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Another big term for arbitration at the Roberts court

By Joseph R. Palmore

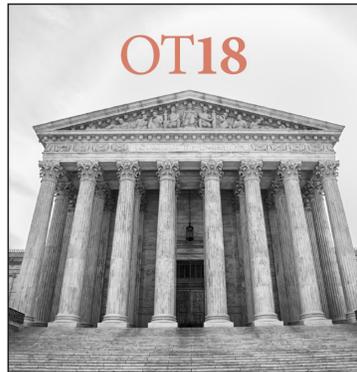
The Roberts court has shown intense and sustained interest in private arbitration. Its decisions in this area do not attract much public attention, but they are of great practical importance to businesses, consumers, and employees. The U.S. Supreme Court will return to the topic this term in a big way. The court's docket presents three more opportunities to support arbitration — and reverse lower courts the Supreme Court views as recalcitrant on the subject.

In 2011, the Supreme Court issued the landmark decision in *AT&T v. Concepcion*. By an ideologically divided 5-4 vote, the court held that agreements requiring that consumer complaints be arbitrated privately and individually (rather than adjudicated in court and on a class basis) are valid and enforceable under the Federal Arbitration Act — even if state law says otherwise. Since *Concepcion*, the court has reviewed eight lower court decisions holding an arbitration provision (or a limitation on class arbitration) invalid or inapplicable. In all eight, the Supreme Court reversed, ruling in favor of arbitration each time. Half of those cases came from either the 9th U.S. Circuit Court of Appeals or a California state appellate court.

One of the Supreme Court's major decisions from last term fits this pattern. Reversing the 9th Circuit, the court in *Epic Systems v. Lewis* held 5-4 that federal law requires enforcement of individual arbitration agreements in the employment context and rejected the argument that the National Labor Relations Act barred such provisions.

The court has been closely divided in some of these cases, breaking down along the same 5-4 divide as in *Concepcion* and *Epic*. Others have resulted in unanimous or lopsided decisions. But the bottom line has remained the same — arbitration has always won.

Just as significant as the results has been the tone of these decisions. The



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Supreme Court has at times expressed frustration with lower courts that it views as defying Supreme Court precedent supporting arbitration. The court has several times seen the need to expressly invoke the supremacy clause, reminding lower courts who the boss is on questions of federal law.

The most striking example of such a scolding came in *DirectTV v. Imburgia* (2015), in which Justice Stephen Breyer wrote the majority opinion upholding an arbitration agreement. Although Breyer dissented in *Concepcion*, he stressed in *DirectTV* that while “[l]ower court judges are certainly free to note their disagreement with” *Concepcion*, they are bound to follow that decision, like it or not.

Given the Supreme Court's sustained focus on arbitration, it's not surprising that even before this September's “long conference,” the court already has three arbitration cases on the docket for this term. And in light of the apparent divide between the Supreme Court and some lower courts on this topic, it's also not surprising that the Supreme Court granted certiorari in all three cases to review decisions that went *against* arbitration. If the court's consistent pattern holds, all three will result in reversals and more pro-arbitration decisions.

Lamps Plus

Lamps Plus, Inc. v. Varela involves a fairly standard arbitration agreement, in which an employee said “the

Company and I mutually consent to the resolution by arbitration of all claims that may hereafter arise in connection with my employment.”

In a 2-1 decision, the 9th Circuit interpreted this provision to authorize class arbitration, i.e., not just individual dispute resolution but a mass action before an arbitrator. The question presented in *Lamps Plus* is whether that was appropriate — can a standard-issue arbitration provision that says nothing about class arbitration nonetheless be read to authorize it?

The Supreme Court has previously said that the difference between individual and class arbitration is too great for courts to presume that mere silence on the issue constitutes consent to authorize class arbitration. If the court adheres to that principle of construction here, *Lamps Plus* will become yet another reversal of a 9th Circuit arbitration decision.

Henry Schein

Henry Schein, Inc. v. Archer and White Sales presents the question of who decides whether a particular dispute is arbitrable: arbitrator or court. It is well settled that parties can agree to arbitrate that gateway question — in other words, they can agree in advance to have an arbitrator decide whether any particular dispute is covered by the arbitration agreement.

In *Henry Schein*, however, the 5th Circuit applied a nonstatutory exception to this rule. It held that a court can decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court independently analyzes that question and concludes that the argument for the arbitrability of the claim is “wholly groundless.”

The Roberts court views arbitration as a matter of contract, and the parties in *Henry Schein* contracted to give the arbitrator the authority to decide this threshold question. The Supreme Court may be skeptical of the argument that a court can override the parties' agreement and decide for

itself whether the dispute is arbitrable.

New Prime

The third arbitration case on the Supreme Court's docket, *New Prime, Inc. v. Oliveira*, presents another “who decides” question. The arbitration agreement in *New Prime*, like the one in *Henry Schein*, delegated the gateway question of arbitrability to an arbitrator. But the employee who signed the agreement nonetheless sued in court, arguing that the arbitration agreement was invalid because he fell within an exception to the Federal Arbitration Act. In particular, he invoked the statute's exception for “contracts of employment” of a defined class of transportation workers, a class to which he argued he belonged.

The 1st Circuit concluded that the applicability of this statutory exception was not a gateway question of arbitrability properly delegated to the arbitrator—it was a question of statutory construction for a court to resolve on its own. It then went on to give the statutory exception a broad reading, applying it to independent contractors, not just employees. The combination of those holdings meant that the arbitration agreement was not applicable to the dispute. The Supreme Court granted review to decide both questions. *New Prime* thus has two paths to victory before a pro-arbitration court.

In sum, this term — which begins on Monday — is shaping up as another significant one for the law of arbitration. And it will test whether arbitration's long winning streak at the Roberts court will continue.

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