K&L GATES

Recap of the Most Important Decisions Impacting Corporations from the U.S. Supreme Court's Last and Current Terms

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PRESENTERS

Paul W. Sweeney, Jr.
Partner
Los Angeles
+1.310.552.5055
paul.sweeney@klgates.com

Vannie Karapetian
Associate
Los Angeles
+1.310.552.5036
vannie.karapetian@klgates.com

Program Overview

- Discussion of decisions by the U.S. Supreme Court in the last and current terms
- Eight principle cases discussed
- Takeaways from these decisions

EPIC SYSTEMS CORP. V. LEWIS

- Parties
  - Jacob Lewis (software technical writer/plaintiff)
  - Employer, Epic Systems Corp. (Wisconsin healthcare company/defendant)
- Facts
  - Three consolidated appeals (included *E&Y v. Morris* and *NLRB v. Murphy Oil USA*).
  - Class actions/collective actions filed in court, alleging claims of misclassification, failure to pay overtime, etc., despite employees having signed agreements to arbitrate their **individual** claims, and prohibiting adjudication of claims of others in class or collective actions.

EPIC SYSTEMS CORP. V. LEWIS

- Lower Courts
  - District court granted employer's motion to compel arbitration.
  - Ninth Circuit reversed based upon provisions in the Federal Arbitration Act (FAA) "savings" clause.
- Issue
  - Does the FAA "savings" clause prohibit enforcing arbitration agreements that waive class and collective actions because they prevent employees from exercising their rights under the NLRA to engage in "concerted activities"?

EPIC SYSTEMS CORP. V. LEWIS

- Decision
  - 5-4 conservative/majority.
  - Reversed Ninth Circuit.
  - FAA "savings" clause allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the **revocation of any contract**."
  - Employees argued that "savings" clause applies because Section 7 of NLRA ensures rights of employees to "engage in … concerted activities for the purpose of collective bargaining **or other mutual aid protection**."

EPIC SYSTEMS CORP. V. LEWIS

- Decision
  - Court rejects argument, ruling that the “savings” clause was not intended to cover circumstances where arbitration agreement requires bilateral arbitration (and disallows class and collective actions).

EPIC SYSTEMS CORP. V. LEWIS

- Takeaways
  - No conflicting **federal law** prohibits employers from requiring employees to sign individual arbitration agreements and waive the right to bring class and collective actions.
  - In *AT&T Mobility v. Concepcion*, the Supreme Court held that the FAA preempts **state laws** that prohibit contracts from disallowing class-wide arbitrations.
  - Thus employers—and presumably vendors—are free to include arbitration and include class action waivers in arbitration agreements. But tech companies and law firms are jettisoning arbitration agreements.

LAMPS PLUS, INC. V. VARELA

- Parties
  - Lamps Plus, Inc. (company that sells light fixtures/defendant)
  - Frank Varela (Lamps Plus employee/plaintiff)
- Facts
  - Hacker tricked a Lamps Plus employee to reveal 1,300 employees' tax information. Thereafter, a fraudulent income tax return was filed in the name of Varela.
  - Varela brought putative class action on behalf of employees whose information had been compromised.
  - Relying on the arbitration agreement in Varela's employment contract, Lamps Plus sought to compel arbitration on an individual rather than a classwide basis.

LAMPS PLUS, INC. V. VARELA

- Lower Courts
  - Rejected the individual arbitration request, but authorized class arbitration and dismissed Varela's claims.
  - Ninth Circuit affirmed lower court's holding. Arbitration agreement ambiguous as to classwide arbitration; construed ambiguity against drafter, Lamps Plus, to hold that class arbitration was authorized.
- Issue
  - Does the Federal Arbitration Act foreclose a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements?

LAMPS PLUS, INC. V. VARELA

- Decision
  - 5-4 conservative/majority.
  - Reversed Ninth Circuit.
  - Under the FAA, an ambiguous agreement cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration
  - Although courts may rely on state law principles to interpret arbitration agreements, state law is preempted when it stands in opposition to the objectives of the FAA.

LAMPS PLUS, INC. V. VARELA

- Takeaways
  - 2010 decision in *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp*, which held that a court cannot compel classwide arbitration when an agreement is silent on its availability was extended to agreements that were ambiguous as to classwide arbitration.
  - Court's rationale centered around the idea of consent–both parties must expressly agree to making class arbitration available for the process to be invoked.
  - The decision is a win for employers because employers will maintain the benefit of individual arbitration and avoid the risks of classwide arbitration unless they agree to it.

SOUTH DAKOTA V. WAYFAIR, INC.

- Parties
  - South Dakota (plaintiff)
  - Wayfair Inc. (retailer e-commerce company selling home goods online/defendant)
- Facts
  - South Dakota taxes retail sales of goods and services in the state.
  - Sellers are required to collect and remit tax to the State, but if they do not, in-state consumers are responsible for paying a use tax at the same rate.

SOUTH DAKOTA V. WAYFAIR, INC.

- Facts
  - Supreme Court precedent prohibited states from requiring a business that has **no physical presence in the State** to collect sales tax.
  - South Dakota passed tailored legislation requiring out-of-state sellers to collect and remit sales tax "as if the seller had a physical presence in the State," but covers only sellers that, on an annual basis:
    - Deliver more than $100,000 of goods or services into State, or
    - Engage in 200 or more separate transactions for the delivery of goods or services into the State.

SOUTH DAKOTA V. WAYFAIR, INC.

- Lower Courts (state courts)
  - Trial court granted summary judgment for the retailers, deciding the state law was unconstitutional.
  - The S.D. Supreme Court, following Supreme Court precedent in *Quill* (physical presence rule), affirmed the lower court (although it recognized that the *Quill* rule was unsound under the current economic system).

SOUTH DAKOTA V. WAYFAIR, INC.

- Issue
  - Is South Dakota law that requires an out-of-state seller with no physical presence in the State to collect and remit taxes on goods and services purchased by consumers in the State constitutional?

SOUTH DAKOTA V. WAYFAIR, INC.

- Decision
  - 5-4: Ginsburg joined the majority/conservatives, and Chief Justice Roberts joined the dissenters/liberals.
  - Reversed S.D. Supreme Court.
  - Court determined that the physical presence rule mandated by its prior decisions like *Quill* is no longer a sound principal, and it overruled those cases.
  - Physical presence rule runs afoul of the commerce clause by creating formal distinctions between two businesses—one an internet business and another with a physical presence—that are given different tax treatments regardless of nexus between the businesses and the State.

SOUTH DAKOTA V. WAYFAIR, INC.

- Decision
  - Stare decisis can no longer support the Court's prohibition of valid exercise of states' sovereign power.
  - 41 states, 2 territories, and the District of Columbia asked the Court to overrule *Quill*.

SOUTH DAKOTA V. WAYFAIR, INC.

- Takeaways
  - Internet companies must now collect sales tax on sales made in states that have laws similar to South Dakota and remit the taxes to the state.
  - Carefully tailored legislation, like South Dakota's law, is not overbroad because it does not apply to retailers who do only occasional business in the state.
  - Small win for brick and mortar stores that had a hard time competing against e-commerce stores
    - E-commerce prices are cheaper because remote/internet retailers were not subject to local taxes because *Quill* created a bright-line "physical presence" requirement to impose sales or use tax collection obligations on retail sales

OHIO V. AMERICAN EXPRESS CO.

- Parties
  - Ohio, 17 states, and the U.S. (plaintiffs)
  - Amex (financial services/defendant)
- Facts
  - Amex charges merchants a fee each time a customer uses an Amex card to purchase goods or services from the merchant.
  - Amex's fees to merchants are higher than the fees that Visa, MasterCard, and other credit card companies charge to merchants.

OHIO V. AMERICAN EXPRESS CO.

- Facts
  - Consequently, most merchants would prefer that customers use credit cards other than Amex.
  - Merchants who accept Amex cards must agree they will not dissuade customer from using the Amex card in favor of other credit cards.
  - This condition or agreement is known as “anti-steering” (merchant can’t steer customers away from using their Amex cards) or “anti-discrimination.”

OHIO V. AMERICAN EXPRESS CO.

- Lower Courts
  - Trial court ruled that the provision limited or prevented price competition among credit card firms for the merchant's business, which demonstrated competitive harm was occurring and was sufficient grounds for finding an antitrust violation.
  - Second Circuit reversed, holding that the trial court failed to consider entire relevant market analysis, which would have demonstrated no competitive harm.

OHIO V. AMERICAN EXPRESS CO.

- Decision
  - 5-4 conservative majority.
  - Affirmed Second Circuit ruling.
  - Somewhat confusing two-sided analysis of relevant market.
  - Analysis resulted in a determination that plaintiff did not carry its burden that anti-steering provision reduced or otherwise stifled competition.
  - Very strong dissent by Justice Breyer (joined by the other liberals) in support of trial court's ruling.

OHIO V. AMERICAN EXPRESS CO.

- Takeaways
  - Merchants are not happy, but will likely pass the costs of Amex fee increases along to all customers.
  - Does this mean that less affluent people (who don't possess Amex cards) disproportionately pay the cost of rising retail prices attributable to credit card fees?

APPLE INC. V. PEPPER

- Parties
  - Robert Pepper and other consumers who purchased iPhone apps from the Apple App Store (plaintiffs)
  - Apple (sells consumer electronics, computer software, and hardware, etc./defendant)

APPLE INC. V. PEPPER

- Facts
  - Apple phones operate on a “closed system,” meaning Apple controls which apps can be loaded onto phones, which is done via the “App Store.”
  - Apps are primarily developed by third parties, and for every App Store sale, Apple receives 30% of sale price.
  - Third-party developers must agree not to sell their apps on any other marketplace, and Apple tells its phone users that if they install apps other than those purchased at the App Store, the warranty on the phone will be voided.

APPLE INC. V. PEPPER

- Facts
  - Plaintiffs allege that these conditions enable Apple to effectively create a monopoly for app distribution, artificially forcing developers to raise costs of apps to cover Apple's fee, and consumers have no place else to go to acquire apps.

APPLE INC. V. PEPPER

- Issues:
  - Do consumers have standing to pursue claims against Apple since they are **indirect purchasers** of the apps? *Illinois Brick* prevents indirect purchaser antitrust actions.
  - Are the third-party developers the owners of the apps (and consumers are merely indirect purchasers via the App Store)?
  - May consumers sue for antitrust damages anyone who delivers goods to them, even where they seek damages based on prices set by third parties who would be the immediate victims of the alleged offense?

APPLE INC. V. PEPPER

- Lower Courts
  - Trial court granted Apple's motion to dismiss, holding plaintiffs have no standing (under *Illinois Brick*); only the developers of the apps could be damaged by Apple's policies.
  - Ninth Circuit reversed, holding plaintiffs have standing because Apple is a distributor who sells the apps to consumers through a closed system where they have no realistic choice to purchase elsewhere.

APPLE INC. V. PEPPER

- Decision
  - 5/4 Kavanaugh and liberal justices in the majority
  - Under *Illinois Brick*, iPhone owners are direct purchasers who may sue Apple for alleged monopolization
    - Text of antitrust laws states "*any person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue."
    - iPhone owners are not consumers attempting to sue manufacturers at the top of the chain. There is no intermediary in the distribution chain between Apple and the consumer.

APPLE INC. V. PEPPER

- Takeaways
  - The court is careful to note that this is an “early stage” of the case, so there’s no ruling on whether Apple actually *does* have an unlawful monopoly in the App Store
  - If Apple does ultimately lose the case, it could have to repay anyone who was “overcharged” due to App Store markups. Successful plaintiffs entitled to triple damages

OBDUSKEY V. MCCARTHY & HOLTHUS LLP

- Parties
  - Dennis Obduskey (plaintiff home owner)
  - McCarthy & Holthus LLP (defendant law firm)
- Facts
  - McCarthy was retained to carry out nonjudicial foreclosure on Obduskey's home. McCarthy sent Obduskey a letter related to the foreclosure, and Obduskey responded with a letter invoking the Fair Debt Collection Practices Act to "cease collection" or "obtain verification of the debt." McCarthy did not abide and instead initiated the foreclosure.

OBDUSKEY V. MCCARTHY & HOLTHUS LLP

- Lower Courts
  - District court dismissed the case on the ground that McCarthy was not a “debt collector” within the meaning of FDCPA.
  - Tenth Circuit affirmed the decision of the lower court.
- Issue
  - Does the FDCPA apply to an entity seeking to enforce a security interest in property through a nonjudicial foreclosure?

OBDUSKEY V. MCCARTHY & HOLTHUS LLP

- Decision
  - 9-0 unanimous decision
  - Affirmed the Tenth Circuit
  - A business engaged in no more than nonjudicial foreclosure proceedings is not a “debt collector” under the FDCPA, except for the limited purpose of § 1692f(6) (nonjudicial foreclosures).

OBDUSKEY V. MCCARTHY & HOLTHUS LLP

- Decision
  - First, the primary definition of a “debt collector” under the FDCPA also includes a “limited purpose definition.” While McCarthy is definitely an enforcer that falls within the limited purpose definition, it does not fall within the primary definition, and therefore is not a “debt collector”
  - Second, Congress may well have chosen to treat security interest enforcement differently from ordinary debt collection in order to avoid conflicts with state nonjudicial foreclosure schemes.
  - Third, Legislative history supports the Court’s reading of the statutory language because it was a product of compromise between competing versions of the bill.

OBDUSKEY V. MCCARTHY & HOLTHUS LLP

- Takeaways
  - Businesses that conduct nonjudicial foreclosure proceedings are not “debt collectors” under the FDCPA if the conduct is confined to nonjudicial foreclosure under state law.
  - These businesses must still comply with Section 1692f(6)’s regarding nonjudicial foreclosure sales.
  - Supreme Court resolved a circuit split, siding with the Ninth and Tenth Circuits as opposed to the Third, Fourth, and Sixth Circuits.

On The Horizon
Pending Decisions From This Term & What To Expect From Next Term

HOME DEPOT U.S.A., INC. V. JACKSON

- Argued in front of the Supreme Court on January 14, 2019
- Pending decision
- Parties
  - Citibank (plaintiff debt collector)
  - George Jackson (defendant and home owner)
  - Home Depot (third party counter defendant)
- Facts
  - Citibank brought a debt collection action in state court against Jackson. Jackson counterclaimed against Citibank and added class action claims against Home Depot and Carolina Water Systems. Home Depot filed a notice of removal to federal court under Class Action Fairness Act (CAFA)

HOME DEPOT U.S.A., INC. V. JACKSON

- Issues
  - Whether the CAFA—which permits "any defendant" in a state-court class action to remove the action to federal court upon satisfaction of certain jurisdictional requirements—allows removal by third-party counterclaim defendants.
  - The Supreme Court will also decide whether the Court's holding in *Shamrock Oil & Gas Corp. v. Sheets*—that an original plaintiff may not remove a counterclaim against it—extends to third-party counterclaim defendants.

HOME DEPOT U.S.A., INC. V. JACKSON

- Lower Court:
  - Remanded the case to state court, holding that under *Shamrock Oil,* Home Depot was not entitled to remove the action, because it could not meet CAFA's definition of a "defendant."
- Fourth Circuit:
  - Affirmed the decision of the lower court. *Palisades*, a Fourth Circuit decision, citing *Shamrock Oil*, has held that an additional counter-defendant is not "the defendant or the defendants" because it is not a defendant against whom the original plaintiff asserts a claim.

HOME DEPOT U.S.A., INC. V. JACKSON

- Takeaways
  - Generally under CAFA, when a plaintiff initiates a large class action in state court, a defendant can remove the case to federal court
  - However, can a defendant who asserts third party claims avoid having those claims removed to federal court?

ROTKISKE V. KLEMM

- Third Circuit; Cert. granted February 25, 2019
- Parties
  - Kevin Rotkiske (debtor/plaintiff)
  - Klemm & Associates (collection agency/defendant)
- Facts
  - Rotkiske accumulated credit card debt between 2003 and 2005 which was referred to Klemm for collection. Klemm eventually obtained a default judgment against Rotkiske, which Rotkiske discovered in 2014 when applying for a loan. Rotkiske brought suit against Klemm in 2014 for violations of FDCPA.

ROTKISKE V. KLEMM

- Issue
  - Whether the “discovery rule” applies to toll the one-year statute of limitations under the Fair Debt Collection Practices Act?
- District Court
  - The statute of limitations under the FDCPA is one year, and the discovery rule does not apply to toll the limitations period.
- Third Circuit
  - Affirmed the district court’s holding. Disagreed with Ninth and Fourth Circuit decisions that allow the discovery rule to toll the statute of limitations for liability under the FDCPA.

ROTKISKE V. KLEMM

- Takeaways
  - A decision from the Supreme Court will resolve a circuit split between the Third, Ninth, and Fourth Circuits regarding the viability of FDCPA cases one year after the violation in question occurs.
  - The Supreme Court considered a similar issue in *TRW, Inc. v. Andrews* in 2001, where it struck the Ninth Circuit's broad application of the discovery rule to the Fair Credit Reporting Act.

Thank you!

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