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Class Action Waivers in Arbitration Agreements: Are they still Viable?

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Today's Presentation

- The history of class action waivers
- Status of enforceability
- What to expect from the Supreme Court
- Recommended best practices

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What is it?

- Agreement to arbitrate:
  - An agreement requiring an employee to submit workplace claims to an arbitrator instead of a judge.
  - Intent: lower the cost of litigation, increase efficiency.
- Class action waiver:
  - An agreement executed by the employee agreeing **not** to pursue claims against their employer on a class or collective basis.
  - Only avenue: single-plaintiff arbitration.

In what type of agreements?

- Where have class action waiver provisions been found?
  - Employment agreements
  - Consumer agreements
    - *AT&T Mobility LLC v. Concepcion*
  - Retail agreements
    - "Retail Installment Sale Contract"
    - *Sanchez v. Valencia Holding Company, LLC*

Recent History

- 2011: *AT&T Mobility LLC v. Concepcion*
  - Upheld the enforceability of a class action waiver in a consumer arbitration agreement
  - Decision applauded by employers who believed that it paved the way for class action waivers in employment agreements.
- 2012: NLRB issues opinion in *D.R. Horton* and found that arbitration agreements are **unlawful** if they prevent employees from filing class/collective actions.

D.R. Horton

- D.R. Horton required all employees sign a “Mutual Arbitration Agreement” as a condition of employment.
- Pursuant to the MAA, all employment-related disputes had to be resolved through individual arbitration.
- NLRB held that “employees who join together to bring employment-related claims on a class wide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA.” Therefore, the MAA “clearly and expressly bars employees from exercising substantive rights that have long been held protected by Section 7 of the NLRA.”

Dec. 2013 - Fifth Circuit Disagrees

- On appeal, the Fifth Circuit agreed with D.R. Horton and ruled that the Federal Arbitration Act ("FAA") trumps the NLRA to the extent that the NLRA renders unlawful an arbitration agreement precluding employees from bringing class action claims.
- Court noted: conclusion consistent with Supreme Court cases holding that the use of class action procedures is not a substantive right.

Subsequent NLRB Action

- NLRB not dissuaded by federal courts and has continued to attack class action waivers whenever possible.

Subsequent NLRB Decisions

- 2014: reaffirmed its *D.R. Horton* theory in *Murphy Oil USA, Inc.*
- 2015: *ON Assignment Staffing Services, Inc.* held that an opt-out provision in an arbitration is also ineffective and itself an additional burden on right to pursue collective action.
- 2016: *Century Fast Foods, Inc.* held that even if an arbitration agreement does not include an express waiver, it is unlawful if the employer interprets it as such.

Other Circuit Court Rulings

- After the Fifth Circuit's ruling, the Second Circuit (in 2013), the Eighth Circuit (in 2013/2014), and the Eleventh Circuit (in 2014) came to the same conclusion and upheld class action waivers.
- In addition, the Fifth Circuit continued to maintain its position.
  - *See Securitas Security Services USA, Inc.* – decided by the Fifth Circuit August 16, 2016 – reversing NLRB decision.
  - *See Citigroup Technology, Inc.*, decided December 8, 2016, reversing previous NLRB decision.

Second Circuit Agrees

- *Sutherland v. Ernst & Young, LLP*
  - Reversed the decision of the U.S. District Court (S.D.N.Y.) denying Ernst & Young's motion to compel arbitration and held:
    - The FLSA does not include a contrary congressional command preventing enforcement of a class action waiver in an arbitration agreement.
    - It is improper to apply the judge-made "effective vindication doctrine" to invalidate an arbitration agreement where a plaintiff argues proceeding individually on an FLSA claim would be "prohibitively expensive."

Eighth Circuit Agrees

- *Owen v. Bristol Care*
  - Decision issued in January, 2013
  - The district court held that *Concepcion* does not apply when the claims arise under the FLSA.
  - Eighth Circuit disagreed: found no conflict between the FLSA's collective action option and the policy established by the FAA favoring arbitration agreements
  - Court also rejected the notion that the FLSA confers any "right" upon employees to bring a class action.

Eleventh Circuit Agrees

- *Walthour v. Chipio Windshield Repair, LLC*
  - Decision issued March, 2014
  - Court rejected the plaintiffs' argument that the right to file a collective action under the FLSA is a non-waivable substantive right
  - Court found no contrary congressional command in the FLSA that would override the FAA's strong policy in favor of arbitration.
  - Emphasized Supreme Court precedent requiring rigorous enforcement of arbitration agreements.

Seventh Circuit Disagrees

- Seventh Circuit: first appeals court to adopt the NLRB's position in May 26, 2016 in *Lewis v. Epic Systems*.
- Landmark decision and sweeping opinion

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Lewis v. Epic Systems, Corp.

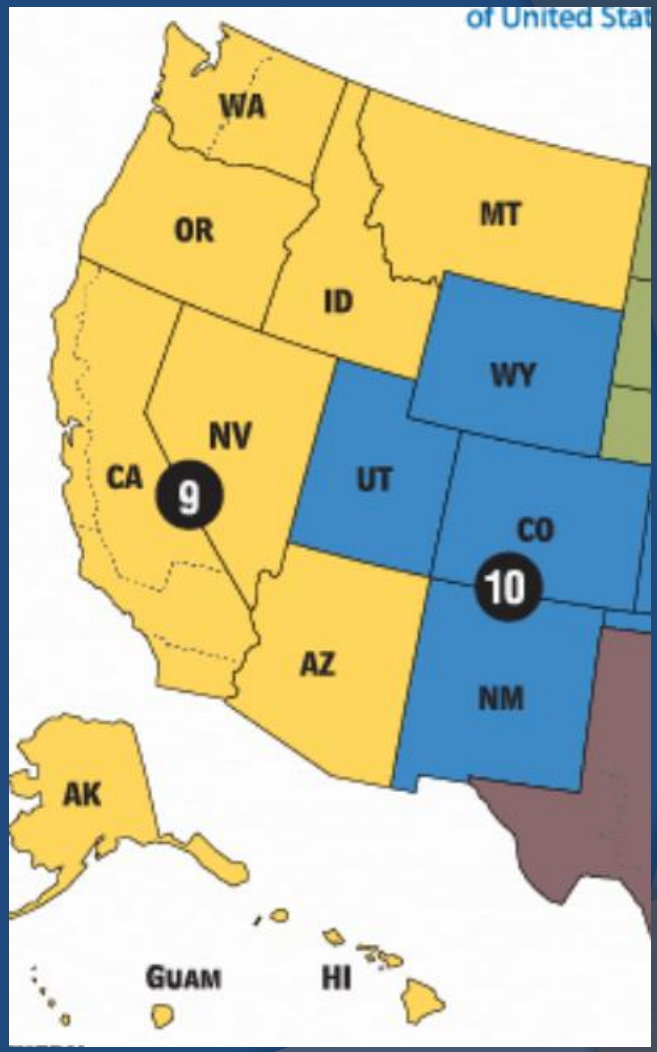
- Seventh Circuit concluded:
  - Arbitration agreement precluding collective arbitration/action violates Section 7 of the NLRA and is unenforceable under the FAA.
  - Fifth Circuit neglected to make an effort to harmonize the statutes involved in *D.R. Horton* and for overstating the effect of *Concepcion* where a state law hostile to arbitration is not present.

Initial Response *Epic Systems*

- Eighth Circuit once again came to the defense of class action waivers in June, 2016 in *Cellular Sales v. NLRB*
- A Massachusetts district court issued a 41-page opinion criticizing the Seventh Circuit's *Epic Systems* decision and explaining why class action waivers should be upheld under the NLRA
  - *See Bekele v. Lyft, Inc.*

Critical August, 2016 Opinion

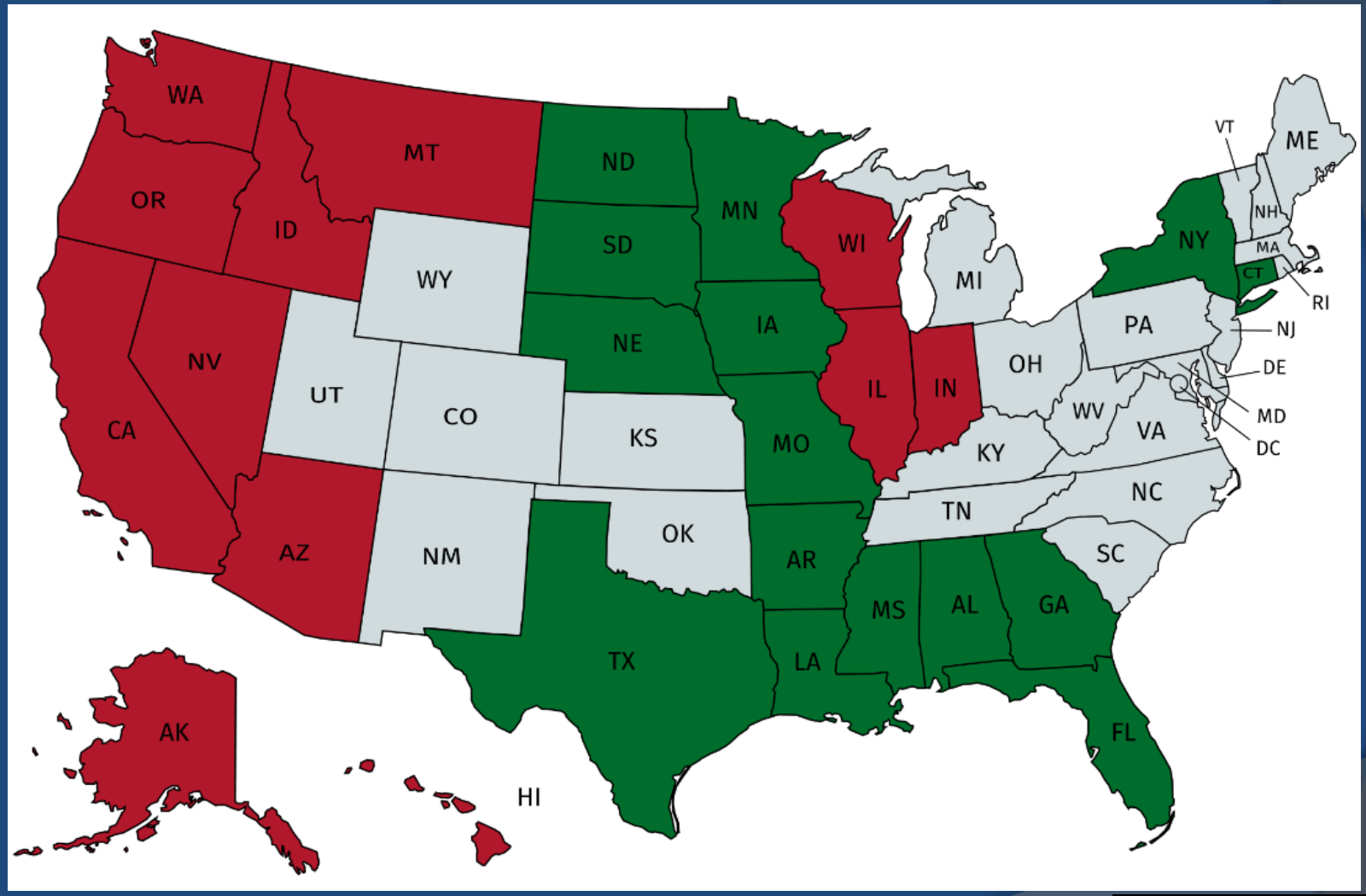
- In *Morris v. Ernst & Young* – the Ninth Circuit mirrored the reasoning of the Seventh Circuit and determined that certain class action waivers violate the NLRA.



Morris v. Ernst & Young

- In addition to following the reasoning of *Epic Systems*, the Ninth Circuit additionally specifically distinguished its prior 2014 holding where it upheld a class action waiver because the provision was optional (*see Johnmuhammed v. Bloomingdale's*).

Result: Major Circuit Court Split



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Stage Set for Supreme Court

- After *Morris*, the NLRB, Ernst & Young, LLP and Epic Systems petitioned the Supreme Court to review whether mandatory, individual arbitration clauses are enforceable under the FAA *and* whether collective action waivers are prohibited by the NLRA.

What Happens Next?

- Supreme Court ***may*** step in to resolve the conflict between the circuit courts.
- Currently four petitions for certiorari pending before the Court.
- Justice Anthony Scalia's death and still-unfilled seat may play a significant role in resolving the issue.

What Happens Next?

- To anticipate the future, we look to the past . . .
- Justice Scalia wrote the majority opinion in *Concepcion* (decided by a 5-4 majority) and in *American Express v. Italian Colors* (also upholding class action waivers in a commercial setting, decided by a 5-3 majority).

Predictive Precedent?

- In *American Express v. Italian Colors* (a case involving a maritime shipping dispute), the Supreme Court noted that it would uphold mandatory class arbitration provisions absent an **express congressional statement** that class proceedings were so necessary to the federal claim as to preempt the FAA.

Critical NLRA Language

- The question becomes… is this a sufficient "**express congressional statement**"?
  - Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, **and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection**, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title]. (*See* Section 7 of NLRA)

Critical NLRA Language

- What about this language?
  - It shall be an unfair labor practice for an employer –

    (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. (*See* Section 8(a)(1) of NLRA).

Congressional Action?

- Arbitration Fairness Act
  - Bill was initially introduced in Congress in 2005
  - The 2015 bill will die in Congress on January 13, 2017
  - By its terms, pre-dispute arbitration agreements are unenforceable in the areas of anti-trust, civil rights, consumer and employment disputes.
  - Prediction: unlikely to pass with current Congress and President-elect.

Best Practices

- Proceed with caution – but don't panic!
- Review your current agreement
- Determine what circuit law applies to your particular employee(s)
  - If Ninth or Seventh Circuit: do not waste your time, effort and money trying to enforce a mandatory arbitration agreement at this time.
  - If Fifth, Eighth or Eleventh: waiver clauses will likely be upheld and allow employers to resolve disputed in a cost-effective and confidential manner.

Best Practices

- What if my circuit court has not issued a ruling?
  - Wait… (decisions are pending, for example in the Third Circuit)
  - Employers not using arbitration agreements may want to consider waiting until the dust settles before implementing a new agreement.
    - Should always weigh pros/cons before implementing such an agreement.

Updating Contract Language?

- Employers with a current agreement that do not reside within the Second/Ninth Circuits may want to consider adding:
  - An opt-out provision
  - A provision stating that if the class action waiver is deemed unlawful for any reason, any class/collective action will be heard in court and not by an arbitrator
    - *May be the best scenario as class action arbitration can be inefficient, costly, and undesirable.*

Thank you!

Stacy Culp will send an email to all of today's participants with CLE information.

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