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NOTE

Are We All in This Together? Enforcing Class Arbitration Waivers

Cellular Sales of Mo., LLC v. NLRB, 824 F.3d 772 (8th Cir. 2016)

Ariel Monroe Kiefer*

I. INTRODUCTION

Mandatory class arbitration waivers are increasingly common in employment agreements.¹ It is estimated that forty-three percent of companies have mandatory class arbitration waivers.² Employees sign them because they either do not believe they will ever have a major problem with their employer, they believe arbitration is a cheaper and faster method of dispute resolution, or they simply do not read or understand the clause.³ Employees should question class action waivers because they take away employees' access to the court system and their right to collective action.⁴ If employees cannot go to the courts or act collectively to enforce their rights, the country might stop making progress or even lose the progress it is making in protecting workers from discrimination, unjust termination, and unfair wages due to a lack of recourse against illegal actions by employers.⁵ For example, unions are able to secure better wages and working conditions for employees than employees are able to secure on

* B.A., University of Missouri, 2015; J.D. Candidate, University of Missouri School of Law, 2018; Associate Editor, *Missouri Law Review*, 2017–2018. I would like to extend a special thank you to Associate Dean Gely and the entire *Missouri Law Review* staff for their support and guidance in writing this Note.

1. KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS 3 (2015), <http://www.epi.org/files/2015/arbitration-epidemic.pdf>. It is difficult to determine the exact number of employers with mandatory class arbitration waivers since companies do not have to report whether they have arbitration agreements to any government agency. *Id.* at 15.

2. Lauren Weber, *More Companies Block Employees from Filing Suits*, WALL STREET J. (Mar. 31, 2015), <http://www.wsj.com/articles/more-companies-block-staff-from-suing-1427824287>. This percentage is based on a study of 350 companies conducted by Carlton Fields Jordan Burt LLP in 2014. *Id.* The percentage has risen dramatically from only sixteen percent in 2012. *Id.*

3. STONE & COLVIN, *supra* note 1, at 3–4.

4. *See id.* at 4.

5. *See generally id.*

their own. Additionally, employees are less likely to win in individual arbitration than they are in an individual lawsuit.⁶ If they do win in individual arbitration, they generally recover less than employees who file individual lawsuits.⁷ The average damage award in federal courts is \$176,000, while the average award in arbitration is only \$36,000.⁸ Because class action waivers have a heavy impact on employee rights, courts must carefully analyze the legality of the waivers.

Part II of this Note discusses the facts surrounding the Eighth Circuit's decision in *Cellular Sales of Missouri* to uphold a class arbitration waiver. Part III of this Note analyzes the approach other federal circuit courts have taken in upholding and striking down class arbitration waivers. Part IV explains the Eighth Circuit's rationale for upholding the class arbitration waiver. Finally, Part V discusses why the Eighth Circuit should not have upheld the waiver.

II. FACTS AND HOLDING

John Bauer worked for Cellular Sales, an authorized Verizon Cellphone retailer.⁹ As a condition of employment, the company required employees to sign an agreement mandating that “[a]ll claims, disputes, or controversies . . . shall be decided by arbitration” and only in “an individual capacity and not as a plaintiff or class member in any purported class, [or] collective action.”¹⁰ After Bauer's employment ended, he filed a class action lawsuit against Cellular Sales.¹¹ He alleged that Cellular Sales violated the Fair Labor Standards

6. *Id.* at 3.

7. *See infra* Part V.

8. STONE & COLVIN, *supra* note 1, at 20 tbl.1.

9. Cellular Sales of Mo., LLC v. NLRB, 824 F.3d 772, 774 (8th Cir. 2016); *see also* CELLULAR SALES, <https://www.cellularsales.com/store/stores/kansas/pittsburg/pittsburg-100401/> (last visited Sept. 11, 2017).

10. *Cellular Sales of Mo.*, 824 F.3d at 774. The pertinent paragraph of the employment agreement stated,

All claims, disputes, or controversies arising out of, or in relation to this document or Employee's employment with Company shall be decided by arbitration Employee hereby agrees to arbitrate any such claims, disputes, or controversies only in an individual capacity and not as a plaintiff or class member in any purported class, collective action, or representative proceeding The decision of the arbitrator shall be final, binding, and enforceable in any court of competent jurisdiction and the parties agree that there shall be no appeal from the arbitrator's decision Except for the exchange of documents that the parties intend to use to support their claims and defend against the other parties' claims, there shall be no interrogatories, depositions or other discovery in any arbitration hereunder.

Id.

11. *Id.* Bauer filed suit five months later. *Id.* The federal court's dismissal of the class action was not appealed in this case; rather, it is one of the ways Bauer claims Cellular Sales violated his right to engage in concerted activity. *See id.* at 775.

Act (“FLSA”)¹² in several ways, including failure to pay overtime and improper deductions from his wages.¹³ Cellular Sales moved to dismiss the action pursuant to the employment agreement’s mandate that claims be settled through individual arbitration.¹⁴ The district court held that the agreement was enforceable and dismissed the case.¹⁵ While the class action suit was pending, Bauer filed a charge with the National Labor Relations Board (“NLRB”).¹⁶

In response to Bauer’s charge, the NLRB filed a complaint on Bauer’s behalf claiming that Cellular Sales’ employment agreement violated the National Labor Relations Act (“NLRA”).¹⁷ The charge alleged that Cellular Sales’ requirement that employees agree to individual arbitration violated the employees’ right to engage in concerted activity.¹⁸ The NLRA gives employees the right to “engage in other concerted activities for the purpose of . . . mutual aid or protection.”¹⁹ Additionally, the NLRA states that it is an “unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.”²⁰ Cellular Sales argued that the NLRB’s *D.R. Horton* decision, which held that agreements prohibiting class arbitration were invalid, should not be followed in this case because the holding was contrary to Supreme Court of the United States precedent and the Federal Arbitration Act (“FAA”).²¹ Cellular Sales argued

12. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2012).

13. *Cellular Sales of Mo.*, 824 F.3d at 774; Complaint at 2, *Bauer v. Cellular Sales of Knoxville, Inc.*, (W.D. Mo. Nov. 9, 2012) (No. 12-cv-5111).

14. *Cellular Sales of Mo.*, 824 F.3d at 774.

15. *Id.* at 774–75. The parties arbitrated the case and settled. *Id.* at 775.

16. The NLRB is an independent federal agency that protects employees’ right to engage in concerted activity covered by the NLRA. *Who We Are*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/who-we-are> (last visited Sept. 11, 2017). The administrative agency process is different from a court proceeding. *The NLRB Process*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/resources/nlr-process> (last visited Sept. 11, 2017). It starts when a charge is filed with the Regional Director. *Id.* The Regional Director issues a complaint and notice of hearing. *Id.* Next an administrative law judge presides over a trial. *Id.* The losing party can file exceptions and a panel for the NLRB can rule on the exceptions. *See Cellular Sales of Mo., LLC & John Bauer*, 362 N.L.R.B. No. 27 at 1 (Mar. 16, 2015). The losing party can then file an appeal with the federal circuit court. *The NLRB Process, supra.* After that, the losing party can petition for certiorari with the Supreme Court of the United States. *Id.*

17. *Cellular Sales of Mo.*, 824 F.3d at 775.

18. *Id.*

19. National Labor Relations Act, 29 U.S.C. § 157 (2012).

20. National Labor Relations Act, 29 U.S.C. § 158(a)(1) (2012). The NLRB also argued that since the agreement did not have an opt-out provision, the agreement would lead employees to reasonably believe that they could not file charges with the NLRB. *Cellular Sales of Mo., LLC & John Bauer*, No. 14-CA-094714, 2013 WL 4427452 (N.L.R.B. Div. of Judges Aug. 19, 2013); *see infra* Part III.A.2.

21. *Cellular Sales of Mo.*, 2013 WL 4427452; *see also In re D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2288 (2012), *rev’d in part*, *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013); Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2012). Cellular Sales

that the Supreme Court's precedent in *American Express Company*,²² showing deference to arbitration agreements, should control.²³ Last, Cellular Sales argued that the FAA mandated that the agreement be enforced.²⁴

An administrative law judge ("ALJ") ruled in favor of the NLRB.²⁵ The ALJ found that the NLRB ruling in *D.R. Horton* was controlling in this case.²⁶ The ALJ also found that filing a class action was a concerted activity within the scope of Section 7 of the NLRA.²⁷ Although only one employee filed the initial suit, filing the lawsuit was concerted activity because "it [was] engaged in with the object of initiating or inducing group action."²⁸ Therefore, mandating that employees waive their rights to class-wide action as a condition of employment impaired employees' Section 7 rights and violated Section 8(a)(1) of the NLRA.²⁹ Additionally, Cellular Sales violated Section 8(a)(1) when it filed a motion to compel arbitration in response to Bauer's class action lawsuit because it restricted his right to engage in concerted activity.³⁰ The ALJ ordered that Cellular Sales revise or rescind the agreement and give written notice of the change to its employees.³¹ Cellular Sales filed a motion to reopen the record with the NLRB, but the NLRB upheld the prior ruling.³²

Cellular Sales appealed the NLRB's ruling to the Eighth Circuit.³³ Cellular Sales argued that the NLRB's decision was wrong because it relied on

made this argument to the NLRB in August of 2013, which was before the Fifth Circuit reversed the NLRB's decision in *D.R. Horton*. *Cellular Sales of Mo.*, 2013 WL 4427452. For information on the FAA, see *infra* Part III.

22. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (upholding a class arbitration waiver in a consumer contract for a credit card).

23. *Cellular Sales of Mo.*, 2013 WL 4427452.

24. *Id.*

25. *Id.*

26. *Id.*; *In re D.R. Horton*, 357 N.L.R.B. at 2277 (holding that an employer violated section 8(a)(1) by requiring employees to sign an agreement mandating individual arbitration to resolve all disputes as a condition of employment).

27. *Cellular Sales of Mo.*, 2013 WL 4427452. Section 7 states, "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 . . ." National Labor Relations Act, 29 U.S.C. § 157 (2012).

28. *Cellular Sales of Mo.*, 2013 WL 4427452.

29. *Id.*; see generally *infra* Part III.

30. *Cellular Sales of Mo.*, 2013 WL 4427452.

31. *Id.*

32. *Cellular Sales of Mo., LLC & John Bauer*, 362 N.L.R.B. No. 27 at 1 (Mar. 16, 2015).

33. *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 774 (8th Cir. 2016).

two prior Board decisions, *D.R. Horton* and *Murphy Oil*, that were subsequently reversed by the Fifth Circuit.³⁴ The NLRB asked that the court reconsider its stance on class waivers in arbitration agreements.³⁵ The Eighth Circuit overturned the NLRB's administrative decision by holding that requiring employees to resolve disputes exclusively through individual arbitration does not violate the NLRA.³⁶ This means that companies can require employees to relinquish their right to file individual lawsuits, class action lawsuits, and class arbitrations.

III. LEGAL BACKGROUND

This Part discusses the history and purpose of the FAA, the NLRA, and individual arbitration agreements. It then analyzes recent federal circuit decisions both upholding and striking down employment agreements with class arbitration waivers.

The FAA was enacted in 1925 in response to judges' negative treatment of arbitration agreements.³⁷ Its purpose was to ensure that arbitration agreements were enforced according to their terms and to ensure that courts did not treat them with contempt.³⁸ It states that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."³⁹ The FAA places arbitration agreements on equal footing with other contractual agreements.⁴⁰ Accordingly, the FAA contains a saving clause allowing arbitration agreements to be invalidated for the same reasons traditional contracts are invalidated, such as unconscionability and illegality.⁴¹

34. *Id.* at 775–76; see *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015) (holding that an employer committed no unfair labor practice by requiring employees to sign arbitration agreements); see also *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) (holding that an employment agreement prohibiting a class proceeding was enforceable because a class action procedure was not a substantive right under Section 7 and because the FAA requires that arbitration agreements be enforced according to their terms).

35. *Cellular Sales of Mo.*, 824 F.3d at 776.

36. *Id.* The court also held that Cellular Sales' motion to compel arbitration was not a violation of the NLRA because the agreement to arbitrate disputes individually was legal. *Id.* at 776–77. Additionally, the court held that employees would reasonably construe the agreement as limiting their right to file complaints with the NLRB, that the unfair labor practice charge was timely filed, and that Bauer was an employee within the meaning of the NLRA. *Id.* at 777–79.

37. *D.R. Horton*, 737 F.3d at 362 (5th Cir. 2013); *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 984 (9th Cir. 2016) (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)), *cert. granted*, 137 S. Ct. 809 (2017).

38. *D.R. Horton*, 737 F.3d at 364–65 (Graves, J., concurring in part and dissenting in part); Federal Arbitration Act, 9 U.S.C. § 2 (2012).

39. § 2.

40. *Morris*, 834 F.3d at 984.

41. *Id.*; § 2.

The NLRA was enacted in 1935 with the purpose of decreasing the power differential between employers and employees.⁴² The NLRA gives employees the right to “engage in other concerted activities for the purpose of . . . mutual aid or protection.”⁴³ The NLRA strengthens an employee’s right to concerted action in Section 8 by stating that it is an “unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.”⁴⁴

In *AT&T Mobility LLC v. Concepcion*, the Supreme Court of the United States held that arbitration agreements with class action waivers are enforceable.⁴⁵ The Court preempted state case law prohibiting class arbitration waivers because “[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”⁴⁶ The Court reasoned that class arbitration interferes with the fundamental benefits of arbitration because it requires procedural formality, makes the process slower, increases the cost, and increases the risk to defendants because there are fewer grounds for appeals.⁴⁷

However, courts have treated class arbitration waivers in employment contracts differently. Several United States circuit courts have heard cases regarding the enforceability of collective action waivers in employment contracts, but the circuits are split in their holdings.⁴⁸ Courts upholding the collective action waivers rely on the FAA and the Supreme Court’s favorable treatment of mandatory arbitration clauses.⁴⁹ Courts that do not uphold collective action waivers rely on Sections 7 and 8 of the NLRA, the NLRB’s interpretation of the NLRA, and the “saving clause” in the FAA.⁵⁰

42. *D.R. Horton*, 737 F.3d at 362.

43. National Labor Relations Act, 29 U.S.C. § 157 (2012).

44. National Labor Relations Act, 29 U.S.C. § 158(a)(1) (2012).

45. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

46. *Id.* at 341.

47. *Id.* at 348–50. Arbitration awards may be appealed on the basis that “the award was procured by corruption, fraud, or undue means” or an arbitrator was corrupt or biased. Federal Arbitration Act, 9 U.S.C. § 10(a)(1)–(2) (2012). Additionally, an award may be appealed if the arbitrator refused to hear relevant evidence, refused to postpone a hearing for good cause, exceeded his or her power, did not exercise his or her authority, did not render a final and definite decision, or otherwise misbehaved. *Id.* at § 10(a)(3)–(4).

48. Compare *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 357 (5th Cir. 2013) with *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1161 (7th Cir. 2016), cert. granted, 137 S. Ct. 809 (2017); see also *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 990 n.16 (9th Cir. 2016), cert. granted, 137 S. Ct. 809 (2017).

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

50. See *Lewis*, 823 F.3d at 1161; *Morris*, 834 F.3d at 982.

A. Courts That Enforce Collective Arbitration Waivers

The Fifth Circuit enforced a class arbitration waiver determining that the right to class arbitration was procedural, not substantive.⁵¹ This distinction is important because while a substantive right cannot be waived by an arbitration agreement, a procedural right can be.⁵² The court supported its proposition by analogizing it to the class action mechanism under the Federal Rules of Civil Procedure, which is a procedural right.⁵³ The Fifth Circuit also found that class procedures listed in employment statutes, such as the Age Discrimination in Employment Act (“ADEA”) and the FLSA, were procedural rights.⁵⁴

The court focused on the FAA rather than the NLRA.⁵⁵ The FAA prevents arbitration clauses from being disfavored by the courts,⁵⁶ and the NLRA protects employees’ right to collective action.⁵⁷ The court reasoned that the NLRB’s interpretation that the NLRA required a class procedure to be available to employees was facially neutral but that interpretation effectively disfavored arbitration because class arbitration changed the fundamental advantages of arbitration.⁵⁸ In a class arbitration, class members must be given notice, an opportunity to be heard, a right to opt out, and adequate representation.⁵⁹ This makes the proceeding more expensive and more formal than individual arbitration.⁶⁰ The court reasoned that requiring class arbitration is “an actual impediment to arbitration and violates the FAA.”⁶¹ The Fifth Circuit did not apply the FAA saving clause the same way as the Seventh and Ninth Circuits.⁶² The Fifth Circuit reasoned that because class arbitration interfered with the main purpose of the FAA, the FAA saving clause was not a basis for invalidating the class arbitration waiver.⁶³ According to the court, since invalidating the arbitration provision violated the FAA, there must be a “contrary congressional command” for the NLRA to override the FAA.⁶⁴ The court did not find

51. *D.R. Horton*, 737 F.3d at 357 (reversing the NLRB decision, which held that the arbitration waiver was invalid).

52. *Morris*, 834 F.3d at 985.

53. *D.R. Horton*, 737 F.3d at 357; FED. R. CIV. P. 23.

54. *D.R. Horton*, 737 F.3d at 357.

55. *See id.* at 358–60.

56. *See id.* at 358.

57. National Labor Relations Act, 29 U.S.C. § 157 (2012).

58. *D.R. Horton*, 737 F.3d at 359 (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011)).

59. *Id.* (citing *Concepcion*, 563 U.S. at 348).

60. *See id.*

61. *Id.* at 360.

62. *See infra* Part III.B.

63. *D.R. Horton*, 737 F.3d at 359–60.

64. *Id.* at 360.

a contrary congressional command in the text of the statute or legislative history, and there was no inherent conflict between the two statutes.⁶⁵ Therefore, the Fifth Circuit upheld the class arbitration waiver.⁶⁶

B. Courts That Refuse to Enforce Collective Action Waivers

The Seventh and Ninth Circuits refuse to enforce class arbitration waivers. They focus on the NLRA and the FAA's saving clause. The Seventh and Ninth Circuits hold that the right to concerted activity was clearly guaranteed by the NLRA.⁶⁷ They further hold that the FAA does not mandate that employees waive that right.⁶⁸

1. Agreements That Prohibit All Class Proceedings Violate the NLRA

Courts that refuse to enforce collective action waivers focus on the rights granted to employees by the NLRA and find that the waivers violate those rights.⁶⁹ The Seventh Circuit analyzed the scope of Sections 7 and 8 and held that the arbitration provision infringed on the employees' Section 7 rights.⁷⁰ The court reasoned that even though Federal Rule of Civil Procedure 23 was not in place when the NLRA was enacted, the right to concerted activity still included class arbitration.⁷¹ The court found no reason to believe that Congress only intended to include proceedings available at the time the NLRA was passed.⁷² Additionally, the court cited other collective procedures that existed when the NLRA was passed.⁷³ The court found that "[a] collective, representative, or class legal proceeding is just such a 'concerted activit[y]'" under Section 7 because the plain language of the section states that "[e]mployees shall have the right to . . . engage in . . . concerted activities for the purpose of . . .

65. *Id.* at 360–61. The Second Circuit also found that a class arbitration waiver had to be enforced pursuant to the FAA because the FLSA did not contain a contrary congressional command. *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 (2d Cir. 2013) (per curiam). Three years later, the Second Circuit reluctantly upheld a class arbitration waiver because it was bound by prior precedent set in *Sutherland*. *Patterson v. Raymours Furniture Co.*, 659 F. App'x. 40, 43 (2d Cir. 2016).

66. *D.R. Horton*, 737 F.3d at 362.

67. *See Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1159 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017); *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 983 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017).

68. *See Lewis*, 823 F.3d at 1157; *see also Morris*, 834 F.3d at 984.

69. *See, e.g., Lewis*, 823 F.3d at 1161; *see also Morris*, 834 F.3d at 981–82.

70. *Lewis*, 823 F.3d at 1154–55.

71. *Id.* at 1154.

72. *Id.*

73. *Id.* For example, permissive joinder and representative suits were allowed long before the NLRA was passed. *Id.*

mutual aid or protection.”⁷⁴ The employment agreement at issue did not allow employees to file class actions in legal or arbitral proceedings; therefore, the court held that it violated Section 8 because it limited employees’ Section 7 rights.⁷⁵ Additionally, Seventh Circuit precedent holds that it does not matter whether the employee was coerced into signing the agreement or entered into it freely because requiring individual arbitration is a per se violation of the NLRA.⁷⁶ Therefore, the Seventh Circuit stated that “[t]he very formation of the contract was illegal” because it limited employees’ Section 7 rights.⁷⁷

The Ninth Circuit focused on Congress’ intent in enacting the NLRA and held that the employment agreement barring class arbitration violated the NLRA.⁷⁸ While all of the circuits recognize that “[t]he Board’s reasonable interpretations of the NLRA command deference,”⁷⁹ the Ninth Circuit is one of the few courts that explicitly follows the steps of *Chevron v. Natural Resource Defense Council*.⁸⁰ *Chevron* provides courts with a two-step analytical framework to use to review administrative decisions.⁸¹ *Lechmere, Inc. v. NLRB* instructs courts to use the *Chevron* two-step analysis to review the NLRB decisions.⁸² The first step under *Chevron* is to determine “whether Congress has directly spoken to the precise question at issue.”⁸³ The Ninth Circuit looked to the statutory language and congressional intent.⁸⁴ The court found that Congress clearly intended concerted activity to include “[t]he pursuit of a concerted work-related legal claim.”⁸⁵ Further, the court found that the intention was consistent with the NLRB’s interpretation of the NLRA.⁸⁶ The court held that since pursuing collective actions was clearly included in concerted

74. *Id.* at 1155 (second and third alterations in original) (quoting National Labor Relations Act, 29 U.S.C. § 157 (2012)).

75. *Id.* (citing *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942), and National Labor Relations Act, 29 U.S.C. § 158(a)(1) (2012)).

76. *Id.* (citing *Stone*, 125 F.2d at 756).

77. *Id.* at 1159.

78. *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 981–84 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017).

79. *Id.* at 981; *see Lewis*, 823 F.3d at 1153; *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 775 (8th Cir. 2016).

80. *See Morris*, 834 F.3d at 981.

81. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). The first step is to determine whether the statute addresses the precise issue. *Id.* at 842. In step two, “[I]f the statute is . . . ambiguous . . . the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843.

82. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992).

83. *Morris*, 834 F.3d at 981 (quoting *Chevron*, 467 U.S. at 842).

84. *Id.*

85. *Id.* at 982.

86. *Id.*

activity, requiring individual arbitration interfered with that right, thereby violating Section 8 of the NLRA.⁸⁷ Since the NLRB's interpretation of Sections 7 and 8 was consistent with clear congressional intent, the court did not reach the second step of the *Chevron* test, which asks "whether the agency's answer is based on a permissible construction of the statute."⁸⁸

2. The FAA Does Not Require the Arbitration Agreement to Be Enforced

Even courts that refuse to enforce collective action waivers recognize that the NLRA is not the only relevant statute – the FAA must also be considered. The Seventh Circuit reconciled these two statutes.⁸⁹ If two statutes are compatible, "it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."⁹⁰ The Seventh Circuit did not find a conflict between the NLRA and the FAA because the FAA saving clause confirms that agreements are not enforceable at law or in equity.⁹¹ Here, the court held that the agreement to arbitrate violated substantive rights granted by the NLRA; therefore, the agreement was illegal and fell under the FAA's saving clause.⁹² Because the court found that the FAA saving clause applied, the court would be overriding the NLRA if it enforced the arbitration agreement.⁹³ The court reasoned that overriding the NLRA would improperly elevate the FAA over the NLRA.⁹⁴

Both the Seventh and Ninth Circuits recognized that the FAA's purpose was to make contracts requiring arbitration as enforceable as other contracts, not more enforceable.⁹⁵ While the Seventh Circuit focused on the saving clause, the Ninth Circuit emphasized that the problem with the agreement was the bar on class proceedings, not that arbitration was the exclusive forum.⁹⁶ If the agreement only allowed individual lawsuits, the Ninth Circuit reasoned that it would still violate the NLRA because it bars collective action.⁹⁷ Like the Seventh Circuit, the Ninth Circuit held that the FAA recognizes the contract defense of illegality because the "illegal provision [was] not targeting arbitration . . . [so] the FAA treats the contract like any other."⁹⁸

87. *Id.*

88. *Id.* at 982–83; *Chevron*, 467 U.S. at 843.

89. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1157 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017).

90. *Id.* (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995)).

91. *Id.* (citing Federal Arbitration Act, 9 U.S.C. § 2 (2012)).

92. *Id.*; *accord Morris*, 834 F.3d at 988.

93. *Lewis*, 823 F.3d at 1159.

94. *Id.* at 1159–60.

95. *Id.* at 1156; *see Morris*, 834 F.3d at 984.

96. *Morris*, 834 F.3d at 986; *see Lewis*, 823 F.3d at 1157–60.

97. *See Morris*, 834 F.3d at 985–86.

98. *Id.* at 985.

The Seventh Circuit also found that the FAA did not override the NLRA because the NLRA's right to concerted action was a substantive right, not a procedural right.⁹⁹ Courts treat substantive rights differently from procedural rights.¹⁰⁰ A substantive right is the "essential, operative protections of a statute."¹⁰¹ A procedural right is an "ancillary, remedial tool[] that help[s] secure the substantive right."¹⁰² An arbitration agreement cannot waive a statutory, substantive right,¹⁰³ and courts will invalidate an arbitration agreement that purports to waive a substantive right.¹⁰⁴ Courts have invalidated arbitration agreements where the agreement did not allow for damages authorized by statutes such as treble damages in an antitrust case and exemplary and punitive damages in a Title VII case.¹⁰⁵ The Seventh Circuit found that the right to concerted action was "at the heart of the restructuring of [the] employer/employee relationship[] that Congress meant to achieve in the statute."¹⁰⁶ The court reasoned that all of the NLRA provisions exist to enforce Section 7.¹⁰⁷ The Ninth Circuit agreed, stating that "substantive rights cannot be waived in arbitration agreements."¹⁰⁸ The agreement did not simply bar the substantive right to collective action in arbitration. Rather, it barred collective action in every forum; therefore, the Seventh Circuit decided that the agreement must be invalidated.¹⁰⁹ The court left open the possibility that the collective arbitration waiver may have been enforceable if it was part of the collective bargaining agreement.¹¹⁰ The federal circuit courts are split on the impact the NLRA and the FAA have on the enforceability of class arbitration waivers.

IV. INSTANT DECISION

In *Cellular Sales*, the Eighth Circuit held that employment agreements requiring individual arbitration are enforceable.¹¹¹ The court recognized that

99. *Lewis*, 823 F.3d at 1160–61; *accord Morris*, 834 F.3d at 986.

100. *See Morris*, 834 F.3d at 985.

101. *Id.*

102. *Id.*

103. *Id.* at 985–86 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

104. *Id.*

105. *Kristian v. Comcast Corp.*, 446 F.3d 25, 48 (1st Cir. 2006) (holding that the award of treble damages under federal antitrust statutes cannot be waived); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 (5th Cir. 2003) (holding that the provision of an arbitration agreement barring any award of punitive damages was unenforceable).

106. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1160 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017).

107. *Id.*

108. *Morris*, 834 F.3d at 985.

109. *Lewis*, 823 F.3d at 1161.

110. *Id.* at 1158.

111. *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 776 (8th Cir. 2016).

the Fifth Circuit allowed such agreements, which overruled the NLRB's prior decisions in *D.R. Horton* and *Murphy Oil USA*.¹¹²

Cellular Sales relied on *Owen v. Bristol Care, Inc.*¹¹³ In *Owen*, the Eighth Circuit held that class waivers in arbitration agreements were enforceable in FLSA claims.¹¹⁴ The FLSA requires employees to give written consent to join a class action.¹¹⁵ The court in *Owen* reasoned that if an employee had to opt in to a class action, she could also agree not to participate in a class action.¹¹⁶ The court did not believe that the FLSA provision was a congressional command to override application of the FAA.¹¹⁷ According to the court, the FAA's reenactment after the passing of the NLRA showed "that Congress intended its arbitration protections to remain intact even in light of the earlier passage of [the NLRA]."¹¹⁸ Lastly, other federal circuit courts that found class arbitration waivers enforceable in the FLSA context persuaded the *Owen* court.¹¹⁹ The *Cellular Sales* court found that *Owen*'s holding was "fatal to [NLRB's] argument 'that a mandatory agreement requiring individual arbitration of work-related claims' violates the NLRA."¹²⁰ The court did not grant the NLRB's motion to reconsider *Owen*'s holding.¹²¹

The court did not discuss why it did not defer to the NLRB's interpretation.¹²² The court stated that it would defer to the NLRB's interpretation of the NLRA if it was "rational and consistent with [the] law."¹²³ It also stated that it

112. *Id.* at 775–76; see *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013). In *D.R. Horton*, the Fifth Circuit found that Section 7 of the NLRA was not a substantive right. *D.R. Horton*, 737 F.3d at 362. The Fifth Circuit found that the agreement did not fall into the FAA's saving clause, and there was no congressional command exempting the NLRA from the FAA. *Id.* Therefore, the court held that the class arbitration waiver had to be enforced. *Id.*

113. *Cellular Sales of Mo.*, 824 F.3d at 776.

114. *Id.* (citing *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–55 (8th Cir. 2013)).

115. *Owen*, 702 F.3d at 1052; Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) (2012).

116. *Owen*, 702 F.3d at 1052–53.

117. *Id.* at 1053.

118. *Id.*

119. *Id.* at 1054 (citing *Vilches v. Travelers Cos., Inc.*, 413 F. App'x 487, 494 n.4 (3d Cir. 2011); *Horenstein v. Mortg. Mkt., Inc.*, 9 F. App'x 618, 619 (9th Cir. 2001); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *Delock v. Securitas Sec. Servs. USA, Inc.*, 883 F. Supp. 2d 784, 786 (E.D. Ark. 2012).

120. *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 776 (8th Cir. 2016).

121. *Id.*

122. See *id.* at 775.

123. *Id.* (quoting *NLRB v. Am. Firestop Sols., Inc.*, 673 F.3d 766, 768 (8th Cir. 2012)).

need not defer to the agency's interpretation of other federal statutes because they are too far removed from the NLRB's expertise.¹²⁴

The holdings in *Owen* and *D.R. Horton* supported class waivers, which led the court to conclude that Cellular Sales' agreement did not violate Section 8(a)(1) of the NLRA.¹²⁵ Because the agreement did not violate the NLRA, Cellular Sales' motion to compel arbitration in the federal class action lawsuit also did not violate Section 8(a)(1), as it was not enforcing an unlawful provision.¹²⁶ The Eighth Circuit held that employers can require employees to resolve all disputes with the company through individual arbitration.¹²⁷

V. COMMENT

The Eighth Circuit should not have upheld the waiver in *Cellular Sales* for four reasons: (1) the NLRA grants a substantive right to class proceedings; (2) the NLRB's interpretation of the NLRA was reasonable and the Eighth Circuit should have deferred to it; (3) the FAA saving clause prevents the FAA from conflicting with the NLRA; and (4) public policy does not favor enforcing class arbitration waivers in employment agreements.

A. *The NLRA Grants a Substantive Right to Concerted Action*

This Section explains why Section 7 should be viewed as a substantive right. Its legislative purpose shows that it was meant to protect a substantive right. Additionally, the plain language and context of Section 7 distinguishes it from procedural rules and statutes.

1. Unlike the FLSA, the Legislative Purpose for the NLRA Shows That It Grants a Substantive Right to Concerted Action

Owen did not bind the Eighth Circuit because the NLRA grants a substantive right to bring class claims, while the FLSA grants a procedural right to bring class claims.¹²⁸ Substantive rights receive greater protection than procedural rights, and an arbitration agreement cannot waive a statutory substantive right.¹²⁹ The claim in *Owen* was based on the employer's alleged violation of the FLSA, not a violation of the NLRA.¹³⁰ The FLSA gives employees "[t]he right . . . to bring an action by or on behalf of any employee, and the right of

124. *See id.* (citing *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002)).

125. *Id.* at 776.

126. *Id.* at 776–77.

127. *Id.* at 776.

128. *See id.*

129. *See Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

130. *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1051–52 (8th Cir. 2013).

any employee to become a party plaintiff to any such action.”¹³¹ The purpose of the FLSA is to maintain a “minimum standard of living necessary for health, efficiency, and general well-being of workers” so that commerce is not negatively impacted.¹³² In contrast, the purpose of the NLRA is to “restor[e] equality of bargaining power between employers and employees.”¹³³ The NLRA equalizes bargaining power by allowing employees to act collectively.¹³⁴

The legislature had different reasons for enacting each statute, and if the language of the statute is ambiguous, the legislative purpose affects statutory interpretation.¹³⁵ In this case, the legislative purpose strengthens the argument that the NLRA grants a substantive right. The legislature believed that the “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership” led to problems in commerce and that “protection by law of the right of employees to organize and bargain collectively safeguards commerce” from those problems.¹³⁶ The legislature’s goal was to enhance commerce by allowing employees to band together for “mutual aid or protection.”¹³⁷ Allowing employers to force employees to sign away the principle right in the statute is contrary to the NLRA’s purpose of protecting employees.¹³⁸ Conversely, while the FLSA allows collective action, its principle purpose is to benefit commerce by protecting employees’ wages and hours.¹³⁹ Because the FLSA and the NLRA were enacted for different reasons, interpreting the NLRA’s right to concerted action as a substantive right, while interpreting the FLSA’s collective action provision as a procedural right, is justified.

2. The Language and Context of Section 7 Shows That It Is a Substantive Right

The plain language of Section 7 also supports the conclusion that it is a substantive right. Section 7 states that “employees *shall* have the right . . . to

131. Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) (2012).

132. Fair Labor Standards Act of 1938, 29 U.S.C. § 202(a) (2012); *see* Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1153 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017).

133. National Labor Relations Act, 29 U.S.C. § 151 (2012).

134. National Labor Relations Act, 29 U.S.C. § 157 (2012).

135. *See* United States v. McAllister, 225 F.3d 982, 986 (8th Cir. 2000) (“Our objective in interpreting a federal statute is to give effect to the intent of Congress . . . [A]bsent clearly expressed legislative intention to the contrary, the language is regarded as conclusive.” (alteration in original) (quoting United States v. Vig, 167 F.3d 443, 447 (8th Cir. 1999))).

136. § 151.

137. *Id.*

138. *See id.*; Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1153 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017).

139. Fair Labor Standards Act of 1938, 29 U.S.C. § 202(a) (2012).

engage in . . . concerted activities.”¹⁴⁰ The legislature could have used the word “may” if it only wanted to provide a method to bring claims rather than to grant a substantive right.¹⁴¹ Section 7 also says that employees have the right to “engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”¹⁴² Concerted action is a substantive right because all of the NLRA’s provisions support and protect that right.¹⁴³ For example, Section 8 makes it an unfair labor practice for employers to deny employees the right to engage in concerted action.¹⁴⁴ Section 7 does not simply suggest a procedure for resolving disputes; it grants employees a substantive right to concerted action.¹⁴⁵

Section 7 differs from the procedural right to a class action proceeding in Rule 23 of the Federal Rules of Civil Procedure. Rule 23 is a procedural tool,¹⁴⁶ but Section 7 is not.¹⁴⁷ Further, simply because Section 7 addresses an “associational [right] does not mean that it is not substantive.”¹⁴⁸ The First Amendment to the United States Constitution guarantees “the right of the people peaceably to assemble,” but that does not mean it is exclusively a procedural right.¹⁴⁹

Lastly, the way in which employees assert their right to bring a class claim pursuant to the NLRA supports the proposition that it is a substantive right. The FLSA grants a procedural right because employees must give their written consent to become part of a class action.¹⁵⁰ The NLRA does not have an equivalent provision.¹⁵¹ *Owen* reasoned that an employee should be able to opt out contractually of a class arbitration proceeding if the statute requires him to opt

140. National Labor Relations Act, 29 U.S.C. § 157 (2012) (emphasis added).

141. *See* United States v. Ackerman, 831 F.3d 1292, 1300 (10th Cir. 2016) (“Congress, too, appears to be well aware of the difference between ‘may’ and ‘shall’ in the funding context . . .”).

142. § 157 (2012) (emphasis added); *Lewis*, 823 F.3d at 1161.

143. *Lewis*, 823 F.3d at 1160. Section 158 makes it an unfair labor practice to interfere with employees’ right to engage in concerted action, which is itself protected by Section 157. National Labor Relations Act, 29 U.S.C. § 158(a)(1) (2012); § 157. Section 159 sets out guidelines for choosing representatives in concerted actions. National Labor Relations Act, 29 U.S.C. § 159 (2012). Section 160 gives NLRB the authority to prevent any person from engaging in any unfair labor practice (listed in Section 158) affecting commerce. National Labor Relations Act, 29 U.S.C. § 160(a) (2012).

144. § 158(a)(1); § 157.

145. *Lewis*, 823 F.3d at 1160–61; *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 980 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017).

146. FED. R. CIV. P. 23.

147. § 157.

148. *Lewis*, 823 F.3d at 1161.

149. U.S. CONST. amend. I; *Lewis*, 823 F.3d at 1161.

150. *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052–53 (8th Cir. 2013); Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) (2012) (“No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”).

151. § 157.

in to be part of a class action.¹⁵² This reasoning cannot apply to the NLRA because there is no requirement that employees give written consent to join a class action.¹⁵³ Both the congressional intent and the language of Section 7 support the conclusion that the NLRA should be interpreted as a substantive right.

B. Deference to the NLRB's Interpretation

The Eighth Circuit did not uphold the NLRB's finding that Section 7 of the NLRA granted a substantive right to bring class action claims.¹⁵⁴ Notably absent from the court's analysis is any discussion of why it did not defer to the NLRB's interpretation.¹⁵⁵ Unlike in *Cellular Sales*, there was no prior administrative agency decision in *Owen*.¹⁵⁶ Therefore, the *Owen* court had more freedom to interpret the law because courts should defer to the NLRB's interpretation of the NLRA if it is "rational and consistent with [the] law."¹⁵⁷ The NLRB's interpretation is entitled to deference because the NLRB enforces the NLRA and sees a wide variety of cases concerning the NLRA.¹⁵⁸

It is rational to construe the NLRA as granting a substantive right to employees to engage in concerted actions, including class arbitration proceedings, because it is clear that this was Congress' intention.¹⁵⁹ It is well established that Section 7 protects employees' right to pursue judicial or administrative claims to improve their working conditions and engage in concerted activity.¹⁶⁰ Therefore, Section 7 clearly includes the right to bring class claims.¹⁶¹ Even the Eighth Circuit recognizes that "a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is*

152. *Owen*, 702 F.3d at 1052–53.

153. *Cf.* § 157.

154. *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772, 776 (8th Cir. 2016).

155. *See id.* at 775.

156. *Id.*; *see Owen*, 702 F.3d at 1050–51.

157. *Cellular Sales of Mo.*, 824 F.3d at 775; *accord Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1153 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017). *But see D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 359 (5th Cir. 2013) (finding that the NLRB's decision did not comport with the FAA).

158. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992); *see also NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) ("[O]n an issue that implicates its expertise in labor relations, a reasonable construction by [the NLRB] is entitled to considerable deference.").

159. *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 981 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017).

160. *Id.*; *See also City Disposal Sys.*, 465 U.S. at 835 ("There is no indication that Congress intended to limit [Section 7] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way.").

161. *Morris*, 834 F.3d at 985–86.

‘concerted activity’ under § 7 of the National Labor Relations Act.”¹⁶² Therefore, the Eighth Circuit erred in failing to defer to the NLRB’s reasonable interpretation of the NLRA.

C. *The FAA and Class Arbitration Waivers*

As referenced above,¹⁶³ the rule of interpreting statutes is, “[w]hen two statutes are capable of co-existence . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”¹⁶⁴ Here, the NLRA and the FAA are capable of co-existing.¹⁶⁵ The FAA mandates that arbitration agreements be enforced according to their terms.¹⁶⁶ However, the saving clause confirms that contracts requiring arbitration will not be enforced if they are invalid “upon such grounds as exist at law or in equity,” such as illegality.¹⁶⁷ Since the NLRA grants a substantive right to concerted activity, a contract purporting to waive an employee’s right to concerted activity is illegal because it violates the NLRA.¹⁶⁸ The illegal agreement falls into the FAA saving clause.¹⁶⁹ Further, the agreement is illegal because it waives the employee’s right to concerted action, not because it mandates arbitration.¹⁷⁰ The NLRA and the FAA do not conflict – they “work hand in glove.”¹⁷¹

D. *Public Policy Reasons to Invalidate Class Arbitration Waivers in Employment Agreements*

The Eighth Circuit failed to consider the public policy arguments against enforcing class arbitration waivers. It is unclear exactly how many companies have mandatory arbitration agreements with class waivers because the agreements are private and companies are not required to report this information to the Bureau of Labor Statistics.¹⁷² Additionally, the government does not have an obligation to conduct official surveys to collect this information.¹⁷³ There-

162. *Brady v. NFL*, 644 F.3d 661, 673 (8th Cir. 2011).

163. *See supra* Part V.A.

164. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1157 (7th Cir. 2016) (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995)), *cert. granted*, 137 S. Ct. 809 (2017).

165. *Id.*

166. *See* Federal Arbitration Act, 9 U.S.C. § 2 (2012).

167. *Id.*; *Lewis*, 823 F.3d at 1157.

168. *Lewis*, 823 F.3d at 1157; *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 988 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017).

169. *Lewis*, 823 F.3d at 1157.

170. *Morris*, 834 F.3d at 982.

171. *Lewis*, 823 F.3d at 1157.

172. *STONE & COLVIN*, *supra* note 1 at 15.

173. *Id.*

fore, the most accurate estimates come from private surveys like those conducted by Carlton Fields Jordan Burt LLP, which estimated that forty-three percent of companies have such waivers.¹⁷⁴ Many large companies such as Nordstrom, Sears, and Uber have class arbitration waivers.¹⁷⁵ Companies are moving toward forced class arbitration waivers because they create the employment contracts, do not allow negotiation, and require employees to sign the contract without changing it as a condition of employment.¹⁷⁶

1. Individual Arbitration Makes Litigating Small Claims Too Expensive

Employees who are unable to bring class arbitration actions are generally unlikely to pursue any type of action against their employer for small claims because individual arbitration is expensive.¹⁷⁷ For example, in *Sutherland v. Ernst & Young*, an employee had a claim under the FLSA for violations of the minimum wage and overtime provisions, which equated to \$1867 in lost earnings.¹⁷⁸ The employee estimated that it would cost \$160,000 in attorney's fees, \$25,000 in expert witness fees, and \$6000 in other costs to arbitrate the claim individually.¹⁷⁹ The court upheld the waiver even though the employee would likely spend approximately \$200,000 to recover only \$1867.¹⁸⁰

2. Fewer Remedies Are Available in Arbitration Than in Litigation

Some remedies are effectively unavailable in individual arbitration.¹⁸¹ It is harder to get employers to end a discriminatory or illegal practice when claims are brought in individual arbitration.¹⁸² Because few employees are likely to be enterprising enough to bring claims, the company might find it cheaper to pay those employees to drop their claims, rather than change the

174. Weber, *supra* note 2. 350 companies were included in the survey. *Id.*

175. *Id.*

176. *See id.*; *see also* Cellular Sales of Mo., LLC v. NLRB, 824 F.3d 772, 774 (8th Cir. 2016).

177. *See* STONE & COLVIN, *supra* note 1, at 6.

178. *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 294 (2d Cir. 2013) (per curiam).

179. *Id.* at 294–95.

180. *Id.* at 295.

181. *See* Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 L. & CONTEMP. PROBS. 75, 90 (2004). This article discusses class arbitration waivers in consumer contracts; however, the logic applies equally to class arbitration waivers in employment contracts.

182. *Id.*

way it does business.¹⁸³ Additionally, arbitration is private, so there is no publicity to encourage the company to make a change.¹⁸⁴

3. Employees Are Less Likely to Prevail in Arbitration Than in Litigation

The third problem is that employees are less likely to win in arbitration than they are at trial.¹⁸⁵ Employees only win 21% of cases in arbitration,¹⁸⁶ whereas employees win 36% of cases in federal court and 57% in state court.¹⁸⁷ Some employers may fare better in arbitration because they are “repeat players.” Being a repeat player is advantageous because the employer knows how to proceed efficiently in arbitration.¹⁸⁸ Additionally, employers who participate in more arbitrations before the same arbitrator tend to win more often.¹⁸⁹ The benefits of being a repeat player are shown in the employees’ success rates. For example, an employee had a 17.9% chance of winning when it was the employer’s first time before the arbitrator; however, after an employer had been before the arbitrator in twenty-five cases, the employees’ chance of winning decreased to 4.5%.¹⁹⁰ While it may be possible to combat the repeat player bias by hiring a lawyer who has participated in employment arbitration, this is unlikely to happen.¹⁹¹ In one study, 54.6% of employers hired law firms that had handled multiple employment arbitration cases, while only 10.7% of employees did the same.¹⁹² Some arbitration agreements state that the employer will choose the arbitrator. If this happens, the arbitrator may favor the employer due to a desire for future work even though such favoritism is against the ethical standards for arbitrators.¹⁹³ The inherent bias in the arbitration system and high cost make it difficult for employees to bring individual arbitration actions. This difficulty is exacerbated if employees cannot bring the claim with the help of other employees as a class arbitration.

183. *Id.*

184. *Id.* at 90–91.

185. STONE & COLVIN, *supra* note 1, at 20 tbl.1.

186. *Id.* This data is based on all employment arbitration cases administered by the American Arbitration Association derived from employer procedures. *Id.*

187. *Id.* The federal court cases surveyed were employment discrimination cases, and the state court cases included all employment disputes except civil rights cases. *Id.*

188. *Id.* at 22.

189. *Id.* at 23.

190. *Id.* This data is based on a study of 2802 employment arbitration cases from 2003 to 2014. *Id.*

191. *See id.*

192. *Id.* at 22. The study was conducted by Alexander Colvin and Kelly Pike. *Id.* at 22 n.57.

193. *Id.* at 23.

E. Future Legislation

The legislature is aware of these policy concerns and is progressing toward limiting class arbitration waivers in employment agreements. The proposed Arbitration Fairness Act (“AFA”) would invalidate pre-dispute arbitration agreements in employment agreements unless the agreement was part of collective bargaining.¹⁹⁴ One premise of the statute is that the FAA was only intended to apply to commercial disputes.¹⁹⁵ Another premise is that allowing mandatory arbitration agreements in employment contracts is unfair because the agreements are not truly voluntary for employees, and further, many “employees are not even aware that they have given up their rights.”¹⁹⁶ The AFA has been proposed to the federal legislature several times. The latest proposal was in 2015, but it did not pass.¹⁹⁷

More recently, the Restoring Statutory Rights and Interests of the States Act (“RSRISA”) of 2016 was introduced to Congress.¹⁹⁸ This bill is similar to the AFA in that it would invalidate pre-dispute arbitration agreements when an individual or small business wants to bring a claim in court based on a statute or constitution.¹⁹⁹ It would not invalidate arbitration agreements that are entered into after a dispute has arisen.²⁰⁰ The legislation is based on the belief that the FAA “should not have been interpreted to[] supplant or nullify the legislatively created rights and remedies which Congress, exercising its power under [A]rticle I of the Constitution of the United States, has granted to the people of the United States for resolving disputes in state and federal courts.”²⁰¹ It is unlikely that such a broad bill will pass, as similar bills were introduced as early as 2005 and failed under both democratic and republican congresses;²⁰² however, it will greatly benefit employees if it passes.

194. Arbitration Fairness Act of 2015, S. 1133, 114th Cong. § 402(a)–(b)(2) (2015).

195. *Id.* at § 2(1), (2).

196. *Id.* at § 2(3).

197. *See id.* Similar versions of the AFA were also proposed in 2005, 2011, and 2013. George H. Friedman, *The Proposed Arbitration Fairness Act: Still a Well-Intended but Potentially Dangerous Overreaction to a Legitimate Concern*, ARBITRATION RESOL. SERVS., INC., <https://www.arbresolutions.com/the-proposed-arbitration-fairness-act-still-a-well-intended-but-potentially-dangerous-overreaction-to-a-legitimate-concern/> (last visited Sept. 12, 2017).

198. Restoring Statutory Rights and Interests of the States Act of 2016, H.R. 4899, 114th Cong. (2016). The bill was introduced on April 12, 2016. *Id.*

199. *Id.* at § 3(2)(b).

200. *Id.*

201. *Id.* at § 2(a)(2).

202. Friedman, *supra* note 197. Examples of similar bills that have been proposed in the past are the Arbitration Fairness Acts of 2011 and 2013. *Id.*

VI. CONCLUSION

In *Cellular Sales*, the Eighth Circuit upheld a class arbitration waiver. The federal circuits are split on this issue. Courts agree that the NLRA and the FAA are the main statutes involved in the analysis; however, courts interpret the statutes differently. Class arbitration waivers should not be upheld because the NLRA was enacted to give employees more bargaining power by granting employees the substantive right to concerted action. The FAA mandates that arbitration agreements be treated the same as other agreements, and the saving clause prevents the FAA from conflicting with the NLRA. Additionally, public policy considerations weigh against enforcing class arbitration waivers because employees will likely have financial difficulty in bringing an individual arbitration action, and employees are less likely to win in arbitration. In *Cellular Sales*, the Eighth Circuit upheld a class arbitration waiver, which widened the circuit split and made it difficult for employees to vindicate their rights.

