Future of Class Action Waivers: The Supreme Court Hears Oral Argument

October 2, 2017

On October 2, 2017, the Supreme Court of the United States heard oral argument in three consolidated cases that will decide the future of class action waivers in the employment context. These cases—National Labor Relations Board v. Murphy Oil USA, Inc., Epic Systems Corp. v. Lewis, and Ernst & Young LLP v. Morris—kicked off the Court’s new term and likely will be the most important employment cases to be decided in the coming year. We were present this morning for the Court’s oral argument, and while you never know how the Court will rule, a few telling moments stood out, as explained below.

Background

The high court is poised to resolve a fierce dispute that has raged for nearly six years since the National Labor Relations Board (NLRB) issued its controversial decision in D.R. Horton. In that case, the NLRB held for the first time that the National Labor Relations Act (NLRA) bans class action waivers in employment arbitration agreements. Critics of the NLRB’s decision object that the NLRA says nothing about class actions or other litigation procedures and that the NLRB defined the Federal Arbitration Act (FAA), which makes arbitration agreements enforceable according to their terms.

From 2012 to 2016, the overwhelming majority of federal and state courts rejected the NLRB’s position. These courts included the Second, Fifth, and Eighth Circuits. Although the Fifth Circuit refused to enforce the Board’s D.R. Horton decision (in a successful appeal handled by Ogletree Deakins), the NLRB adhered to its own position in dozens of subsequent Board cases, including Murphy Oil. This put the NLRB on a direct collision course with most courts, with employers caught in the middle.

In 2016, the Seventh and the Ninth Circuit Courts of Appeals became the first federal appellate courts to side with the NLRB, followed by the Sixth Circuit in 2017.

The Supreme Court jumped into the contest earlier this year, granting certiorari in three cases that illustrate the split among the NLRB and the various courts of appeals. On one side there is Murphy Oil, in which the Fifth Circuit re-asserted its rejection of the NLRB’s position in D.R. Horton, and on the other side are the Seventh (Lewis) and Ninth (Morr) Circuits, which adopted the Board’s view that class action waivers are illegal under the NLRA.

Dozens of amici also have filed briefs, including, most strangely, the United States represented by the Solicitor General, who opposes the NLRB’s position, and scores of groups representing employers. Ogletree Deakins filed one such amicus

What We Heard From the Supreme Court

Most of the current justices’ views on arbitration and class action waivers in arbitration are fairly well known. The Court has issued a series of decisions on these issues in recent years, including AT&T Mobility LLC v. Concepcion in 2011. This line of cases generally affirms the enforceability of class action waivers in arbitration agreements under the FAA, but none of the Court’s prior cases dealt specifically with employment arbitration or the NLRA.

Most notably, the Court’s decisions in the area have been sharply split with many 5-4 votes. And the late Justice Scalia, who passed away in February 2016, was always in the majority of those decisions. His absence created the prospect of a 4-4 tie prior to Justice Gorsuch joining the Court in April 2017.

Since his confirmation, all eyes have been on Justice Gorsuch for clues to his leanings. The day after President Trump nominated Gorsuch to the Supreme Court, we analyzed his prior rulings on arbitration. During the arguments today, Justice Gorsuch didn’t say a word, in stark contrast to his active questioning during oral arguments at the end of the Court’s last term. He did seem to be enjoying himself, however, frequently smiling and even winking at guests of the justices in the reserved seating section to his left.

Justices Breyer, Kagan, Sotomayor, and Ginsburg all offered vociferous and passionate advocacy in support of the NLRB and employees’ position, leaving observers with no doubt of their impression of the cases. Chief Justice Roberts and Justice Alito, on the other hand, posed questions that, while more subtle than the others’ questions, seemed to support the employers’ arguments. Like Justice Gorsuch, Justice Thomas did not ask any questions or make any comments, instead sitting back passively and even yawning at one point.

As with most divided cases at the Supreme Court these days, that leaves us with Justice Kennedy. On several different occasions, Justice Kennedy made the point that other types of concerted action are still permitted under an arbitration agreement with a class action waiver. For example, according to Justice Kennedy, employees can hire the same lawyer, advance the same evidence, and collaborate in the prosecution of their claims. These are the same arguments we made to the Fifth Circuit in D.R. Horton and again to the Supreme Court in our amicus brief. Apparently dissatisfied with the response from the NLRB General Counsel to Justice Kennedy’s question, Justice Breyer jumped in and attempted to answer it, but Justice Kennedy then noted that Justice Breyer was answering a slightly different question, stating again that employees can act concertedly without filing joint or class claims.

In an apparent attempt to court Justice Kennedy’s vote further, Justice Breyer twice floated the idea of issuing a narrow ruling holding the arbitration agreements at issue are unlawful because they prohibit two employees from filing their claims in a single proceeding, leaving for another day the question of whether a prohibition on class and collective actions filed by one individual also violates the NLRA. In response, Chief Justice Roberts suggested the issue is “more complicated” than that.
In general, the arguments advanced on both sides were the same that have existed since the NLRB’s D.R. Horton decision in January 2012. The only potential twist came from Chief Justice Roberts, who posed a hypothetical of an arbitration agreement that adopts the rules of an arbitral forum but does not contain a class action waiver. Chief Justice Roberts asked if the NLRA would be violated if the arbitral forum’s rules prohibited class actions or, for example, prohibited class actions unless more than 50 employees asserted the same claim. Surprisingly, the NLRB General Counsel conceded such a situation would not violate the NLRA because the prohibition on class actions would be coming from the arbitral forum and not the arbitration agreement imposed by the employer. Arguing separately but representing the same side, the attorney for the employees disagreed with the NLRB General Counsel’s concession, displaying a rare division at the Supreme Court for parties that supposedly are aligned.

What Happens Next

At this point, the only thing that is certain is that the Court is divided. That in turn means the Court will issue at least two opinions, which probably will delay their release until approximately January or February of 2018, as we previously predicted. Stay tuned.

There are many additional nuances to the three consolidated cases pending before the Supreme Court. For an in-depth review of the oral argument in addition to predictions and insights on the future of class action waivers in the employment context, join us for our upcoming webinar, “The Future of Class Action Waivers: An Up-to-the-Minute Report on the Supreme Court Argument in Murphy Oil” featuring Ron Chapman, Jr. (shareholder, Dallas) and Christopher C. Murray (shareholder, Indianapolis) on Tuesday, October 3, 2017, at 4 p.m. Eastern.