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All The King's Horses And All The King's Men CAN Put Humpty Dumpty Together Again: NLRB Overrules Specialty Healthcare, Potentially Reducing Number Of Fractured Bargaining Units

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The National Labor Relations Board (NLRB) capped one of the most notable weeks in its history by issuing a decision that overruled the agency's now infamous *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), decision. That decision paved the way for a slew of micro-units being certified by the NLRB over the last five-plus years (despite the NLRB's assurances back in 2011 that its holding in *Specialty Healthcare* would only apply to healthcare bargaining units). For those unfamiliar with micro-units, when filing an election petition with the NLRB, a union must identify a legally appropriate group of employees (i.e., the "bargaining unit") it seeks to organize. Historically, all-inclusive "wall-to-wall units" (e.g., production and maintenance employee units) were favored by the NLRB. In contrast, micro-units are fractional. Generally, they seek to decrease the size of the unit and make organizing easier. For example, a union could believe it has ample support in a manufacturing plant among maintenance employees, but not production employees, so it could seek to only represent the maintenance workers – in which case the employer would be left dealing with a labor agreement only applying to half of the workforce and likely resulting in inequities among its employees. The NLRB previously often disapproved of micro-units, but *Specialty Healthcare* altered the NLRB's legal standard regarding bargaining units and made it easier for unions to seek such units. Specifically, the NLRB held in *Specialty Healthcare* that an employer opposing a micro-unit had to show the "larger" unit desired by the company shared an "overwhelming community of interest" with the smaller unit sought by a union – an almost impossibly high standard. *Specialty Healthcare* resulted in fractured units around the country and many headaches for employers. Fast forward to Dec. 15, 2017. In PCC Structurals, Inc., the newly Trump-appointed NLRB members overruled *Specialty Healthcare* and eliminated the "overwhelming community of interest" standard for employers opposing micro-units. The board stated the following in a press release on the new case: In a 3-2 decision involving PCC Structurals, Inc., the National Labor Relations Board overruled *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011) (*Specialty Healthcare*), and reinstated the traditional community-of-interest standard for determining an appropriate bargaining unit in union representation cases. The National Labor Relations Act provides that the Board must decide in each case whether the group of

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employees a union seeks to represent constitutes a unit that is 'appropriate' for collective bargaining. … The Board has now abandoned the 'overwhelming' community-of-interest standard. In today's decision, the Board stated that 'here are sound policy reasons for returning to the traditional community-of-interest standard that the Board has applied throughout most of its history, which permits the Board to evaluate the interests of all employees—both those within and those outside the petitioned-for unit—without regard to whether these groups share an 'overwhelming' community of interests.' By abandoning *Specialty Healthcare*, this likely will result in a reduction in the number of micro-units certified by the board going forward. Great news for employers. Excellent end to an epic week at the NLRB, which saw significant reversals of other Obama-era precedent and an announcement that the board may be seeking to rescind the "ambush election rule."