

## Employment Agreement Class Action Waiver Deemed Unenforceable by Delaware Court

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The Delaware Bankruptcy Court held, as a matter of first impression on October 11, 2016, that a class action waiver provision in an arbitration agreement violates the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* (NLRA) and the arbitration agreement remains unenforceable even where the employee has an ability to revoke it after following certain procedures.

### The Facts

Debtor Fresh & Easy LLC was faced with a class action complaint alleging violation of the Workers Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2100-2109, and its California state law analogue. The putative class representative was a former employee who signed an arbitration agreement containing a provision that all employment-related disputes would be subject to individual arbitration.

The arbitration agreement specifically waived the employee's right to participate in a class action against the debtor. The employee was afforded the ability to revoke the arbitration agreement so long as within 30 days of signing it she notified the debtor in writing, signed the notice, and delivered a copy thereof to the debtor's human resources department. The employee did not opt out of the arbitration agreement. The arbitration agreement provided that if any portion thereof was deemed unenforceable, the remainder of the agreement would remain in full force and effect.

### The Argument

The debtor moved to compel the former employee to individual arbitration. Alternatively, the debtor argued that the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (FAA), applied such that the allegations of the class complaint would be subjected to class arbitration. The court rejected the debtor's arguments, and found the arbitration agreement unenforceable in its entirety.

### The Ruling

The court identified a two-prong analysis to determine whether class action is a substantive right protected by Section 7 of the NLRA.

First, the court looked to the language of the NLRA to determine if Congress unambiguously evidenced intent for class action to constitute a substantive right.

Second, the court considered whether the National Labor Relations Board (NLRB) provided a reasonable interpretation, with deference being given to any such reasonable interpretation.

The court concluded that the NLRA protection of "concerted activities" evidenced unambiguous Congressional intent for class action to be a substantive and not merely procedural right. Recognizing that other courts have drawn a different conclusion about class action being a substantive right protected by the NLRA, the court further evaluated the NLRB's determination that the NLRA grants employees a substantive right to adjudicate claims collectively. The court found the NLRB's interpretation was reasonable and subject

to deference.

Having concluded that class action is a substantive right protected by the NLRA, the court found that the class action waiver in the arbitration agreement was unenforceable. Nevertheless, the court addressed whether the FAA compelled enforcement of the arbitration agreement as drafted by the parties, in particular because the employee had an opportunity to, but did not, opt out. The court determined that the FAA and NLRA were not in conflict on this issue. The FAA affords arbitration agreements the same enforceability as other contracts, but not more so according to the court. Applying this principle, the court concluded that the FAA does not compel arbitration of an illegal provision in an agreement (e.g., waiver of substantive rights under the NLRA).

The court rejected that the opt-out provision revived the enforceability of the class action waiver in the arbitration agreement. Relying upon the Board's decisions for guidance, the court agreed that any action (i) reasonably tending to interfere with the free exercise of rights to engage in collective action or (ii) precluding individual employees from pursuing prospective concerted legal activity in the future constitutes a violation of the NLRA. Thus, the court concluded that requiring the employee to consider the opt-out provision in the first instance was a violation of the NLRA.

Lastly, the court considered whether the arbitration agreement could be enforced with the class action waiver provision stricken. Despite there being a savings provision allowing the balance of the arbitration agreement to remain in force if any provision is found unenforceable, the court noted its inherent discretion to override the savings provision. The court found that the class action waiver was an integral component of the arbitration agreement. Since the integral component of the arbitration agreement was found to be illegal, the court exercised its inherent power to override the savings provision and declared the entire arbitration agreement unenforceable.

## The Impact

Throughout this decision the court acknowledged competing authorities from several jurisdictions that have reached different conclusions when faced with similar arbitration agreement provisions. Indeed, there is considerable authority disagreeing with the court's conclusion that class action litigation is a substantive right protected by the NLRA.

Until the Third Circuit Court of Appeals directly addresses these points, this decision must be considered controlling authority for employers who may find their arbitration agreements subject to review by a Delaware court.

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