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## **U.S. Supreme Court to Review Rulings Regarding Inclusion of Class Action Waivers in Mandatory Arbitration Agreements Between Employers and Employees**

On January 13, 2017, the United States Supreme Court agreed to review decisions from three separate Circuit Courts of Appeal that reached different conclusions regarding whether class action waivers in mandatory employment arbitration agreements violate federal law. Specifically, *certiorari* was granted in the Fifth Circuit case of *Murphy Oil USA, Inc. v. National Labor Relations Board*;

<sup>1</sup> the Seventh Circuit case of *Lewis v. Epic Systems Corp.*;<sup>2</sup> and the Ninth Circuit case of *Morris v. Ernst & Young, LLP*<sup>3</sup> to address the question of whether the Federal Arbitration Act (“FAA”) requires the enforcement of class action waivers in employment arbitration agreements notwithstanding the prohibition against employers interfering with employees’ exercise of their rights under the National Labor Relations Act (“NLRA”).

As the Supreme Court has made clear, the FAA “is a congressional declaration of a liberal federal policy favoring arbitration agreements,”<sup>4</sup> passed in order to “overcome judicial resistance to arbitration.”<sup>5</sup> Thus, the FAA generally requires courts to enforce arbitration agreements, unless “grounds . . . exist at law or in equity for the revocation of” the arbitration agreement.<sup>6</sup> The “clear intent” behind the FAA is “to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible,”<sup>7</sup> in recognition of the parties’ agreement to trade “the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”<sup>8</sup>

The scope of the procedural rights implicated by the FAA’s policy in favor of arbitration has increased significantly in recent years. In 2011, in *AT&T Mobility LLC v. Concepcion*, the Supreme Court held that class action waivers included within mandatory arbitration agreements between businesses and consumers could not be held unconscionable as a matter of state law.<sup>9</sup> As the majority explained, the FAA “requires courts to compel arbitration ‘in accordance with the terms of the agreement,’” which “afford[s] parties discretion in designing arbitration processes” to “allow for efficient, streamlined procedures tailored to the type of dispute” at issue.<sup>10</sup> Accordingly, the Supreme Court concluded in *Concepcion* that “[r]equiring the availability of classwide arbitration” would “create[] a scheme inconsistent with the FAA.”<sup>11</sup> Since *Concepcion*, mandatory arbitration agreements containing class action waivers have proliferated in a wide variety of contracts and have been the subject of significant controversy and criticism, ranging from the popular press and legal academia to all levels of the judiciary.<sup>12</sup>

Each of the cases in which the Supreme Court recently granted *certiorari* addresses the inclusion of class action waivers in mandatory arbitration agreements between employees and employers. In that context, courts have sought to reconcile the FAA's mandate that arbitration agreements must be enforced with Section 7 of the NLRA, which provides employees with certain enumerated rights in addition to a generalized right "to engage in other concerted activities for the purpose of . . . mutual aid or protection."<sup>13</sup> The NLRA further provides that it is "an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees" in the exercise of their rights under Section 7,<sup>14</sup> making contracts renouncing such rights illegal and unenforceable.<sup>15</sup>

In *In re D.R. Horton, Inc.*, the forerunner of the Fifth Circuit *Murphy Oil* case taken up by the Supreme Court for review, the National Labor Relations Board held that employment agreements containing mandatory arbitration provisions with class action waivers "unlawfully restrict[] employees' Section 7 right to engage in concerted action" because the NLRA protects "employees' ability to join together to pursue workplace grievances . . . through litigation."<sup>16</sup> The Board further reasoned that this determination did not conflict with the FAA because, under that statute, arbitration agreements are not enforceable where they would "require a party to 'forgo the substantive rights afforded by [another] statute,'" including the NLRA.<sup>17</sup> Accordingly, the Board determined that any contract depriving employees of their right to bring class or collective actions against their employer violates Section 7 of the NLRA and therefore cannot be enforced under the FAA.

That case was appealed to the Fifth Circuit, which concluded that the Board erred because it did not give proper weight to the FAA.<sup>18</sup> The Fifth Circuit explained that while the Board's reasoning was "facially neutral," *Concepcion* had established that "[r]equiring a class mechanism is an actual impediment to arbitration" that impermissibly "violates the FAA."<sup>19</sup> The Fifth Circuit went on to determine that the NLRA did not preempt the FAA's application in this context because there was no "inherent conflict" between the two statutes, and "[n]either the NLRA's statutory text nor its legislative history contain a congressional command against application of the FAA" with respect to employment agreements.<sup>20</sup> In reaching that conclusion, the Fifth Circuit noted the "importance" of the fact that the NLRA was enacted "prior to the advent in 1966 of modern class action practice," such that there was "limited force" to arguments that the NLRA was meant to "protect[] a right of access to a procedure that did not exist" at the time of its enactment.<sup>21</sup> The Fifth Circuit subsequently reaffirmed that holding in *Murphy Oil*,<sup>22</sup> in which the Supreme Court recently granted *certiorari*.

The Seventh Circuit addressed the same issue in *Lewis*, but came to the opposite conclusion, holding that an arbitration agreement violates the NLRA and is unenforceable under the FAA if it does not "permit collective arbitration or collective action in any other forum."<sup>23</sup> Noting that the National Labor Relations Board's "interpretation of ambiguous provisions of the NLRA are entitled to judicial deference," the Seventh Circuit explained that the Board's *D.R. Horton* opinion "must" be followed because it was, "at a minimum, a sensible way to understand the statutory language."<sup>24</sup> *Lewis* went on to critique the Fifth

Circuit's contrary determination, explaining that the NLRA "restrain[s] employers from interfering with employees engaging in concerted activities" by seeking to preclude class or collective actions, but does not conflict with the FAA because it does not "mandate class arbitration" and, in fact, "say[s] nothing about class arbitration, or even arbitration generally."<sup>25</sup> Furthermore, the Seventh Circuit faulted the Fifth Circuit for making "no effort to harmonize the FAA and NLRA," explaining that "courts are not supposed to go out *looking* for trouble" and "may not 'pick and choose among congressional enactments.'"<sup>26</sup> The Ninth Circuit subsequently agreed with the Seventh Circuit in its *Morris* decision. Although *Morris* included a footnote recognizing that there is a circuit split, it described the Seventh Circuit as "the only one that has engaged substantively with the relevant arguments."<sup>27</sup>

The Supreme Court's determination as to whether the NLRA and FAA conflict with one another in the context of class action waivers in mandatory employment agreements and, if so, its prescription for how to resolve that conflict will have significant practical implications for all companies that include arbitration agreements in their employment contracts. Moreover, these cases will also present the Supreme Court with its first significant decision regarding arbitration since the passing of Justice Scalia, who authored several of the Court's recent arbitration opinions on behalf of five-justice majorities, including *Concepcion*. Accordingly, these rulings may be a harbinger of how willing the Supreme Court will be to enforce arbitration agreements going forward. We anticipate that the Supreme Court will hear oral argument by the Spring and will issue an opinion by the end of June.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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<sup>1</sup> 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, No. 16-307, 2017 WL 125666 (U.S. Jan. 13, 2017).  
<sup>2</sup> 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, No. 16-285, 2017 WL 125664 (U.S. Jan. 13, 2017).  
<sup>3</sup> 834 F.3d 975 (9th Cir. 2016), *cert. granted*, No. 16-300, 2017 WL 125665 (U.S. Jan. 13, 2017).  
<sup>4</sup> *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983).  
<sup>5</sup> *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).  
<sup>6</sup> 9 U.S.C. § 2.  
<sup>7</sup> *Moses H. Cone*, 460 U.S. at 22.  
<sup>8</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).  
<sup>9</sup> 563 U.S. 333 (2011).  
<sup>10</sup> *Id.* at 344 (quoting 9 U.S.C. § 4).  
<sup>11</sup> *Id.*  
<sup>12</sup> *See, e.g., Carr v. Credit One Bank*, No. 15 Civ. 6663, 2015 WL 9077314, at \*4 (S.D.N.Y. Dec. 16, 2015) (citing criticism in the New York Times, Yale Law Journal and from Justice Ginsburg).  
<sup>13</sup> 29 U.S.C. § 157.  
<sup>14</sup> 29 U.S.C. § 158(a)(1).  
<sup>15</sup> *See, e.g., J.I. Case Co. v. Nat'l Labor Relations Bd.*, 321 U.S. 332, 337 (1944); *Nat'l Licorice Co. v. Nat'l Labor Relations Bd.*, 309 U.S. 350, 361 (1940).  
<sup>16</sup> 57 NLRB No. 187, at \*1, \*3 (2012).  
<sup>17</sup> *Id.* at \*12 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).  
<sup>18</sup> *D.R. Horton Inc. v. Nat'l Labor Relations Bd.*, 737 F.3d 344, 348 (5th Cir. 2013).  
<sup>19</sup> *Id.* at 359-60.  
<sup>20</sup> *Id.* at 361.  
<sup>21</sup> *Id.* at 362.  
<sup>22</sup> *See* 808 F.3d at 1018.  
<sup>23</sup> 823 F.3d at 1151.  
<sup>24</sup> *Id.* at 1153 (quotations omitted).  
<sup>25</sup> *Id.* at 1159.  
<sup>26</sup> *Id.* at 1158 (emphasis in original, quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).  
<sup>27</sup> 834 F.3d at 990 n.16.