Legal Backgrounder

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Will the High Court Resolve Circuit Split on Class Waivers in Employee Arbitration Agreements?

by Mark A. Perry and Kevin Barber

For more than eight decades, the Federal Arbitration Act (FAA) and the National Labor Relations Act (NLRA) have coexisted in relative harmony. In the last few years, however, questions regarding the enforceability of class-action waivers in employee arbitration agreements have brought these statutes into perceived tension with each other—tension reflected in a growing circuit split. The Supreme Court of the United States is currently considering several petitions for writs of certiorari that present divergent views on how to harmonize the statutes.

The FAA creates a robust default rule that specifies that agreements to arbitrate disputes "shall be valid, irrevocable, and enforceable" in US courts. 9 U.S.C. § 2. Meanwhile, the NLRA guarantees the right of employees to engage in "concerted activities" for their "mutual aid or protection," and declares employer interference with this right to be an "unfair labor practice" subject to the NLRA's remedial regime. 29 U.S.C. §§ 157, 158(a)(1). While these two federal statutes are both of considerable import, they initially seem to have rather little to do with each other.

But suppose an employee signs an arbitration agreement, as many do, that includes the following clause: "All employment disputes between Employer and Employee must be submitted to binding arbitration on an individual basis and may not be litigated or arbitrated in a class action." What happens if an aggrieved employee, despite having signed this arbitration agreement, files a putative class-action lawsuit against the employer?

When viewed through the lens of the FAA, this is not a particularly difficult question: The arbitration clause itself is enforceable, as is the attendant prohibition on proceeding via class action. The Supreme Court has observed, in enforcing such a provision, that "[t]he class-action waiver merely limits arbitration to the two contracting parties." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013). And this principle has been applied in the employment context. *See, e.g.*, *Cohen v. UBS Fin. Servs., Inc.*, 799 F.3d 174, 179–80 (2d Cir. 2015).

Posing the question through the perspective of the NLRA, however, some employees have argued that a class waiver interferes with their right to take concerted action with coworkers for their "mutual aid or protection." They point out that the Supreme Court has said that the right to take concerted action protects employees' efforts to "improve working conditions through resort to administrative and judicial forums." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978).

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How the Circuit Split Developed

The current imbroglio began in 2012, when the National Labor Relations Board (NLRB) decided that employers violate the NLRA when they require "employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims … against the employer in any forum, arbitral or judicial." *In re D. R. Horton, Inc.*, 357 N.L.R.B. 2277, 2277 (2012). NLRB reasoned that such provisions conflict with the NLRA because they impair employees' "substantive right to engage in concerted activity aimed at improving wages, hours or working conditions through litigation or arbitration." *Id.* at 2281. The FAA posed no obstacle, NLRB continued, because invalidating class waivers in arbitration agreements does not disadvantage arbitration in particular; rather, it vindicates employees' substantive right to act collectively in *any* forum, arbitral or judicial. *See id.* at 2285–86.

NLRB's decision in *D. R. Horton* did not initially receive a warm welcome from federal appellate courts. On a petition for enforcement in *D. R. Horton* itself, the U.S. Court of Appeals for the Fifth Circuit rejected NLRB's view and upheld the collective-action waiver under the NLRA. *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). Both the Eighth and Second Circuits had already taken an approach similar to that of the Fifth Circuit majority:

> **Eighth Circuit**. The Eighth Circuit had expressly rejected NLRB's approach in *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013). Although the court noted that that NLRB's ruling in *D. R. Horton* was distinguishable on its facts (because, for example, the agreement at issue in *Owen* did not bar collective resort to administrative agencies like NLRB), it also indicated that it would not follow *D. R. Horton* even if it were factually apposite. *See id.* at 1053–54.
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> **Second Circuit**. In a unanimous opinion, the Second Circuit held that the Fair Labor Standards Act, another federal statute that protects employees' right to collectively litigate against their employers (29 U.S.C. § 16(b)), does not bar enforcement of a class-action waiver provision. *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) (per curiam). In so holding, the court explicitly agreed with the Eighth Circuit's decision not to follow NLRB's lead in *D. R. Horton*. *See id.* at 297 n.8.
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> **Fifth Circuit**. The Fifth Circuit adhered to its holding in *D. R. Horton* and reaffirmed its rejection of NLRB's view in *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015) ("Murphy Oil committed no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing the arbitration agreements at issue here."), and in *Employers Resource v. NLRB*, No. 16-60034, 2016 WL 6471215 (5th Cir. Nov. 1, 2016) (per curiam).

In 2016, however, two other courts of appeals created a circuit split by refusing to enforce class-action waivers in cases brought by employees subject to the NLRA:

> **Seventh Circuit**. First, in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), the Seventh Circuit affirmed a district court's refusal to enforce a class-action waiver. After holding that such waivers are inconsistent with the NLRA, the court concluded that the FAA does not dictate otherwise because its "saving clause" allows arbitration agreements to be invalidated by generally applicable contract defenses, like illegality. *See id.* at 1156; *see also* 9 U.S.C. § 2 (providing that arbitration provisions are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract").

Ninth Circuit. The Ninth Circuit took a similar approach in *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), holding that the FAA's saving clause applies and resolves any tension between the FAA and the NLRA in favor of invalidating class-action waivers. *See id.* at 984–86. Judge Ikuta dissented, defending the reasoning of the Second, Fifth, and Eighth Circuits as "consistent with Supreme Court precedent." *Id.* at 998.

Split Cited in Four Pending Cert Petitions

As these sharply conflicting decisions suggest, the debate over the enforceability of class waivers in employee arbitration agreements is far from over. For example, in a recent unpublished decision, a panel of the Second Circuit expressed doubts about that court's own decision in *Sutherland*. *Patterson v. Raymours Furniture Co.*, No. 15-2820, 2016 WL 4598542, at *2 (2d Cir. Sept. 2, 2016) ("If we were writing on a clean slate, we might well be persuaded ... to join the Seventh and Ninth Circuits and hold that the ... waiver of collective action is unenforceable."). Another recent decision in the District of Maine declined to enforce a class-action waiver, providing an opportunity for the First Circuit to deepen the circuit split. *Curtis v. Contract Mgmt. Servs.*, No. 15-487, 2016 WL 5477568 (D. Me. Sept. 29, 2016).

This kind of split would normally be an ideal candidate for Supreme Court resolution. There is now a clear-cut difference of opinion among the circuits on a pure legal question, and it has resulted in a geographic inconsistency in federal law with real-world consequences. (Consider the predicament of nationwide employers whose employment contracts may or may not be enforceable depending on the circuit in which a dispute arises.)

In a perfect storm, four pending petitions for writs of certiorari—two from each side of the split—ask the Court to resolve this question. Petitions have been filed by the employers in the *Lewis* and *Morris* cases (Nos. 16-285 and 16-300), while an employee and the Solicitor General (on behalf of NLRB) have sought certiorari in *Murphy Oil* and *Patterson* (Nos. 16-307 and 16-388). Whether the Court will actually grant one or more of these petitions anytime soon is far from clear.

Supreme Court Precedents Favor the Employers' Arguments

The case for enforcing class- and collective-action waivers in arbitration agreements is straightforward. As the Supreme Court so often notes, the FAA embodies "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Like that of any federal statute, the FAA's mandate can be overridden by a "contrary congressional command," *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987), but the Court has indicated that such a command must be quite specific, *see CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 673 (2012) (listing as examples statutes expressly mentioning arbitration).

It is unlikely that the NLRA supplants the FAA with the specificity required. The relevant section of the NLRA does not even mention arbitration or classwide dispute resolution, let alone specifically articulate a congressional intent to preclude enforcement of class-action waivers. *See* 29 U.S.C. § 157. Add to this the fact that federal labor policy actually "favors and promotes arbitration," *Morris*, 834 F.3d at 984, and it becomes difficult to see how the NLRA could constitute a "contrary congressional command" abrogating collective-action waivers in arbitration agreements. *Shearson/Am. Express Inc.*, 482 U.S. at 226.

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In case after case, however, employees have answered these points by insisting that they seek to avoid not arbitration per se but rather individualized proceedings in *any* forum, because such proceedings lack the benefits of concerted action. *See, e.g.*, *Morris*, 834 F.3d at 985 n.7. Since they assert a right that does not specifically burden arbitration, the argument goes, there is simply no conflict with the FAA at all. *See, e.g.*, *Lewis*, 823 F.3d at 1157–59.

The Supreme Court rejected an argument virtually indistinguishable from this one in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). There, California courts had devised a rule that collective-action waivers are generally unconscionable and unenforceable as a matter of state contract law. *See id.* at 340–41. The Supreme Court held that the California rule was inconsistent with and preempted by the FAA even though the rule was ostensibly "generally applicable" to all contracts, not just arbitration agreements. *Id.* at 341. The majority pointed out, among other things, that classwide procedures are especially "poorly suited" to arbitration, meaning the California rule was likely to have a "disproportionate impact on arbitration agreements." *Id.* at 342, 350.

Concepcion strongly undercuts the best argument for invalidating class waivers in arbitration agreements under the NLRA—the notion that doing so would not specifically target arbitration in violation of the FAA. Employers might therefore have reason to be hopeful that the Supreme Court will grant certiorari and hold that courts must enforce such waivers under the FAA.

Resolution at Supreme Court Not Foregone Conclusion

This issue might not be resolved anytime soon, however. Justice Scalia wrote for a bare majority of five justices in both *Concepcion* and the follow-on *Italian Colors* case. With Justice Scalia's passing, it is all too likely that the short-handed Court would deadlock 4-4 on the enforceability of class waivers in this context. Affirmance by an equally divided Court would be nonprecedential, wasting judicial resources and an opportunity to provide clarity to American employers and their workers. It may very well be, therefore, that the Court will take a pass on the current batch of petitions—or hold them until a ninth justice has been confirmed.

The legal community should continue to watch courts grapple with the enforceability of class-action waivers, but with the understanding that a definitive resolution to this contentious legal debate may come later rather than sooner. For this reason, every case presenting this issue now pending in federal court has the potential to go all the way to the Supreme Court.

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