

Showdown of the NLRB v. the Courts: Supreme Court Action on Class Action Waivers in Arbitration Agreements

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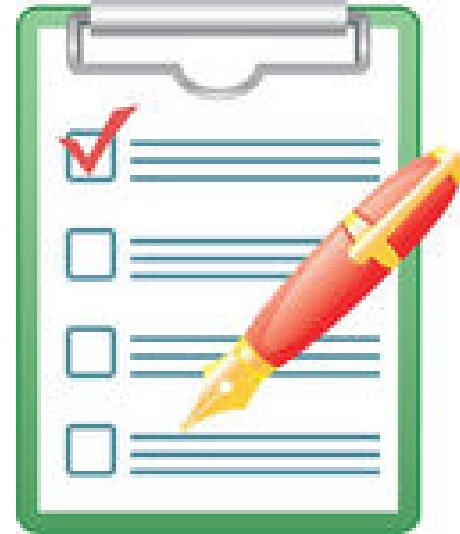


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Agenda

- Purpose of arbitration agreements and class action waivers
- Enforcement prior to the *Murphy Oil* NLRB decision
- Current state of the law
- Status of petitions for review
- What the Supreme Court has and has not (yet) held regarding tension between FAA and NLRA



Advantages of Arbitration

- Costs
- Splitting the Baby
- Appellate Rights
- Speed
- Privacy
- Runaway Juries
- Predictability
- Class Action Waivers!



Purpose of Class Action Waivers

- Employee's only recourse is limited to single-plaintiff arbitration hearings
- Provides more certainty in scope of damages
- More at stake for employee's attorney to pursue given reduced attorneys' fees at issue
- And REDUCE COSTS



Enforcement by the Courts Pursuant to FAA



- FAA arbitration is a matter of contract
- Courts require parties proceed to arbitration on issues covered by arbitration agreement
- Careful drafting is essential
- FAA's primary purpose to ensure private agreements to arbitrate are enforced according to their terms

Class Action Waiver Enforcement Prior to *Murphy Oil*

Supreme Court precedent:

- *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010)
 - Must have a contractual basis for arbitration
- *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011)
- *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013).
 - Courts will enforce a carve-out of the class action waiver that specifically requires the court, not the arbitrator, to review enforceability of the waiver.

State of the Law – Circuit Split

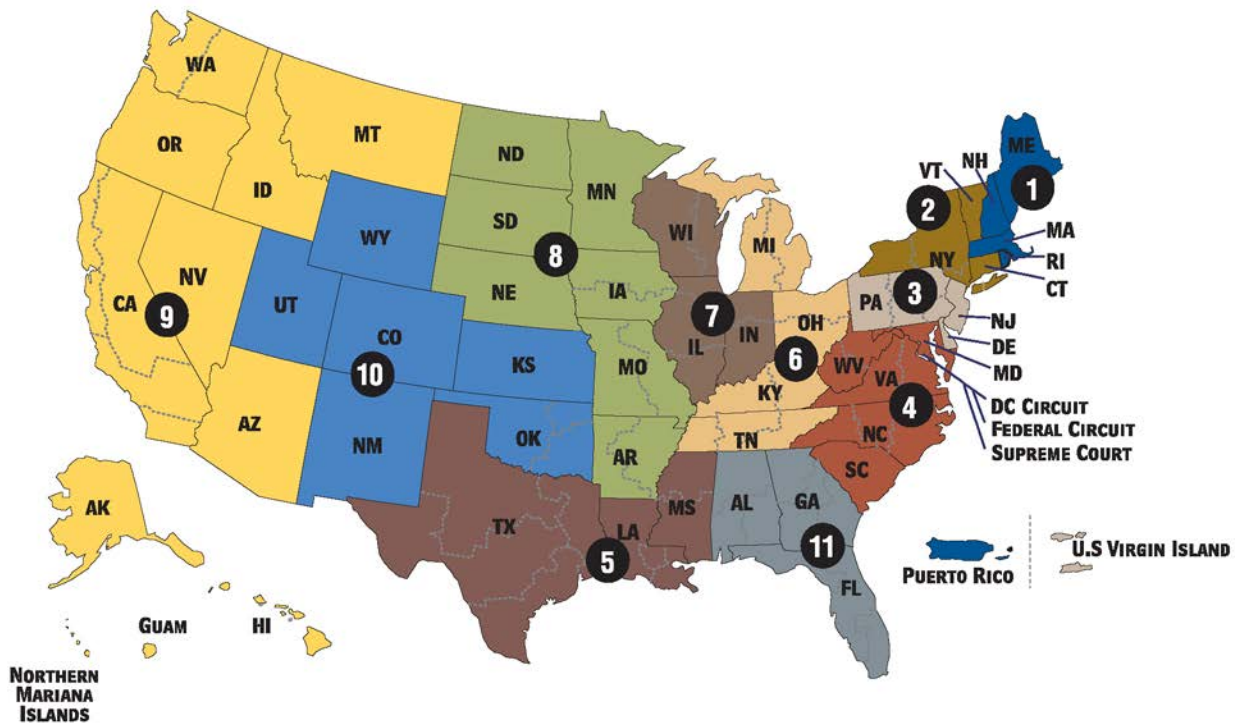
The Circuits

- Pro Arbitration Agreements
 - *D.R. Horton, Inc.* (NLRB, 2012; reversed by 5th Cir. 2013)
 - *Murphy Oil USA, Inc.* (NLRB, 2014; reversed by 5th Cir. 2015)
 - *Cellular Sales of Missouri, LLC* (NLRB reversed by 8th Cir. 2016)
 - *Owen v. Bristol Care, Inc.* (8th Cir. 2013)
- Prohibited by Section 7 of the National Labor Relations Act (right to engage in “concerted activity”)
 - *Lewis v. Epic Systems Corp.* (7th Cir. 2016)
 - *Morris v. Ernst & Young, LLP* (August 12, 2016 9th Cir.)

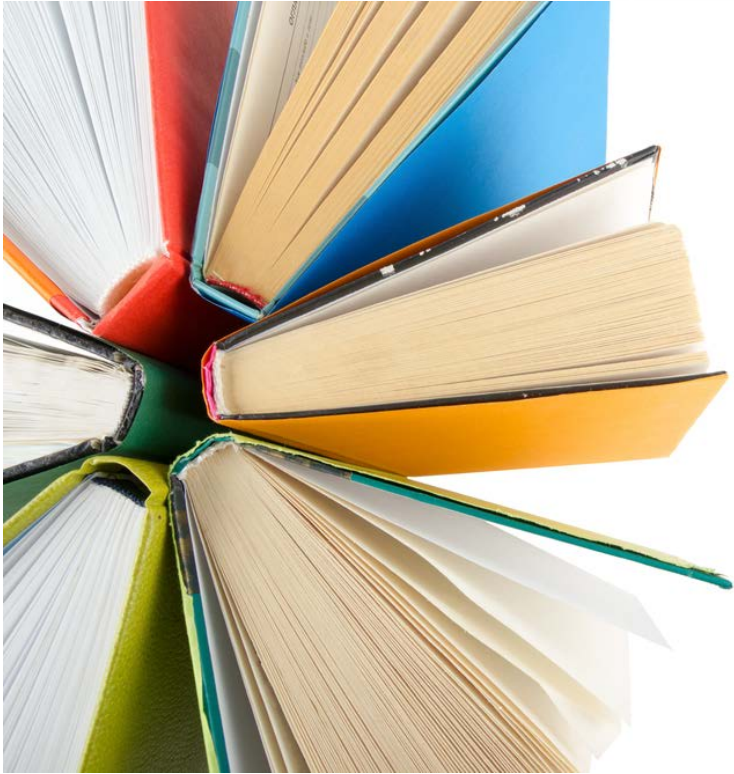


Geographic Boundaries

of United States Courts of Appeals and United States District Courts



State of the Law - The Ninth Circuit



- *Morris v. Ernst & Young, LLP* (August 12, 2016)
 - Class action waivers contained in mandatory, pre-dispute arbitration agreements are unlawful under NLRA and not enforceable under the FAA
- *Johnmohammadi v. Bloomingdale’s* (June 23, 2014)
- *Mohamed v. Uber Techs., Inc.* (Sept. 7, 2016)
 - Crucial opt-out distinction
 - NLRB still believes the agreement is unlawful, but the Ninth Circuit has enforced it

The Showdown

- *Murphy Oil USA Inc. v. NLRB* (5th Cir. 2015)
- *Lewis v. Epic Systems Corp.* (7th Cir. 2016)
- *Morris v. Ernst & Young* (9th Cir. 2016)

The Case That Started It All

- *D.R. Horton, Inc.* (NLRB, 2012)
 - The 5th Circuit reversed *D.R. Horton Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013)
 - NLRB continued enforcement efforts

Murphy Oil USA Inc. v. NLRB

- *Murphy Oil USA Inc. v. NLRB* (5th Cir. 2015)
 - A collective action against Murphy Oil USA Inc., which operates retail gas stations in several states, alleging that the company violated the FLSA
 - The 5th Circuit rejected the board's holding in *D.R. Horton Inc. v. NLRB*, 357 N.L.R.B. 184 (2012)

Lewis v. Epic Systems Corp.

- *Lewis v. Epic Systems Corp.* (7th Cir. 2016)
 - A wage and hour collective action against Epic Systems, a health care software company, alleging misclassification of technical writers as exempt in violation of the FLSA
 - The 7th Circuit affirmed denial of Epic's motion to compel arbitration, concluding that the arbitration provision's bar on employees seeking any class action of wage and hour disputes violated the NLRA

Morris v. Ernst & Young

- *Morris v. Ernst & Young* (9th Cir. 2016)
 - A collective action claiming that Ernst & Young misclassified employees to deny overtime wages in violation of the FLSA and California labor laws
 - The 9th Circuit held that the employer violated the NLRA by requiring employees to sign an arbitration agreement precluding them from bringing a class action regarding wages, hours and employment conditions

Supreme Court Resolution

- On January 13th, the Supreme Court granted Petitions for a Writ of Certiorari in all three cases
- Notably, none of the cases involve an opt-out provision



What WE DO Know

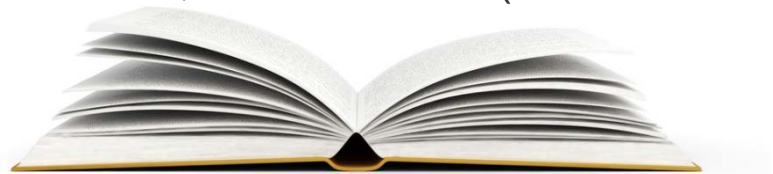
- FAA arbitration is a matter of contract
- Arbitration agreements are on equal footing with other contracts
- FAA savings clause
 - Arbitration agreements may be invalidated by generally applicable contract defenses
- Arbitration agreements may not be invalidated by defenses derived from the fact that an agreement to arbitrate is an issue
- Arbitration agreement must be clear that it does not require arbitration of unfair labor practice complaints

Issues for the Supreme Court

- Tension between FAA and NLRA
 - Congressional mandate to override FAA
- Concerted activity
 - Procedural right
 - Substantive right
- Chevron deference
- Opt-out provision required

Supreme Court Composition

- Changed Supreme Court composition since *Concepcion* and *Italian Colors*, which established a liberal policy in favor of arbitration agreements
- Eight member court expected to come out 4-4 on the issue
- Critical ninth seat if nominee Neil Gorsuch is confirmed as expected
 - His four days of confirmation hearings were last week
 - Reputation as textualist like Scalia and solidly conservative
 - Openly opposed to Chevron deference to executive branch agencies. *Trans Am Trucking v. DOL Administrative Review Board*
 - Has embraced the view that one purpose of the FAA is to foster expedient dispute resolution. *Howard v. Ferrellgas Partners LP*, 748 F.3d 975 (10th Cir. 2014).



NLRB Stance Pending Supreme Court Resolution

- General Counsel issued a memorandum to regional offices to proceed as follows:
 - Hold in abeyance all opt-out agreements in apparent deference to 9th Circuit precedent
 - In all other agreements, propose conditional settlement conditioned on NLRB prevailing at the Supreme Court. If the Court decides that class and collective action waivers are unlawful, then the employer would cease enforcing the arbitration agreement and comply with standard NLRB remedies including the posting of a notice to employees. But if the Court decides that such waivers are lawful, the charge against the employer would be dismissed.
 - If the employer refuses the conditional settlement, then NLRB will go forward

Alternatives

- Stand-alone class action waiver without an agreement to arbitrate disputes
- Agreement that shortens the time by which a complaint must be raised



Jury Trial Waiver

- Factors used to assess whether the jury trial waiver is knowing, voluntary and intentional:
 1. Standardized form
 2. Terms negotiable
 3. Waiver conspicuous
 4. Relative bargaining power
 5. Business or legal acumen of party opposing the waiver
 6. Sufficient opportunity to review
 7. Actually did review
 8. Represented by counsel

Implementation Considerations

- New employees or current employees or both?
- What do you do with employees who won't sign?
- Are there ways to draft the agreements that make them more palatable to existing employees?
- State law considerations



Signature

Drafting Issues

- All claims?
- All forms of collective action?
- Applicable law?
- Time limits?
- Injunctive relief?
- Mandatory prior mediation?
- Arbitrator selection?
- Scope of discovery?

Cost Control

- Mandatory pre-arbitration mediation
- AAA list only or designated arbitrators
- Stipulations regarding brief limitations
- Resolution of objections in advance
- No transcripts



Judgment Calls

- Who pays the costs?
- Do you need to advise employees to see a lawyer before signing?
- Pilot program before full employee roll out?



Corporate Culture and History as Considerations

- Litigation history and volume
- Type of business
- Size of business (punitive damage exposure)
- Publicity
- Venue
- Foreign corporations
- Timing issues
- Morale issues
- Unionization risks



Takeaways





Questions



Thank You!

Thank you!

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