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CLIENT ALERT

An "Epic" Win for Employers on Arbitration Agreements

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Yesterday, the U.S. Supreme Court delivered yet another important victory for employers relying on arbitration agreements. In *Epic Systems Corp. v. Lewis*, No. 16-285, the Court confirmed that the Federal Arbitration Act ("FAA") requires enforcing arbitration agreements even if they stand in the way of employment-related class and collective actions. The Court rejected the argument that a collective bargaining provision in the National Labor Relations Act ("NLRA") overrides the FAA in this context.

The issue arose in three circuit court cases, which the Supreme Court consolidated. In each case, an employer was sued by an individual in federal court under the Fair Labor Standards Act. Each employee purported to assert a collective action on behalf of a class of similarly situated employees. The employers moved to compel arbitration and to require the plaintiffs to arbitrate their respective claims individually. The employees responded by arguing that the arbitration agreements could not be enforced because they precluded "class" and "collective" claims. According to the employees, these arbitration clauses were invalid because of the NLRA's provisions granting employees the right to engage in concerted activity for their "mutual aid or protection."

The cases arrived at the Supreme Court after a circuit split arose on the issue. Two circuits (along with the National Labor Relations Board) agreed with the employees, noting that the FAA contains a savings clause allowing courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or equity for the revocation of any contract." One circuit disagreed.

The Supreme Court held that the arbitration agreements must be enforced. Writing for a five-Justice majority, Justice Gorsuch first considered the FAA's savings clause. Relying heavily on *AT&T Mobility LLC v. Concepcion*, the Court held that the savings clause recognizes only "generally applicable contract defenses." The employees could not invoke the savings clause because they did not contend that their arbitration agreements were procured by fraud. Rather, as the Court saw it, the employees argued that the "contract is unenforceable *just because it requires bilateral arbitration*" (emphasis in original). This defense violated Concepcion's "central insight": "courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent."

Turning to the NLRA, the Court held that Section 7 relates only to "the right to organize unions and bargain collectively." Although it "may permit unions to bargain to prohibit arbitration," it "does not express approval or

disapproval of arbitration." The Court gave several reasons for this conclusion, including the following:

- class actions were "hardly known when the NLRA was adopted in 1935";
- the statutory reference to "other concerted activities" should be interpreted with reference to "the terms that precede it";
- the NLRA provides rules for other rights protected by Section 7, such as collective bargaining, but none "govern[ing] the adjudication of class or collective actions";
- Congress "knows how to override the" FAA "when it wishes," and Section 7 of the NLRA would be an unusual way to do so; and
- the Court's precedents have repeatedly rejected "effort[s] to conjure conflicts between the Arbitration Act and other federal statutes."

The Court also refused to defer to the National Labor Relations Board's view that the NLRA overrides the FAA. First, the Board had no authority to limit the scope of the FAA. Second, "the Executive seem[ed] of two minds," as the Solicitor General and the Board took opposing positions before the Court. Third, there was no ambiguity in the statute.

In a one-paragraph concurrence, Justice Thomas (who also joined the majority opinion) argued that the NLRA argument was a public-policy defense, which is not a "ground[] as exist[s] in law or in equity for the revocation of any contract." For this reason, too, Justice Thomas voted to enforce the arbitration agreements.

Joined by Justices Breyer, Sotomayor, and Kagan, Justice Ginsburg dissented. She relied heavily on what she saw as the broad purpose and terms of the NLRA, arguing that "arbitration agreements' employer-dictated collective-litigation waivers are unlawful." And if the NLRA and FAA conflicted, she argued, the NLRA, which was "[e]nacted later in time . . . should qualify as 'an implied repeal' of the FAA."

By dispelling confusion among the circuits, *Epic Systems* should give businesses confidence that courts will enforce class-action waivers in arbitration agreements with employees. Indeed, *Epic Systems* should lend litigants confidence in enforcing any arbitration agreement—as the Court has once again reaffirmed its commitment to enforce the FAA's pro-arbitration mandate, even in the face of arguably conflicting statutes and implacable federal agencies.

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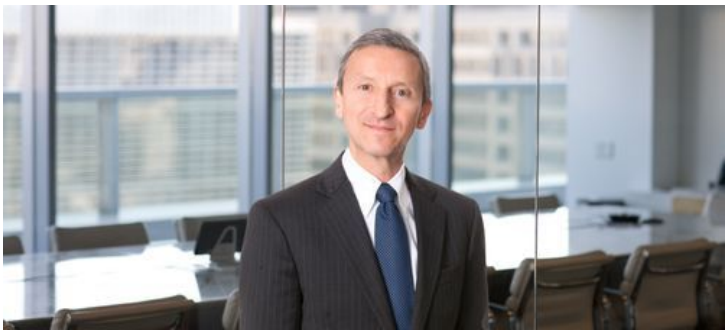

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