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# EMPLOYMENT ARBITRATION AGREEMENTS AND THE FUTURE OF CLASS-ACTION WAIVERS

STACEY L. PINE

## INTRODUCTION

Nearly a century ago, Congress enacted the Federal Arbitration Act (FAA)<sup>1</sup> to reverse the longstanding judicial hostility that existed towards arbitration agreements, and to encourage the use of arbitration as a means of reducing the excessive costs and delays commonly associated with litigation.<sup>2</sup> As a result of the enactment of the FAA and numerous Supreme Court cases interpreting the Act, this country has come to embrace a strong federal policy which favors arbitration. This policy requires arbitration agreements, including employment arbitration agreements, to be enforced according to their terms in the same manner as other contracts.<sup>3</sup>

While numerous federal cases and Supreme Court opinions have provided employers with guidance on the application of arbitration to a myriad of employment issues, there is currently little case law that addresses the enforcement of employment arbitration agreements which prohibit class-action arbitration. The Supreme Court has issued three opinions in the past three years in which it has held that the FAA preempts state contract law and permits consumer contracts to prohibit class arbitration, but the Court has yet to comment on the applicability of class-action arbitration waivers in the employment arena.<sup>4</sup> In light of the Supreme Court's silence on this issue, the National Labor Relations Board (NLRB) took it upon itself to determine the law in this area, and asserted in

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<sup>1</sup> *See generally* 9 U.S.C. §1 (1947).

<sup>2</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Brady v. Williams Capital Group, L.P.*, 878 N.Y.S.2d 693, 698 (N.Y. App. Div. 2009) (determining whether the specific arbitration provision is unenforceable as a matter of public policy).

<sup>3</sup> *In re White Mountain Mining Co.*, 403 F.3d 164, 168 (4th Cir. 2005) (citing 9 U.S.C. § 201; *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1985)); *Volt Info. Srvs., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475-76 (1989) (arguing that there is a strong policy in favor of arbitration); *see also Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (using contractual rights and determining the expectations of the parties).

<sup>4</sup> *See generally CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 599 U.S. 662 (2010).

its administrative decision handed down in *D.R. Horton, Inc. v. Cuda*,<sup>5</sup> that an employer cannot prohibit class litigation of a claim while simultaneously prohibiting class arbitration.<sup>6</sup> The *D.R. Horton* decision has led to disparate treatment of the issue in the federal courts and has left employers wondering whether they should utilize class arbitration waivers.

Part I of this paper describes the evolution of the contract approach to the enforcement of employment arbitration agreements through an analysis of landmark cases that were instrumental in promoting this approach. Parts II and III explore the controversy and confusion surrounding employment class-action arbitration waivers and explain why the NLRB's decision constitutes an erroneous interpretation of the law which conflicts with Supreme Court precedent as well as the Congressional intent that arbitration agreements be enforced as contract. Finally, Part IV of this paper analyzes what the *D.R. Horton* ruling means for employers and discusses several ways employers may be able to utilize class arbitration waivers despite the ruling.<sup>7</sup>

## PART I

### JUDICIAL HOSTILITY TO FAVORABLE POLICY

#### A. *The FAA Mandate to "Shake off" Judicial Hostility*

Arbitration has been a means of private dispute resolution for thousands of years, with some asserting that its use dates back to biblical times.<sup>8</sup> In the early 1900s, as our country became more commercialized, businesses recognized the time and cost savings that could be achieved by resolving commercial claims through arbitration rather than litigation.<sup>9</sup> As a result, businesses increasingly began to use arbitration agreements in commercial transactions as a required means of dispute resolution.<sup>10</sup> While arbitration

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<sup>5</sup> 357 N.L.R.B. 184 (2012).

<sup>6</sup> *Id.* at 12.

<sup>7</sup> Another issue relating to the *D.R. Horton* case concerns whether that decision was properly issued without a quorum of three Board members as procedurally required by *New Process Steel v. NLRB*. This topic, however, is outside the scope of this paper.

<sup>8</sup> See e.g., CARRIE J. MENKEL-MEADOW, DISPUTE RESOLUTION BEYOND THE ADVERSARIAL MODEL, at 383 (2<sup>nd</sup> ed. 2011) ("In the biblical story when two women asked King Solomon to decide which of them could keep the baby, he acted not as an officially appointed judge, deciding the matter according to predetermined rules and procedures, but rather as an arbitrator to whom they voluntarily brought their dispute.").

<sup>9</sup> See James E. Berger & Charlene Sun, *The Evolution of Judicial Review Under the Federal Arbitration Act*, 5 N.Y.U. J.L. & BUS. 745, 748 (2009) (describing the abandonment of hostility towards arbitration).

<sup>10</sup> *Id.*

agreements gained early popularity with businesses, they were largely opposed by the judiciary.<sup>11</sup> Judges were reluctant to enforce agreements which required parties to abandon their statutory rights as well as their rights to have disputes decided by a jury of their peers.<sup>12</sup> For centuries, this reluctance manifested itself as distrust and outright hostility as judges expressly refused to enforce arbitration agreements.<sup>13</sup> This hostility stemmed from the belief that arbitration agreements were against public policy.<sup>14</sup> It also originated, in part, from the long-standing opposition to such agreements espoused by English judges who were unwilling “to surrender their jurisdiction over various disputes” by enforcing arbitration agreements.<sup>15</sup> As this hostility became embedded in our judicial system, courts increasingly declined to stray from the common law precedent and refused to enforce arbitration agreements without a legislative mandate.<sup>16</sup>

Congress responded to the judiciary’s disdain for arbitration agreements in 1925 by enacting the Federal Arbitration Act (FAA).<sup>17</sup> The FAA provided the judiciary with a clear directive to “shake off the old judicial hostility towards arbitration” and begin enforcing arbitration agreements as legally viable contracts.<sup>18</sup> Specifically, Section 2 of the FAA<sup>19</sup> provides:

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, or the refusal to perform the whole or any part

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<sup>11</sup> Jane Byeff Korn, *Changing Our Perspective on Arbitration: A Traditional Feminist View*, 1991 U. ILL. REV. 67, 71 (1991) (dating back to the seventeenth century).

<sup>12</sup> See *id.* at 75 (“worrying about the lack of judicial instruction on the law”).

<sup>13</sup> *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974) (citing H. R. Rep. No. 96, 68<sup>th</sup> Cong., 1st Sess., 1, 2 (1924); see also S. Rep. No. 536, 68<sup>th</sup> Cong., 1st Sess. (1924)); see also *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 24 (1991) (giving the purpose of the FAA); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-220 (1985) (“The House Report accompanying the [Federal Arbitration] Act makes clear that its purpose was to ... overrule the judiciary's longstanding refusal to enforce agreements to arbitrate.”).

<sup>14</sup> JON O. SHIMABUKURO, CONG. RESEARCH SERV., RL30934, FEDERAL ARBITRATION ACT: BACKGROUND AND RECENT DEVELOPMENTS (2003).

<sup>15</sup> *Id.* at 2.

<sup>16</sup> See *Kulukundis Shipping v. Amtorg Trading Corp.*, 126 F.2d 978, 983-985 (1942) (leading to the enactment of the FAA to fight this intransigence); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001).

<sup>17</sup> *Kulukundis Shipping*, 126 F.2d at 985.

<sup>18</sup> *Id.*

<sup>19</sup> 9 U.S.C. § 2 (1947).

thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

This language has been held to constitute a clear Congressional declaration favoring arbitration agreements.<sup>20</sup> More significantly, this language requires arbitration agreements to be construed as contracts and placed upon “the same footing” as other contracts.<sup>21</sup> In other words, the FAA affirms that the parties have the right to structure arbitration agreements in ways that meet their specific needs, and requires the enforcement of terms agreed upon by the parties.<sup>22</sup> The import of treating arbitration agreements as contracts is that it requires the courts to stay or dismiss judicial proceedings, and to compel arbitration where the parties have a written arbitration agreement.<sup>23</sup> It also means that arbitration agreements may be invalidated only by generally applicable contract defenses, such as fraud, duress, or unconscionability.<sup>24</sup> The FAA’s command to treat arbitration agreements as contracts paved the way for the use of such agreements to settle a wide-range of future disputes, including employment disputes.<sup>25</sup>

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<sup>20</sup> *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

<sup>21</sup> *Kulukundis Shipping v. Amtorg Trading Corp.*, 126 F.2d 978 at 985 (1942)(quoting H. R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924) “the House committee report [for the enactment of the FAA] stated, in part: ‘Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs.’”); *Scherk v. Alberto-Culver Co.*, 417 U.S., 506, 510-11 (1974) (quoting H. R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)); *Arrants v. Buck*, 130 F.3d 636, 640 (4<sup>th</sup> Cir. 1997).

<sup>22</sup> *Perry v. Thomas*, 482 U.S. 483, 490 (1987) (finding under the FAA, “courts are required to place arbitration agreements on equal footing with other contracts and ‘rigorously’ enforce them according to the terms agreed to by the parties.”); *Volt Info. Svcs., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748-49 (2011).

<sup>23</sup> *See* 9 USCS § 3 (1947) (mandating the arbitration clause be followed); *Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 178-179 (3d Cir. 1999) (stating courts have the right to compel arbitration). *But see* *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992) (courts may dismiss a case when all of the claims are required to be submitted to arbitration).

<sup>24</sup> *AT&T Mobility*, 131 S. Ct. at 1746 (quoting *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

<sup>25</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001) (“the FAA compels judicial enforcement of a wide range of written arbitration agreements.”).

## B. Judicial Enforcement of Employment Arbitration Agreements

In the mid 1960s, Congress embarked on an aggressive expansion of the rights and protections afforded employees through the enactment of laws such as Title VII of the Civil Rights Act of 1964 (Title VII),<sup>26</sup> the Age and Discrimination Act of 1967 (ADEA)<sup>27</sup>, and the Occupational Safety and Health Act (OSHA).<sup>28</sup> Employers, faced with new statutes defining minimum employment standards and expanding the rights of employees to litigate employment claims, quickly realized that contractual arbitration agreements could provide reprieve from the uncertainty and costs associated with litigating such claims. Employers also realized that arbitration clauses could minimize the power of unions, and began to insert arbitration clauses into collective bargaining agreements (CBA).<sup>29</sup> There existed, however, residual judicial hostility towards arbitration agreements in the context of employment disputes, and the judiciary in *Alexander v. Gardner-Denver*<sup>30</sup> blatantly displayed this hostility by refusing to recognize arbitration clauses as valid components of a CBA.<sup>31</sup>

In *Alexander*, a labor union and an employer negotiated a CBA which specified that employees could only be terminated for proper cause; that the employer could not discriminate against any employee; and that binding arbitration would be used to resolve violations of the CBA.<sup>32</sup> The plaintiff-employee was terminated for poor performance, but alleged that his dismissal was racially motivated, i.e. discriminatory and therefore, in breach of the contractual CBA agreement.<sup>33</sup>

The arbitrator ruled that the employer had demonstrated proper cause for dismissal and, therefore, did not violate the contractual provisions of the CBA. Subsequently, the EEOC determined there was no Title VII

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<sup>26</sup> See generally 42 U.S.C. § 2000e (1964) (expanding employment protections on the basis of race, color, religion, sex, and national origin).

<sup>27</sup> See 29 U.S.C. §§ 621-24 (1967) (expanding rights on the basis of age).

<sup>28</sup> See 29 U.S.C. § 651 (1967) (expanding rights to those injured on the job).

<sup>29</sup> *Gilmer v. Interstate Johnson/Lane, Corp.*, 500 U.S. 20, 29 (1991) (“Congress, however, did not explicitly preclude arbitration or other nonjudicial resolution of claims.”); See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 38 (1974); *Barrentine v. Arkansas Best Freight Sys., Inc.*, 450 U.S. 728, 730-31 (1981).

<sup>30</sup> *Alexander*, 415 U.S. at 59-60 (allowing an employee to pursue his title VII remedy in federal court).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 39-40.

<sup>33</sup> *Id.* at 39 (filing a grievance).

violation.<sup>34</sup> The employee, nonetheless, filed a Title VII suit in U.S. District Court alleging racial discrimination.<sup>35</sup> The defendant-employer argued that the employee was barred from litigating the action because he had agreed to arbitration and a final arbitration decision had been reached.<sup>36</sup> The Supreme Court found that the employee actually had two separate claims, the CBA contractual claim and the Title VII claim.<sup>37</sup> The Court concluded that because the arbitration clause in the CBA did not specify that employees' statutory claims were subject to arbitration, the employee had not waived his rights to litigate the Title VII claim in court.<sup>38</sup> The Court further held that the employee had not waived his right to litigate statutory claims because an employee's individual rights to litigate such claims could not be waived through a CBA negotiated by a third-party, union representative.<sup>39</sup>

The question not answered by this decision was whether arbitration clauses requiring the arbitration of statutory claims were valid if the employee personally entered into the agreement with the employer.

In 1985, the Supreme Court took the first step towards clarifying the validity of individual arbitration agreements encompassing statutory claims in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, an international commerce dispute involving claims under the Sherman Anti-Trust Act.<sup>40</sup> In *Mitsubishi*, the Court held that agreements to arbitrate statutory claims were valid, and "by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded him by the statute; the employee only submits to the resolution of claims in an arbitral, rather than a judicial, forum."<sup>41</sup> The Court reinforced that arbitration agreements, including those involving statutory claims, are instruments of contract by declaring a "party should be held to an arbitration agreement unless Congress has evidenced the intention to preclude a waiver of judicial

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<sup>34</sup> *Id.* at 42-43.

<sup>35</sup> *Id.* at 43 (alleging a racially discriminatory employment practice).

<sup>36</sup> *See id.* (the district court granted the employer's motion for summary judgment holding the employee was bound by the arbitral decision and thereby precluded from suing his employer under Title VII).

<sup>37</sup> *See id.* at 48 (using legislative history to show that there was intent to allow both actions).

<sup>38</sup> *Id.* at 49-50, 52.

<sup>39</sup> *See id.* at 51 (holding that Title VII protects individuals and therefore is separate from the CBA).

<sup>40</sup> *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (upholding a two-part test).

<sup>41</sup> *Id.* at 628 (by submitting to arbitration, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.")

remedies for the statutory rights at issue.”<sup>42</sup> Stated another way, the Court surmised that if neither the plain statutory language nor legislative history prohibits arbitration, then there is a strong presumption that Congress intended arbitration to be permitted as a means of resolving disputes arising under the statute.

The *Mitsubishi* holding was not limited to claims arising under the Sherman Act which meant the Court could apply it to other statutory disputes.<sup>43</sup> Just a few years later, the Court did in fact look to *Mitsubishi* as it addressed the arbitration of employment statutory claims in *Gilmer v. Interstate/Johnson Lane, Corp.*<sup>44</sup> In this seminal case, the Court held that employment agreements requiring arbitration to resolve statutory disputes, where the agreement is entered into by the individual employee, are enforceable.<sup>45</sup>

Interstate/Johnson Lane hired Gilmer as a Financial Services Manager, but in order to work for the company, Gilmer was required to register with the New York Stock Exchange (NYSE).<sup>46</sup> As part of his NYSE registration application Gilmer signed a contract agreeing to arbitrate any dispute between him and Interstate/Johnson Lane arising out of his employment with the company.<sup>47</sup> Upon turning sixty-two, Gilmer was terminated and brought suit in district court alleging age discrimination in violation of the Age Discrimination Employment Act (ADEA).<sup>48</sup> Gilmer also asserted that compulsory arbitration of his claim was inconsistent with the purposes of the statute.<sup>49</sup> The *Gilmer* Court determined that neither the plain language of the statute, nor its legislative history precluded arbitration; and the agreement was, therefore, enforceable pursuant to the FAA.<sup>50</sup>

*Gilmer* is a landmark decision, because it mandates the enforcement of arbitration clauses requiring the arbitration of statutory employment claims. Not unexpectedly, the *Gilmer* decision led to a significant increase in private sector employment arbitration agreements. Following *Gilmer*, “the percentage of employers in the private sector using employment arbitration agreements increased from 3.6% in 1991 to 19% in 1997. By 1998, 62% of

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<sup>42</sup> *Id.*

<sup>43</sup> See e.g., *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000).

<sup>44</sup> *Gilmer v. Interstate/Johnson Lane, Corp.*, 500 U.S. 20, 26 (1991).

<sup>45</sup> *Id.* at 23.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 23, 27 (alleging a violation of the ADEA).

<sup>49</sup> *Id.* at 27.

<sup>50</sup> *Id.* at 26, 29.



large corporations had used employment arbitration on at least one occasion.”<sup>51</sup>

However, *Gilmer*'s contract was with a third-party, the NYSE, rather than the employer, and the *Gilmer* holding did not address the validity of arbitration agreements between the employer and the employee regarding statutory claims.<sup>52</sup> Following *Gilmer* there was a lingering question regarding whether the court would also find agreements entered into by the employer/employee for the arbitration of statutory claims to be valid.

The Supreme Court answered that question in the affirmative in *Circuit City Stores, Inc., v. Adams*.<sup>53</sup> The employee, in *Circuit City*, entered into an agreement with the employer which stated,

“I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, *exclusively* by final and binding *arbitration* before a neutral Arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and the law of tort.”<sup>54</sup>

The Court of Appeals for the Ninth Circuit held that the FAA did not apply to labor and employment contracts, specifically stating that “all contracts of employment are beyond the FAA’s reach.”<sup>55</sup> The Supreme Court disagreed.<sup>56</sup>

The employee argued that Section 2 of the FAA was applicable only to “transactions involving commerce” and because “transaction” as used in Section 2 applies only to commercial contracts, an employment contract is not a “contract evidencing a transaction involving interstate commerce.”<sup>57</sup> The Supreme Court looked to Section 1 as well as Section 2 of the FAA in making its decision.<sup>58</sup> Section 1 of the FAA states, “nothing herein

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<sup>51</sup> Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., May-July 2003, 9, at 10 (illustrating that the use of private employment arbitration has risen).

<sup>52</sup> See *Gilmer v. Interstate/Johnson Lane, Corp.*, 500 U.S. 20, 23 (1991).

<sup>53</sup> *Circuit City Stores, Inc., v. Adams*, 532 U.S. 105, 110 (2001) (citing *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9<sup>th</sup> Cir. 1999)).

<sup>54</sup> *Circuit City*, 532 U.S. at 110.

<sup>55</sup> *Id.* at 109.

<sup>56</sup> See *id.* at 119 (exempting only transportation workers).

<sup>57</sup> *Id.* at 113.

<sup>58</sup> See *id.* at 119.

contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>59</sup> The Supreme Court explained that interpreting Section 2 to apply only to commercial contracts would make the Section 1 exemption provision “superfluous” because it would make all contracts beyond the scope of the Act, and, in that case, there would have been no reason to specify an exemption in Section 1 for seamen and railroad employees.<sup>60</sup> Relying on the doctrine of *ejusdem generis*<sup>61</sup> the Court also determined that the words “any other class of workers engaged in foreign or interstate commerce” in Section 1 of the FAA meant that the FAA was applicable to all employment arbitration agreements except for those entered into by transportation workers.<sup>62</sup> In arriving at this decision, the Court explained that the FAA was constructed “broadly to overcome judicial hostility to arbitration agreements” and that to exempt employment arbitration agreements from enforceability would be counter to the intended purposes of the statute.<sup>63</sup> With this decision, the Supreme Court definitively established that the FAA did place employment arbitration agreements on the “same footing” as other contracts.<sup>64</sup>

Two other Supreme Court decisions played a significant role in defining the scope of enforceability of employment arbitration agreements. First, in *Southland Corp. v. Keating*,<sup>65</sup> the Court ruled that the FAA applies to state as well as federal courts.<sup>66</sup> Thus, where there is a valid arbitration

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<sup>59</sup> 9 U.S.C. § 1 (1947).

<sup>60</sup> *Circuit City Stores, Inc., v. Adams*, 532 U.S. 105, 113 (2001).

<sup>61</sup> *Id.* at 114-15 (“the statutory canon that ‘where words follow specific words in a statutory enumeration, the general words are constructed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.’”).

<sup>62</sup> *Id.* at 119; see also David R. Wade and Curtiss K. Behrens, *Opening Pandora's Box: Circuit City v. Adams and the Enforceability of Compulsory, Prospective Arbitration Agreements*, 86 MARQ. L. REV. 1, 4 (2002).

<sup>63</sup> *Circuit City*, 532 U.S. at 118-19.

*Kulukundis Shipping v. Amtorg Trading Corp.*, 126 F. 2d 978, 985 (1942) (quoting H. R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)) (“The report of the House committee [for the enactment of the FAA] stated, in part: ‘Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs.’”)

<sup>65</sup> 465 U.S. 1, (1984).

<sup>66</sup> See *id.* at 12-13 (pointing to the legislative history to justify broadening the scope).

agreement, state anti-arbitration laws cannot preclude the application of the FAA.<sup>67</sup>

Finally, in *14 Penn Plaza, LLC, v. Pyett*<sup>68</sup> a divided 5-4 Supreme Court held that “a CBA that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law.”<sup>69</sup> *Penn Plaza* is distinguishable from the Court’s prior decision in *Alexander* because the arbitration provision contained within the Penn Plaza CBA “expressly covered both statutory and contractual discrimination claims, whereas the *Alexander* agreement covered only contractual claims.”<sup>70</sup>

The *Penn Plaza*, decision was undoubtedly influenced by the precedent established in pre-2009 cases, and expounded upon the principals set forth in those cases.<sup>71</sup> However, the *Penn Plaza* Court ultimately based its decision on the exclusive representative authority afforded unions through the National Labor Relations Act (NLRA).<sup>72</sup> The Court reasoned that because unions had a duty to bargain in good faith on behalf of employees, and because employees could bring an action against the union for breach of that duty, the employee’s rights were sufficiently protected.<sup>73</sup> While the *Alexander* Court held that that a union representative could not use a CBA to waive an employee’s rights, the *Penn Plaza* Court strongly disagreed, stating “nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative, and so long as a CBA *clearly and unmistakably sets forth the claims which will be arbitrated then an agreement to arbitrate shall be enforced.*”<sup>74</sup>

One obvious question left unanswered by *Penn Plaza* is what language is required to meet the “clear and unmistakable” threshold. That issue was not raised by the *Penn Plaza* employee in the lower court and, therefore, was not addressed by the Supreme Court.<sup>75</sup> Since *Penn Plaza*, federal courts have held that the “clear and unmistakable” standard is met when an arbitration agreement specifies that the employee agrees to waive his right

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<sup>67</sup> *Id.* at 12 (using the power to regulate commerce, Congress intended to apply the FAA).

<sup>68</sup> *14 Penn Plaza, LLC, v. Pyett*, 556 U.S. 247(2009).

<sup>69</sup> *Id.* at 274.

<sup>70</sup> *Id.* at 249.

<sup>71</sup> *Id.* at 258, 266 (citing *Gilmer*, the Court opined that the clear language of the ADEA did not prohibit arbitration, and that had Congress’ intent been to provide such a prohibition, then such a provision would appear in the statute; quoting *Mitsubishi*, the Court further emphasized that “by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.”)

<sup>72</sup> See generally 29 U.S.C. §§ 151-169 (1935).

<sup>73</sup> See *Penn Plaza, LLC*, 556 U.S. at 271-72.

<sup>74</sup> See *id.* at 258 (emphasis added).

<sup>75</sup> *Id.* at 249.

to litigate statutory claims; alerts the employee to this waiver; and specifies which statutes are covered by the agreement.<sup>76</sup> Further, if the employee is given a choice to pursue his claim either through arbitration or litigation, the agreement must specify that by pursuing the grievance through arbitration, the employee is forfeiting his rights to litigate his statutory claim.<sup>77</sup>

PART II  
THE CONTROVERSY AND CONFUSION SURROUNDING CLASS-ACTION  
ARBITRATION AGREEMENTS

In the wake of the aforementioned decisions, the number of employees covered by employment arbitration plans administered by the American Arbitration Association increased from 3 million employees in 1997 to 6 million in 2001.<sup>78</sup> This is not a surprising statistic considering labor and employment issues are the second most litigated topic in federal courts, and the defense of such claims requires an exorbitant outlay of funds.<sup>79</sup>

Employers should be aware, however, that the previously discussed case law does not mean that arbitration agreements are enforceable in every type of employment dispute. For example, the authority granted to the National Labor Relations Board (“NLRB” or “Board”), limits the enforceability of an arbitration agreement for issues that fall under the Board’s purview.

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<sup>76</sup> See generally *de Souza Silva v. Pioneer Janitorial Svcs., Inc.*, 777 F. Supp. 2d 198, 203-05 (D. Mass. 2011); *Mathews v. Denver Newspaper Agency LLP*, 649 F.3d 1199, 1205 (10th Cir. 2011); *Shipkevich v. Staten Island Univ. Hosp.*, 2009 U.S. Dist. LEXIS 51011 (E.D.N.Y. June 16, 2009)(CBA arbitration provision that did not state that statutory anti-discrimination claims were subject to mandatory arbitration was held unenforceable).

<sup>77</sup> See *de Souza Silva*, 777 F. Supp. 2d at 203.

<sup>78</sup> Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., May-July 2003, at 2.

<sup>79</sup> *Fulbright Litigation Trends: Fulbrights 7<sup>th</sup> Annual Litigation Trends Survey Report*,

<http://www.fulbright.com/images/publications/2010AnnualLitigationTrendsSurveyFindingsReport.pdf>;

<http://hrtests.blogspot.com/2007/04/cost-of-defending-employment.html> (last visited November 19, 2013)(As the number of suits has increased, the cost for employers to defend an employment discrimination law suit has reached significant levels: \$10,000 if the suit is settled; \$100,000 if it is resolved through summary judgment or other pre-trial ruling; \$175,000 if it goes to trial; \$250,000 if the trial is won by the plaintiff(s); \$300,000 if the plaintiff’s victory survives appeal).

### A. The NLRB's Discretionary Authority Poses A Risk For Arbitration Agreements

The NLRB is charged with enforcing the National Labor Relations Act (NLRA), which governs the private sector employer/employee relationship and protects employees' rights to organize a union, engage in collective bargaining, and engage in other concerted activity for the purpose of influencing wages or working conditions.<sup>80</sup> The right to engage in concerted activity is not confined to union activity, and the NLRA is applicable to all non-union employees except supervisors, independent contractors, railway and airline employees, and federal, state or local government workers (U.S. Postal Service Employees are the only government employees covered by the Act).<sup>81</sup> Unlike the Equal Employment Opportunity Commission (EEOC), which may or may not elect to represent an employee in a dispute, the NLRB automatically becomes an employee's representative upon a finding that the employer violated the NLRA.<sup>82</sup> In such cases, the NLRB will attempt to facilitate a settlement between the parties, and if these efforts fail, the matter then goes before an Administrative Law Judge.<sup>83</sup> Administrative rulings may be appealed to the full Board and ultimately to the U.S. Courts of Appeal.<sup>84</sup>

Most significantly, the NLRB is not bound by arbitration agreements entered into between the employer and employee, and it has unfettered authority to determine whether it will recognize arbitration awards. This authority is affirmed by the Supreme Court's opinion in *Carey v. Westinghouse Electric Corp.*<sup>85</sup> There the Court interpreted Section 10(a) of the NLRA to permit the NLRB to adjudicate claims for unfair labor practices even if such claims are subject to an arbitration proceeding and award.<sup>86</sup> This discretionary authority poses substantial risk for employers since an arbitration award in favor of the employer could be overturned by

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<sup>80</sup> NATIONAL LABOR RELATIONS BOARD, [https://www.nlr.gov/75th/emp\\_rights.html](https://www.nlr.gov/75th/emp_rights.html) (last visited November 19, 2013).

<sup>81</sup> NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/resources/faq/nlr#t38n3182> (last visited November 19, 2013).

<sup>82</sup> THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/index.cfm> (last visited November 19, 2013) ("We do not, however, file lawsuits in all cases where we find discrimination."); NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/what-we-do/investigate-charges> (last visited November 19, 2013).

<sup>83</sup> NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/what-we-do/investigate-charges> (last visited November 19, 2013).

<sup>84</sup> *See id.*

<sup>85</sup> *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271 (1964) (citing *International Harvester Co. v. NLRB*, 138 NLRB 923 (1962)).

<sup>86</sup> *Id.* at 271.

the NLRB, thereby subjecting the employer to liability and additional legal expenses.

Additionally, there is limited jurisprudence regarding the enforceability of employment arbitration agreements concerning issues governed by the NLRA. In instances where case law exists, the Board is not required to defer to federal court decisions, and can instead render decisions based on Board precedent.<sup>87</sup> This subjects employers to substantial risk for action by the NLRB as the lack of judicial guidance in this area gives the Board broad authority to determine whether it will enforce an employment arbitration agreement under the NLRA.

#### B. A Consumer Arbitration Case Gives Employers Hope Regarding Class-Action Waivers

As exhibited by the *Gilmer* decision, when courts are faced with a case of first impression in the employment arena, they will likely seek guidance from principles set forth in cases involving consumer arbitration agreements.<sup>88</sup> For this reason, the Supreme Court's 2011 decision in *AT&T Mobility v. Concepcion*<sup>89</sup> provided employers with hope that employment arbitration agreements could be structured to preclude class arbitration.

The contract at issue in *AT&T* required consumers to arbitrate their claims on an individual basis, thereby precluding class litigation as well as class arbitration.<sup>90</sup> The dispute arose when AT&T advertised free phones with the purchase of an AT&T service contract and then billed the plaintiffs, the Concepcions, \$30.22, representative of the sales tax based on the phone's retail value.<sup>91</sup> The Concepcions and other consumers brought a class action suit alleging deceptive trade practices, and AT&T moved to compel arbitration under the terms of the service contract.<sup>92</sup> The Ninth Circuit held that the arbitration provision was unconscionable pursuant to

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<sup>87</sup> Daniel P. O'Gorman, CONSTRUING THE NATIONAL LABOR RELATIONS ACT: THE NLRB AND METHODS OF STATUTORY CONSTRUCTION, 81 Temp. L. Rev. 177, 190 (2008).

<sup>88</sup> *Gilmer v. Interstate Johnson/Lane, Corp.*, 500 U.S. 20, 29 (1991); *See also* *LaVoice v. UBS Fin. Servs.*, 2012 U.S. Dist. LEXIS 5277 (S.D.N.Y. Jan. 13, 2012)(citing *AT&T Mobility, LLC v. Concepcion*, the Court held that requiring the arbitration of a Fair Labor Standards Act (FLSA) claim on an individual basis does not conflict with the FLSA's collective action provisions).

<sup>89</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (U.S. 2011).

<sup>90</sup> *Id.* at 1744.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1744-45.

California's *Discover Bank* rule, and not pre-empted by the FAA.<sup>93</sup> The Circuit Court reasoned that because the final phrase of Section 2 of the FAA permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract," and California law permits the revocation of a contract for unconscionability, the dispute was governed by state law.<sup>94</sup> Finding that California's *Discover Bank* rule rendered class-action waivers in arbitration agreements unconscionable, the Court held the AT&T agreement unconscionable and, therefore, unenforceable.<sup>95</sup>

The Supreme Court declined to uphold the Ninth Circuit's decision.<sup>96</sup> Instead, the Supreme Court found the California law to be an "obstacle" to the Congressional objectives of the FAA and held that the FAA pre-empts any state contract law that stands as an obstacle to the FAA's purpose.<sup>97</sup> In reaching this conclusion, the Court relied upon case law affirming that "the principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms."<sup>98</sup> The Court explained that the number of parties involved and the added procedural requirements placed on the arbitrator relative to class certification, would hinder the arbitration process by eliminating the advantages which include informality, speed, and lower cost.<sup>99</sup> The Court further opined that class arbitration would be more likely to "generate procedural morass rather than final judgment."<sup>100</sup>

### C. NLRB Decision Invalidates Class-Action Arbitration Waivers

Many employers and labor attorneys celebrated the *AT&T* decision, believing the open language of the decision provided the necessary guidance for the prohibition of class arbitration in the employment setting much like *Mitsubishi* paved the way for the arbitration of employment statutory claims.<sup>101</sup> That celebration abruptly ended three months after it

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<sup>93</sup> *Id.* at 1745.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 1753 ("a federal statute's saving clause cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act.") *Id.* at 1748.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1753 (citing *Volt Info. Srvs., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989); see also *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010)).

<sup>99</sup> *AT&T Mobility*, 131 S. Ct. at 1750-51.

<sup>100</sup> *Id.* at 1751.

<sup>101</sup> Daniel Schwartz, *The Quickly Shifting Landscape of Class Actions and Arbitrations*, Connecticut Employment Law Blog (November 21, 2013, 11:05 am),

began when the NLRB exercised its broad administrative authority in *D.R. Horton*, and ruled that an employer could not use employment contracts to prohibit class litigation while simultaneously prohibiting class arbitration.<sup>102</sup>

In January 2006, D.R. Horton implemented a corporate-wide policy requiring all new and current employees to sign a Mutual Arbitration Agreement (MAA) as a condition of employment.<sup>103</sup> The MAA stipulated 1) that binding arbitration would be the exclusive means of dispute resolution, thereby preventing employees from bringing class action litigation; 2) the employees were prohibited from arbitrating their claims as a class; and 3) by signing the agreement employees waived their right to file a law suit or civil proceeding as well as the right to resolve the dispute before a judge or jury, thereby prohibiting employees from having cases heard by any judge, including an Administrative Law Judge.<sup>104</sup> In 2008, Cuda and other superintendents notified D.R. Horton of their intent to initiate class-action arbitration, alleging that Horton violated the Fair Labor Standards Act (FLSA) by misclassifying them as exempt employees and denying them overtime pay.<sup>105</sup> When D.R. Horton refused to submit to class-action arbitration, asserting that the MAA barred arbitration of collective claims, Cuda filed an unfair labor practice charge with the NLRB. NLRB efforts to resolve the claim failed, and the NLRB filed an Administrative Law complaint against the employer alleging unfair labor practice under Section 8(a)(1) of the NLRA.<sup>106</sup>

D.R. Horton and NLRB's General Counsel both appealed the Administrative Law Judge's decision to the full Board, which ultimately ruled that D.R. Horton had engaged in unfair labor practices.<sup>107</sup> In arriving at this decision, the Board determined the issue before it was not whether an NLRA claim could be arbitrated, but rather "whether the MAA's categorical prohibition of joint, class, or collective employment law claims in any forum directly violated the substantive rights vested in employees by Section 7 of the NLRA."<sup>108</sup> The Board predicated its decision on three legal conclusions.<sup>109</sup> First, the Board observed that sections 1 and 6 of the MAA

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<http://www.ctemploymentlawblog.com/2011/05/articles/the-quickly-shifting-landscape-of-class-actions-and-arbitrations/>.

<sup>102</sup> See generally, D. R. Horton, 2012 NLRB LEXIS 11 (2012).

<sup>103</sup> D. R. Horton, at 1.

<sup>104</sup> *Id.*

<sup>105</sup> 29 U.S.C. § 213; D. R. Horton, at 1.

<sup>106</sup> D. R. Horton, at 1.

<sup>107</sup> See *id.* at 2.

<sup>108</sup> See *id.* at 1.

<sup>109</sup> *Id.* at 5, 17, and 47.



collectively stated that “all disputes would be determined by binding arbitration and the employee was waiving his right to file a law suit or other civil proceeding or have it heard before any judge or jury.”<sup>110</sup> The Board concurred with the Administrative Law Judge that this language would reasonably lead employees to believe they were prohibited from filing charges against their employer with the NLRB or other federal agencies, which violates the NLRA.<sup>111</sup> The Board held that employers may not keep employees in the dark about their rights and are obligated to communicate to employees that by signing the arbitration agreement the employees retains their rights to file charges with the NLRB, EEOC, or other applicable agencies.<sup>112</sup>

Next, the Board surmised that the right to engage in concerted activity under Section 7 is a substantive right, central to the NLRA’s purpose, and is not merely a procedural right.<sup>113</sup> The Board reasoned that because it is a substantive right, it cannot be contractually waived and employees cannot be forced to individually bargain for aid or protection.<sup>114</sup> The Board noted the existence of a strong NLRB precedent holding that contracts restricting Section 7 rights are unlawful.<sup>115</sup> It refused to deviate from that precedent, holding the MAA constituted an unfair labor practice under Section 8(a)(1) because it prevented employees from collectively arbitrating or litigating a claim which is a direct violation of Section 7 of the NLRA.<sup>116</sup>

Finally, the board boldly asserted that the FAA did not govern this case, and in the alternative, if it did govern, it was not applicable.<sup>117</sup> The Board held the Norris-LaGuardia Act was the controlling law rather than the FAA since the Norris-LaGuardia Act was enacted seven years after the FAA and invalidates any agreement between the employer and the employee which requires the employee to waive his rights to collective action.<sup>118</sup> The Board argued that the later enacted Norris-LaGuardia Act implicitly repealed conflicting provisions of the earlier FAA.<sup>119</sup>

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<sup>110</sup> *Id.* at 3, 5.

<sup>111</sup> *Id.* at 2.

<sup>112</sup> D. R. Horton, at 1 at 17.

<sup>113</sup> *See id.* at 2.

<sup>114</sup> *Id.* at 17, 19.

<sup>115</sup> *Id.* at 17.

<sup>116</sup> *Id.* at 1, 6.

<sup>117</sup> D. R. Horton, at 1 at 8..

<sup>118</sup> 29 U.S.C. §§ 101-115 (1982); *D.R. Horton* at \*12 (“Congress determined that workers should have full freedom of association and shall be free from the interference, restraint, or coercion of employers in concerted activity for the purpose of collective bargaining or other mutual aid or protection.”)

<sup>119</sup> *Id.* at 12 (citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582 fn. 18 (1971); *Posadas v. Nat’l City Bank*, 296 U.S. 497, 503(1936); *see also Tug Allie-B, Inc. v. United States*, 273 F.3d 936, 948(11<sup>th</sup> Cir. 2001)).

The Board further reasoned that the FAA was not applicable to this case because arbitration agreements are enforceable under the FAA only where the agreement does not require a party to forgo substantive rights afforded by the statute.<sup>120</sup> Because the MAA required employees to abandon the substantive right to engage in concerted activity, the FAA did not apply.<sup>121</sup>

Seminal cases interpreting the application of the FAA to class arbitration presented a troubling issue for the Board. It devoted a considerable portion of its decision to explaining the ways in which *D.R. Horton* was distinguished from judicial precedents. Regarding the *AT&T* case, for example, the Board noted that *AT&T* involved a state pre-emption claim, governed by the Supremacy Clause where the *D.R. Horton* case involved two federal statutes.<sup>122</sup> The Board stressed that its ruling provided an appropriate accommodation of the policies underlying the two federal statutes.<sup>123</sup> The Board further defended by asserting that a critical factor leading to the *AT&T* decision was the determination that requiring class arbitration would “sacrifice the principal advantages” of arbitration, namely informality and streamlined proceedings.<sup>124</sup> The Board reasoned that the *D.R. Horton* case differed from *AT&T* because the disputes covered by the *AT&T* consumer agreements could involve “tens of thousands of potential claimants,” but employment class actions typically only involved twenty employees, thereby, making employment class arbitration more manageable and less time consuming than consumer arbitration.<sup>125</sup>

The Board similarly dismissed the *Penn Plaza* decision, reasoning that an arbitration clause in a CBA does not stand on the same footing as an MAA imposed on an individual employee as a condition of employment.<sup>126</sup> The Board opined that when employees engage in the collective bargaining process through a union representative, the employee is engaging in concerted activity.<sup>127</sup> For this reason, in instances where the

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<sup>120</sup> *D.R. Horton* at 9 (citing *Gilmer v. Interstate Johnson/Lane, Corp.*, 500 U.S. 20, 29 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614 (1985)).

<sup>121</sup> *Id.*

<sup>122</sup> U.S. CONST. ART. VI §2; *D.R. Horton*. at 50.

<sup>123</sup> *Id.* at 34.

<sup>124</sup> *Id.* at 11 (citing [AT&T Mobility LLC v. Concepcion](#), 131 S. Ct. 1740, 1750 (U.S. 2011)).

<sup>125</sup> *Id.* (citing [AT&T Mobility LLC v. Concepcion](#), 131 S. Ct. 1740, 1752 (U.S. 2011)).

<sup>126</sup> *Id.* at 10.

<sup>127</sup> *Id.*

CBA waives employees' rights, there is no infringement of Section 7 rights.<sup>128</sup>

### PART III

#### THE NLRB'S QUESTIONABLE INTERPRETATION OF THE LAW Federal Courts Disagree About the Applicability of *D.R. Horton*

So far, the District Courts that have addressed employment class-action waivers since the NLRB rendered its decision have not agreed on whether the *D.R. Horton* decision controls.<sup>129</sup> For instance, ten days after the NLRB handed down its decision, the U.S. District Court for the Southern District of New York explicitly refused to rely on the *D.R. Horton* decision in deciding *LaVoice v. UBS Financial Services*, a case which, like *D.R. Horton*, involved a claim under the FLSA.<sup>130</sup> Instead, the court treated *AT&T* as the controlling authority, noting that *AT&T* made clear that an absolute right to collective action is inconsistent with the FAA's purpose of enforcing arbitration agreements according to their terms.<sup>131</sup> Conversely, two months later, the District Court for the Western District of Wisconsin held in *Herrington v. Waterstone Mortgage Corp.*, another FLSA case, that the *D.R. Horton* ruling made the class-action waiver at issue unenforceable.<sup>132</sup>

#### A.NLRB Decision Seemingly Conflicts With Supreme Court Precedent

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<sup>128</sup> *Id.*

<sup>129</sup> See [Palmer v. Convergys Corp.](#), 2012 U.S. Dist. LEXIS 16200 (M.D. Ga. Feb. 9, 2012) (holding that a class-action waiver pertained to procedural rather than substantive rights and dismissing *D. R. Horton* as not meaningful to the assessment); [Sutherland v. Ernst & Young LLP](#), 768 F. Supp. 2d 547 (S.D.N.Y. 2011) (refusing to follow *AT&T Mobility* and enforce the class waiver because the employee was unable to vindicate her rights on an individual basis); [Sanders v. Swift Transp. Co. of Ariz., LLC](#), 2012 U.S. Dist. LEXIS 24234 (N.D. Cal. Jan. 17, 2012)(Court granted employer's motion to compel the arbitration of individual claims in a putative class action. Plaintiff argued the class-action waiver was invalid under *D.R. Horton*, but the Court held *D.R. Horton* was not pertinent and refused to follow it); *Johnmohammadi v. Bloomingdale's Inc.*, No. 11-cv-06434 (GW)(AJW) (C.D. Cal. Feb. 29, 2012)(unpublished decision. District Court enforced the employee's waiver of his rights to class action arbitration or litigation of his claim).

<sup>130</sup> [LaVoice v. UBS Fin. Servs.](#), 2012 U.S. Dist. LEXIS 5277 (S.D.N.Y. Jan. 13, 2012).

<sup>131</sup> *Id.* at 19-20.

<sup>132</sup> [Herrington v. Waterstone Mortg. Corp.](#), 2012 U.S. Dist. LEXIS 36220, at 18 (W.D. Wis. Mar. 16, 2012) (basing decision on *D.R. Horton*).

Two of the three legal conclusions on which the NLRB based its decision conflict with Supreme Court precedent, and are likely to be rejected if the Supreme Court considers the *D.R. Horton* case.

First, the Board erroneously concluded that the Norris-LaGuardia Act governs this dispute because it was enacted seven years after the FAA, and the statute's language implicitly repeals conflicting sections of the FAA.<sup>133</sup> The Norris-LaGuardia Act prevents an employer from hindering an employee's ability to join in concerted activity for the purpose of collective bargaining or other mutual aid or protection, but does not expressly state that its provisions supersede conflicting provisions in the FAA.<sup>134</sup> The Supreme Court has repeatedly cautioned that it strongly disfavors "repeals by implication."<sup>135</sup> "In the absence of some affirmative showing of intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable" and the later statute covers the whole subject of the earlier one, and is clearly intended as a substitute.<sup>136</sup> Clearly, the FAA is not irreconcilable with the Norris-LaGuardia Act as the **Norris-LaGuardia Act encourages** use of non-judicial processes of negotiation, mediation and arbitration for the resolution of labor disputes.<sup>137</sup> Moreover, the primary purpose of the Norris-LaGuardia Act was to foster growth and vitality of labor unions, evidencing that it was not intended to be a substitute for the FAA which was enacted to ensure that arbitration agreements are "on the same footing" as other contracts.<sup>138</sup> Additionally, since the Norris LaGuardia Act did not express a clear Congressional intent to repeal all or part of the FAA, the Supreme Court will likely reject the Board's argument that the Norris-LaGuardia Act supplants the FAA.<sup>139</sup>

Next, the Board concluded that the right to engage in concerted activity under Section 7 is a substantive right, not merely a procedural right, and that substantive rights cannot be contractually waived.<sup>140</sup> The Board

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<sup>133</sup> [D. R. Horton, 2012 NLRB LEXIS 11, 12 \(2012\)](#).

<sup>134</sup> 29 U.S.C. §§ 101-115

<sup>135</sup> *Id.* (citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582 fn. 18 (1971); *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503(1936); *see also* *Tug Allie-B, Inc. v. United States*, 273 F.3d 936, 948(11<sup>th</sup> Cir. 2001); [United States v. United Continental Tuna Corp.](#), 425 U.S. 164, 168 ("it is a cardinal principle of statutory construction that repeals by implication are not favored.")).

<sup>136</sup> *Posadas v. National City Bank*, 296 U.S. 497, 504-05 (1936); *Morton v. Mancari*, 417 U.S. 535, 550 (1974).

<sup>137</sup> *Brotherhood of R. Trainmen v Toledo, P. & W. Railroad*, 321 US 50 (1942).

<sup>138</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)

<sup>139</sup> *Boys Markets, Inc. v Retail Clerks Union*, 398 US 235 (1970).

<sup>140</sup> [D. R. Horton, 2012 NLRB LEXIS 11, \\*6 \(2012\)](#).

contended the NLRA prohibited Cuda from being denied the right to engage in concerted activity provided to him through the FLSA.<sup>141</sup> This conclusion is also defective and contradicts case law. First, specific to the FLSA, various courts have held that the right to engage in collective activity is not a substantive right within the FLSA.<sup>142</sup> More generally courts have established that the right to proceed as a class is merely a procedural mechanism that can be waived through an arbitration agreement because there is no substantive right to collectively address grievances.<sup>143</sup>

The Board further contended that requiring individual arbitration equates to a waiver of a substantive right and such rights cannot be contractually waived.<sup>144</sup> First, *Gilmer* makes clear that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to resolution in an arbitral, rather a judicial forum.”<sup>145</sup> The *Gilmer* Court maintained that an arbitration agreement that prohibits class-wide relief is not necessarily invalid in cases brought under a statute which includes a collective action provision.<sup>146</sup> Further, because of the contract principles surrounding arbitration agreements, such agreements must be enforced “even if the arbitration could not go forward as a class-action or class relief could not be granted by the arbitrator.”<sup>147</sup>

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<sup>141</sup> See generally *D. R. Horton*.

<sup>142</sup> [Herrington v. Waterstone Mortg. Corp., 2012 U.S. Dist. LEXIS 36220 \(W.D. Wis. Mar. 16, 2012\)](#) (citing *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (“[W]e reject the Carter Appellants’ claim that their inability to proceed collectively deprives them of substantive rights available under the FLSA.”); *Horenstein v. Mortgage Market, Inc.*, 9 Fed. Appx. 618, 619 (9th Cir. 2001) (“Appellants’ contention that the arbitration clause in the Employment Agreements may not be enforced because it eliminates their statutory right to a collective action, is insufficient to render an arbitration clause unenforceable.”); *Copello v. Boehringer Ingelheim Pharmaceuticals Inc.*, 812 F. Supp. 2d 886, 894 (N.D. Ill. 2011) (“Courts routinely hold that FLSA does not grant employees the unwaivable right to proceed in court collectively under § 216(b) . . . [W]hile FLSA prohibits substantive wage and hour rights from being contractually waived, it does not prohibit contractually waiving the procedural right to join a collective action.”).

<sup>143</sup> *Kristian v. Comcast Corp.*, 446 F.3d 25, 54 (1<sup>st</sup> Cir. 2006)(class-action (including class arbitration) is a procedure for redressing claims); *Blas v. Belfer*, 368 F.3d 501, 505 (5<sup>th</sup> Cir. 2004) (holding “there is no substantive right to a class remedy; a class action is a procedural device.”); *Johnson v. West Suburban Bank*, 225 F.3d 366 (3<sup>rd</sup> Cir. 2000) (holding that the right to collectively assert a claim for the violation of a federal statute can be waived through an arbitration agreement since it is merely a procedural right); See also *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (opining that Federal Rule of Civil Procedure 23, the federal rule authorizing class actions, affects only procedural rights, while “it leaves the parties’ legal rights intact.”).

<sup>144</sup> See generally [D. R. Horton, 2012 NLRB LEXIS 11, \\*6, 15-21 \(2012\)](#).

<sup>145</sup> *Gilmer v. Interstate/Johnson Lane, Corp.*, 500 U.S. 20, 32 (1991).

<sup>146</sup> *Id.* at 33.

<sup>147</sup> *Id.*

The Board's assertion also conflicts with the Supreme Court's decision in *14 Penn Plaza, LLC v. Pyett* in which the Court held that a union could, in a CBA, contractually waive employees' Section 7 rights in exchange for employer concessions.<sup>148</sup> *D.R. Horton* did not involve a CBA, and the MAA was unilaterally imposed on employees as a condition of employment.<sup>149</sup> The Board stated that "an arbitration clause freely and collectively bargained between a union and an employer does not stand on the same footing as an employment policy, such as the MAA, imposed on individual employees by the employer as a condition of employment."<sup>150</sup> Thus, while the Supreme Court's interpretation permits a third-party to contractually waive an employee's Section 7 rights, the NLRB's interpretation prohibits the employee from contractually waiving his own right to engage in concerted activity through an arbitration agreement.

The Board next asserted that the FAA was not applicable to this case because arbitration is applicable under the FAA only where the arbitration agreement does not require a party to forego substantive rights afforded by the statute.<sup>151</sup> Since the right to collective activity is not a substantive right this argument fails, thereby, making the FAA applicable to the *D.R. Horton* dispute and requiring the contractual enforcement of the arbitration agreement.<sup>152</sup>

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<sup>148</sup> *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247, 259-60 (2009) ([T]here is no basis for the Court to strike down the arbitration clause in this CBA, which was freely negotiated by the Union . . . , and which clearly and unmistakably requires respondents to arbitrate the age-discrimination claims at issue in this appeal. Congress has chosen to allow arbitration of ADEA claims. The Judiciary must respect that choice.").

<sup>149</sup> [D. R. Horton, 2012 NLRB LEXIS 11, at \\*3 \(describing the agreement that required all employees "to agree, as a condition of employment, that they will not pursue class or collective litigation of claims in any forum, arbitral or judicial"\)](#).

<sup>150</sup> *Id.* at \*45.

<sup>151</sup> *Id.* at \*38 (citing *Gilmer v. Interstate Johnson/Lane, Corp.*, 500 U.S. 20, 26 (1991)).

<sup>152</sup> See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745-46 (2011) (emphasizing that arbitration is a matter of contract and that courts must place arbitration agreements on an equal footing with other contracts); *Volt Info. Srvs., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989) (affirming the lower court's proposition that "the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate"); *Perry v. Thomas*, 482 U.S. 483, 490 (1987) (noting that the general applicability of the FAA reflects that "[t]he preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered . . . .") (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

### B. The D.R. Horton Decision Contradicts Supreme Court Cases Regarding Class Arbitration

Finally, the Board's decision contradicts the three most recent Supreme Court cases barring class arbitration in consumer cases and ignores the reasoning that led to those decisions. For instance, in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, the Supreme Court held that when an arbitration agreement is silent on the matter of class arbitration, it is presumed that the parties did not agree to use class arbitration and, therefore, that neither party can be compelled to submit to class arbitration to resolve the claim.<sup>153</sup> The Court reached this decision based on the FAA principal that arbitration is a matter of contract and consent.<sup>154</sup> The *D.R. Horton* decision makes it clear that if an employee wishes to engage in concerted activity, the employer cannot prevent the employee from doing so.<sup>155</sup> Under the *D.R. Horton* decision, if an arbitration agreement prohibits class litigation but is silent on class arbitration, and an employee wants to engage in class arbitration as a means of resolving his dispute, the employer has no choice but to submit to the employee's demand, lest he be found by the Board to have engaged in unfair labor practices. This is in direct conflict with the *Stolt-Nielsen* decision, which requires parties to consent to the terms. Although *Stolt-Nielsen* was a consumer case, the contract principle of consensual terms upon which the decision is based applies to all arbitration agreements.<sup>156</sup> The Board, however, refused to give weight to *Stolt-Nielsen* saying it was not applicable to employment cases since it involved a consumer dispute.<sup>157</sup>

Similarly, the Board refused to apply *AT&T* to the *D.R. Horton* case because it too was a consumer, rather than employment, dispute.<sup>158</sup> In arriving at its decision, the *AT&T* Court reasoned that “[r]equiring the availability of class wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”<sup>159</sup> The Court maintained that class arbitration would eviscerate the benefits of arbitration as more participants would require more formality for the sake of keeping order, confidentiality would be impossible to achieve, and a

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<sup>153</sup> [Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.](#), 130 S. Ct. 1758, 1775 (U.S. 2010) (reasoning that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so”).

<sup>154</sup> *Id.*

<sup>155</sup> See generally [D. R. Horton](#), 2012 NLRB LEXIS 11, at \*6 (2012).

<sup>156</sup> [D. R. Horton](#), 2012 NLRB LEXIS 11, at \*54.

<sup>157</sup> *Id.* (noting that *Stolt-Nielsen* is not controlling because it did not “involve[ ] the waiver of rights protected by the NLRA or even employment agreements”).

<sup>158</sup> *Id.*

<sup>159</sup> [AT&T Mobility LLC v. Concepcion](#), 131 S. Ct. 1740, 1748 (2011).

large number of plaintiffs would inevitably slow down the pace of resolution while adding to the procedural complexity, and the cost to all parties.<sup>160</sup> This is sound reasoning regardless of whether the dispute involves 10,000 consumers or 100 employees.

Should *D.R. Horton* be heard by the Supreme Court, the Court will likely also look to *CompuCredit v. Greenwood* for guidance. In *Compucredit*, credit card holders signed an agreement agreeing to arbitrate all claims, but subsequently filed a class action suit against the credit card company alleging violations of the Credit Repair Organizations Act (CROA).<sup>161</sup> As required by the CROA, the agreement contained the statement, “You have a right to sue a credit repair organization that violates the [CROA]” and any waiver by any consumer of any protection provided by the Act is void.<sup>162</sup> The consumers asserted that the statute gave them the right to litigate their claim, and also prohibited the waiver of that right, making the arbitration agreement unenforceable.<sup>163</sup>

The Court held that the only consumer rights provided by the CROA were the rights to be alerted to the fact they could file an action in a court of law, and also alerted to the protections provided elsewhere in the statute.<sup>164</sup> The Court further held that arbitration agreements are to be enforced in accordance with their terms unless the statute manifests a clear Congressional intent to preclude arbitration as a means of resolving claims.<sup>165</sup>

The Court concluded that the language of the CROA providing for a “right-to-sue” and maintenance of class actions did not demonstrate a Congressional intent to nullify the FAA policy favoring arbitration.<sup>166</sup> In other words, notwithstanding a notice about the right to sue, consumers could contractually waive their right to sue through an arbitration

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<sup>160</sup> *Id.* at 1749-52.

<sup>161</sup> [CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 668 \(2012\).](#)

<sup>162</sup> *Id.* at 669.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 669-70 (“The only consumer right it *creates* is the right to receive the statement, which is meant to describe the consumer protections that the law *elsewhere* provides. The statement informs consumers, for instance, that they can dispute the accuracy of information in their credit file and that “[t]he credit bureau must then reinvestigate and modify or remove inaccurate or incomplete information.”).

<sup>165</sup> *Id.* at 672-673 (suggesting that “[h]ad Congress meant to prohibit these very common provisions in the CROA, it would have done so in a manner less obtuse than what respondents suggest,” and holding that “[b]ecause the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms”).

<sup>166</sup> [CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 672 \(2012\).](#)



agreement.<sup>167</sup> Similarly, although the language of the NLRA gives employees the right to engage in concerted activities, it does not express clear Congressional intent to thwart an employee's ability to contractually waive that right.

The Board's rejection of these cases indicates the Board will not defer to Supreme Court decisions upholding the enforcement of class-action waivers in consumer cases despite the fact that *AT&T*, *Stolt-Nielsen*, and *Compucredit* exemplify the Supreme Court's deference to class arbitration waivers. Because the Board's interpretation of the law is contrary to the principles the Supreme Court set forth in these cases, the Supreme Court seemingly has ample reason to reject the *D.R. Horton* ruling.

#### PART IV

### What Does The D.R. Horton Ruling Mean For Employers?

#### The D.R. Horton Decision is Limited in Scope

The NLRB is likely to follow *D.R. Horton* absent a contrary ruling by the U.S. Supreme Court or the election of a new Administration and subsequent replacement of Board members. The peril to employers is that while employers can appeal decisions of the NLRB to the federal courts, there is significant cost associated with doing so and the contradictory decisions that currently exist create much uncertainty relative to outcome. Additionally, this ruling puts employers who currently have agreements that prohibit class litigation and arbitration at considerable risk for charges of unfair labor practices by the NLRB as employees and unions will inevitably begin to challenge such agreements.

Employers can find some solace, however, in knowing that the *D.R. Horton* decision is limited in scope.<sup>168</sup> For instance, the decision is only applicable to private-sector, union and non-union, employees covered by the NLRA. This means that employers may require supervisors, independent contractors, railway and airline employees, and federal, state or local government workers (with the exception of U.S. postal workers) to resolve all disputes through individual arbitration, including class-action arbitration. The NLRA is not applicable to these employees and, therefore employers are, not required to afford them opportunities for collective activity.<sup>169</sup>

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<sup>167</sup> *Id.*

<sup>168</sup> See generally JON O. SHIMABUKURO, CONG. RESEARCH SERV., RL30934, FEDERAL ARBITRATION ACT: BACKGROUND AND RECENT DEVELOPMENTS (2003).

<sup>169</sup> *Frequently Asked Questions*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/resources/faq/nlr/which-employees-are-protected-under-nlra> (last visited January 22, 2014).

Additionally, the decision does not mandate that employees resolve class-action disputes only through litigation.<sup>170</sup> Key to the *D.R. Horton* decision was the fact that the MAA prohibited both class-action litigation and class-action arbitration.<sup>171</sup> The Board noted in dicta that the NLRA permits collective arbitration and observed that Supreme Court decisions have held that the pursuit of grievances through collective arbitration is concerted activity within the bounds of Section 7.<sup>172</sup> Therefore, employers can require all disputes to be resolved through arbitration, so long as the right to collective arbitration is not foreclosed.<sup>173</sup> If employers utilize an agreement requiring arbitration, including class arbitration, they must ensure that the agreement clearly advises employees of the employees' rights to file charges with the NLRB or other applicable agencies.<sup>174</sup>

#### A. Potential Opportunity For Limited Use of Class-Action Waivers

The *D.R. Horton* decision did not address whether allowing subgroups of the class to collectively arbitrate their claims would be permissible. This could be an area of opportunity for employers who wish to require arbitration, but want to limit the number of claims arbitrated at one time. Section 7 of the NLRA grants employees the right to “engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection,” and this includes efforts to “improve terms and conditions or otherwise improve their lot as employees.”<sup>175</sup> The right to engage in concerted activities includes those instances in which the employee presents demands to the employer as a group in order to improve working

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<sup>170</sup> [D. R. Horton, 2012 NLRB LEXIS 11, at \\*6, 52 \(2012\)](#) (holding that “an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums”).

<sup>171</sup> *See generally id.*

<sup>172</sup> *Id.* at \*9 (“When the grievance is pursued under a collectively-bargained grievance-arbitration procedure, the Supreme Court has observed, ‘No one doubts that the processing of a grievance in such a manner is concerted activity within the meaning of § 7.’”) (citing *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 836 (1984)).

<sup>173</sup> *Id.* at \*10 (“Thus, 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”).

<sup>174</sup> *Id.* at \*55 (holding that “an agreement requiring arbitration of any individual employment-related claims, but not precluding a judicial forum for class or collective claims, would not violate the NLRA, because it would not bar concerted activity”).

<sup>175</sup> *Id.* at \*6.

conditions.<sup>176</sup> Arguably, an employment arbitration agreement that allows employees to collectively arbitrate a claim, but restricts the number of employees who can join together for a single arbitration, while allowing the employee to self-select the employees with whom he will join, would meet this criterion. For instance, if one-hundred employees who are governed by an arbitration agreement institute a class action against the employer, and are allowed to arbitrate in groups of twenty, and self-select their group, the arbitration agreement should arguably be enforced.

The reasons for this are three-fold. First, the decision in *D.R. Horton*, relied on the fact that employees were completely denied an opportunity to jointly arbitrate claims in any forum.<sup>177</sup> Relying on *Gilmer*, the Board reasoned that arbitration was permissive so long as it did not require a party to forgo substantive rights afforded by the NLRA, namely the substantive right of collective activity.<sup>178</sup> It is well established that “arbitration may substitute for a judicial forum so long as the litigant can effectively vindicate his or her statutory rights through arbitration.”<sup>179</sup> Assuming the right to engage in concerted activity is a substantive right, this scenario does not cause the employee to lose that substantive right since the employee could collectively advocate for mutual aid and protection with a group of his or her peers rather than individually. Pursuant to NLRB precedent, for an activity to be “concerted activity” it must include multiple employees and not just one employee acting on his own behalf.<sup>180</sup> Neither case law nor the language of the NLRA prohibits subdividing the class.<sup>181</sup> The law simply says that you must be free to join together for collective action. So long as the statute does not stipulate that the class must proceed as one unit, the scenario does not foreclose the employees’ rights to collectively proceed.

Where a conflict exists between two federal statutes, the Board is required to resolve the contract in a manner that maintains the integrity of

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<sup>176</sup> 29 U.S.C.A. § 157; *see, e.g.*, citing *Distributive Workers of America v. NLRB*, 593 F.2d 1155, 1167 (D.C. Cir. 1978) (holding that Section 7 rights “extend beyond formal union activities and include concerted activities of the type engaged in here, where the employees found it necessary to present their demands as a group in order to secure relief from intolerable working conditions”).

<sup>177</sup> [D. R. Horton, 2012 NLRB LEXIS 11, at \\*6, 15 \(2012\)](#) (reasoning that “the MAA requires employees, as a condition of their employment, to refrain from bringing collective or class claims in any forum”).

<sup>178</sup> *Id.* at \*38.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at \*13-14 (noting that for conduct by a single employee to constitute concerted activity, he or she must be seeking to initiate, induce, or prepare for group action).

<sup>181</sup> *Id.* at \*14.

both statutes to the greatest extent possible.<sup>182</sup> Neither the FAA nor the NLRA explicitly sanction or prohibit class-action arbitration agreements.<sup>183</sup> The conflict arises because the FAA purports a liberal policy favoring arbitration which requires arbitration agreements to be honored as contracts, while the NLRA requires employees to be given the right to collectively resolve claims.<sup>184</sup> According to the NLRB, you cannot contractually waive this substantive right.<sup>185</sup> The small group proposal would honor the contract adopted by both parties while allowing the resolution of the claim through concerted activity. Further, since the employee's ability to collectively engage in arbitration would not be restrained, small group arbitration would not constitute an unfair labor practice under Section 8(a)(1).<sup>186</sup>

Finally, the judicially affirmed benefits of arbitration cannot be discounted: less procedural rigor, lower costs, greater efficiency and speed, confidentiality, and the ability to utilize expert adjudicators to resolve specialized disputes.<sup>187</sup> Large class arbitrations impede the realization of these benefits as envisioned by the FAA.<sup>188</sup> Such benefits would be preserved, however, by allowing the class to subdivide into smaller groups for the arbitration of their claims.

There are, of course, some potential downsides to this proposal which should be considered by employers. First, arbitrating a claim in front of multiple arbitrators could actually increase the employer's legal costs. Additionally, many federal employment statutes allow employees to recover attorney fees, thus, subjecting employers to the risk of multiple fees for several small groups of employees rather than a single fee for a large class of employees. Further, by subdividing the class, the employer could

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<sup>182</sup> *Id.* at \*34 (citing *S. S. Co. v. NLRB*, 316 U.S. 31, 47 (1942); *Direct Press Modern Litho*, 328 NLRB 860, 861 (1999); *Image Sys.*, 285 NLRB 370, 371 (1987)).

<sup>183</sup> 9 U.S.C.A. §§ 2, 9; *see Discover Bank v. Superior Ct.*, 113 P.3d 1100, 1110 (Cal. 2005) (stating that “under both federal and California law, arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”).

<sup>184</sup> 9 U.S.C.A. §2; 29 U.S.C. § 157.

<sup>185</sup> [D. R. Horton, 2012 NLRB LEXIS 11, at \\*6, 17 \(2012\)](#) (affirming that “employer-imposed, individual agreements that purport to restrict Section 7 rights – including, notably, agreements that employees will pursue claims against their employer only individually,” are unlawful under the Board’s precedent).

<sup>186</sup> *Id.* at \*15-16 (“Section 8(a)(1) of the Act makes it an unfair labor practice for an employer ‘to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in’ Section 7.”).

<sup>187</sup> *See, e.g., Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775 (2010).

<sup>188</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751-53 (2011).

be exposed to inconsistent outcomes relative to the various subgroups as decisions would be rendered by different arbitrators and would be based on facts specific to the subgroups.

Employers may also be able to use class-waivers by showing the waivers were voluntary. The fact that D.R. Horton employees were required to sign the MAA as a condition of employment was another critical factor the Board cited as a reason for its decision.<sup>189</sup> However, if employers require employees to sign a class arbitration waiver, but give them a specified period of time in which to “opt-out” of the agreement, then the agreement is no longer a condition of employment.<sup>190</sup> Employers could argue that those who did not “opt-out” after the specified time made a truly voluntary decision to waive their rights to class arbitration.<sup>191</sup>

## PART V CONCLUSION

As the *D.R. Horton* case makes its way through the appeals process, the two critical questions that must be answered are whether the right to pursue collective activity is a substantive right under the NLRA and whether employment agreements requiring the simultaneous waivers of class litigation and class arbitration must be enforced according to the terms of those agreements.

The law is clear that arbitration agreements are contracts, and therefore, must be enforced according to their terms.<sup>192</sup> These principles extend to the adjudication of employment claims, and are applicable to statutory claims, unless the statute contains a “contrary congressional command” that claims brought under the statute are exempt from arbitration.<sup>193</sup>

The NLRA does not contain a clear command to exempt disputes governed by the statute from arbitration, which means it must be enforced as a contract.<sup>194</sup> The Board’s interpretation of the NLRA as granting employees a substantive right to engage in concerted activity, including the

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<sup>189</sup> D.R. Horton, 2012 NLRB 11, at \*3.

<sup>190</sup> *Labor and Employment*, THE CALIFORNIA LAWYER: A DAILY JOURNAL PUBLICATION, <http://www.callawyer.com/Clstory.cfm?eid=918771> (last visited Apr. 7, 2012) (advising employers to give employees 30 days to opt out of an arbitration agreement).

<sup>191</sup> *Id.*

<sup>192</sup> See generally *In re White Mountain Mining Co.*, 403 F.3d 164, 169 (4th Cir. 2005) (citing 9 U.S.C. § 201); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1985); *Volt Info. Srvs., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989); see also *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

<sup>193</sup> *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (U.S. 2012) (citing *Shearson/American Express Inc. v. McMahon*, 482 U. S. 220, 226 (1987)).

<sup>194</sup> See generally 29 U.S.C. §§ 151-169.

right to pursue collective relief through litigation or arbitration is, therefore, erroneous. Specifically, this interpretation severely conflicts with the established judicial view that there is no substantive right to collectively address grievances, and the right to class action is a procedural rather than substantive right.<sup>195</sup> Arguably, the NLRB cannot prohibit the enforcement of a valid arbitration agreement merely because the NLRA is silent on class arbitration.<sup>196</sup>

There is much at stake for employers with this decision, and employers have strong reasons for wanting the Supreme Court to decide this issue. First, while employers may appeal to U.S. Courts of Appeals, “courts are required to defer to the Board’s construction of the Act as long as it is ‘reasonably defensible.’”<sup>197</sup> Additionally, should a court decide not to follow the Board’s decision, the Board and Administrative Law Judges will not treat decisions by the district courts as binding precedent on disputes governed by the NLRA and will, therefore, continue to treat the *D.R. Horton* ruling as the controlling precedent until and unless the Supreme Court deems their interpretation flawed.<sup>198</sup>

The FAA was enacted to ensure arbitration agreements were enforced as contracts and to help avert the exuberant costs associated with litigation.<sup>199</sup>

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<sup>195</sup> *Kristian v. Comcast Corp.*, 446 F.3d 25, 54 (1st Cir. 2006) (characterizing class actions, including class arbitrations, as procedures for redressing claims); *Blas v. Belfer*, 368 F.3d 501, 505 (5th Cir. 2004) (holding that “there is no substantive right to a class remedy; a class action is a procedural device”); *Johnson v. West Suburban Bank*, 225 F.3d 366 (3rd Cir. 2000) (holding that the right to collectively assert a claim for the violation of a federal statute can be waived through an arbitration agreement since it is merely a procedural right); *see also* *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (opining that Federal Rule of Civil Procedure 23, the federal rule authorizing class actions, affects only procedural rights, while “it leaves the parties’ legal rights and duties intact”).

<sup>196</sup> *CompuCredit*, 132 S. Ct. at 673 (holding that statutes that are silent on the enforcement of arbitration agreements cannot be interpreted to prohibit the enforcement of such agreements).

<sup>197</sup> Daniel P. O’Gorman, *Construing The National Labor Relations Act: The NLRB And Methods of Statutory Construction*, 81 TEMP. L. REV. 177, 190 (2008) (analyzing the Board’s method of statutory construction in applying the NLRA).

<sup>198</sup> *Id.*

<sup>199</sup> *See Kulukundis Shipping v. Amtorg Trading Corp.*, 126 F. 2d 978 at 985 (1942)(quoting H.R. REP. NO. 96, at 1-2 (1924) (“[the report of the House Committee [for the enactment of the FAA] stated, in part: ‘Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs.’”); *see generally* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011); *Volt Info. Srvs., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (“By permitting the courts to

Courts have recognized cost reduction as one of the principle benefits provided to parties through arbitration.<sup>200</sup> Now, as the litigation costs associated with litigating employment disputes have reached unprecedented levels, the Board, has elected to disregard the Congressional intent to curb litigation expenses through arbitration.<sup>201</sup>

Conceivably, an employer and employee could have an agreement that forecloses class litigation and class arbitration in a judicial district where the court has held that such waivers are enforceable. Since the Board is only required to defer to Supreme Court rulings, the fact that there is judicial precedent in this particular district would be irrelevant. Therefore, if the employee decided to file a claim with the Board, the employer would be forced to defend itself before an Administrative Law Judge, and likely before the full Board. The Administrative Law Judge and the Board would likely determine *D.R. Horton* controls. Only after going through this process could the employer appeal to the district court, a potentially favorable venue. Unfortunately, at that point, the costs savings inherent to arbitration will have been stripped away.

Even more significant is the fact that this decision is not limited to the NLRA. It lends considerable reach to the NLRA and essentially positions the NLRB as the “class action enforcer” by allowing it to interpret statutes outside of the NLRA to determine whether an employee’s right to engage in concerted activity has been violated. This could provide an incredible impetus for the NLRB to look into laws under the purview of other

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‘rigorously enforce’ such agreements according to their terms . . . we give effect to the contractual rights and expectations of the parties.’”); *Perry v. Thomas*, 482 U.S. 483, 490-91 (1987) (maintaining that under the FAA, courts must “rigorously” enforce arbitration agreements according to the terms agreed to by the parties); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974); *Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir. 1997).

<sup>200</sup> See [AT&T Mobility LLC v. Concepcion](#), 131 S. Ct. 1740, 1751 (U.S. 2011) (“Congress was fully aware that arbitration could provide procedural and cost advantages); see also [Scherk v. Alberto-Culver Co.](#), 417 U.S. 506, 510-11 (1974) (“The United States Arbitration Act . . . was designed to allow parties to avoid ‘the costliness and delays of litigation’ and to place arbitration agreements ‘upon the same footing as other contracts. . . .’”); *Prima Paint Corporation v. Flood & Conklin*, 388 U.S. 395, 415 (1967).

<sup>201</sup> *Fulbright Litigation Trends: Fulbright’s 7<sup>th</sup> Annual Litigation Trends Survey Report*, FULBRIGHT INSTITUTE OF INTERNATIONAL EDUCATION, <http://www.fulbright.com/images/publications/2010AnnualLitigationTrendsSurveyFindingsReport.pdf>; *HR Tests – Recruitment, Assessment, and Personnel Selection*, <http://hrtests.blogspot.com/2007/04/cost-of-defending-employment.html> (last visited Jan. 23, 2014) (As the number of suits has increased, the cost for employers to defend an employment discrimination law suit has reached significant levels: \$10,000 if the suit is settled; \$100,000 if it is resolved through summary judgment or other pre-trial ruling; \$175,000 if it goes to trial; \$250,000 if the trial is won by the plaintiff(s); and \$300,000 if the plaintiff victory survives appeal).

administrative agencies. What the NLRB has failed to realize is that the NLRA “was not intended to be a ‘super class action statute’ that protects and preserves the right to proceed as a class in all circumstances.”<sup>202</sup> Hopefully, for the sake of employers, an authoritative proclamation to that effect will be forthcoming from the Supreme Court.

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<sup>202</sup> [Steven](http://www.nytimes.com/2012/01/07/business/nlrbs-backs-workers-on-joint-arbitration-cases.html?scp=2&sq=babson&st=cse) Greenhouse, *Labor Board Backs Workers on Joint Arbitration Cases*, NEW YORK TIMES (Jan. 6, 2012), <http://www.nytimes.com/2012/01/07/business/nlrbs-backs-workers-on-joint-arbitration-cases.html?scp=2&sq=babson&st=cse>.