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**Forceful Arbitration v. the Workforce**

**Overview**

Employer-mandated arbitration is actively and rapidly expanding in the United States. Through this controversial practice, employers require their employees to give up their right to litigation and instead turn to a specified, mandatory arbitration forum as a non-negotiable condition of their employment. If either party chooses to pursue their disputes in court, the opposing party can file a motion to compel arbitration. These employers also tend to forbid class actions, a type of lawsuit in which one or some members within a party files a lawsuit on behalf a group of people.

Although *Gilmer v. Interstate/ Johnson Lane* *Corp.* *(1991)* set the stage for private employers to expand mandated arbitration, the three cases of *AT&T Mobility LLC v. Conception (2011)*, *American Express Co., et al. v. Italian Colors Restaurant (2013)*, *Epic Systems Corp. v. Lewis (2018)* further strengthened employers’ position and power in arbitration. This paper concludes that employer-mandated arbitration unjustly favors employers and defeats the purpose of the Federal Arbitration Act, weaking employees and those whose rights have been violated since they cannot pursue fair litigation.

**Historical Analysis**

Whereas prior to the 1990s, employers and employees resolved their disputes through litigation, mandatory employment arbitration grew significantly from the 1990’s to present day. By the 1990s, only 2% of non-union employees faced mandatory employment arbitration, by the 2000’s almost a quarter, and in present day over half of these employees must undergo binding arbitration (Bickerman, 2020). Its rapid expansion and frequency tightly correlate with Court rulings that favored employers starting in 1991 that encouraged the use of mandated-employer arbitration.

In 1991, the Supreme Court upheld that mandatory employment could be enforced through *Gilmer v. Interstate/ Johnson Lane Corp. (1991)*. This crucial decision greatly influenced employers to expand their mandatory arbitration requirements, making one-quarter of the workforce subject to arbitration by the 2000s. In less than a decade, this landmark decision promoted and expanded the use of binding arbitration as opposed to litigation.

However, it was not until a decade later that employers rapidly started adopting this practice. Data supports that employer-mandated arbitration rapidly expanded soon after the 2011 and 2013 Court decisions. From 2012 to 2018, 45.3% of larger establishments and corporations adopted mandated arbitration (Colvin, 2018). This largely correlates to Supreme Court decisions about arbitration and class action lawsuits. A class action lawsuit is a type of lawsuit in which one or some members within a party files a lawsuit on behalf a group of people. Today, over 40% of employers who mandate arbitration also prohibit class actions (Bickerman, 2020). The two now commonly go hand-in-hand within employment contracts. An arbitration agreement will usually include a clause forbidding class action in employment contracts.

The cases of *AT&T Mobility LLC v. Conception (2011)* and *American Express Co. v. Italian Colors Restaurant (2013)* strengthened arbitration agreements. The 2011 decision defined that the Federal Arbitration Act (FAA) that provides judicial facilitation of private dispute through arbitration also preempts state law, allowing companies to prevent class action within their arbitration agreements. The 2013 decision further upheld that FAA does not prevent employers from enforcing arbitration clauses regardless of the cost. These cases skyrocketed the use of arbitration. Similarly, the latest 2018 decision defined that the FAA’s saving clause and the National Labor Relations Act (NLRA), which protects the rights of employees and employers, encouraging collective bargaining to prevent harm from private sector labor and management practices, cannot prevent individualized arbitration from being enforced. These cases upheld the use of mandatory arbitration and added an extra protection from class action claims for employers.

Today, 60.1 million American workers cannot protect their legal employments rights in court anymore and instead must turn to arbitration, which research supports overwhelmingly favors employers (Wesson, 2020). This comes as no surprise since employers get to define the arbitration procedures and providers. Overtime, the Court has shifted the balance of power toward companies and employers.

***AT&T Mobility LLC v. Conception (2011): FAA Preempts State Law***

On April 27th, 2011, the Supreme Court ruled 5-4 that the Federal Arbitration Act (FAA) preempts California contract law related to arbitration agreements, enforcing that arbitrations on a class-action basis goes against Congress’ legislative intent. AT&T customers filed a class action lawsuit against the company on the basis that the company’s offer of a free phone to any customer who signed up was fraudulent since AT&T charged sales tax on the retail value of each free phone. AT&T moved to compel arbitration based on their clause within the contract of service. The California federal district court denied the motion. On appeal, the US Court of Appeals for the Ninth Circuit held that the clause was unconscionable and unenforceable under California law and the Federal Arbitration Act (FAA) did not express nor imply preemption from California law governing unconscionability.

The Supreme Court reversed the lower court’s decision and held that the FAA preempts “state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”

Justice Stephen Breyer dissented with others claiming that the Court should not state that the federal act preempts the rule of state law.

 Although this case did not directly involve employees, it involved big companies that are also large employers, enforcing and encouraging the arbitration agreements. This case encouraged the use of arbitration disregarding unconscionability and preventing states from balancing this power.

***American Express Co., et al. v. Italian Colors Restaurant (2013): Arbitration Costs Can Be High***

On June 20th, 2013, the Supreme Court rules 5-3 that arbitration could be enforced regardless of the cost.

Italian Colors Restaurant and several merchants filed a lawsuit against American Express Company on the basis that the Card Acceptance Agreement violated U.S. antitrust laws. American expressed moved to dismiss and compel arbitration. The Southern NY district court enforced the arbitration clause and dismissed the case. The Court of Appeals for the Secord Circuit held that the arbitration clause, specifically the class action waiver, cannot be enforced because it would protect American Express from antitrust suits. The Supreme Court remanded it back to the lower court, but the appellate court still found the class action waiver unenforceable.

The Court held that the high cost of arbitration is not sufficient to overrule an arbitration clause that prohibits class action suits. Justice Anton Scalia delivered that federal law does not guarantee affordability and that the right to pursue a statutory remedy is not negated simply because individual arbitration is more expensive than they are worth.

Justice Elena Kagan dissented claiming that the purpose of the FAA is to resolve disputes and facilitate compensation of injuries. Others joined the dissent on the basis that the arbitration clause in the American Express form contract counters the purpose of the FAA since it makes them immune from potential federal claims. The dissenting opinion also claimed that it violates the Sherman Act since it prevents parties from challenging allegedly monopolistic conduct.

This case enforced arbitration agreements while ignoring the purpose of the FAA. The arbitration enforced defeats FAA’s purpose is to facilitate compensation. Employees will be discouraged from getting compensation if the arbitration costs are more expensive than what the result would render. This topped off with arbitration favoring employees discourages employees from defending their rights and largely protects employers from accountability. Litigation, on the other hand, would render fairer remedies.

***Epic Systems Corp. v. Lewis (2018): Employers Can Protect Themselves from Class Action***

On May 21st, 2018, the US Supreme Court ruled 5-4 that employers can require individualized arbitration instead of letting them combine as a group to protest wages, hour complaints, and more.

Epic Systems Corporation is a healthcare data management software company based in Wisconsin which requires its employees to undergo individualized arbitration to resolve any disputes. Employees thus had to waive their right to class action. In February 2015, Jacob Lewis sued in federal court both individually and on behalf of other employees with similar claims within Epic on the basis that their rights had been violated under the Fair Labor Standards Act of 1938. Epic moved to dismiss the complaint claiming that employees had waived their right to class action under their arbitration agreement. The district court denied Epic’s motion and held that employees could engage in “concerted activities” under Section Seven of the National Labor Relations Act (NLRA). Thus, Epic was violating their employees’ rights. The US Court of Appeals for the Seventh Circuit affirmed the lower court’s decision and reinforced that the savings clause of the FAA renders that the arbitration agreement could not be enforced if the contract is illegal in the first place. The court found that the waiver of collective proceedings was illegal under the NLRA so the arbitration agreement could not be enforced under the FAA.

The Supreme Court held that the Arbitration Act’s saving clause and the NLRA do not displace the Federal Arbitration Act in which individualized arbitration agreements must be enforced. Justice Neil Gorsuch delivered the majority opinion that the NLRA “does not mention class or collection action procedures” and that the FAA instructed federal courts to enforce arbitration.

Justice Ruth Bader Ginsburg and others dissented claiming that the NLRA seeks to remedy the extreme imbalance between employer and employee and that the FAA should not belittle the NLRA’s “protective sphere.”

 This case further expanded the power gap between employer and employee. It also defeated the purpose of the NLRA to protect employees from their employer, weaking the workforce’s rights.

**Opinion**

Employees should be able to bring their disputes to court. The nature of the arbitration practice gives too much power to employers, leaving their employees largely vulnerable to discrimination and violations.

Particularly, research suggests that this practice is typically present in industries disproportionately composed of black and women employees (Colvin 2018). Whereas employees before had the right to bring their concerns to a court that would likely use strict scrutiny for their concerns under protected classes, employees are now left to arbitrate their concerns under weaker employer-designated procedures and providers that would render less remedies and protect the employer in question.

Although the argument under forced arbitration relies on the employee willingly signing the agreement as a condition and term of their employment, there are instances where workers do not sign this agreement. About 3.5% of establishments adopt arbitration requirements by announcing a change in organization’s employment policies (Colvin 2018). This act appears largely unconscionable. In the future, this may be challenged and influence future decisions against mandatory arbitration.

However, given the substantial power the Court has given employers and the immense expansion of forced arbitration and its anti-class action clauses, it is unlikely that this practice will end anytime soon. Since a series of cases starting in the 1990’s led to commonality of employer-mandated arbitration today, it is likely that a series of cases would also need to crash down the practice.

The NLRA and its protections could question the power that arbitration has gained through the FAA. Future cases could involve how the current application and instructions of the FAA interfere with the NLRA’s protections and how the Court can balance the power between employers and employees.

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