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Is the End Near for Employee Class Actions in the 5th Circuit?

By Mark A. Shoffner of Bell Nunnally – (March 5, 2018) – Employment class action lawsuits may soon be a thing of the past in Texas.

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While that might seem too good to be true for employers, a pair of potentially landmark federal appellate court decisions recently enforced broad class action waivers in court for the first time. If proper steps are taken, employers have the opportunity to substantially reduce their exposure to expensive and protracted class action litigation.

At the risk of oversimplification, there are two ways to formally resolve a legal dispute – litigation or arbitration. In either setting, a plaintiff can prosecute a case on his own behalf or, in some instances, on behalf of a class of plaintiffs.

For many years, the U.S. Court of Appeals for the 5th Circuit has held that an employee can waive his right to prosecute or participate in a class action against his employer if such a provision is included in a valid arbitration agreement. Because employers would rather defend against single-plaintiff cases than class actions, which often pose the risk of large liability by their very nature, many employers now require employees to sign arbitration agreements containing class action waivers during the onboarding process.

Some employers, however, would rather litigate in court than arbitrate. These reasons include preference for judicial resolution, past bad experiences, lack of perceived costs savings and virtually no right of appeal. Because no Texas court – state or federal – had ever enforced a class waiver absent an arbitration agreement, those employers remained vulnerable to employee class action litigation. Until now.

In *Convergys Corporation v. NLRB* and *LogistiCare Solutions, Inc. v. NLRB,* both employers required job applicants to sign class action waivers with respect to any prospective lawsuit against their employers. There were no arbitration agreements between the employers and employees. The NLRB concluded that the waivers were invalid under the National Labor Relations Act because they interfered with the employees' rights to engage in concerted activity, and the agency ordered the employers to cease and desist from enforcing the waivers.

The 5th Circuit, in a splintered opinion, rejected the NLRB's position and held that the right to participate in a class action is a procedural, rather than a substantive, right that could be waived and that participation in a class action lawsuit did not constitute protected concerted activity under the NLRA.

The court further reasoned that, due to the procedural nature of this right,the adjudicative forum – whether in court or arbitration – was immaterial and permitted enforcement of naked class action waivers in court.

Finally, the court stated that the outcome was dictated by its previous rulings that examined the interplay between the NLRA and the Federal Arbitration Act (FAA). For example, in *Murphy Oil USA, Inc. v. NLRB,* the 5th Circuit held that Congress did not intend for the NLRA to override the FAA's strong presumption in favor of arbitrability and that participation in a class action was not a substantive right.

The *Convergys* and *LogistiCare* opinions would likely have already garnered much more attention except for the fact that these rulings ›

are susceptible to being overturned almost immediately. In her majority opinions, Judge Jennifer Walker Elrod noted that the U.S. Supreme Court is currently reviewing *Murphy Oil* and two companion cases to decide if class action waivers are enforceable at all.

If the high court strikes down these waivers in the context of arbitration, these pathmarking decisions will no longer be good law. But that outcome seems unlikely given the Supreme Court's recent pronouncements under the FAA.

Indeed, the proliferation of class action waivers originated from the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion,* in which the court upheld the validity of such a waiver in a consumer arbitration agreement and decided that the FAA preempted California law that such agreements were unconscionable.

Two years later, the Supreme Court held in *American Express Co. v. Italian Colors Restaurant* that a contractual class action waiver in arbitration was enforceable under the FAA even when the plaintiff's cost of individually arbitrating a federal statutory claim exceeded the potential recovery.

After these cases, employers took note of the court's jurisprudence on class action waivers and started including them in arbitration agreements with their employees. The NLRB challenged the provisions with mixed outcomes, ultimately resulting in the circuit split that is soon to be resolved.

Both *Concepcion* and *Italian Colors* were products of narrowly divided courts, with the late Justice Antonin Scalia writing the majority opinions. What makes *Murphy Oil* even more intriguing for Supreme Court watchers – beyond its likely profound impact on class action litigation – is that review was granted when Justice Scalia was still on the bench, and the prevailing thought is the court was evenly split on this issue upon his death. The court's composition since review was granted and those cases were decided has, of course, been altered with Justice Neil Gorsuch's confirmation, and the newest justice had limited jurisprudence on arbitration issues during his tenure as a circuit judge.

Although the trilogy of cases currently before the Supreme Court presents a novel issue that requires interpretation of two federal statutes – the NLRA and the FAA – practitioners should at least be prepared for the likelihood that class action waivers in arbitration agreements will be upheld.

If so, *Convergys* and *LogistiCare* will immediately take on added significance in Texas and elsewhere in the 5th Circuit and give employers broader options in seeking and obtaining enforceable waivers of class actions by employees.

The 5th Circuit has already held in *Carter v. Countrywide Credit Industries, Inc.* that a class action waiver of a claim under the FLSA in an arbitration agreement is enforceable. The reasoning in Convergys and LogistiCare should naturally extend to make these waivers enforceable in litigation regardless of whether there is an arbitration agreement between the employer and employee.

Armed with valid waivers, employers could potentially eliminate the ability of employees to bring expensive and seemingly ubiquitous class actions under the FLSA, ADEA and other employment statutes. Employers and employment attorneys should closely monitor the outcome of *Murphy Oil* and be ready to include class action waivers in employee handbooks, policies or contracts if the Supreme Court renders a favorable decision.

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