Class and Collective Action Waivers in Employer Arbitration Agreements

Mitchell Boyarsky and Elizabeth Cowit

New Jersey Law Journal, November 7, 2016

Agreements requiring employees to submit employment disputes to arbitrators rather than courts are common in today's workplaces but have faced legal challenge with inconsistent results. Employers, including those in New Jersey, regularly incorporate class and collective action waivers into such agreements, prohibiting employees who bring claims against their employers from pursuing such claims on a class or collective basis and instead providing for single-claimant arbitration hearings.

Although challenges asserted against the waivers have been grounded in various legal theories, the challenge gaining the most traction is based on the National Relations Labor Act (NLRA). Beginning in January 2012 and continuing through the present, the National Labor Relations Board (NLRB or "the board") issued rulings striking down class and collective action waivers as violating the NLRA. There is a split in the circuit courts regarding this issue, and three recent petitions for review to the United States Supreme Court set the stage for a high-profile showdown.

'D.R. Horton'

On Jan. 3, 2012, the NLRB issued its decision in *D.R. Horton*, 357 N.L.R.B. 184 (2012), and barred the use of class action waivers in employment arbitration agreements. The board focused on Section 7 of the NLRA, providing "employees shall have the right to engage in … concerted activities for the purpose of collective bargaining or other mutual aid or protection," and found that such "mutual aid or protection" included employees' "efforts to improve their terms and conditions of employment"—outside the employee-employer relationship, including through class or collective actions. The board held that requiring employees to forego class or collective claims restricts their substantive NLRA Section 7 protected rights, in violation of Section 8(a)(1) of the NLRA, and that, due to the unlawfulness of the waiver, the Federal Arbitration Act's (FAA) savings clause (which allows for harmonizing inconsistent statutes) applied to allow the NLRA to override the FAA.

On review, in *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013), the Fifth Circuit rejected the board's analysis. The circuit found that the FAA requires arbitration agreements to be enforced

according to their terms unless invalidated by the FAA's saving clause or another statute's "contrary congressional command." The FAA's saving clause provides that "a written provision in any … contract …to settle by arbitration a controversy … arising [from] such contract … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.*, at 358-59.

The court, noting the strong federal policy favoring arbitration, held that the right to pursue collective action is *procedural*, not substantive, and rejected the NLRB's determination that the agreement at issue violated the NLRA, thus triggering the savings clause. The circuit further determined that the NLRA did not contain any "contrary congressional command," such as specific language or legislative history, disavowing arbitration or providing any basis to override the FAA. *Id.* at 360-62. The circuit rejected the NLRB's position that an arbitration agreement violated employee rights to engage in protected activity but agreed with the NLRB that the D.R. Horton agreement contained language that violated Section 8(a)(1) because it could cause employees to believe they were not able to file an unfair labor practice (ULP) charge with the NLRB.

The Fifth Circuit's decision in *D.R. Horton* and the board's disagreement with that decision set the stage for *Murphy Oil v. National Labor Relations Board,* 808 F3d 1013 (5th Cir. 2015),where two versions of the employer's arbitration agreement were analyzed. The first, which predated the board's *D.R. Horton* decision, required workers to resolve all employment related claims on an individual basis "by binding arbitration" and waive their rights to bring class/collective claims. The second, issued after that decision, carved out an exception to arbitration by allowing employees to bring ULP proceedings—thereby correcting the flaw the Fifth Circuit previously identified in *D.R. Horton*. The court found that the carve-out for ULP proceedings in the second version of the agreement was sufficient, although it agreed with the NLRB that the first version, which had no carve-out, would likely have a chilling effect on employee's rights. *Id.*, at 1019-20.

Federal Appeals Courts Consistently Upheld Class and Collective Waivers, 2013 - 2015
In August 2013, the Second Circuit, in *Sutherland v. Ernst & Young,* 726 F.3d 290 (2d Cir. 2013), upheld the enforceability of class action waivers in arbitration agreements. There, the plaintiff agreed to submit all employment disputes to the company's Common Ground Dispute Resolution Program, which mandated arbitration and barred class and collective proceedings. Sutherland filed a class action in federal court against Ernst & Young (E&Y) alleging federal and state overtime claims. The district court denied E&Y's motion to compel arbitration, based on the

plaintiff's argument that the waiver was unenforceable under the "effective vindication doctrine" due to the significant costs involved in pursuing individual claims as compared to the recovery sought and deprivation of economic incentive to pursue individual claims.

The Second Circuit rejected this argument based on *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (overruling prior Second Circuit authority), in which the Supreme Court held that the mere cost of proceeding individually was insufficient to invalidate a class action waiver. *Id.* at 2310-12 (citations omitted). The circuit also analyzed whether the FLSA contained any "contrary command" barring class action waivers. The court, stating that nothing in the FLSA "evince[s] an intention to preclude" class action waivers, along with Supreme Court precedent consistently upholding such waivers, found no such "contrary command." The Second Circuit also rejected the plaintiff's alternate argument that the board's decision in *D.R. Horton* invalidated the waiver as unlawful under the NLRA. The circuit disregarded the board's earlier decision, in part because its *D.R. Horton* decision advocated a position using federal laws and policies unrelated to the NLRA. *See Sutherland*, 726 F.3d 290, 297 fn. 8. *See also Owen v. Bristol Care,* 703 F3d. 1050 (8th Cir. 2013).

Federal Appeals Court Rulings in 2016 Created a Circuit Split

Despite decisions since 2013 by the Second, Fifth and Eighth Circuits upholding waivers, rulings this year by the Seventh and Ninth Circuits created a split in authority, which may change the scope of workplace arbitration. In May, the Seventh Circuit decided *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), becoming the first federal appeals court to rule that an agreement requiring employees to arbitrate wage and hour claims exclusively on an individual basis is unenforceable.

The plaintiff in *Epic* filed a collective action alleging claims for overtime on behalf of himself and co-workers. The employer moved to compel arbitration based on the parties' agreement to elect arbitration and to bar class and collective claims in any forum. The district court denied the motion, and the employer appealed. The Seventh Circuit interpreted NLRA Section 7's "text history and purpose" to find that collective actions constituted "concerted activity," and a waiver restricted the employees' protected rights. The circuit, agreeing with prior board decisions, ruled that the right to pursue collective action was "substantive," which the waiver unlawfully proscribed, and not resuscitated by the FAA's savings clause because the FAA and NLRA are not inconsistent. *Epic,* at 1160-61.

In August, in *Morris v. Ernst & Young*, the Ninth Circuit joined the Seventh Circuit in holding that class action waiver prohibitions in arbitration agreements governing employment disputes are illegal under the NLRA, because they interfere with employees' Section 7 rights to engage in concerted activity. There, E&Y required employees to sign agreements requiring them to pursue all claims against the company through arbitration and not join other employees in bringing claims. Despite signing an arbitration agreement with a waiver provision, Morris filed a federal class and collection action complaint asserting wage claims against E&Y. The district court issued an order compelling individual arbitration, and the plaintiff appealed. On appeal, the Ninth Circuit held that class or collective actions constitute "concerted activities" within Section 7's scope, and, therefore, E&Y's waiver agreement unlawfully interfered with employees' protected rights in violation of NLRA Section 8. The court noted that the NLRB had reached the same conclusion in its 2012 *D.R. Horton* decision, as had the Seventh Circuit in *Epic.*

In September, the Second Circuit again addressed the enforceability of class and collective action waivers in *Patterson v. Raymours Furniture Co.*,2016 WL 4598542 (2d Cir. Sept. 2, 2016). Similarly, the appeal primarily considered whether the waiver violated the NLRA. The circuit, following its *Sutherland* decision, concluded the waiver did not violate the NLRA and upheld the agreement. The court, however, suggested that, were it not constrained by the *Sutherland* decision, a different result might be possible. The Eighth Circuit similarly sided with the Second Circuit more recently. *See Cellular Sales of Missouri v. NLRB*, 824 F. 3d 772.

The Uncertain State of the Law

Currently, petitions to the Supreme Court on the waiver issue are pending in *Epic*, *Morris* and *Murphy's Oil*, and the irreconcilable circuit split is positioning the Supreme Court to ultimately decide the issue and resolve the uncertainty for employers and employees alike. For now, employers within the Second, Fifth and Eighth Circuits can require waivers of class and collective actions in their arbitration agreements, while those in the Seventh and Ninth Circuits should not. Employers in other jurisdictions who continue to rely on waivers in arbitration agreements may incur challenges by employees seeking to bring class/collective claims, and/or by the NLRB. In addition, employers operating nationally across jurisdictions may be subject to different rules depending on where litigation is commenced.