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Epic decision allowing class-action waivers may have broad implications

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In a significant victory for employers, the U.S. Supreme Court held May 21 that arbitration agreements with class-action waivers do not violate the National Labor Relations Act. The Supreme Court's decision will pave the way for employers to continue to contract around class-action claims and also could substantially affect federal labor law.

D.R. HORTON SERVES AS PRELUDE

The case, *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), presented a relatively straightforward yet hotly disputed question: Do class-action waivers in employment arbitration agreements violate the NLRA?

At issue was Section 7 of the NLRA, 29 U.S.C.A. § 157, which protects the right of employees "to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing."

This right focuses on union formation and collective bargaining. It also protects the right of employees to engage in "other concerted activities for the purpose of ... other mutual aid or protection."

This latter provision of Section 7 — deemed the "catchall term" by Justice Neil Gorsuch — protects the right of employees to act together in the workplace regardless of whether they are unionized or covered by a collective bargaining agreement.

Over the years, many National Labor Relations Board decisions have involved determining what type of employee conduct falls within the catchall term "other concerted activities" and what kind of employer actions unlawfully interfere with this protected conduct.

In 2012 a plurality of the board held in *D.R. Horton*, 357 NLRB No. 184 (2012), for the first time, that class-action waivers — in which employees waive the right to pursue class-action relief in any forum over workplace disputes — violate the catchall term of Section 7.

Over the next six years, *D.R. Horton* and the issue of class-action waivers unfolded in the courts, at times in interesting ways.[1] The issue generally arose in cases involving either direct review of board decisions or efforts by employers to dismiss class-action suits and compel individual arbitration.

Ultimately, the 6th, 7th and 9th circuits adopted the board's holding in *D.R. Horton*,[2] while the 2nd, 5th and 8th circuits,[3] as well some state courts,[4] rejected it.

THE DECISION: *EPIC SYSTEMS CORP. V. LEWIS*

The issue finally worked its way to the Supreme Court, which disagreed with the board's position in *D.R. Horton*. In a 5-4 decision, over a vigorous dissent, it rejected the notion that class-action waivers violate Section 7.

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The Supreme Court's *Epic Systems* opinion included two key holdings.

FAA's 'saving clause'

First, the Supreme Court adopted a pro-arbitration interpretation of the "saving clause" of the Federal Arbitration Act, 9 U.S.C.A. § 2.

The saving clause allows courts to decline enforcement of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." The board argued that Section 7's protection of "other concerted activities" was the precise type of "grounds" on which courts should decline enforcement of arbitration agreements and the class action waivers contained in them, thus avoiding the FAA's application.

The Supreme Court disagreed, explaining that the saving clause "recognizes only defenses that apply to 'any' contract," meaning "generally applicable contract defenses, such as fraud, duress or unconscionability."

On the other hand, it said the saving clause "offers no refuge for defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue" and that "the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by interfer[ing] with fundamental attributes of arbitration."

For this reason, the Supreme Court held, the defense of "illegality" under Section 7 of the NLRA "impermissibly disfavors arbitration" and was therefore rejected.

The Supreme Court's opinion in this regard was consistent with its past holdings involving class-action waivers.[5]

Absent a specific statutory command from Congress, which the NLRA does not contain, the Supreme Court is instructing courts to enforce arbitration agreements as written and reject defenses that would interfere with this instruction — regardless of whether they are artfully presented as generally applicable defenses.

In that sense, in addition to resolving a narrow conflict between the FAA and NLRA, *Epic Systems* is a continuation of the Supreme Court's pro-FAA jurisprudence.

Though the high court's majority purported to "put to the side the question whether the saving clause was designed to save not only state law defenses but also defenses allegedly arising from federal statutes," *Epic Systems* will make it difficult for parties to use federal statutes to avoid application of the FAA absent a contrary congressional command.

Section 7's 'catchall term'

Second, the Supreme Court narrowly interpreted Section 7's protection of "other concerted activities."

The board and employees in *Epic Systems* had asserted that the catchall term "can be read to include class and collective legal actions."

The Supreme Court rejected this broad reading, explaining that "the term appears at the end of a detailed list of activities" in Section 7, consisting of self-organization, forming, joining or assisting labor organizations, and bargaining collectively.

"And where, as here, a more general term follows more specific terms in a list, the general term is usually understood to embrace only objects similar in nature to those objects enumerated by the preceding specific words," the court said.

Thus, the Supreme Court cabined the catchall term to mean activities that are similar to the specific activities listed in the same statute. Because the term "other concerted activities" means activities similar to specific activities aimed at achieving collective bargaining, the Supreme Court reasoned that "other concerted activities" phrase excluded the activity of initiating or joining class litigation.

While many have focused on *Epic Systems*' resolution of the class-action waiver issue, the decision is also a potentially far-reaching contribution to Section 7 jurisprudence.

The Supreme Court's narrow interpretation of Section 7's "other concerted activities" language could one day overshadow the case's primary holding and may be perhaps the most notable aspect of *Epic Systems*.

In addition to resolving a narrow conflict between the FAA and NLRA, *Epic Systems* is a continuation of the Supreme Court's pro-FAA jurisprudence.

It marks the first time the Supreme Court has weighed in on the much-litigated "other concerted activities" language since its 1984 decision in *NLRB v. City Disposal Systems Inc.*, 465 U.S. 822,[6] and *Epic Systems* is probably the most substantive case on the term to date.

If, as the Supreme Court says, "other concerted activities" is limited to activities that are similar to "self-organization, to form[ing], join[ing], or assist[ing] labor organizations, [and] to bargain[ing] collectively through representatives of their own choosing," then the question remains to what extent Section 7 will be applied to activities not related to establishing a union and bargaining collectively.

As recently as April 20, an NLRB administrative law judge held that employees engaged in protected activity under Section 7's catchall term when they sent emails to each other regarding wages and complaining about their work schedules and their employer's tip policies.[7]

With the board's recent recomposition as a Republican-majority body for the first time since Dec. 31, 2007, the board could use the language in *Epic Systems* to issue far-reaching decisions on the scope of Section 7's catchall term.

EPIC SYSTEMS AND THE NLRB POLICY OF NON-ACQUIESCENCE

Another interesting aspect of the class-action waiver and *D.R. Horton* saga was the board's continued prosecution of the issue — and of employers — pursuant to its policy of non-acquiescence.

Under this policy, the board will continue to apply its case law, such as the rule established in *D.R. Horton*, even if it is rejected by one or more federal appeals courts.

The board's reasoning behind its non-acquiescence policy is that it wishes to determine for itself "whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise."[8]

Despite receiving an adverse and directly on-point decision from the 5th Circuit in *D.R. Horton*, the board doubled down regarding the application of its non-acquiescence policy in *Murphy Oil USA Inc.*, 361 NLRB No. 72 (2014), holding once again that class-action waivers violated the NLRA.

On appeal a second time to the 5th Circuit, the court reversed the board on the issue yet again, noting that the "board disregarded this court's contrary *D.R. Horton* ruling."[9]

Nevertheless, the court stated, "we do not celebrate the board's failure to follow our *D.R. Horton* reasoning, but neither do we condemn its non-acquiescence."[10]

With clear Supreme Court precedent now in place, the board must cease its pursuit of employers for alleged unfair labor practices based on their class-action waivers, because — notwithstanding its non-acquiescence policy — the board, like all federal agencies, is bound to follow Supreme Court precedent.

CONCLUSION

From a practical standpoint, as a result of the Supreme Court's decision in *Epic Systems*, employers nationwide may now contract for individual arbitration and potentially preempt common employment class actions.[11]

Epic Systems is an interesting case on the issue of class-action waivers under the NLRA, a much-litigated question over the past six years and an important aspect of businesses protecting themselves from vexatious class-action claims.

However, its other substantive holdings and reasoning should not be overlooked. Whether and to what extent future boards and courts will use *Epic Systems* to modify Section 7 jurisprudence remains to be seen.

NOTES

[1] After the 5th Circuit rejected *D.R. Horton* in *D.R. Horton Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), the board famously doubled down in *Murphy Oil USA Inc.*, 361 NLRB No. 72 (2014). On appeal the second time, the 5th Circuit again rejected the board's holding in *Murphy Oil USA Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). The issue also resulted in seemingly conflicting decisions among the same court. *Compare Richards v. Ernst & Young LLP*, 744 F.3d 1072, 1075 at n.3 (9th Cir. 2013) ("Without deciding the issue, we also note that the two courts of appeals, and the overwhelming majority of the district courts, to have considered the issue have determined that they should not defer to the NLRB's decision in *D.R. Horton* on the ground that it conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the Federal Arbitration Act."), *with Morris v. Ernst & Young LLP*, 834 F.3d 975, 979 (9th Cir. 2016) ("In this case, we consider whether an employer violates the National Labor Relations Act by requiring employees to sign an agreement precluding them from bringing, in any forum, a concerted legal claim regarding wages, hours, and terms and conditions of employment. We conclude that it does, and vacate the order of the district court compelling individual arbitration.").

[2] *NLRB v. Alt. Entm't Inc.*, 858 F.3d 393 (6th Cir. 2017); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young LLP*, 834 F.3d 975 (9th Cir. 2016).

[3] *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *D.R. Horton Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013); *Cellular Sales of Mo. LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016).

[4] *Tallman v. Eighth Jud. Dist. Court*, 359 P.3d 113, 123 (Nev. 2015) (rejecting argument that the NLRA invalidates class-action waivers because in light of the "liberal federal policy favoring arbitration" the NLRA "cannot fairly be taken as a contrary congressional command sufficient under *CompuCredit* to override the FAA") (internal citations and quotations omitted); *Iskanian v. CLS Transp. Los Angeles LLC*, 59 Cal. 4th 348 (Cal. 2014) (rejecting *D.R. Horton* by a 6-1 majority); *see also Neary v. Mastec N. Am. Inc.*, No. 15-CV-2655, 2016 WL 2968336, at *1 (Mass. Super. Ct., Suffolk Cty. May 9, 2016) (rejecting plaintiff's argument that a class-action waiver restricted his Section 7 rights because "the NLRB's decision in [*D.R. Horton*] directly contradicts the United States Supreme Court's decisions in *AT&T Mobility LLC v. Concepcion* and *American Express Company v. Italian Colors Restaurant*" and noting that the "majority of federal courts have also declined to follow the NLRB's decision"). Some intermediary state courts adopted the board's holding in *D.R. Horton*. *See, e.g., Gold v. N.Y. Life Ins. Co.*, 153 A.D.3d 216 (N.Y. App. Div., 1st Dep't 2017) (affirming lower court's denial of motion to compel arbitration because class waiver ran afoul of Section 7 of the NLRA); *Mims v. Adecco USA Inc.*, No. 2017 IL App (1st) 163366-U, 2017 WL 5202949, ¶ 22 (Ill. App. Ct., 1st Dist. Nov. 9, 2017) ("We believe that the 9th and 7th Circuit, along with the NLRB, present the most well-reasoned and persuasive analysis of the issue. And until the United States Supreme Court rules otherwise, we continue to follow the reasoning set forth by the NLRB and the federal circuit courts in *Lewis* and *Morris*.").

[5] *Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013) (upholding class-action waiver in merchant agreements that compelled arbitration of antitrust claims); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012) (holding that only a contrary congressional command could override the FAA's requirement that courts enforce arbitration agreements); *see also DirecTV Inc. v. Imburgia*, 136 S. Ct. 463 (2015) (upholding class-action waiver in arbitration provision of service agreement).

[6] In *NLRB v. City Disposal Systems Inc.*, 465 U.S. 822 (1984), the Supreme Court held that Section 7 includes actions of an individual employee who invokes safety rights that affect all employees covered by a collective bargaining agreement. However, the case was clearly limited to employees operating under a current collective bargaining unit and its analysis more focused on the term "concerted activities" rather than the term "other." Thus, it was of limited utility to other situations, such as class action litigation. The Supreme Court's dicta, however, included the observation that by enacting Section 7, "Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment."

[7] *Mexican Radio Corp.*, 366 NLRB No. 65 (2018).

[8] *Insurance Agents' Int'l Union, AFL-CIO*, 119 NLRB 768, 773 (1957). Long before *D.R. Horton*, the board's then-general counsel advised that class-action waivers were consistent with the NLRA. *See* GC Memorandum 10-06 (June 30, 2010). Nevertheless, the board issued *D.R. Horton* on

Jan. 3, 2012, which the 5th Circuit later rejected. The board's policy paid off in some respects here, as three circuit courts of appeals eventually decided to adopt its reading of Section 7, and created the split that generated the Supreme Court's review.

[9] *Murphy Oil USA Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015).

[10] Separately, the board had held that Murphy Oil USA violated the NLRA by filing the motion to compel arbitration, which chilled employees' Section 7 rights. The 5th Circuit held that based on *D.R. Horton*, the employer did in fact have a reasonable basis to compel arbitration and that the motion to compel was not retaliatory. "Though the board might not need to acquiesce in our decisions, it is a bit bold for it to hold that an employer who followed the reasoning of our *D.R. Horton* decision had no basis in fact or law or an 'illegal objective' in doing so. The board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders."

[11] Arbitration agreements, however, are still subject to state-specific requirements governing contract formation as well as the practical realities of individual arbitration actions.

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