FORCED ARBITRATION AND THE EROSION OF THE SEVENTH AMENDMENT

Tuesday, October 27th @ Noon
1.0 hour of CLE credit is pending

Panelists

- **Eric L. Dirks**, Principal Attorney, Williams Dirks Dameron LLC (Kansas City)
- **Jason Knutson**, Shareholder, Habush Habush & Rottier S.C. (Madison)
- **Caitlin Madden**, Associate Attorney, Hawks Quindel, S.C. (Madison)
- **Sean M. Scullen**, Partner, Quarles & Brady LLP (Milwaukee)
- **Breanne L. Snapp**, Shareholder, Habush Habush & Rottier S.C. (Madison) and Member, ACS Madison Lawyer Chapter Board of Directors
- **Dave Zoeller**, Shareholder, Hawks Quindel, S.C. (Madison)

Topics

- The Federal Arbitration Act: origins and recent interpretations
- Trial versus arbitration
- Class arbitrations
- Mass individual arbitrations: economics and inconsistent outcomes
- Defense perspectives
- Proposed legislation

The Federal Arbitration Act

The Federal Arbitration Act (FAA) was enacted in 1925 to place arbitration agreements "upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *see also Southland Corp. v. Keating*, 465 U.S. 1, 13-14 (1984). The "savings clause" states agreements to arbitrate are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Congressional records demonstrate that the FAA was perceived as a remedy to enforce agreements in "commercial contracts and in admiralty contracts." *Southland Corp.*, 465 U.S. at 25 (O'Connor, dissenting). The Supreme Court paid little attention to the FAA until the eighties, when the Court stated the FAA espoused "a national policy favoring arbitration." *Southland Corp.*, 465 U.S. at 10; *but see Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 fn. 32 (1983) (FAA created a "body of federal substantive law" applicable in state and federal court); *see Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614,

628 (1985)) (agreements to arbitrate enforceable provided litigants are able to effectively vindicate their statutory rights).

With its decision in *AT&T Mobility, LLC v. Concepcion*, the Court continued to expand the reach of the FAA. 563 U.S. 333 (2011). In a 5-4 decision, the Court held that the FAA pre-empted a California judicial rule finding class arbitration waivers in consumer contracts to be unconscionable. Writing for the majority, Justice Scalia suggested that class arbitration is "inconsistent with the FAA." In successive cases, a similarly-divided Court continued to uphold class arbitration waivers in consumer contracts. Similarly divided majorities upheld the right of corporations to require consumers to arbitrate their claims in *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012), where Justice Scalia, again writing in the 5-4 majority, rejected consumers' argument that Congress intended claims under the Credit Repair Organizations Act to be nonarbitrable. The next year, another 5-4 decision held that consumers may be compelled to individually arbitrate their claims even when the plaintiff's cost to individually arbitrate a federal statutory claim – here, an antitrust lawsuit – exceeded the statutory recovery. *American Exp. Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

Epic Systems Corp. v. Lewis

In this case, the plaintiff filed a class action complaint in the Western District of Wisconsin alleging his employer had misclassified him and similarly situated employees and deprived them of overtime wages. Epic sought to enforce its arbitration agreement, which barred employees from bringing wage claims in court, and from bringing any such claims collectively. The district court denied the motion, and was upheld by the Seventh Circuit. 2015 U.S. Dist. LEXIS 121137 (W.D. Wis. Sept. 10, 2015), *affirmed by Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016). Shortly thereafter, the Seventh Circuit was joined by the Ninth and Sixth Circuits in holding that class waivers in arbitration agreements are impermissible under the NLRA. *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016); *NLRB v. Alt. Entm't, Inc.*, 858 F.3d 393 (6th Cir. 2017). This created a circuit split, as the Fifth Circuit had previously ruled that requiring the availability of classwide actions is an impediment to arbitration and therefore violates the FAA, and that in the absence of a contrary congressional command establishing that the NLRA supersedes the FAA, the FAA controls. *D.R. Horton v. NLRB*, 737 F.3d 344, 360 (5th Cir. 2013); *see also Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013) (finding class waivers in employment agreements enforceable).

The Supreme Court granted certiorari to resolve this split and in a 5-4 decision, reversed the Seventh Circuit, holding that class waivers in employment arbitration agreements are enforceable. 138 S. Ct. 1612 (2018). Writing for the majority, Justice Gorsuch concluded that the FAA requires enforcement of agreements to arbitrate, and that the NLRA lacked a "clear congressional command" precluding the

enforcement of class waivers in employment agreements. The majority rejected employees' argument that the FAA's "savings clause," which states arbitration agreements are still subject to grounds that exist at law for the revocation of any contract, meant the agreement is not enforceable. Because the employees object to the class waiver specifically, and attack "the individualized nature of the arbitration proceedings," the employees "interfere with one of arbitration's fundamental attributes" by allowing one party to demand collective treatment. Finally, the majority noted that collective litigation is not explicitly included in the "concerted activities" protected by the NLRA.

In dissent, Justice Ginsburg reviewed the history of the NLRA and its purpose in protecting employees' right to act collectively, including recognition by courts and the National Labor Relations Board that "concerted activity" encompasses lawsuits to enforce workplace rights. The dissent also questioned the majority's framing of the issue as concerning the enforcement of a mutual agreement, given that the employees in the underlying cases were required to accept the terms of their employers' agreements as a condition of their employment. The dissent maintained that because collective action waivers are unlawful under the NLRA, the common-law contract defense of illegality available under the FAA's savings clause harmonizes the two laws, and no conflict exists. In conclusion, the dissent noted its concern that the decision may lead to the "underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."

More recently, the Court decided *New Prime Inc. v. Oliveira*, in which a driver for an interstate trucking company brought suit alleging he, and similarly situated drivers, had been misclassified as independent contractors. 139 S. Ct. 532 (2019). The Court unanimously held that the company's arbitration agreement was *not* enforceable because the plain language of the FAA states it may not be used to compel arbitration of disputes involving the "contracts of employment" of certain transportation workers, which the Court held applied to these truckers. 9 U.S.C. § 1.

Does Forced Individual Arbitration Even Make Economic Sense?

I. Average Total Costs to Resolve a Class or Collective Action Wage Case

Class size of 500, with $5,000 individual settlement value (relatively high) = $2,500,000 + cost of defense of $100,000 = **$2,600,000**

- Buys Defendant a class-wide court-approved release

II. Average Total Costs to Resolve a Mass Arbitration

- AAA (sample of 10)

- Pl's Avg. Awarded Attorney's Fees and Costs = $69,914.57
- Avg. Arbitrator Fees = $23,738.07
- Estimated Cost of Defense Per Arbitration = $50,000
- Hypothetical Damages = $7,500 (based on $5,000 settlement value above)
    - Total Cost to Defendant Per Arbitration = $151,152.64[1]

- Compare, $2,600,000 buys class-wide resolution or covers the costs of **17** individual arbitrations with no resolution

    - 17 arbitrations leaves liability open for 483 class members
    - 17 arbitrations is a 3.4% class participation rate

III. Winners and Losers

- Plaintiff's Attorneys do okay
    - Fees for 17 Arbitrations = $1,118,663 or $891,410 with 75% success rate
    - Compare to $833,333 (1/3 of $2,500,000)
- Costs of defense is higher. 17 arbs at $50,000 is $850,000
- Total cost for defending business is much higher + no finality
    - Most mass arbitrations resolve class wide after a set of arbitrations
- Absent class members are the big losers. $0.00

[1] A similar analysis done by Attorney Matthew Helland at Nichols Kaster, PLLP on a set of JAMS arbitrations produced very similar results. Average attorney's fees and costs awarded were $73,000, and the average arbitrator fees and costs through arbitration were $25,000.