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Will the Supreme Court Rein in Employee Class Actions?

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Three cases involving the enforceability of class/collective action waivers in arbitration agreements are headed to the U.S. Supreme Court. In this piece, we look at the facts of those cases, which will be consolidated for hearing before the Supreme Court in October 2017.

Murphy Oil

The Fifth Circuit, in *Murphy Oil,* overturned a decision by the National Labor Relations Board (NLRB) finding that Murphy Oil had engaged in an unfair labor practice by requiring employees to sign its arbitration agreement, which required the employees to waive the right to pursue class or collective claims in an arbitral or judicial forum. A group of Murphy Oil employees filed a collective action against Murphy Oil in the U.S. District Court for the Northern District of Alabama alleging violations of the Fair Labor Standards Act (FLSA). Murphy Oil moved to dismiss and compel individual arbitration pursuant to the arbitration agreement with its employees. While Murphy Oil's motion was pending, one plaintiff filed a charge with the NLRB claiming that the arbitration agreement interfered with her NLRA Section 7 right to engage in concerted activity.[1] The NLRB determined that Murphy Oil's requirement that employees agree to resolve all employment-related claims through individual arbitration and it's taking steps to enforce these agreements in federal court constituted unfair labor practices under the NLRA.

On appeal, the Fifth Circuit held that the arbitration agreement was enforceable under the Federal Arbitration Act[2] (FAA) and not unlawful under the NLRA. In so holding, the Fifth Circuit noted that the Supreme Court has already explained that the right to proceed collectively under the ADEA and the FLSA does not render class waivers in arbitrations agreements unlawful as the statutes provide no congressional command contrary to the FAA.

Epic Systems

The Seventh Circuit in *Epic Systems* upheld a decision by the Western District of Wisconsin finding that the arbitration agreement between plaintiff and Epic Systems violated the NLRA because it interfered with the employees' right to engage in concerted activities for mutual aid and protection. The court concluded that the employees' right to "engage in other concerted activities" for "other mutual aid or protection" by definition included the right to legal process by class, representative or collective action. The employees in *Epic Systems* filed a collective action against their employer alleging that they had been misclassified under the FLSA. Epic Systems filed a motion to dismiss and compel arbitration, which was denied because the court found that the arbitration agreement was unenforceable. The court noted that Epic Systems emailed a copy of the arbitration agreement to its employees mandating that the employees bring claims through individual arbitration and that employees waived the right to participate in class, collective or representative proceedings. Further, the email noted that employees were deemed to have accepted the agreement if they continued to work at Epic Systems. It may be that the circumstances surrounding the imposition of the agreement impacted the decision that the agreement was unenforceable, but the reasoning set forth suggests that all arbitration agreements with class action waivers are unenforceable because employees have a "substantive" right to concerted activity, which encompasses concerted judicial actions.

Ernst & Young

The Ninth Circuit's opinion in *Ernst & Young* follows similar reasoning to that set forth by the Seventh Circuit in holding that the arbitration agreement at issue was unenforceable in violation of the NLRA, whereas the dissenting opinion of Judge Ikuta therein follows the reasoning of the Fifth Circuit explaining that the arbitration clause should be held to be enforceable under the FAA.

While it has taken almost five years for there to be a clear circuit split, this issue is now prime for consideration by the Supreme Court. Consideration was briefly delayed by the Supreme Court in these cases as it was expected to be a deadlock four-to-four decision prior to the appointment of Justice Neil Gorsuch.

Justice Gorsuch has been described as ideologically being "cut from the same cloth" as Justice Antonin Scalia, which suggests that we might expect Justice Gorsuch to follow to Scalia's reasoning in *AT&T Mobility LLC v. Concepcion*. In *Concepcion*, Justice Scalia's written opinion rejected California's judicially created rule finding arbitration agreements that limit or prohibit classwide arbitration unconscionable. The decision held that the FAA requires the enforcement of arbitration clauses, and that such agreements should not be found unconscionable for limiting or denying the availability of classwide arbitration. Further, Justice Scalia noted that "requiring classwide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." While not directly on point as to the issues up for consideration by the Supreme Court in October, the decision certainly demonstrates the federal policy favoring arbitration and an appears to attempt to reign in class proceedings.

Stay tuned for more information once we have a decision from the Supreme Court. We all look forward to the resolution of this hotly debated question and to know the viability of agreements similar to those at issue in the three cases up for consideration.

[1] Section 7 provides as follows: "Employees shall have 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***, …". 29 U.S.C. § 157 (emphasis added).

[2] The FAA provides as follows: "[A]n agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, ***shall be valid, irrevocable, and enforceable***, save upon such grounds as exist at law or in equity for the revocation of any contract."