Collective Actions and Joinder of Parties in Arbitration: Implications of *DR Horton* and *Concepcion*

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- Collective action waivers or requirements to arbitrate individually are unenforceable under the National Labor Relations Act and the Norris LaGuardia Act. The Fifth Circuit's decision in *D.R. Horton* is wrong, the Board should adhere to its rule, and other courts of appeals should enforce the Board's orders when the issue reaches them.

- Arbitration agreements requiring claims to be brought by individuals are not covered by the Supreme Court's reasoning in *Concepcion* and *Italian Colors* to the extent they prohibit joinder of fewer parties than would be required to bring a large class action. Therefore, remain protected by labor law.

- State and federal courts universally allow liberal joinder of plaintiffs and defendants because it is more efficient and avoids thorny issues about the preclusive effect of judgments. Unless employers can opt out of the usual rules for the binding effects of judgments and the usual rules for joinder of claims and parties, the notion that individual arbitration is superior for everyone (including employers) is simply wrong.

*D.R. Horto*n v. NLRB, 737 F.3d 344, 362 (5th Cir. 2013)

- Under the FAA, neither the right to go to court nor the right to use a class or collective action is a substantive right.
- Although the NLRA protects the right to institute group litigation and group arbitration, the FAA's policy favoring individual arbitration trumps the NLRA's protections for group action.
- A prohibition on class action waivers in arbitration violates the FAA because "employers would be discouraged from using individual arbitration" and "requiring the availability of class actions interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 359.
- The NLRA does not protect a right to engage in group litigation because it was "enacted and reenacted prior to the advent in 1966 of modern class action procedure."
  - The right to file a collective action under the FLSA was in the statute when it was enacted in 1938
  - The NLRB found group filing under the FLSA to be protected concerted activity as early as 1942. Spandsco Oil & Royalty Co., 42 NLRB 942 (1942).

Hypothetical Matter A

Two female coworkers were sexually harassed and physically assaulted by a coworker and a supervisor while employed at Corporation A while the four were working alone in Corporation A's warehouse late at night. The women reported the incidents pursuant to their employer's workplace harassment policy; the person responsible for handling complaints did nothing, the harassment continued for two weeks, and the harassers threatened to severely injure the victims in retaliation for reporting. The victims wish to file a lawsuit under Title VII (which allows claims only against the employer, in this case a corporation), the state fair employment law (which allows claims against the employer as well as supervisory employees), and to assert tort claims for battery and intentional infliction of emotional distress against the individual harassers.

Hypothetical Matter B

Six administrative assistants and twelve nurses work in identical jobs under identical schedules and pay for a corporate medical practice (Corporation B) owned by two doctors. The six administrative assistants and twelve nurses believe the employer misclassified them as exempt administrators and professionals and seek unpaid overtime under the FLSA and a state wage/hour law. When the doctors learn that their employees are demanding unpaid overtime, they fire all eighteen employees, dissolve the corporation, and transfer all its assets to a new corporation engaged in the same business in the same city under a different name (Corporation C)

Arbitration Agreements of A, B, and C Corporations

"All disputes and claims relating to the employee's employment" will be determined by arbitration and the arbitrator "may hear only Employee's individual claims" and "will not have the authority to consolidate the claims of other employees" or authority "to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding." "YOU AND CORPORATON A [or B or C] MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY."

The employee waives the "right to file a lawsuit or other civil proceeding or any claim before a court or agency relating to Employee's employment with the company" and the right to resolve employment-related disputes before a judge or jury.

When and why is joinder of claims and parties antithetical to the nature of arbitration?

- "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." *Concepcion*, 131 S. Ct. at 1749.

- "Class" arbitration "sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly and more likely to generate procedural morass than final judgment." *Id.* at 1751.

- If procedures are too informal, arbitration will not be final, because absent adequate representation, notice, and an opportunity to opt out, absent parties could not be "bound by the results of the arbitration." *Id.*

- Class arbitration "greatly increases risks to defendants" because "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Id.* at 1752.

Why *D.R. Horton* was wrong to conclude that *Concepcion* trumps section 7 right to bring collective actions

- Employment arbitration of statutory claims is nowhere near as informal as the system in *Concepcion*, nor could it be.
- Under the FLSA, unlike under the class action procedure used in *Concepcion*, the collective action procedure can be implemented only if plaintiffs first opt in.

Joinder and Arbitration

- To obtain final judgment rather than “procedural morass” plaintiffs should be allowed to join claims and parties as necessary to resolve the dispute without duplicative proceedings.
- In Matter A, efficiency would be served rather than thwarted by allowing both harassment victims to litigate their statutory and tort claims together–so that they only need to call the witnesses and assemble the documentary evidence once–and also that they be allowed to assert their claims against all three defendants.
- In Matter B, why would an employer wish to litigate six identical claims with the assistants, twelve with each nurse, and to litigate whether the doctors and/or Corporation C are liable for the unpaid wages if Corporation B is judgment-proof eighteen separate times? The procedural morass would be especially tricky if arbitrators ruled for one plaintiff and against another on the same issue.

Offensive Non-Mutual Collateral Estoppel?

- If Assistant # 1 in Matter B obtains an award against the doctors and Corporation C determining she is non-exempt and the violation was willful so she can collect 3 years' unpaid overtime, can Assistants 2 – 6 preclude the defendants from relitigating those issues?
- If Assistant 1 in Matter B loses on the non-exempt status issue or the wilfulness issue, Assistants 2 – 6 can relitigate those issues.