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Introduction to an *Epic* Trilogy: Implications for Class Arbitration, Regulatory Administration, and Labor Law in *Epic Systems Corp. v. Lewis*.

Robert L. Temple*

I. A SYNOPSIS OF THE CASE

On April 2, 2014 Epic Systems Corporation, a healthcare software company, sent an email to a subset of its employees. The email contained within it an arbitration agreement, mandating that claims centering on wage-and-hour compensation could only be brought through individual arbitration, and “the right to receive . . . relief from any class, collective, or representative proceeding” was waived outright.¹ Further, acceptance of this agreement was implied if the employees continued their employment; no option to decline was provided.² Jacob Lewis, then a “technical writer” at Epic, complied with these instructions and acknowledged this agreement. Later, Lewis filed a suit against Epic in Federal court, ignoring the arbitration agreement and alleging that the corporation had violated the Fair Labor Standards Act (“FLSA”). Epic moved to have the case dismissed per the arbitration agreement, but Lewis responded that the arbitration clause violated the National Labor Relations Act (“NLRA”) because of its interference with the employees’ right to engaged in “concerted activities.”³

Since the Supreme Court decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, lower courts have, following the lead of the Court, by and large favored employment arbitration agreements.⁴ However, there has been some disagreement. In *Morris v. Ernst & Young*, the Ninth circuit invalidated the types of agreement at issue before the Seventh circuit,⁵ while in contrast, the Second, Fifth, and Eighth circuits enforced such agreements.⁶ In the end, the Seventh would join the Ninth circuit, invalidating the agreement and holding that it violated

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1. *Lewis v. Epic System Corporation*, 823 F.3d 1147, 1150 (7th Cir. 2016).

2. *Id.*

3. *Id.* See also, e.g., National Labor Relations Act, 29 U.S.C. § 157 (2012).

4. *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1620 (2018).

5. *Morris v. Ernst and Young, LLP*, 834 F.3d 975 (9th Cir. 2016).

6. See *D.R. Horton Inc. v. National Labor Relations Board*, 737 F.3d 344 (5th Cir. 2013); *Sutherland v. Ernst & Young*, 727 F.3d 290 (2nd Cir. 2013) and *Owen v. Bristol Care Inc.*, 702 F.3d 1050 (8th Cir. 2016).

the National Labor Relations Act and could not be enforced under the Federal Arbitration Act (“FAA”).⁷ The Seventh circuit deferred to the National Labor Relations Board’s (“NLRB”) interpretation of the NLRA, holding that the right to engage in “concerted” activities per section 7 of the NLRA includes the right to file collective and class actions⁸ and is further protected by section 8, which prohibits employers from “interfere[ing] with [or] restrain[ing]” the rights contained in section 7.⁹

Fast forward three years. The Supreme Court had taken up the *Epic* case, along with *Ernst and Young LLP v. Morris* and *NLRB v. Murphy Oil*. Oral arguments were heard on October, 2 2017 with Mr. Paul Clement and Mr. Richard Griffin representing the employers and the NLRB, respectively.¹⁰ On May 21, 2018 the Court decided the case and in a 5-4 vote reversed the Seventh Circuit’s holding. The case also served as the opportunity for Justice Gorsuch to set his pen to paper as the author of his first Supreme Court opinion. The majority held that the NLRA should be read as not to interfere or disrupt the enforceability of arbitration agreements, which are governed under the FAA.¹¹ The majority’s decision focused on a three-pronged explanation.

First, the majority argued that, through an analysis of plain meaning and historical interpretation, the FAA mandates that courts favor arbitration and enforce and respect the arbitration procedures chosen by the parties.¹² Although the Court did address the saving clause in section two of the FAA, which allows for courts to vacate arbitration agreements that are found to be illegal,¹³ the majority held that it did not apply in this case, as the saving clause can only be used to invalidate an arbitration agreement based on factors that would make *any* contract unenforceable.¹⁴ The use of Sections 7 and 8 of the NLRA to overcome the historical favoritism toward arbitration of the FAA would, in the majority’s view, violate the saving clause.¹⁵

The majority then moved its analysis to the NLRA, stating reasons as to why Section 7 did not cement collective litigation as a right.¹⁶ Section 7 gives workers “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”¹⁷

However, the majority held that it would be a step too far for the Court to infer, from these sections, protection for class actions. Congress inserted into Section 7 rules for the recognition of exclusive bargaining representatives, picketing, strikes,

7. *Lewis v. Epic System Corporation*, 823 F.3d. 1147, 1150 (7th Cir. 2016).

8. *Lewis*, at 1152–53.

9. *Id.*

10. *National Labor Relations Board v. Murphy Oil USA*, SCOTUS Blog, <http://www.scotusblog.com/case-files/cases/national-labor-relations-board-v-murphy-oil-usa-inc/> (last visited Nov. 21, 2018).

11. *Lewis*, at 1619–20.

12. *Id.* at 1621.

13. Federal Arbitration Act, 9 U.S.C. § 2 (2012).

14. *Epic*, at 1622.

15. *Id.* at 1622–23.

16. *Id.* at 1625.

17. National Labor Relations Act, 29 U.S.C. § 157 (2012).

and adjudicatory proceedings under the NLRA¹⁸ The majority points out that nowhere does Section 7 set forth rules for collective actions in either court or arbitration.¹⁹ This lack of comparable guidance for collective action, which exists in Section 7 for other protected activities, convinced the Court that Section 7 did not guarantee protection to such collective claims.²⁰ The employees responded that the NLRA does not contain any of these provisions because the NLRA confers rights to procedures which already exist under other statutes or laws.²¹ The Court replied that if the employees are citing existing procedures, then they must recognize the laws which limit said procedures.²²

Finally, the court addressed the employees' argument that the NLRA and the FAA are in conflict, and that the NLRA should overcome provisions within the FAA. The majority stated that the Court had, in the past, refused to entertain conflicts between the FAA and other federal statutes,²³ and that, barring some specific mention of arbitration or class action within a statute, the FAA would not be overcome in this scenario either. In the end, the majority claimed that its decision in *Epic Systems* protects the legislative intent behind the NLRA and rejects the dissent's opinion that the Court is ushering in a return to the *Lochner* era of Court entanglement in legislative policy judgments.²⁴

II. THE JOURNAL OF DISPUTE RESOLUTION'S RESPONSE TO *EPIC SYSTEMS*.

On May 21, 2018, the Journal of Dispute Resolution began the process of soliciting responses to the ruling in *Epic Systems v. Lewis*, as the importance of the case was immediately clear. The Journal, along with its faculty advisor Professor S.I. Strong, decided a single case note or comment was insufficient, and instead, sought a trio of works, focusing on the class arbitration, labor law, and regulatory and administration law implications of the ruling. With help from the University of Missouri Center for Dispute Resolution, three authors were asked and agreed to answer the call for scholarship.

What follows are three separate articles, each focusing on various implications of the *Epic Systems* decision. Professor Lise Gelernter writes from the perspective of labor law, focusing on the case's impact on non-unionized workers, the employers themselves, and the implications of the ruling on the National Labor Relations Act. Professor Maria Glover examines the class arbitration standpoint. She begins by tracing the Court's employment law jurisprudence since the October Term in 2017, discussing the regulatory consequences of these opinions and how she believes the Court's opinions reflect political commitments that discriminate between claims and claimants. Finally, Professor Daniel Deacon provides the regulatory administration perspective of the decision, arguing that the Court erred in the ruling and discussing how its error will affect the future of administrative law.

18. *Epic*, at 1625.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. Examples include the Sherman and Clayton Acts, Age Discrimination in Employment Act, the Credit Repair Organizations Act, Securities Act of 1933, the Securities and Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act.

24. *Epic*, at 1630.

With a top-notch slate of authors, The Journal of Dispute Resolution is proud to present the following analyses of the Court's continued commitment to enforcing individual arbitration under the FAA.