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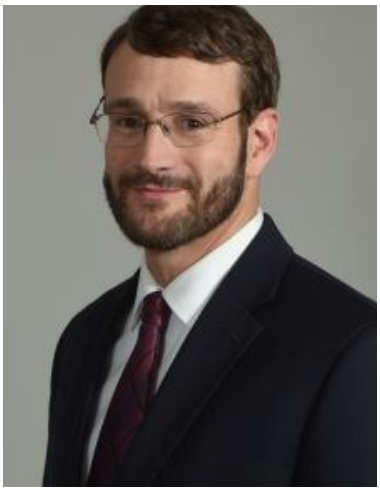
An *Epic* fail for workers

By Brian J. Markovitz May 31, 2018



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The power of class actions took a major blow earlier this month as the Supreme Court held in *Epic Systems Corp. v. Lewis* that arbitration agreements banning class actions for employees are enforceable. Corporations have been using mandatory arbitration clauses for years in order to deter people from bringing viable class-action claims in a variety of settings, including consumer cases, defective products, and other matters. One of the last legal holdouts was employment.

Some courts and the National Labor Relations Board had ruled arbitration class-action bans were a violation of the concerted activity provisions of the National Labor Relations Act because such bans prohibited workers from acting together (as a class) to enforce labor rights, much like a union does collectively for employees. That all changed with the Supreme Court's 5-4 ruling.

Mandatory individual arbitration provisions prohibiting class actions deter people from exercising their rights for a variety of reasons. From a practical perspective, often the process costs more than the actual harm done to an individual so people do not file an arbitration claim. It is a simple cost-benefit analysis.

Equally as discouraging is the likelihood of a recovery is small in an individualized proceeding. Corporations often use arbitration services multiple times while an individual is likely to use it only once. This makes it much more likely arbitrators working for a service will rule the corporation's way, because if they do not, the corporations commonly refuse to use that service ever again. This is known as "one-shot vs. repeater," and it stacks the deck for corporations. Think of it as a roundabout way of sliding $20 to the umpire before the ballgame even begins. The court's holding now makes it likely that more corporations will include these arbitration requirements as part of their conditions for employment, if they did not already do so.

From a legal perspective, the majority's decision is an intellectually dishonest political power grab. When Congress passed the NLRA in 1935, the Federal Arbitration Act had been law for 10 years. In writing the NLRA, Congress never mentioned the FAA as being superior to the NLRA. Supreme Court

precedent dictates that Congress is presumed to know about prior existing laws and, therefore, the Supreme Court is supposed to make every attempt to have two laws work together and not conflict.

This principle of statutory construction is actually taught to first-year law students. The majority, nonetheless, failed to follow this bedrock principle by finding that the two laws could not co-exist (despite having done so for 83 years) and had an irreconcilable conflict. Consistent with correct statutory construction, the Supreme Court should have interpreted the two laws to work together and not conflict, meaning that the FAA's arbitration provision did not trump the NLRA's concerted activity principles. This would have allowed a carve-out on class action bans for employees.

Justice Neil Gorsuch, writing for the majority, claimed "harmony over conflict" was what the majority had in mind. The majority found its rationale in the fact that the NLRA did not expressly approve or disapprove arbitration, mention class-action litigation by name, or displace the FAA. Despite seeming to be somewhat concerned over how the two laws have operated alongside each other for decades, Gorsuch went to the good ol' approach of tough noogies, writing: "(t)he parties … contracted for arbitration."

Individual pressure?

Justice Ruth Bader Ginsburg, writing at length for the dissent, called that a Hobson's choice, or rather, no choice at all. Ginsburg wrote the majority was "egregiously wrong" and discussed the history of the employer-employee relationship, its imbalance, and how that imbalance "prompted Congress to enact the NLRA."

Ginsburg, so angered by the majority's opinion, took the rare step of reading her dissent from the bench. She stated Congress understood when it passed the NLRA that "(a) single employee…is disarmed in dealing with an employer," but the majority has now ignored the very reason for the act's passage in reaching its conclusion.

Only time will tell if employees will turn around recent trends and organize and join unions so they have a chance at fighting the decision collectively. Ironically, it may be up to individual consumers to pressure companies to remove these clauses as was recently done by Uber for cases of sexual misconduct. The ridesharing company received much backlash after one woman released a public letter asking to be released from mandatory arbitration.

One thing is certain, though: Do not look to Congress to enact a legislative fix for this "egregious wrong" unless its membership drastically changes. One can only hope a new Congress will create a legislative fix soon after being elected and take Ginsburg's advice that a "Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order."

Brian J. Markovitz is a principal at Joseph, Greenwald & Laake P.A. in Greenbelt in the firm's Labor and Employment and Civil Litigation practice groups. He can be reached at bmarkovitz@jgllaw.com.