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Michael Thomas Mangels

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# **Uncharted Waters: Compulsory Arbitration of Employment Disputes after *D.R. Horton***

**Michael Mangels<sup>1</sup>**

## **I: Introduction**

Michael Cuda went to work as a superintendent for a home building company named D.R. Horton in 2005.<sup>2</sup> In 2006, D.R. Horton required each new and current employee, including Mr. Cuda, to sign a Mutual Arbitration Agreement (MAA), which provided that “all disputes and claims relating to the employee’s employment with Respondent will be determined exclusively by final and binding arbitration.”<sup>3</sup> Generally, employment arbitration is a hearing where both parties present their cases in front of a neutral fact finder.<sup>4</sup> The neutral fact finder then makes a decision as to which party’s position is correct. An arbitrator’s decision is generally binding on both parties, but the effect of the decision is determined by the agreement of the parties. Arbitration is a way to resolve disputes through contract as opposed to a court.<sup>5</sup> It is distinguishable from a courtroom trial, because the formalities, such as rules of evidence and various discovery procedures, can be, and generally are, waived through the underlying arbitration agreement. In arbitration, an arbitrator is limited to interpreting the contract; not fulfilling the role of a judge.<sup>6</sup>

In the case of *D.R. Horton*, the MAA stated that the individual could not consolidate his claims with another employee, and that the arbitrator could not provide class-based relief.<sup>7</sup> In 2008, Mr. Cuda felt that he had been misclassified as an “exempt employee” under the Fair

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<sup>1</sup> J.D. Candidate May 2014.

<sup>2</sup> *D.R. Horton*, 357 N.L.R.B. No. 187, \*1 (2012).

<sup>3</sup> *Id.*

<sup>4</sup> See BLACKS’S LAW DICTIONARY 119 (9th ed. 2009).

<sup>5</sup> See 2 DOMKE ON COM. ARB. §29.1.

<sup>6</sup> See *Stolt-Nielson S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1767 (2010).

<sup>7</sup> *D.R. Horton*, 357 N.L.R.B. at \*1.

Labor Standards Act (FLSA) and was thereby denied his right to overtime under the FLSA.<sup>8</sup> As a result, he hired a lawyer who attempted to initiate arbitration on both his behalf and the entire class of similarly situated superintendents.<sup>9</sup> In response to Mr. Cuda's notice of intent to initiate arbitration, the employer, D.R. Horton, maintained that Mr. Cuda's lawyer did not file an effective notice of intent to arbitrate because the arbitration agreement did not recognize class claims.<sup>10</sup> Due to the lack of coverage, Mr. Cuda would have been forced to pursue his FLSA claim individually in arbitration.

Instead of accepting the individual arbitration procedure, Mr. Cuda attempted to attack the agreement.<sup>11</sup> Specifically, in November of 2008, Mr. Cuda filed an Unfair Labor Practice with the National Labor Relations Board ("the Board").<sup>12</sup> The Board issued a complaint, and after a November 2010 trial, the Administrative Law Judge (ALJ) found the agreement unenforceable. First, the judge found that the MAA did not violate Section 8(a)(1)<sup>13</sup> of the National Labor Relations Act (NLRA) by prohibiting class or collective litigation.<sup>14</sup> Second, the judge found that D.R. Horton *did* violate Section 8(a)(4)<sup>15</sup> and 8(a)(1) of the NLRA through the MAA because the text of the MAA would reasonably lead employees to believe that they were not able to file charges with the Board.<sup>16</sup>

Both the employer, D.R. Horton, and the Board's General Counsel appealed the

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *D.R. Horton*, 357 N.L.R.B. at \*19.

<sup>12</sup> *Id.*

<sup>13</sup> Section 8(a)(1) states that it shall be an unlawful employment practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7 of the National Labor Relations Act. 29 U.S.C. § 158(a)(1) (2006).

<sup>14</sup> *D.R. Horton*, 357 N.L.R.B. at \*23.

<sup>15</sup> Section 8(a)(4) states that it shall be an unlawful employment practice for an employer to "discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter." 29 U.S.C. § 158(a)(4) (2006).

<sup>16</sup> *D.R. Horton*, 357 N.L.R.B. at \*24.

decision.<sup>17</sup> In January of 2012, the Board ruled to uphold the Judge’s finding of the 8(a)(4) violation because employees could reasonably interpret the MAA to interfere with access to the Board.<sup>18</sup> The Board, however, reversed the Judge’s decision that the class action waiver was not a violation of Section 8(a)(1).<sup>19</sup> Instead, the Board held that the class waiver was a restriction on employees’ right under the NLRA to engage in “concerted activities for the purpose of . . . mutual aid or protection.”<sup>20</sup>

D.R. Horton appealed both of the Board’s holdings to the Fifth Circuit.<sup>21</sup> While the Fifth Circuit will be deciding both questions, this note will only consider whether the class waiver violates § 8(a)(1). The Board’s decision in *D.R. Horton* must now be a part of any discussion of enforceability of a class action waiver. This note will be directed to that question.

If the class waiver was a simple contract and not contained within the MAA, the question would be much easier. Due to the class waiver’s inclusion within an arbitration agreement, this case implicates another federal statute in addition to the NLRA. The Federal Arbitration Act (FAA) provides that “[a] written provision . . . evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>22</sup> Various legal challenges to agreements to arbitrate have reached the Supreme Court.<sup>23</sup> The agreements have been challenged for being inconsistent with the administrative enforcement scheme,<sup>24</sup> too

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<sup>17</sup> *Id.* at \*1. n.1.

<sup>18</sup> *D.R. Horton* 357 N.L.R.B. at \*2.

<sup>19</sup> *Id.*

<sup>20</sup> 29 U.S.C. § 157 (2006).

<sup>21</sup> See *Horton Leads Courts to Disagree on Whom to Follow*, 20 NO. 3 EMPLOYER’S GUIDE FAIR LAB. STANDARDS ACT NEWSL. 3, Nov., 2012.

<sup>22</sup> 9 U.S. C. § 2 (2006).

<sup>23</sup> See, e.g., *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012); *AT&T Mobility v. Concepcion* 131 S. Ct. 1740 (2011); *Stolt-Nielson S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010); *Circuit City Stores v. Adams* 532 U.S. 105 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

<sup>24</sup> See *Gilmer* 500 U.S. at 27.

complex to arbitrate,<sup>25</sup> or for amounting to a waiver of rights that is unconscionable.<sup>26</sup> In all of these cases, the Supreme Court enforced the arbitration agreement over the particular objection.<sup>27</sup> Specifically, the Supreme Court has said that an agreement to arbitrate a statutory claim will be enforced unless “Congress itself has evinced an intention to preclude a waiver of judicial remedies.”<sup>28</sup> The Court has stated that there are multiple ways to discover Congress’s intention<sup>29</sup> not to permit arbitration including: an examination of the statutory text; the legislative history; or an inherent conflict between arbitration and the statute’s underlying purposes.<sup>30</sup>

This leaves Mr. Cuda in murky waters. Although he has a right under the NLRA to challenge his classification as an “exempt employee” through collective activity, the MAA that he signed limits him to individual action.<sup>31</sup> Therefore his right under the NLRA to challenge his classification through collective legal activity is in tension with the FAA’s preference to enforce the MAA that he signed as written. The question is whether the NLRA qualifies as one of those grounds “as exist at law or in equity” that warrant an exception to the FAA’s preference toward enforcement, and make the agreement unenforceable. If the MAA was found unenforceable, Mr. Cuda would have an opportunity to challenge his employment classification through some sort of collective legal action.<sup>32</sup>

This comment will consider the most recent, and likely most significant, challenge to the FAA. Part II will explain the FAA, the Supreme Court’s interpretation of it, and when a valid arbitration agreement is not enforceable. Next, Part III will explain Section 7 of the NLRA and

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<sup>25</sup> See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

<sup>26</sup> See *Concepcion*, 131 S. Ct. 1740.

<sup>27</sup> See, e.g., *Mitsubishi Motors Corp.* 473 U.S. at 628; *Gilmer*, 500 U.S. at 20; *Concepcion* 131 S. Ct. at 1740 (2011).

<sup>28</sup> *Mitsubishi Motors Corp.* 473 U.S. at 628.

<sup>29</sup> See *Gilmer* 500 U.S. at 26.

<sup>30</sup> *Id.*

<sup>31</sup> See *D.R. Horton*, 357 NLRB No. 187, \*1 (2012).

<sup>32</sup> *Cf. id.* (holding that employees have a right to engage in collective legal action dealing with terms and conditions of employment.)

begin to define the conflict between Section 7's protection of concerted activity and the FAA's preference for individual arbitration. Then, Part IV will explain the NLRB's decision in *D.R. Horton* that class waivers in arbitration agreements signed as a condition of employment are unenforceable as a violation of employees' labor rights. Part V will describe and analyze court decisions that have considered the Board's holding in *D.R. Horton*. Finally, Part VI will conclude that the Fifth Circuit should affirm the Board's decision when it considers it on appeal.

## **II: The Federal Arbitration Act and Pro-Arbitration Policy**

### **A. Introduction to the Federal Arbitration Act.**

The operative clause of the FAA reads, “[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>33</sup> Additionally, much like agreements to arbitrate contract disputes, agreements to arbitrate statutory claims are also enforceable by courts.<sup>34</sup> The Supreme Court has held that an agreement to arbitrate a statutory claim is enforceable unless Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.<sup>35</sup> While many parties have turned to arbitration to solve disputes, many others have challenged the enforceability of various types of pre-dispute arbitration agreements.<sup>36</sup>

### **B. Legal Challenges to the Federal Arbitration Act**

While numerous challenges to arbitration agreements have reached the Supreme Court,

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<sup>33</sup> 9 U.S.C. § 2 (2006).

<sup>34</sup> See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

<sup>35</sup> *Id.*

<sup>36</sup> See, e.g., *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012); *AT&T Mobility v. Concepcion* 131 S. Ct. 1740 (2011); *Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *Circuit City Stores v. Adams* 532 U.S. 105 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

the most significant cases with respect to the pending challenge in *D.R. Horton* are *Gilmer v. Interstate/Johnson Lane Corp.*, *AT&T Mobility v. Concepcion*, and *Compucredit Corp. v. Greenwood*.

1. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>37</sup>

A Japanese and Swiss joint venture disputed an agreement to ship and sell automobiles with a Puerto Rican company, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>38</sup> After the dispute arose, the Japanese and Swiss joint venture sued to compel arbitration pursuant to the agreement between the parties.<sup>39</sup> The Puerto Rican company counter-claimed alleging, among other claims, a violation of the Sherman Antitrust Act.<sup>40</sup> The District Court granted the joint venture's motion to compel arbitration of all the issues presented by the dispute, including the antitrust issues.<sup>41</sup> The First Circuit Court of Appeals, on the other hand, reversed the order to compel arbitration of the antitrust claims.<sup>42</sup> The Supreme Court granted certiorari to resolve the issue.<sup>43</sup>

The Supreme Court held that the language of parties' agreement to arbitrate disputes should be read broadly to favor the arbitration of issues.<sup>44</sup> The Court clarified that the general presumption that there is a presumption that arbitration agreements cover all disputes including rights provided through statute.<sup>45</sup> The Court, while holding that agreements should be read broadly to include statutory rights within the agreement of what can be arbitrated, clarified that

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<sup>37</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

<sup>38</sup> *Id.* 616-617.

<sup>39</sup> *Id.* at 618-619.

<sup>40</sup> *Id.* at 619-620.

<sup>41</sup> *Id.* at 620-621.

<sup>42</sup> *Id.* at 623.

<sup>43</sup> *Mitsubishi Motors Corp.*, 473 U.S. at 624.

<sup>44</sup> *Id.* at 626.

<sup>45</sup> *Id.*

Congress can make agreements to arbitrate any statutory claim unenforceable.<sup>46</sup> If Congress intends to include protection against waiving a judicial forum, it will make that intention clear either in the text of the statute or in the legislative history.<sup>47</sup> Thus, once a party makes an agreement to arbitrate a dispute over a statutory right, it should be enforced unless Congress intended to prohibit the waiver of judicial remedies.<sup>48</sup>

The Supreme Court explicitly rejected certain attacks on agreements to arbitrate statutory disputes.<sup>49</sup> While an arbitration agreement that resulted from “fraud, undue influence, or overweening bargaining power” would be unenforceable, the Court would not assume that every arbitration agreement results from those inequities.<sup>50</sup> Additionally, the Court would not presume that arbitration panels either lack the ability to effectively arbitrate a matter or that they will be hostile to a party.<sup>51</sup> Finally, the fact that a statute contains an important public policy does not itself make the statute inappropriate for arbitration.<sup>52</sup> “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.”<sup>53</sup>

After *Mitsubishi*, it was clear that the mere presence of a right within a statute was insufficient to defeat an agreement to arbitrate a dispute over that right.<sup>54</sup> The Court, however, made it equally clear that it would not enforce any arbitration agreement.<sup>55</sup> Two aspects of this decision are crucial to the pending case of *D.R. Horton*. First, the Court made clear that some

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<sup>46</sup> *Id.* at 627.

<sup>47</sup> *Id.* at 628.

<sup>48</sup> *Id.*

<sup>49</sup> *Mitsubishi Motors Corp.*, 473 U.S. at 632-639.

<sup>50</sup> *Id.* at 627.

<sup>51</sup> *Id.* at 633-634.

<sup>52</sup> *Id.* at 634-637.

<sup>53</sup> *Id.* at 637.

<sup>54</sup> *Id.*

<sup>55</sup> *Mitsubishi Motors Corp.*, 473 U.S. at 627-628



statutory rights may be unavailable for arbitration, if Congress makes that intent clear.<sup>56</sup> Second, the Court explicitly held that traditional defenses to contracts such as fraud and duress apply even to arbitration agreements.<sup>57</sup>

## 2. *Gilmer v. Interstate/Johnson Lane Corp.*

Gilmer, the Plaintiff in *Gilmer v. Interstate/Johnson Lane Corp.*, thought that his employer terminated him on account of his age.<sup>58</sup> Before the dispute arose, the plaintiff registered with the New York Stock Exchange, which was required in order for him to secure employment.<sup>59</sup> Included in the plaintiff's registration application with the Stock Exchange was an agreement to arbitrate any dispute with his employer arising out of employment or termination of employment.<sup>60</sup> Plaintiff was terminated at the age of sixty-two and filed a charge with the Equal Employment Opportunity Commission (EEOC) claiming a violation of the Age Discrimination in Employment Act (ADEA).<sup>61</sup> Plaintiff then brought suit against Interstate, his employer, alleging a violation of the ADEA.<sup>62</sup> Interstate moved to compel arbitration.<sup>63</sup> The District Court denied the motion, but the Fourth Circuit reversed because it did not find that Congress intended to preclude enforcement of agreements to arbitrate claims under the ADEA.<sup>64</sup>

Plaintiff argued that the compulsory arbitration of claims would be inconsistent with the statutory framework and purposes of the ADEA.<sup>65</sup> Specifically, he argued that enforcing the arbitration agreement would undermine the important social policy advanced by the ADEA of

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<sup>56</sup> *Id.* at 628.

<sup>57</sup> *Id.* at 627.

<sup>58</sup> *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991).

<sup>59</sup> *Id.* at 23.

<sup>60</sup> *See id.* at 23.

<sup>61</sup> *See id.*

<sup>62</sup> *See id.*

<sup>63</sup> *Id.* at 24.

<sup>64</sup> *Gilmer*, 500 U.S. at 24.

<sup>65</sup> *Id.* at 27.

preventing discrimination.<sup>66</sup> Plaintiff also claimed that enforcing the arbitration agreement would undermine the role of the EEOC in enforcing the ADEA.<sup>67</sup> Additionally, plaintiff contended that Congress provided a judicial forum for the ADEA, and therefore compulsory arbitration is improper because it deprived individuals of this forum.<sup>68</sup>

The Supreme Court rejected all of plaintiff's arguments. First, the Court made clear that although arbitration focuses on specific disputes, judicial resolution of a claim also focuses on the specific dispute in front of the court.<sup>69</sup> Both of these mechanisms to resolve disputes can further important social policies;<sup>70</sup> so long as a claimant can still pursue her cause of action in some forum, the statute still serves its remedial and deterrent functions.<sup>71</sup>

Secondly, the Supreme Court was not persuaded that enforcing an arbitration agreement would interfere with an executive agency's role in enforcing a statute.<sup>72</sup> Prior to the EEOC bringing a suit, the agency is tasked with using "informal methods of conciliation, conference, and persuasion" to bring about voluntary compliance with the statute.<sup>73</sup> Additionally, even if someone is subject to an arbitration agreement, she is still free to file a charge with the EEOC.<sup>74</sup> Also, the EEOC is not limited to enforcement actions by individuals who file charges with the agency; the EEOC has independent authority to investigate claims of discrimination.<sup>75</sup>

Furthermore, the Court found that there was no evidence that Congress intended to preclude waiver of the judicial forum under the statute.<sup>76</sup> The Court stated that had Congress

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<sup>66</sup> *See id.*

<sup>67</sup> *See id.* at 28.

<sup>68</sup> *See id.* at 29.

<sup>69</sup> *Id.* at 27-28.

<sup>70</sup> *Gilmer* 500 U.S. at 28.

<sup>71</sup> *Id.* at 28.

<sup>72</sup> *Id.*

<sup>73</sup> *See id.* at 27.

<sup>74</sup> *Id.* at 28.

<sup>75</sup> *Id.*

<sup>76</sup> *Gilmer*, 500 U.S. at 29.

intended to include protection against waiver of the right to a judicial forum, it would have been made clear in either the text or legislative history.<sup>77</sup> Instead, the Court found that Congress intended for parties to resolve claims flexibly.<sup>78</sup> The Court again cited to the legislative provision that requires the EEOC to first pursue voluntary compliance prior to initiating proceedings against an employer.<sup>79</sup> Plaintiff could not establish that Congress intended to protect the right to a judicial forum against waiver, and there was a great deal of evidence that Congress intended to encourage informal settlement over judicial proceedings.

Plaintiff advanced a second attack against the arbitration agreement. He argued that the procedural protections provided by arbitration were inconsistent with the ADEA.<sup>80</sup> First, he argued that the arbitration panels would be biased.<sup>81</sup> He also argued that the limited discovery provided by arbitration would be insufficient to prove discrimination.<sup>82</sup> In addition, he argued that a failure to issue written opinions will undermine both public knowledge of employer practices and the ability to obtain effective appellate review of an arbitration panel's decision.<sup>83</sup> Finally, he challenged arbitration procedures because they generally do not provide for broad equitable relief or class actions.<sup>84</sup>

The Supreme Court rejected these attacks, and made clear that it will not strike down arbitration agreements based on assumptions about insufficient procedural protections within arbitration, because they “are far out of step with [the Court’s] current strong endorsement of the federal statutes favoring this method of resolving disputes.”<sup>85</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 29.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 30.

<sup>81</sup> *Id.*

<sup>82</sup> *Gilmer*, 500 U.S. at 31.

<sup>83</sup> *Id.* at 31-32.

<sup>84</sup> *Id.* at 32.

<sup>85</sup> *Id.* at 30.

As to plaintiff's claim of bias, the Court refused to entertain a presumption of bias.<sup>86</sup> Additionally, the New York Stock Exchange rules, which governed Gilmer's specific arbitration agreement, contained protections against biased panels.<sup>87</sup> The parties were to be informed of the arbitrators' backgrounds, and each party was allowed one peremptory challenge and unlimited challenges for cause.<sup>88</sup> Finally, there was no need to prospectively protect against bias because courts can overturn decisions of arbitrators where there is "evident partiality or corruption in the arbitrators."<sup>89</sup>

The Court was also deeply skeptical about the discovery argument<sup>90</sup> because the Court could not see why discrimination claims needed more extensive discovery than claims under either the Racketeer Influence and Corrupt Organization Act (RICO) or the Sherman Antitrust Act, both of which it had previously held were arbitrable.<sup>91</sup> In plaintiff's case, the agreement provided various discovery type protections. For example, the rules that governed plaintiff's arbitration with the New York Stock Exchange provided for document production, information requests, depositions, and subpoenas, making the permissible discovery quite extensive and less problematic.<sup>92</sup> Finally, the Court explained that part of the tradeoff for more limited discovery is the increased simplicity, informality, and expeditious nature of the proceedings.<sup>93</sup> Additionally, the court held that even if an agreement did not require a written opinion, that alone was not a reason to find an agreement to arbitrate a statutory claim unenforceable.<sup>94</sup>

Plaintiff also attacked arbitration agreements contained in employment agreements more

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Gilmer* 500 U.S. at 30.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 31.

<sup>91</sup> *Id.*

<sup>92</sup> *See Id.*

<sup>93</sup> *Id.* at 31.

<sup>94</sup> *Gilmer*, 500 U.S. at 32.

broadly.<sup>95</sup> Gilmer argued that employers and employees will frequently have unequal bargaining power.<sup>96</sup> He argued that due to this inequality, arbitration agreements arising out of employment relationships should not be enforced.<sup>97</sup>

The Court also held that this was insufficient to strike down the agreement. Mere inequality in bargaining power is not enough to hold that employment arbitration agreements are never enforceable.<sup>98</sup> While courts should still strike down an agreement if it resulted from “the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract,”<sup>99</sup> there is no per se rule that an arbitration agreement in an employment context is unenforceable.<sup>100</sup>

The Court also rejected Plaintiff’s argument claiming that the agreement was unenforceable because it did not provide for class action. The Court held that any concerns about collective action were not implicated in *Gilmer* because the rules of arbitration through the Stock Exchange did not limit the type of relief that an arbitrator could provide, and in fact the rules explicitly allowed for collective proceedings.<sup>101</sup> The Court stated that “even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the ADEA provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred;”<sup>102</sup> however, it also noted that these agreements would not bar the EEOC from bringing an action seeking class-wide and equitable relief.<sup>103</sup>

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<sup>95</sup> See *id.* at 32-33.

<sup>96</sup> *Id.* at 32-33.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 33.

<sup>99</sup> *Id.*

<sup>100</sup> *Gilmer* 500 U.S. at 33.

<sup>101</sup> *Id.* at 32.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

The collective action language is likely the most significant for *D.R. Horton*. However, it is important to note two things. First, plaintiff was suing in his individual capacity and therefore the issue was not before the court. Additionally, the provision involved in the ADEA is an opt-in provision as opposed to a non-waivable provision like Section 8(a)(1).<sup>104</sup>

Consequently, as a result of *Gilmer*, a court will only refuse to enforce an agreement to arbitrate a right contained within a federal statute if (1) the defense is one that applies to a contract at law, or (2) if Congress intended to prohibit waiver of a judicial forum.<sup>105</sup> Moreover, the court left open three ways to discover this intention: legislative text, legislative history, or an “inherent conflict” between arbitration and the statute’s underlying purposes.<sup>106</sup>

### 3. *AT&T Mobility LLC v. Concepcion*<sup>107</sup>

In *AT&T Mobility LLC v. Concepcion*, the plaintiffs attacked a consumer arbitration agreement.<sup>108</sup> The agreement required that all relevant disputes be arbitrated and could only be brought in the disputant’s individual capacity.<sup>109</sup> Plaintiffs sued as a class alleging misrepresentation of phone prices, and AT&T moved to compel arbitration.<sup>110</sup> The District Court denied the motion based on California’s doctrine of unconscionability.<sup>111</sup> The doctrine had three requirements: (1) a consumer contract of adhesion;<sup>112</sup> (2) involving predictably small amounts of money; and (3) a plaintiff must allege that the party with superior bargaining power executed a scheme to “deliberately cheat large numbers of consumers out of individually small

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<sup>104</sup> See 29 U.S.C. §216(b) (requiring similarly situated plaintiffs to opt-in to an action).

<sup>105</sup> *Gilmer*, 500 U.S. at 26.

<sup>106</sup> *Id.*

<sup>107</sup> *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011)

<sup>108</sup> *Concepcion*, 131 S. Ct. at 1744.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 1745.

<sup>112</sup> An adhesion contract is a standard form contract prepared by one party to be signed by another who is in a weaker position who does not have a genuine choice of the terms in the agreement. BLACK’S LAW DICTIONARY (9th. ed. 2009).

sums of money.”<sup>113</sup> If those three requirements are met, then, according to California, the agreement works to exempt the party from responsibility for its conduct, and is therefore unconscionable.<sup>114</sup>

The plaintiffs argued that because the class waiver doctrine applies both to arbitration agreements and to contracts regulating lawsuits, the FAA did not apply.<sup>115</sup> The Court rejected this argument.<sup>116</sup> First, it expanded the application of the FAA, stating that the FAA’s preemptive effect may extend “even to grounds traditionally thought to exist at law or in equity for the revocation of any contract.”<sup>117</sup> The Court compared the instant situation to a doctrine that found agreements unconscionable if they did not provide for judicially monitored discovery.<sup>118</sup> Thus, it expanded the analysis to preclude doctrines that not only directly target arbitration, but also those that would disproportionately affect arbitration agreements.<sup>119</sup> Ultimately, the FAA was interpreted to prohibit a state’s preference for procedures that are incompatible with arbitration, due to preemption.<sup>120</sup>

Next, the Court expansively defined the purpose of the FAA as ensuring that arbitration agreements are enforced according to their terms in order to facilitate streamlined proceedings.<sup>121</sup> Because class proceedings require procedural protections, it is inconsistent with the fundamental attributes of arbitration, and therefore a doctrine prohibiting class waivers is pre-empted by the FAA.<sup>122</sup> As a result, while the savings clause of the FAA permits defenses to contracts as exist at law or equity, that clause does not apply to contract defenses based in state law that have a

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<sup>113</sup> *Concepcion*, 131 S.Ct. at 1746.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1748.

<sup>117</sup> *Id.* at 1747

<sup>118</sup> *Id.*

<sup>119</sup> *Concepcion*, 131 S. Ct. at 1747.

<sup>120</sup> *Id.* at 1748.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 1753.

disproportionate impact on arbitration agreements.<sup>123</sup>

4. *CompuCredit Corp. v. Greenwood*<sup>124</sup>

In *CompuCredit Corp. v. Greenwood* plaintiffs attacked an agreement to arbitrate a dispute in a credit repair service agreement.<sup>125</sup> The plaintiffs sued in district court under the Credit Repair Organizations Act, and the company moved to compel arbitration.<sup>126</sup> The court denied the motion, concluding that Congress intended claims under the Credit Repair Organizations Act to be non-arbitrable.<sup>127</sup>

The Supreme Court on review, reiterated that agreements to arbitrate statutory claims should be enforced according to their terms even if the claim is based on a federal statute.<sup>128</sup> Congress can override the FAA’s presumption, however, if it gives a contrary command.<sup>129</sup>

The plaintiffs in *CompuCredit* asserted that Congress gave that contrary command, focusing on the specific language in the statute.<sup>130</sup> One provision in the statute required that a credit repair organization provide a statement to the consumer prior to executing a contract.<sup>131</sup> One sentence in that statement read: “[Y]ou have a right to sue a credit repair organization that violates the Credit Repair Organization Act.”<sup>132</sup> Another provision in the statute read that any waiver by any consumer of any “protection provided by or any right of the consumer under this subchapter” (1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person.<sup>133</sup>

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<sup>123</sup> *Id.* at 1748.

<sup>124</sup> *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012)

<sup>125</sup> *Id.* at 668.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 669.

<sup>129</sup> *Id.*

<sup>130</sup> *See CompuCredit*, 132 S. Ct at 669.

<sup>131</sup> 15 U.S.C. §1679c(a) (2006).

<sup>132</sup> *CompuCredit*, 132 S. Ct. at 669.

<sup>133</sup> *Id.*



Despite this language, the Supreme Court found no Congressional intent to preclude waiver of a judicial forum.<sup>134</sup> It determined that the right created by the statute was a right to receive the statement outlining the rights within the statute, not the right to bring an action in a court.<sup>135</sup> Additionally, the use of words such as “action,” “class action,” and “court” are not sufficient even when used throughout a statute to create a non-waivable right to a judicial forum.<sup>136</sup>

### C. Summary of the Defenses

Despite these decisions and many others challenging arbitration agreements that apply to statutory claims, the Court has left open a few avenues of attack. First, Congress can prohibit parties from waiving judicial remedies for particular federal statutory rights.<sup>137</sup> Congress does not have to do this explicitly in the text of the statute; Congressional intent can be found in an act’s text, the legislative history, or “an inherent conflict between arbitration and [the statute’s] underlying purposes.”<sup>138</sup> The Court has recently raised the bar for this defense, and requires a contrary congressional demand.<sup>139</sup> Second, an agreement to arbitrate a statutory claim can be attacked based on “grounds as exist at law or in equity for the revocation of any contract.”<sup>140</sup> In fact, the Court specifically left open defenses based on fraud and duress.<sup>141</sup> While generally applicable contract defenses such as fraud, duress, and unconscionability are available as a defense against an arbitration agreement, agreements cannot be invalidated by defenses that “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate

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<sup>134</sup> *Id.* at 669-70.

<sup>135</sup> *Id.* at 670.

<sup>136</sup> *Id.*

<sup>137</sup> *See Gilmer v. Interstate/Johnson Corp.*, 500 U.S. 20, 26 (1991).

<sup>138</sup> *See id.* at 26.

<sup>139</sup> *See Compucredit* 132 S. Ct. at 669.

<sup>140</sup> *Gilmer*, 500 U.S. at 33 (*citing* 9 USC § 2).

<sup>141</sup> *Id.* (“Courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds ‘for the revocation of any contract.’”)

is at issue.”<sup>142</sup> Given that class treatment is inconsistent with the FAA’s policy of enforcing arbitration agreements according to their terms, states cannot coerce class arbitration through its doctrine of unconscionability.<sup>143</sup>

Two defenses are available to the enforceability of an agreement to arbitrate a statutory right. First, arbitration agreements are automatically unenforceable if Congress precluded waiver of the right under the statute.<sup>144</sup> Importantly, the right must be a covered right under the statute, and not merely a right to have a claim heard.<sup>145</sup> If the only right being waived is the right to a judicial forum, then Congress must use explicit language that pre-dispute arbitration agreements are unenforceable for the specific statutory claims at issue.<sup>146</sup> Absent such explicit language, an arbitration agreement is enforceable.<sup>147</sup> The Supreme Court has not held that any statutory right can be waived by an arbitration agreement. Instead, the Court generally finds that no statutory right is at issue.<sup>148</sup> It will classify the provision as a forum selection question, and will enforce the agreement.<sup>149</sup> The remaining defense is grounds as exist at law or in equity.<sup>150</sup> If the source of the legal or equitable ground is state law, however, it cannot be based on a mere distaste for arbitration.<sup>151</sup> Thus, while a state cannot pass a law, or hold a common law doctrine that is inconsistent with the FAA, presumably Congress may still pass a statute that is fundamentally inconsistent with the FAA, making an agreement to arbitrate unenforceable in

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<sup>142</sup> AT&T Mobility v. Concepcion, 131 S.Ct. 1740, 1746 (*citing* Doctor’s Assocs., Inc. v. Casarotto, 517 US 681, 687 (1996)).

<sup>143</sup> *Id.* at 1748 (2011).

<sup>144</sup> *See Gilmer*, 500 U.S. at 26.

<sup>145</sup> *See CompuCredit Corp. v. Greenwood*, 131 S. Ct. 665, 665 (2012).

<sup>146</sup> *Id.* at 672.

<sup>147</sup> *See id.*

<sup>148</sup> *See id.* at 670.

<sup>149</sup> *Cf. id.*

<sup>150</sup> *See AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1745 (2011).

<sup>151</sup> *Id.* at 1748, 1753.

certain circumstances.<sup>152</sup>

### III: Section 7: Concerted Activity and Legal Action

#### A. Overview of Section 7 Protection

For the purposes of this Comment, the relevant provision of the NLRA is Section 7, which grants statutory employees<sup>153</sup> the right to engage in concerted activities for the “purpose of collective bargaining or other mutual aid or protection.”<sup>154</sup> The Board requires two elements for activity to be protected under the statute.<sup>155</sup>

First the activity must be “concerted.”<sup>156</sup> There are two types of “concerted” activities.<sup>157</sup> Action by a group is always a type of concerted activity,<sup>158</sup> but action by an individual can also be considered “concerted.”<sup>159</sup> The applicable test is whether an activity is engaged in “with or on the authority of other employees,” and not “solely on behalf of the employee himself.”<sup>160</sup>

This leaves two types of individual action covered by the term “concerted.” One type of individual action is where an individual employee seeks to initiate or prepare for group action.<sup>161</sup> This includes actions such as circulating a petition, or simply discussing the possibility of initiating group action with another employee.<sup>162</sup> Additionally, “concerted activity” includes

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<sup>152</sup> See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). (holding that such an intention of waiver preclusion could be found in either text, legislative history, or an “inherent” conflict” between arbitration and a federal statute’s purposes.)

<sup>153</sup> Section 2 excludes persons employed as agricultural workers, domestic workers in the service of someone’s home, individuals employed by their parents, independent contractors, supervisors, a person employed under the Railway Labor Act, or any person defined under the NLRA as an employer. See 29 U.S.C. § 152 (2006).

<sup>154</sup> 29 U.S.C. § 157 (2006).

<sup>155</sup> Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 WAKE FOREST L.REV. 173, 187.

<sup>156</sup> See *Meyers Industries*, 281 N.L.R.B. 882, 885 (1986).

<sup>157</sup> See *id.* at 886-887.

<sup>158</sup> See *id.* at 884.

<sup>159</sup> *Id.* at 885.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 887.

<sup>162</sup> *Meyers Industries*, 281 N.L.R.B. at 887.

situations where an individual brings a group complaint to the attention of management.<sup>163</sup> To qualify under this category, the individual employee must at a minimum engage in discussions with other employees, even though there is no explicit requirement that the individual be “authorized” to speak on behalf of others in some formal agency sense.<sup>164</sup> In fact, even if the group initiating the complaint in the presence of the individual employee does not know what the employee plans to do, the activity may still be “concerted.”<sup>165</sup>

Second, the activity must be for the purpose of “mutual aid or protection.”<sup>166</sup> This phrase reaches activities by employees that seek to improve working conditions.<sup>167</sup> The phrase also has a broad reach in terms of where the activity takes place. The Supreme Court, in *Eastex, Inc. v. NLRB*, has held that Congress did not wish to limit the statute’s protection to concerted activity that took place within the immediate employer-employee relationship.<sup>168</sup> This is why Congress included the broader language of “mutual aid or protection” after it had used both “self-organization” and “collective bargaining” within Section 7 of the NLRA.<sup>169</sup> The Court explicitly held that the NLRA protects employees from retaliation by their employer when they attempt to improve working conditions by using either a judicial or administrative forum.<sup>170</sup>

#### B. Section 7 and *D.R. Horton*

The above two sections have set up the potential conflict. The MAA at issue in *D.R. Horton* prohibited individuals from pursuing any dispute resolution channel other than arbitration that was agreed upon in the MAA.<sup>171</sup> In that agreement, the employees were

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<sup>163</sup> *Id* at 886.

<sup>164</sup> *See* *Compuware Corp. v. NLRB*, 134 F.3d 1285, 1288 (6th Cir. 1998).

<sup>165</sup> *Meyers Industries*, 281 N.L.R.B. at 886.

<sup>166</sup> *See* *Hodges*, *supra* note 155 at 187.

<sup>167</sup> *See* *Hodges*, *supra* note 155 at 196; *Eastex, Inc v. NLRB*, 437 U.S. 556, 566 (1978).

<sup>168</sup> *Eastex*, 437 U.S. at 565.

<sup>169</sup> *Id.* at 567.

<sup>170</sup> *Id.* at 566.

<sup>171</sup> *D.R. Horton*, 357 N.L.R.B. No. 187, \*1 (2012).

prohibited from consolidating claims.<sup>172</sup> When Mr. Cuda filed his notice of intent to arbitrate his dispute, he alleged that he was denied his statutory right to overtime due to being misclassified as “exempt.”<sup>173</sup> Consequently, his suit, which was seeking additional pay, sought to improve his working conditions by restoring his right to overtime pay.<sup>174</sup> As a result, this action fell within the “for the purpose of mutual aid and protection” prong because it was directed to improve working conditions.<sup>175</sup> Additionally, he filed a notice of intent to arbitrate representing a class of “similarly situated superintendents.”<sup>176</sup> This suit was therefore “concerted” because it was an action by an individual employee seeking to initiate or prepare for group action.<sup>177</sup> Although the MAA prohibited action within the protection of Section 7 of the NLRA, the question in front of the Board was whether the presence of an arbitration agreement, and therefore the federal policy promoting individual arbitration of disputes, meant that the Section 7 restriction was somehow lawful.

#### **IV: *D.R. Horton* -- Collective Action and Arbitration Agreements**

##### A. Facts of the Case

D. R. Horton was a homebuilder with operations in multiple states.<sup>178</sup> In 2006, it decided to condition employment on the signing of the MAA.<sup>179</sup> The MAA provided (1) that all disputes relating to employment will be determined by final and binding arbitration, (2) that the arbitrator only had the authority to hear the claims of an individual employee and could not consolidate claims of employees or fashion relief as a class or group of employees in one proceeding, and (3)

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *See Eastex*, 437 U.S. at 566.

<sup>175</sup> *Id.* at 566.

<sup>176</sup> *D.R. Horton*, 357 N.L.R.B. No. 184, \*1 (2012).

<sup>177</sup> *Meyers Industries*, 281 N.L.R.B. 882, 886 (1986).

<sup>178</sup> *D.R. Horton*, 357 N.L.R.B. at \*1.

<sup>179</sup> *Id.*

that the signatory employee waived the right to file a lawsuit or other civil remedy.<sup>180</sup>

Michael Cuda, employed by D.R. Horton as a superintendent, decided to challenge his status as “exempt”<sup>181</sup> from the protections of the FLSA.<sup>182</sup> His attorney gave notice of intent to initiate arbitration on behalf of Michael Cuda and a nationwide class of similarly situated superintendents.<sup>183</sup> The employer responded that the notice was ineffective, citing the provision of the MAA stating that the arbitrator “may hear only Employee’s individual claims and does not have the 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.”<sup>184</sup> Michael Cuda then filed an Unfair Labor Practice charge with the Board.<sup>185</sup> The ALJ found that the Employer violated Section 8(a)(1) and (4) of the NLRA<sup>186</sup> because the MAA’s language could be reasonably interpreted to prohibit access to the Board’s procedures.<sup>187</sup> The ALJ did not find that the MAA violated Section 8(a)(1) of the NLRA<sup>188</sup> because there was no direct Board precedent, and recent Supreme Court pronouncements made it clear that arbitration was a matter of consent.<sup>189</sup> Consequently, the ALJ did not find that the MAA’s bar of class or collective activity itself violated the Act.<sup>190</sup>

#### B. The Board’s Holding that Class Action Waivers Contained in Arbitration Agreements are Unfair Labor Practices

The Board reached its holding under a multi-step process. First, it found that employees

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<sup>180</sup> *Id.*

<sup>181</sup> Various categories of employees are exempt from minimum wage and maximum hour protections. *See* 29 U.S.C. § 213 (2006).

<sup>182</sup> *D.R. Horton*, 357 N.L.R.B., at \*1.

<sup>183</sup> *Id.*

<sup>184</sup> *See id.*

<sup>185</sup> *Id.* at \*2.

<sup>186</sup> 29 U.S.C. §§ 158(a)(1),(4) (2006)

<sup>187</sup> *D.R. Horton*, 357 N.L.R.B., at \*2.

<sup>188</sup> *Id.* at \*23.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

have a right to engage in class-wide or collective litigation either in court or before an arbitrator.<sup>191</sup> Second, the MAA, which constituted a workplace rule, explicitly prohibited exercising this type of protected activity, making it unlawful.<sup>192</sup> Third, it held that the fact that the employee agreed to the restriction of Section 7 activity was irrelevant to the analysis because Section 7 rights are not waivable by contract.<sup>193</sup> Fourth, the Board found that its holding was not in conflict with the FAA<sup>194</sup> because the FAA expressly permits traditional equitable and legal defenses to their enforceability.<sup>195</sup>

### 1. Section 7 Protects Class-Wide or Collective Litigation and Arbitration

The Board began by clarifying that employees have a right to engage in collective or class-wide litigation, which is protected by Section 7 of the NLRA.<sup>196</sup> Section 7's protection extends beyond the workplace,<sup>197</sup> and in fact, the court expressly stated that employees are protected when they resort to administrative or judicial forums.<sup>198</sup>

Furthermore, Section 7 extends beyond judicial and administrative forums, and includes advancing a collective workplace grievance through arbitration.<sup>199</sup> This would be true either if a collective bargaining agreement created an arbitration procedure, or if the procedure was unilaterally imposed by the employer, as was the case in *D.R. Horton*.<sup>200</sup> If the employee was pursuing a collective workplace grievance through an arbitration mechanism that was created through a collective bargaining agreement, it would be considered an “ongoing process of

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<sup>191</sup> *Id.* at \*2-4.

<sup>192</sup> *Id.* at \*6.

<sup>193</sup> *D.R. Horton*, 357 N.L.R.B. at \*6.

<sup>194</sup> 9 U.S.C. § 2 (2006).

<sup>195</sup> *See D.R. Horton*, 357 N.L.R.B. at \*11.

<sup>196</sup> *Id.* at \*3.

<sup>197</sup> *Eastex Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978).

<sup>198</sup> *Id.*

<sup>199</sup> *D.R. Horton*, 357 N.L.R.B., at \*3.

<sup>200</sup> *Id.* at \*5.

employee concerted activity.”<sup>201</sup> In the present case, however, the employee was attempting to advance a grievance about misclassification that affected numerous employees through an arbitration mechanism that was unilaterally imposed by the employer.<sup>202</sup> The pursuit of the grievance was “concerted,” and therefore the employee’s activity was protected, because a single individual advanced the grievance attempting to initiate group action.<sup>203</sup>

## 2. Section 8(a)(1) Makes Restrictions of the Right to Collective or Class Litigation and Arbitration Unlawful

Section 7 of the NLRA protects the pursuit of collective workplace grievances through either litigation or arbitration.<sup>204</sup> Section 8(a)(1) of NLRA goes further and makes it unlawful for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in” Section 7.<sup>205</sup>

In *D.R. Horton*, employment was conditioned on signing the MAA, so the Board analyzed the MAA as a unilaterally imposed workplace rule.<sup>206</sup> There is a two-step inquiry for unilaterally imposed workplace rules.<sup>207</sup> The first inquiry is whether the rule explicitly restricts Section 7 activity.<sup>208</sup> If it does, the rule is unlawful.<sup>209</sup> If the rule does not explicitly restrict Section 7 activities, then a reviewing party would analyze whether: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.<sup>210</sup> If any of those three factors are met, then the rule is unlawful.<sup>211</sup>

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<sup>201</sup> *Meyers Industries*, 281 N.L.R.B. 882, 888 (1986).

<sup>202</sup> *D.R. Horton*, 357 N.L.R.B. at \*1.

<sup>203</sup> *Id.* at \*3.

<sup>204</sup> *Eastex Inc. v. NLRB.*, 437 U.S. 556, 565-566 (1978).

<sup>205</sup> 29 U.S.C. § 158(a)(1) (2006).

<sup>206</sup> *D.R. Horton*, 357 N.L.R.B., at \*5.

<sup>207</sup> *See Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646, 646-47 (2004)

<sup>208</sup> *D.R. Horton*, 357 N.L.R.B. at \*5.

<sup>209</sup> *Lutheran Heritage*, 343 N.L.R.B. at 646-47.

<sup>210</sup> *Id.*



The Board held that the MAA explicitly restricted Section 7 activity, and was therefore unlawful.<sup>212</sup> This was a straightforward holding for the Board. Section 7 provided a right to engage in either collective litigation or arbitration.<sup>213</sup> The MAA, which was a unilaterally imposed workplace rule, expressly prohibited both by mandating that all claims go to arbitration and by prohibiting the arbitrator from consolidating claims.<sup>214</sup> As a result, the MAA expressly restricted Section 7 activity.

### 3. Section 7 Rights Cannot be Waived by Individual Agreements

The fact that the employee agreed to the MAA was irrelevant to the Board's analysis.<sup>215</sup> The Board began its discussion by citing four cases where it held that individual contracts where the employee gave up Section 7 rights were unlawful even when the employee received valuable consideration, such as subscriptions to a stock purchase plan.<sup>216</sup> Then, the Board proceeded to discuss two different Supreme Court cases that held that individual contracts that restrict rights under the NLRA are unenforceable.<sup>217</sup> In *National Licorice Co. v. NLRB*,<sup>218</sup> the Court held that a contract that simply discouraged a discharged employee from presenting a grievance "through a labor organization or his chosen representative, or in any way except personally" was unenforceable and unlawful because it was a means of avoiding the NLRA's policy.<sup>219</sup> The Court stated that employers cannot frustrate the NLRA by "inducing their workmen to agree not to demand performance of the duties which it imposes."<sup>220</sup>

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<sup>211</sup> *Id.*

<sup>212</sup> *D.R. Horton*, 357 N.L.R.B., at \*5.

<sup>213</sup> *See infra* Sec. IV.B.1.

<sup>214</sup> *D.R. Horton*, 357 N.L.R.B. at \*1.

<sup>215</sup> *See id.* at \*6

<sup>216</sup> *See id.* at \*5 n. 7.

<sup>217</sup> *See id.* at \*6.

<sup>218</sup> *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940).

<sup>219</sup> *See id.* at 360.

<sup>220</sup> *Id.*

The Court later reaffirmed this principle in *J.I. Case Co. v. NLRB*,<sup>221</sup> stating that “wherever private contracts conflict with the Board’s functions of preventing unfair labor practices, they obviously must yield or the [NLRA] would be reduced to a futility.”<sup>222</sup> In fact, the Board had decided a case with similar facts much earlier. In *J.H. Stone & Sons*,<sup>223</sup> the Board held an arbitration clause unlawful.<sup>224</sup> There, the employment agreement required the employee to agree to individually arbitrate any claim in the event of continued disagreement with her employer.<sup>225</sup> The Board struck down the agreement reasoning that it denied the employee the right to act collectively at the earliest stage of the dispute, and compelled the employee to pit her “individual bargaining strength against the superior bargaining power of the employer.”<sup>226</sup>

The fact that the employees retained other rights protected by Section 7 is insufficient to save the MAA.<sup>227</sup> For example, any agreement where an employee not covered by a collective bargaining agreement waives the right to strike is unlawful.<sup>228</sup> It does not matter if the employer permits the employee to bring forward grievances, petition to improve working conditions, or simply engage in discussions with other employees.<sup>229</sup> Once the employer forces the employees to give up their right to strike, the agreement is per se unlawful.<sup>230</sup> Just as the strike is a means for realizing the demands protected by Section 7 through the exertion of collective pressure and equalizing bargaining positions, so too is engaging in collective litigation or arbitration.

#### 4. The Board’s Holding Does Not Conflict with the Federal Arbitration Act

Finally, the Board held that its decision that the MAA was an unlawful restriction of

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<sup>221</sup> *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

<sup>222</sup> *D.R. Horton*, 357 N.L.R.B. No. 184, \*6 (2012) (*citing* *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944)).

<sup>223</sup> *J.H. Stone & Sons*, 33 N.L.R.B. 1014 (1941).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *D.R. Horton*, 357 N.L.R.B. at \*8.

<sup>228</sup> *Id.*

<sup>229</sup> *See id.*

<sup>230</sup> *Id.*

Section 7 activity did not conflict with the FAA or the liberal pro-arbitration policy implied under the FAA.<sup>231</sup> While courts are not required to defer to this holding, as it is outside of the Board's realm of expertise,<sup>232</sup> the Board's reasoning is instructive nonetheless.

The Board stated that the purpose of the FAA was to reverse the longstanding judicial hostility to arbitration agreements and to place them on the same footing as other contracts.<sup>233</sup> The Board conceded that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."<sup>234</sup> Despite this, the Board recognized that arbitration agreements to resolve statutory claims in an arbitral forum are not enforceable if a party forgoes the substantive rights given by the statute.<sup>235</sup> The Board found that there was no conflict between the FAA and the NLRA, in the alternative it reasoned that if there was a conflict between the two statutes, the NLRA's protection should lead to non-enforcement of the MAA.<sup>236</sup> The Board advanced three arguments in support of its holding that the FAA was not in conflict with the NLRA.<sup>237</sup>

First, the Board argued that recognizing a right under Section 7 did not uniquely affect arbitration, and therefore did not frustrate the purpose of the FAA.<sup>238</sup> The Board reached this conclusion through a two-step process.<sup>239</sup> First, it narrowly defined the pro-arbitration policy of the FAA as preventing courts from treating arbitration agreements less favorably than other private contracts.<sup>240</sup> Next, it cited and discussed prior court precedent, finding that when private contracts conflict with the NLRA, they must yield to the NLRA or the NLRA would be reduced

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<sup>231</sup> *Id.* at \*10.

<sup>232</sup> *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002).

<sup>233</sup> *D.R. Horton*, 357 N.L.R.B., at \*11.

<sup>234</sup> *Id.* (citing *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

<sup>235</sup> *D.R. Horton*, 357 N.L.R.B., at \*11 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)).

<sup>236</sup> *Id.* at \*10.

<sup>237</sup> *Id.* at \*11-16.

<sup>238</sup> *Id.* at \*11.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

to a futility.<sup>241</sup> Moreover, the Board found that the MAA would have been just as unlawful if it allowed access to the courts but required that all litigation claims be pursued individually.<sup>242</sup> Since the agreement would have been unlawful had it said nothing about arbitration, the Board found that its holding did not undermine the strong pro-arbitration policy of the FAA.<sup>243</sup>

The Board did not enforce the agreement for a second reason; the MAA actually precluded the exercise of substantive rights under federal law.<sup>244</sup> While Congress intended the FAA to compel courts to enforce arbitration agreements according to their terms, the Board found that the savings clause contained in the FAA<sup>245</sup> allowed for defenses in law and equity.<sup>246</sup> Given that the employees here were being required to waive rights guaranteed to them under the NLRA, the Board found that these rights were not merely procedural, but constituted “the core substantive right protected by the NLRA.”<sup>247</sup> The Board read *Gilmer* to preclude enforcement of an arbitration agreement, if enforcement would require waiving a statutory right.<sup>248</sup> While *Gilmer* upheld an agreement to arbitrate a claim under a statute that involved a provision that provided for a collective action, the Board distinguished *Gilmer* on its facts, indicating that the claim in *Gilmer* was an individual claim.<sup>249</sup> Thus, *Gilmer*’s holding that employees can effectively vindicate their statutory rights under the ADEA through arbitration is inapplicable to the MAA’s legality.<sup>250</sup> Instead, the Board clarified that the relevant question was whether employers can condition employment on employees waiving their statutory right to engage in

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<sup>241</sup> *D.R. Horton*, 357 N.L.R.B. at \*11 (citing *J.I. Case Co.*, 321 U.S. 332, 337 (1944)).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at \*11.

<sup>244</sup> *Id.* at \*13.

<sup>245</sup> “Save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (2006).

<sup>246</sup> *D.R. Horton*, 357 N.L.R.B. at \*13.

<sup>247</sup> *Id.* at \*12.

<sup>248</sup> *See id.*

<sup>249</sup> *Id.* at \*12.

<sup>250</sup> *Id.*

collective legal action on matters that touch terms and conditions of employment.<sup>251</sup>

Third, the Board held that in accommodating the competing policies,<sup>252</sup> the substantive rights provided by the NLRA outweigh the interest promoted by the FAA in an employment arbitration agreement, and therefore, which weighed in favor of non-enforcement of the MAA.<sup>253</sup> It was in this context of the balancing that the Board considered the Norris-LaGuardia Act.<sup>254</sup> The Board interpreted Section 8(a)(1)'s provision making employer restriction of collective action unlawful as an extension of the Norris-LaGuardia Act's prohibition of "yellow-dog contracts," which coerced employees to agree not to join a union in exchange for employment.<sup>255</sup> The Board found that the Norris La-Guardia Act "manifested a strong federal policy protecting employees' rights to engage in protected concerted action, including collective pursuit of litigation or arbitration."<sup>256</sup> Furthermore, the Board recognized the tension between the NLRA and the FAA as interpreted by the Supreme Court in *Concepcion* as "ensuring the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."<sup>257</sup> Despite this tension, the Board found that in the specific circumstances, enforcing the MAA would impact the federal policy promoting collective action rights of employees more significantly than not enforcing the MAA would impact the pro-arbitration policy for two reasons.<sup>258</sup> First, the Board's holding is limited to a specific class, namely employers and employees covered under the NLRA.<sup>259</sup> Second, given the limited scope of the Board's holding, the concerns about interfering with the streamlined proceedings of arbitration were less likely to

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<sup>251</sup> *See id.*

<sup>252</sup> *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 145 (2002).

<sup>253</sup> *D.R. Horton*, 357 N.L.R.B. at \*14-15.

<sup>254</sup> 29 U.S.C. §§ 101-115 (2006).

<sup>255</sup> *See D.R. Horton*, 357 N.L.R.B. at \*14.

<sup>256</sup> *Id.*

<sup>257</sup> *See id.* at \*15

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

be present in a proceeding.<sup>260</sup> Employment disputes are limited by the physical workplace, where consumer disputes, such as those presented in *Concepcion*, are much larger.<sup>261</sup> Due to the smaller scale of employment disputes, they do not raise the same concerns about procedures as were implicated in *Concepcion*.<sup>262</sup> In the context of the MAA, these two elements combined to favor the NLRA over the FAA.<sup>263</sup>

### **V: *Horton* goes to Court**

The Board's holding in *Horton* created a conflict within the Federal courts.<sup>264</sup> More specifically, many courts are not following the Board's reasoning, and instead are enforcing arbitration agreements comparable to the MAA in *Horton*.<sup>265</sup> In contrast, other courts are finding that class arbitration waiver provisions are unenforceable as an illegal restriction of Section 7 activity.<sup>266</sup>

#### **A. Decisions Finding the Class Waivers Enforceable.**

While numerous decisions in the lower courts since *Horton* have rejected its holding that class waivers in employment agreements are unlawful employment practices, two decisions provided in depth analysis regarding why the courts declined to follow the Board's decision. *Morvant v. P.F. Chang's China Bistro*,<sup>267</sup> involved two plaintiffs who brought a class action for various state law violations, including failure to provide meal and rest breaks, refusal to pay for

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<sup>260</sup> *Id.*

<sup>261</sup> *D.R Horton*, 357 N.L.R.B. at \*15.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> See *Horton Leads Courts to Disagree on Whom to Follow*, 20 NO. 3 EMPLOYER'S GUIDE FAIR LAB. STANDARDS ACT NEWSL. 3, Nov., 2012.

<sup>265</sup> See, e.g. *Delock v. Securitas Sec. Services USA, Inc.*, No. 4:11-CV-520-DPM, 2012 WL 3150391 (E.D. Ark. Aug. 1, 2012). (holding that although the arbitration agreement constrained Section 7 activity, there was no "contrary congressional command, and the FAA controls in a conflict between it and another statute if the result would be to favor litigation over arbitration"); *Morvant v. P.F. Chang's China Bistro, Inc.*, No. 11-CV-05405-YGR, 2012 WL 1604851 (N.D. Cal. May 7, 2012). (relying on *Concepcion* to find that class arbitration cannot be required, because it interferes with "fundamental attributes of arbitration").

<sup>266</sup> See *Herrington v. Waterstone Mortg. Corp.*, No. 11-cv-779-BBC, 2012 WL 1242318 (W.D. Wis. Mar. 16, 2012).

<sup>267</sup> *Morvant*, 2012 WL 1604851 at \*1.

missed breaks, failure to pay overtime compensation that was due, and failure to provide accurate wage statements.<sup>268</sup> The employer filed a motion to compel arbitration based on an arbitration agreement that read, “[a]ny dispute arising out of or related to an Employee’s employment with P.F. Chang’s” must be “resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial.”<sup>269</sup> It also contained a class waiver stating, “there will be no right or authority for any dispute to be brought, heard, or arbitrated” as a class action.”<sup>270</sup> The court held that the inclusion of a class waiver is not grounds to hold an arbitration agreement unenforceable as contrary to public policy.<sup>271</sup> In reaching this decision the court articulated a few reasons for declining to accept a public policy through the NLRA.<sup>272</sup>

First, the court found that the Board moved outside its area of expertise in reaching its holding.<sup>273</sup> The court also found that *Gilmer* exception preserving the “vindication of statutory rights” only applies when the agreement to arbitrate precludes vindicating the right under which a plaintiff brings suit.<sup>274</sup> Finally, the court held that for a statute to preclude arbitration, Congress must expressly override the FAA.<sup>275</sup>

Similarly, *Delock v. Securitas Securities Services USA, Inc.*,<sup>276</sup> dealt with whether to enforce an arbitration agreement, containing a class waiver similar to *Horton* and *Morvant*, over claims arising under the FLSA.<sup>277</sup> The *Delock* decision is more interesting than *Morvant*

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<sup>268</sup> See *Morvant*, 2012 WL 1604851, at \*1.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at \*11.

<sup>272</sup> *Id.* at \*9.

<sup>273</sup> *Id.* at \*10.

<sup>274</sup> *Morvant*, 2012 WL 1604851, at \*11.

<sup>275</sup> *Id.*

<sup>276</sup> *Delock v. Securitas Sec. Services USA, Inc.*, No. 4:11-CV-520-DPM, 2012 WL 3150391 (E.D. Ark. Aug. 1, 2012).

<sup>277</sup> *Id.* at \*1.

because the court deferred to the Section 7 reasoning of the Board.<sup>278</sup> Despite the court’s finding of a Section 7 restriction, it still chose to enforce the class waiver.<sup>279</sup> First, the *Delock* court criticized the Board’s historical argument, holding that the FAA was reenacted after the NLRA was reenacted.<sup>280</sup> As a result, the court reasoned that because the FAA was reenacted after the NLRA, the NLRA’s provision repealing any *previous* existing contradictory laws does not resolve any conflict between the statutes.<sup>281</sup>

The court then found that there is no “contrary congressional command,” as is required by *CompuCredit*, to override the FAA.<sup>282</sup> It discovered this through a multi-step process.<sup>283</sup> First it analogized the NLRA’s protection of concerted activities to the FLSA’s provision offering employees a statutory provision for proceeding with a collective action, which the *Gilmer* court considered waivable.<sup>284</sup> After that analogy, the *Delock* court held without further discussion that the NLRA’s text was insufficient to resolve the dispute in favor of making the class waiver unenforceable.<sup>285</sup>

While the text did not provide the “clear congressional command,” the court found that there was a conflict between the purposes of the NLRA, collective action, and the FAA, individual dispute arbitration, but that the NLRA must bend to the FAA for a few reasons.<sup>286</sup> As a preliminary matter, the court noted that collective arbitration cannot be manufactured, and relies on consent.<sup>287</sup> Because class arbitration cannot be manufactured absent consent, any collective legal action that was to proceed could not move forward in arbitration unless the

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<sup>278</sup> *Id.* at \*4.

<sup>279</sup> *Id.* at \*6.

<sup>280</sup> *Id.* at \*5.

<sup>281</sup> *Id.* at \*5.

<sup>282</sup> *Delock*, 2012 WL 3150391, at \*5.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at \*5.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*



agreement explicitly allowed it.<sup>288</sup> As a result, the overall impact of finding the class waiver unenforceable would lead to more litigation and less arbitration, which conflicts with the federal policy favoring arbitral dispute resolution.<sup>289</sup> Additionally, finding a class waiver unenforceable would lead to a legal patchwork as it would treat individual employees seeking to assert statutory rights differently merely because they joined a group.<sup>290</sup> Lastly, it would have a far more sweeping impact on the law than the Board suggested in *Horton*, because it would affect every employment dispute as long as two employees make the complaint together.<sup>291</sup> The *Delock* court took an unusual step in affirming the Board's Section 7 holding, yet enforcing the agreement through finding that the FAA controlled in a conflict between the two statutory policies.<sup>292</sup>

#### B. Decision Finding the Class Waivers Unenforceable

In *Herrington v. Waterstone Mortgage Corp.*,<sup>293</sup> the court decided not to enforce a class waiver contained in an arbitration agreement.<sup>294</sup> This case also involved a claim under the FLSA and other state law claims.<sup>295</sup> The court first held that although the NLRB generally has exclusive jurisdiction to enforce §157 and 158 of the NLRA,<sup>296</sup> a federal court has authority to invalidate a contractual agreement that violates the NLRA.<sup>297</sup> The court then deferred to the Board's finding that collective legal action to improve terms and conditions of employment is covered by Section 7.<sup>298</sup> In doing so, the court distinguished *Concepcion* because the preemption

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<sup>288</sup> See *Stolt-Nielson v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010).

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at \*6.

<sup>291</sup> *Delock*, 2012 WL 3150391 at \*6.

<sup>292</sup> *Id.* at \*4-6.

<sup>293</sup> *Herrington v. Waterstone Mortg. Corp.*, No. 11-cv-779-BBC, 2012 WL 1242318 (W.D. Wis. Mar. 16, 2012).

<sup>294</sup> *Id.* at \*6.

<sup>295</sup> *Id.* at \*1.

<sup>296</sup> See *Amalgamated Utility Workers v. Consol. Edison Co. of NY*, 309 U.S. 261, 264 (1940).

<sup>297</sup> *Herrington*, 2012 WL 1242318 at \*3.

<sup>298</sup> *Id.* at \*5.

analysis<sup>299</sup> does not apply when dealing with a federal statute.<sup>300</sup> After finding the class waiver unenforceable, the court held that because the provision was severable<sup>301</sup> from the agreement, it would still compel arbitration, but on a collective basis.<sup>302</sup>

### C. Analysis of the Split in the District Courts

While not all courts have recognized this, the first step in analyzing whether the NLRA makes an arbitration agreement unenforceable is whether it restricts activity protected by Section 7.<sup>303</sup> The *Morvant* court did not consider whether there was a possible NLRA violation under Section 8(a)(1), which leaves deficiencies in its holding.<sup>304</sup> If there is no determination of whether Section 7 protects joint or collective litigation, then the question of a violation of federal law is never implicated. In contrast to the *Morvant* court, the *Delock* court found that the Board's reading of Section 7 was reasonable and therefore deferred.<sup>305</sup> Similarly, the *Herrington* Court also found that the Board's interpretation of Section 7 was reasonable, though it was much easier in that case because the defendant did not argue the issue.<sup>306</sup> Interestingly, to date,<sup>307</sup> no court has overturned the Board's Section 7 holding.<sup>308</sup> The Board's Section 7 holding is central to an analysis of the legality of a class waiver. Therefore, an analysis of the Board's holding is necessary.

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<sup>299</sup> See generally Part. II.B.3.

<sup>300</sup> *Herrington*, 2012 WL 1242318 at \*6.

<sup>301</sup> If a contractual clause violates law, courts will sometimes sever the provision from the contract in order to bring the agreement into accord with law. Courts will evaluate two factors in this determination: (1) whether the provision is essential to the agreement as a whole; and (2) whether multiple unlawful provisions make it clear that the drafter was attempting to undermine the other party's rights. *Id.* at \*7.

<sup>302</sup> *Id.* at \*7.

<sup>303</sup> See *Delock v. Securitas Sec. Services USA, Inc.*, No. 4:11-CV-520-DPM, 2012 WL 3150391, \*4 (E.D. Ark. Aug. 1, 2012); *Herrington v. Waterstone Mortg. Corp.*, No. 11-cv-779-BBC, 2012 WL 1242318, \*5 (W.D. Wis. Mar. 16, 2012); and *D.R. Horton*, 357 N.L.R.B. \*2 (2012).

<sup>304</sup> *Morvant v. P.F. Chang's China Bistro, Inc.*, No. 11-CV-05405-YGR, 2012 WL 1604851 at \*9-10 (N.D. Cal. May 7, 2012).

<sup>305</sup> *Delock*, 2012 WL 3150391 \*4.

<sup>306</sup> *Herrington* 2012 WL 1242318 at \*5.

<sup>307</sup> This comment went to publication on June 7, 2013

<sup>308</sup> See, e.g. *Delock*, 2012 WL 3150391, \*4; *Herrington*, 2012 WL 1242318, \*5.

## 1. Section 7 Protects Joint or Collective Legal Action

In *D.R. Horton*, The Board rested its Section 7 holding on Supreme Court precedent that expanded the area of employee protection outside the immediate employer-employee context and specifically protected court action.<sup>309</sup> While the Board made clear that some sort of joint or collective legal action is protected by the NLRA, the *Delock* court goes even further giving express protection to class action lawsuits, if filed in good faith by a group of employees to achieve more favorable terms or conditions of employment.<sup>310</sup> The Section 7 issue is undisputed in all of the cases. Each case involves a suit dealing with terms and conditions of employment which satisfies the “mutual aid or protection” clause, and the class waiver means that it prohibits suits by groups or by individuals acting on behalf of groups, satisfying the concerted action requirement.<sup>311</sup> Importantly, there is no authority on point that contradicts the Board’s conclusion that the class waiver restricts action protected by Section 7.<sup>312</sup>

## 2. Section 8(a)(1) Compels a Finding that Class Waivers are Unlawful

After finding that an agreement violates Section 7, a reviewing court should next consider Section 8(a)(1) of the NLRA.<sup>313</sup> It is an unfair labor practice for an employer to “interfere with, restrain or coerce employees in the exercise of rights” guaranteed by Section 7 of the NLRA.<sup>314</sup> The arbitration agreements at issue in these cases restrain class or collective legal actions, which are protected by Section 7.<sup>315</sup> This makes such agreements an “unfair labor practice.”<sup>316</sup> Thus, federal courts are prohibited from enforcing the agreements, because federal courts are

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<sup>309</sup> See *D.R. Horton*, 357 N.L.R.B. No. 184 \*2 (2012) (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978)).

<sup>310</sup> *Delock*, 2012 WL 3150391 at \*4 (quoting *Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011)).

<sup>311</sup> *Supra* Part. III.A.

<sup>312</sup> See, e.g., *Delock*, 2012 WL 3150391, \*4; *Herrington*, 2012 WL 1242318, \*5.

<sup>313</sup> See *D.R. Horton*, 357 N.L.R.B. at \*2

<sup>314</sup> 29 U.S.C. § 158(a)(1) (2006).

<sup>315</sup> *Delock*, 2012 WL 3150391, at \*4.

<sup>316</sup> *D.R. Horton*, 357 N.L.R.B. at \*5.

prohibited from enforcing private contracts that violate a federal statute.<sup>317</sup>

A federal court cannot exert its judicial power to enforce a contract that violates the public policy of the United States as expressed through federal statutes.<sup>318</sup> The activities prohibited by the agreement are protected by Section 7.<sup>319</sup> Section 8(a)(1) makes it unlawful for an employer to restrict Section 7 activity.<sup>320</sup> This part of the inquiry is where the facts of each individual case begin to matter. If the arbitration agreement is unilaterally imposed by the employer on the employees, then it is a work rule.<sup>321</sup> What constitutes a mandatory arbitration agreement is outside the scope of this note, but if the agreement does not itself constitute a term or condition of employment, then the analysis would shift drastically.<sup>322</sup> Returning to a case of a mandatory arbitration agreement that restricts Section 7 activity, it is clear that 8(a)(1) on its face would make the agreement an unfair labor practice.<sup>323</sup> Therefore, courts should be entering their analyses of these arbitration provisions with the presumption that they unlawfully restrict federal rights.<sup>324</sup>

Unfortunately some courts are confused because they have not begun from this set of propositions.<sup>325</sup> *Morvant*, for example, went off into discussions about whether the statutory right being restricted is the one being sued under, and other issues that are not found within the doctrine.<sup>326</sup>

The *Delock* court started with the finding of a Section 7 violation, but then proceeded to

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<sup>317</sup> *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-84 (1982)

<sup>318</sup> *Id.*

<sup>319</sup> *See* Part. V.C.1.

<sup>320</sup> 29 U.S.C. § 158(a)(1) (2006).

<sup>321</sup> *D.R. Horton*, 357 N.L.R.B. at \*5.

<sup>322</sup> *See id.*

<sup>323</sup> 29 U.S.C. § 158(a)(1) (2006).

<sup>324</sup> *See Herrington v. Waterstone Mortg. Corp.*, No. 11-cv-779-BBC, 2012 WL 1242318, \*5 (W.D. Wis. Mar. 16, 2012)

<sup>325</sup> *See Morvant v. P.F. Chang's China Bistro, Inc.*, No. 11-CV-05405-YGR, 2012 WL 1604851 (N.D. Cal. May 7, 2012)

<sup>326</sup> *Id.* at \*11.

enforce the agreement finding that there was a conflict between the NLRA and FAA, and that the NLRA must bend to the FAA, because the result of not enforcing the class waiver would be to cause more litigation and less arbitration in conflict with the clear policy of the FAA.<sup>327</sup> There are two problems with this reasoning. First, enforcing the class waiver means more individual dispute resolution and less collective action, which while not stated by the *Delock* court logically flows from its decision.<sup>328</sup> Second, the court ignores both of the crucial statutory sections, Section 8(a)(1) of the NLRA, and the savings clause of the FAA. The reasoning that the *Delock* court applied is lifted very closely from *Concepcion*.<sup>329</sup> Surprisingly, the *Delock* court did not cite to *Concepcion* during its discussion of the disproportionate impact reasoning.<sup>330</sup> Instead, the court discussed the Board's reading of the NLRA having the effect of leading to more litigation and less arbitration, cited to the "strong federal policy promoting arbitration," then held that the FAA controlled the conflict.<sup>331</sup>

This pattern of analysis ignores the crucial question of whether these statutes even conflict. Instead of jumping to the question of which statute controls in a conflict, these courts skipped over the important question of whether these statutes can be read in a way where they do not conflict. The Board fulfilled that role when it attempted to accommodate the statutes.<sup>332</sup>

The policy promoted by the FAA can be accommodated with the policies of the NLRA. The FAA expressly includes a savings clause within it.<sup>333</sup> The NLRA does not contain a savings clause, but makes it clear that it intended to provide a non-waivable right when it makes attempts

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<sup>327</sup> *Delock v. Securitas Sec. Services USA, Inc.*, No. 4:11-CV-520-DPM, 2012 WL 3150391, \*5 (E.D. Ark. Aug. 1, 2012).

<sup>328</sup> *See id.*

<sup>329</sup> *See Concepcion*, 131 S. Ct. at 1747.

<sup>330</sup> *Delock*, 2012 WL 3150391 at \*5.

<sup>331</sup> *Id.*

<sup>332</sup> *D.R. Horton*, 357 N.L.R.B. No. 184 \*10 (2012).

<sup>333</sup> 9 U.S.C. § 2 (2006). ("Save upon grounds as exist at law or in equity for the revocation of any contract.")

by an employer to restrict activities protected by Section 7 unlawful.<sup>334</sup>

By recognizing that agreements that restrict Section 7 rights are presumptively invalid under the NLRA, cases involving compelled arbitration become much easier to decide. It is clear that the Supreme Court has been interpreting the FAA broadly to enforce arbitration agreements;<sup>335</sup> however, the savings clause (save upon grounds such as exist at law or in equity) clearly controls this dispute.<sup>336</sup> The court has not yet held that an arbitration agreement is enforceable if it restricts a federal statutory right.<sup>337</sup> The court has not even held that an arbitration agreement is enforceable if it restricts a state statutory right. The two closest cases are *Concepcion* and *CompuCredit*;<sup>338</sup> however, both cases are distinguishable.

*Concepcion* is likely the most sweeping pronouncement both of the purpose of the FAA and its reach. At one point, the decision goes as far as stating, “the FAA’s preemptive effect might extend even to grounds traditionally thought to exist” ‘at law or in equity for the revocation of any contract.’<sup>339</sup> While this language is clearly expansive, even the most sweeping pronouncement of the FAA’s reach was limited to preemption.<sup>340</sup> While in *Concepcion*, the Court struck down a state judicial doctrine that found class action waivers unconscionable due to their disproportionate effect on arbitration agreements;<sup>341</sup> when a federal statute is involved, constitutional preemption under the Supremacy clause is not involved in the analysis.<sup>342</sup> Since preemption does not apply, courts are left with an agreement to arbitrate a dispute that is in

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<sup>334</sup> 29 U.S.C. § 158(a)(1) (2006).

<sup>335</sup> See Part.II.

<sup>336</sup> 9 U.S.C. § 2 (2006).

<sup>337</sup> See *supra*. Part. II.

<sup>338</sup> See *supra*. Part. II.B.3, II.B.4.

<sup>339</sup> *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740, 1747 (2011).

<sup>340</sup> *Id.*

<sup>341</sup> *Id.* at 1753.

<sup>342</sup> Compare *Concepcion*, 131 S. Ct. at 1747 (“When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”) with *CompuCredit Corp.v. Greenwood*, 132 S. Ct. 665, 669 (2012) (The FAA requires courts to enforce arbitration agreements according to their terms, even when the claims at issue are federal statutory claims, “unless the FAA’s mandate has been overridden by a contrary congressional command.”)

violation of a federal law. Since the savings clause of the FAA says that agreements to arbitrate disputes should be enforced “save upon grounds as exist at law” there is no reason that the statutes need to be read to conflict.

The other case that may give pause on this dispute is *CompuCredit*. That case raised the bar on what constitutes an unwaivable right under federal law.<sup>343</sup> It made clear that classifying something as a “right to sue” or using language that described judicial processes was insufficient to rise to the level of a “contrary congressional command” necessary to preclude waiver of a right to a judicial forum.<sup>344</sup> The NLRA is quite distinct from the statute at issue in *CompuCredit*. The Court went out of its way in *CompuCredit* to classify the “right to sue” as merely a procedural right, or a type of forum selection.<sup>345</sup> Unlike the Credit Repair Organizations Act, both the Court and the Board described Section 7 as a substantive protection.<sup>346</sup>

This issue is uncharted water for the district courts. It does not fit into the previous doctrine laid out by the court, but that is because the NLRA expressly provides an unwaivable substantive right. Given that there is a federal law providing this right, the savings clause means that the FAA’s presumption in favor of arbitration is inapplicable. Just as the Court will not enforce an illegal contract, it should not enforce an unlawful arbitration agreement. To hold otherwise would be to eviscerate congressional intent as expressed through the savings clause.

## **VI: The Fifth Circuit Should Affirm the Board’s Decision**

As of the writing of this Comment, the Board’s decision is currently under appeal in the Fifth Circuit.<sup>347</sup> The Fifth Circuit should affirm the Board’s decision in *Horton* because to

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<sup>343</sup> See *CompuCredit*, 132 S. Ct. at 669-70.

<sup>344</sup> *Id.* at 669.

<sup>345</sup> *Id.* at 670.

<sup>346</sup> *D.R. Horton*, 357 N.L.R.B. No. 184, \*4 (2012); See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564-568 (1978).

<sup>347</sup> See *NLRB Arbitration Ruling Appealed*, LEGAL NEWSLINE, Mar. 9, 2012, available at: <http://www.legalnewsline.com/news/235461-nlr-arbitration-ruling-appealed>.

overturn it would drastically change the law currently governing both arbitration and labor relations. Enforcing the decision would be much more predictable given current precedent. First, no Supreme Court decision has found that rights under a federal statute are subject to waiver simply because an arbitration agreement is involved.<sup>348</sup> Second, both the Board and the Supreme Court have found that individual agreements that purport to waive labor rights are unenforceable.<sup>349</sup> The current dispute is between one statute that grants rights that cannot be waived, and another statute that says agreements to follow a particular procedure to resolve disputes should be enforced as long as they do not conflict with any other law. The statutes are not in conflict.

While the broad language in *Concepcion* may give pause, the distinction between a state judicial doctrine, where preemption analysis applies, and a federal statutory right, where preemption analysis does not apply, is sufficient to truly distinguish these two cases. Additionally, in finding that rights provided under federal statutes were subject to arbitration, the courts classified the statutory provisions as forum selection clauses or procedural rights.<sup>350</sup> At no point has the Supreme Court upheld a waiver of a truly substantive right.<sup>351</sup> While resolving disputes collectively as opposed to individually may be perceived as a procedural right, Congress's intent, as evidenced by the statute, sought to protect collective activity over individual activity because it felt that that the process of dispute resolution between employees and employers would improve working conditions and therefore have a positive impact on interstate commerce.<sup>352</sup> The fact that some may now find that individual dispute resolution may be more efficient and costly is not a sufficient reason to disregard Congress's intent that in

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<sup>348</sup> See *CompuCredit*, 132 S. Ct. 665, 669 (2012).

<sup>349</sup> See *supra* Part III.B.3.

<sup>350</sup> See *CompuCredit*, 132 S. Ct. at 670.

<sup>351</sup> Cf. *id.* at 669.

<sup>352</sup> See 29 U.S.C. §151.



employment matters, the equalizing of bargaining positions is more important than the sanctity of contract.

In *Horton*, the Board correctly applied the requisite steps to reach the proper conclusion. First, employees have a Section 7 right to engage in collective legal action.<sup>353</sup> Joint litigation is concerted as well as class litigation that involves individual action seeking to initiate group action.<sup>354</sup> Since the proposed action in *Horton* was both concerted and directed at improving workplace conditions, the conduct met the two prong test required under Section 7.<sup>355</sup> Next, the Board found that agreements to waive Section 7 rights are unenforceable because they conflicted with a federal statutory policy,<sup>356</sup> and are unlawful under Section 8(a)(1).<sup>357</sup> The only element left was to attempt to accommodate the statutory policies of the NLRA with the FAA.<sup>358</sup>

Here, the Board reached the correct decision that there is no conflict between its holding that the MAA's class waiver is a violation of Section 7, and the underlying purposes of the FAA because of the savings clause within the FAA.<sup>359</sup>

The Fifth Circuit should affirm the Board's reconciliation of the NLRA and the FAA based on the Board's decision. An agreement is unenforceable if an arbitration agreement would violate the law due to the savings clause. Due to the MAA's restriction of Section 7 activity by an employer, the agreement is unlawful and unenforceable. Alternatively, Supreme Court FAA jurisprudence will not enforce a waiver of rights contained in an arbitration agreement for which Congress intended to preclude waiver, and Section 7 is one of those provisions.

FAA jurisprudence permitting enforcement of arbitration agreements makes clear that the

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<sup>353</sup> See *infra* Part IV.B.1.

<sup>354</sup> D.R. Horton, 357 N.L.R.B. No. 184, \*4 (2012).

<sup>355</sup> Eastex Inc. v. NLRB, 437 U.S. 556, 564 (1978).

<sup>356</sup> D.R. Horton, 357 N.L.R.B. at \*6.

<sup>357</sup> *Id.* at \*6-7.

<sup>358</sup> See Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 145 (2002).

<sup>359</sup> D.R. Horton, 357 N.L.R.B. at \*11-12.

agreement “may not require a party to ‘forgo the substantive rights afforded by the statute.’”<sup>360</sup> The Board distinguished *Gilmer*<sup>361</sup> by clarifying that the agreement in question in that case did not contain a class waiver.<sup>362</sup> On its face, the MAA restricts legitimate Section 7 activity because the employees were not allowed to engage in collective legal action on matters affecting the terms and conditions of employment, which is the substantive right provided by the NLRA.<sup>363</sup> Unlike *Gilmer*, the MAA does not simply make a choice about a forum,<sup>364</sup> but restricts a substantive protection. Also unlike the ADEA involved in *Gilmer*, Congress’s intent in passing the NLRA was to decrease positional bargaining inequality between employers and employees.<sup>365</sup> Thus, while in *Gilmer* the flexible and informal approach of arbitration was not in conflict with the ADEA’s encouragement of conciliation,<sup>366</sup> here the arbitral preference of individual dispute resolution is in direct conflict with the NLRA’s preference for collective action by employees so as to decrease the inequality in bargaining power.<sup>367</sup>

## VI: Conclusion

Although the Supreme Court has consistently upheld arbitration agreements when it has considered them, the Court has yet to rule that if an agreement violates federal law, it is nonetheless enforceable. Because the savings clause makes Congress’s intent clear that if an agreement is otherwise unlawful it is unenforceable, mandatory arbitration agreements containing class waivers by employers restrict employees’ Section 7 rights and therefore are unenforceable. The Fifth Circuit should clarify and simplify this area of the law and enforce the Board’s decision in *D.R. Horton*.

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<sup>360</sup> See *D.R. Horton*, 357 N.L.R.B. at \*11 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 US 20, 26 (1991)).

<sup>361</sup> 500 U.S. 20.

<sup>362</sup> *D.R. Horton*, 357 N.L.R.B. at \*12.

<sup>363</sup> *Id.* at \*5.

<sup>364</sup> See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991).

<sup>365</sup> See *D.R. Horton*, 357 N.L.R.B. at \*7.

<sup>366</sup> *Gilmer*, 500 U.S. at 29.

<sup>367</sup> See 29 U.S.C. § 151 (2006).