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Arbitration Agreement "Take Two": Fifth Circuit Refuses To Revisit D.R. Horton In Murphy Oil Case

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In *Murphy Oil USA v. NLRB*, No. 14-60800 (5th Cir. Oct. 26, 2015), the Fifth Circuit once again followed its decision in *D.R. Horton, Inc.*, 737 F.3d 344 (5th Cir. 2013). In the earlier *D.R. Horton* case the Fifth Circuit held, contrary to the NLRB's decision in 357 NLRB 184 (2012), that arbitration agreements that waive an employee's right to pursue class and collective claims in all forums do not violate the National Labor Relations Act. Employer groups have (and continue to) roundly criticize the NLRB's decision in *D.R. Horton*, which the NLRB continues to follow, and have taken nearly every opportunity to press their arguments in court. In *D.R. Horton*, the Fifth Circuit held that the National Labor Relations Act does not contain a "congressional command overriding" the Federal Arbitration Act, and held that it is not an unfair labor practice to maintain and enforce agreements. However, the court also found that such agreements must not be able to be "misconstrued" such that employees would believe that filing an unfair labor practice charge was prohibited. Other Federal Circuit Courts have agreed with and followed the Fifth Circuit's *D.R. Horton* decision. *See Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336 (11th Cir. 2014), *cert. denied,* 134 S. Ct. 2886 (2014); *Richards v. Ernst & Young, LLP,* 744 F.3d 1072, 1075 n.3 (9th Cir. 2013), *cert. denied,* 135 S. Ct. 355 (2014); *Owen v. Bristol Care, Inc.,* 702 F.3d 1050, 1053-55 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP,* 726 F.3d 290, 297 n.8 (2d Cir. 2013). The NLRB, of course, takes the position that it does not have to follow Federal Circuit Court decisions, and so has continued to apply its *D.R. Horton* decision. It did just that in the *Murphy Oil* case, which Murphy Oil ultimately appealed to the Fifth Circuit. Although the Fifth Circuit did not "celebrate the Board's failure to follow [its] *D.R. Horton* [decision]…," it did note that the Board is not always sure of where an appeal to a Circuit Court may land. Employers can have various options for appeal forums depending on different factors, including where the alleged unfair labor practice occurred. Be that as it may, the Fifth Circuit refused to revisit its earlier *D.R. Horton* holding that: 1) such agreements are generally permissible; but 2) the language of employer arbitration agreements must not be reasonably interpreted as prohibiting the filing of unfair labor practice charges. Otherwise, such agreements can still violate Section 8(a)(1). In doing so, however, the court also stated that it was *not* holding "…that an express statement must be made than an employee's right to file Board charges remains intact before an employment agreement is lawful." The court did, however, say that "[s]uch a provision would assist, though, if incompatible or confusing language appears in the contract." Also at stake in the *Murphy Oil* decision was the NLRB's assertion that Murphy Oil independently committed an unfair labor practice by filing a motion to dismiss an employee

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collective action in another pending federal action based on its arbitration agreement. By seeking to enforce such an agreement, the Board said that *Murphy Oil* allegedly sought to “chill employees’ Section 7 rights.” The court strongly disagreed with this proposition noting that, because of the court’s *D.R. Horton* ruling and NLRB authority relative to employer lawsuits:

> "Though the Board might not need to acquiesce in our decision, it is a bit bold for [the Board] to hold that an employer who followed the reasoning of our D.R. Horton decision had no basis in fact or law or an 'illegal objective' in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders.”

Thus, the court also refused to find that Murphy Oil’s motion to dismiss the employee’s collective action violated the NLRA. Where this leaves us: the NLRB continues to vigorously pursue its interpretation of arbitration agreements requiring arbitration of class or collective actions; and the Federal Circuit Courts continue to disagree. This issue will now most surely find its way to other Federal Circuit Courts, or possibly at some point the Supreme Court.