ARBITRATION LAW

By Yolanda C. Garcia and David A. Silva

Federal Developments

In May, the U.S. Supreme Court issued a 5-4 opinion in *Epic Systems Corp. v. Lewis*,[1] which further established the court's deference to employee arbitration agreements containing class and collective action waivers. The court's consolidation of three cases from the U.S. Courts of Appeals 5th, 7th, and 9th Circuits resolved a larger, six-circuit split regarding the enforceability of such waivers, holding that "arbitration agreements providing for individualized proceedings must be enforced." Although the lower courts in *Epic Systems* (7th Circuit) had found that the National Labor Relations Act's protection of "concerted activity" prohibited the petitioners from enforcing an individual arbitration agreement, the court rejected this argument, noting that while the National Labor Relations Act, or NLRA, secured for employees the "right to organize unions and bargain collectively," the NLRA did not include "a right to class actions." As such, the Federal Arbitration Act, or FAA, required courts "to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." In the short time since the ruling came down, multiple district and circuit courts have already cited *Epic Systems* in dismissing collective action cases brought by employees who had previously signed individual arbitration agreements.[2]

Texas Developments

The Texas Supreme Court recently limited the scope of an arbitrator's authority to compel arbitration when the moving party was not itself a signatory to the arbitration agreement. In *Jody James Farms, JV v. Altman Group*,[3] an insurance agency sought to force arbitration upon an insured suing for damages related to a policy he purchased from the agency. The agency, which was not a named party or a signatory on the policy, nevertheless attempted to force the insured into arbitration under the policy's terms. The court noted that a party could not be "forced to arbitrate absent a binding agreement to do so," and found that the arbitrator had no authority to compel arbitration against the insured, since the agency was not a signatory to the policy. Prior to reaching this conclusion, however, the court identified "six scenarios in which arbitration with non-signatories may be required;" including, for example, direct-benefits estoppel (noting that when "a claim depends on the contract's existence and cannot stand independently … equity prevents a person from avoiding the arbitration clause that was part of that agreement.") While the court ultimately rejected the agency's argument in *Jody James*, practitioners should nevertheless find its analysis instructive.

Cases to Watch

The U.S. Supreme Court currently has *three* separate arbitration cases scheduled for argument during the 2018 term, including one rising from the 5th Circuit. That case, *Henry Schein v. Archer and White Sales*,[4] will assess whether the FAA permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless." Meanwhile, in *Lamps Plus v. Varela*,[5] the court will consider whether the FAA forecloses a state law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements. Finally, in *New Prime v. Oliveira*,[6] the court will address two issues: (1) whether a dispute over applicability of the FAA's Section 1 exemption is an arbitrability issue that must be resolved in arbitration pursuant to a valid delegation clause; and (2) whether the FAA's Section 1 exemption, which applies on its face only to "contracts of employment," is inapplicable to independent contractor agreements.

Notes

1. 138 S. Ct. 1612 (2018).
2. *See, e.g., Sifuentes v. Brema Investments*, No. H-17-1742 (W.D. Tex. June 27, 2018) (Magistrate memorandum recommending dismissal and order compelling arbitration); *Gaffers v. Kelly Services*, 900 F.3d 293 (6th Cir. 2018).
3. 547 S.W.3d 624 (Tex. 2018).
4. 878 F.3d 488 (5th Cir. 2017), *cert. granted*, 138 S.Ct. 2678 (Jun. 25, 2018) (No. 17-1272).
5. 701 Fed.Appx. 670 (9th Cir. 2017), *cert. granted*, 138 S.Ct. 1697 (Apr. 30, 2018) (No. 17–988).
6. 857 F.3d 7 (1st Cir. 2017), *cert. granted*, 138 S.Ct. 1164 (Feb. 26, 2018) (No. 17–340).

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