O'Donnell, Adams in ABA Business Law Today: Arbitration Class and Collective Action Waivers Are Enforceable, But What Should Employers Do'

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In a landmark victory for employers, the U.S. Supreme Court held that agreements requiring employees to arbitrate claims on an individual basis are enforceable. The case, *Epic Systems Corp. v. Lewis*, 584 U.S. ____ (2018), consolidated three different cases on appeal from the Fifth Circuit, Seventh Circuit, and Ninth Circuit. *Murphy Oil U.S.A., Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015); *Epic Systems Corp. v. Lewis*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young*, LLP, 834 F.3d 975 (9th Cir. 2016). In each of those cases, employees challenged the validity of an arbitration agreement that provided employees were required to arbitrate disputes, but not on a class or collective basis. Justice Neil Gorsuch, writing for the majority, boiled down the dispute to two simple questions:

- Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?
- Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?

The Court, recognizing that these questions are debatable as a matter of policy, held that the answer was clear as a matter of law. “You might wonder if the balance Congress struck in 1925 between arbitration and litigation should be revisited in light of more contemporary developments. You might even ask if the [Federal Arbitration] Act was good policy when enacted. But all the same you might find it difficult to see how to avoid the statute’s application.” First, the Court reaffirmed the principle that the Federal Arbitration Act (FAA), 9 U.S.C. § 2, instructs courts to enforce arbitration agreements according to their terms, including those terms providing for individualized arbitration proceedings. Second, the Court held that the National Labor Relations Act (NLRA) does not create a right to class actions in the courtroom or arbitral forum. As such, the Court held that neither the FAA nor NLRA permits the Court to declare agreements to arbitrate one-on-one as illegal.

Excerpted from *ABA Business Law Today*. To read the full article, click here.