PERKINS COIE

COUNSEL TO GREAT COMPANIES

Arbitration Agreements and Executive Arbitration

June 13, 2017 – Labor & Employment Law Workshop

Bellevue, Washington

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Agenda

- **Arbitration Agreements**
  - **Overview**
  - **Current State of the Law**
  - **Upcoming Supreme Court Cases**
- **Executive Arbitration Agreements and Confidentiality**
  - **One Solution to the Problem**
  - **Tips for Drafting**

Overview: The Basics of Arbitration Agreements

Overview: Class Action Waivers

What are they?

- Agreements to waive the right to litigate on a representative basis, either in a class or collective action.

Why do employers use them?

- Fair Labor Standards Act (FLSA) collective action lawsuits are on the rise and can be very costly for employers.
- Wage-and-hour cases are currently the most common type of litigation in employment law, with 8,954 filings in federal courts in 2015, up from 8,066 the previous year, according to one report.
- The top settlements secured were worth nearly $2.5 billion in 2015, compared to $1.87 billion in 2014, marking the highest figure ever.

Overview: Choosing Arbitration vs. Litigation

Upsides of Arbitration

- Typically less expensive
- No jury
- Proceedings generally more efficient and use informal procedures
- Limited discovery
- May choose arbitrator
- Protects confidentiality of parties and award amount
- Class action waivers

Overview: Choosing Arbitration vs. Litigation

Downsides of Arbitration

- Summary judgment can be rare
- No appeal, except in limited circumstances
- Cost of compelling arbitration in court may be high
- Cost of arbitrator
- Complex issues may be difficult to resolve

The Current State of the Law: Recent Supreme Court Decisions

The Current State of the Law: *AT&T Mobility LLC v. Concepcion*

(Slip Opinion) OCTOBER TERM, 2010 1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

AT&T MOBILITY LLC *v.* CONCEPCION ET UX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 09–893. Argued November 9, 2010—Decided April 27, 2011

The cellular telephone contract between respondents (Concepcions) and petitioner (AT&T) provided for arbitration of all disputes, but did not permit classwide arbitration. After the Concepcions were charged sales tax on the retail value of phones provided free under their service contract, they sued AT&T in a California Federal District Court. Their suit was consolidated with a class action alleging, *inter alia*, that AT&T had engaged in false advertising and fraud by charging sales tax on "free" phones. The District Court denied AT&T's motion to compel arbitration under the Concepcions' contract. Relying on the California Supreme Court's *Discover Bank* decision, it found the arbitration provision unconscionable because it disallowed classwide proceedings. The Ninth Circuit agreed that the provision was unconscionable under California law and held that the Federal Arbitration Act (FAA), which makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U. S. C. §2, did not preempt its ruling.

Held: Because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U. S. 52, 67, California's *Discover Bank* rule is preempted by the FAA. Pp. 4–18.

(a) Section 2 reflects a "liberal federal policy favoring arbitration," *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 24, and the "fundamental principle that arbitration is a matter of contract," *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U. S. ____, ____. Thus, courts must place arbitration agreements on an equal footing with other contracts, *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U. S. 440, 443, and enforce them according to their terms, *Volt In-*

SUPREME COURT OF THE UNITED STATES

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The Current State of the Law: *American Express Co. v. Italian Colors Restaurant*

(Slip Opinion) OCTOBER TERM, 2012 1

Syllabus

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SUPREME COURT OF THE UNITED STATES

Syllabus

AMERICAN EXPRESS CO. ET AL. *v.* ITALIAN COLORS RESTAURANT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 12–133. Argued February 27, 2013—Decided June 20, 2013

An agreement between petitioners, American Express and a subsidiary, and respondents, merchants who accept American Express cards, requires all of their disputes to be resolved by arbitration and provides that there "shall be no right or authority for any Claims to be arbitrated on a class action basis." Respondents nonetheless filed a class action, claiming that petitioners violated §1 of the Sherman Act and seeking treble damages for the class under §4 of the Clayton Act. Petitioners moved to compel individual arbitration under the Federal Arbitration Act (FAA), but respondents countered that the cost of expert analysis necessary to prove the antitrust claims would greatly exceed the maximum recovery for an individual plaintiff. The District Court granted the motion and dismissed the lawsuits. The Second Circuit reversed and remanded, holding that because of the prohibitive costs respondents would face if they had to arbitrate, the class-action waiver was unenforceable and arbitration could not proceed. The Circuit stood by its reversal when this Court remanded in light of *Stolt-Nielsen S. A.* v. *AnimalFeeds International Corp.*, 559 U. S. 662, which held that a party may not be compelled to submit to class arbitration absent an agreement to do so.

Held: The FAA does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery. Pp. 3–10.

(a) The FAA reflects the overarching principle that arbitration is a matter of contract. See *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U. S. ___, ___. Courts must "rigorously enforce" arbitration agreements according to their terms, *Dean Witter Reynolds, Inc.* v. *Byrd*,

SUPREME COURT OF THE UNITED STATES

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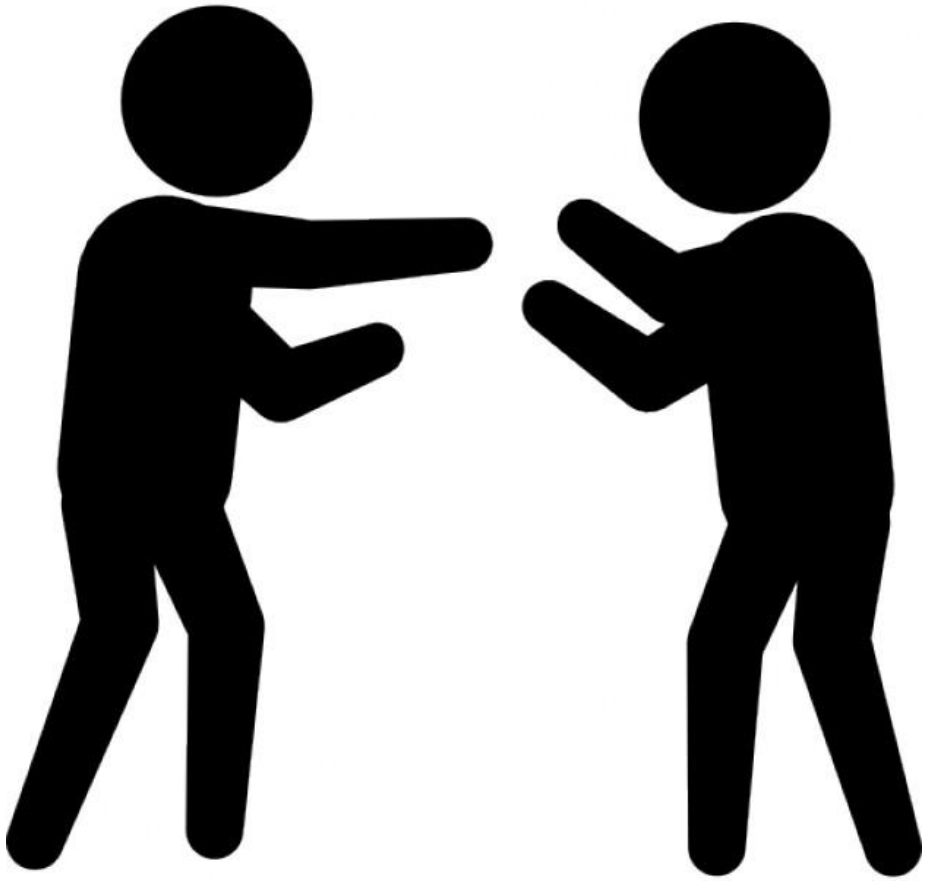
Competing Laws Governing Employees: The NLRA vs. the FAA



Competing Laws: The Position of the National Labor Relations Board

Competing Laws: The Counterargument

The Current State of the Law: The Federal Arbitration Act ("FAA")

Section 2 of the FAA, which was enacted in 1925, states in relevant part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

The Current State of the Law: The National Labor Relations Act ("NLRA")

Section 7 of the NLRA states in relevant part:

> Employees shall have the right to . . . engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

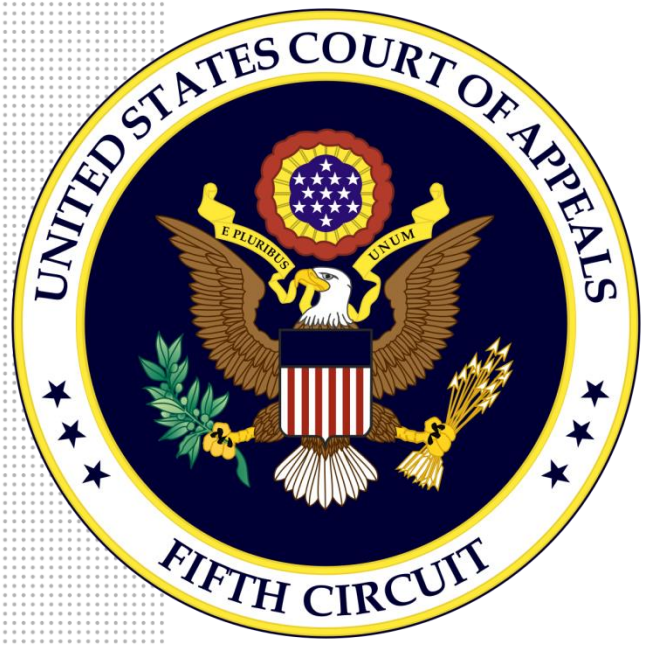
29 U.S.C. § 157.

Section 8(a)(1) provides that

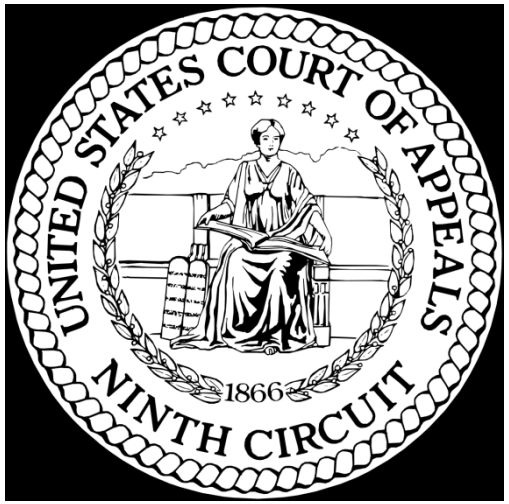
> "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of" Section 7 rights.

Id. § 158(a)(1).

Circuit Split: Class Action Waivers



VS.



Upcoming Supreme Court Review

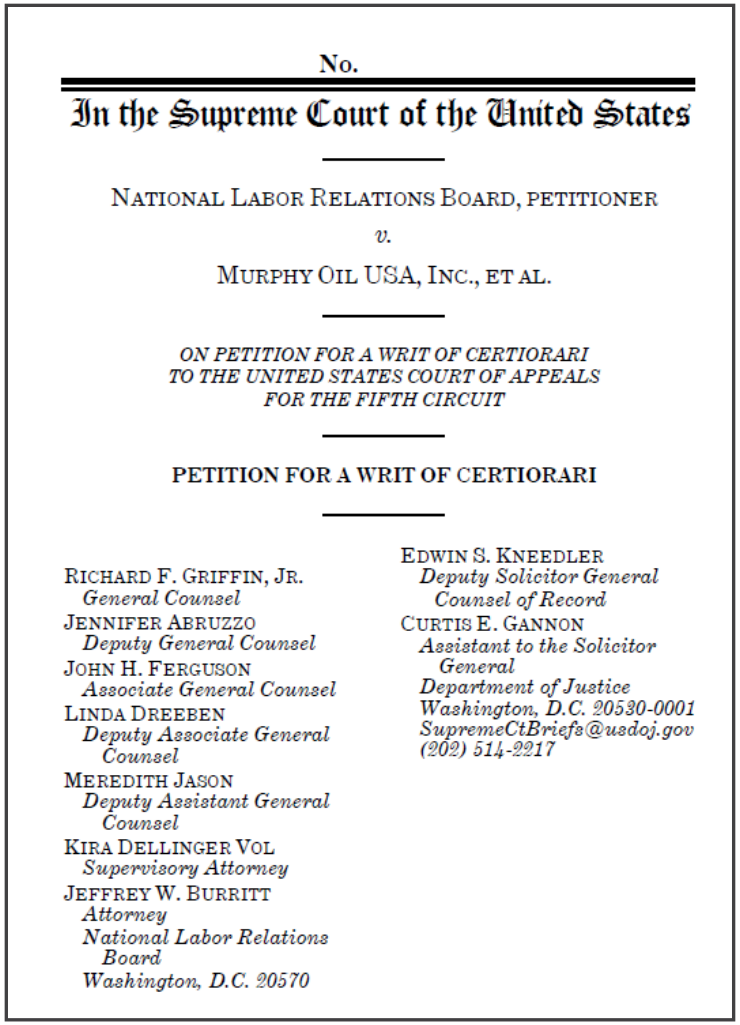
In January 2017, the Supreme Court granted petitions for writs of certiorari in the three recent Fifth, Seventh, and Ninth Circuit cases. The three cases were consolidated and the three questions will be briefed and argued together.

Upcoming Supreme Court Review

SUPREME COURT OF THE UNITED STATES

1. *NLRB v. Murphy Oil USA, Inc.*, Case No. 16-307

Question presented: Are arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum prohibited as an unfair labor practice?



No.

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MURPHY OIL USA, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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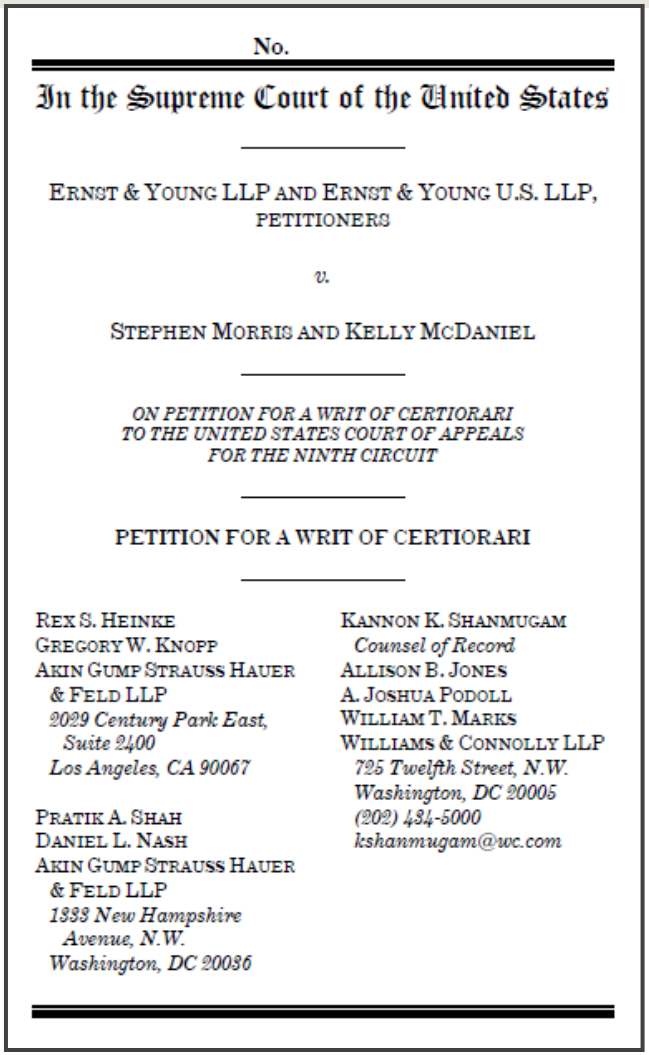
Upcoming Supreme Court Review

SUPREME COURT OF THE UNITED STATES

2. *Ernst & Young LLP v. Morris*, Case No. 16-300

Question Presented: Do the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Federal Arbitration Act of an agreement that requires an employee to arbitrate claims against an employer on an individual, rather than collective, basis?



No.

In the Supreme Court of the United States

ERNST & YOUNG LLP AND ERNST & YOUNG U.S. LLP,
PETITIONERS

v.

STEPHEN MORRIS AND KELLY MCDANIEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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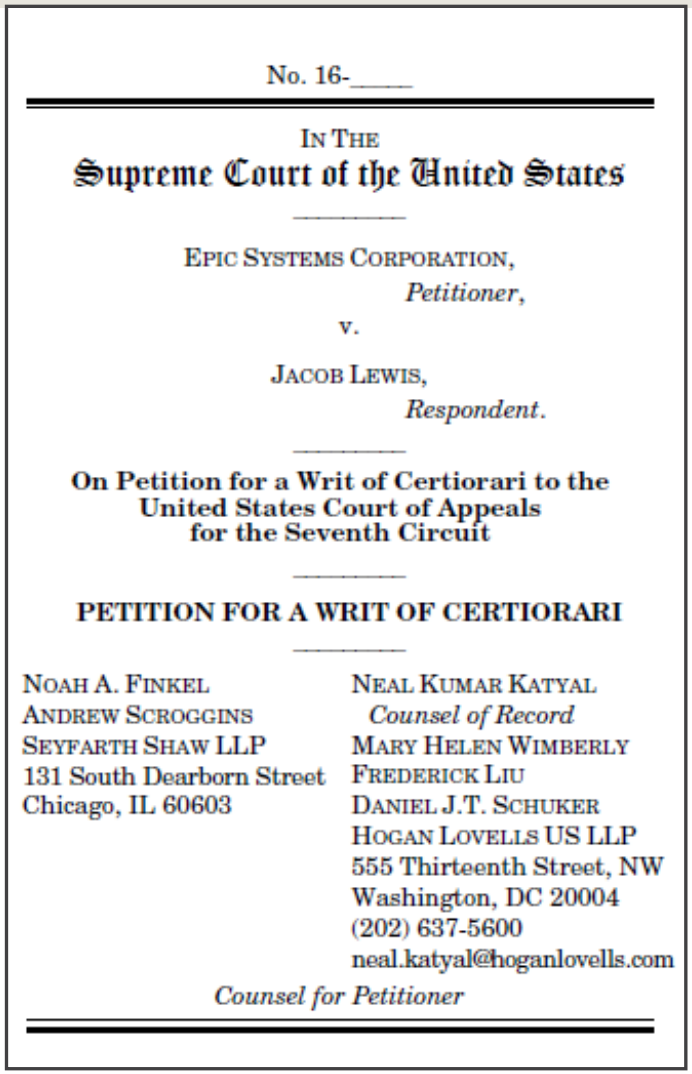
Upcoming Supreme Court Review

SUPREME COURT OF THE UNITED STATES

3. Epic Systems Corp. v. Lewis, Case No. 16-285

Question Presented: Is an agreement requiring an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act?



No. 16-____

IN THE
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,
v.
JACOB LEWIS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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Confidential Arbitration Agreements for High-Profile Clients & Senior Executives

The Problem and a Solution

Tips for Drafting

- Support with consideration
- Select arbitrators and governing rules thoughtfully
- Allow for appropriate discovery
- Permit filing of prehearing summary judgment motions
- Provide for confidentiality and privacy over the arbitration, the award, and all proceedings that take place prior to the hearing
- Make the confidentiality clause expansive and comprehensive

Questions?