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The Federal Arbitration Act v. The National Labor Relations Act: Battle of the Titans

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Last year in *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740 (2011) the United States Supreme Court held that the Federal Arbitration Act ("FAA") prohibits a court from invalidating arbitration agreements that preclude plaintiffs from proceeding collectively as a class, through either judicial or arbitral forums. Earlier this year the National Labor Relations Board (the "NLRB") issued a decision limiting the scope of *AT&T Mobility*. In *D.R. Horton, Inc.*, 2012 NLRB LEXIS 11 (N.L.R.B. Jan. 3, 2012), the NLRB held that arbitration agreements that bar employees from proceeding collectively as a class in employment-related claims violated the National Labor Relations Act ("NLRA") because such agreements waive employees' rights under the NLRA to engage in "concerted activity." The crucial issue for employers, at this juncture, is how, or if, these two rulings can be reconciled.

In *AT&T Mobility*, plaintiffs filed suit, which was later consolidated into a class action, alleging AT&T engaged in false advertising and fraud for charging them sales tax on cellular phones that were advertised as free. *AT&T Mobility,* 131 S. Ct. at 1744. AT&T moved to compel arbitration under the consumer contracts the putative class members signed that required individual arbitration to resolve any disputes. *Id.* at 1744-45. The district court denied AT&T's motion, holding that the arbitration agreement was unconscionable pursuant to California state law that prohibited the preclusion of class wide arbitration when requested by a party. *Id.* at 1745. The Ninth Circuit Court of Appeals affirmed. *Id.*

Preliminarily, the United State Supreme Court addressed the impact of the FAA's saving clause on plaintiffs' contracts. The Court noted that generally applicable contract defenses can invalidate arbitration agreements; however, contract defenses that only serve to thwart the ability to arbitrate will not invalidate an agreement. *Id.* at 1746. Applying the saving clause to the consumer contracts at issue, the Court reversed the appellate court's decision and held that the FAA preempts any state law that prohibits a party's ability to agree to arbitrate. *Id.* at 1747.

Through *AT&T Mobility*, the Supreme Court announced that under the FAA "parties may agree to limit the issues subject to arbitration, . . . to arbitrate according to specific rules, . . . and to limit with whom a party will arbitrate its disputes." *Id.* at 1748 (internal citations omitted). That is, courts cannot refuse to enforce arbitration agreements that waive or preclude plaintiffs from proceeding as a class, whether through arbitration or litigation, against a company. However, the NLRB has recently limited the scope of the application of this decision, and its utility to employers is in question.

In *D.R. Horton*, respondent home builder corporation required its current and new employees, in January 2006, to sign, as a condition of employment, a Mutual Arbitration Agreement. 2012 NLRB LEXIS 11 at *3. The arbitration agreement set forth that "all employment-related disputes must be resolved through individual arbitration, and the right to a judicial forum [was] waived." *Id.* at *3-4. Essentially, the employees could not file class or collective actions in any forum. A D.R. Horton superintendent, who signed an arbitration agreement, informed the company of his intent to initiate a class arbitration to resolve its misclassification of him and other similarly situated employees as exempt under the Fair Labor Standards Act. *Id.* at *4. When D.R. Horton failed to acknowledge this grievance due to the terms of its arbitration agreement, the superintendent filed unfair labor charges. *Id.*

Under the NLRA, Section 7 "vests employees with a substantive right to engage in specified forms of associational activity . . . for the purpose of collective bargaining or other mutual aid or protection." *Id.* at *6. As explained by the NLRB, mutual aid or protection included "employees' efforts to 'improve terms and conditions of employment,'" which could be done through seeking recourse through administrative, judicial, or arbitral forums. *Id.* at *6-7 (internal citation omitted). "Concerted legal action addressing wages, hours or working conditions is protected by Section 7." *Id.* at *7. D.R. Horton's arbitration agreement was held to bar its employees from exercising their substantive rights under the NLRA. Id. at *13-15.

The NLRB also analyzed the interplay between the Supreme Court's discussion of the FAA in *AT&T Mobility* and the NLRA. Acknowledging that federal policy favors arbitration, the NLRB remained firm in its holding that such arbitration agreements are unenforceable within the context of an employment relationship. *Id.* at 38. The NLRB stated that the Supreme Court has held that "the FAA protects the right of parties to agree to resolve statutory claims in an arbitral forum so long as 'a party does not forgo the substantive rights afforded by the statute.'" *Id.* (internal citation omitted). As such, the NLRB believed that this conflict between the federal statutes is resolved by the saving clause within the FAA that provides that arbitration agreements will not be enforceable if "grounds as exist at law or in equity for the revocation of any contract." *Id.* at *47. Furthermore, the NLRB asserted that its decision only limits the holding in *AT&T Mobility* to agreements between employers and those employees who are protected by the NLRA. *Id.* at *49-50, *55.

Clarity on this issue may be forthcoming soon. Recently, an employee of 24 Hour Fitness USA ("24 Hour Fitness") filed an unfair labor practice charge against the fitness company. The employee alleges that 24 Hour Fitness' arbitration policy, which requires employees who do not "opt-out" of its arbitration agreement to waive their right to proceed collectively, is unenforceable because it violates Section 7 rights under the NLRA. Since August 2010, 24 Hour Fitness has moved to compel arbitration of collective action employment disputes in several state and federal courts. To date, 24 Hour Fitness has successfully compelled arbitration on several occasions. Unlike D.R. Horton's arbitration agreement, 24 Hour Fitness' provision allows its employees to "opt-out" of complying with the agreement. In *D.R. Horton,* the NLRB opined that "an agreement requiring arbitration of any individual employment-related claims, but not precluding a judicial forum for class or collective claims, would not violate the NLRA, because it would not bar concerted activity." *D.R. Horton,* 2012 NLRB LEXIS 11 at *56. Although the NLRB has yet to issue a decision in the matter against the fitness company, 24 Hour Fitness may be able to compel arbitration because the opt-out option allows employees to seek class or collective recourse within employment disputes.

BOTTOM LINE

Yes, the *AT&T Mobility* decision was a big win for employers, in that an employer may preclude plaintiffs from proceeding as a class given the underlying purpose of the FAA. On the other hand, this *win* is limited; as stated by the NLRB, such arbitration agreements will not be enforceable against employees protected by the NLRA, as collective legal action is considered protected "concerted activity" under the Act. However, all hope is not lost. Employers may be able to limit their exposure to collective or class action through carefully-drafted arbitration agreements. As long as an employer does not eliminate an employee's right to proceed collectively in an employment dispute through either litigation or arbitration, then such agreements may be upheld. Employers should seek the advice of legal counsel when revising or creating such agreements to ensure compliance with federal and state law. (We will provide an update of the pending unfair labor practice charges posed against 24 Hour Fitness as they progress.)