The conflict over workplace conflict resolution is officially over. For now.

The May 21 5-4 U.S. Supreme Court decision backing employers’ mandatory waivers by workers on using class processes to resolve employment disputes ends six years of uncertainty on the role of alternative dispute resolution in settling employee-company conflict.

But while Epic Systems Corp. v. Lewis, No. 16-285 (available at https://bit.ly/2rWzAE8) resolves the question of whether employers can require individualized arbitration, the result isn’t sitting quietly.

Consumer advocates, labor leaders, and attorneys who represent employees in all types and categories of jobs against their present and former bosses weren’t expected to like the decision, which some Court observers believed was a fait accompli in the employers’ favor after the oral argument, which kicked off the Court’s 2017-2018 term on Oct. 2.

But in addition, a broad spectrum of arbitration users beyond the plaintiffs’ bar is cautious in addressing the future of the process in the wake of the majority opinion by Justice Neil Gorsuch.

The Court’s backing of class waivers in employment cases under the Federal Arbitration Act authorizes businesses to require workers, and demand in employment contracts, that disputes be resolved individually, in arbitration.

The arguments on behalf of employees, ranging from their own briefs, to their amicus supporters, and even to Justice Ruth Bader Ginsberg’s dissent, warned either directly or implicitly that companies will rush to install the waivers and require arbitration to resolve claims.

Reporting on the decision picked up on the point. “Tens of millions of employees currently work under contracts limiting redress to claims filed before a private arbitrator on an individualized basis,” noted the Wall Street Journal, adding, “With the issue clarified, employers are expected to impose such limits on millions more.” Jess Bravin, Supreme Court Imposes Limits on Workers in Arbitration Cases, Wall Street Journal (May 21, 2018)(available at https://on.wsj.com/2sOhJzE).


The plaintiffs, as well as Justice Ginsberg, also warned that the result of the Court’s decision will be under-enforcement—that without the ability to form classes in either litigation or arbitration, many workplace claims could not proceed and would be dropped.

May’s Supreme Court decision has cleared up questions by resolving the overarching issue, with the details to be worked out in employment policies, ADR sessions and, eventually, courtrooms nationwide.

(continued on page 105)
REVIEW TO REVERSE?
SUPREME COURT
WILL REVISIT
CLASS ARBITRATION

BY LEWIS TAN

Just ahead of May’s landmark Epic Systems v. Lewis class waivers/mandatory arbitration decision (see article on the front page of this issue), the U.S. Supreme Court added a second arbitration case for the 2018-2019 term, Lamps Plus Inc. v. Varella, No. 17-988.

The unpublished case, from the Ninth U.S. Circuit Court of Appeals, will decide whether the Federal Arbitration Act “forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements,” according to the issue presented issued by the Court.

In Lamps Plus, the Court will continue from Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 55 U.S. 662 (2010)(available at https://bit.ly/2H7vga0), where the Court had held that a party “may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.” 559 U.S. at 684 (emphasis is the Court’s).

In that regard, Stolt-Nielsen stated that “mere silence on the issue of class-action arbitration” could not be presumed to constitute consent to resolve disputes in class proceedings. Rather, “the FAA requires more,” and “the question … [is] whether the parties agreed to authorize class arbitration.” [Emphasis is the Court’s.]


Faced with an arbitration agreement that made no express mention of class proceedings, the majority nevertheless held that “perhaps the most reasonable” interpretation of the contractual terms “was that it authorizes class arbitration.” Varella v. Lamps Plus Inc., No. 15-56085 (July 12, 2017)(unpublished)(available at https://bit.ly/21909ZA)(emphasis is the Ninth Circuit’s).

The Court agreed to hear Lamps Plus on April 30.

An interesting sidelight to the case is that the parties’ advocates are not only familiar foes, but have squared off in arbitration court battles for years, including the Supreme Court. Petitioner Lamps Plus’s successful cert petition was prepared by Mayer Brown, based in Washington, D.C. Employee Varella is repre

(continued on page 110)
The following is Part 1 of an edited transcript of a March 14 webinar hosted by the Arlington, Va.-based Federal Bar Association, a century-old nonprofit group of about 18,000 attorneys and 1,500 judges who promote practitioners' development in federal law. The transcript was produced by Alternatives and used with the FBA's permission and the participants' consent. Part 2 on, among other topics, ethics issues will appear in the September Alternatives.

The hour-long session, “#MeToo: Its Impact on Confidential Settlements, Mediation and Arbitration of Sexual Harassment Claims,” covers extensive conflict resolution ground. [Information on the FBA can be found at www.fedbar.org/About-Us.aspx; See the FBA's link to a CLE-accredited archive version at https://bit.ly/2stOYY0.]

The program features a panel of experts in the fields of alternative dispute resolution and employment litigation discussing the current state of the practice for workplace sexual harassment claims in the wake of widespread criticism of confidential settlements. The panel includes a neutral, a plaintiff’s attorney, and a management attorney, discussing the potential impact of legislative and judicial developments on ADR confidentiality, focusing on practice tips for protecting clients’ interests on both sides of the cases.

The moderator is Joan D. Hogarth, a New York City-based attorney-neutral, who is the FBA's ADR Section Chair. She is joined by

- Abigail Pessen, a neutral who heads her own New York firm, Abigail Pessen Dispute Resolution Services.
- Laura S. Schnell, a name partner in New York's Eisenberg & Schnell LLP, which represents plaintiffs in employment cases.
- Robert S. Whitman, a New York-based partner in the Labor and Employment Department of Seyfarth Shaw LLP, who represents management-side clients. [Whitman is a member of Alternatives' editorial board.]

**Moderator Joan Hogarth**: … Today we have three wonderful and passionate panelists who are ready to share their experiences their insights and tips on the issues in placing confidentiality in nondisclosure agreements in the wake of the #MeToo phenomenon and sexual harassment cases. Now I can imagine that for most people the term #MeToo evokes some emotion or set of complex feelings, and I want you to know that the issues that are coming out of this movement are no less complex.

[The panelists] will be sharing with us the ways of reconciling tensions that have been created as a result of these conflicting interests after #MeToo. They will be talking about some legislative efforts and actions to curb nondisclosure agreements—and by the way, that is the very cornerstone of arbitration and mediation and other settlement procedures—and they will be sharing their views on actions to bar mandatory arbitration on sexual harassment claims, and some state and private actions. …

Throughout all of this, our neutral, Abigail [Pessen] will be reminding us of the advantage of mediation, arbitration and confidentiality. …

I want to take a couple of minutes to set the backdrop for our presentation today. Hopefully, you have done your own research, or you will do it after this. First, we want to talk about the Silence Breakers—I’m sure you have seen this, the Time … person of the year, those women who are representing the voices of those women and men who have been afraid to speak out about sexual harassment in the workplace.

If you look closely [at the Time magazine cover, available at https://ti.me/2AvIsPu], you will see the pictures of such famous people as Ashley Judd and Taylor Swift. And perhaps there are others not shown …, less well-known victims … who have not had the opportunity to speak up about sexual harassment in the workplace.

This, by the way, is not a new phenomenon. You [probably] remember the Supreme Court hearings of Clarence Thomas and Anita Hill, speaking up about sexual harassment in the workplace. Yet we’re finding ourselves today in the throes of what one commenter called a cataclysmic social uprising. Certainly the reason is because of technology.

But in addition to technology, we are also looking at celebrities, the #MeToo “invitation,” and the high-profile public figures who have been caught up in this situation.

Also contributing to the shift in the awareness of sexual harassment in the workplace is the #TimesUp initiative. We have had a number of studies … and reports … including the Equal Employment Opportunity Commission’s 2016 task for report on harassment. [See EEOC Select Task Force on the Study of Harassment in the Workplace (June 20, 2016)(available at https://bit.ly/2H5pMw8).]

[These] activities and concerns are having an impact on us as conflict resolvers. ADR, specifically mediation, arbitration and any other negotiated settlements along the spectrum, has as an essential element confidentiality, oftentimes memorialized in a [non-disclosure agreement].

Now, with #MeToo, we have mediation, for example, finding itself in the crosshairs between those who want to maintain that confidentiality and those who are asking for openness and transparency. [T]hey’re feeling that NDAs are being used to hide the wrongdoings of defendants, thereby perpetuating (continued on next page)
The final issue is prevention. And I think everybody thinks that the more knowledge there is out there, the more companies ... will take steps to prevent and to stop what is going on. And then the more employees will maybe walk with their feet, and not join, or not go to, or leave companies that are not taking the issue seriously.

**HOGARTH:** Rob, what are your thoughts on this from the employers'/defendants' perspective?

**ROBERT S. WHITMAN, SEYFARTH SHAW:** Thank you, Joan. If we think back about how the #MeToo movement and the #TimesUp movement began, so much of it followed the disclosures about Harvey Weinstein and his behaviors over a long period of time. Much of the attention in particular was not just about the behavior itself but the fact that there was a number of settlements, all of which were subject to strict confidentiality restrictions.

The same happened with Bill O'Reilly at Fox News and any number of others. So there has been a focus on confidentiality as perpetuating the problem—now, obviously, not causing the behavior in the first instance, but enabling it to continue for a lengthy period of time.

So there is the concept—I think [U.S. Supreme Court] Justice [Louis] Brandeis's—[that] sunlight is the best disinfectant as a way to prevent the problem from continuing: by exposing it to the light of day and preventing confidentiality agreements or provisions that would bar the public or other employees or applicants from learning about it.

The flip side of that, of course, is—and I say this not just as a defense lawyer ... but I think as a more general comment—is the privacy interest, not just of the claimant or the plaintiff or the employee in a particular matter, but also the accused. And we do have to keep that in perspective. This is not intended as in any way a defense of Mr. Weinstein or Mr. O’Reilly or anybody who has been accused or shown as engaging in these types of behaviors.

But what we do see and I have seen in my own practice is an increase in the number of inquiries from employees-side lawyers, of accusations, of allegations, of charges that are made, bringing up claims of this nature, which have varying levels of merit once they are investigated.

And yet, in the current environment, this is such a charged issue, that the possibility of a settlement that might resolve something early—whether it's for a modest amount of money or for no money at all or even a substantial amount—does have the potential to be a career-ending event for an individual based on unproven or unsubstantiated allegations.

So that is the balance that needs to be weighed. There is no one-size-fits-all answer, but simply that there is a concern not only about the deterrent effect that publicity could have, but also the career-ending effect that publicity could have going in the other direction.

**HOGARTH:** Laura, do you have anything else you would like to add to that?

**SCHNELL:** Yes, in terms of the career issue, it's also relevant for the person complaining. It's not exactly a career-enhancing move necessarily to be making claims of sexual harassment. It may be something the claimant doesn't want known as well. There are privacy interests on both sides.

My biggest concern is that if there is a complete ban on NDAs, that there will be some cases that do not settle. And as I tell almost every client with respect to litigation, “I might have fun. You won’t.” It's not a fun process. So the idea that it would make it harder to settle for individual claimants I think is a potential serious problem.

**HOGARTH:** I want to turn it over to our neutral. ... In light of these changes and the call for transparency, ... how is this going to affect mediation?

**NEUTRAL'S VIEW**

**ABIGAIL PESSEN, ABIGAIL PESSEN DISPUTE RESOLUTION SERVICES:** It's interesting because my first reaction to that question was oh, gosh, with this onslaught of criticism over secret confidential agreements, mediation of...
sexual harassment claims are going to be a casualty of the #MeToo movement, because, of course, mediation itself is confidential. And I guess you could call it secret.

But as I thought it through, I actually do not think that will be the outcome at all.

First of all, at its core, I think #MeToo is not only about these NDAs, it's also more fundamentally a reaction of outrage at the harassing conduct that so many women have been subjected to in the workplace, and the NDAs are just one tool that has kept a lid on that, as Rob said on the serial harassers like Harvey Weinstein. …

[But] NDAs are not the only reason that these prior incidents don't come to light. The statistic was that 90% of women never come forward and there are many reasons for that. So [a question is] whether a blunt instrument like banning NDAs is the best way to get to the root of the problem. [Discussed further below].

But I think that mediation is actually very well suited for dealing with sexual harassment claims and will continue to be. And the reason I say that is … that it is an opportunity for a woman to tell her story. Laura said that it is like that—they just may not be as effective in this new environment.

And finally, because of those factors, the damages calculation may be different now also. Employers may have more fear of jurors' and arbitrators' reaction. I think we saw last week … a federal jury in Yonkers awarded a blue-collar female worker $13 million for sexual harassment by a supervisor. She was a storeroom attendant. … Eleven million dollars of that was for punitive, which will be reduced. But even so. A verdict like that can create headaches for both sides. [See Victoria Bekiempis, “Yonkers sugar refinery worker gets $13.4M after suing over sexual harassment, gender discrimination,” N.Y. Daily News (March 6) (available at https://nydn.us/2LbF05A).]

If you think back to the McDonalds hot coffee verdict in 1994, $3 million led to a lot of unrealistic expectations, which could happen here. Plaintiffs may be expecting $13 million too, but it also may cause some anxiety among employers.

Because of the flexibility that mediation affords, there may be room here to try to address sexual harassment in the workplace in ways that just getting a decision from a court or arbitrator doesn't really allow for.

**LEGISLATIVE CHANGES**

**HOGARTH:** On the one hand, you are saying that mediation would be a great forum, and I certainly agree, but … state and federal governments have been proposing and enacting all sorts of legislation in order to give what they believe is the right thing—the employees their day in court. … Rob, when do these laws that have been proposed or enacted have their intended effects?

**WHITMAN:** Let's go over some of these proposals that have been percolating at the state level.

I'll cover some of the state provisions. We'll talk about some of the federal activity [too]. …

There has been quite a bit of activity in the state legislatures in an effort to address the confidentiality aspect of this problem. Obviously, we all know that the behavior that has been discussed in the context of these high-profile individuals has been unlawful for decades. There really is no question about that.

So it's not a matter of enacting a prohibition on certain behaviors. But there has been an attempt to attack the confidentiality aspect of it, and that is with respect to both nondisclosure agreements themselves or the institution of arbitration, which in some corners is perceived as a way to perpetuate the confidentiality, since arbitration is by its nature a private proceeding rather than a proceeding in open court. …

The state level proposal is New York Senate Bill S6328A, [which] would make contract provisions needing a settlement that conceal the details of claims of discrimination or harassment unconscionable and unenforceable as a matter of law. There would be an exemption for an amount paid in a settlement, but the actual details and the fact of the settlement to the extent that would be confidentiality there, that would be unconscionable as a matter of law.

Interestingly, this proposal was introduced in May of 2017, well before anyone had thought of Harvey Weinstein in this context—certainly before the general public did—and well before the #MeToo movement had formed or taken shape.

This provision is still pending in the New York State Senate. As far as we can tell, there has been no further action on it.

What's more interesting is actually there is a New York State Senate bill that was passed by the state Senate [during the March week of the webinar] heading to the state Assembly where I assume it will be received favorably and if so, then on to the governor's desk.

Bill No. 7848A would do a number of things, but of most interest for our purposes is that it would amend the state's General Business Law to prohibit mandatory arbitration agreements to the extent they pertain to sexual harassment.

I personally would question the enforceability of an enactment like that in light of (continued on next page)
Federal Arbitration Act preemption, but nevertheless, there it is, in a bill that has passed the state Senate. [At press time in late June, the bill was before the New York State Assembly.] It would also amend the state’s CPLR, the procedural rules for court proceedings, to prohibit confidential settlements of harassment claims unless the confidentiality is at the claimant’s request.

That latter piece is particularly interesting and important and it gets at some of the concerns that Laura has expressed with respect to when the claimant himself or herself would want the confidentiality. To the extent it is at the claimant’s request, then the provision would not be unenforceable under this Senate bill.

There is a proposal pending in Pennsylvania which would similarly void contractual provisions that would prohibit disclosure of the name of any person who [is] suspected of sexual misconduct, including harassment, [and] that the claimant’s identity may be withheld and the settlement amount may be withheld. …

Interestingly, it would also permit retroactive voiding of certain contracts that were entered into before the enactment of the statute itself under certain limited circumstances. So [it is] certainly worth keeping an eye on that.

There is a California proposal. Also pending in committee, not yet enacted, that would be similar with respect to settlement agreement provisions involving facts around claims of sexual harassment.

And then finally there was a New Jersey bill pending, … but this does not appear to be still pending in the state legislature, but because it is a new session of the legislature that began in January, [though] this may be reintroduced in the current session.

Moving now to the federal level, what is of most interest there is a change to the Internal Revenue Code which was part of the December 2017 tax reform bill. That bill itself was enacted in a fairly compressed time frame. But this provision in particular really slipped under the radar. It was not part of anyone’s awareness— I certainly didn’t know about it while the bill itself was being discussed. It wasn’t until after it was enacted and the president signed it that we all realized it had been inserted in there at all.

It is an amendment to the Internal Revenue Code which prohibits a tax deduction under federal law for any settlement that includes a payment related to sexual harassment or sexual abuse to the extent that there is a nondisclosure agreement pertaining to that settlement. It would also prohibit a deduction for the attorneys’ fees in connection with such a settlement or payment.

What is important here to keep in mind is that it relates only to the deductibility. It does not prohibit nondisclosure agreements. It only prohibits deductibility and it only applies where there is a nondisclosure provision.

And that deductibility or the lack thereof would go in both directions: The employer could not deduct a payment made in settlement or the attorneys fees in connection with the settlement where there is an NDA. And similarly the plaintiff/claimant could not take a deduction for the fees to the extent there is an NDA. …

This is so new, and I have not personally seen it play out in conversations around settlements. It’s unclear to what extent the deductibility issue is a motivator for purposes of settlements, whether this will have a dampening effect on settlements, or will drive up or drive down the cost of settlements. All of this is still to be seen, but an interesting way to attack the issue. …

There are a number of ways that the bar has discussed dealing with this provision. One is the possibility of allocations. Those involved in mediation will probably want to be thinking about this. If there is a settlement amount, let’s say it’s $100,000, the parties can choose to allocate that settlement amount in whatever ways they want.

So they can say, for example, $75,000 of the $100,000 is toward claims other than the claims of harassment or discrimination. So to the extent there is a nondisclosure agreement that would apply to the entirety of the settlement, only 25% of the amount would be subject to the prohibition on deductibility. That’s at least the sort of initial consensus on the best way to deal with this change to the tax code.

Hogarth: Laura, do you wish to comment on this?

Schnell: Yes, in particular on the Internal Revenue Code provision. I don’t agree with Rob that it’s a given that the plaintiffs’ attorneys fees can’t be deducted. The clear intent of this was not to do that, and I have read some pretty thoughtful articles that suggest the IRS wouldn’t interpret it that way.

But it’s obviously a potential problem. It’s a huge problem for plaintiffs if they can’t deduct their fees because the current IRS code is [that] in a discrimination case, the fees are deductible above the line, which means the claimant or the plaintiff doesn’t have any adverse tax effect on it.

The other point I would make is that this only relates to sexual harassment or abuse. It doesn’t say sex discrimination and, as we know, sexual harassment is just one kind of sex discrimination. So it would be interesting in terms of how claims are at least asserted initially, in order to make sure there wouldn’t be a problem with the deductibility of fees.

The final point I would make is obviously this would be a reason to not have a nondisclosure agreement.

And then the final point I think I should have made before, when we were talking about nondisclosure agreements, is that just because they are banned doesn’t mean that anybody has to disclose it. It doesn’t make these things public. The idea that if NDAs are banned, that all this stuff will come out, I think is a little bit naïve, because I don’t think, generally, either side has much interest in talking about what happened once something has been resolved.

In September’s Part 2, the panelists will conclude by continuing the discussion on legislation, as well as ethics and key practice points.
Avoiding Isolation, and Creating a Connection, To Help Lonely Parties Settle their Cases

BY ROBERT A. CREO

What loneliness is more lonely than distrust?

— George Eliott (1819-1880)

I tell ya' a guy gets too lonely an' he gets sick.

— John Steinbeck, Of Mice and Men (1937)

All the lonely people: Where do they all come from?

— John Lennon–Paul McCartney, "Eleanor Rigby" (1966)

H umans are social creatures who thrive in communities.

Affiliation and connection are core to physical, mental and social wellness. Historically, in many societies, banishment, exile, or being ostracized was a severe form of punishment.

Animal communities, such as primate troops, act in the same manner to ban errant or anti-social behavior. We form multiple identities and connections based upon being parts of groups. Social and professional networks provide us context for who we are, and for successful daily functioning.

On the other hand, loneliness is an emotional state—we feel it. We can be conscious of it and take actions to combat what may be a subjective experience of emptiness, isolation, and feeling alienated, resentful, or hostile to other people. Loneliness often involves anxiety about a lack of connection or communication with others.

Loneliness differs from solitude or voluntary isolation where people seek time and space alone from others. Not everyone wants to be in constant contact with other people. This differs in that it is a choice and a decision that promotes your own sense of well-being.

Sometimes creative and artistic people can only produce work and outcomes in isolation. Many people need daily periods of peace and quiet.

Loneliness, isolation, exclusion, and being disconnected do not appear in the vast majority of commercial mediation cases. But loneliness may be an individual aftereffect of whatever caused the conflict in the first place, and could play a part at the bargaining table.

Any decision maker, anywhere, who doesn't have confidence in his or her position, or feels like he and she is operating without support can be operating in mediation with a lonely perspective.

Loneliness is a popular topic for researchers. One study estimated that more than 60 million people in the United States—20% of the population—feel lonely. The General Social Survey (see http://gss.norc.org) found that in 1985, the number of people the average American discussed important matters with was three. By 2004, this decreased to two.

Loneliness is linked to a host of mental and physical illnesses including depression, suicide, substance abuse, digestive issues, pain, fatigue, cardiac stressors, and sleep disorders.

THE MASTER MEDIATOR

The author is a Pittsburgh attorney-neutral who has served since 1979 as an arbitrator and mediator in the United States and internationally handling thousands of cases. He conducts negotiation and decision behavior courses that focus on neuroscience and the study of decision-making. He is annually recognized by Best Lawyers in America and was named in both 2017 and 2014 as Pittsburgh Mediator of the Year. In 2018 he was awarded the Sir Francis Bacon Award by the Pennsylvania Bar Association for contributions to the field of ADR. He is the author of numerous publications, including “Alternative Dispute Resolution: Law, Procedure and Commentary for the Pennsylvania Practitioner” (George T. Bisel Co. 2006). He is the principal of Happy! Effective Lawyer, LLC (www.happylawyer), an initiative focusing on lawyer contentment, soft skills, and peak performance, which publishes The Effective Lawyer blog. He is a long-time member of Alternatives’ editorial board and of the CPR Institute’s Panels of Distinguished Neutrals. His website is www.robertcreo.com.

THIS SERIES

Master Mediator Columnist Bob Creo is examining emotions in mediation in a series of columns that stretch back to the July/August 2016 issue. Emotions are present in all participants in a mediation session, including the mediator. The dynamics of the overwhelming majority of litigated cases and interpersonal claims involve negative emotions. These columns have focused on both the positive and negative emotions. (You can read these columns with a subscription at http://bit.ly/1BUALop.) After examining the positive for seven columns, last month the study of emotions renewed its focus on envy and jealousy. The return to negative emotions continues here with the concepts of belonging and loneliness.

BOWLING ALONE

In his influential study of U.S. social norms, Harvard Prof. Robert D. Putnam used the activity of bowling to examine the connection of individuals to each other and community.

He developed the concept of Social Capital to encompass the affiliations, connections, group identities, and relationships among people that result in enriched civic engagement and reciprocal obligation. He concluded in 2001 that, at least temporarily, those connections were declining in the U.S. to society’s detriment.

Putnam concluded that successful societies have strong social capital and “sturdy norms of reciprocity,” which create mutual trust. When trust is present, people count on others for support, help and promoting the common good.

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The Master Mediator

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with prosocial behavior. Loneliness, isolation, and exclusion are antithetical to trust.

MEDIATION EXPERIENCE

As noted, loneliness, along with isolation, exclusion, and being disconnected aren’t common commercial mediation case characteristics. Conflict, however, often involves termination or transition of professional and social relationships.

Loneliness, or a sense of exclusion and isolation, can be common as a consequence of a breakup, discharge, divorce, or loss of any significant long-term relationship.

Many disputes involve intense emotions and interpersonal relationships arising in a commercial context. A mediator who has grappled with conflict within a family business understands the emotional overlays and entanglements with control and economic issues.

This author doesn’t do matrimonial cases, but I know that there are often deep wounds related to betrayal, trust, and other factors that may lead to a perception of isolation and loneliness.

Employment cases are another area ripe with sub-surface loneliness dynamics. I am often struck by the language a terminated employee uses when discussing the workplace and former colleagues. It is common for them to use “we” when describing prior actions and “us” when including current employees.

This happens even if it has been many months or years away from active employment without any prospect of reinstatement or return to the organization.

In most cases, I explore if it makes sense to reframe the feelings and beliefs of the aggrieved participant in terms of exclusion, disconnectedness, disaffiliation, and “loneliness” from being separated involuntarily from expectations of a long-term role in the workplace or business.

If a person lives alone, or seems to have little apparent evidence of a support network, I ask the party how he or she now spends time. I ask how it differs from when the party was active in the prior relationship or organization. We talk about new activities, groups or affiliations that the party has explored since the dispute arose.

I try to learn if they are going it alone or if indeed they have a support network beyond their lawyers in the case. In short, do they feel alone or not?

The key question and dialogue usually resolves around closure and letting go of the past so the parties can focus on, among other things, the Internet, and immediate accessibility to information and opportunities. I became active in Meetup.com, and started to attend all sorts of events, most of which involved cultural or educational activities.

Except for eating pizza. The pizza group usually met twice per week at a different small pizzeria and was attended by a diverse group of singles. Within a few years, I was hosting my own pizza Meetup group, which now has more than 2000 members. The new friendships and exposure to diverse people enriches me greatly.

There are times when a natural and easy bond, and rapport, builds between the mediator and the participant. I am no longer startled by the level of personal details or feelings a participant just meeting me that day will share with me. I suspect this correlates to the research noted above that the average person has fewer confidants and trusted advisers than in the past.

Obviously, the mediator’s role and the power of confidentiality encourages sharing a depth of feelings and thoughts. Remember, it’s not about the mediator; it’s about the parties. But when I am engaged in these deep dialogues, which are really one-on-one despite the presence of others in the room, I know that trust has fueled the mediation engine.

* * *

Loneliness is out there and sometimes is present in the bargaining room. Mediators should explore and acknowledge it when it is a barrier to resolution. Mediators can help raise awareness or provide some gentle direction to potentially productive paths for the disputant to explore on his or her own.

**SOURCES AND ADDITIONAL READING**

- Nicholas A. Christakis and James H. Fowler, “Connected: The Surprising Power of Our Social Networks and How They Shape Our Lives” (Little, Brown & Co. 2009)
Still, how that plays out in practice is far more in question than it was even a few months ago.

Beyond employee-side fears that claims will be cut off altogether, now that the Court’s endorsement of workplace class waivers and mandatory arbitration is here, a lawyerly cautious view appears predominant. See, e.g., Lisa Burden, “Employers shouldn’t rush to adopt arbitration agreements in light of ‘Epic,’ experts say,” HR Dive.com (June 4) (available at https://bit.ly/2Ja3SY6); Braden Campbell, “Class Waiver Ruling Could Backfire on Businesses: Panel,” Law360 (May 23) (available with a subscription at https://bit.ly/2ItdkGW).

That means tackling everything from contract clauses to design and structural questions about employment programs for management-side attorneys and the in-house counsel who hire them, all ultimately geared to boost programs’ credibility and maximize dispute resolution effectiveness.

But for plaintiffs’ lawyers, the new era means finding ways to bring claims efficiently without the ability to combine workers with small-value or tough-to-prove cases into class matters. The repeat player issue is supposed to be covered in the cases often, and against the individuals. The grassroots hashtag push has made accusations about arbitration stick in a way that the plaintiffs’ lawyers in the Supreme Court cases and, for advocates in the regulatory and legislative arena in their fight to preserve a rule issued by the Consumer Financial Protection Bureau banning consumer financial services arbitration, simply could not. (The CFPB rule was rescinded last fall with Vice President Mike Pence casting the deciding Senate vote to overturn.)

Accusations that companies use private arbitration to protect themselves from the embarrassment of any sex discrimination charges and incidents of harassment and even sexual violence have met with little public counterargument, although so far only a handful of companies and law firms have changed their practices in response.

The phrase “forced arbitration” has become synonymous with alternative dispute resolution—even dragging mediation into question when it was revealed that the U.S. Congress has a mandatory employment mediation policy designed to cool off parties, but which critics charged kept the problems under the Capitol’s roof and offending members from exposure. The Senate responded with mandatory sexual harassment training. Id.

Epic Systems provides ADR program points that need attention and adjusting. But #MeToo has produced even more than its most important product: awareness, solidarity, and compassion for crime and tort victims. Mostly originating directly from those often-angry threads on social media—and probably even more so than the result of the Court’s Epic Systems opinion—the movement lays out reform, including a focus on key structural issues facing arbitration users that need attention.

First, it has produced accusations that arbitration comes from programs favoring companies, staffed by industry-leaning neutrals who work the cases often, and against the individuals. Second, confidentiality has become the #MeToo campaign’s biggest issue. Many believe that arbitration itself exists only to protect the powerful abusers.

REPEAT PLAYERS

The repeat player issue is supposed to be covered by the employment arbitration processes themselves in two ways: workers are allowed to have input into the arbitrators, and quality control comes from independent processes conducted by established ADR administrators with broad neutral-selection choices.

Open-door human resources programs are designed to resolve the cases before arbitration. But it’s questionable whether employees taking processes past the informal negotiation and mediation steps can handle vetting professional arbitrators.

Of course, those same programs allow for attorney assistance, and rules will explain processes for reviewing neutrals choices to both complainants and advocates.

Michelle Leetham, chief legal officer and secretary, Rodan & Fields LLC, a San Francisco-based skincare manufacturer and marketer, says, “I simply don’t buy the notion that you are taking away employees’ rights and they are not getting a fair hearing.”

“Unless the parties are informed and voluntarily choose otherwise, neutrality in ADR is sacrosanct,” notes Noah Hanft, president and chief executive officer of the International Institute for Conflict Prevention and Resolution, best known as the CPR Institute, “and the only acceptable level of design is an ADR program that will reach unbiased compromises and/or decisions that companies will implement, and employees will embrace immediately.”

Adds Hanft, “Those neutrals can be found at established neutral organizations, such as CPR, which have such safeguards in place.”

[The CPR Institute, which, among other things, maintains lists of neutrals to resolve commercial disputes and provides ADR case administration services, produces this newsletter with John Wiley; Hanft is publisher but did not participate in the writing or editing of this article.]

Leetham, who also worked extensively on development and design of a multistep ADR program at engineering and construction giant Bechtel Inc., says she believes that employment
EMBARRASSMENT OVER REMEDIES?

Confidentiality is more complicated.

Critics have decried the closed-door nature of cases, and say that the result is an emphasis that insulates corporate and personal embarrassment rather than remedies for victims.

But it’s not that clear cut. Complainants often want to be free from the glare of a public court process to protect their own privacy and, often, career prospects.

Confidentiality may harm the efforts of any complainant depending on the situation, but the biggest concern is for so-called downstream victims—those who have complaints about the same harasser but don’t know about the repeated conduct that has been adjudicated in a private arbitration.

At the same time, there is a misconception. Employment arbitration rules, depending on the source, may default to being confidential. But confidentiality usually isn’t mandatory.

Parties generally may agree to remove confidentiality, and reject nondisclosure agreements. In fact, in the wake of the public revelation of bad conduct, legislatures are considering moves to bar the use of nondisclosures in sexual harassment cases.

“Arbitrators routinely misunderstand the providers’ rules and issue protective orders regarding confidentiality, all the time believing the rules require it,” say Cliff Palefsky, name partner in San Francisco McGuinn Hill & Palefsky, which represents employees. “A blog post [reporting the result] is a lot different than allowing the media in to see the hearing and testimony.”

The End

The dispute: Will the Supreme Court’s reasoning in consumer law on allowing mandatory predispute arbitration provisions to bar class actions survive the nation’s labor laws?
The final answer: Yes.

Is it really final? Some people are wary of legislation that is popping up around the country and in Washington. It’s more #NotMe than Epic Systems. For now, the law is clear: Employers may prevent employees from filing class action cases in workplace disputes.


At least three major law firms have dropped employment arbitration entirely. Id. Some management-side attorneys worry about a slippery slope.

General opt-outs are less problematic contract provisions. Employees, in-house counsel say, often don’t use them. And the opt-outs can be restricted to the arbitration process itself, while still requiring dispute resolution through the class waiver and the company’s ADR program.

Finally, some class waivers likely have been written in the alternative—that is, if the waiver was found ineffective by a court, then alternative resolution paths would be used.

That alternative route was justified; at least two federal circuit courts outlawed class waivers by following the National Labor Relations Board in the In re D.R. Horton case, both of which were part of the consolidated Epic Systems decision overturning that view.

In other words, a new precision is needed for arbitration provisions in employment agreements, because the setting has changed. Any new ambiguities will be challenged.

THREE MORE CASES

And even before Epic Systems was decided, those challenges kept coming, and the stream of arbitration cases to the Supreme Court continued to flow. Three cases have been accepted for the new term. One case is a broader application issue, concerning whether FAA Sec. 1 exempts agreements with independent contractors from the statute’s coverage. New Prime v. Oliveira, No. 17-340.

But the case also is expected to revisit arbitrability determinations—who decides how the case is adjudicated, the court or arbitrator? For more on New Prime, see Ginsey Varghese, Supreme Court Will Decide Independent Contractor Arbitration Case, 36 Alternatives 56 (April 2018)(available at https://bit.ly/2J619FP).

On April 30, the Court agreed to drill down once again on class arbitration, and decide whether a court determination allowing the process using state law can stand. Lamps Plus Inc. v Varela, No. 17-988 (see article on page 98 of this issue.)

And in late June, as its current year ended, the Court took a third case for the 2018–2019
term, *Henry Schein Inc. v. Archer and White Sales Inc.*, No. 17-1272, on whether the FAA permits courts “to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is ‘wholly groundless.’”

Down the road, says Roger Jacobs, a mediator and arbitrator in Roseland, N.J., and New York (and an *Alternatives* editorial board member), arbitration in joint employment issues could follow independent contractors to courts—those situations where franchisees and franchisers, or joint venture partners, both affect employees by their rules even if the complainant was hired by and works for the franchisee or one of the partners exclusively, and not the corporate parent that is the source of the work setting. Those situations call for precise drafting, and also may need revision post-*Epic Systems*.

Still in the pipeline are the so-called PAGA cases—those where employees subject to contracts with mandatory arbitration clauses file suit under a private attorney general’s act as a class.

Because employees in those suits are substituting for the state itself, courts have found that the class waiver doesn’t apply. The U.S. Supreme Court late last year declined to hear an appeal in a California case refusing to enforce the mandatory arbitration clause in the face of a PAGA challenge, *Betancourt v. Prudential Overall Supply*, No. E064326 (Cal. App. 4d. March 17, 2017) (available at https://bit.ly/2Mxc19y).

Bills to enact laws with a similar effect to California’s have been introduced in Connecticut, Illinois, New York, and Vermont, with plans for an Oregon introduction. Kristen Capps, The Supreme Court Just Made It Even Harder to Sue Your Employer, *Citylab* (May 1, updated May 21) (available at https://bit.ly/2IzHb1S).

**MORE CLASSES**

In addition to PAGA, plaintiffs’ attorneys have been working on alternatives to class actions that could fall under a category of “be careful what you wish” for their management-side opponents.

A class of employees decertified by a California federal court bombarded national health club 24-Hour Fitness with hundreds of individual arbitrations earlier in the decade, forcing the company to settle all at once.

The decertification—over the claims’ content and unrelated to the class waiver issue—pushed the company to be more aggressive about defending its arbitration clauses, though the Supreme Court didn’t accept its case as part of the consolidated *Epic Systems* cases decided in May. Jessica Goodheart, “Why 24 Hour Fitness Is Going to the Mat against Its Own Employees,” *Fast Company* (March 13) (available at http://bit.ly/2pKDPlm).

Ultimately, costs will bring companies to end the litigation or multiple arbitrations regardless of whether an official class is established. “At some point it becomes inefficient to handle” multiple repeat cases, says Roger Jacobs, adding, “Everybody makes economic decisions, and that’s probably more compelling than the court decisions in a lot of these cases.”

Some arbitration veterans say that an increased use of the process as a result of mandatory clauses could invigorate the demand for appellate arbitration processes, which until now usually have been a tool for wealthy parties in big ticket commercial cases.

**NEW DAY**

Lawyers who represent management are hailing the new day of employment arbitration under the May 21 *Epic Systems* decision, removing the class actions they and their clients loathe.

Evan M. Tager, a Washington, D.C., Mayer Brown partner who has argued many arbitration cases on employers’ behalf, says, “The Court reaffirmed in the strongest possible terms that conditioning the enforcement of arbitration provisions on the availability of class-like procedures frustrates the purposes of arbitration and is not permissible absent a clear congressional command.”

He also praises the Court for an expansive opinion that may preclude future challenges in two areas. Tager explains,

In holding that Section 7 of the [National Labor Relations Act] does not override the FAA’s command that arbitration agreements be enforced according to their terms, the Court could have begun and ended with the observation that Section 7 does not refer to either arbitration or class actions. But it went further and held that the term ‘other concerted activities’ in Section 7 does not cover class-wide procedures and that the [National Labor Relations Board] was not entitled to *Chevron* deference in concluding otherwise. That is a fairly momentous holding because it suggests that the Board could not prohibit employers from barring class actions outside the arbitration context (although a state legislature still could).

NLRA Sec. 7 states that “Employees shall have 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. …” [*Alternatives’* emphasis on the language to which Tager referred.]

On Tager’s second point, the court’s newest member, Justice Gorsuch, who authored the majority opinion, is a longtime critic of *Chevron U. S. A. Inc. v. Natural Resources Defense Council Inc.*, 467 U. S. 837 (1984).

*Chevron* provides Court deference to agency determinations made in the areas of the agency’s expertise. But in *Epic Systems*, Gorsuch writes that the NLRB’s decision that launched the case, *In re Horton*, didn’t meet the *Chevron* deference standards.

“[T]he Court’s discussion of *Chevron* looks like the beginning of an effort to chip away at that doctrine,” says Tager, who worked on Mayer Brown’s amicus brief on behalf of the U.S. Chamber of Commerce in the consolidated cases. He adds, “The Court reasoned that *Chevron* has no role to play except when traditional canons of statutory interpretation are incapable of resolving a statutory ambiguity. That is very rarely the case.”

*Epic Systems* involves arbitration contract clauses that kick in due to class waivers which prohibit employees from joining class processes—litigation or arbitration—in favor of mandatory, predispute, individualized arbitration to resolve disputes with their employers.

The questions in the cases surrounded challenges involving the workers’ pay; two of the cases involved white collar employees.

The May decision is actually on three cases—*NLRB v. Murphy Oil* (No. 16-307), from the Fifth U.S. Circuit Court of Appeals; *Ernst & Young v. Morris* (No. 16-300), from the Ninth Circuit, and the Seventh Circuit’s *Epic Systems*—that the Court consolidated into its 2017-2018 term’s kickoff argument on Oct. 2, with four attorneys arguing the case on behalf of the parties in all three cases. The long-
Court Decisions

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The contested issue began with the release in 2012 of the In re Horton opinion.

That NLRB administrative decision, which found that class waivers illegally violated the National Labor Relations Act's Sec. 7 allowing employees to take concerted action to confront their employer, was overturned repeatedly by the Fifth U.S. Circuit Court of Appeals in numerous cases.

The NLRB ruled that class waivers were eliminated by the FAA's Sec. 2 savings clause, which enforces arbitration agreements “save upon such grounds as exist at law or in equity for the revocation of any contract.”

The Fifth Circuit rejected that view on the ground it infringed on the Federal Arbitration Act, a position strongly echoed in the Gorsuch majority Epic Systems opinion. The class waivers in question apply from collectively bargained rank-and file to executive suites, but not management. While unions can agree to mandatory predispute arbitration on behalf of their members, the cases involved white-collar employees and nonunion workers with little bargaining power.


Epic Systems now settles how arbitration is used in workplace matters.

KEY HOLDINGS

Mark Kantor, a Washington, D.C., neutral who closely follows the Court’s arbitration work, notes that the key holdings were (a) the rejection of the FAA Sec. 2 Savings Clause application because it only recognizes defenses that apply to any contract, therefore demanding equal treatment for arbitration contracts; (b) the denial of the NLRB’s ability to make class waivers illegal as a protected “concerted activity[;]” and (c) the rejection of Chevron deference application.

The implications of the latter two points, according to Kantor, who is a Georgetown University Law Center adjunct professor, will extend beyond labor law. “Those principles,” according to Kantor, “will undermine attempts by many U.S. federal agencies to interpret their general regulatory authority under their own organic statutes to permit them to limit or prohibit mandatory arbitration agreements.”

The Trump administration already has reversed Obama-era prohibitions on mandatory predispute arbitration, including nursing home contracts at the Centers for Medicare and Medicaid.

Kantor points out that a future administration seeking to restore such rules won’t be able to rely on National Labor Relations Act-style support, but instead will need to “seek legislative authority” that is a direct authorization. That means future moves to restrict class waivers and mandatory arbitration will need action urged by Associate Justice Ruth Bader Ginsburg in her Epic Systems dissent, where she wrote, “Congressional correction of the Court’s elevation of the FAA over workers’ rights to act in concert is urgently in order.”

Mark Kantor also noted that the NLRB’s ruling might have disappeared on its own with Trump administration appointees now installed as commissioners ready to reverse the Obama-era In re D.R. Horton administrative decision.

In his majority opinion, Gorsuch stated, “The respective merits of class actions and private arbitration as 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.”

CHANGED CONCEPT

Along with the new future it provides, the Supreme Court decision also demands a reassessment of arbitration history.

The case “is really about how dramatic the changes in the arbitration process have been since the F.A.A. was enacted in 1925,” explains Chappaqua, N.Y., arbitrator Paul Bennett Marrow. He continues:

In their respective opinions, Justices Gorsuch (majority) and Ginsburg (dissent) both agree that until Congress says otherwise, the draftsman is free to include in an arbitration clause a restriction against class actions. Back in 1925 the concept of a class action as we know it today had yet to be born. And no one seriously believed that employment matters were the proper subject for an arbitration.

Marrow warns, however, that Justice Gorsuch’s “declaration that a literal interpretation of the language in the FAA ‘honors’ Congress’s policy judgment as expressed in 1925” may point the way to renewed opposition. The statement, notes Marrow, “is likely to serve as the proverbial straw needed to break the camel’s back.”

He states that Epic Systems supporters need to be on the lookout for a re-engineered/reinvigorated effort to force Congress to take a position, one way or the other. To date Congress has tried to pass the buck to administrative agencies and Epic Systems is the death knell to that approach. Given the refusal of organizations such as the American Arbitration Association and JAMS to administer an arbitration with a restriction against class actions, Epic Systems and all the jurisprudence that proceeds it, is likely to grease the skids for both an increase in the number of ad hoc proceedings and a push to legislative reform.

BROKEN BEDROCK?

Those working on the consolidated cases from the plaintiffs’ side, while perhaps not surprised, are still outraged at the loss of the ability of employees to team up in court actions, which they saw as a bedrock part of the National Labor Relations Act’s concerted activities.

“The very first line of the opinion highlights the dishonesty of it all,” says Cliff Palefsky, who worked on an amicus brief filed in the consolidated cases on behalf of 10 labor unions and the National Employment Lawyers Association, and who has been active on the employees’ side in the cases for years. “[It says] ‘Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?’ ”

Palefsky and employee-side attorneys maintain that workers are not bargaining when mandatory arbitration is a condition of employment. Management-side attorneys speak to the Epic Systems decision as one that allows all parties to choose.
Palefsky isn’t buying it. The Court “took a statute that Congress expressly said doesn’t apply to employment and used it to preempt the nation’s most significant labor and civil rights laws,” he says, concluding, “It was an intellectually and legally indefensible political assault on worker’s rights.”

FEARING MORE LEGISLATION

People who work in commercial contract arbitration exclusively, with no attachment to employment or consumer processes, frequently lean to the plaintiffs’ view. They often cringe when mandatory arbitration and class waivers arise in seminars and events. They say that they fear that as political winds shift, there will be blowback, and the restrictions will affect commercial processes that they and their business clients have counted on for years to deal with complicated disputes.

Nowhere does that view arise more often than with overseas practitioners who work on cases in the United States. Robert A. de By, a partner and chair of the international arbitration practice at Connon Wood who works out of the firm’s London and San Diego offices, says that Congress could get involved and warns that the ripple effects could be extreme. “Our arbitration world suffers badly by not openly confronting such societal problems caused by (labor) arbitration,” notes de By in an email, adding,

The employers’ win in Epic Systems only makes that worse. For, ultimately, it is Congress that determines the laws regarding arbitration, not Justice Gorsuch, and the bill (pun intended) will soon become due.

The “very important” international commercial arbitration field, he adds, “will suffer if arbitration is diminished or harmed by restrictive legislation because some people rather than acknowledging societal problems in the labor arbitration sphere and deal with them, defend the indefensible.”

De By concludes that “the remedy that Congress may impose as a result may be far worse overall for arbitration, and sadly may hit commercial arbitration as well.”

Plaintiffs’ lawyers have pointed out that arbitration has its costs to employers, too, and, if employees proceed with small claims on their own in arbitration, the costs to defend could be huge. See the Fast Company and Law360 articles above. See also, Marcia Coyle, “Plaintiffs Plot ‘Way Around’ Supreme Court’s Ruling against Worker Class Actions,” Nat’l Law J. (May 25) (available at https://bit.ly/2sSINh7) (discussing the use of “non-mutual offensive collateral estoppel” in multiple arbitrations).

The Law360 article discusses an American Arbitration Association seminar just 48 hours after the decision that saw lawyers on both sides agree that stacking up arbitrations was possible, and the costs could bring employers to faster, comprehensive settlements.

Emails to the AAA and JAMS requesting general comment on ADR practice post-Epic Systems weren’t responded to ahead of Alternatives’ deadline.

REFINING PRACTICES

Whether more workplace conflict is diverted to resolution methods via human-resources departments’ open-door policies or mediation remains to be seen.

But a growth in the presence of mandatory arbitration ensures that there will be more court cases that dive into finer points involving use of the process—though the extent of arbitration use is now clearer, there will always be questions about ADR limits and parameters. See the discussion above on the two new Supreme Court cases.

Management-side attorneys have advised tightening up drafting points discussed above, and some appear to have been preparing for the Court’s Epic Systems moment for years.

Christopher Murray, an Indianapolis shareholder in Ogletree Deakins—the firm that brought In re D.R. Horton to the Fifth Circuit where it was overturned, leading to the Epic Systems decision (the firm also submitted an amicus brief on behalf of trade associations in the consolidated cases)—says, “This is a good decision for parties interested in any form of alternative dispute resolution because it confirms those parties are best situated to agree on the procedures to be used to resolve their disputes quickly, effectively, and fairly, and courts are generally not permitted under the FAA to second-guess those procedures.”

The decision provided an opportunity clearly long in planning for Murray—who authored May’s Alternatives cover story, “No Longer Silent: How Accurate Are Recent Criticisms of Employment Arbitration?” 38 Alternatives 65 (May 2018) (available at https://bit.ly/2rYmmmed), and who co-chairs Ogletree’s Arbitration and ADR Practice Group—and his firm. Ogletree announced a new clause drafting product just a few hours after the decision was announced on May 21.

The firm’s DIY Arbitration Agreements is “an automated tool that quickly prepares custom arbitration agreements with class action waivers based on employers’ requirements and preferences,” promising to deliver contract clauses “in under five minutes.” The tool is available at https://bit.ly/2JLTtYS.

A COMPELLING CASE

The principal tool as a result of Epic Systems, of course, is the case itself, as an enforcement vehicle to compel arbitration.

At press time last month, the case produced more than a dozen commercial database citations that either grant requests to compel arbitration, or make that request of courts—many in class cases. The parties seeking arbitration, and getting it, include well-known companies like United HealthGroup Inc. and Uber Technologies Inc.

Ultimately, says Rodan & Fields’ Michelle Leetham, good employment dispute resolution programs will avoid making barriers to entry high, attempting to shift costs, or taking away substantive rights—the same overreaching that ran programs aground before Epic Systems.

“Transparency is really important,” she says, adding, “A level playing field is really important.”

Leetham says her company is ready for the post-Epic Systems era. But she says that its program won’t need tweaking, explaining that the early program steps have resolved all of its matters so far, and the company and its employees have not needed to go to the arbitration step.

“The bottom line is that ADR could resolve situations in much more creative ways than court,” she says.

CPR Institute summer intern Jill Russell, a Tulane University Law School student, contributed research to this article.
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And in late June, as its current year ended, the Court took a third case for the 2018–2019 term, Henry Schein Inc. v. Archer and White Sales Inc., No. 17-1272, on whether the FAA permits courts “to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is ‘wholly groundless.’” In early 2016, Lamps Plus, a privately held lighting retailer based in Chatsworth, Calif., was subject to a phishing attack that caused it to send copies of its current and former employees’ tax forms to a third party. Shortly after this attack, Lamps Plus employee Frank Varela filed a class action suit in California federal court, asserting statutory and common-law claims for the data breach. Pursuant to Varela’s arbitration agreement under his employment contract, the district court granted Lamps Plus’s motion to compel arbitration. But instead of the individual arbitration sought by Lamps Plus and notwithstanding that there was no express mention of class proceedings in the employment agreement, the district court ordered arbitration on a class-wide basis.

This order was affirmed by the divided Ninth Circuit panel in an unpublished opinion. The majority was Circuit Judges Kim McLane Wardlaw and Stephen Reinhardt. Reinhardt, a liberal jurist who strongly opposed mandatory arbitration in a long line of cases, died in March.

In coming to its decision, the majority—the per curiam opinion doesn’t indicate the author—held that “silence” in Stolt-Nielsen meant “more than the mere absence of language explicitly referring to class arbitration; instead, it meant the absence of agreement.” (Emphasis is the Ninth Circuit’s.) To determine whether an agreement for class arbitration had been reached, the opinion turned to state law contract principles. Under California law, a contract is ambiguous “when it is capable of two or more constructions, both of which are reasonable.” One such construction was that the agreement was for individual arbitration only, given its silence on class proceedings.

Another, the majority notes, was that the agreement authorized class proceedings. This was because it contained (1) a waiver of Varela’s right to file a suit, (2) a waiver of Varela’s right to resolve employment disputes through trial by judge or jury, and that (3) arbitration was to be in lieu of any and all “lawsuits or other civil legal proceedings” relating to his employment.

Such “expansive language” meant that the “most reasonable interpretation” of the employment agreement was that “it authorizes class arbitration,” the opinion states, since “[i]t requires no act of interpretive acrobatics to include class proceedings as part of a ‘law-suit or other civil legal proceeding’” as contemplated by the employment contract.

Faced with two reasonable constructions, the majority found that the contract was ambiguous, and state contract principles required construction against Lamps Plus, the agreement’s drafter. Varela’s construction—that class arbitration was permitted—was accepted, and the district court’s order was upheld.

The majority’s decision received a two-sentence, scathing dissent by Senior Circuit Judge Ferdinand F. Fernandez, who wrote that the decision was a “palpable evasion of Stolt-Nielsen.” * * *

In its successful petition for certiorari at the Supreme Court, Lamps Plus raised several arguments highlighting weaknesses in the majority Ninth Circuit decision.

First, the retailer relied on AT&T Mobility where, the brief notes, the Supreme Court held that class-action arbitration “sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.” Thus, it was “not arbitration as envisioned by the FAA” (Id. at 350-51; emphasis is the Court’s), which was enacted to allow for an efficient, informal, and cost-efficient procedure for the settlement of disputes.

As a result, a class action arbitration agreement cannot be lightly inferred from “mere silence on the issue of class-arbitration,” and more is required. Stolt-Nielsen at 687. The panel majority’s decision, which inferred an agreement for class arbitration when the arbitration agreement made no express mention of class arbitration, therefore amounted to a “palpable evasion of Stolt-Nielsen,” Lamps Plus argued in its brief, echoing the Ninth Circuit dissent.

Second, by inferring an agreement to class-arbitration from an ordinary arbitration agreement, petitioner argued that the majority’s decision rendered Stolt-Nielsen, which required something more than mere silence on the matter, “a nullity.” The petition argued that the reasoning means that language in any arbitration agreement would “entitle a party to demand” class arbitration unless there was an express waiver.

Third, Lamps Plus argues that the FAA “forecloses the … reliance on a state-law canon to manufacture the consent to class arbitration.” The petitioners point again to AT&T Mobility, noting that the Supreme Court held that “class arbitration, to the extent it is manufactured by [application of a state law doctrine] rather than consensual, is inconsistent with the FAA.” AT&T Mobility at 348.

Finally, petitioner Lamps Plus raised several decisions from other U.S. Circuit Courts, including the Sixth, Third and Fifth Circuits, noting direct conflicts with the result arrived at by the panel majority.

For example, the Sixth Circuit three times has rejected arguments to read an agreement for class-wide arbitration from contracts silent on the matter. In AlixPartners LLP v. Brewington, 836 F.3d 543, 547 (6th Cir. 2016), the petition notes, the Sixth Circuit court held that “silence on the availability of classwide arbitration” was insufficient to constitute consent.
Given the disadvantages of class-arbitration as detailed above—for example, Lamps Plus notes, “arbitration is poorly suited to the higher stakes of class litigation.” AT&T Mobility at 350—the petitioners urged the Supreme Court to reverse the panel’s decision to ensure that “garden-variety arbitration agreements like the one in this case” would not be interpreted to permit class arbitration.

* * *

The U.S. Chamber of Commerce, a frequent friend-of-the-court participant in arbitration cases, filed an amicus brief urging the Court to take the Lamps Plus case and reverse it.

Apart from agreeing that the decision constituted a “palpable evasion” of the Court’s decision in Stolt-Nielsen, the Chamber argued that the decision, requiring non-consensual class arbitration, “ran afoul of the ‘liberal federal policy favoring arbitration.’” Amicus brief at 9 (citing AT&T Mobility at 339).

Requiring non-consensual class arbitration, the amicus brief noted, would violate a primary purpose of the FAA, “encourag[ing] efficient and speedy dispute resolution.” Amicus brief at 6 (citing Dean Witter Reynolds v. Byrd, 470 U.S. 213, 221 (1985)).

* * *

Employee Varela countered in his brief to the Supreme Court that the Ninth Circuit majority’s decision was consistent with Stolt-Nielsen. He urged the Court to let the lower court’s decision stand.

While Stolt-Nielsen required “a contractual basis” for class arbitration, the respondent brief said, “[n]othing in Stolt-Nielsen indicates that in requiring a contractual basis for class arbitration, the Court also silently required the creation of a new federal common law of contracts to replace state law in determining whether such a contractual basis exists.”

Therefore, the panel majority’s reliance on Californian contract principles to interpret the effect of the agreement was in fact consistent with Stolt-Nielsen, the Varela brief noted.

* * *

While the Stolt-Nielsen court did not “decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration” (Stolt-Nielsen at footnote 10), the 5-3 opinion, written by Justice Samuel A. Alito Jr., was unequivocal that silence on the matter of class-action arbitration was insufficient under the opinion.

It states: “[T]he differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties’ mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings. … [T]he FAA requires more.” Stolt-Nielsen at 687.

So while the FAA does not prohibit reference to state law to interpret a contract’s effect, it remains, flowing from the doctrine of preemption, that the state law cannot be applied in order to recognize an agreement for class

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ADR Brief

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 arbitration despite the contract's silence. By referring solely to state law in interpreting the arbitration agreement, the Ninth Circuit panel majority did in fact evade the Stolt-Nielsen judgment.

* * *

Respondent Varela also relied on the Supreme Court's decision in Oxford Health Plans LLC. There, the arbitrator had found, after the release of the Stolt-Nielsen decision, that the parties' contract permitted class arbitration solely from a clause stating that "[n]o civil action … shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration."

The clause also was silent on class arbitration. The arbitrator, however, reasoned that a class action was "plainly one of the possible forms of civil action that could be brought in a court." Therefore, "on its face, the arbitration clause … expresses the parties' intent that class arbitration can be maintained." Oxford Health at 566-567.

The Supreme Court refused to vacate the arbitrator's decision, leading respondent Varela in his Lamps Plus brief to argue that the panel's decision, contrary to the petitioner's arguments, did not "nullify" Stolt-Nielsen.

While Oxford Health appears to support the Ninth Circuit panel's decision, the basis of the decision may not help the respondent in Lamps Plus. Although Oxford Health ultimately upheld the arbitrator's decision to allow for class arbitration notwithstanding the lack of an express agreement, the decision was on the limited basis that the arbitrator, having been tasked by the parties to interpret the agreement, had carried out his interpretive role. Id. at 571-572.

Having found this, the Court had no power to vacate the arbitrator's award as "an arbitrator's error—even his grave error—is not enough" to vacate an award under FAA § 10(a)(4). The Court was bound to the FAA guidelines in backing the arbitrator's decision, which was arguably inconsistent with Stolt-Nielsen, and not because the Court agreed with the arbitrator's findings ("Nothing we say in this opinion should be taken to reflect any agreement with the arbitrator's contract interpretation, or any quarrel with Oxford's contrary reading." Id. at 572).

So Oxford Health may not aid the respondent where the class arbitration decision was made by a trial court, and not an arbitrator.

* * *

Given the Supreme Court's decision to grant certiorari, interested parties can see the relevance of state law interpretative principles for arbitration agreements in relation to class-action proceedings. If the Supreme Court retains its pro-arbitration stance from cases like AT&T Mobility and Epic Systems, and given the inherent limits on class arbitration from Stolt-Nielsen and Oxford Health Plans, the Supreme Court may have taken the case to reverse the Ninth Circuit's decision.

The drafting advice since Stolt-Nielsen hasn't changed: Parties would be best advised to use express class action waivers in arbitration agreements to prevent any dispute on the matter.