I. Alternative Dispute Resolution

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A. Introduction

Class action arbitrations are exceedingly rare. But the enforceability of mandatory, pre-dispute arbitration clauses that waive the right to file or participate in class arbitration is perhaps the most controversial issue in alternative dispute resolution. A circuit split over this issue resulted in the U. S. Supreme Court granting certiorari to decide three cases that will impact the terms of employment for millions of Americans. The Supreme Court's resolution of these cases is also likely to impact rules proposed or adopted by numerous federal agencies in the waning hours of the Obama administration. These rules limit or bar altogether arbitration clauses containing waivers of class actions in a wide variety of contracts subject to federal regulation.

To be clear, neither companies nor class action plaintiffs' lawyers prefer class arbitration to class action litigation as a means of dispute resolution. Companies utilize mandatory arbitration clauses containing waivers of class arbitration to force all disputes into bilateral arbitral proceedings. Such arbitration blocks *all*

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class disputes, whether in litigation or arbitration.[1] If for any reason a waiver of class arbitration is held unenforceable, many companies have provisions in their agreements that void the entire arbitration clause so that the dispute can be resolved in court rather than through class arbitration.

The preference for arbitration in employment and consumer disputes often is not motivated by a belief that arbitration is inherently faster, less expensive, or less adversarial than litigation. Rather, companies chose to make bilateral arbitration the sole remedy to employees and consumers because it eliminates the risk of large class action claims and tends to reduce the total number of claims. A number of factors contribute to lower claim volume. First, absent a class action,[2] a single plaintiff with a small case typically finds it is difficult to secure and pay for counsel. Second, despite some notable exceptions, arbitration typically involves higher transaction costs for filing, administrative, and arbitrator's fees, which can be a disincentive to filing a claim. Third, inability to obtain a jury trial discourages some claimants and their potential counsel because there is at least the perception that a jury will be more predisposed and/or generous to a claimant than will an arbitrator. Thus, a mandatory arbitration clause that contains a class action waiver, either as a condition of employment, or as a term in a consumer contract of adhesion, can reduce the value and number of claims and, therefore, overall corporate spending on dispute resolution.

Labor and consumer advocates have long objected to mandatory pre-dispute arbitration clauses with class waivers. But the Supreme Court's expansive interpretation of the Federal Arbitration Act (FAA)[3] has left state lawmakers with no authority to regulate arbitration contracts involving interstate commerce. In the absence of any possibility that Congress might amend the FAA to strengthen employee and consumer rights,[4] the executive branch and independent agencies under the Obama administration adopted agency rules seeking to limit or prohibit enforcement of mandatory arbitration provisions containing class waivers. One of the earliest such efforts arose when the National Labor Relations Board (NLRB) held in *D.R. Horton, Inc.*[5] that it was a violation of the National Labor Relation Act (NLRA)[6] for employers to adopt employment terms waiving employees' rights to participate in class dispute resolution. The NLRB held that

1. An agreement to arbitrate a claim is a waiver by the parties to that agreement to participate in class action litigation in either federal or state court. If there is a waiver of class or collective arbitration, it is an agreement by the parties to participate only in bilateral arbitration between the claimant and the respondent.

2. Plaintiffs' class action lawyers typically accept representations on a contingent fee basis.

3. 9 U.S.C. §§ 1–16 (2012).

4. At least twenty bills have been introduced in Congress to amend the FAA, all without success. The statute was enacted in 1925 and has never been substantively amended. Its interpretation and development have proceeded exclusively through case law. The Supreme Court's recent cases broadening the FAA's preemptive scope have been controversial and frequently decided by five-to-four votes. It is unlikely the current Republican-controlled Congress will consider any amendments to the FAA given the Supreme Court's generally pro-business interpretations of the statute.

5. 357 N.L.R.B. 2277 (2012).

6. 29 U.S.C. §§ 151–169 (2012).

Section 7 of the NLRA authorized "concerted activities" by employees to enforce employment rights, which included the right to participate in class actions. The U.S. Circuit Courts of Appeals for the Second,[7] Fifth,[8] and Eighth Circuits[9] were unanimous in refusing to enforce the NLRB's *Horton* rule, finding it was contrary to the FAA. That changed shortly after Justice Scalia passed, when both the Seventh[10] and Ninth Circuits[11] agreed with the NRLB, creating a circuit split.[12]

Justice Scalia had cast the fifth vote on the crucial Supreme Court decisions expanding the preemptive scope of the FAA. It appeared to many observers that the Democrats would win the November presidential election, such that Hillary Clinton would be appointing the next Justice to the Court, as well as the agency heads who would be overseeing the anti-arbitration rulemakings started by the Obama administration. That did not occur, and in January 2017, the Supreme Court agreed to review the decisions of the Seventh and Ninth Circuits enforcing the NLRB rule, as well as a new decision of the Fifth Circuit[13] denying enforcement of the rule. Certiorari was granted late enough so that oral argument had to be carried over to the Court's fall term. Justice Neil Gorsuch may provide an important fifth vote to decide the NLRB cases, which are likely to more definitively establish the rules resolving conflict between the FAA and other federal statutes, including agency rules relating to arbitration.

This report discusses the development of the NLRB's *Horton* rule and the legal grounds on which the circuit courts split on the issue of enforcing that rule. It then previews the likely arguments that will be raised in support of

7. Sutherland v. Ernst & Young, LLP, 726 F.3d 290, 297–98 n.8 (2d Cir. 2013).
8. D.R. Horton, Inc. v. N.L.R.B., 737 F.3d 344 (5th Cir. 2013).
9. Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013).
10. Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017) (No. 16-285).
11. Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017) (No. 16-300).
12. In May 2017, the Sixth Circuit in *N.L.R.B. v. Alternative Entertainment, Inc.*, 858 F.3d 393 (6th Cir. 2017), joined the Seventh and Ninth Circuits in holding the NLRA creates a substantive right to class actions such that arbitration provisions mandating bilateral arbitration constitute an unfair labor practice. *Alternative Entertainment*, however, raises somewhat different legal issues than the *Murphy Oil*, *Epic Systems*, and *Morris* cases pending before the Supreme Court. Those three cases arose from litigation filed under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–219 (2012). The employees in those cases seek to expand the right to sue granted under the FLSA by reliance on the "concerted activities" protection afforded by Section 7 of the NLRA. By contrast, *Alternative Entertainment* arises solely as an administrative enforcement action under the NLRA. The NLRB determined Alternative Entertainment fired its employee for discussing his concerns about salary, wages, and other compensation with his coworkers. Since these employee discussions about compensation are protected concerted activities, the discharge was considered a violation of NLRA Section 8(a)(1). In the course of investigating this in charge, the NLRB discovered the employers' arbitration agreement with employees contained a class waiver, which resulted in the NLRB finding this agreement was an unfair labor practice, even though the employee's discharge was unrelated to the arbitration agreement or the class waiver. The Supreme Court's resolution of the three FLSA cases before it may impact the Sixth Circuit decision, but *Alternative Entertainment* is not, at the time of this writing, pending review by the Court.
13. Murphy Oil USA, Inc. v. N.L.R.B., 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017) (No. 16-307).

and opposition to enforcement of the NLRB rule during oral argument before the Supreme Court. It addresses how the resolution of these cases could impact the enforcement of newly adopted agency rules prohibiting mandatory arbitration and class action waivers in a wide range of consumer contracts. Finally, it addresses how companies are likely to respond to new anti-arbitration agency rules, considering that the combination of the Trump administration, Republican control of Congress, and the appointment of Justice Gorsuch may unwind some of these Obama anti-arbitration rules.

B. Using Arbitration Agreements to Preclude Access to Class Action Litigation

Companies avoid class action litigation by including binding arbitration provisions in their contracts with employees and customers. Courts have historically enforced such agreements, staying litigation and compelling the parties to arbitrate their disputes.[14] The rules of most arbitral institutions allow parties to arbitrate on either an individual or class basis, usually and in the first instance at the option of the claimant.[15] Class arbitration presents significant procedural and due process concerns, such that most companies find class arbitration is an even less attractive option than class action litigation.[16] To avoid this problem, arbitration agreements typically require employees and consumers to waive their right to class arbitration. These waiver provisions require that all disputes be arbitrated on an individual (i.e., bi-lateral) basis between the company and one of its employees or customers.

C. The NLRB Rules' Waivers of Class Arbitration Constitute an Unfair Labor Practice

In June 2010, prior to the NLRB's adoption of the *Horton* rule, the General Counsel for the NLRB prepared a "Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Employee Waivers in the Context of

14. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015).

15. *See, e.g.*, AAA Supplementary Rules for Class Arbitration (2003), http://www.adr.org.

16. Leaving aside platitudes about how class arbitration would frustrate the supposed advantages of arbitration (e.g., quicker, less expensive, and less formal than litigation), class arbitration poses serious due process issues. Arbitration is generally conducted by written consent of the parties. In a class arbitration, there may be no actual consent from absent class members to (1) the arbitrator conducting the proceeding or (2) the arbitral rules and procedures that will apply to the arbitration. *See* Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2071–72 (2013) (Alito, J. concurring) ("at least where absent class members have not been required to opt in, it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members who have not authorized the arbitrator to decide on a classwide basis which arbitration procedures are to be used").

Employers' Mandatory Arbitration Policies."[17] That memorandum advised the NLRB's regional directors that the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*[18] "determined that an employer can require an employee, as a condition of employment, to channel his or her individual non-NLRA employment claims into a private arbitral forum for resolution."[19] The General Counsel established four guidelines for evaluating what was permissible in an employer-sponsored arbitration program. First, an employer could not threaten, discipline, or discharge an employee for "concerted filing of a class action lawsuit or arbitral claim seeking to enforce employment statutes" protected by Section 7 because such actions would constitute an unfair labor practice in violation of Section 8(a)(1) of the NLRA.[20] Second, employer-sponsored mandatory arbitration agreements cannot require a waiver of Section 7 rights.[21] Third, notwithstanding the second point, conditioning employment on an employee agreeing to arbitrate his or her "individual non-NLRA statutory employment claims"[22] is "permissible under the Supreme Court's holding in *Gilmer*, supra."[23] Fourth, as long as the arbitration agreement makes clear that Section 7 "rights are not waived and that they will be not be retaliated against for concertedly challenging the validity of those agreements through class or collective actions seeking to enforce their employment rights," an "employer does not violate Section 7 by seeking the enforcement of an individual employee's lawful *Gilmer* agreement to have all his or her individual employment disputes resolved in arbitration."[24] In furtherance of the fourth point, General Counsel stated: "an employer may lawfully seek to have a class action complaint dismissed on the ground that each purported class member is bound by his or her signing of a lawful *Gilmer* agreement/waiver."[25]

In summary, the application of the law by the NLRB's General Counsel prior to *Horton* was that "if mandatory arbitration agreements are drafted to make clear that the employees' Section 7 rights to challenge those agreements through concerted activity are preserved and that only individual rights are waived, no

17. NLRB, Office of the Gen. Counsel, Memorandum GC 10-06, Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Employee Waivers in the Context of Employers' Mandatory Arbitration Policies (June 16, 2010), https://www.nlrb.gov/publications/general-counsel-memos [hereinafter General Counsel Memo 10-06].

18. 500 U.S. 20 (1991).

19. General Counsel Memo 10-06, *supra* note 17, at 1.

20. *Id.* at 2.

21. *Id.*

22. The NLRA does not provide a private right of action to employees against employers. The term "NLRA employment claims" as used in General Counsel Memo 10-06 refers to unfair labor charges that can be filed by employees under the NLRA. These charges are investigated under the direction of the NLRB's Office of General Counsel and, if substantiated, result in an administrative complaint being filed, which is ultimately adjudicated by the NLRB, and subject to review in the federal courts. "Non-NLRA employment claims" refers to all other claims arising under the federal labor laws, such as, for example, wage and hours claims under the FLSA.

23. General Counsel Memo 10-06, *supra* note 17, at 2.

24. *Id.* at 2.

25. *Id.*

issue cognizable under the NLRA is presented by an employer's making and enforcing an individual employee's agreement that his or her non-NLRA employment claims will be resolved through the employer's mandatory arbitration system."[26]

Two years later, the NLRB held in *In re D.R. Horton, Inc.*[27] that an employer commits an unfair labor practice by requiring its employees to arbitrate disputes related to their employment on an individual basis. The NLRB found this practice violates Section 7 of the NLRA, which permits employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[28] The NLRB held that the right to engage in "concerted activities" included a substantive statutory right to file legal actions in court or in arbitration, in a joint, class, or collective capacity. The NLRB adopted its "*Horton* rule" invalidating class waivers in pre-dispute arbitration agreements even though the NLRA creates no private right of action on behalf of employees or anyone else. Further, since the waiver of class arbitration precluded employees from pursuing concerted legal action to address their wage claims, the NLRB concluded waivers constituted an unfair labor practice under Section 8(a)(1) of the NLRA. In addition, the NLRB found that the language in *Horton's* mandatory arbitration agreement "would lead employees reasonably to believe that they were prohibited from filing unfair labor practice charges with the Board," leaving individual arbitration as their only remedy.[29]

The *Horton* decision explicitly rejects certain fundamental premises of General Counsel Memo 10-06. First, the General Counsel acknowledged *Gilmer* permitted waivers by individual employees of the right to class or collective dispute resolution in court or in arbitration and that "no Section 7 right is violated when an employee possessed of an individual right to sue enters such a *Gilmer* agreement as a condition of employment and that no Section 7 right is violated when that individual agreement is enforced."[30] By contrast, the NLRB in *Horton* held that Section 7 created a "substantive" and non-waivable right to class, collective, or cooperative litigation that rendered individual arbitration agreements per se unenforceable.[31] Second, the General Counsel concluded that an employer's

26. *Id.*
27. 357 N.L.R.B. 2277 (2012).
28. *Id.* at 2278.
29. *Id.*
30. General Counsel Memo 10-06, *supra* note 17, at 6.
31. *D.R. Horton*, 357 N.L.R.B. at 2286 ("Any contention that the Section 7 right to bring a class or collective action is merely 'procedural' must fail. The right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest.") (emphasis in original). The *Horton* decision criticizes General Counsel Memo 10-06, stating: "If choosing to initiate or participate in a class or collective action is a purely individual act, so is choosing to initiate or participate in *any* activity protected by Section 7. Based on the logic of General Counsel Memo 10-06, an employer would be privileged to secure prospective individual waivers of *all* future Section 7 activity, including joining a union and engaging in collective bargaining." *Id.* This criticism misrepresents General Counsel Memo 10-06, which at page 2 and elsewhere made clear that arbitration agreements had to be drafted so as to make clear Section 7 rights are not waived. It also sets up a straw man in its concern that individual employees

enforcement of a *Gilmer* agreement did not constitute an unfair labor practice, whereas the NLRB in *Horton* concluded that merely entering into *Gilmer* waivers was an unfair labor practice in violation of Section 8(a)(1).

D. The Fifth Circuit Declines to Enforce the NLRB's *Horton* Rule

Horton challenged the enforcement of the NLRB's decision in the Fifth Circuit. Horton disputed that Section 7 granted employees a non-waivable, substantive right to adjudicate claims on a joint, class, or collective basis. Further, it argued that the NLRB's interpretation of Section 7 conflicted with the FAA by placing an impermissible burden on the right to arbitrate. Horton argued that barring waivers of class arbitration would indisputably make arbitration a less attractive option than litigation, thereby frustrating Congress's intent that arbitration agreements should be enforced on an equal basis with all other contractual obligations.

The Fifth Circuit started its analysis by acknowledging that the NLRB's decisions construing the NLRA would generally be entitled to *Chevron* deference.[32] But the court noted that deference was limited to issues implicating the NLRB's expertise in labor relations matters. Where the dispute requires "careful accommodation of one statutory scheme [i.e., the NLRA] to another [i.e., the FAA]," the Fifth Circuit stated it had "never deferred to the Board's remedial preferences" because "such preferences potentially trench upon federal statutes and policies unrelated to the NLRA."[33] While acknowledging that there was "some support" in the law for "the Board's analysis that collective and class claims, whether in lawsuits or in arbitration, are protected by Section 7,"[34] the Fifth Circuit nevertheless refused to enforce the NRLB's decision.

The Fifth Circuit rejected the NLRB's central holding that Section 7 created a substantive statutory right to joint, class, or collective adjudication of labor disputes. The court noted that similar arguments had recently been considered and

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could waive "all future Section 7 activity," since the Supreme Court was 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 their resolution in an arbitral, rather than judicial, forum." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991), quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985). The threshold issue in *Horton* is whether Section 7 grants a non-waivable substantive right to class or collective dispute resolution. The NLRB claims it does. At the same time, the NLRB admits Rule 23 of Federal Rules of Civil Procedure governs the terms on which parties can participate in class arbitration, including the requirements for class certification. *See D.R. Horton*, 357 N.L.R.B. at 2286. The NLRB did not address the obvious tension between holding NLRA Section 7 creates a substantive right to participate in class actions, while at the same time acknowledging that a substantive right created by the labor laws could be diminished, burdened or theoretically eliminated altogether by amendments to Rule 23 and or the class action rules of arbitral institutions.

32. "*Chevron* deference" refers to the doctrine of law the Supreme Court developed in *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which held that considerable weight (deference) should be accorded to an agency's permissible construction of a statutory scheme entrusted to it to administer.

33. D.R. Horton, Inc. v. N.L.R.B., 737 F.3d 344, 356 (5th Cir. 2013).

34. *Id.* at 357.

rejected in the context of other federal labor statutes, including the Age Discrimination in Employment Act (ADEA)[35] and the FLSA. With respect to the ADEA, the Supreme Court in *Gilmer* compelled arbitration despite the arguments by the Equal Employment Opportunity Commission (EEOC) that the absence of a judicial remedy would undermine enforcement of substantive rights protected by the statute.[36] The Supreme Court reached this result even though the ADEA explicitly provides claimants with judicial relief in either state or federal courts, which would include class action procedures. With respect to the FLSA, the Fifth Circuit noted that "numerous courts have held that there is no substantive right to proceed collectively under the FLSA" despite the fact that the FLSA explicitly authorizes class litigation.[37] For example, both the Second and Eighth Circuits have ruled that, while the FLSA creates an express right to bring a collective action, that right requires "an employee with a FLSA claim to affirmatively opt-in to any collective action."[38] The Second and Eighth Circuits reasoned that "[e]ven assuming Congress intended to create some 'right' to class actions, if an employee must affirmatively opt-in to any such class action, surely the employee has the power to waive participation in a class action as well."[39] They concluded that class action waivers were not barred, with the Second Circuit specifically arguing "Supreme Court precedents inexorably lead to the conclusion that the waiver of collective action claims is permissible in the FLSA context."[40]

The Fifth Circuit's opinion also criticizes the NLRB's decision to prioritize the NLRA over the FAA.[41] The court stated that "arbitration agreements must be enforced according to their terms," save for two exceptions.[42] First, "an arbitration agreement may be invalidated on any ground that would invalidate a contract under the FAA's 'savings clause.' "[43] Second, "application of the FAA may be precluded by another statute's contrary congressional command."[44]

35. 29 U.S.C. §§ 621–634 (2012).

36. The Supreme Court noted that notwithstanding the arbitration provision, the claimant could (and did) file a charge with the EEOC, which the EEOC investigated. The Supreme Court further rejected the argument that a judicial forum (which would include access to class action procedures) was necessary to protect substantive ADEA rights, stating "[I]f Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum, that intention will be deducible from the text or legislative history." *Gilmer*, 500 U.S. at 29, citing *Mitsubishi*, 473 U.S. at 628.

37. *Horton*, 737 F.3d at 357; *see also* Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294, 298 (5th Cir. 2004).

38. Sutherland v. Ernst & Young, LLP, 726 F.3d 290, 296 (2d Cir. 2013); Owen v. Bristol Care, Inc., 702 F.3d 1050, 1052–53 (8th Cir. 2013). The FSLA provides with respect to protected collective actions that: "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b) (2012).

39. *Sutherland*, 726 F.3d at 297, quoting *Owen*, 702 F.3d at 1052–53.

40. *Sutherland*, 726 F.3d at 297.

41. *See Horton*, 737 F.3d at 358.

42. *Id.*

43. *Id.*

44. *Id.*

The FAA's savings clause provides that a written arbitration agreement must be enforced according to its terms "save upon such grounds as exist at law or in equity for the revocation of any contract."[45] This means that traditional defenses to the enforceability of all contracts, such as illegality, fraud, duress, lack of consideration, etc., may be used to invalidate an arbitration clause. But the savings clause does not apply if the legal ground advanced for revocation is a law (statutory or judge-made) that specifically targets arbitration agreements to the exclusion of other contracts.[46] Arguably, the NRLB's *Horton* rule purports to be facially neutral because it applies equally to arbitration and litigation.[47] But the Fifth Circuit found that the actual application of the rule placed an undue burden on arbitration, rendering use of the FAA's saving clause inapplicable.[48]

The Fifth Circuit next addressed whether the NLRA contained a "contrary congressional command"[49] to override the FAA. After examining the text of the statute and its legislative history, the court concluded there was neither explicit statutory language nor any recorded legislative history reflecting congressional intent for the NLRA to override the FAA.[50] Further, the court could find no "inherent conflict" between arbitration and the NLRA's underlying purpose, noting labor disputes have had a long history of resolution through (bilateral) arbitration.[51]

In 2015, the Fifth Circuit reaffirmed its *Horton* decision in *Murphy Oil*.[52] This is the decision the Supreme Court granted certiorari to review.

45. 9 U.S.C. § 2 (2012).

46. DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 478 (2015).

47. The Fifth Circuit stated: "Like the statute in *Concepcion*, the Board's interpretation prohibits class-action waivers. While the Board's interpretation is facially neutral—requiring only that employees have access to collective procedures in an arbitral or judicial forum—the effect of this interpretation is to disfavor arbitration." *Horton*, 737 F.3d at 359. The Fifth Circuit therefore concluded that "[r]equiring a class mechanism is an actual impediment to arbitration and violates the FAA." *Id.* at 360.

48. *Id*.

49. *Id*.

50. *Id*. at 360–61.

51. *Id*. at 361, citing 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 257–58 (2009) for the proposition that "courts repeatedly have understood the NLRA to permit and require arbitration."

52. 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017) (No. 16-307). *Murphy Oil* breaks little new ground, and is not discussed at length in this article, because the panel felt constrained by the Fifth Circuit's internal rules to follow the court's prior holding in *Horton*. 808 F.3d at 1015 ("The Board . . . moved for an en banc review in order to allow arguments that the prior decision [*Horton*] should be overturned. Having failed in that motion . . . the Board will not be surprised that we adhere, as we must, to our prior ruling."). Seven months after the Supreme Court granted certiorari in *Murphy Oil*, another Fifth Circuit panel, in *Convergys Corp. v. N.L.R.B.*, No. 15-60860, 2017 WL 3381432 (5th Cir. Aug. 7, 2017), split two to one to deny enforcement to an NLRB order finding that imposing a mandatory "class and collective action waiver" as a term of employment violated the NLRA. Enforcement was denied even though two of the three judges on the panel agreed with the NLRB that the waiver violated the NLRA. Judge Stephen Higginson, despite agreeing with Judge Patrick Higginbotham's dissent, voted to concur in Judge Jennifer Walker Elrod's judgment in order to comply with the Fifth Circuit's "rule of orderliness," which requires a panel of the court to follow another panel's prior decision. Judge Higgenbotham argued the Fifth Circuit's rule did not apply, because *Horton* involved an arbitration agreement and the issue decided was whether the FAA prevailed over the federal labor laws because there was no contrary congressional

E. Sixth, Seventh and Ninth Circuits Split with Second, Fifth and Eighth Circuits

Shortly after the *Murphy Oil* decision, first the Seventh Circuit, then the Ninth Circuit, and finally the Sixth Circuit split with their sister circuits in holding that incorporating mandatory class arbitration waivers in employment agreements constituted an unfair labor practice. The Seventh Circuit concluded in *Epic Systems*[53] that Section 7 of the NLRA creates a substantive right to joint, class, or collective adjudication. It also held that the class arbitration waivers in Epic Systems' employment agreements were unenforceable under the FAA's savings clause. The Ninth Circuit, in *Morris*,[54] reached substantially the same result for reasons similar to those articulated by the Seventh Circuit. The Sixth Circuit's decision in *Alternative Entertainment*[55] differed from the Seventh and Ninth Circuits in that it did not involve an FLSA claim. The NLRB assessed an unfair labor charge merely because the employer had an arbitral class waiver in its terms of employment. The reasons for the employee's discharge in *Alternative Entertainment* were unrelated to the class waiver, and the employee had not filed either a class action lawsuit or arbitration. The Supreme Court granted certiorari to hear the *Epic Systems* and *Morris* cases before the Sixth Circuit decided *Alternative Entertainment*.

In *Epic Systems*, a select group of employees was required, as a condition to continued employment, to sign an arbitration agreement that included a waiver of class arbitration. The agreement provided that if the waiver provision was found to be unenforceable, "any claim brought on a class, collective, or representative action basis must be filed in a court of competent jurisdiction."[56] The employees filed a class action lawsuit challenging their classification as exempt from overtime pay under the FLSA. Epic Systems moved to dismiss the lawsuit and Lewis defended on the grounds that the waiver clause in the arbitration agreement violated the NLRA's right to concerted activities for mutual aid and protection. The district court refused to dismiss the action and the Seventh Circuit affirmed.

In support of its conclusion that the NLRA's Section 7 "other concerted activities" protection created a substantive right to class, collective, or representative adjudication, the Seventh Circuit advanced a series of arguments. First, it

command barring arbitration of the dispute. By contrast, *Convergys Corp.* involved employer adoption of rules prohibiting employees from participating in class or collective actions where there was no arbitration agreement between the employer and its employees. In Judge Higgenbotham's view, the employer was simply requiring an advance waiver of collective action in violation of the NLRA, such that he would have enforced the NLRB's order finding there was an unfair labor practice.

53. 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017) (No. 16-285).

54. 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017) (No. 16-300).

55. 858 F.3d 393 (6th Cir. 2017).

56. *Epic Sys.*, 823 F.3d at 1151. This stipulation is important because it essentially implodes the entire arbitration agreement if the class arbitration waiver is invalidated. Without such a provision, if the class waiver were found unenforceable and blue-lined out of the contract, the case would nevertheless remain subject to arbitration. With this provision, any class or collective claim has to be referred to the courts for resolution.

asserted that concerted activity had long been held by both the NRLB and the courts to include "resort to administrative and judicial forums," citing the Supreme Court's decision in *Eastex, Inc. v. N.L.R.B.*[57] Second, the court concluded that although the NLRA does not define concerted activities, Section 7's "text, history, and purpose" indicated the "language at issue has a plain and unambiguous meaning."[58] Section 7 "should be read broadly to include resort to representative, joint, collective, or class legal remedies."[59] Third, the court stated that if it strained to read the term concerted activity "through our most Epic-tinted glasses," the term could at most "be read as ambiguous as applied to collective lawsuits."[60] In that event, however, the NLRB's interpretation of ambiguous provisions of the NLRA is "entitled to judicial deference" under *Chevron*.[61] Since the court concluded the "Board's interpretation is, at a minimum, a sensible way to understand the statutory language," it accepted the Board's interpretation.[62]

The Seventh Circuit rejected Epic Systems' argument that because Rule 23 class action procedure did not exist when the NLRA was enacted in 1935, the NLRA could not have been meant to provide a non-waivable right to participate in that later-adopted procedural remedy. The court disagreed, stating "[t]here is no reason to think that Congress intended the NLRA to protect only concerted activities that were available at the time of the NLRA's enactment."[63] And, in any event, the court noted that collective and representative procedures existed in 1935 through the doctrine of permissive joinder.[64]

57. 437 U.S. 556 (1978). In *Eastex*, the Supreme Court stated "it has been held that the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums," adding a footnote (number 15) after that quoted phrase in which it collected a number of NLRB cases, and cases from three circuit courts, supporting the proposition. However, the quoted proposition is not that Section 7 grants a substantive right to class or collective adjudication such that a class waiver is unenforceable, but rather that Section 7's "mutual aid or protection" language "protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums." *See id*. at 565–66. General Counsel Memo 10-06, at page 2, point 1, agreed that NRLA Section 7 protects employees from retaliation if through concerted action one or more employees files a class action. But that same memorandum at page 2, points 3 and 4, concludes Section 7 does not create a substantive, non-waivable right to class adjudication. General Counsel Memo 10-06, *supra* note 17. Protection from retaliation for concerted filing of a class action is a different concept than the concept that concerted activity includes a non-waivable and substantive right to class adjudication. It does not automatically follow that Section 7 protection from retaliation for filing a class action necessarily results from the fact that Section 7 creates a non-waivable right to class adjudication. Further, in footnote 15 of *Eastex*, where the Supreme Court collected cases for the proposition that concerted activity for "mutual aid or protection" included "resort to administrative and judicial forums," the Court added this disclaimer: "We do not address here the question of what may constitute 'concerted' activities in this context." In light of this disclaimer, it is unclear that the current Court will conclude *Eastex* is a strong precedent for the proposition that Section 7 creates a non-waivable substantive right to class adjudication.

58. *Epic Sys*., 823 F.3d at 1152 (citation omitted).

59. *Id.* at 1153.

60. *Id.*

61. *Id.* (citation omitted).

62. *Id.*

63. *Id*. at 1154.

64. *Id.*

The court also addressed the concept previously adopted by the Ninth Circuit that an agreement mandating individual arbitration would be enforceable *if* the employee had the right to opt out of the agreement without penalty.[65] The Seventh Circuit held its prior decision in *N.L.R.B. v. Stone*[66] precluded that result. That case held that an employer-employee agreement providing "the employee was obligated to bargain individually" was a per se violation of the NLRA and could not "be legalized by showing the contract was entered into without coercion."[67] Again, the Seventh Circuit's rationale makes clear that it considered class or collective litigation a substantive statutory right that individual employees could not waive. This is true even though the NLRA itself provides no private cause of action, and the FLSA plainly requires that individual employees opt in to a collective action.

Having thus agreed with the NLRB that the class waiver in the arbitration clause was incompatible with the NLRA, the Seventh Circuit turned its attention to Epic Systems' argument that the FAA should prevail over any contrary federal labor law. Epic Systems asserted that Supreme Court precedent required the FAA to control over another inconsistent federal statute unless that statute reflected a "contrary congressional command" against arbitration, and the NLRA contained no such command.[68]

The Seventh Circuit asserted that Epic Systems' argument puts the cart before the horse. It stated that before rushing "to decide whether one statute eclipses another, we must stop to see if the two statutes conflict at all."[69] But the Seventh Circuit then adopted a novel approach to attaching the cart to the horse, and one that is arguably in conflict with the Supreme Court's approach.

The Supreme Court's approach to conflicts between the FAA and another federal statute that arguably conflicts with the FAA is to inquire whether the other federal statute contains a contrary congressional command, indicating Congress intended that substantive rights granted in the other statute should not be vindicated through arbitration. If the text, legislative history, or essential purpose of the other statute does not reflect a clear intent to preclude arbitration, the Court reads that statute in a manner to harmonize it with the FAA and permit arbitration of statutory rights.

The Seventh Circuit harmonized the FAA with the NLRA in a different and novel manner. Characterizing the class action waiver in Epic Systems' arbitration

65. *Id.* at 1155. The Ninth Circuit found such an opt-out clause was permissible in *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1077 (9th Cir. 2014) because it did not "interfere with, restrain, or coerce" the employee in violation of Section 8 of the NLRA.

66. 125 F.2d 752, 756 (7th Cir. 1942). The right to collectively bargain is expressly identified in Section 7 as a form of concerted activity and, thus, indisputably represents a substantive right protected by the statute.

67. *Id*.

68. *Epic Sys.*, 823 F.3d at 1156. The Seventh Circuit did not contend that the plain language of the NLRA, or its legislative history, indicated that Congress intended to exclude arbitration of labor disputes. On the contrary, the Seventh Circuit recognized that federal labor statutes, including the NLRA, are "*pro*-arbitration." *Id*. at 1158 (emphasis in original).

69. *Id.* at 1156.

agreement as an "illegal promise" that was "unlawful under Section 7," the Seventh Circuit held the FAA's saving clause was triggered.[70] That clause provides an exception to the FAA's command that arbitration agreements "shall be valid, irrevocable, and enforceable."[71] Because the FAA was intended to place arbitration agreements on an equal footing with all other contracts, defenses "at law or in equity for the revocation of any contract,"[72] such as fraud, can be used to invalidate an arbitration agreement if the fraud pertains to the formation of the agreement to arbitrate, and not just to the underlying contract.[73] Having concluded that the NLRA created a substantive right to class adjudication, and that Epic Systems' arbitration agreement violated that right, the Seventh Circuit harmonized the two statutes by invoking the FAA's savings clause to invalidate the class waiver. The court then applied the remaining provision in the arbitration agreement requiring court litigation to resolve any class disputes. It thus found no conflict between the NLRA and the FAA because the FAA was itself used to render the class arbitration waiver unenforceable.[74]

70. *Id.* at 1157. The confusingly named savings clause is found in Section 2 of the FAA. What it saves are defenses to enforcement of contracts. But to be saved, the defense must be equally applicable to all contracts. If the defense (e.g., a limitation found in a state statute) targets arbitration specifically, such as by referencing arbitration, or by placing a special burden on arbitration that does not apply to other types of contracts because the defense only has applicability in the event of arbitration, then Section 2 is not applicable. Otherwise, the savings clause would turn into an exception that swallows the entire statute. Thus, Section 2 did not save California's Discovery Bank rule prohibiting mandatory waivers of class action arbitration in consumer contracts of adhesion because that rule applied only to arbitration agreements. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011). Rather than being saved, the defense provided in the California statute was preempted by the FAA.

71. 9 U.S.C. § 2 (2012).

72. *Epic Sys*., 823 F.3d at 1157.

73. It is important to remember that the Supreme Court and most other courts view an agreement to arbitrate as separate and distinct from the underlying contract. If the underlying contract is fraudulently induced, but the fraud does not extend to the promise to arbitrate, the arbitration agreement will be upheld and the defense of fraud in the inducement will have to be arbitrated rather than litigated in court. *See, e.g.,* Prima Paint Corp. v. Flood & Franklin Mfg. Co., 388 U.S. 395, 403 (1967) (determining that if fraud in the inducement goes to the making of the agreement to arbitrate, a federal court may adjudicate the matter, but the FAA does not permit the federal courts to consider claims of fraud in the inducement of the contract generally); John B. Goodman Ltd. P'ship v. THF Constr., Inc., 321 F. 3d 1094, 1096–97 (11th Cir. 2003) (finding that because the parties signed a presumptively valid agreement to arbitrate all disputes, the issue of whether the contract generally was unenforceable was for the arbitrator, not the court.

74. The Ninth Circuit adopted the same rationale in *Morris*, provoking a strong dissent by Judge Ikuta, who argued "the Supreme Court does not apply the savings clause to federal statutes; rather, it considers whether Congress has exercised its authority to override the FAA's mandate to enforce arbitrations agreements according to their terms." Morris v. Ernst & Young, LLP, 834 F.3d 975, 997 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017) (No. 16-300), citing CompuCredit Corp. v. Greenwood, 565 U.S. 95, 98 (2012). Judge Ikuta also challenged the majority decision in *Morris* for concluding the class waiver was illegal, stating "such a waiver would be illegal only if it were precluded by a 'contrary congressional commend' in the NLRA, and here there is no such command." *Id*. Judge Ikuta argued that even if the FAA's savings clause were applicable to a federal statute, "the majority's construction of § 7 and § 8 of the NLRA as giving employees a substantive, nonwaivable right to classwide actions would not be saved under the clause." *Id.* Judge Ikuta argued that under *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011), the NLRB's *Horton* rule is agency-made law that "disproportionately and negatively impacts arbitration agreements by requiring procedures that 'interfere[] with fundamental attributes of arbitration' " and as such fall outside

The Ninth Circuit in *Morris* joined the Seventh Circuit a few months later and adopted most of the Seventh Circuit's reasoning. *Morris* involved two employees who claimed they had been misclassified as exempt employees under the FLSA and filed a class action lawsuit despite both having signed a concerted action waiver that promised to arbitrate all disputes only as individuals and in separate proceedings from other employees. The district court compelled arbitration. On appeal, the Ninth Circuit reversed.

Despite the similarity of the courts' reasoning, there is a material factual distinction between the *Epic Systems* and *Morris* arbitration clauses.[75] Unlike *Epic Systems*, where the parties' agreement reverted to litigation if the class action waiver was invalidated, the concerted action waiver in the *Morris* contract was part of a multi-paragraph dispute resolution provision that prohibited either party to file court litigation. Aside from the concerted action waiver, the Ninth Circuit identified no other violation of the NLRA that would justify nullifying the entire arbitration agreement. Nevertheless, the Ninth Circuit treated the entire arbitration clause, not just the concerted action waiver, as void. Without so much as even mentioning the issue or stating that it was invalidating the entire arbitration clause, the court allowed the case to proceed as a class action in court.

When it vacated the order compelling arbitration and allowed the class action to remain in the district court, the Ninth Circuit insisted its opinion was not "a ban on arbitration":

> The "separate proceedings" provision in this case appears in an agreement that directs employment-related disputes to arbitration. But the arbitration requirement is not the problem. The same provision in a contract that required court adjudication as the exclusive remedy would equally violate the NLRA. The NLRA obstacle is a ban on initiating, in any forum, concerted legal claims—not a ban on arbitration.[76]

The Ninth Circuit's opinion suggests that if the employment agreement was silent on the issue of concerted action, in other words, if there was no "separate proceedings" provision waiving the right to file concerted actions, then the arbitration could have proceeded without violating the NLRA. But when this argument is juxtaposed against the requirements of *Stolt-Nielsen*, discussed below, it appears that, as a practical matter, *Morris* actually imposes a total ban on arbitration unless the parties affirmatively consent to class arbitration in the arbitration agreement.

The Supreme Court in *Stolt-Nielsen* held arbitration means bilateral arbitration absent contract-based evidence that the parties agreed to engage in class

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the confines of the FAA's savings clause. *Morris*, 834 F.3d at 997 (alternation in original) (citation omitted).

75. More of the details of the Ernst & Young arbitration agreement are set out in the district court's opinion compelling arbitration and dismissing the class action lawsuit. *See* Morris v. Ernst & Young, LLP, No. 12-4964, 2013 WL 3460052 (N.D. Cal. July 9, 2013).

76. *Morris*, 834 F.3d at 984.

arbitration, which cannot be inferred merely from the agreement to arbitrate.[77] This has led some scholars to conclude that, contrary to the claim by the Seventh and Ninth Circuits, there is a fundamental conflict between the NLRA, the FAA, and arbitration.[78] In many instances,[79] this conflict cannot be resolved by resort to the FAA's savings clause. Striking or blue-lining a class action waiver would often not invalidate the entire arbitration agreement. The court or arbitrator would then have to conduct a *Stolt-Nielsen* evaluation whether the remainder of the arbitration clause, without the class waiver, authorized class, collective, or concerted arbitration. Presumably, the remaining portions of the arbitration clause would be silent about class arbitration because the clause specifically addressing it was stricken. In that case, the Supreme Court's default rule is that arbitration must be conducted on a bilateral basis. But according to the NLRB, that would violate the NLRA because it is an unfair labor practice. To avoid this problem, the parties' arbitration agreement must include a provision affirmatively consenting to class arbitration (and also probably advising that consenting to arbitration did not waive employees' rights to seek redress with the NLRB of their employment-related claims). Hence, the stage was set for Supreme Court review.

F. The Supreme Court Grants Review of Three Related FLSA Cases

The Supreme Court agreed to review *Murphy Oil*, *Epic Systems*, and *Morris* during its term beginning in October 2017.[80] The Court agreed to address the following issue:

77. In *Stolt-Nielsen SA v. AnimalFeeds International*, 559 U.S. 662, 684 (2010), the Court held 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." The Court further stated:

> An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration. *Id.* at 685–86 (citations omitted).

The Court therefore concluded: "We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.* at 687.

78. *See* Charles A. Sullivan & Timothy P. Glynn, *Horton* Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution, 64 Ala. L. Rev. 1013, 1021 (2012-2013) ("An unqualified agreement to arbitrate violates the NLRA because an employee could reasonably understand the agreement to restrict rights to engage in concerted activity. Indeed, this must be true given the Supreme Court's declaration in *Stolt-Nielsen* that 'arbitration' means 'bilateral arbitration.'").

79. The *Epic Systems* case being an exception because the arbitration clause defaults to litigation if the class waiver was held unenforceable for any reason.

80. Certiorari was granted, and the cases consolidated, on January 13, 2017.

> Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. 158(a)(1), because they limit the employees' right under the National Labor Relations Act to engage in "concerted activities" in pursuit of their "mutual aid or protection," 29 U.S.C. 157, and are therefore unenforceable under the saving clause of the Federal Arbitration Act, 9 U.S.C. 2.[81]

To resolve the issue, the Court will likely have to address at least the following questions. First, whether the NLRA contains a contrary congressional command overriding the FAA's mandate that arbitration agreements be enforced as written. Second, whether the NLRB has correctly construed the right to concerted activities in Section 7 of the NLRA to create a substantive right to participation in a class or collective arbitration or litigation.[82] Third, whether the NLRB's *Horton* rule can be invoked under the FAA's savings clause as "grounds as exist at law or in equity for the revocation of any contract"[83] to void class action waivers.

At its core, the issue the Supreme Court must resolve is whether there is a conflict between two federal statutes and, if so, how that conflict should be resolved. In the recent past, the Court's approach to federal statutory conflict issues involving the FAA has been to inquire whether the contested federal statute (here the NLRA) contains a "contrary congressional command" overriding the FAA's mandate that "requires [an] arbitration agreement to be enforced according to its terms."[84] The Supreme Court has noted that if Congress issues a contrary command, it usually does so with clarity by mentioning arbitration expressly in the text of the statute.[85] This is a demanding standard. It is clear that neither the text of the NLRA nor its legislative history contains language suggesting a contrary congressional command, and neither the Seventh nor Ninth Circuit actually found that the NLRA contained such a command in enforcing the NLRB's ruling.

In the absence of a contrary congressional command, the FAA can be overridden, and the class action waiver invalidated, if the arbitration agreement "operat[es] . . . as a prospective waiver of a party's right to pursue statutory remedies."[86] The right to pursue statutory remedies is violated when the arbitration clause prohibits assertion of a statutory right or cause of action. Since

81. Petition for a Writ of Certiorari at 1, Epic Sys. Corp. v. Lewis, No. 16-285 (Jan. 13, 2017).

82. Both class litigation and arbitration are barred because the mere agreement to arbitrate precludes litigation, and the class waiver limits the parties to bilateral arbitration only.

83. 9 U.S.C. §2.

84. CompuCredit Corp. v. Greenwood, 565 U.S. 95, 104 (2012).

85. *Id.* at 116.

86. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310 (2013), quoting Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985). Thus, the Fifth Circuit in *Murphy Oil*, despite refusing to enforce the overall NLRB decision, upheld the portion of the decision finding the arbitration clause did not make sufficiently clear to employees that they could pursue a collective administrative claim with the NLRB. Murphy Oil USA, Inc. v. N.L.R.B., 808 F.3d 1013, 1019 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017) (No. 16-307).

all the disputed arbitration agreements permit individual assertion of statutory rights, the issue is whether the statute creates a substantive right to participate in class rather than individual arbitration/litigation.

Section 7 of the NLRA does not mention litigation, arbitration, or class actions as examples of concerted activities. While the FLSA does mention collective litigation, most of the circuit courts have held that this is insufficient to create a nonwaivable, substantive right to class arbitration/litigation. Prior Supreme Court cases have considered class actions as a "procedural right only, ancillary to the litigation of substantive claims."[87] If the Supreme Court were to continue to follow this precedent, and considering that the NLRA was enacted years prior to modern class action practice, it might be difficult to prevail on the argument that Congress intended the concerted activities provision in Section 7 to create a substantive statutory right to participate in class arbitration.

One interesting development is that after the Supreme Court granted certiorari, the Office of the Solicitor General was asked by the Trump administration to re-evaluate the government's position on the enforceability of the arbitration clause. When merit briefs were filed, the Solicitor General's brief switched sides and attacked the *Horton* rule. The Solicitor General highlighted that although "the FLSA authorizes employees to pursue collective actions in court, that authorization is not meaningfully different from similar provisions of other laws that this Court has found insufficient to override the FAA's mandate to enforce arbitration agreements as written."[88] The Solicitor General further criticized the NLRB's legal argument, noting:

> Presumably for that reason, plaintiffs in these cases have not argued, and the courts of appeals that ruled in their favor did not suggest, that the FLSA—the statute under which plaintiffs' federal claims arise—overrides the FAA's directive that their arbitration agreements should be enforced. Plaintiffs' argument thus depends on the proposition that the NLRA's recognition of a general right to engage in "concerted activities," 29 U.S.C. 157, confers greater rights to pursue FLSA claims collectively than does the FLSA itself.
>
> In no other context, however, has Section 157 been construed to expand the availability of class or collective remedies beyond those that are authorized by the law that directly address those issues. Section 157 would not, for example, allow employees who do not satisfy the numerosity and typicality requirements of Federal Rule of Civil Procedure 23 to pursue a class action against their employer. Similarly here, Section 157 does not supersede the balance struck in the FAA and FLSA, or expand the range of circumstances in which collective litigation can go forward.[89]

87. Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 332 (1980).

88. Brief for the United States as Amicus Curiae Supporting Petitioners in Nos. 16-285 and 16-300 and Supporting Respondents in No. 16-307 at 9, Epic Sys. Corp. v. Lewis (No. 16-285), Ernst & Young LLP v. Morris (No. 16-300), and N.L.R.B. v. Murphy Oil USA, Inc., (No. 16-307).

89. *Id.* at 9–10.

In essence, the Solicitor General argues that the broad wording of the NLRA, which states that employees have "the right to self-organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection,"[90] cannot be used in an action filed under the FLSA to broaden the scope of the class action remedy specifically provided in the FLSA. The FLSA requires individual employees to opt in to any collective action filed under that statute. The Second Circuit, among other courts, has found this means employees must be deemed to have a right to opt out of class actions, such that signing a class action waiver is not prohibited.[91] The Solicitor General argues that the NLRA neither broadens nor excuses compliance with the specific requirements of the FLSA when employees pursue a claim for relief under that statute, including by prohibiting bilateral arbitration of FLSA claims.

G. The Supreme Court's Decision Will Also Impact Consumer Rights

The NRLB's *Horton* rule is just one of many agency rules seeking to limit use of mandatory pre-dispute arbitration clauses.[92] In the final months of the Obama administration, various federal agencies drafted rules seeking to limit or prohibit mandatory arbitration clauses, including specifically waivers of class arbitration. Under the Trump administration, Congress has moved to invalidate some of these Obama rules under the Congressional Review Act (CRA).[93] From its passage in 1996 until January 2017, the CRA had been invoked exactly once. Since the start of the Trump administration, however, fourteen disapproval resolutions have been passed and many more have been proposed.[94]

The CRA was used to invalidate Obama rules barring mandatory, pre-dispute arbitration agreements in newly executed federal procurement contracts issued by the General Services Administration (GSA) having a value greater than $1 million. That battle began in July 2014, when President Obama signed an Executive Order barring mandatory, pre-dispute arbitration agreements in newly executed federal procurement contracts.[95] As a result of the Executive Order,

90. *Id.* at 3, quoting 29 U.S.C. § 157.

91. *Sutherland*, 726 F.3d at 296–97.

92. Ironically, one of Congress's primary goals in adopting the FAA in 1925 was to validate use of mandatory, pre-dispute arbitration clauses in contracts because such clauses were invalid in many states at that time.

93. Enacted as § 251 of the Contract with America Advancement Act of 1996, Pub. L. 104-121, 5 U.S.C. § 801 (2012). Under the CRA, Congress has sixty legislative days after a new rule has been published in the Federal Register to invalidate it.

94. A chart reflecting CRA Resolutions introduced and passed is published by "rulesatrisk.org," and is available at http://rulesatrisk.org/resolutions/.

95. Exec. Order No.13673, 79 Fed. Reg. 45309 (July 31, 2014), https://www.federalregister.gov/documents/2014/08/05/2014-18561/fair-pay-and-safe-workplaces.

the GSA, in conjunction with the Department of Defense and the National Aeronautics and Space Administration, issued regulations that prohibited mandatory arbitration of claims for sexual assault and harassment and for violation of Title VII of the Civil Rights Act.[96] After his election, President Trump promptly signed an Executive Order rescinding President Obama's Executive Order.[97] On March 27, 2017, Congress voted to disapprove the GSA rules.[98]

The defeat of these rules cast in doubt previously announced plans by the Consumer Financial Protection Bureau (CFPB) to finalize a rule limiting use of mandatory arbitration containing class action waivers in contracts for consumer financial services. On the one hand, consumer advocates worried that if Congress were to disapprove these rules, the CRA would prohibit future adoption of a similar rule "unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule."[99] On the other hand, with the Republicans in control of Congress and with the Supreme Court once again apparently having a majority of conservative and business-oriented Justices, pushing ahead with a consumer-oriented program was all the more important to the CFPB. On July 10, 2017, the CFPB released its final anti-arbitration rule,[100] which would block banks and credit card companies from forcing customers to consent to mandatory arbitration agreements containing waivers of class actions as a condition of opening an account. In addition, the rules reduce the confidentiality of arbitration because financial companies are required to provide to the CFPB redacted records of claims and awards rendered by arbitrators, which the CFPB will publish on its website. Some Republicans immediately urged rejection of the rule through the CRA, and the U.S. Chamber of Commerce indicated it would evaluate litigation options to challenge the rule.[101]

Unless the Congress acts promptly to reject the CFPB rule, or a court, in response to a suit, enjoins the rule's application, many companies will have to begin incurring compliance costs. The process of designing and drafting a new dispute resolution agreement, obtaining legal signoff, and having a large

96. Federal Acquisition Regulation; Fair Pay and Safe Workplaces, 81 Fed. Reg. 58562 (Aug. 25, 2016) (to be codified in various parts of 48 C.F.R.).

97. Executive Order No. 13782, 82 Fed. Reg. 15607 (Mar. 27, 2017), https://www.federalregister.gov/documents/2017/03/30/2017-06382/revocation-of-federal-contracting-executives-orders.

98. H.R.J. 115, Pub. L. No. 115-11 131 Stat. 75 (2017).

99. 5 U.S.C. § 801(b)(2) (2012). *See* Evan Weinberger, *CFPB Bets Congress Will Let Arbitration Rule Slip By*, Law360, July 10, 2017, at 1, https://www.law360.com/articles/942869/print?section=banking, stating: "Many observers had believed the CRA threat would put a hold on the bureau's rulemaking process, particularly with respect to its mandatory arbitration and payday lending rules."

100. Arbitration Agreements, 82 Fed. Reg. 33210 (July 19, 2017) (to be codified at 12 C.F.R. § 1040 (2017).

101. The *New York Times* reported the Republican chair of the House Financial Services Committee, Representative Jeb Hensarling (R-TX), said Congress should reject the rule under the CRA. It also reported that the Chamber of Commerce "said it will 'consider every approach to address our concerns,' which many interpreted as a threat to sue." Reuters, *New Rule Requires U.S. Banks to Allow Consumer Class Actions*, N.Y. Times, July 19, 2017, at 3, https://www.nytimes.com/rueters/2017/07/10/us/10reuters-usa-consumers-arbitrations.html."

number of new forms printed and distributed, is long and complicated for a large financial institution. Many companies will not want to risk non-compliance and the reputational injury that could come with sanctions for failing to comply with the law. As a result, some companies may incur compliance costs long before they know whether Congress will reject the rule under the CRA or whether a court will ultimately overturn the rule in whole or in part. If the rule is allowed to go into effect, companies will also have compliance costs associated with reviewing, redacting, and arranging to produce copies of claims and awards to the CFPB for publication on its website beginning in July 2019.

Other agencies, such as the Federal Communications Commission, have pending plans to address mandatory arbitration clauses. It is uncertain whether these agencies will, like the CFPB, proceed to finalize their regulations, especially as the Trump administration begins to appoint additional senior officials who are likely to object to such regulations.

Regardless of the administration's efforts, it seems likely that there will be judicial challenges to some of the Obama administration rules that have already gone into effect.[102] For example, the Department of Education adopted a final rule prohibiting colleges that participate in the federal student loan program from including arbitration agreements in their contracts.[103] The Department of Labor adopted a final rule banning financial advisers from including mandatory arbitration clauses with class waivers in certain ERISA financial advisory contracts.[104] These rules are being challenged in multiple court proceedings.[105] The methodology the Supreme Court adopts for resolving the conflict between

102. The Department of Health and Human Services rule barring nursing homes from including binding arbitration provisions in admission documents suffered a court defeat when the rule was stayed before it even went into effect. *See* Am. Health Care Ass'n v. Burwell, 217 F. Supp. 3d 921 (N.D. Miss. 2016). In April 2017, the Department decided to withdraw and reconsider the rule. In June 2017, the Trump administration suspended application of the Department of Education's 2016 regulation prohibitng pre-dispute arbitration agreements, including class action waivers.

103. *See* Student Assistance General Provisions. 81 Fed. Reg. 75926 (Nov. 1, 2016) (to be codified at various parts of 34 C.F.R.).

104. The arbitration restrictions related to the Department of Labor's Fiduciary Rule are incorporated into the Best Interest Contract Exemption. 81 Fed. Reg. 20946 (Apr. 8, 2016) (to be codified at 29 C.F.R. pts. 2509, 2510, and 2550).

105. *See* Chamber of Commerce of the United States of Am. v. Hugler, 231 F. Supp. 3d 152 (N.D. Tex. 2017) (granting summary judgment in favor of the Department of Labor upholding the Fiduciary Rule). On February 3, 2017, four days before the district court granted summary judgment, President Trump issued a memorandum directing the Secretary of Labor to conduct a further review of the Fiduciary Rule, with a view to delaying its enforcement or withdrawing it altogether. *See* https://www.whitehouse.gov/the-press-office/2017/02/03/presidentialmemoranum-fiduciary-duty-rule. The DOL is continuing to defend the case on appeal, with the exception of the waiver of class arbitration requirement, which it informed the court it no longer seeks to enforce after the Acting Solicitor General withdrew its support for class arbitration waiver in briefs summited to the Supreme Court in the consolidated *Murphy Oil, Epic Systems,* and *Morris* trilogy of cases. Brief of Appellees at 59, Chamber of Commerce of the United States of Am. v. United States Department of Labor, Case No. 17-10238 (July 3, 2017). In another action challenging the Fiduciary Rule, *Thrivent Financial for Lutherans v. Perez,* Case No. 16-cv-03289 (D. Minn. filed Sept. 29, 2016), the Department of Labor has twice moved to stay, arguing implementation of the Fiduciary Rule is likely to delayed and may be withdraw, such that the Rule may never apply to the claimant. The district court denied the first stay motion, and currently has the second one under review.

the competing federal statutes involved in the *Horton* rule will likely be influential in resolving future disputes over agency limits on arbitration clauses.

If the NLRB's *Horton* rule prevails, many employers will redraft their contracts to abandon arbitration, likely resulting in an increase in class action litigation. There is substantial evidence that, given the choice between class arbitration and class action litigation, companies prefer the relative certainty and due process protection afforded by civil litigation under the Federal Rules of Civil Procedure. This preference is demonstrated by the widespread adoption of arbitration agreements that are self-voiding if a mandatory waiver of class arbitration is held to be unenforceable.[106]

In summary, the stakes will be high for employers, employees, and consumers alike when the Supreme Court addresses the *Horton* rule. Although the issue before the Court is couched in terms of the validity of class waivers, the issue is actually much broader. If waivers of class arbitration are not sustained in the labor cases before the Supreme Court and in other commercial cases involving consumers, then arbitration as currently utilized in the United States will go the way of the dinosaurs. Most companies will reject arbitration in any commercial context in which there is a risk that they could be subjected to class arbitration. The Obama administration clearly realized that its goal of reducing use of mandatory, pre-dispute arbitration in employment and consumer disputes could be achieved simply by preventing the use of waivers of class arbitration. Many companies prefer bilateral arbitration as a means of preventing class action litigation, but if the choice is class action arbitration or class action litigation, litigation will overwhelmingly prevail. The financial stakes are so high that the once mundane world of alternative dispute resolution has become politicized along party lines.

106. *See, e.g.*, DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015) (if the class arbitration waiver is unenforceable for any reason, the entire arbitration agreement is deemed to be unenforceable and the parties revert to litigation).