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A Growing Consensus In Favor Of Labor Arbitration

Law360, New York (December 06, 2013, 1:24 PM ET) -- We have frequently chronicled the ongoing efforts of the plaintiffs' bar to circumvent the U.S. Supreme Court's decision in AT&T Mobility LLC v. Concepcion, which held that the Federal Arbitration Act requires the enforcement of parties' agreements to resolve their disputes through individual arbitration rather than class or collective proceedings.

One of the most prominent efforts to evade Concepcion has been the National Labor Relations Board's ruling in D.R. Horton (see opinion here), which declared that the right of employees to engage in "concerted activities" under Section 7 of the National Labor Relations Act trumps the FAA and requires that employees be allowed to bring class actions (either in court or arbitration).

The board also pointed to the Norris-LaGuardia Act, which provides that employees "shall be free from the interference, restraint or coercion of employers" in "concerted activities." In the NLRB's view, any business subject to the board's jurisdiction (and that includes most private sector businesses) that requires its employees to agree to resolve disputes through individual arbitration has engaged in an unfair labor practice and faces the threat of agency action.

Numerous plaintiffs seeking to invalidate arbitration provisions in employment agreements have claimed that the Labor Board's D.R. Horton decision establishes the invalidity of arbitration provisions that include a class waiver, but virtually every court to consider the question has declined to follow the NLRB's lead.

Recently, in an important decision for employers nationwide, the Fifth Circuit invalidated the board's decision, holding in D.R. Horton Inc. v. NLRB (see opinion here) that the NLRB's position is inconsistent with the FAA. In overturning the board's order, the Fifth Circuit noted its agreement with "[e]very one of our sister circuits to consider the issue," each of which "has either suggested or expressly stated that they would not defer to the NLRB's rationale, and held arbitration agreements containing class waivers enforceable." Slip op. at 25 (citing Richards v. Ernst & Young LLP (9th Cir.), Sutherland v. Ernst & Young LLP (2d Cir.), and Owen v. Bristol Care Inc. (8th Cir.)).

The NLRB attempted to defend its position on two grounds. First, it argued that its effort to outlaw employment agreements that bar class or collective proceedings is affirmatively authorized by the FAA's savings clause, which specifies that arbitration agreements are enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract."

Because the NLRB interpreted the NLRA to require that class actions be permitted for all claims — whether brought in arbitration or in litigation — it insisted that its policy falls within the literal terms of the savings clause and that this suffices to comply with the FAA.

The Fifth Circuit made short work of that argument, correctly observing that the Supreme Court considered and rejected the very same position in Concepcion, which unequivocally held that enforcement of arbitration agreements may not be conditioned on the availability of class action procedures.

The Supreme Court explained that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." As the Fifth Circuit put it, "[r]equiring a class mechanism is an actual impediment to arbitration and violates the FAA."

Second, the NLRB argued that the NLRA's and Norris-LaGuardia Act's protections of "concerted activity" reflect Congress' intent to preserve class or collective procedures for employees regardless of whether they had agreed to arbitrate, and thus that Congress has implicitly overridden the FAA by enacting those statutes.

It is true, of course, that Congress can restrict arbitration if it wishes, but the Supreme Court has repeatedly explained that a statute overrides the FAA only if "Congress itself has evinced an intention to do so." As the court explained in Gilmer v. Interstate/Johnson Lane Corp., that intention must appear "in the text of the [statute], its legislative history, or in an 'inherent conflict'" between the statute and the FAA.

And the court has indicated that any such intention must be stated expressly. Thus, the court recently explained in CompuCredit Corp. v. Greenwood that when a statute "is silent on whether claims can proceed in an arbitral forum," the FAA "requires the arbitration agreement to be enforced according to its terms."

Applying these precedents, the Fifth Circuit determined that the NLRA does not override the FAA. Turning first to the text of the statute, the court observed that the NLRA "does not even mention arbitration." Recognizing the Supreme Court's holding in Gilmer that "the fact that the [statute] provides for the possibility of bringing a collective action does not mean that individual attempts at reconciliation are intended to be barred," the court noted that "[e]ven explicit procedures for collective actions will not override the FAA" — and the NLRA falls far short of even that.

Moreover, mere "statutory references to causes of action, filings in court, or allowing suits all have been found insufficient" under CompuCredit to demonstrate a congressional intent to override the FAA.

Indeed, the Fifth Circuit explained that nothing in the NLRA creates a substantive right to bring class or collective actions. As the court observed, "[t]he NLRA does not explicitly provide for ... a collective action, much less the procedures such an action would employ." The NLRA's "general language" about concerted activities "is an insufficient congressional command, as much more explicit language" authorizing class or collective actions "has been rejected in the past" as a basis for concluding that agreements to arbitrate on an individual basis cannot be enforced.

The court of appeals likewise observed that the legislative history of the NLRA offers no hint that Congress intended to restrict arbitration or to provide a substantive right to class actions. To the contrary, the court observed, "the NLRA was enacted and reenacted prior to the advent in 1966 of modern class action practice."

Finally, the Fifth Circuit determined that there is no "inherent conflict" between the NLRA and the FAA. In fact, the court found precisely the opposite: "[C]ourts repeatedly have understood the NLRA to permit and require arbitration. ... Having worked in tandem with arbitration agreements in the past, the NLRA has no inherent conflict with the FAA."

Significantly, the Fifth Circuit held that the NLRB's decision was not entitled to judicial deference. While acknowledging that, under Supreme Court precedent, "[w]e give to the board 'judicial deference when it interprets an ambiguous provision of a statute that it administers,'" the Fifth Circuit explained that there are limits to that deference when, as here, the board's "'preferences potentially trench upon federal statutes and policies unrelated to the NLRA'" — namely, the FAA's policy of promoting arbitration. Moreover, in rejecting the board's Norris-LaGuardia arguments, the court pointed out that the NLRB was not charged with interpreting that statute.

The decision reaffirms the vitality of Concepcion in the employment context. Every appellate court to consider the issue has now rejected the NLRB's position in D.R. Horton as out of step with the FAA and the Supreme Court's decisions interpreting the statute. And that growing consensus is a positive development for employers and employees alike.

Moreover, although the legal question addressed by the Fifth Circuit did not turn on demonstrating the advantages of arbitration, a growing body of evidence confirms that employers and employees benefit from arbitration's reduced transaction costs and quicker decision-making — especially in light of today's increasingly overcrowded court dockets resulting from state and federal budget constraints.

Even claims that could be brought in class actions may be vindicated effectively in individual arbitrations, as Justices Elena Kagan, Ruth Bader Ginsburg and Stephen Breyer recognized in their dissenting opinion in American Express Co. v. Italian Colors Restaurant.

And studies of outcomes in arbitration and judicial proceedings show that employees fare at least as well, and often better, in arbitration than they do in court. By overturning the NLRB's anti-arbitration ruling, the Fifth Circuit's decision eliminates what would have been a significant obstacle to the use of arbitration to resolve disputes between employers and employees.

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