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CLASS ACTION BLOG

Employment Agreement Class Action Waivers in Arbitration Provisions are Enforceable Notwithstanding the National Labor Relations Act

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Summary: Justice Gorsuch held that employment agreement class or collective action waivers in arbitration clauses are enforceable notwithstanding the National Labor Relations Act (NLRA). He stated the issues were: "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?" After acknowledging that the issues "are surely debatable," he held that the conclusion was clear "as a matter of law." The Federal Arbitration Act (FAA) requires federal courts "to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." In reaching that conclusion, Justice Gorsuch specifically held that the NLRA did not render these specific class and collective action waivers "illegal" and thus unenforceable. He interpreted the FAA as "a congressional command requiring us to enforce, not override, the terms of the arbitration agreements before us."

Epic Systems Corporation v. Lewis

Justice Gorsuch then refuted the argument that the NLRA overrode the FAA. The employees argued that the NLRA conflicted with, and thus overrode by implication, the FAA. The majority responded by citing multiple rules including the strong presumption "that repeals by implication are 'disfavored' and that 'Congress will specifically address' pre-existing law when it wishes to suspend its normal operations in a later statute." Justice Gorsuch explained that those rules were in place due to the Supreme Court's proper "[r]espect for Congress as drafter" of legislation. Those rules prevented the Court from "too easily finding irreconcilable conflicts in its work. More than that, respect for the separation of powers counsels restraint." Furthermore, it was Congress' job "both to write the laws and to repeal them." The employees relied upon § 7 of the NLRA as the basis for finding "an irreconcilable statutory conflict." In finding that the Court should not infer "a clear and manifest command to displace the [FAA]," Justice Gorsuch found that § 7 of the Act did not "express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the [FAA]–let alone… clearly and manifestly."

The majority also refused the invitation to defer "to [the NLRB's] interpretation of the law. To be sure, the employees do not wish us to defer to the general counsel's judgment in 2010 that the NLRA and the [FAA] coexist peaceably; they wish us to defer instead to the Board's 2012 opinion suggestion the NLRA displaces the [FAA]." The Court analyzed that argument in light of the standard stated in *Chevron USA Inc. v. Natural Resources Defendant Council, Inc.*, 467 U.S. 837 (1984). In reviewing the *Chevron* standards, Justice Gorsuch stated that it made little sense to defer to the Executive Branch on that issue because "the Executive seems of two minds, for we have received competing briefs from the Board and from the United States (through the Solicitor General) disputing the meaning of the NLRA." Because of those two contrary positions, the majority stated that the Executive was speaking "from both sides of its mouth, articulating no single position on which it might be held accountable."

Justice Gorsuch devoted the final portion of the majority opinion to discussing Justice Ginsberg's lengthy dissent before concluding: "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 [FAA]. Because we can easily read Congress's statutes to work in harmony, that is where our duty lies."

Justice Ginsberg's dissent began with a lengthy history regarding the enactment of both the FLSA and the FAA. In her view, the Court's ruling "ignore[d] the destructive consequences of diminishing the right of employees 'to band together in confronting an employer.'" She then invited Congress to overrule the Court's ruling stating: "Congressional correction of the Court's elevation of the FAA … over workers' rights to act in concert is urgently in order." She then reviewed at length the unfair and unjust employment practices prevalent early in the 20th Century and the legislation Congress enacted to overcome those problems. Justice Ginsberg stated in part: "The NLRA text, history, purposes and longstanding construction" required the Court to "conclude[] that collective proceedings [ ] fall within the scope of §7. None of the Court's reasons for diminishing § 7 should carry the day." She explained 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 hold that the employer-dictated collective-litigation stoppers, i.e., 'waivers' are unlawful."

Justice Ginsberg disagreed with the "Court's finding in the [FAA] 'emphatic directions' to enforce arbitration agreements according to their terms, including collective-litigation prohibitions. … Nothing in the FAA or this Court's case law, however, requires subordination of the NLRA's protections." In her view, the FAA did not trump the NLRA. Rather, in "recent decades, this Court has veered away from Congress' intent simply to afford merchants a speedy and economical means of resolving commercial disputes." In Justice Ginsberg's view, "in relatively recent years, the Court's [FAA] decisions have taken many wrong turns. Yet, even accepting the Court's decisions as they are, nothing compels the destructive result the Court reaches today." She "would hold that the arbitration agreements' employer-dictated collective-litigation waivers are unlawful. By declining to enforce those adhesive waivers, courts would place them on the same footing as any other contract provision incompatible with controlling federal law. The FAA's saving clause can thus achieve harmonization of the FAA and the NLRA without undermining federal labor policy." The NLRA should control because it was enacted later in time. For that reason, she believed that "the NLRA should qualify as 'an implied repeal' of the FAA, to the extent of any genuine conflict."

She expressed concern that the Court's decision would lead to "the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers." Justice Ginsberg contended that "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.'"

Epic Systems is a classic case of a five justice majority's statutory construction and interpretation of the Court's precedents clashing with the four justice minority's statutory construction and reading of the same statutes and precedents. Despite Justice Ginsberg's impassioned arguments for federal labor laws to control over the FAA, the majority's reading of FAA precedents combined with its strict construction of the FAA and the NLRA carried the day. The lesson for today's class action litigators is that when there is a clash between the Federal Arbitration Act and any other statutory provision, the Federal Arbitration Act will prevail. That will be especially true regarding class or collective action waivers.