.75 Law & Legal CLE Credit – A/V Approval #1080947

Recording Date - September 13, 2018
Recording Availability – September 20, 2018

Meeting Location	Date	Time	Topic
King County Bar Association 1200 Fifth Avenue - Suite 700 Seattle, WA	**Thursday, September 13, 2018**	12:00 PM to 1:30 PM	EPIC changes to Litigation and Arbitration

---

AGENDA

12:00 PM Introduction

12:00 PM Presentation: 'EPIC changes to Litigation and Arbitration', by Justo Gonzalez, Stokes Lawrence; Marc Cote, Frank Freed Subit & Thomas LLP and Donna Lurie, Lurie Workplace Solutions

- What did the US Supreme Court decide in the EPIC Trilogy Cases?
- How does the EPIC decision impact litigation of employment claims?
- How does the EPIC decision impact arbitration of employment claims?
- How can parties make mandatory arbitration work on discovery issues and process fees?
- How do we handle confidentiality requests?
- Does the EPIC decision pre-empt recent changes in Washington State law?

1:30 PM Adjourn

SPEAKER BIOGRAPHY

Justo Gonzalez, Stokes Lawrence – Justo is a shareholder at Stokes Lawrence. At the trial court level, he has successfully represented clients facing class action and multi-plaintiff employment discrimination lawsuits, competition and consumer protection actions, intellectual property litigation, and trade secrets litigation. Justo has worked on appeals across a spectrum of legal issues, including employment, contracts, and consumer protection laws. Justo's employment practice includes working with clients on preventative measures, such as leading employee trainings, counseling on disciplinary actions and workplace investigations, and conducting employment practices reviews. Justo also maintains an active pro bono practice, primarily in civil rights and civil liberties litigation.

Marc Cote, Frank Freed Subit & Thomas LLP – Marc is a partner with Frank Freed Subit & Thomas LLP. He has successfully litigated several groundbreaking class action cases on behalf of delivery drivers, restaurant workers, farm workers, construction workers, and other low-wage workers. Marc has recovered millions of dollars on behalf of employees whose wage and hour rights have been violated or who have faced discrimination in the workplace. His clients in individual employment law matters range from immigrant farm workers to high-level executives, physicians, and other professionals. Marc is the co-author of the Wage and Hour Law chapter of the Washington Association for Justice Employment Law Deskbook, and he speaks frequently on employment law topics at legal seminars and conferences.

Donna Lurie, Lurie Workplace Solutions – Donna is a labor and employment arbitrator and mediator with 30 years' experience in labor relations, collective bargaining, and employment law. She serves as an independent arbitrator with the American Arbitration Association (AAA), FMCS, and FINRA. Donna is the current Chair of the KCBA ADR Section and a member of the Planning Committees for the NW Dispute Resolution Conference and the Pacific Coast Labor & Employment Law Conference. She arbitrated business contract disputes for the King County Superior Court Mandatory Arbitration program.

HOW DO I EARN CREDIT FOR SELF-STUDY OR AUDIO/VISUAL (A/V) COURSES?

For pre-recorded A/V (self-study) programs, although the sponsor should apply for accreditation, **lawyers need to report the credits earned for taking the course.**

To add an approved course to your roster, follow the procedures below:

- Go to the "mywsba" website at www.mywsba.org/.
- Log in.
- Click on the "Access MCLE" link in the "MCLE Info" box on your home profile page.
- Click on "Add Activity." Search to find the approved course in our system. (See search suggestions on the screen.)

Adding a Recorded Course

Select Recorded Course from the Add New Activity screen.

This will prompt you to search for the activity in case the activity has already been accredited in the MCLE system.

You can search by Activity ID or by specific Activity Details. For the Activity Details search, you can use keywords for the title, sponsor name and date.

After entering your search criteria and selecting Search at the bottom of the screen, a list of possible activities will be provided.

You can select the correct one by clicking the Activity ID. This will take you to the specific activity. Entered the date(s) on which you began and ending viewing this recorded activity.

Then claim the correct credits for which you attended this activity in the Credits Claimed fields and click the Submit button at the bottom of the page.

You will receive a confirmation message at the top of your screen stating, “The activity has been added to your roster.

ANALYSIS OF US SUPREME COURT DECISION IN EPIC SYSTEMS CORPORATION v. LEWIS, ERNST & YOUNG LLP v. MORRIS, and NLRB v. MURPHY OIL USA

By Donna Lurie of Lurie Workplace Solutions

Three US Circuit cases were granted certiorari by the US Supreme Court to settle the split in Circuit Courts on the question of whether courts should enforce individualized arbitration proceedings under the Federal Arbitration Act to resolve employment disputes between the parties. The employees sought to nullify their mandatory arbitration agreements and address their Fair Labor Standards Act (FLSA) claims through class action litigation in federal court. The employees argued that the "savings clause" of the Federal Arbitration Act removed the obligation to arbitrate and that requiring individualized arbitration proceedings violated Section 7 of the National Labor Relations Act (NLRA) providing employees with the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection" 29 U.S.C. Section 157.

The Supreme Court justices issued a 5-4 Decision on May 21, 2018. Justice Gorsuch wrote the Majority opinion with Roberts, Kennedy, Thomas, and Alito joining him. Ruth Bader Ginsburg wrote the Dissenting opinion with Breyer, Sotomayor, and Kagan joining her. Justice Gorsuch framed the issue as follows:

> *Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?*

Justice Gorsuch and the Majority based their reasoning on the premise that the employees and the employers in these three cases "agreed" or consented to use individualized arbitration and to waive any claim to class action litigation. Since employee consent to the arbitration policies was a condition for continuing employment with Epic Systems, Ernst & Young, and with Murphy Oil, the degree of "agreement" is questionable. On the other hand, one could argue that employees were free to quit and seek employment elsewhere if they objected to the requirement to use individualized arbitration proceedings to resolve their employment disputes.

The Majority viewed the employees' arguments as continuing efforts to manufacture conflicts between the Federal Arbitration Act and other federal statutes. Gorsuch reviewed the history of US Supreme Court decisions enforcing the Federal Arbitration Act. Congress adopted the Arbitration Act in 1925 to overcome the courts' hostility towards arbitration and treat arbitration agreements as "valid, irrevocable, and enforceable". 9 U.S.C. Section 2. Furthermore, the Arbitration Act requires courts to vigorously "enforce arbitration agreements according to their terms, including with whom the parties choose to arbitrate their disputes and the rules under which the arbitration will be conducted" *American Express Co. v. Italian Colors Restaurant,* 570 US 228, 233 (2013).

According to *AT&T Mobility LLC v. Concepcion,* 563 US 333, 339 (2011), the Arbitration Act's savings clause only allows a refusal to enforce arbitration agreements under conditions such as "fraud, duress, or unconscionability". Challenging an arbitration agreement because of the

individualized nature of the proceeding does not meet any of these three named conditions. “The clause offers no refuge for defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue”, p. 7 of the Opinion citing *Kindred Nursing Centers LP v. Clark,* 581 US _ (2017) (slip opinion). The Majority concluded that a challenge to the individualized nature of the arbitration proceedings was an attempt to interfere with one of arbitration’s fundamental attributes. The Court in *Concepcion* refused to prohibit class action waivers in consumer contracts. Allowing any party in an arbitration to insist on class action proceedings would fundamentally change arbitration and “make the process slower, more costly, and more likely to generate procedural morass than final judgment”. Id at 347, 348.

While the individualized arbitration procedures were mandated without employee consent in the three cases before the Court, the Majority concluded that “courts may not allow a contract defense to reshape individualized arbitration and mandate class-wide arbitration procedures without the parties’ consent”, p. 8 of Opinion.

The Court Majority rejected the argument that the National Labor Relations Act (NLRA) superseded the Federal Arbitration Act and rendered the arbitration agreements illegal. Gorsuch pointed out that the Arbitration Act (passed in 1925) and the NLRA (passed in 1935) have coexisted for decades without conflict. The NLRB’s General Counsel remarked in a memorandum dated June 16, 2010 that the validity of arbitration agreements “does not involve consideration of the policies of the NLRA”. Memorandum GC 10-06, pp 2 and 5 (2010). Board members refused to adopt this view. The NLRB took a formal position in 2012 that mandatory arbitration agreements prohibiting class action proceedings were a violation of Section 7 of the NLRA and interfered with employees’ ability to engage in other concerted activities. Gorsuch stated that “this Court has never read a right to class actions into the NLRA - and for three quarters of a century neither did the NLRB”, p. 2 of Opinion. He flatly rejected the assertion that Section 7 of the NLRA rendered a class action waiver to be illegal. Section 7 does not express approval or disapproval of arbitration, nor does it mention any rules to govern the adjudication of class or collective actions in arbitration or litigation. Gorsuch opined that the employees relied on the NLRA because every Circuit Court has held that the “FLSA allows agreements for individualized arbitration”, p. 15 of Opinion. Even the collective action procedures under the Fair Labor Standards Act (FLSA) do not supplant the Arbitration Act or prohibit an individualized arbitration process, citing *Gilmer v. Interstate/Johnson Lane Corporation*, 500 US 20, 32 (1991). Gorsuch highlighted the disagreement between the NLRB and the Solicitor General (they argued opposite positions in the three cases) as evidence that the Executive branch was not of one mind and should not receive any deference from the Court.

The Majority refused to “pick and choose among congressional enactments”, and they cited the rule of statutory construction that “repeals by implication” are highly disfavored, p. 10 of Opinion. The Supreme Court refused to find a conflict between the Arbitration Act and the Sherman Act in *Italian Colors* and between the Age Discrimination in Employment Act and the Arbitration Act in *Gilmer*. Even where the Credit Repair Organizations Act (CROA) expressly stated the right to sue, declared that a waiver of the CROA rights would be void, and specifically mentioned class actions and court proceedings, the Supreme Court refused to find a conflict between the Arbitration Act and the CROA in *CompuCredit*. “If all the statutes in all those cases did not provide a congressional command sufficient to displace the Arbitration Act, we cannot imagine how we might hold that the NLRA alone and for the first

time does so today." See p. 17 of Opinion. Absent a clear and manifest congressional intention to displace one statute with another, the Court must give effect to both.

The Court was able to interpret Congress' statutes to work in harmony. The Majority concluded that Congress instructed the courts to enforce arbitration agreements like the agreements in question. Congress is free to amend the Court's judgment in future legislation. "The respective merits of class actions and private arbitrations as a means of enforcing the law are questions constitutionally entrusted not to the courts to decide but to the policymakers in the political branches where those questions remain hotly contested." See p. 24 of Opinion.

In writing her Dissent, Justice Ginsburg argued that individual employees have little power in addressing employment disputes and that fear of retaliation deters individual claimants from seeking relief. She pointed out that the expenses incurred in pursuing an individual claim can often outweigh the potential recovery. For example, a New York federal court concluded that an employee in the Ernst & Young arbitration program would have to spend $200,000 to recover about $1867 in overtime pay and an equivalent amount in liquidated damages. See *Sutherland v. Ernst & Young*, 768 F. Supp. 2d 547, 552 (SDNY 2011). Ginsburg criticized the Majority for accepting "agreement" between employees and employers in situations where the arbitration policies were mandatory and constituted a condition of continuing employment. She compared the mandatory arbitration policies to "yellow dog contracts" and argued that they were not genuinely bilateral agreements (calling them "take-it-or-leave-it arbitration agreements"). See p. 7 of Dissent. Ginsburg understood the NLRA and the Norris-LaGuardia Act (NLGA) to operate on the principle that "employees must have the capacity to act collectively to match their employers' clout in setting terms and conditions of employment." See p. 3 of Dissent. With this understanding, Ginsburg accepted the employees' argument that Section 7 of the NLRA prohibited employers from denying employees the right to pursue work-related claims in concert in any forum, including arbitration.

Countering Gorsuch's description of the history of the Federal Arbitration Act, Ginsburg cited legislative history and argued that the Arbitration Act was intended to apply to voluntary, negotiated agreements. Congress had intended to provide merchants with a speedy and economical means of resolving commercial disputes. Over time, the US Supreme Court has extended the reach of the Arbitration Act to employment contract claims and statutory claims and encouraged employers to limit their liability from employment claims. Citing research from the Economic Policy Institute, over 53 percent of employers imposed mandatory arbitration agreements on their employees in 2017 and over 30 percent included an express waiver for class actions in 2017. Ginsburg predicted that employer use of waiver of class actions and mandatory arbitration procedures would grow exponentially after the *Epic Systems* decision.

Ginsburg cited the importance of class action litigation in addressing workplace discrimination based on race, sex, and other protected characteristics. Government agencies are unlikely to be funded at levels sufficient to enforce anti-discrimination statutes and make up for a significant reduction in private enforcement efforts.

The Dissent raised several concerns about the ramifications of mandating individualized arbitration proceedings. How do we avoid anomalous results and conflicting awards for similarly situated employees – even employees working for the same employer? Many

arbitration agreements include provisions that arbitration proceedings are private, and their outcomes are confidential. Some arbitration agreements bar arbitrators from deferring or giving precedential value to previous arbitration decisions.

Issues for Labor & Employment Arbitrators Following the Epic Systems Decision:

How does the field of arbitration address the criticisms of anomalous and conflicting decisions for similarly situated employees and employers?

How does the field of arbitration address the criticisms that private arbitrations will fail to expand the meaning of statutory laws and fail to promote consistent application of laws?

How do we handle funding for mandatory arbitrations, especially in cases where the employees serve as *pro se* representatives of themselves?

How do we handle multiple arbitration claims by individual employees who wish to consolidate their claims and the employer insists that each claim be arbitrated individually?

How do we handle confidentiality requests for cases involving sexual harassment claims or other statutory issues regarding discrimination, considering changes in Washington State law?

Should an “agreement” that is imposed as a condition of continuing employment cause any concern for arbitrators?

In a class action arbitration proceeding, an arbitrator would have to decide the following:

- Are the class representatives sufficiently representative and typical of the class;
- What kind of notice needs to be provided for class members;
- What opportunity should be provided for class members to be heard;
- What rights to opt out should be provided; and
- How should discovery be adjusted to address the class action nature of the proceedings?

How do we balance due process concerns and discovery issues with the need for efficiency?

NOTE: The US Supreme Court will review *Lamps Plus, Inc. v. Varela* (a Ninth Circuit case that raises a variation of the question from *Sutter* - How clear does an arbitration agreement need to be to show the parties authorized class arbitration?) in the October, 2018 Term.

In addition, the US Supreme Court will review *Henry Schein Inc. v. Archer and White Sales Inc.* to resolve the circuit court split over the “wholly groundless” doctrine. The issue is whether the Federal Arbitration Act permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is “wholly groundless.”

©Materials copyrighted by Donna Lurie, 2018. Please do not reproduce without permission.