NEUTRAL NOTES

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SUPREME COURT TIPS AGAINST CLASS ARBITRATIONS IN EPIC SYSTEMS

In Epic Systems Corporation v. Lewis, by a 5-4 majority, in an opinion written by Justice Neil Gorsuch, held that the parties, specifically employees and employers, can agree that any disputes between them will be resolved through one-on-one arbitration. In a long and relatively folksy opinion, Justice Gorsuch admitted that the questions involved were "surely debatable." But, he ruled that the question of the law was "clear." He held that in the Federal Arbitration Act (FAA) Congress instructed federal courts to enforce arbitration agreements according to their terms and including terms providing for individualized proceedings.

He rejected suggestions that the National Labor Relations Act (NLRA) offered a conflicting "command." The Court said that "[t]he NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum." In an effort to "harmonize" the majority thinking, the Court ruled that the Arbitration Act and the NLRA enjoy "separate spheres of influence."

The underlying facts involved three cases differing in detail but not in substance. Each of the individuals had entered into an agreement providing that all employment disputes would be arbitrated. In Ernst & Young LLP v. Morris, for example, Morris sued regarding misclassification under the Fair Labor Standards Act (FLSA) and California law. Morris sought to litigate as a class action and Ernst & Young followed with a motion to compel arbitration. The Court went through a historical analysis suggesting, essentially, that class actions did not exist at the time of the enactment of the NLRA so, therefore, class actions were not possible even utilizing that statute.

The majority also made a painstaking review and analysis of the history of the FAA and prior Supreme Court precedent. Significantly, the Court rejected reliance upon Section 7 of the NLRA which guarantees individuals and employees the right to self-organization and to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The Court declared as follows: "The notion that Section 7 confers a right

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EPIC SYSTEMS DISSENT

Justice Ginsburg, in an even longer dissent, challenged the essence and efficacy of the majority opinion as a matter of fact and law. For example, Justice Ginsburg stated, at the outset, that individual claims might be so small that they might be difficult to seek redress alone. On that point the majority essentially stated "so what."

Justice Ginsburg characterized the majority opinion as "egregiously wrong" and looked at the historical underpinnings of the NLRA. She said prior labor law was essentially enacted due to poor working conditions. In her analysis, employees must have the capacity to act collectively to match their employers' clout. By following that analysis, employees should be permitted to bring collective claims in arbitration when there is an arbitration provision.

The dissent relied primarily on Section 7 of the NLRA which has regularly formed the lynchpin for employee rights in the workplace. In a footnote, the dissent also discussed the "bilateral" nature of the agreements and posited that perhaps they were not fair and equitable. For example, Epic emailed its employees an

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SUPREME COURT OF ALABAMA COMPELS ARBITRATION EVEN WHERE UNDERLYING CONTRACTS ARE MIXED REGARDING ARBITRATION CLAUSES

In Eickhoff Corporation v. Warrior Met Coal, a lawsuit was filed in Tuscaloosa Circuit Court (Alabama) regarding deficiencies in certain pieces of heavy mining equipment it purchased that were alleged to be defective. Eickhoff moved the trial court to compel Warrior Coal to arbitrate pursuant to an arbitration provision in contracts for the equipment. The trial court denied the motion and this appeal ensued.

There were several agreements between Warrior Coal's predecessor in interest, Jim Walter Resources, Inc. (JWR) for the purchase of longwall shearers. Shearers are used in underground coal mining to separate slabs of coal from the coal seam or longwall panel. In the purchase order, it provided JWR with certain warranty protection and the contract contained no arbitration provision providing only that the venue for any legal proceedings would be Birmingham, Alabama.

The Master Service Agreement, however, contained an arbitration provision requiring the parties to

> submit "any dispute, controversy or claim arising out of or in connection with the agreement" to the American Arbitration Association ("the AAA") for binding arbitration conducted in accordance with the AAA's commercial arbitration rules if the parties were not otherwise able to resolve the dispute using all reasonable efforts.

In February 2017 Warrior Coal notified Eickhoff that it was revoking acceptance of all three longwall shearers, asserting that it had experienced continual problems with the equipment and it had not been resolved. About a month later, Warrior Coal sued Eickhoff claiming damages in excess of $10 million. Eickhoff filed a demand for arbitration with AAA pursuant to the arbitration provision in the master service agreements. In addition, Eickhoff moved the trial court to stay all proceedings and compel arbitration. The trial court declined and the matter moved to the Supreme Court.

The key question the Supreme Court said was essentially who would decide the AAA jurisdictional question. The Court said pursuant to Rule 7(a) of the commercial arbitration rules, the arbitrator would decide on jurisdiction. The Supreme Court noted that the trial court denied the motion to compel "without stating its rationale."

The Alabama Supreme Court said there was no dispute but that the master service agreements applied and it would be Warrior Coal's burden to show the arbitration provision was invalid or did not apply to the instant dispute. The Court cited significant precedent holding that questions of arbitrability must be decided by an arbitrator when the parties executed a contract containing an arbitration provision incorporating the AAA commercial arbitration rules.

Warrior Coal stated it did not "in any way challenge that precedent," but, instead argued this case was distinguishable because there were multiple contracts defining the relationship. The Court disagreed and said "this appeal still essentially amounts to one party asking us to examine multiple contracts between it and another party to hold that certain claims asserted by one of the parties arise under one of those contracts that does not contain an arbitration provision, as opposed to another one of those contacts that does contain an arbitration provision."

The Court rejected that argument as follows:

> this Court has made it clear that, once it is established (1) that two parties to a dispute are bound by a valid contact containing an arbitration provision, (2) that the same contract contains a clear indication that the parties have agreed to arbitrate the issue of arbitrability, and (3) that the subject dispute is at least arguably within the scope of that contract, this Court will not tolerate arguments that the dispute actually fails within the scope of some other contract binding the parties that does not contain an arbitration.

Interestingly, since Warrior Coal did not ask the court to ignore its precedent, the Court said it would not be inclined to abandon precedent without a specific invitation to do so. Thus, following stare decisis, the Alabama Supreme Court found the motion to compel arbitration should have been granted.

PRACTICE NOTE: Parties should carefully examine their contractual obligations. At least in Alabama, courts will compel arbitration despite several agreements which may appear contradictory.

Supreme Court Tips Against Class Arbitrations in Epic Systems

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to class or collective actions seems pretty unlikely when you recall that procedures like that were hardly known when the NLRA was adopted in 1935…. Section 7's failure to mention them only reinforces that the statute doesn't speak to such procedures."

The Court ruled that the silence of Congress on these points makes it clear and that "[n]othing in the NLRA even whispers to us on any of these essential questions."

Responding directly to the analysis that Justice Ginsburg articulated regarding the primacy of individual rights under Section 7, Justice Gorsuch calls her opinion a "sort of interpretive triple bank shot."

> Basically, the majority stated that:
>
> The policy may be debatable but the law is clear. Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA - much less that it manifested a clear intention to displace the Arbitration Act. Because we can easily read Congress's statutes to work in harmony, that is where our duty lies. The judgments *Epic*, No. 16-285, and *Ernst & Young*, No. 16-300, are reversed, and the cases are remanded for further proceedings consistent with this opinion. The judgment in *Murphy Oil*, No. 16-307, is affirmed.

In other words, the majority ruled that individual policies that mandate arbitration on an individualized basis cannot be abrogated.

PRACTICE NOTES: What the Court does not discuss is the unequal bargaining power of individual employees and employers or the potential for contracts of adhesion where arbitration clauses are imposed.

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Epic Systems Dissent

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arbitration agreement requiring resolution of wage and hours claims by individual arbitration. The Agreement further provided that continued employment alone would be deemed as acceptance of the provision. Ernst & Young similarly emailed an arbitration agreement.

In other words, as the minority stated, employees faced a Hobson's choice: accept arbitration on their employer's terms or give up their jobs.

Justice Ginsburg reviewed the Court's reasoning and said that "none of the Court's reasons for diminishing Section 7 should carry the day." Justice Ginsburg rejected the "whispering" comment and explains that the whole premise of the NLRA was to deal with employment conditions that were "entirely one sided." She noted that

> [o]nce again, the Court ignores the reality that sparked the NLRA's passage: Forced to face their employers without company, employees ordinarily are no match for the enterprise that hires them. Employees gain strength, however, if they can deal with their employers in numbers. That is the very reason why the NLRA secures against employer interference employees' right to act in concert for their "mutual aid or protection." 29 U.S.C. §§151, 157, 158.

The dissent also rejected the majority's history lesson regarding the failure to put in collective procedures in 1935. Perhaps Justice Ruth Bader Ginsburg asked the fundamental question when she stated "is there any reason to suppose that Congress intended to protect employees' right to act in concert using only those procedures and forums available in 1935?"

The dissent declared that "[b]ecause I would hold that employees' §7 rights include the right to pursue collective litigation regarding their wages and hours, I would further hope that the employer-dictated collective-litigation stoppers, *i.e.*, 'waivers,' are unlawful." Justice Ginsburg strongly resisted the majority's finding and stated that the FAA was not intended to apply to employment contracts. Rather, citing Herbert Hoover, then Secretary of Commerce, there was a specific provision put forward in 1923 that was adopted virtually verbatim in Section 1 of the Act. The dissent stated that "Congress, it bears repetition, envisioned application of the Arbitration Act to voluntary, negotiated agreements."

The dissent concluded very strongly, comparing the majority's opinion to the invocation of yellow dog contracts.

> If these untoward consequences stemmed from legislative choices, I would be obliged to accede to them. But the edict that employees with wage and hours claims may seek relief only one-by-one does not come from Congress. It is the result of take-it-or-leave-it labor contracts harking back to the type called "yellow dog," and of the readiness of this Court to enforce those unbargained-for agreements. The FAA demands no such suppression of the right of workers to take concerted action for their "mutual aid or protection." Accordingly, I would reverse the judgment of the Fifth Circuit in No. 16-307 and affirm the judgments of the Seventh and Ninth Circuits in Nos. 16-285 and 16-300.

PRACTICE TIPS: No doubt, we will see more 5-4 decisions in the workplace but the Epic Systems opinion is very significant regarding employment rights. Interestingly, I have sometimes had cases where there have been so many individual plaintiffs that, ultimately, it was more prudent for the employer to resolve the case than litigate multiple separate arbitrations. Only time will tell.

NO FEDERAL QUESTION TO ADDRESS IN A LAWSUIT AGAINST FINRA REGARDING MANDATORY ARBITRATION

In Webb, et al. v. FINRA, the Seventh Circuit Court of Appeals examined essentially an employment dispute regarding the termination of two brokers fired by their employer Jefferies & Company. Webb and Beversdorf filed claims at FINRA in the arbitration forum as required to do. They proceeded in arbitration for the next two and one-half years but withdrew their claims before a final decision was rendered. Under FINRA's rules, a withdrawal constituted a dismissal with prejudice.

After the arbitration failed Webb and Beversdorf sued FINRA in state court in Illinois alleging that FINRA breached its contract to arbitrate their dispute and had specific issues regarding training of arbitrators, discovery and other internal procedural matters. FINRA removed the dispute to federal court and moved to dismiss the claims. The U.S. District Court held that FINRA was entitled to arbitral immunity and dismissed the suit. This appeal then followed.

Although neither side raised a jurisdictional challenge, the court on its own decided to determine whether it had the authority to resolve the dispute. The Seventh Circuit noted that this case was really about federal jurisdiction. There was complete diversity. However, the amount in dispute may or may not have exceeded $75,000.

According to FINRA, this dispute is one of the rare state-law causes of action that gives rise to federal question jurisdiction under Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, 545 U.S. 308 (2005); see also Merrill Lynch, Pierce, Fenner & Smith v. Manning, 136 S.Ct. 1562, 1566 (2016) (holding that the Grable & Sons test determines the reach of "arising under" jurisdiction for purposes of the jurisdictional grant in the Securities Exchange Act of 1934). Its theory is that the presence of an issue of federal securities law transforms this state-law contract claim into one arising under federal law.

The Court of Appeals rejected that argument, vacated the judgment and remanded the case to the district court with instructions to remand to state court.

The Seventh Circuit said the dispute did not make it past even the first factor of the Grable & Sons test. The Court opined that this basically is a state law contract claim and FINRA's efforts to make it a federal question simply fail.

PRACTICE COMMENTS: It is unclear from the decision why it did not remain at FINRA arbitration. At least at this point there is still no decision and it appears to be involved in esoterica rather than the discharge issues.

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