US Supreme Court Begins New Term with Three Arbitration Cases Set for Oral Argument in October

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We’ve been keeping you apprised of the many developments over the past few years coming from the United States Supreme Court and other courts concerning agreements between employers and their employees to arbitrate disputes arising out of the employment relationship. The Supreme Court’s decision last term in *Epic Systems v. Lewis*, which we discussed in our post here, garnered significant attention as it addressed the National Labor Relations Board’s (“NLRB”) several-years’-running position that arbitration agreements with class or collective litigation waivers illegally restrain employees in the exercise of concerted activity protected under the National Labor Relations Act (“NLRA”). In *Epic Systems*, the Supreme Court rejected the NLRB’s position, holding that class action litigation is court procedure and not a substantive right or an activity protected under the NLRA. The Court thereby preserved employers’ ability to limit disputes to individual claims in arbitration without running afoul of employee rights under the NLRA to act together to improve their work environment.

The Supreme Court’s new term began as it always does, on the first Monday in October. On the Court’s docket in its first month are three more arbitration cases – one of which also deals with class action litigation. All three cases involve various aspects of the reach or interpretation of the Federal Arbitration Act (“FAA”).

The Supreme Court heard its first arbitration case during Wednesday, October 3’s oral arguments in *New Prime, Inc. v. Oliveira*, (the First Circuit’s opinion below reported at 857 F. 3d 7). In this case, the Supreme Court is being asked to determine whether Section 1(a) of the FAA, which excludes certain transportation “workers” from the FAA’s purview, applies to independent contractors, in addition to the employees, of a transportation company. The Supreme Court also has been asked to address whether the application of the Section 1(a) exemption is a threshold issue that should be decided by a court before ordering a case to arbitration, even when the parties’ arbitration agreement contains a clear delegation provision assigning questions of the arbitrator’s jurisdiction to the arbitrator and not a court. In the case below, the First Circuit answered “yes” to the first question, finding that the term “workers” under Section 1(a) of the FAA includes traditional employees and independent contractors. If the Supreme Court adopts this interpretation, it could have a noteworthy impact on the transportation industry, which widely relies on the services of independent contractors. These individuals, in addition to employees, may not be subject to arbitration despite otherwise valid arbitration agreements between themselves and a transportation company. This outcome also could lead to the expansion of other laws that have traditionally been limited to the employer/employee relationship and not independent contractors. In the underlying decision, the First Circuit also held that the determination of whether the claims at issue are exempt from the FAA under Section 1(a) is a “gateway” question to arbitrability that should be answered by a court, regardless of a valid delegation provision in an arbitration agreement. The upshot of this outcome is that despite contractual language agreed between the parties stating that an arbitrator should decide whether he or she can hear a case, in part or whole, the Section 1(a) question is an exception to such a provision. Early commentators on the *Oliveira* oral argument believe the Justices’ lines of questioning clearly indicated that the Court leans in the direction of a broad interpretation of the FAA exemption to include independent contractors, and that courts, and not arbitrators, should analyze the application of the exemption.

*Lamps Plus, Inc. v. Varela*, is scheduled for oral argument on October 29, 2018. It comes to the Supreme Court
from the Ninth Circuit (opinion is reported at 701 F. App’x 67). This case arises out of the Supreme Court’s 2010 decision in Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., wherein it held that state courts cannot order class arbitration unless there is a contractual basis to do so. In Varela, the Ninth Circuit held that, under the contract law of California (the state by which the arbitration agreement at issue is governed), the parties’ intention to allow class and collective claims in arbitration could be inferred from the agreement’s commonly-used language, which in this case was, “arbitration shall be in lieu of any and all lawsuits or other civil proceedings.” The lower court concluded that the phrase “other civil proceedings” includes class actions, therefore, there was a contractual basis to find that the parties meant to replace class litigation in court with class litigation in arbitration. In its petition to the Supreme Court, Lamps Plus opposed the Ninth Circuit’s decision by arguing that under the FAA, class arbitration is disfavored because it is inconsistent with the purpose of arbitration to streamline litigation. Accordingly, it argued that parties to an arbitration agreement must clearly and explicitly authorize class arbitration, or be limited to individual, bilateral litigation in the arbitration forum. This case provides the Supreme Court with the opportunity to define the contours of its holding in Stolt-Nielsen by explaining just how parties can indicate their assent to participate in class arbitration and whether the FAA precludes an inference in favor of class arbitration based on general contract language that does not specifically address class or collective litigation procedures. A less likely, but possible outcome would be for the Court to defer the FAA issue by ruling that the Ninth Circuit misapplied California contract law.

Also set for oral argument on October 29, 2018, is the third arbitration case on the Supreme Court’s docket this term. Although not an employment case, Henry Schein v. Archer & White Sales, Inc. (Fifth Circuit Court of Appeals decision reported at 878 F.3d 488), like Oliveira, addresses whether a court or an arbitrator should be charged with making threshold determinations about the arbitrability of claims. In this case, the parties had entered into an arbitration agreement stating they would resolve all legal disputes in arbitration, except claims for injunctive relief and involving intellectual property rights. The plaintiff’s case included a claim that sought injunctive relief among other remedies; he thus argued that the court where the case was filed should refrain from ordering the parties to arbitration because the claim seeking injunctive relief was not arbitrable. The defendants argued that the terms of the arbitration agreement provided that any questions about the arbitrability of the case or a specific claim was to be decided by the arbitrator. The trial court’s magistrate judge found that the arbitration agreement’s delegation language, when combined with the language carving out claims for injunctive relief, could reasonably be interpreted in both manners suggested by the parties. However, the District Court judge and the Fifth Circuit both discarded this interpretation, and instead found that the defendant’s claim that the parties to the arbitration agreement intended the arbitrator to handle the arbitrability of a carved-out claim was “wholly groundless.” Although its analysis was brief, the Fifth Circuit held that the language of the parties’ arbitration agreement was clear and the court should determine the arbitrability of the entire litigation when it included a carve-out claim, such as injunctive relief. The defendants’ case before Supreme Court argues that the “wholly groundless” doctrine used by the Fifth Circuit is too subjective and violates the federal policy favoring arbitration expressed in the FAA. Having suggested their lean toward court determination of arbitrability issues in the Oliveira argument, the Supreme Court may take a similar tact in Henry Schein. On the other hand, the Court could also distinguish this case by the fact that these parties agree they have a valid arbitration agreement that governs the terms of their arbitration, and not an overarching statutory exemption to arbitration such as exists in Oliveira.

Although employers can continue to feel confident that arbitration agreements with their employees are a valid mechanism to limit employment-related disputes to the arbitration forum, some of the contours of these agreements continue to be defined through ongoing litigation, such as the cases above. The outcomes in these cases may impact how employers craft their arbitration agreements to ensure parties get the exactly the arbitration they are bargaining for. Stay tuned as we continue to update you on the outcomes of these cases, and their effects on employer arbitration agreements.

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