Circuit Court Owes "No Deference" to NLRB Ruling on Class Arbitration

By Albrecht Riepen*

As and more businesses are turning to arbitration as a means of settling their legal issues, various courts throughout the country, including the United States Supreme Court, have been handing down decisions that are changing the face of modern arbitration jurisprudence. These decisions are helping practitioners in the field of alternative dispute resolution understand the contours of the new legal landscape in which they find themselves practicing.

One such case, handed down by the 8th Circuit Court of Appeals, was *Owen v. Bristol Care, Inc.*[1] Sharon Owen worked as an administrator for Bristol Care, Inc., a nursing home operator. Upon being hired, Owen signed a Mandatory Arbitration Agreement (MAA), providing that the employer and employee "agree to the resolution by binding arbitration of all claims or controversies for which a federal or state court or other dispute-resolving body otherwise would be authorized to grant relief" and prohibiting the parties "from arbitrating claims… as, or on behalf of, a class."[2] This agreement applied to "claims for wages and other compensation" as well as "claims for violations of federal statute, including the Fair Labor Standards Act (FLSA)."[3] The MAA did not, however, "waive the right to file a complaint with… any… federal, state or local agency designated to investigate complaints of harassment, discrimination, other statutory violations, or similar claims."[4]

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Owen filed an action on behalf of herself and other similarly situated employees alleging that Bristol Care misclassified employees as administrators to avoid paying overtime for hours worked in excess of 40 hours per week. In response, Bristol Care attempted to stay the district court proceedings and compel arbitration, in accordance with the MAA.[5] The district court denied Bristol Care's motion to compel arbitration on the grounds that while the MAA did cover Owen's allegations, it was invalid because of the class waiver. The district court reasoned that the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*,[6] which upheld the enforceability of a class waiver in a consumer contract, was not controlling in the employment context.[7] Instead, the district court relied on a National Labor Relations Board (NLRB) decision, *In re D.R. Horton, Inc.,*[8] and the case of *Chen-Oster v. Goldman, Sachs & Co.*[9] in concluding that class waivers are invalid in FLSA cases because the FLSA provides for the right to bring a class action.

Owen on Appeal

The Eighth Circuit reversed the district court's denial of Bristol Care's motion to compel arbitration because arbitration agreements containing class waivers are enforceable in claims brought under FLSA in the absence of any contrary congressional command. Section 2 of the Federal Arbitration Act (FAA) provides that a written provision in any contract to settle by arbitration any controversy arising out of said contract shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of the contract.[10] Courts must enforce arbitration agreements according to their terms, and there must be a contrary congressional command for another statute to override the FAA's mandate. Such a command can be found in the text of a statute, its legislative history, or an inherent conflict between arbitration and the statute's underlying purposes. The Supreme Court has previously stated that this provision of the FAA establishes "a liberal federal policy favoring arbitration agreements" and that when Congress restricts the use of arbitration, it does so with clarity.[11]

The Eighth Circuit found that Owen identified nothing in either the text or the legislative history of the FLSA that indicated congressional intent to bar employees from agreeing to arbitrate FLSA claims individually. Moreover, the court found no inherent conflict between the FLSA and the FAA. The court reasoned that if an employee must affirmatively opt-in to a class action, then the employee has the power to waive participation in a class action as well. The court examined the legislative history and context of the FAA, which showed that although the FAA was originally enacted in 1925, it was *reenacted* in 1947, years after the FLSA, the National Labor Relations Act, and the Norris-LaGuardia Act. This suggests that, contrary to Owen's assertion, Congress intended the arbitration protections in the FAA to remain intact even in light of the FAA's subsequent revisions.[12] Lastly, the court found the NLRB's decision in *D.R. Horton* relied upon by Owen to be unpersuasive and remarked that the court was not obligated to defer to the NLRB's interpretation of Supreme Court precedent under *Chevron* or any other principle.[13]

While the issue in this case was novel for the Eighth Circuit, the court was able to look to numerous other circuit courts for guidance from similar cases. The court noted that its decision upholding the enforceability of class waiver arbitration clauses in the context of the FLSA was consistent with all of the other circuit courts of appeal that have considered the issue.

- In *Vilches v. Travelers Cos.*,[14] the Third Circuit dealt with FLSA claims by insurance adjustors alleging improper compensation of overtime work. The Third Circuit held that class waivers were neither procedurally nor substantively unconscionable.[15]
- In *Horenstein v. Mortg. Mkt., Inc.*,[16] the Ninth Circuit held that an agreement requiring employees to arbitrate FLSA claims against the employer was valid even though the arbitration clause eliminated employees' statutory right to collective action.[17]
- In *Caley v. Gulfstream Aerospace Corp.*,[18] two groups of employees filed claims against their employer under the FLSA, the Age Discrimination in Employment Act (ADEA), and the Employee Retirement Income Security Act (ERISA). The employer added an employment condition to the employment contract and gave notice of such to the employees. By continuing employment, the employees accepted the modified employment contract. The Eleventh Circuit upheld the district court's granting of employer's motion to compel arbitration.[19]
- In *Carter v. Countrywide Credit Indus. Inc.*,[20] current and former employees sued to recover overtime wages under the FLSA. The Fifth Circuit upheld the district court's granting of employer's motion to compel arbitration.[21]
- In *Adkins v. Labor Ready, Inc.*,[22] temporary employees filed suit against their temporary employment agency claiming violations of the FLSA in regard to unpaid wages. The Fourth Circuit upheld the district court's granting of employer's motion to compel arbitration and subsequent dismissal of the suit.[23]

The above decisions are also consistent with more than two decades of pro-arbitration Supreme Court precedent, which, al

though primarily relating to class waivers in a consumer context, does uphold the enforceability of class waivers in employment disputes.

- In *CompuCredit Corp. v. Greenwood*,[24] consumers filed suit against their credit card issuer even though they had signed an agreement containing an arbitration clause. Because the Credit Repair Organizations Act does not preclude arbitration agreements, the FAA requires that parties arbitrate the dispute according to the arbitration clause.[25]
- In *AT&T Mobility, LLC v. Concepcion*,[26] the FAA preempted California state law regarding the unconscionability of class waivers in arbitration clauses. Plaintiffs' class action suit could not continue and claims would have to be adjudicated individually.[27]
- In *Gilmer v. Interstate/Johnson Lane Corp.*,[28] an employee brought suit alleging discriminatory termination based of age under the ADEA against employer. The employer moved to compel arbitration based on employment contract and the FAA. The Supreme Court held that age discrimination claims are subject to mandatory arbitration clauses.[29]

CONCLUSION

The result in *Owen* reflects the trend over the past few decades of courts favoring arbitration over litigation. Even though this trend is nothing new, many plaintiffs are unpleasantly surprised when they notice that they have (inadvertently and unknowingly, perhaps) signed away the right to sue their employer, cellphone provider, credit card company, or any of the host of consumer-oriented businesses now using arbitration clauses as boilerplate language in their forms and contracts. This leaves an aggrieved party with no option but to arbitrate according to the terms dictated by contract. Federal court decisions, especially at the circuit court level and the Supreme Court, have upheld the validity of these agreements favored by companies and the defense bar and, consequently, have helped establish arbitration clauses as a new standard operating procedure.

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1 702 F.3d 1050 (8th Cir. 2013).
2 *Id.* at 1051.
3 *Id.*
4 *Id.*
5 9 U.S.C.A. §2 (West) ("A written provision in … a contract … to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").
6 131 S.Ct. 1740 (2011).
7 *Owen*, 702 F.3d 1050 at 1052.
8 357 NLRB No. 184, 2012 WL 36274.
9 785 F.Supp.2d 394 (S.D.N.Y. 2011).
10 9 U.S.C.A. § 2 (West).
11 *Owen*, 702 F.3d 1050 at 1052 (Quoting *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012)).
12 *Id.* at 1053.
13 *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
14 413 Fed.Appx. 487 (3rd Cir. 2011).
15 *Id.* at 494.
16 9 Fed.Appx. 618 (9th Cir. 2001).
17 *Id.*
18 428 F.3d 1359 (11th Cir. 2005).
19 *Id.* at 1379.
20 362 F.3d 294 (5th Cir. 2004).
21 *Id.* at 302.
22 303 F.3d 496 (4th Cir. 2002).
23 *Id.* at 507.
24 132 S.Ct. 665 (2012).
25 *Id.* at 673.
26 131 S.Ct. 1740 (2010).
27 *Id.* at 1753.
28 500 U.S. 20 (1991).
29 *Id.* at 1657.