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Appellate Courts Set the Supreme Court Stage for Waiver Showdown?

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Many of our readers are no strangers to the ongoing legal battle over the enforcement of arbitration agreements containing class action waivers. While the National Labor Relations Board (NLRB) has steadfastly maintained its position that such agreements interfere with employees' rights to engage in protected concerted activity under the National Labor Relations Act (NLRA), federal courts have largely refused to endorse the NLRB's view; and because the federal appellate courts had taken a consistent view of the issue, to this point, the Supreme Court has shown no inclination to enter the fray.

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That is, until now.

Late last month, the United States Court of Appeals for the Seventh Circuit (covering Illinois, Indiana, and Wisconsin) went against the prevailing federal court tides and concluded that class action waivers in mandatory arbitration clauses are unenforceable. In so ruling, the Seventh Circuit declined to follow two rulings from the United States Court of Appeals for the Fifth Circuit (covering Louisiana, Mississippi, and Texas) finding that the Federal Arbitration Act (FAA) permits mandatory class action waivers in arbitration agreements. The NLRB then immediately took this ruling to argue in a brief filed in a case pending before the United States Court of Appeals for the D.C. Circuit that class action waivers violate federal law. But just one day later, the United States Court of Appeals for the Eighth Circuit (covering Arkansas, Iowa, Minnesota, Missouri, Nebraska, and North and South Dakota) issued an opinion concurring with the Fifth Circuit's position and its own previous decision that such class waivers are valid.

In other words, it has been a busy two weeks on the arbitration and class action waiver front.

In its ruling contradicting other circuits, the Seventh Circuit largely rubber stamped the NLRB's broad reading of "concerted activity" in Section 7 of the NLRA, such that requiring an employee to sign a class action waiver violates the employee's right to engage in concerted activity. The Seventh Circuit also found its ruling is consistent with the FAA because a mandatory class action waiver provision is illegal, and that illegality means courts are not obligated to enforce arbitration agreements with waivers because the FAA's "savings clause" does not require enforcement of agreements subject to traditional equitable defenses. The Seventh Circuit's conclusion directly contradicts the Fifth Circuit's, and now the Eight Circuit's, view that the NLRA does not oppose individual arbitration either in text or in policy, and that the NLRA does not intend to protect the modern class action not in existence at the time of the NLRA's reenactment.

Given the sudden tension between appellate courts (and the fact that the NLRB has already shown for years it will refuse to adhere to federal appellate opinions on the class action waiver issue, and will only be emboldened by the Seventh Circuit decision), it suddenly seems this issue is far more likely to land in front of the Supreme Court. In the meantime, employers wondering whether required class action waivers are enforceable in arbitration clauses may have to answer this question based on what federal circuit they operate within, and hope that the Supreme Court will settle the score between the courts' opposing interpretations of the NLRA and the FAA.