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An Epic Timeline: The Cases That Set The Stage

By **Vin Gurrieri**

Law360 (May 23, 2019, 10:51 PM EDT) -- The Epic Systems case may have captivated U.S. Supreme Court watchers in 2018, but the seeds that led to last May's blockbuster decision were sown by the California Supreme Court and the National Labor Relations Board many years earlier.

Here, in the final installment of a four-article series marking the one-year anniversary of the Epic Systems ruling, Law360 follows class waiver law's winding path to the nation's highest court.

In Epic Systems Corp. v. Lewis, the name for a trio of consolidated cases, the high court by a 5-4 vote blessed the legality of arbitration agreements that include provisions requiring workers to eschew class actions, saying the contracts must be enforced under the Federal Arbitration Act.

The class waiver question's rise to the Supreme Court got kick-started on Jan. 3, 2012, when the NLRB first adopted its position in D.R. Horton that arbitration agreements forcing workers to sign away their right to pursue class or collective actions violated the National Labor Relations Act.

Harry Johnson, a partner at Morgan Lewis & Bockius LLP and a former board member who authored a key dissent in a follow-up NLRB case that reaffirmed the Horton precedent, said the nearly decadelong saga that led to the high court's ruling left the justices with a well-developed record on the class waiver issue to delve into.

"I was happy and proud to be a modest part of this process of working out in litigation whether there was a conflict between these two laws and how to resolve it, because I did think it was very important," Johnson said. "Regardless of what view ultimately prevailed, I think it was a good process in the sense that by the time this issue got to the Supreme Court, all views had been fully aired about what the [NLRA's] relationship should be to the Federal Arbitration Act. So, it wasn't a situation where the Supreme Court walked in and there had not been robust discussion over this."

Seeds Planted

Although Epic Systems was the D.R. Horton precedent's last gasp, the broader issue of whether class actions could be blocked by clauses in arbitration agreements had started to percolate well before Horton was decided.

In 2005, the California Supreme Court ruled in Discover Bank v. Superior Court that class waivers in consumer contracts were unenforceable under certain circumstances.

About two years later, the state high court extended its rationale to cover employment contracts in a case called Gentry v. The Superior Court of Los Angeles County, holding that workers whose employment contracts included class action waivers could still pursue employment claims as a class if they met certain criteria.

The U.S. Supreme Court weighed in on class waivers in the consumer context when it upended California's Discover Bank precedent in a 2011 decision called AT&T v. Concepcion, holding in part that the FAA preempted the state law rule.

Michael Rubin of Altshuler Berzon LLP, who has been involved in numerous class waiver cases, said that he and his co-counsel when they were drafting briefs in Gentry "realized we also had a way to challenge class action [waivers] using Section 7 of the NLRA" as well as portions of an earlier labor law called the Norris-LaGuardia Act, but they decided not to pursue those arguments in the Gentry case since they hadn't been presented in its early stages.

"But in July 2007, we used those theories, I think the first time that anyone's ever used them that I know, ... in a board charge," Rubin said.

As the issue started being raised in unfair labor practice cases before the NLRB, then-agency general counsel Ronald Meisburg issued a memorandum in June 2010 that delved into whether class action waivers in mandatory arbitration agreements were valid under the NLRA. Dubbed Memorandum GC 10-06, it was meant to serve as guidance for the agency's field offices that encountered such claims.

The guidance said that employers could be found to have violated Section 8(a)(1) of the NLRA if they threatened or fired workers for filing a class action, and that an arbitration pact would be deemed unlawful if workers could reasonably interpret it as barring them from joining a class action.

But the memo further advised that employers shouldn't be deemed to be breaking the NLRA if their arbitration agreements clearly stated that workers could challenge those contracts through a class or collective action without being retaliated against for doing so.

Rubin noted that another firm later picked up on the legal theory he had previously presented and asserted it in the original D.R. Horton charge, which was accepted by the NLRB field office that investigated the case.

"The regional office in Florida that investigated the charge read the 2010 NLRB memo as permitting it rather than prohibiting it to go forward with the charge and that's how the complaint in D.R. Horton ended up being pursued before the board," Rubin said.

Changed Landscape

Almost as soon as Horton was issued, employment law observers noted the stark contrast it presented with the Supreme Court's decision in Concepcion, which while it didn't directly apply to employment contracts was an indication of the high court's general inclination toward upholding the validity of arbitration deals containing class waivers in the employment context.

The Fifth Circuit, however, dealt the NLRB a sharp rebuke in 2013 when it rejected its Horton theory on appeal after finding that the labor board "did not give proper weight" to the FAA, in a case that drew significant attention and amicus participation from labor and business advocates.

While the case was working its way through the appeals court, the NLRB itself underwent a drastic facelift from the time Horton was issued, with four new members being added. Only one out of the five board members who were on the board when it reaffirmed Horton — Mark Gaston Pearce — had been on the board when Horton was decided.

Richard Griffin, a former board member who spent four years as NLRB general counsel starting in November 2013 and who eventually argued the Epic Systems ruling before the Supreme Court, recently told Law360 that the general counsel's office needed the new board members to weigh in on the Horton precedent and various related issues that arose in Horton's aftermath.

They finally got their chance to opine on the Horton precedent in a case involving Murphy Oil USA Inc. — one of the three cases that ultimately worked its way up to the high court. The board in that ruling doubled-down on the precedent it set in Horton.

"We were waiting for the new reconstituted board to decide to endorse Horton or not, and once Murphy Oil was decided, that opened the floodgates to the board's decision," Griffin said.

Johnson, who noted that the initial Horton decision was issued by a two-person panel without dissent because the board's lone Republican at the time was recused, authored one of the two dissenting opinions in Murphy Oil.

"From my personal perspective, it's one of the most important four or five dissents I wrote because I think that the board majority got a lot of things wrong, unfortunately, in getting to where it was going," Johnson said. "I concluded it by saying if it keeps going this way, the Supreme Court is going to intervene and [the NLRB] is going to lose a lot of deference. And that's what happened ... in the Epic opinion."

The other dissent was penned by Morgan Lewis & Bockius LLP partner and former NLRB Chairman Philip Miscimarra.

Although they overlap some, Miscimarra says his and Johnson's dissents were "complementary" to one another, with his being generally focused more on the scope of protections afforded by the NLRA and Johnson's more aimed at the role of FAA.

NLRB Presses On

After Murphy Oil was issued, a spate of federal and circuit courts hearing cases in which employers were seeking to enforce class action waivers to get disputes sent to individual arbitration started to weigh in.

While some courts followed in the Fifth Circuit's footsteps in rejecting the Horton theory — including the Fifth Circuit itself again in ruling against the NLRB when the Murphy Oil decision was appealed — other courts issued decisions that broke the board's way.

Rubin, who represented several unions as amici in the Fifth Circuit D.R. Horton appeal, said favorable rulings helped proponents of the board's theory that class waivers were unlawful further advance that theory's legitimacy.

"Whenever we would get a favorable case, we would use it to promote the argument and show there was a basis for it," Rubin said.

Eventually, the Seventh Circuit in the case involving Epic Systems and the Ninth Circuit in a case involving Ernst & Young each ruled that the employers couldn't force workers to individually arbitrate their disputes.

Next Stop: Congress?

By continuing to press its Horton theory even after the two Fifth Circuit setbacks, the board was partaking in its policy of "nonacquiescence," or not adhering to the law of a circuit that diverges from its precedent.

Miscimarra says that policy has often been viewed as controversial, but that there have been instances when the board's pursuit of its own legal views in the face of contrary circuit court opinions "ultimately ended up being upheld by the Supreme Court" if the issue made it that far.

"The board has a long history in certain types of cases in continuing to pursue its own view of the statute notwithstanding a [divergent view] that has been expressed by one or more courts of appeals," Miscimarra said. "When you end up having a multiplicity of circuits and you have one agency that is vested with what is regarded as specialized expertise, the nonacquiescence doctrine is one that certainly has a place in the functioning of the agency."

But in this case, that policy didn't work out in the NLRB's favor, as the high court ultimately sided against it.

Since the legal issue over the validity of class action waivers in mandatory arbitration pacts was largely resolved by the high court's ruling in Epic Systems, Rubin said it's now on Congress to decide if its an issue worth addressing.

To that end, numerous Democratic lawmakers who took notice of the effect Epic Systems has had on employment law have introduced legislation meant to limit or eliminate the inclusion of class waiver provisions in arbitration agreements or curtail the availability of arbitration for certain types of claims.

"Eventually, there's going to be a legislative fix, but that's going to take a political change before it can occur," Rubin said.

Miscimarra offered a similar outlook, saying that lawmakers' positions on the legality of class waivers will be worth watching over the next few years.

"It's the province of Congress to evaluate possible changes, or modifications, or refinements in [the NLRA and the FAA]," Miscimarra said. "I think that places everybody in the position to stay tuned for what Congress may do if Congress chooses to act in this area."

--Editing by Breda Lund and Emily Kokoll.