among the Circuits on arbitration provisions requiring employees to only pursue individual arbitration.

The agreement, in Epic, did not permit collective action of any kind or collective arbitration.

The underlying issue was the arbitration agreement mandating that wage and hour claims could only be brought through individual arbitration and that employees - by their continued employment - accepted the agreement. Epic gave employees no option to decline and requested that email recipients review the agreement and acknowledge their consent by clicking two buttons.

The Court concluded that "concerted activity," in accordance with Section 7 of the NLRA, is not ambiguous nor were the Act's protections limited only to those claims available at the time of the NLRA's enactment.

The Court acknowledged that other circuits had taken another position but said "those differences do not affect our analysis here." Epic also argued that the Federal Arbitration Act precluded a finding that would not permit arbitration. The Court, however, said that "it is not clear to us that the FAA has anything to do with this case."

Rather than the FAA trumping the NLRA, as Epic argued, the Seventh Circuit concluded that it is the duty of courts when dealing with statutes that clash to seek to harmonize them.

The Court opined there was no conflict because the provision at issue was unlawful under Section 7 of the Act and, therefore, illegal. Thus, it met the criteria of the FAA saving clause for non-enforcement. As far as the Court of Appeals was concerned "the NLRA and FAA work hand in glove." Noting that the Federal Arbitration Act primarily has to do with arbitration, the Court, perhaps tongue in cheek, said that "finding the NLRA in conflict with the FAA would be ironic considering that the NRLA is in fact *pro*-arbitration…."

The Court made a further observation that it was entirely possible that the NLRA would not have barred Epic's arbitration provision if it were included in a collective bargaining agreement or if Epic had permitted collective arbitration it would not have run afoul of Section 7 either. But since it did not, the Court concluded that it was unlawful.

The Court further addressed the more typical utilization of Section 7 rights under the NLRA and said that "if Congress had meant for Section 7 to cover only 'concerted activities' related to collective bargaining, there would have been no need for it to protect employees' 'right to … engage in other concerted activities for the purpose of collective bargaining *or other mutual aid or protection*.'"

PRACTICE NOTES: There is a clear conflict between the Circuits with the Fifth Circuit and others lining up in D.R. Horton and Murphy making clear that employers have a right to mandatory arbitration in agreements. On the other side, the Seventh and Ninth Circuits take an opposite view and confront very directly the notion that Section 7 rights may only be implicated when collective bargaining is involved. Due to the split among the Circuits, a decision from the Supreme Court, at some point, will be needed to resolve this issue.

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9th CIRCUIT CONTINUED THE BATTLE OVER CLASS VS. INDIVIDUAL ARBITRATION

In Morris v. Ernst & Young, LLP, the Court held that it violated the National Labor Relations Act (NLRA) for employees at Ernst & Young to be required to sign an agreement precluding them from bringing in any forum a concerted legal claim. The Court utilized a "concerted action" waiver and Sections 7 and 8 of the National Labor Relations Act as the basis for its decision. As a result, it vacated the order of the district court compelling individual arbitration.

Morris had brought a class and collective action against Ernst & Young in federal court in New York. It said, in part, that he was misclassified to deny him overtime wages and violation of the Fair Labor Standards Act as well as applicable state law.

The Court majority primarily based its decision on the "mutual aid or protection" language of Section 7 of the Act as well as enforcement under Section 8. Section 7 classically protects a range of concerted employee activity as well as "the right of employees to act in concert."

FACTS:

Plaintiff worked for the accounting firm Ernst & Young. As a condition of employment, employees were required to sign agreements not to join with other employees in bringing legal claims against the company. Employees were required to pursue any claims through arbitration and only as individuals and in separate proceedings.

The Ninth Circuit concluded that the Board's interpretation of Sections 7 and Section 8 "is correct" and that applying those provisions makes the concerted action waiver unenforceable. The Court said that the Federal Arbitration Act did not require a contrary result.

The Court stated that the illegality had nothing to do with arbitration as a forum. It would equally have violated the NLRA if Ernst & Young required disputes to be resolved through

> casting lots, coin toss, duel, trial by ordeal, or any other dispute resolution mechanism, if the contract (1) limited resolution to that mechanism and (2) required separate individual proceedings. The problem with the contract at issue is not that it requires arbitration; it is that the contract term defeats a substantive federal right to pursue concerted work-related legal claims.

Significantly, the Court ruled that "substantive rights cannot be waived in arbitration agreements."

The Court held there were three principal defects in this case. One, since a substantive federal right was waived by the contract, its terms could be characterized as "illegal." Two, the enforcement defense had nothing to do with the adequacy of the arbitration proceedings. The underlying illegality of the contract follows directly from the NLRA. Three, the only role arbitration played was that it "happens to be the forum" that Ernst & Young chose to be exclusive.

> The contract here would face the same NLRA troubles if Ernst & Young required its employees to use *only* courts, or *only* rolls of the dice or tarot cards, to resolve workplace disputes - so long as the exclusive form provision is coupled with a restriction on concerted activity in that forum. At its heart, this is a labor law case, not an arbitration case. (Emphasis supplied.)

The Court held that the NLRA established a "core right to concerted activity" and that "[i]rrespective of the forum in which disputes are resolved, employees must be able to act in the forum *together*." The Court took no position on whether arbitration may ultimately be required nor whether Ernst & Young waived its right to arbitration.

Circuit Judge Ikuta, dissenting, said the majority is simply wrong; the Supreme Court has upheld individual arbitration agreements and rejected class-wide arbitration of claims. Judge Ikuta questioned the impact of such a decision on the ability of employers to bring arbitration agreements which have long been accepted by the Supreme Court. The Judge stated that "when a party claims that a federal statute makes an arbitration agreement unenforceable, the Supreme Court takes a different approach."

The dissent was clear and straightforward: nothing in either Section 7 or Section 8 of the NLRA "creates a substantive right to the availability of class-wide claims that might be contrary to the FAA's mandate. While the NLRA protects concerted activity, it does not give employees an unwaivable right to proceed as a group to arbitrate or litigate disputes." Judge Ikuta, citing D.R. Horton, Inc. v. NLRB, and other authorities, said that "there is not 'inherent conflict between arbitration' and the 'underlying purposes' of the NLRA" also citing the Supreme Court.

Based upon the long federal labor policy favoring and promoting arbitration, at least going back to Steelworkers Trilogy in 1960, and the Supreme Court decision more recently in Pyett, the majority has disregarded Supreme Court "guidance" and "instead conflates the question whether 'the FAA's mandate has been overridden by a contrary congressional command' (citations omitted) with the question whether an employee's agreement to arbitrate individually is invalid under the FAA's savings clause…."

Judge Ikuta strongly joins the Second, Fifth, and Eight Circuits which had concluded that the NLRA does not invalidate collective action waivers in arbitration agreements.

PRACTICE NOTE: The Ninth Circuit's opinion, in Morris v. Ernst & Young along with Lewis v. Epic (on page 1), continues a dispute that will need resolution by the Supreme Court on class action waivers. Even accountants, having nothing to do with a more traditional reading of the National Labor Relations Act, are found to have utilized the concerted action provision of the Act.

UBER STALLED BY JUDGE RAKOFF

In Meyer v. Travis Kalanick and Uber Technologies, Judge Jed S. Rakoff from the SDNY found the Uber arbitration clause unenforceable. He began his decision with a historical discussion regarding the right to a jury trial and the fact that individuals, in this case Uber users, agreed to terms and conditions they had "no realistic power to negotiate or contest and often were not even aware of." The case itself had to do with an alleged anti-trust conspiracy arising from the algorithm that Uber used to set ride prices. For our purposes, the discussion has to do with the ultimate motion to compel arbitration based upon an arbitration provision that was buried two steps within the Terms and Conditions on the Uber site.

Plaintiff's main argument was that he did not agree to arbitrate his claims. The Court relied upon a declaration submitted by Uber engineer Mi. When plaintiff Meyer registered his Uber account, via the Uber smart phone application, it triggered things he obviously was not even aware of. At the first screen potential Uber riders were prompted to either register using Google+ or Facebook or to enter other information and click "Next." After clicking "Next" they were directed to a second screen where they could make payment and register to use Uber. The second screen of the Uber registration process features at the top fields for users to insert their credit card information. Beneath these fields is a large and prominent button whose width spans most of the screen. It is labeled "Register." Beneath this button are two additional buttons, with heights similar to that of the Register button, labeled "PayPal" and "Google Wallet." Beneath these two additional buttons, in considerably smaller font, are the words "By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY." There is a hyperlink which the Court noted that even if a potential user clicked on it,

> she is not immediately taken to the actual terms and conditions. Rather, in the words of Uber engineer Mi, "the user is taken to a screen that contains a button that accesses the 'Terms and Conditions' and 'Privacy Policy' then in effect…." Thus, it is only by clicking first the hyperlink and then the button - neither of which is remotely required to register with Uber and begin accessing its services - that a user can even access the Terms and Conditions.

Even further, after arriving at the Terms and Conditions there are nine pages of "highly legalistic language that no ordinary consumer could be expected to understand." Only at that point, the Court noted, and at the very bottom of the seventh page, did one finally reach the dispute resolution provision which stated as follows:

> You and Company agree that any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof or the use of the Service or Application (collectively, "**Disputes**") will be settled by binding arbitration, except that each party retains the right to bring an individual action in small claims court and the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party's copyrights, trademarks, trade secrets, patents or other intellectual property rights. **You acknowledge and agree that you and Company are each waiving the right to a trial by jury or to participate as a plaintiff or class User in any purported class action or representative proceeding.** Further, unless both you and Company otherwise agree in writing, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of any class or representative proceeding. If this specific paragraph is held unenforceable, then the entirety of this "Dispute Resolution" section will be deemed void. Except as provided in the preceding sentence, this "Dispute Resolution" section will survive any termination of this Agreement. (Emphasis supplied.)

In more than thirty pages, the Court analyzed the Uber hyperlink and the Agreement and rejected it finding that it was not a reasonably conspicuous notice of Uber's user agreement including its arbitration clause and did not evince an unambiguous manifestation of assent. The Uber registration screen "did not adequately call users' attention to the existence of Terms of Service, let alone to the fact that, by registering to use Uber, a user was agreeing to them." Interestingly, the Court stated that

> The reasonable user might be forgiven for assuming that "Terms of Service" refers to a description of the types of services that Uber intends to provide, not to the user's waiver of his constitutional right to a jury trial or his right to pursue legal redress in court should Uber violate the law. In other words, "the importance of the details of the contract" was "obscured or minimized by the physical manifestation of assent expected of a consumer seeking to purchase or subscribe to a service or product." (Citation omitted.) There is a real risk here that Uber's registration screen "made joining [Uber] fast and simple and made it appear - falsely - that being a [user] imposed virtually no burdens on the consumer besides payment.

At its core Judge Rakoff was dealing with the "electronic bargaining" over the relinquishment of the right to jury trials. In this particular Uber case, he found a complete lack of notice and no agreement by Meyer to waive that right.

PRACTICE NOTE: I commend the reader to read all of Judge Rakoff's thirty-one pages. It is an interesting and thoughtful analysis regarding hyperlinks, clickwrap, and browsewrap, among other things. Arbitration clauses, in order to be enforceable, cannot be obscure or nearly impossible to find by the consumer through a hyperlink.

NAP EXCLUSIVE ARBITRATION FORUM NOT POSSIBLE — BUT NO REMEDY

The Second Circuit issued an interesting decision in Deborah Moss v. First Premier Bank, dealing with the National Arbitration Forum (NAF). The NAF no longer accepts consumer arbitrations. However, it was inserted in a consumer agreement as the sole forum to decide disputes. The District Court held that it could not appoint a substitute arbitrator because the language of the agreement contemplated arbitration only before the NAF. The Court of Appeals agreed.

FACTS:

Deborah Moss had signed an arbitration agreement that any dispute between her and her payday lender would be resolved by arbitration before the NAF. She tried to bring such a claim and NAF refused pursuant to a consent decree that prohibited it from accepting consumer arbitrations. Moss had three payday loans from an online payday lender SFS, Inc.

When Moss applied for the loan she electronically signed an application that included an arbitration clause which she may or may not have ever seen. The clause provided as follows:

> Arbitration of All Disputes: You and we agree that any and all claims, disputes or controversies between you and us, any claim by either of us against the other … and any claim arising from or relating to your application for this loan, regarding this loan or any other loan you previously or may later obtain from us, this Note, this agreement to arbitrate all disputes, your agreement not to bring, join or participate in class actions, regarding collection of the loan, alleging fraud or misrepresentation … including disputes regarding the matters subject to arbitration, or otherwise, shall be resolved by binding individual (and not joint) arbitration by and under the Code of Procedure of the National Arbitration Forum ("NAF") in effect at the time the claim is filed…. Rules and forms of the NAF may be obtained and all claims may be filed at any NAF office, on the World Wide Web at aww.arb-forum.com, by telephone at 800-474-2371, or at "National Arbitration Forum, P.O. Box 50191, Minneapolis, Minnesota 55405." Your arbitration fees will be waived by the NAF in the event you cannot afford to pay them. (Emphasis added.)

Moss filed a class action against the banks in Federal Court alleging RICO and other claims and the banks moved to compel arbitration. After the District Court ordered the parties to arbitrate, Moss sent a letter to NAF indicating her attempt to arbitrate claims. NAF rejected her request based upon a consent judgment it had entered into with the Minnesota Attorney General. After NAF declined to accept her dispute Moss went back to Federal Court and moved to vacate the District Court's order compelling arbitration. The District Court lifted its order and the matter was appealed.

The Court of Appeals relied upon the literal language of the agreement - which Moss obviously did not negotiate and probably never saw. The Court concluded that "[t]he agreement does not address how the parties should proceed in the event that NAF is unable to accept the dispute."

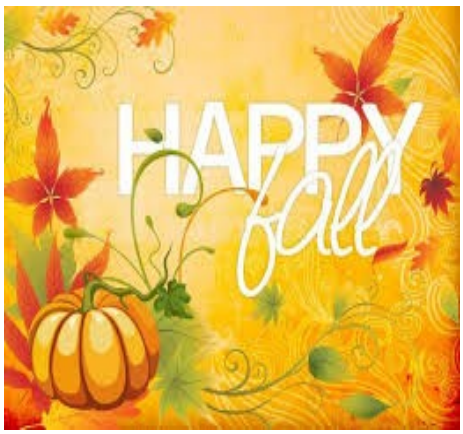
The Court, relying upon its own precedent, said the only question was whether the language of the parties' agreement contemplated arbitration before NAF or whether it contemplated the appointment of a substitute arbitrator should NAF become unavailable. The Court concluded that "the parties contemplated one thing: arbitration before NAF."

PRACTICE NOTE: It is unlikely that the parties actually contemplated anything. Moss filed a form which had an arbitration provision she probably never saw. It was never negotiated and was simply part of her agreement.

The Court said in this case the only question was whether the designated forum was "exclusive" and not why the designated arbitral forum was unavailable. Where the forum is exclusive the District Court may not use another provision "to circumvent the parties' designation of an exclusive arbitral forum."

As a result of that analysis, the Court of Appeals concluded that "[t]he only question that we can decide is whether, applying *Salomon*, the district court correctly declined to compel Moss to arbitrate her claims before a forum to which she did not agree. We hold that it did."

PRACTICE NOTE: Moss leaves many questions. Since it is unlikely Deborah Moss ever negotiated or even read the arbitration provision, and NAF is no longer able to handle consumer claims due to claims of consumer fraud, deceptive trade practices, and false advertising that resulted in a consent judgment with the Minnesota Attorney General, a classic conundrum results. The Court has required arbitration that is futile, thus leaving Moss without a remedy. Such a situation seems untenable.



MORE ORGANIZING ON CAMPUS AS BOARD EXTENDS ITS REACH

In a far reaching decision, The Trustees of Columbia University in the City of New York and Graduate Workers of Columbia-GWC, UAW, NLRB August 2016, the National Labor Relations Board (NLRB) majority overruled Brown University regarding the right of graduate students in private institutions to organize. The majority interpreted Section 2(3) and the meaning of the word "employee" under the Act and whether graduate students were primarily engaged in educational activities or not. In its simplest term the majority said "we disagree."

The petition for a unit at Columbia was quite broad - to represent both graduate and undergraduate teaching assistants as well as graduate research assistants.

The majority concluded that "where a university exerts the requisite control over the research assistant's work, and specific work is performed as a condition of receiving the financial award, a research assistant is properly treated as an employee under the Act."

There was a spirited dissent by member Philip Miscimarra fundamentally disagreeing with the conclusion that teaching assistants, including both graduates and undergraduates, should be lumped into the same group and that the Board's prior decision should not be disturbed. The dissent objected to the petition for a unit as inappropriate under any "community of interest" test and raised other substantial objections including the temporary nature of the "employment" of many of the students. Member Miscimarra stated very simply that the business of a university is education and "students are not the means of production - they are the 'product.'" He noted essentially that the main focus of higher education is just that. The ultimate question, he argued, is whether Congress intended to make the NLRA govern the relationship between students and the universities merely because they may temporarily occupy academic positions in connection with their education. He urged that the relationship is "primarily educational" and that the statute should not be governed by "bargaining leverage, the potential resort to economic weapons, and the threat or infliction of economic injury by or against students, on the one hand, and colleges and universities, on the other."

PRACTICE NOTE: Since I primarily comment on ADR issues, I have limited my discussion on Columbia University. Suffice it is an extremely important decision with regard to higher education, an area I also spend some time in as a professional. The implications of Columbia University will no doubt be longstanding and perhaps change again in a few years with the next incarnation of the NLRB.

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