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THE CONCERTED PROTECTED ACTIVITY LOOPHOLE: HOW THE NLRB IS UNDERMINING THE FEDERAL POLICY FAVORING ARBITRATION BY INVALIDATING CLASS ACTION WAIVERS

By
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I. INTRODUCTION

Over the past year, a major rift has emerged between the National Labor Relations Board (NLRB) and the Federal Circuit Courts over the status of class action arbitration waivers in employment contracts. Based on a broad interpretation of National Labor Relations Act (NLRA) Section 7, the NLRB has taken the position that waivers of class action arbitration infringe upon the ability of covered employees to carry out concerted protected activities.[1] The Circuit Courts have uniformly rejected this approach, instead basing their decisions on the emphatic federal policy favoring arbitration.[2] Either the NLRB or the Supreme Court must close this concerted protected activity loophole because at its core, it represents the very policy that the Federal Arbitration Act[3] (FAA) and the Supreme Court have been attempting to eliminate since 1925: hostility toward the arbitral forum.

The conflict between the NLRB and the Courts of Appeal leave employers in a serious bind when considering the use of an arbitral clause in a standard employment contract. Supreme Court precedent that firmly allows for class action arbitral waivers may seem like a distant fantasy when compared to the comparative imminence of an NLRB action. Because the NLRB position directly conflicts with the emphatic federal policy favoring arbitral agreements, one of the positions must give way. Given the course of Supreme Court precedent over the past twenty-five years, and particularly given recent

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[1] *See* National Labor Relations Act, 29 U.S.C. § 157 (West 2014); D.R. Horton, Inc., 357 N.L.R.B. No. 184, 2012-2013 NLRB Dec. ¶ 15,546 (Jan. 3, 2012). The term "concerted protected activity" is a derivation of the language of Section 7. The term is not defined in the statute, but has been loosely defined by the Supreme Court as "clearly embrac[ing] the activities of employees who have joined together in order to achieve common goals." N.L.R.B. v. City Disposal Sys., Inc., 465 U.S. 822, 831 (1984). The umbrella of concerted protected activity has also expanded to the actions of lone employees if the "employee intends to induce group activity" or "acts as a representative of at least one other employee." Mobil Exploration v. N.L.R.B., 200 F.3d 230, 238 (5th Cir. 1999). Whether or not forming a class constitutes concerted protected activity is a hotly debated topic. *See infra* Part IV.A.

[2] *See, e.g.*, Owen v. Bristol Care, Inc., 702 F.3d 1050, 1054 (2013) (finding that the Court owed the NLRB's interpretation of Supreme Court precedent in *D.R. Horton* no deference). Although *Owen* involved a FLSA claim, the petitioner in that case invoked *D.R. Horton* as support for the position that class action waivers in employment contracts were invalid. *Id.* at 1053-54. Note also that the action in *D.R. Horton* became a NLRA issue only after the plaintiff raised it as a Fair Labor Standards Act (FLSA) issue. *See* D.R. Horton, Inc. v. N.L.R.B., 737 F.3d 344, 349 (5th Cir. 2013).

[3] Federal Arbitration Act, 9 U.S.C.A. §§ 1-16 (West 2014) [hereinafter FAA].

decisions such as *AT&T Mobility v. Concepcion*[4] and *American Express v. Italian Colors Restaurant*,[5] the FAA and its preference for arbitral dispute resolution maintains primacy over the NLRB's novel interpretation of Section 7.

This comment will first briefly detail the federal policy favoring arbitration by highlighting the Supreme Court cases that have made the class action arbitral waivers a popular contractual term. Next, the comment will utilize the *D.R. Horton* example to highlight both the NLRB position on class action waivers and the alternative tack taken by several Circuit Courts. Finally, the comment will seek to explain why the concerted protected activity loophole must be closed and how it can be done: namely, through an unlikely position-shift at the NLRB or through a grant of certiorari to the Supreme Court.

II. THE FEDERAL ARBITRATION ACT AND THE SUPREME COURT

For more than two decades, the United States Supreme Court has consistently maintained an "emphatic federal policy in favor of arbitral dispute resolution."[6] On countless occasions, the Supreme Court has rejected even seemingly innocuous regulations and statutes that might limit access to the arbitral forum. It is not surprising, then, that recent decisions have also allowed for class action arbitration waivers because class arbitration is deemed a danger to the usefulness of arbitration.

A. The Emphatic Federal Policy Favoring Arbitration

In *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, the Supreme Court announced an oft-repeated and familiar phrase to those well-versed in the jurisprudence surrounding arbitral contracts: the emphatic federal policy favoring the enforceability of arbitral agreements.[7] The basis for this statement was the FAA, passed in 1925, and the Act's straightforward, if occasionally misunderstood, statement of intent. The FAA's premier provision is Section 2, which commands that any

> written provision . . . 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 thereof, or an agreement in writing to submit to arbitration . . . shall

[4] AT&T Mobility v. Concepcion, 131 S. Ct. 1740 (2011).

[5] American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

[6] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985). *See also* KPMG LLP v. Cocchi, 132 S. Ct. 23, 25 (2011); Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983).

[7] *Mitsubishi*, 473 U.S. at 631.

> be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[8]

This simple and powerful Congressional command has come to define Supreme Court jurisprudence on the topic of arbitral agreements. [9] Generally speaking, and with limited exceptions, courts will enforce arbitral agreements.[10]

Likewise, the Supreme Court has consistently ruled that statutes which create impediments to arbitration are violations of the FAA. In cases such as *Southland Corporation v. Keating*[11] and *Doctor's Association v. Casarotto*,[12] the Supreme Court recognized the primacy of the FAA over state laws that attempted to regulate the enforceability of arbitral agreements. The Supreme Court has definitively established that arbitral agreements trump state laws which attempt to frustrate the resort to arbitration.

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[8] FAA, 9 U.S.C.A. § 2.

[9] *See Concepcion*, 131 S. Ct. at 1745; Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 581 (2008); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006).

[10] Four statutory exceptions and two common law exceptions apply to the general policy favoring the enforcement of arbitral agreements. The FAA specifically defines four exceptions:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--
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> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C.A. § 10 (West 2014). The other exceptions, not without Circuit variation, are described at common law: (1) manifest disregard of the law, *see, e.g.*, Patten v. Signator Ins. Agency, Inc., 441 F.3d 230, 235, (4th Cir.), *cert. denied* 549 U.S. 975 (2006); (2) an arbitrary or capricious decision, *see, e.g.*, Ainsworth v. Skurnick, 960 F.2d 939, 941 (11th Cir. 1992); or (3) a decision that violates public policy, *see, e.g.*, Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 782 (11th Cir. 1993).

[11] 465 U.S. 1, 16 (1984) (invalidating a California franchising statute purporting to make judicial proceedings the exclusive forum for resolving claims brought under the franchise investment statute).

[12] 517 U.S. 681, 688-89 (1996) (invalidating a Montana statute which required explicit, underlined and capital-letter language warning contracting parties about arbitral clauses in order to be deemed a valid arbitral clause.)

B. Recent Decisions: Concepcion *and* Italian Colors

Two recent decisions highlight the Supreme Court's seeming disinterest in any and all limitations on arbitral agreements. In *AT&T Mobility v. Concepcion*, the Supreme Court approved the use of class action arbitral waivers in adhesive consumer contracts where claimants were barred from bringing collective actions but afforded a number of incentives for bringing individual claims against AT&T. In *Italian Colors Restaurant v. American Express, Inc.*, the Court deemed a collective action waiver valid in contracts between businesses and a credit card company even where the cost of proving an individual antitrust claim would be economically infeasible for the individual claimant.

Concepcion was a case brought by consumers against the communications giant AT&T.[13] The pertinent issue before the Supreme Court was AT&T's motion to compel arbitration and a class action arbitral waiver signed by AT&T customers.[14] The petitioner's unconscionability claim challenging the motion to compel arbitration relied almost entirely on the class action arbitral waiver. The District Court invalidated the waiver due to California precedent, known as the *Discover Bank* rule,[15] which essentially outlawed the use of class action arbitral waivers.[16] The Supreme Court found that class arbitration, essentially mandated by the *Discover Bank* rule, seemingly defeated the very advantages of arbitration: relative rapidity and informality of proceedings.[17] In addition to finding class arbitration unnecessary and inefficient, the majority wrote that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for other reasons" – referencing the dissent's claim that class actions were necessary to make litigation of "small dollar claim[s]" economically feasible.[18] The unmistakable result of *Concepcion* was a clear directive from the highest court that class arbitration was inconsistent with the purpose of the FAA.[19]

In *Italian Colors* the Supreme Court relied in part on *Concepcion* to enforce a class action arbitration waiver between American Express and merchants that utilized its

[13] *Concepcion*, 131 S. Ct. at 1744.

[14] *Id.* at 1745.

[15] In *Discover Bank v. Superior Ct.*, 113 P.3d 1100 (Cal. 2005), the California Supreme Court applied California law to adhesive consumer contracts, finding that such contracts were unconscionable. Specifically, the court found that class action arbitral waivers essentially constitute an "exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another'" by limiting liability for individually small claims brought by many consumers. *Id.* at 1110 (quoting Cal. Civ. Code Ann. § 1668).

[16] *Concepcion*, 131 S. Ct. at 1745-46. The Ninth Circuit affirmed the District Court's ruling. *Id.* at 1745.

[17] *Id.* at 1751.

[18] *Id.* at 1753.

[19] "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748.

products.[20] The Supreme Court clearly held that in the absence of a contravening Congressional command, the FAA mandates the enforcement of arbitral agreements.[21] Finding no contrary Congressional command, nor a substantive right to class actions, the Court turned to the petitioners claim that a judge-made exception to the FAA applied.[22] Where arbitration would deny the "effective vindication" of federal rights, courts occasionally invalidate arbitral agreements.[23] The argument was simply that the unavailability of class action made pursuing the claim against American Express economically infeasible, thus denying the effective vindication of the petitioner's statutory rights.[24] The Court dispensed with this concern, finding that "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy."[25]

The decisions in *Concepcion* and *Italian Colors* have been analyzed in depth by scholars and practitioners alike. What these decisions represent is a clear policy decision by the Court, based in equal part on the FAA and the Court's hostility toward class actions, to support class action waivers in arbitral forums. This precedent extends to statutory claims as well[26] which have long been held to be imminently arbitrable.[27]

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[20] *Italian Colors*, 133 S. Ct. at 2312 ("Truth to tell, our decision in *AT&T Mobility* all but resolves this case.").

[21] *Italian Colors*, 133 S. Ct. at 2309-10

[22] *Id.* at 2310.

[23] *Id.* The effective vindication doctrine is the offspring of dicta in *Mitsubishi*: "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Mitsubishi*, 473 U.S. at 637. The Supreme Court has never invalidated an arbitral clause on effective vindication grounds, *Italian Colors*, 133 S. Ct. at 2310, but several Circuit Courts have done so. *See, e.g.*, Shankle v. B-G Maint. Mgmt. of Colorado, Inc., 163 F.3d 1230, 1235 (10th Cir. 1999) ("The [arbitral] [a]greement thus placed Mr. Shankle between the proverbial rock and a hard place—it prohibited use of the judicial forum, where a litigant is not required to pay for a judge's services, and the prohibitive cost substantially limited use of the arbitral forum."); Paladino v. Avnet Computer Technologies, Inc., 134 F.3d 1054, 1060 (11th Cir. 1998) (holding that an arbitration agreement was unenforceable because it was "fundamentally at odds" with the purposes of Title VII). Some of the Circuit Court decisions are based on the inability of effective vindication due to prohibitive cost, which most other Circuits have found to be an unconvincing basis for *per se* effective vindication invalidation. *See* Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 659 (6th Cir. 2003).

[24] *Italian Colors* 133 S. Ct. at 2310-11. The Second Circuit's opinion contained excerpts of the testimony of a Dr. Gary L. French, an economist who testified for the small businesses. Dr. French concluded that "'it would not be worthwhile for an individual plaintiff'" to bring a claim because the greatest potential damages for the antitrust claims in question was only $38, 549, while the fees for expert testimony on the antitrust activities alleged would range between a few hundred thousand dollars and one million dollars or more. *See* In re American Express Merchants' Litigation, 554 F.3d 300, 316-17 (2nd Cir. 2009).

[25] *Id.* at 2311.

[26] *See, e.g.*, Carter v. Countrywide Credit Indus., 362 F.3d 294, 298-99 (5th Cir. 2004) (holding that despite specific statutory provisions for collective actions, no right to collective action exists under FLSA).

[27] *See., e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991); *Mitsubishi*, 473 U.S. at 625-27.

Despite the claim in both cases that class actions allowed for plaintiffs to bring small dollar claims collectively, and denying that recourse would spell the end of small claims against large corporations, the Supreme Court remained firm in its holdings that (1) there is no general right to class action and (2) that class action arbitration stands in direct opposition to the purposes of arbitration and the policy behind the FAA.

III. THE STATUS OF CLASS ACTION ARBITRATION WAIVERS IN EMPLOYMENT CONTRACTS: THE D.R. HORTON EXAMPLE

Few cases in recent memory have brought the viability of employment arbitration so fundamentally into question as the *D.R. Horton* saga. The *D.R. Horton* case, originally brought before the NLRB, was a challenge to a class action arbitration waiver in a typical employment contract. The NLRB found that the waiver violated Section 7 of the NLRB, and deemed the provision unenforceable. After *D.R. Horton*, numerous other NLRB cases relied on that precedent to invalidate class action arbitration waivers. In December 2013, the Fifth Circuit reversed the *D.R. Horton* decision, becoming the most recent Circuit Court to distance itself from the NLRB's hostility toward class action arbitration waivers in employment contracts.

A. The NLRB Takes on Class Action Waivers

In a case of first impression, the NLRB considered in *D.R. Horton* whether an arbitral clause containing an express waiver of collective action rights violated Section 7 of the NLRB.[28] In finding that the provision did in fact violate the NLRA, the NLRB held that class actions were a substantive right afforded by the NLRA, and that such a finding would not conflict with the FAA.[29] Even if the holding did conflict with the FAA, the NLRB decided, the NLRA would prevail. Other NLRB cases would follow this precedent to invalidate class action arbitral waivers in employment contracts.

The agreement at issue in *D.R. Horton* was simple: it provided for the exclusive use of arbitration in the case of any dispute arising between the employee and the employer and further constrained the arbitrator by restricting the ability of the arbitrator to hear collective actions or allow a class to be formed.[30] The petitioner claimed that the provision abridged his Section 7 rights under the NLRA, which provides in pertinent part that employees shall have the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[31] Among those concerted

[28] *D.R. Horton*, 357 N.L.R.B. No. 184, at 1.

[29] *Id.* at 5, 10-16.

[30] *Id.* at 1.

[31] 29 U.S.C. § 157. Section 7 does not technically provide the terms of an NLRA violation. Rather, Section 8(a)(1) deems any attempt to "interfere with, restrain, or coerce employees in the exercise of the right guaranteed in section 157 of this title" an unfair labor practice. 29 U.S.C. § 158. Thus, a Section 8(a)(1) violation occurs when an employer abridges an employee's Section 7 rights.

activities, the petitioner argued, was the *substantive* right to initiate collective action against an employer.[32]

The NLRB began its analysis by finding that forming a class was a concerted activity protected by Section 7.[33] That finding was based primarily in Board precedent which established Section 7 protection for collective statutory claims,[34] but also on both Board and Supreme Court precedent holding that collective grievances constituted concerted protected activity.[35] Because the arbitration agreement expressly disallowed class actions, the NLRB reasoned, the agreement "clearly and expressly bar[red] employees from exercising substantive rights that have long been held protected by Section 7 of the NLRA."[36]

Finding a Section 7 violation did not end the NLRB's analysis. A violation of substantive rights under the NLRA implicated the FAA, requiring the Board to assess the mutual compatibility of both statutes. The NLRB found that the two statutes did not conflict by reasoning that invalidating the class action waiver would treat arbitration no differently than other private contracts that violated the NLRA.[37] The NLRB also relied heavily on the "effective vindication" doctrine to hold that its decision did not conflict with the FAA.[38] In other words, because collective action was deemed a substantive right under the NLRA, and the agreement in question did not allow for the exercise of that substantive right, the decision did not conflict with the FAA.[39] The NLRB also maintained that "nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable."[40] The NLRB distinguished *Concepcion* by pointing out that the case did not involve the NLRA, was aimed at potentially very large classes, and that the case involved a Supremacy Clause

[32] *D.R. Horton*, 357 N.L.R.B. No. 184, at 2.

[33] *Id* at 2-5.

[34] *See, e.g.*, Spandsco Oil & Royalty Co., 42 N.L.R.B. 942, 948-949 (1942) (holding that that the filing of a FLSA suit by three employees was protected by Section 7).

[35] *See, e.g.*, N.L.R.B. v. Washington Aluminum Co., 370 U.S. 9, 14-18 (1962) (holding that a grievance brought by seven employees, although not specific, was protected activity); Clara Barton Terrace Convalescent Ctr., 225 N.L.R.B. 1028, 1033 (1976) ("It is . . . well settled that the advancement of a collective grievance is protected activity, even if the grievance in question is not formally stated or does not take place under the auspices of a contractual grievance procedure."). At least one circuit has ruled that class action litigation is also protected activity within Section 7. *See* Brady v. Nat'l Football League, 644 F.3d 661, 673 (8th Cir. 2011).

[36] *D.R. Horton*, 357 N.L.R.B. No. 184, at 5.

[37] *Id.* at 10-11.

[38] *Id.* at 12.

[39] *Id.*

[40] *Id.* at 14.

issue, as opposed to two conflicting federal statutes.[41] Finally, the NLRB found that even if the two statutes did conflict, there were "strong indications" that the NLRA would prevail.[42]

After *D.R. Horton*, a number of other NLRB cases used this established precedent to invalidate adhesive, arbitral class action waivers in employment contracts.[43] This string of cases invalidated class action arbitral waivers from California to New York. *D.R. Horton*'s precedential value, however, was soon called into question.

B. The Fifth Circuit Response

The Fifth Circuit, in a direct appeal from the NLRB's *D.R. Horton* decision, held that the NLRB's assessment of the arbitral class action waiver was flawed.[44] The Court found that the NLRB's effective mandate requiring the availability of class proceedings in arbitration violated the FAA.[45] The Court first found no clear substantive right to class proceedings, and then described how class arbitration conflicted with Supreme Court precedent and the meaning of the FAA.[46]

The Fifth Circuit, in reviewing the NLRB finding that the ability to seek collective action was concerted protected activity, did not come to a clear answer on whether class action waivers violate Section 7.[47] Instead, the Court noted that some courts, and certainly the run of NLRB cases, seemed to support the finding that collective actions may be protected under Section 7.[48] The Court then noted that simply considering

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[41] *D.R. Horton*, 357 N.L.R.B. No. 184 at 15.

[42] *Id.* at 16. The "strong indications" were based on the Norris-LaGuardia Act, 29 U.S.C. § 101 et seq. (West 2014), which prohibits interference with "'lawful means [of] aiding any person participating or interested in' a lawsuit arising out of a labor dispute (as broadly defined) as contrary to the public policy protecting employees' 'concerted activities for … mutual aid or protection.'" *Id.* at 16 (citing the Norris-LaGuagrdia Act?). As the Fifth Circuit noted, the interpretation of the Norris-LaGuardia Act is indisputably "outside the Board's interpretive ambit." *D.R. Horton*, 737 F.3d at 362 n. 10. As if that were not enough, the Court also found the Board's interpretation of the statute "unpersuasive." *Id.*

[43] *See, e.g.*, Leslie's Poolmart, Inc., 2014 WL 204208 (N.L.R.B. Div. of Judges) (Jan. 17, 2014); JP Morgan Chase & Co., 2013 WL 4499144 (N.L.R.B. Div. of Judges) (Aug. 21, 2013); Cellular Sales of Missouri, LLP, 2013 WL 4427452 (N.L.R.B. Div. of Judges) (Aug. 19, 2013); Everglades College, Inc., D/B/A Keiser University & Everglades Univ., 2013 WL 4140317 (N.L.R.B. Div. of Judges) (Aug. 14, 2013). These cases were centered on conduct in California, New York, Missouri/Kansas, and Florida, respectively.

[44] *D.R. Horton*, 737 F.3d at 349. An unsuccessful challenge to recess appointments made by President Obama to the NLRB was also raised. *Id.* at 350-55. The issue recently went before the Supreme Court in an unrelated case. *See* NLRB v. Canning, 705 F.3d 490 (D.C. Cir.), *cert. granted*, 133 S. Ct. 2861 (2013).

[45] *Id.* at 360.

[46] *Id.* at 356-62.

[47] *Id.* at 355-57.

[48] *Id.* at 356-57.

whether Section 7 rights were violated did not end the inquiry, and focused on court decisions holding that class actions were not a substantive right.[49] While the Court did not go so far as to discount the NLRB finding that collective actions were a protected activity under Section 7, the implication was clear: the Court was hesitant to label class actions as a substantive right.[50]

Perhaps more importantly, the Fifth Circuit took issue with the NLRB finding that the *D.R. Horton* holding did not conflict with the FAA. The Court compared the NLRB decision in question to the *Discover Bank* rule at issue in *Concepcion*, and noted the similarities.[51] The finding was identical: forcing contracting parties to include the possibility of class-wide arbitration was a significant impediment to the effective use of arbitration as an adjudicatory mechanism.[52] In addition, the Court found no Congressional command which required the supremacy of the NLRA over the FAA.[53] Thus, even if collective actions were deemed protected under Section 7, that protection would necessarily yield to the FAA.[54] In one of the final paragraphs of the decision, the Court confined its holding to a simple sentence: "[r]equiring a class mechanism is an actual impediment to arbitration and violates the FAA."[55]

In sum, the Fifth Circuit decision and the NLRB holding could not be more diametrically opposed on the issue of class action arbitral waivers. The Fifth Circuit followed every one if its sister courts in disavowing the NLRB's rationale in *D.R. Horton*.[56] It remains unclear, however, how the NLRB will respond to the overwhelming Circuit Court opposition to their position.

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[49] *D.R. Horton*, 737 F.3d at 357.

[50] Indeed, the Court seemed to assert that class actions were merely a vehicle for recovery – not a remedy in and of themselves. *Id.* at 357.

[51] *Id.* at 359-60.

[52] *Id.* at 359-60.

[53] *Id.* at 362.

[54] *D.R. Horton*, 737 F.3d at 362.

[55] *Id.* at 360. The *Concepcion* decision was controversial when decided, and its implications for the future of collective actions have provided fodder for those who see the decision as a blow to consumers and employees. Professor Maureen A. Weston argued, for instance, that the "Concepcion decision, based on a dated and deluded conception of arbitration, improperly guts the FAA savings clause, violates the reserved role of states under the FAA to 'regulate contracts, including arbitration clauses, under general contract law principles,' and threatens the ability of parties in some cases to vindicate their statutory rights." Maureen A Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 771 (2012). Prof. Weston went on to advocate for a "narrow construction of the decision" so as to allow for the "meaningful vindication of rights." *Id.* at 771, 784-91. Prof. Weston cited the NLRB's decision in *D.R. Horton* as one of the decisions that followed her narrow construction paradigm. *Id.* at 790-91.

[56] Walthour v. Chipio Windshield Repair, LLC, No. 13-11309, 2014 WL 1099286, *7-9 (11th Cir. Mar. 21, 2014); *Owen*, 702 F.3d at 1055; Richards v. Ernst & Young, LLP, 734 F.3d 871, 873-74 (9th Cir. 2013); Sutherland v. Ernst & Young, LLP 726 F.3d 290, 297-98 n. 8 (2d. Cir 2013). These Circuit Court cases disavowing *D.R. Horton*'s holding did not deal solely with NLRA issues; in all of these cases, the *D.R.*

IV. TO CLOSE THE LOOPHOLE

The conflict between the NLRB and the Courts of Appeal on the topic of class action arbitral waivers requires a solution. Uncertainty in the enforceability of arbitral clauses in employment contracts can only lead to higher transaction costs and a backload of cases in both state and federal courts. The precedential value of those cases labeling class actions as concerted protected activity is anything but certain. But even if class actions are concerted protected activity, the FAA's preference for the enforceability of arbitral clauses must carry the day. The solution to the concerted protected activity loophole in the enforceability of class action arbitration waivers is simple: the NLRB must take the unlikely step of changing its position on class action arbitral waivers or the Supreme Court must rule against the NLRB.

A. Class and Collective Actions as Concerted, Protected Activity

The concerted protected activity loophole has its origins in precedent established by the NLRB and endorsed by some Circuit Courts. This precedent labels class actions as concerted protected activity. Without that building block, NLRB cases like *D.R. Horton* would never arise. Recent cases have questioned whether class action can properly be characterized as protected by Section 7.[57]

The NLRB based the *D.R. Horton* decision on a line of cases apparently beginning with *Spandsco Oil & Royalty Co.*, in which the Board held that Section 7 protected the right of three employees to bring a Fair Labor Standards Act Claim.[58] The Board cited a slew of other cases for the position that "concerted legal action addressing wages, hours or working conditions is protected by Section 7."[59] In one sentence lacking a citation, the NLRB applied the same finding to arbitration.[60] The NLRB deemed collective action in any form "not peripheral but central to the Act's purposes."[61]

Horton decision was brought forward by the plaintiff as further evidence that the arbitral clause in question should not be enforced. All four circuits either distanced themselves from the NLRB's reasoning in *D.R. Horton* or outright refused to follow the decision's holding. *Richards* also contains a list of District Court opinions disavowing the NLRB holding in *D.R. Horton*. *See Richards*, 734 F.3d at 874 n. 3. Reportedly, a rehearing was denied by the Ninth Circuit in the Ernst and Young case. *See* Julia Brodsky, *NLRB Takes D.R. Horton One Step Further While the Ninth Circuit Upholds Its Contrary Decision*, PROSKAUER (Feb. 11, 2014), http://calemploymentlawupdate.proskauer.com/2014/02/articles/nlra/nlrb-takes-d-r-horton-one-step-further-while-the-ninth-circuit-upholds-its-contrary-decision/.

[57] *See infra* note 66 and accompanying text.

[58] 42 N.L.R.B. 942, 948-49 (1942).

[59] *D.R. Horton*, 357 N.L.R.B. No. 184, at 2 n. 4.

[60] "The same is equally true of resort to arbitration." *Id.*

[61] *Id.* at 4. For an interesting discussion of collective action waivers from the social equality perspective, see Samuel R. Bagenstos, *Employment Law and Social Equality*, 11 MICH. L. REV. 225, 267 (2013). From this perspective, social equality is the central purpose of employment law statutes like the NLRA, *id.* at 231, and collective actions are an important element of that purpose, *id.* at 268-269. Professor Bagenstos

The NLRB's position on collective action runs afoul of more recent Supreme Court decisions, like *Amchem Products, Inc. v. Windsor*[62] and *Italian Colors*,[63] which specifically construe the right to a class action as procedural. Whether or not that ruling is correct is a separate question – the judicial reality is that litigants do not have the *substantive right* to form a class.[64] Even where the procedure for class formation is specifically included in the statute, including employment law statutes, courts have consistently ruled that no more than a procedural right exists.[65] Class actions have most recently been construed as a vehicle to arrive at a remedy, rather than a remedy in and of themselves.[66]

While the NLRB is seemingly convinced that class actions are covered by Section 7, court decisions holding that class formation is a procedural right seem to undermine that position. It is indeed a curious paradox that one does not have a right to class action, but attempting to form a class is concerted protected activity. Even so, the concerted protected activity loophole has a more fundamental flaw.

B. NLRA vs. FAA

Even if class actions are concerted protected activity, the recent NLRB hostility toward arbitral class action waiver raises another fundamental, if more readily answerable, question. Namely, should the NLRB position on class action arbitral waivers preempt the FAA? To simply ignore the conflict between the concerted protected activity loophole and the FAA is a specious position. The NLRB cannot continue to overlook the problem, and the Supreme Court may need to act.

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shares some of the concerns expressed by the NLRB, particularly about the effective vindication of statutory rights. *Id.* at 268-69. Even so, the distinct possibility remains, and Prof. Bagenstos admits as much, that arbitration may be as effective or more effective at vindicating employee rights. *Id.* at 267-68. Prof. Begantos predictably decried the Fifth Circuit's response to *D.R. Horton*. *Id.* at 269.

[62] Amchem Prods., Inc. v. Windsor, 521 U.S. 591(1997).

[63] *Italian Colors*, 133 S. Ct. 2304.

[64] *See Amchem Prods.*, 521 U.S. at 612-613 ("Rule 23's constraints must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'"); *Italian Colors*, 133 S. Ct. at 2309-10 ("Nor does congressional approval of Rule 23 establish an entitlement to class proceedings for the vindication of statutory rights . . . . One might respond, perhaps, that federal law secures a nonwaivable *opportunity* to vindicate federal policies by satisfying the procedural strictures of Rule 23 or invoking some other informal class mechanism in arbitration. But we have already rejected that proposition . . . ." (citing *Concepcion*, 131 S. Ct. at 1748)).

[65] *See Gilmer*, 500 U.S. at 32 (no substantive right to collective action under the ADEA); *Carter*, 362 F.3d at 298 (no substantive right to collective action under the FLSA).

[66] *D.R. Horton*, 737 F.3d at 358 (quoting Reed v. Fla. Metro. Univ., Inc., 681 F.3d 630, 643 (5th Cir. 2012)).

In the *D.R. Horton* decision, the NLRB found that invalidating the class action arbitration waiver would not conflict with the FAA.[67] The reasoning behind that conclusion is faulty at best and deceptive at worst. The first rationale is that the NLRB interpretation would not treat arbitral contracts differently from any other type of contractual agreement.[68] This assertion is both true and irrelevant. While part of the policy behind enacting the FAA was to ensure that arbitral contracts were enforced and treated like other contracts, the grounds for invalidating arbitral agreements are much more limited than general defenses to contract.[69] Second, the NLRB found that the Supreme Court's holdings on arbitration make clear that the arbitration of statutory rights may not deprive plaintiffs of substantive rights afforded by those statutes.[70] This is accurate only to the extent that the ability to form a class is a substantive right under the NLRA – and only to the extent that such a right would outweigh the contradictory policy goals of the FAA.

Thus, we come to the third and most problematic rationale offered by the NLRB: "nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable."[71] One needs only look to a string of Supreme Court cases including *Concepcion* and *Italian Colors* to discern the manifest flaw in this holding.[72] The NLRB's unconvincing attempt to distinguish *Concepcion* gives short shrift to the underpinning of the decision: mandatory class arbitration eviscerates the entire arbitral process, and disincentivizes companies from including arbitration clauses in contracts. As such, class action arbitration – enforced by courts – stands in the way of effective arbitral resolution of disputes, therefore violating the FAA.[73] While the NLRB is of the opinion that in a conflict between these two statutes the NLRA must prevail, Supreme Court precedent which has slowly eviscerated hostility toward arbitration says otherwise. Because nothing in the NLRA indicates that the statute should supersede the FAA, the emphatic federal policy favoring the enforcement of arbitral agreements must prevail.

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[67] *D.R. Horton*, 356 N.L.R.B. No. 184, at 10.

[68] *Id.* at 11.

[69] *See supra* text accompanying note 10.

[70] *D.R. Horton*, 356 N.L.R.B. No. 184, at 12.

[71] *Id.* at 14.

[72] *Italian Colors*, 133 S. Ct. at 2312 ("[In *Concepcion*] we invalidated a law conditioning enforcement of arbitration on the availability of class procedure because that law 'interfere[d] with fundamental attributes of arbitration.'"(quoting *Concepcion*, 131 S. Ct. at 1748)).

[73] *Concepcion*, 131 S. Ct. at 1753.

C. Closing the Concerted Protected Activity Loophole

With the most recent decision in *D.R. Horton* joining the chorus of courts calling for an end to the NLRB's recalcitrance on class action arbitral waivers, one might think that the NLRB would cut their losses and change course. That, however, appears unlikely. Early reports and statements from those familiar with NLRB policy-making find the prospect of Board surrender nearly unimaginable.[74] An op-ed written by AFL-CIO general counsel and former NLRB member Craig Becker certainly seems to indicate that the NLRB will not budge on this position.[75] In addition, commentators demonstrating support for expansive rights under the NLRA may embolden the NLRB.[76] What is more, the NLRB recently requested a rehearing of the Fifth Circuit's decision in *D.R. Horton* in an attempt to reverse the tide of Circuit Court opposition to the NLRB's insistence that class action arbitration is protected by Section 7.[77]

In light of the seeming impossibility of Board reversal on the topic of class action arbitral waivers, Supreme Court action may be required. The likelihood of a grant of certiorari is unclear. Right now, there is no circuit split. The split exists entirely between the courts and the NLRB.[78] Indeed, the sheer inevitability of the Supreme Court's

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[74] Ronald Meisburg, former NLRB general counsel, said after the decision that the "'board looks at its jurisdiction as being national in scope, so they generally are not inclined to let one circuit be the decider of its policy for the rest of the country . . . . For that reason, I would suspect that the board and general counsel will continue to apply the D.R. Horton decision for the foreseeable future.'" Amanda Becker, *Businesses Win in U.S. Court Ruling on Worker Arbitration Pacts*, YAHOO! NEWS (Dec. 3, 2013, 6:41 P.M.), http://news.yahoo.com/businesses-win-u-court-ruling-worker-arbitration-pacts-234156820--finance.html. *See also* John Holmquist, *The D.R. Horton Arbitration Saga: Now What*? LEXISNEXIS LEGAL NEWSROOM, Labor and Employment Law, (Dec. 10, 2013, 4:26 P.M.) http://www.lexisnexis.com/legalnewsroom/labor-employment/b/labor-employment-top-blogs/archive/2013/12/10/the-d-r-horton-arbitration-saga-now-what.aspx ("The NLRB believes that because of expertise and its national jurisdiction to interpret the Act, it will not change its interpretation based on a single appellate decision. It will of course listen to the Supreme Court.").

[75] Craig Becker, *A Court Just Gutted Your Right to Sue Your Boss*, POLITICO (Jan. 5, 2014), http://www.politico.com/magazine/story/2014/01/a-court-just-gutted-your-right-to-sue-your-boss-101756_Page2.html#.UtHHLi-A2po. For an alternative, if equally politicized position, see Editorial, *A Labor Board Smackdown*, WALL STREET JOURNAL, Jan. 8, 2014, http://online.wsj.com/news/articles/SB10001424052702303433304579306863826969236.

[76] *See, e.g.*, Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013, 1056 (2013) ("Given its policy of nonacquiescence, the Board may – and should – still rule against the use of similar clauses in other unfair labor practices cases." (internal citations omitted)). Professors Sullivan and Glynn conclude that "courts that have rejected Horton-based challenges to individual arbitration clauses in employment agreements are wrong" for most of the reasons expressed by the Board in *D.R. Horton*. *Id.* at 1062. *See also* Michael D. Schwartz, Note, *A Substantive Right to Class Proceedings: The False Conflict Between the FAA and NLRA*, 81 FORDHAM L. REV. 2945, 2947 (2013) (finding that the NLRB was correct in finding a substantive, unwaivable right to collective action under the NLRA).

[77] *See NLRB Asks Fifth Circuit to Rehear* Horton*; Panel Split Over Board View on Class Waivers*, BNA BLOOMBERG (March 17, 2014), http://www.bna.com/nlrb-asks-fifth-n17179885658/.

[78] While the Fifth Circuit is the only Federal Court of Appeals to tackle the validity of class action waivers under the NLRA directly, the strong indication from other circuit courts is that they would follow the Fifth.

decision on the matter may help to explain why no petitioners have appealed the Circuit Court decisions that have slowly unraveled *D.R. Horton*. But without Supreme Court action, the NLRB may not change course.

V. CONCLUSION

While the Supreme Court may have set a clear standard regarding arbitral class action waivers in cases like *Italian Colors* and *Concepcion*, the NLRB has yet to get the message. The administrative agency remains ambivalent toward the emphatic federal policy favoring arbitration and its legion of Supreme Court precedential support. Most recently, the *D.R. Horton* saga has highlighted the major split between the Federal Circuit Courts and the NLRB over the enforceability of class action waivers in contract. In light of *Concpecion* and *Italian Colors*, the NLRB seems to have committed an error by invalidating such clauses as violations of the NLRA's Section 7 protection of concerted activity. The NLRB position needs correcting – either by the agency itself, or more likely and effectively, from the Supreme Court. The Supreme Court is in the best position to rectify the NLRB position on class arbitration waivers and close the concerted protected activity loophole: a relic of hostility toward arbitration.

See supra note 56. In addition, numerous District Courts have disavowed *D.R. Horton*. *See Richards*, 734 F.3d at 874 n. 3.