Kluwer Arbitration Blog

NLRB Opens a New Chapter in Class Arbitration Saga

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The United States Supreme Court's decision in *AT&T v. Concepcion* last April appeared to signal the demise of class arbitration in the United States. That decision upheld a consumer contract arbitration agreement that waived the consumer's right to initiate a class action lawsuit or arbitration. In its recent *D.R. Horton v. Cuda* decision (Case 12-CA-25764), however, the National Labor Relations Board (the "Board") has opened a new chapter in the class arbitration saga by ruling that certain class waivers in employee arbitration agreements violate the National Labor Relations Act ("NLRA"). This ruling has been appealed to the Fifth Circuit Court of Appeals and may reach the Supreme Court.

There are two key questions that a court of appeals should address when reviewing *D.R. Horton*: first, whether class waivers are indeed clearly contrary to the NLRA; second, if the answer to first question is no, whether the Board's interpretation of the NLRA may trump the strong federal policy under the Federal Arbitration Act ("FAA") mandating enforcement of arbitration agreements in accordance to their terms. Unfortunately, it is likely that in addition to focusing on these two questions the court of appeals reviewing *D.R. Horton* will continue the misguided discussion that the Supreme Court began in *Concepcion* of whether class arbitration is "real" arbitration. (See prior post criticizing *Concepcion* on this point.)

In 2006, D.R. Horton, a home builder with operations in more than 20 states, began requiring new and current employees to execute a "Mutual Arbitration Agreement" ("MAA"). The MAA provided that all employment disputes and claims were to be determined exclusively by final and binding arbitration before a single, neutral arbitrator. The MAA specifically included claims for discrimination or harassment; wages, benefits or other compensation; breach of contract; violations of public policy; personal injury; and other tort claims. The only statutory rights expressly excluded were employee claims for worker's compensations or unemployment benefits. The MAA also contained a class waiver provision that permitted the arbitrator to hear only individual claims and forbade the arbitrator from consolidating claims or "fashion[ing] a proceeding as a class or collective action or [awarding] relief to a group or class of employees in one arbitration."

Michael Cuda, a past superintendent with D.R. Horton, filed a notice of intent to arbitrate on behalf of a purported class challenging D.R Horton's classification of superintendents as exempt from the protections of the Fair Labor Standards Act. D.R. Horton replied by stating that the notice was ineffective since the MAA barred class claims. Cuda then filed an unfair labor practice charge against D.R. Horton, alleging that the MAA's class waiver provision violated Section 8(a)(1) of the NLRA.

Section 8(a)(1) makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by the NLRA. Section 7 of the NLRA gives employees the right "to engage in … concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Three principal questions faced the Board in *D.R. Horton*: does maintaining a class action lawsuit or arbitration constitute a "concerted activity" protected by Section 7? If so, did the MAA "interfere with, restrain, or coerce employees in the exercise" of this right? Finally, would striking down the MAA's class waiver conflict with the FAA?

In keeping with its own precedent, the Board answered the first part of the question affirmatively: "employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA." *D.R. Horton* at 3. In addition to citing its own cases, the Board cited a recent Eighth Circuit case as support. *D.R. Horton* at 2 n.4 (citing *Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011) ("a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under § 7 of the National Labor Relations Act") (emphasis in original)).

The Board then found that the MAA, as a unilaterally implemented workplace rule, restrained the right to file a class action. The Board affirmed "the principle that employers cannot enter into individual agreements with employees in which the employees cede their statutory right to act collectively." *D.R. Horton* at 4 (citing *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944)).

Finally, the Board faced a question "of first impression," whether striking down the MAA's class waiver conflicted with the FAA. The Board recognized that the FAA's "general intent was to 'reverse the longstanding judicial hostility to arbitration agreements' and to place private arbitration agreements 'upon the same footing as other contracts.'" *D.R. Horton* at 8 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)). The Board also recognized that the "FAA manifests 'a liberal federal policy favoring arbitration agreements' … [and] 'requires that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" *D.R. Horton* at 8 (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The Board added, however, "that the FAA protects the right of parties to agree to resolve statutory claims in an arbitral forum as long as a party does not forgo the substantive rights afforded by the statute." *D.R. Horton* at 9 (quoting *Gilmer*, 500 U.S. at 26).

The Board found that striking down the MAA as violating the NRA did not conflict with the FAA or undermine the FAA's pro-arbitration policy for three reasons. First, the Board's decision did not place the MAA on an unequal footing vis-à-vis other private agreements; in accordance with Supreme Court precedent that private contracts conflicting with the NLRA "obviously must yield or the Act would be reduced to a futility," the Board would have struck down any private agreement that required an employee to give up the right to initiate a class action. *D.R. Horton* at 9 (quoting *J.I. Case Co.*, 321 U.S. at 337).

Second, by signing the MAA employees relinquished substantive rights under the NLRA, which is contrary to *Gilmer*. The Board dismissed arguments that the right to bring a class action was only a procedural right. The Board also noted that while a certified union could relinquish a substantive statutory right in the course of negotiations, this was different from "an employment policy, such as the MAA, imposed on individual employees by the employer as a condition of employment."

D.R. Horton at 10.

Third, the Board referenced the savings clause of Section 2 of the FAA – which permits the invalidation of an arbitration agreement upon any "grounds as exist at law or in equity for the revocation of any contract." The Board noted that in accordance with the savings clause an arbitration agreement contrary to public policy would not be enforced, and made the point that private agreements contrary to the NLRA had been found to be contrary to public policy.
The Board stated that "Section 7 of the NLRA manifests a strong federal policy protecting employees' right to engage in protected concerted action, including collective pursuit of litigation or arbitration." *D.R. Horton* at 11. The Board then balanced this policy against the competing policy, "associated with the FAA," which had been articulated in *Concepcion*: "The 'overarching purpose of the FAA … is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.' The 'switch from bilateral to class arbitration,' … 'sacrifices the principle advantage of arbitration – its informality.'" *D.R. Horton* at 11 (quoting *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740, 1748 &1750 (2011)).

The Board stated that this "countervailing consideration," which was "arguably in tension" with the Board's policy of encouraging collective pursuit of remedies, was not as strong in *D.R. Horton* as it had been in *Concepcion*. The Board noted that contracts of adhesion in the retail and services industries could result in many thousands of claimants, while the average number of employees employed by a single employer is twenty and most employment litigation would only involve a subset of the employees. Class arbitration in the employment context "is thus far less cumbersome and more akin to an individual arbitration proceeding along each of the dimensions considered by the Court in *AT&T Mobility* – speed, cost, informality, and risk." *D.R. Horton* at 12.

Finally, the Board rejected the argument that its decision was inconsistent with the Supreme Court's holding in *Concepcion* and *Stolt-Nielsen v. AnimalFeeds* that a party cannot be compelled to submit to class arbitration without its consent. The Board noted that neither case involved the waiver of rights protected by the NLRA or even employment agreements, and that *Concepcion* involved a conflict between federal and state law and was therefore governed by the supremacy clause. The Board also noted that its decision did not compel class arbitration since under its ruling it would uphold an arbitration agreement that compelled individual arbitration for individual claims as long as it left open a judicial forum for class and collective claims.

The most important question to be answered in an appeal of *D.R. Horton* is whether the right to maintain a class action is a substantive right – akin to unionizing or organizing a strike – guaranteed by the NLRA as part of the protection afforded to "concerted activity." If this is the case, then the Board likely reached the correct decision: in accordance to Supreme Court precedent, employees cannot give up a substantive right under the NLRA. However, as argued by some of the amicus briefs in *D.R. Horton*, there is a substantial argument that the right to maintain a class action is not a right under the NLRA at all but rather a procedural mechanism, the appropriateness of which in any particular case is to be determined by a federal judge.

While the NLRA clearly protects the right of employees to coordinate and discuss legal strategy for improving work conditions, a class waiver obviously does not prevent such coordination or discussion. Employees are free to file coordinated individual claims. They are free even to file a class action and, when the employer moves to compel arbitration, to argue that the arbitration agreement is unenforceable due to a ground recognized under the savings clause of Section 2 of the FAA. But it stretches the NLRA very far to argue that employees have a right to maintain a class

action when a class action (i) is a *procedure* for enforcing rights that is found in the Federal Rules of Civil Procedure, (ii) is not expressly mentioned by the NLRA, and (iii) depends on the inherent discretion of a federal judge. The substitution of traditional court procedures with other procedures chosen by the parties is, of course, a hallmark of arbitration. As the Supreme Court recognized in *Gilmer*, the change in procedure implicated by arbitration does not affect substantive statutory rights.

This analysis does not completely answer the question presented in *D.R. Horton*. A court could find that the Board's interpretation of the NLRA, while not the only plausible interpretation, is nevertheless a permissible interpretation of an ambiguous statute. Typically, in such a situation courts will defer to an agency's interpretation of a statute it administers. As argued in a prior post, however, this is not the correct approach in the situation where an agency interprets a statute to limit arbitration. (See prior post). The Supreme Court has indicated that the FAA's policy favoring arbitration can only be trumped when a statute's text, history or purpose shows that Congress clearly intended to curtail the arbitrability of certain disputes. *Gilmer*, 500 U.S. at 26. As shown above, such unambiguous intent is not evident in the NLRA, and thus the MAA should be enforced in accordance to its terms.

A court's analysis of *D.R. Horton* should end after the inquiry into whether the right to maintain a class action is clearly a substantive right under the NLRA and a decision on whether typical agency deference is appropriate in the context of an arbitration agreement. However, the Board and the amicus briefs spend considerable time debating the appropriateness of class arbitration as a general matter. Several of the amicus briefs in support of D.R. Horton found it important to argue that arbitration is not suited to resolving class claims and to quote extensively from *Concepcion* on this point. Moreover, in its decision, the Board accepts and perpetuates the Supreme Court's mistaken premise in *Concepcion* that the purpose of arbitration under the FAA is to provide streamlined, low-stake, low-cost, informal proceedings and that class arbitration undermines this purpose.

The Board sought to distinguish *Concepcion* by arguing that class arbitration in the employee context would be small in size and would therefore meet *Concepcion's* supposed requirements of arbitration under the FAA. Of course, in trying to fit within the constraints of *Concepcion*, the Board ignored the fact that class actions against company corporate employers could readily encompass individual claims numbering in the thousands. But this is beside the point. There is nothing inherent in arbitration that prohibits the adjudication of class claims. In an arbitration, parties can decide to resolve low-stake or high-stake claims using streamlined or complicated procedures. That is the point of arbitration – the parties agree on what should be arbitrated and how it should be arbitrated. By the same token, parties cannot be forced to arbitrate in a manner to which they did not agree. That is the fundamental principle that justifies the result reached in *Concepcion*.

The discussion in *Concepcion* regarding the nature of arbitration is wrong, and it is unfortunate that this discussion will influence the way litigants, lower courts, and agencies such as the NLRB view arbitration. Moreover, if, despite the arguments above, the NLRB's decision is upheld by the courts, it is very possible that class claims in the employee context will be channeled only to the courts due to the perceived inadequacies of arbitration, even though there is no inherent reason that class claims could not be handled by arbitrators.

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