New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 256—NO. 12
TUESDAY, JULY 19, 2016

ARBITRATION

Expert Analysis

Arbitration Provision Barring Class Action Ruled Void

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On May 26, the U.S. Court of Appeals for the Seventh Circuit in *Lewis v. Epic Systems*[1] issued the first appellate decision to agree with the National Labor Relations Board (NLRB) that §7 of the National Labor Relations Act (NLRA) bars employers from requiring as a condition of employment that employees agree to an arbitration provision precluding class or collective actions. *Epic Systems* sets up a conflict with other courts of appeals, which have held that the NLRB's rule clashes with the Federal Arbitration Act (FAA).

The NLRB's position was first announced in *D.R. Horton*.[2] In that case, the agency reasoned that §7 protects the rights of all employees to engage in "concerted activity," which includes resort to a class forum for addressing work complaints, and prohibits an employer's insistence on an arbitration agreement requiring employees to waive their rights to file class or collective actions.

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The U.S. Court of Appeals for the Fifth Circuit denied enforcement of the NLRB's order in *D.R. Horton*,[3] explaining that the availability of class actions is a procedural right that gives way to the FAA, which requires enforcement of arbitration clauses according to their terms. In the Fifth Circuit's view, §7 of the NLRA did not constitute a clear "contrary congressional command" overriding the FAA in the case of class action waivers, and…any doubts are required to be resolved "in favor of arbitration."

'Epic Systems'

Epic Systems, a non-union healthcare software company, required Jacob Lewis, a technical writer, and other employees to sign an arbitration agreement under which they waived "the right to participate in or receive money or any other relief from any class, collective, or representative proceeding" with respect to wage and hour claims. Lewis subsequently resigned his employment and brought a wage and hour claim in federal court alleging that Epic had misclassified him and other technical writers as exempt from overtime pay.

When Epic moved to dismiss the claim and compel individual arbitration, Lewis argued that the arbitration agreement was unenforceable because it interfered with the rights of employees to engage in "other

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concerted activities for the purpose of collective bargaining or other mutual aid or protection" under §7 of the NLRA.

Deferring to the NLRB's reasoning in *D.R. Horton*, the district court denied Epic's motion to compel arbitration. On appeal, the Seventh Circuit, in an opinion by Chief Judge Diane Wood, affirmed. The panel held that the arbitration clause was unenforceable because it violated Lewis' substantive rights under §7. The court noted that "Congress was aware of class, representative, and collective legal proceedings when it enacted the NLRA," that "[t]he plain language of [§]7 encompasses them," and that "there is no evidence that Congress intended them to be excluded." It further noted that such rights were clearly "substantive" given that "[§]7 is the NLRA's only substantive provision," as "[e]very other provision of the statute serves to enforce the rights [§]7 protects."

Epic argued, however, that the NLRA contained no clear "contrary congressional command" against wage and hour class action waivers, and that the FAA therefore trumped the NLRA. The court's response to this was that neither statute trumped the other. Rather, the two fit "hand in glove." For this assertion, the court cited the FAA's savings clause, which states that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract," including "illegality." The court concluded that because the arbitration agreement was illegal under §7 of the NLRA, it fell within the FAA savings clause for non-enforcement.

The Circuit Split

The Seventh Circuit's decision is plainly in conflict with the Fifth Circuit's decision in *D.R. Horton*, and, as the panel itself noted, with the Ninth Circuit's decision in *Johnmohammadi v. Bloomingdale's*.[4] It is also a marked departure from decisions in other circuits which, while not addressing the NLRA, have held class waiver provisions enforceable under the FAA in wage and hour and other statutory contexts.

These latter decisions are based on the Supreme Court's reasoning in *AT&T Mobility v. Concepcion*[5] that requiring class-wide arbitration when the arbitration agreement itself bars class procedures "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." In *Epic Systems*, the court distinguished *Concepcion* as a consumer contract case involving state law, whereas the NLRA is a federal statute that must be treated on "equal footing" with the FAA.

Implications

The Seventh Circuit's decision creates a number of unresolved issues. Whether the NLRB has authority to regulate arbitration agreements in the non-union sector remains an open question. The agency has authority under §7 of the NLRA to protect employees who attempt to file class actions or give testimony in such actions, but it is unclear whether the provision extends to ensuring the availability of a class forum that is otherwise not legally available. If the agency is assumed to have this authority, then the question is whether the agency's rule creates a federal statutory substantive right overriding the FAA.

In light of *Epic Systems*, employers should review their arbitration programs and consider both whether to include a carve-out for the NLRA as well as the scope of any class action waiver provision. Consideration also should be given to not requiring arbitration and the accompanying waiver provision as a condition of employment, but rather allowing initial hires an opportunity to opt out of the clause.

1. No. 15-2997 (7th Cir. May 26, 2016).

2. *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012).

3. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).

4. 755 F.3d 1072, 1077 (9th Cir. 2014).

5. 563 U.S. 333, 339 (2011).

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