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Fifth Circuit Reverses NLRB (National Labor Relations Board) Ruling in D.R. Horton

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In reversing the NLRB's determination that D.R. Horton, the national home-builder, violated the **National Labor Relations Act ("NLRA")** by requiring employees to sign an arbitration agreement that prohibited them from pursuing claims in class or collective actions, the Fifth Circuit held that "the Board's decision did not give proper weight to the **Federal Arbitration Act**," which encourages the speedy resolution of claims through individual arbitration. However, the court upheld the Board's determination on requiring Horton to clarify with employees that the arbitration agreement did not eliminate their rights to pursue claims of unfair labor practices with the Board. For those employers with a unionized workforce who have been following the *D.R. Horton* saga, the Fifth Circuit's ruling was largely not unexpected. Nevertheless, these employers now can take their long-awaited sigh of relief as this issue, for all intents and purposes, has been put to rest.

Background – Factual and Procedural History

Over the last couple of years, the U.S. Supreme Court and the federal circuit and district courts, have placed their imprimatur on the enforceability of class and

collective action waivers. The last vestige of resistance to their enforceability has been with the National Labor Relations Board ("NLRB"). In January 2012, the Board handed down its controversial decision in *D.R. Horton* where it concluded that a class action waiver contained in an arbitration agreement violated Sections 7 and 8(a)(1) of the NLRA by requiring employees to sign agreements which precluded them from filing class or collective claims against their employer addressing their wages, hours worked, or other working conditions in any forum, arbitral or otherwise. The Board determined that an agreement prohibiting class or collective claims interfered with the exercise of employees' substantive rights under Section 7 of the NLRA, which allows employees to act in concert with each other. Because the NLRA protects the right of employees to "join together to pursue workplace grievances, including through litigation and arbitration," the Board concluded that the "individual who files a class or collective action . . ., whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by [the NLRA]." The Board also held that Horton committed an unfair labor practice under NLRA Section 8 by requiring employees to agree not to act in concert in administrative proceedings.

Arguments on Appeal

On appeal, Horton argued that the NLRA did not grant employees the substantive right to adjudicate claims collectively. Horton also argued that the Board's interpretation of Sections 7 and 8 of the NLRA impermissibly conflicted with the Federal Arbitration Act ("FAA") by prohibiting the enforcement of the arbitration agreement. The NLRB countered by arguing that the policy behind the NLRA trumped the different policy considerations in the FAA that supported the enforcement of arbitration agreements.

Fifth Circuit's Discussion and Analysis

The Fifth Circuit framed the issue narrowly: "do the rights of collective action embodied in [the NLRA] make it distinguishable from . . . all other statutes that have been found to give way to requirements of arbitration . . . [T]he answer is "no." " In reaching its conclusion to reverse the NLRB's determination, the Fifth Circuit found the use of class action procedures not a substantive right, as argued by the Board, but a procedural one only. The Fifth Circuit found the Board's determination to run counter to the principles outlined in the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* (2011), which held that the FAA preempts state laws that prohibit contracts that disallow class arbitration. For the Fifth Circuit, requiring availability of class actions "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA . . . Requiring a class mechanism is an actual impediment to arbitration and violates the FAA. The saving clause [relied upon by Board] is not a basis for invalidating the waiver of class procedures in the arbitration agreement."

The Fifth Circuit also concluded that there was no basis in the NLRA's text or legislative history to glean a congressional command to override the FAA. The Fifth Circuit concluded the NLRA not only permits but requires arbitration, and there was no inherent conflict between the NLRA and the FAA.

However, the Fifth Circuit sided with the Board as to whether the language in the arbitration agreement may violate the NLRA by discouraging employees from filing unfair labor practice claims with the Board under Section 8(a)(1) of the NLRA. Based on the language of the arbitration agreement, the Fifth Circuit concluded, "[t]he reasonable impression could be created that an employee is waiving not just his trial rights, but his administrative rights as well."

One judge offered a short dissent approving of the Board's determination that the NLRA did not conflict with FAA and concluded that the arbitration agreement interferes with the exercise of employees' substantive rights under Section 7 of NLRA of the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Takeaway

Although the *D.R. Horton* saga will continue a little while longer as the Board will surely petition for a writ of certiorari with the Supreme Court, it now appears to be the settled law of the land that class action waivers in the labor and employment context, at least with respect to those waivers contained in arbitration agreements, are enforceable.