What's Next for the Saga of *D.R. Horton* and Class Action Waivers?

By Barry Winograd

Employment and labor law practitioners, and those following developments in the fields of arbitration and administrative law, will find much of interest in the year ahead. On tap in the aftermath of the election of Donald Trump as the U.S. President is an answer to a significant question: Will the Supreme Court conclude that waivers of class and other collective actions contained in arbitration agreements interfere with rights protected by Section 7 of the National Labor Relations Act (NLRA)[1] or the Norris LaGuardia Act (NLGA),[2] or both. The court's decision may be the most important workplace-related Supreme Court ruling in decades, affecting tens of millions of employees in both union and non-union settings and providing a consistent rule of law for courts, agencies, and employers throughout the country.

In 2012, the National Labor Relations Board (NLRB) in the *D.R. Horton* case determined that contractual waivers of class, collective or group actions, whether in an arbitration provision or in another express or implied agreement, interfere with an individual's right under Section 7 to engage in concerted activity.[3] The NLRB also grounded its reasoning in the protections of the NLGA, the terms of which may be construed to independently bar a class action waiver whether or not deference is accorded the NLRB's interpretation of the NLRA. In *D.R. Horton,* the NLRB rejected the company's reliance on the Federal Arbitration Act (FAA) to preclude NLRB action.[4]

The NLRB's decision concerned a claim by a superintendent for D.R. Horton, a homebuilder that operates throughout the country. The superintendent alleged that he and others were improperly classified as exempt from wage and hour law under the Fair Labor Standards Act (FLSA).[5] Based on this claim, the superintendent sought to initiate an arbitration on his own behalf and for other employees. The company objected, citing an arbitration agreement signed by the claimant when he was hired. The agreement provided that only individual claims could be advanced under the arbitration agreement. Responding to the company's objection, the claimant filed an unfair practice charge with the NLRB alleging interference with the right to pursue a collective action.

Had the NLRB's authority been deemed subordinate to the terms of the FAA, a class arbitration proceeding would have been barred, and an arbitration for the superintendent's individual claim would have followed. In determining how the

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NLRA and the FAA should be reconciled, the NLRB in *D.R. Horton* considered Section 2 of the FAA, which provides not only for enforcement of written arbitration agreements, but also identifies limits on enforcement.[6] The latter portion of Section 2, referring to rejection of arbitration, "upon such grounds as exist at law or in equity for the revocation of any contract," is known as the FAA's "savings clause."[7]

The class action waiver question assumes special importance because of subsequent appellate treatment of the *D.R. Horton* decision. Judicial momentum against *D.R. Horton* that emerged in the years immediately after the decision, including reversal of the NLRB's decision in the Fifth Circuit Court of Appeals, has been challenged in two recent federal appellate cases.[8] The legal significance of the conflict between circuit courts of appeal is that the division likely will lead to Supreme Court review, although such review might be delayed due to the court currently operating with eight justices rather than nine.[9]

If the NLRB's doctrine ultimately is upheld, or if the NLGA is found standing alone to bar class action waivers, the result will be a substantial blow to employers and management representatives seeking to preclude the use of wage and hour, and other employment class actions, and to bar joint and consolidated actions generally. If waivers are enforced, employees will be required to arbitrate disputes individually rather than through a class action in court or in arbitration.

To weigh future prospects, it is helpful to consider the principal positions for and against the *D.R. Horton* decision. Each side argues that its construction of competing federal statutes should prevail.

Employer representatives relying on the FAA argue that the judiciary is expected to "enforce arbitration agreements according to their terms" absent a "contrary congressional command for another statute to override the FAA's mandate."[10] For these advocates, compelling an individual arbitration is required by the Supreme Court's interpretation of the FAA developed in decisions beginning in the 1980s. These decisions reject judicial hostility to arbitration, establish a presumption of arbitrability, and bar actions that negatively affect arbitration by interfering with its fundamental attributes such as speed and informality.[11] The court's decision in *Concepcion,* in particular, draws this contrast by criticizing class actions as being, "...more likely to generate procedural morass than final judgment."[12]

Citing this body of precedent to assess whether there is a contrary congressional command precluding arbitration under the FAA, proponents of class action waivers emphasize that there is no specific reference to class actions or arbitrations in Section 7 of the NLRA, nor elsewhere in that statute or in the NLGA. These advocates urge that, even if both labor laws refer to concerted activity, it stretches the concept too far to find that it translates into a substantive right to a particular legal procedure sufficient to reject the pro-arbitration mandate of the FAA that applies to any class or group claim in any forum. On this point, it is reasoned, the NLRB is not entitled to the traditional deference owed by the judiciary to an administrative body because the FAA is a federal statute that is beyond the statutory interpretation authority of the NLRB.[13] Deference also is on shaky ground because new appointees to the NLRB once President-elect Trump takes office can overrule *D.R. Horton*.

Counsel for plaintiffs and the NLRB as currently constituted, take a contrary position. They urge that the NLRB and the courts have long held that Section 7 of the NLRA spells out a substantive right of employees (and employee organizations pursuing class claims) to engage in concerted activity protected against employer interference through negotiations with individual employees.[14] In their view, an employer cannot require an employee to relinquish this statutory right by compelling arbitration, just as an employer, according to the Supreme Court, cannot require an employee in arbitration to waive other substantive, statutory protections against age, race, gender or other forms of discrimination.[15] Given this premise, plaintiffs and the NLRB contend that the savings clause in Section 2 of the FAA renders unenforceable an arbitration agreement that is unlawful under the NLRA, or the NLGA, and thus the FAA is not in conflict with nor does it supersede either statute.

The argument continues that the right to concerted activity protected by federal law applies not only to actions that are subject to direct review by the NLRB, but also to concerted activity by other means and in other forums, including judicial relief, an interpretation that has been upheld for decades.[16] In this perspective, the NLRB's decision extends to all contractual promises to bar class proceedings sought by employers from individual employees, not just to arbitration agreements, and therefore a ban on class action waivers is not disfavoring or targeting arbitration in a manner that undermines the FAA.[17] Indeed, for these advocates, upholding a class action bar because it is lodged in an arbitration agreement covered by the FAA would elevate arbitration over other contracts, even if such agreements could not ban concerted activity under the NLRA or the NLGA.

What's next in this unfolding saga? Three immediate questions should be considered

First, will the Supreme Court grant certiorari to review the waiver issue, particularly in the absence of a new, ninth justice to replace Antonin Scalia after his death in early

2016? And, in the wake of Donald Trump's election, there are questions about who he will nominate to fill Justice Scalia's seat, how the opposition party will respond, and how long it will take to fill a ninth seat.

Petitions for certiorari have been filed in the two 2016 appellate decisions that shifted the momentum in the field: *Lewis v. Epic Systems* in the Seventh Circuit,[18] and *Morris v. Ernst & Young* in the Ninth Circuit.[19] The NLRB also has filed a petition from an adverse ruling in a Fifth Circuit case, *Murphy Oil v. NLRB*, that followed that circuit's previous decision in *D.R.Horton*.[20] The plaintiff-side has submitted a petition in a Second Circuit decision that applied an earlier precedent in that circuit to compel arbitration, although the appellate panel commented that, were it writing on a clean slate, it might decide the case differently, citing *Epic Systems* and *Ernst & Young*.[21]

Once briefing on the petitions is finished by late 2016, the Supreme Court will consider the issue in conference, perhaps accepting one case and placing others on hold for later disposition. If a petition is granted, we can expect further briefing, with oral argument later this term. Given the current political climate, there is a reasonable chance that a new, ninth justice, presumably nominated by President-elect Trump after he takes office, will join the court only after a protracted confirmation process. This alone might require months of wrangling extending well into 2017, and perhaps into the 2017-18 term of the court.

In this setting, if certiorari is granted and the dispute moves forward without a new justice due to continuing political discord, a four-four split on the court could emerge. This result would uphold any appellate decision granted review or others being held by the court.[22] A persistent jurisprudential stalemate would be troubling for the NLRB, a national agency, and for multi-state employers. All would face the continuing prospect of doing business in potentially conflicting circuit court jurisdictions throughout the country.

The timing of an eventual Supreme Court decision is unpredictable. Faced with petitions in four cases at this writing, and the importance of this issue, the court may be hard-pressed to avoid confronting the question despite the potential uncertainty. However, there remains a possibility that the court will deny review in the current round of cases, thereby avoiding further complications, and reserve a decision until a full court is in place. Denying certiorari at this stage would leave the impact of *D.R. Horton* unresolved, but that may be the price that is paid for a Supreme Court obliged to operate with less than a full bench, and the result of the NLRA's unusual provision permitting review in competing circuit courts.[23]

A second question, even as Supreme Court action is pending, is how will this unresolved issue affect the terms of arbitration agreements? After considering the appellate cases, and not wishing to assume a Supreme Court adhering to past precedent favoring arbitration of individual claims, some employers may decide to amend arbitration agreements to include an opt-out provision permitting employees to decline arbitration. In so doing, employers can argue that mandatory agreements are thereby transformed into voluntary agreements because employees are given a choice whether to agree to a waiver.

This potential change, however, also has uncertain prospects. The NLRB has applied *D.R. Horton* to reject an agreement with an opt-out provision,[24] and has barred an agreement that prohibits a class action in any forum, whether voluntary or not.[25] The Seventh Circuit in *Epic Systems* signaled its disapproval of a class action waiver, even if an opt-out provision is offered.[26] The Ninth Circuit appears headed in a different direction, confirming its own precedent favoring an opt-out approach.[27] Ultimately, since the opt-out issue is not squarely presented in the cases presently pending before the Supreme Court, it need not reach the question, and could defer for a later case a decision about the NLRB's construction of the statute, assuming that construction continues.

Another potential employer change in arbitration agreements would be language seeking to ensure that arbitrators, rather than courts, are clearly delegated authority to decide whether class action waivers are enforceable, an assignment of authority that builds upon Supreme Court precedent.[28] In such cases, employers also may include a severance provision to limit the possibility of an arbitrator rejecting a waiver and authorizing a class arbitration proceeding. Whether ordered by a court or by an arbitrator, a severance provision would permit recourse to a court for resolution of a class action, leaving individual arbitration for all other cases.

Taking a different tack, other employers willing to accept class arbitration proceedings can include as an element of an agreement a requirement for judicial approval of a class determination or settlement, even if an arbitrator has given a green light to a resolution. This approach can protect the due process interests of absent class members. This also could be a desirable option for employers who believe that a particular arbitration award violates statutory mandates, such as laws governing whether independent contractors or managers are exempt from wage and hour laws.

If a workplace is unionized, agreements can be modified as well through collective bargaining, a prospect that may arise more frequently if the class waiver issue is unresolved by the Supreme Court for a year or longer while bargaining for successor agreements continues. Based on the Supreme Court's decision in *14 Penn Plaza v. Pyett,*[29] a union serving under the NLRA as an exclusive bargaining agent at

a workplace presumably can waive Section 7's statutory protection of concerted activity, including, in theory, class actions by individuals, regardless of a ban on an employer seeking a waiver from an individual alone.

Overall, an eventual Supreme Court decision approving *D.R. Horton* may prompt some employers to abandon arbitration in the non-union workplace, believing that its value has been greatly diminished. Nevertheless, since managers and supervisors are excluded from the NLRA under Section 2(3), employers could continue to rely on class action waivers for those employees.[30]

A third question of unfolding interest is whether the *D.R. Horton* appellate conflict, and the prospect of one or more Supreme Court nominations during the Trump presidency, will affect judicial and administrative filings by promoting new litigation and forum-selection preferences? For example, in the Ninth Circuit covering the western United States, employment class actions in federal court will be subject to the Ninth Circuit's *Ernst & Young* decision approving *D.R. Horton* and declining to apply the FAA to preclude such actions. This is significant in California because the state's Supreme Court in 2014 expressly rejected *D.R. Horton* in a challenge to a class action waiver.[31] In Nevada, in the Ninth Circuit as well, the state's high court also declined to follow *D.R. Horton.*[32] Once the Supreme Court has rendered its decision on a federal law interpretation, contrary state and appellate court rulings would give way. Will parties wait for this to happen?

The current juxtaposition of federal and state law will require plaintiffs to decide the appropriate court in which to challenge class action waivers. Historically, at least in California, plaintiffs have preferred to file class actions based on state law in state courts. California state court filings preserve the opportunity for non-unanimous jury verdicts, rather than a unanimous jury required in federal court.[33] State court class actions relying on statutory claims typically provide for individual opt-outs after preliminary approval of the class action in court, and avoid the more burdensome opt-in requirements of collective (non-class) claims pursued under the FLSA as a sole cause of action.[34] In class action wavier cases, however, plaintiffs now may choose to file in federal court.

Similarly, if a class action waiver would be upheld if the parties remained in state court, defendant employers may decline the option of removing the case to federal court based on federal questions or on diversity. This includes situations in which class members meet the jurisdictional standards of the Class Action Fairness Act.[35]

The Seventh and Ninth Circuit decisions also may spur an increase in unfair practice charges with the NLRB in addition to those already filed relying on *D.R. Horton.* Additionally, these appellate rulings may prompt plaintiff-side counsel to pursue independent enforcement objections under the NLGA as they anticipate a change in the composition of the NLRB that eventually will overrule *D.R.Horton*. For cases involving a single employer doing business in several states, charges with the NLRB or a separate objection invoking the NLGA provide a hedge against separate, adverse lower court or state court decisions.

While Supreme Court and NLRB changes are awaited, an employer with national operations may seek to discourage NLRB reliance on *D.R. Horton* by informing the NLRB that it will seek review in a circuit in which it does business and which does not follow *D.R. Horton.*[36] This possibility might deter the NLRB from declining to acquiesce to a previous adverse appellate ruling in the specific circuit identified. This complication arose in the Fifth Circuit when, after *D.R. Horton* was rejected by that appellate court, the NLRB's usual policy of non-acquiescence was accepted in the subsequent *Murphy Oil* decision because of uncertainty regarding the potential outcome and appellate jurisdiction.[37] However, the NLRB's non-acquiescence could be less acceptable to a reviewing court if the agency is on notice of an employer's intent to seek review in a favorable circuit.

As a counter-measure, a plaintiff dealing with a business in several jurisdictions also might file in a favorable circuit if, in a case involving the NLRB, it has suffered a partial defeat. In such a case, "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought," can file in a preferred circuit.[38]

Whatever *D.R. Horton's* final outcome in the Supreme Court and before the NLRB, all interested parties will need to sort through several options in a rapidly-changing landscape. Strategic and tactical adjustments to protect, or to avoid, class action waivers may be the wisest course in the face of a potential, protracted deadlock before the nation's highest court.

ENDNOTES

[1] 29 U.S.C. Section 157. Section 7 of the NLRA states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and "*...to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection....*" (*Id.;* emphasis added.) An employer interfering with an employee's Section 7 right commits an unfair labor practice under Section 8(a)(1) of the NLRA. (29 U.S.C. Sec. 158(a)(1).)

[2] 29 U.S.C. Section 101, et seq. The Norris-LaGuardia Act, passed in 1932 three years before the NLRA, declares as public policy the right of employees to engage in "*in concerted activities for the purpose of collective bargaining or other mutual aid or protection.*" (29 U.S.C. Sec. 102; emphasis added.) To support this policy, the

NLGA bans "any other undertaking or promise in conflict with this policy." (29 U.S.C. Sec. 103.). In addition, the NLGA specifically renders unenforceable employer-imposed contracts barring union membership as a condition of employment, and blocks federal court injunctions in peaceful labor disputes. (29 U.S.C. Secs. 103-104.)

[3] *D.R. Horton, Inc.*, 357 NLRB 2277 (2012).

[4] 9 U.S.C. Section 1, et seq.

[5] 29 U.S.C. Section 201, et seq.

[6] 9 U.S.C. Section 2. The statute states, in relevant part: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction…shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

[7] *Id.*

[8] Compare *Morris v. Ernst & Young LLP, 834* F.3d 975 (9th Cir. 2016) and *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), rejecting class action waivers, with *Murphy Oil v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2nd Cir. 2013), and *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013), upholding class action waivers. Also see *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016) and *Patterson v. Raymours Furniture Co.*, 2016 WL 4598542(2nd Cir. 2016), following precedent in their respective circuits.

[9] A second conclusion in *D.R. Horton* has not been challenged by appellate courts. According to the NLRB, the NLRA is violated by an overbroad arbitration provision that, apart from a waiver of class action relief, also precludes access by an individual to the NLRB itself. (*D.R. Horton, supra,* 357 NLRB at 2278, n. 2.)

[10] *Owen v. Bristol Care, Inc.*, *supra*, 702 F.3d at 1052, quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985), *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669 (1987), and *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987).

[11] In addition to decisions cited in n. 11, *supra*, examples of the Supreme Court's historical treatment of arbitration include: *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20 (1995); *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440 (2006); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 353 (2011); *American Express Corp. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015).

[12] *AT&T Mobility v. Concepcion, supra,* 563 U.S. at 348.

[13] *Cf. Hoffman Plastics Compounds, Inc. v. NLRB,* 535 U.S. 137, 143-144 (2002)(no deference to NLRB remedies in interpreting federal immigration law). Also see *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).

[14] *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944); *Nat'l Licorice Co. v. NLRB,* 309 U.S. 350, 365 (1940). Also see *J.H. Stone & Sons*, 125 F.2d 752 (7th Cir. 1942).

[15] *Gilmer v. Interstate Johnson Lane Corp., supra,* 500 U.S. at 26.

[16] See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978); *Brady v. Nat'l Football League*, 644 F.3d. 661, 673 (8th Cir. 2011); *Mohave Elec. Co-Op., Inc. v. NLRB*, 206 F.3d 1183, 1188-1189 (D.C. Cir. 2000); *Salt River Valley Water Users' Ass'n,* 206 F.2d 325, 328 (9th Cir. 1953).

[17] Compare *AT&T Mobility v. Concepcion, supra,* 563 U.S. 333, 339.

[18] U.S. No. 16-285; *Lewis v. Epic Systems Corp.*, *supra*,.

[19] U.S. No. 16-300; *Morris v. Ernst & Young LLP*, *supra*.

[20] U.S. No. 16-307; *Murphy Oil USA, Inc. v. NLRB*, *supra*.

[21] U.S. No. 16-388; *Patterson v. Raymours Furniture Co.*, *supra,* ___ F.3d____ [2016 WL 4598542](2nd Cir. 2016).

[22] See, e.g., *Friedrichs v. California Teachers Association*, 136 S.Ct. 1083 (2016).

[23] 29 U.S.C. Section 160(f).

[24] *On Assignment Staffing,* 362 NLRB No. 189 (2015).

[25] *Ross Stores*, 363 NLRB No. 79 (2015).

[26] *Lewis v. Epic Systems Corp.*, *supra*, 823 F.3d at 1155.

[27] *Morris v. Ernst & Young*, supra, ___ F.3d at ___, n. 4, citing *Johnmohammedi v. Bloomingdales, Inc.*, 755 F.3d 1072 (9th Cir. 2014).

[28] *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63 (2010)(upholding delegation of arbitrability determination to arbitrator). Whether the validity of a class action waiver clause will be treated as a threshold, or gateway, issue for judicial determination, or left to an arbitrator to decide, may depend on the language of the agreement being considered. (Compare, e.g., *Reed Elsevier, Inc. v. Crockett,* 734 F.3d 594 (6th Cir. 2013) and *Opalinski v. Robert Half Intern., Inc.,* 761 F,3d 326 (3d Cir. 2014), with *Sandquist v. Lebo Automotive, Inc.,* 1 Cal.5th 233 (2016).)

[29] *14 Penn Plaza v. Pyett*, 556 U.S. 247 (2009). Also see *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983).

[30] 29 U.S.C. Section 152(3).

[31] *Iskanian v. CLS Transp. LA, LLC*, 59 Cal.4th 348, 366-374 (2014)(disapproving waiver on other grounds); but see Justice Werdegar, dissenting on this issue, 59 Cal.4th at 397-406.

[32] *Tallman v. Eighth Judicial District Court,* 359 P.3d 113 (Nev. 2015).

[33] Compare California Constitution, Article 1, Section 16 and California Code of Civil Procedure, Section 618 with Federal Rules of Civil Procedure, Rule 48(b).

[34] Compare Federal Rules of Civil Procedures, Rule 23, California Code of Civil Procedure, Section 382, and California Rules of Court, Rule 3.760, et seq. with 29 U.S.C. Section 216(b).

[35] 28 U.S.C. 1332(d).

[36] 29 U.S.C. Section 160(f).

[37] *Murphy Oil v. NLRB*, *supra,* 808 F.3d at 1018.

[38] 29 U.S.C. Section 10(f); 28 U.S.C. Section 2112.