

## EMPLOYMENT LAW

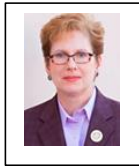
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### IN THIS ISSUE

*The Fifth Circuit in Murphy Oil v. N.L.R.B took another look at class waivers in arbitration agreements. Eve Masinter and Rachel Coe give a spirited analysis of what started with D.R Horton and provides insight on what to tell clients about these agreements.*

## Fifth Circuit Signals to NLRB to Show Respect and Shun Sophistry

### ABOUT THE AUTHORS



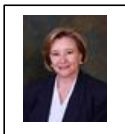
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### ABOUT THE COMMITTEE

The Employment Law Committee serves members who represent employers and their insurers. Committee members publish newsletters and Journal articles and present educational seminars for the IADC membership-at-large and mini-seminars for the committee's membership at the Annual and Midyear Meetings. The Committee presents significant opportunities for networking and business referrals. The goal of the Employment Law Committee is to build an active committee with projects that will attract and energize attorneys who practice employment law on a domestic and international basis. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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The Fifth Circuit's October 26, 2015 ruling in Murphy Oil USA, Inc. v. N.L.R.B. is hardly surprising. No. 14-60800, 2015 WL 6457613 (5th Cir. Oct. 26, 2015). This case, addressing the legality of individual arbitration agreements under Sections 7 and 8(a) of the National Labor Relations Act ("NLRA"), provides a sense of déjà vu because the Fifth Circuit considered a nearly identical case just two years earlier in D.R. Horton v. N.L.R.B., 737 F.3d 344 (5th Cir. 2013). By upholding the legality of one arbitration agreement and casting doubt on another, the Fifth Circuit's Murphy Oil decision nonetheless provides useful information on how to construct enforceable arbitration agreements and hints at whether similar litigation from the National Labor Relations Board ("NLRB") can be expected in the future.

Murphy Oil utilized an arbitration agreement that waived employees' rights to pursue class and collective actions. The agreement provided that employees must individually "resolve any and all disputes or claims...which relate...to Individual's employment...by binding arbitration." In 2010, several employees filed a Fair Labor Standards Act ("FLSA") collective action whereupon Murphy Oil sought to dismiss the suit and compel arbitration. Meanwhile, one plaintiff employee filed an unfair labor charge with the NLRB alleging that the agreement unlawfully interfered with employees' Section 7 rights guaranteed by the NLRA.

The NLRB's decision regarding the unfair labor charge against Murphy Oil is the concern of the instant case, but the Fifth Circuit's ultimate decision requires an understanding of the separate D.R. Horton case that was pending simultaneously. While Murphy Oil's FLSA case and unfair labor charge awaited decisions, the NLRB issued a ruling holding that an arbitration agreement similar to Murphy Oil's violated the NLRA because the agreement restricted Section 7 rights to engage in concerted activity. In re D.R. Horton, Inc. 357 N.L.R.B. No. 184 (2012). Murphy Oil responded to this development in March 2012 by revising its agreement to include language clarifying that the agreement did not bar employees from "participating in proceedings to adjudicate unfair labor practice[] charges before the Board."

In October 2014, the NLRB applied its D.R. Horton decision to Murphy Oil's arbitration agreement and similarly concluded that both the original and amended Murphy Oil arbitration agreement could be interpreted as unlawfully prohibiting employees from filing unfair labor practice charges, and thus required corrective action. Murphy Oil USA, Inc., 361 N.L.R.B. No. 72 (2014). Unfortunately for the NLRB, the Fifth Circuit had already overturned the NLRB's D.R. Horton decision in December 2013 based on that company's challenge to the NLRB's ruling. D.R. Horton, Inc. v. N.L.R.B., 737 F.3d 344 (2013). Nonetheless, the NLRB maintained its D.R. Horton position in analyzing Murphy Oil's agreements. Murphy

Oil petitioned the Fifth Circuit to review the NLRB's decision that seemingly ignored the Court's recent D.R. Horton ruling, even going as far as requesting that the Court hold the Board in contempt for its nonacquiescence to Fifth Circuit precedent.

By holding in Murphy Oil that the original arbitration agreement violated employees' Section 7 rights but that the amended agreement was lawful, the Fifth Circuit's analysis of the arbitration agreements both clarifies and complicates when arbitration agreements are enforceable under the NLRA. Section 7 of the NLRA grants employees the broad right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." See 29 U.S.C. § 157 (2015). An employer infringes on Section 7 rights by taking actions that are likely to create a "chilling effect" on exercising these rights, such as actions and policies that could be reasonably interpreted to discourage or bar employees' ability to act collectively.

The NLRB did not strike out completely in the Fifth Circuit's review of its decision. The Court considered Murphy Oil's pre- and post- D.R. Horton agreements separately because each agreement had different language. The Fifth Circuit sided with the NLRB on the original agreement, concluding that the agreement was problematic because its far-reaching terms could likely have a chilling effect on employees' ability to act collectively and thus constituted an unfair labor practice. Recall that the original agreement provided that employees waived

the right to pursue collective or class claims for "any and all disputes or claims...which relate...to Individual's employment." According to the Fifth Circuit, employees could interpret the agreement to mean that they could not file unfair labor practice charges with the NLRB, since "any and all" claims related to employment had to proceed to individual arbitration. Murphy Oil unsuccessfully argued that the fact that an employee filed the very unfair labor charge under the Court's consideration proved that its arbitration agreement had not been interpreted to chill Section 7 rights. The Fifth Circuit disagreed, reiterating that the test for violating Section 7 rights hinges on "likelihood," not an employee's actual actions.

Murphy Oil clinched a victory with its amended arbitration agreement, which the Court found acceptable under the NLRA. Despite Murphy Oil's attempt to comply with the NLRB's D.R. Horton decision, its good deed did not go unpunished when the NLRB concluded that the amendment still violated the NLRA. The NLRB reasoned that Murphy Oil's new clause reassuring employees that "[N]othing in this Agreement precludes [employees]...from participating in proceedings to adjudicate unfair labor practice[] charges before the [Board]" could still be misconstrued by employees to restrict their right to pursue collective action. The Fifth Circuit held otherwise and explained that no employee could reasonably interpret the amended agreement as a prohibition on filing unfair

labor practice charges because the agreement clearly stated the exact opposite.

In sum, the Fifth Circuit's Murphy Oil decision provides that individual arbitration agreements are not a per se unfair labor practice. Nevertheless, an arbitration agreement might still violate Section 7 rights if it is not worded carefully and the NLRB may order corrective action to bring the agreement into compliance. Herein lies the confusion. The Fifth Circuit stopped short of providing a panacea or talismanic incantation to ward off NLRA violations in arbitration agreements, explaining that "an express statement" preserving employees' right to file Board charges is not required, although the Court conceded that "such a provision would assist" if the agreement is confusing. The primary difference between Murphy Oil's original and amended arbitration agreements, and the ultimate saving grace for the amended agreement, was the explicit provision that the agreement did not bar filing charges with the Board. The Fifth Circuit therefore did not mandate such a strong statement, but found that this provision left no room for the likelihood of chilling Section 7 rights. Thus, an explicit provision is a helpful amendment for employers with similar arbitration agreements, even if not required.

On a final note, another perplexing aspect of the Murphy Oil case is why the NLRB did not recognize the Fifth Circuit's D.R. Horton opinion when it first considered the unfair labor charge and issued its ruling. The Fifth Circuit was mostly unoffended by the NLRB's

actions, explaining an agency need not acquiesce to appeals court decisions in making its own rulings when these rulings may not be reviewed by the same circuit court in the future. Because the NLRA's jurisdiction clause permits cases like Murphy Oil to be reviewed in multiple jurisdictions, including any circuit where the employer transacts business and the United States Court of Appeals for the District of Columbia, "the Board may well not know which circuit's law will be applied on a petition for review." However, in overturning the Board's award of attorney's fees against Murphy Oil for retaliation for filing the motion to dismiss and compel arbitration and subsequent pleadings a year and a half before the NLRB's D.R. Horton decision, the Murphy Oil Court cautioned the NLRB to "strike a more respectful balance between its views and those of circuit courts reviewing its orders." As such, although the NLRB can overlook a circuit court's precedent if a petition for review of its decision could be filed in another circuit, when considering the legality under the NLRA of an arbitration agreement, completely ignoring circuit precedent to find that an employer acted with an "illegal objective" was "a bit bold." Perhaps we may experience déjà vu all over again in the future.

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