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# A FORK IN THE ROAD: ISSUES SURROUNDING THE LEGALITY OF MANDATORY CLASS ACTION WAIVERS IN ARBITRATION AGREEMENTS

## ABSTRACT

*Recently, federal circuit courts have presented contrasting outcomes regarding the legality of mandatory class action waivers in arbitration agreements. More specifically, these outcomes vary on whether such waivers violate the Fair Labor Standards Act (FLSA) and the National Labor Relations Act (NLRA), and importantly, whether it is possible for these statutes to coexist with the Federal Arbitration Act (FAA). The Second, Fifth, and Eighth Circuits have previously held that the act of an employer requiring employees to sign class action waivers in arbitration agreements posed no violation to either the FLSA or the NLRA. However, in May 2016, the Seventh Circuit created a circuit split, finding that the waivers in these agreements did in fact violate both statutes. This Note argues that the Seventh Circuit's analysis is correct, and focuses on how the other circuits failed to give proper deference to the FAA. Further, this Note suggests that Congress enact a statute requiring the creation of internal dispute departments within all companies, or alternatively, to amend the FAA to properly address and protect the rights of employees in these circumstances.*

## INTRODUCTION

For many years, federal circuit courts have struggled with the issue of whether an employer requiring his or her employees to sign a waiver barring them from bringing class action lawsuits, and further, prohibiting the litigation of an individual action by any means other than that of arbitration violates the National Labor Relations Act (NLRA) and the Fair Labor Standards Act (FLSA).<sup>1</sup> Several factors are taken into consideration when analyzing this issue, such as an employee's right under the FLSA to proceed with class action litigation,<sup>2</sup> the interest of an employer to arrange for litigation by means of arbitration,<sup>3</sup> and the issue of uniformity and cohesion between the Federal Arbitration Act (FAA) with the NLRA and the FLSA.<sup>4</sup> Prior to the Seventh Circuit's May 2016 holding in *Lewis v. Epic Systems Corporation*,<sup>5</sup> all other circuit courts that have rendered decisions on this

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1. See N. Peter Lareau, *Seventh Circuit Creates Circuit Split on NLRB's D.R. Horton Decision*, 16-8 BENDER'S LAB. & EMP. BULL. 2 (2016).

2. See generally 29 U.S.C. § 216(b) (2012).

3. See Amelia W. Koch et al., *Individualizing the FLSA: Collective Action Waivers and the Split in the Federal Court*, 13 J. FED. SOC'Y. PRAC. GRP., Oct. 2012, at 99–100.

4. See Lareau, *supra* note 1.

5. See generally *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016).

matter—the Fifth, Eighth, and Second Circuits—were in agreement that these waivers did not violate the NLRA.<sup>6</sup>

This Note examines why the Seventh Circuit has correctly ruled on this matter, and contends that these waivers do indeed violate the NLRA and the FLSA because not enough deference was given to the legislature’s intent when forming the FAA.<sup>7</sup> Part I of this Note will consist of a general overview of the history of class action waivers in arbitration agreements, as well as examples of a few United States Supreme Court cases, which exemplify the permissibility of these arbitration agreements.<sup>8</sup> Part II will provide a breakdown of the NLRA,<sup>9</sup> the FLSA,<sup>10</sup> and the FAA,<sup>11</sup> as these three pieces of legislation play a crucial role in the analysis of the circuit courts’ holdings. Part III will provide a summary of the history and the current role arbitration plays in corporations. Next, Part IV will furnish a detailed analysis of the circuit split at issue, and address the weaknesses in the holdings from the Second, Fifth, and Eighth Circuits. Lastly, Part V will suggest that Congress enact a statute that would require (with a heightened focus on publicly traded corporations) the creation of internal dispute departments within all companies,<sup>12</sup> as well as call for an amendment to the FAA to more adequately address the rights of employees in these circumstances.<sup>13</sup>

## I. A GENERAL OVERVIEW OF CLASS ACTION WAIVERS

The term “class action litigation” refers to the process of one individual commencing legal action on behalf of oneself, as well as all other similarly situated individuals.<sup>14</sup> From the perspective of an employer, class action litigation can lead to catastrophic and irreparable damage within a company.<sup>15</sup> Needless to say, there is a substantial difference in a claim brought by just one employee/plaintiff, in comparison with a claim brought by hundreds, or possibly even thousands of employees/plaintiffs against a single employer.<sup>16</sup> Thus, employers’ incentives to implement waivers

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6. See Lareau, *supra* note 1.

7. See *id.*

8. See generally *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2070–71 (2013).

9. See generally 29 U.S.C §§ 151–169 (2012).

10. See generally *id.* § 201.

11. See generally 9 U.S.C §§ 1–3 (2012).

12. See Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights* 23 (Econ. Pol’y Inst. Briefing Paper No. 414, Dec. 7, 2015), available at <http://www.epi.org/publication/the-arbitration-epidemic/#epi-toc-15>.

13. See *id.* at 25.

14. See generally Irving M. Geslewitz, *Class Action Waivers: Should Employers Be Adopting Them in Their Employment Agreements?*, MUCH SHELIST (Oct. 30, 2012), <https://www.muchshelist.com/knowledge-center/article/class-action-waivers-should-employers-be-adopting-them-their-employment-agr>.

15. See generally *id.*

16. See generally *id.*

requiring single-employee litigation through arbitration revolve around factors such as litigation cost and exposure, the inability of a plaintiff to undergo a trial by jury, the benefit of selecting the arbitrator, and the reduction of time spent litigating in court.<sup>17</sup>

A brief example explaining the detrimental effects of a class-action waiver in an arbitration agreement provides an introduction to one of the focal points of this Note, that is, an employee's uphill battle when faced with this situation. In *Patricia Rowe P.A. v. AT&T, Inc.*,<sup>18</sup> the plaintiff purchased telecommunication services from AT&T and BellSouth Telecommunications.<sup>19</sup> The contract for the services contained an automatic renewal clause, and through that provision, the plaintiff, as well as other similarly situated individuals, was charged an early cancellation fee of \$600.<sup>20</sup> Alleging that AT&T's early termination fee was fraudulent, the plaintiff filed suit in the United States District Court for the District of South Carolina.<sup>21</sup> In response, AT&T, without arguing the merits of the complaint, contended that the plaintiff was not permitted to bring this action in court, and rather, was required to submit all claims to binding arbitration.<sup>22</sup> Unbeknownst to the plaintiff, it turned out that a clause in the original service contract had stated the following: "[b]y signing or indicating acceptance, I acknowledge and accept all terms of the Agreement as set forth above, including all terms set forth in the 'Service Agreement, Service Descriptions and Price Lists' found at [http://cpr.bellsouth.com/bst/product\\_line.htm](http://cpr.bellsouth.com/bst/product_line.htm)."<sup>23</sup>

Sure enough, there were two clauses on the site that were problematic for the plaintiff's argument.<sup>24</sup> The first clause stated that the method of dispute resolution was independent arbitration.<sup>25</sup> The second clause stated the following: "[b]y applying for, subscribing to, using, or paying for the ordered service, you agree to be bound by the charges, terms, and conditions set forth in this agreement. If you do not agree with the provisions of this agreement, do not use the services and cancel this agreement immediately. . . ."<sup>26</sup> Ultimately, the District Court granted AT&T's motion to compel arbitration.<sup>27</sup> The plaintiff ended up conceding and paying the \$600

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17. *See generally id.*

18. *See Rowe v. AT&T, Inc.*, No. 6:13-cv-01206-GRA, 2014 WL 172510, at \*1 (Dist. S.C. Jan. 15, 2014).

19. *Id.*

20. *See id.* at \*3.

21. *See id.* at \*1.

22. *See id.*

23. *See id.*

24. *See id.* at \*2.

25. *See id.*

26. *See id.*

27. *See id.* at \*9.

termination fee, as she could not afford to individually arbitrate the case.<sup>28</sup> This is just one example where a class action waiver in an arbitration agreement diminished the plaintiff's chances of receiving adequate relief for her injuries.

Arbitration poses certain risks for both sides of the litigation, such as the extremely limited ability to appeal the arbitrator's decision, and the tendency for arbitrators to permit entry of certain evidence that a judge would not otherwise prohibit.<sup>29</sup> In a study entitled, "Comparison of Outcomes of Employment Arbitration and Litigation," Alexander J.S. Colvin created a dataset that compared the results of employment actions brought by arbitration to those by litigation.<sup>30</sup> Colvin broke down the study into two categories: "mean time to trial" and "employee trial win rate."<sup>31</sup> "Mean time to trial" analyzed the average amount of days involved in arbitrating an employment action, in comparison to litigating the action in federal or state court.<sup>32</sup> Additionally, "employee trial win rate," just as it sounds, compared the likelihood of a plaintiff succeeding in their action, by means of arbitration, federal court actions, and state court actions.<sup>33</sup>

In terms of the "mean time to trial," the results of the study<sup>34</sup> demonstrated that the average length of time for mandatory employment arbitration actions was 361.5 days, whereas litigation in both federal and state court was over 700 days.<sup>35</sup> As one can see, the average time required to litigate an action is significantly greater than the average time it takes to settle an action through arbitration. Furthermore, regarding the "employee trial win rate," mandatory employment arbitration results were 21.40%, federal court actions were 36.40%, and state court actions were 57%.<sup>36</sup> Thus, plaintiffs had a significantly greater chance of success by means of litigation, as opposed to arbitration. These statistics highlight just how detrimental arguing a dispute by means of arbitration can be for an employee, considering the "employee win rate" in federal court actions is almost double that of arbitration, and the employee win rate for state court actions is almost triple.<sup>37</sup>

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28. See Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), [http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?\\_r=0](http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0).

29. See Geslewitz, *supra* note 14.

30. See generally Stone & Colvin, *supra* note 12, at 20.

31. See *id.*

32. See *id.*

33. See *id.*

34. It is worth mentioning that another category analyzed in this study was "median damages," which compared the average amount of damages an employee would receive through an arbitration action to both federal and state court actions. The findings for this category were \$36,500 for arbitration actions, \$176,426 in federal court actions, and \$85,560 in state court actions. Clearly, the damages are significantly greater when an employee litigates in either federal or state court, in comparison to arbitration. See *id.*

35. See *id.*

36. See *id.*

37. See *id.*

Theodore Eisenberg implemented a similar study in 2015, which provides for a more up-to-date look on the differences between arbitration and federal court litigation.<sup>38</sup> Within these findings, the employee win rate had dropped from 36.40% to 29.70% in federal court, and arbitration actions experienced a drop as well, going from 21.40% to 19.10%.<sup>39</sup> These updated statistics show that although a plaintiff's chance of success in an employment action has decreased in both categories, there is still about a 10% greater chance of success when litigating an employment action in federal court as opposed to arbitration.<sup>40</sup> Needless to say, there is a visible explanation for an employer's desire to require legal action by arbitration, and at the same time, an arguably inherent unfairness from the perspective of an employee.

Interestingly enough, the United States Supreme Court has already ruled on the permissibility of employers' collective action waivers in arbitration agreements. In June of 2013, the Supreme Court decided both *Am. Express Co. v. Italian Colors Rest.*,<sup>41</sup> and *Oxford Health Plans LLC v. Sutter*.<sup>42</sup> In the former case, merchants entered into an arbitration agreement providing for a class action waiver with both American Express and its subsidiary.<sup>43</sup> Nonetheless, the merchants filed a class action suit against petitioners, at which point petitioners presented a motion to compel individual arbitration in light of the waiver.<sup>44</sup> Although the Second Circuit held that it would cost each merchant more money to pursue individual claims than they would receive through arbitration, the Supreme Court disagreed and held that, "[t]he FAA does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery."<sup>45</sup>

In *Sutter*, the parties entered into a contractual agreement that provided that a physician would administer medical care to individuals in possession of this specific insurance.<sup>46</sup> Both parties agreed that, should any problems arise, an arbitrator would decide on the issue of whether the parties' contractual agreement called for collective arbitration.<sup>47</sup> The physician brought a class action lawsuit on behalf of other physicians who were equally affected when the insurer allegedly failed to make certain payments, and as per the parties' prior agreement, an arbitrator decided that the contract did, in fact, allow for class arbitration.<sup>48</sup> The Supreme Court affirmed this decision,

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38. *See id.* at 19.

39. *See id.*

40. *See id.*

41. *See generally* *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

42. *See generally* *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013).

43. *See Italian Colors Rest.*, 133 S. Ct. at 2306.

44. *See id.*

45. *See id.*

46. *See generally* *Sutter*, 133 S. Ct. 2064.

47. *See generally id.*

48. *See generally id.*

finding that under Section 10(a)(4) of the FAA, courts are not permitted to interfere with the decision of an arbitrator when said arbitrator is within his or her power to consider a contract and interpret its intent.<sup>49</sup>

In light of these two holdings, the Supreme Court's stance on the matter of class action waivers in arbitration agreements is clear—that is, class action rights must be explicitly waived in order to prevent the possibility of an arbitrator deciding that the true intentions of the parties stated otherwise.<sup>50</sup> Although certain aspects of class action waivers have been settled, the issue still remaining is whether employees can be required to sign such arbitration agreements that demand waiver of one's right to a class action lawsuit, as said issue has yet to reach the United States Supreme Court.<sup>51</sup>

## II. A BREAKDOWN OF THE NLRA, FLSA, AND FAA

Before diving into the depths of our circuit split, it is crucial to understand the purposes and basic overviews of the NLRA, FLSA, and FAA. While all three pieces of legislation are referenced throughout the circuit courts' decisions, the crux of the dilemma that the circuit courts are struggling with is whether there is room for the NLRA and FAA to exist cohesively amongst one another.<sup>52</sup> The pertinent sections of each piece of legislation are presented in this section.

### A. FAIR LABOR STANDARDS ACT: 29 U.S.C. § 201

Congress's underlying intention for passing the FLSA in 1938 was, “. . . to achieve uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act.”<sup>53</sup> The section of the Act that covers damages, rights of action, attorney's fees and costs, and the termination of rights of action is the section at issue for the purposes of the split.<sup>54</sup> Under Section 216, any employers' contract that is required to comply with FLSA, and nevertheless incorporates inconsistent provisions into its agreement, is rendered illegal and nonbinding on the employee.<sup>55</sup> Specifically, Section 216(b) states that “[a]n action to recover the liability . . . may be maintained against any employer . . . in any Federal or State Court of competent jurisdiction by any *one or more employees for and in behalf of himself or themselves and other employees similarly situated.*”<sup>56</sup> This speaks directly to an employee's right to bring a class action suit.<sup>57</sup> More

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49. *See generally id.*

50. *See generally id.*; *see also Italian Colors Rest.*, 133 S. Ct. 2304.

51. *See generally* Lareau, *supra* note 1.

52. *See id.*

53. *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 602 (1944).

54. *See* 29 U.S.C. § 216 (2012).

55. *See id.*

56. *Id.* (emphasis added).

57. *Id.*

specifically, there is nothing within the statute prohibiting claims by means of arbitration.<sup>58</sup>

### **B. NATIONAL LABOR RELATIONS ACT: 29 U.S.C. §§ 151–169**

Congress enacted the NLRA in 1935, primarily “to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.”<sup>59</sup> Section 7, entitled “Rights of Employees,” states that, “[e]mployees shall have the right to . . . engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>60</sup> Additionally, Section 158, entitled “Unfair Labor Practices,” states that it is contrary to fair labor practice for employers, “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.”<sup>61</sup>

### **C. FEDERAL ARBITRATION ACT: 9 U.S.C. §§ 1–3**

The FAA “provides the legislative framework for the enforcement of arbitration agreements and arbitral awards in the United States.”<sup>62</sup> Initially, the FAA’s enforcement power only reached arbitration agreements in the realm of commercial disputes, but has since been held to extend to employment disputes as well.<sup>63</sup> At issue in this circuit split is the “Saving’s Clause,” in Section 2 of the Act, which provides that an agreement that calls for the resolution of any issues by means of arbitration, “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>64</sup>

## **III. ARBITRATION AND CORPORATIONS**

Over the years, there has been a development within the corporate practice of employing mandatory arbitration agreements into contracts with both employees and customers.<sup>65</sup> As mentioned previously, given the benefits to arbitration, employees do not at first recognize the ominous cloud that the agreements cast on the ability to protect many of their own employment rights such as privacy, family leave, and protection against

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58. *See generally id.*

59. NLRB, NAT’L LAB. REL. ACT, <https://www.nlr.gov/resources/national-labor-relations-act> (last visited Mar. 18, 2018).

60. 29 U.S.C. § 157.

61. *Id.* § 158.

62. Claudia Salomon & Samuel de Villiers, *The United States Federal Arbitration Act: A Powerful Tool for Enforcing Arbitration Agreements and Arbitral Awards*, LATHAM & WATKINS LLP (Apr. 17, 2014), <https://m.lw.com/thoughtLeadership/the-us-fed-arbitration-act>.

63. *See* Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013, 1015–18 (2013).

64. 9 U.S.C. § 2 (2012); Sullivan & Glynn, *supra* note 63.

65. *See* Stone & Colvin, *supra* note 12, at 3.

unjust discrimination, all of which are guaranteed by federal statutes.<sup>66</sup> However, the real trouble for an employee working for a major corporation begins to stir when a class action waiver is coupled with an arbitration agreement.<sup>67</sup> These class action waivers became popular in the 1990s, and by 1999, ten major banks<sup>68</sup> had formed what was known as “the Arbitration Coalition,” to publicize and promote the employment of class action waivers in arbitration agreements.<sup>69</sup>

Importantly, unlike an arbitration clause in a contract formed between two businesses, where the terms of the contract are negotiated at the discretion of both parties entering into the agreement, arbitration clauses in a contract between an employer and employee are usually located in the fine print of a contract, or within the company’s orientation materials.<sup>70</sup> Naturally, this makes it much less likely that an employee would 1) understand the extremity of the grip said agreement will have on the duration of their employment, and 2) that said employee would even notice the existence of the clause at all.<sup>71</sup> Moreover, many of the practices involved in an arbitration proceeding<sup>72</sup> ultimately place the corporation in a greater position of power and leave the employees in an extremely defenseless state in terms of the arbitrator’s decision, as well as through the questionable practices that are implemented throughout the course of the proceeding.<sup>73</sup>

Some states have tried to pass legislation in an attempt to protect consumers and employees from unreasonable arbitration agreements, as well as to try to trigger the “Saving’s Clause” of the FAA and invalidate the arbitration agreement at issue.<sup>74</sup> The Supreme Court, however, has struck down these efforts when the sole purpose of the state’s law is to govern the validity of *arbitration agreements* in contracts and not contracts *generally*.<sup>75</sup> For example, in 1985, Montana’s legislature enacted a statute,<sup>76</sup> which compelled employers to include their arbitration agreement in the first page of their contracts with consumers, in a reasonably sized font that would provide the other party with adequate notice.<sup>77</sup> Importantly, corporations

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66. *See id.*

67. *See id.* at 4.

68. These banks include American Express, Citibank, First USA, Capital One, Chase, and Discover. *See id.*

69. *See id.*

70. *See id.*

71. *See id.* at 4–5.

72. Examples include the absence of a jury, the admissibility of evidence that would otherwise be excluded in a court proceeding, and the fact that the arbitrator is normally a lawyer, not a judge. *See id.* at 5.

73. *See id.*

74. *See id.* at 8.

75. *See id.*

76. *See generally* MONT. CODE ANN. § 27-5-114(4) (1989) (originally enacted as MONT. CODE ANN. § 27-5-114(3) (1985)) (repealed 1997).

77. *See* Stone & Colvin, *supra* note 12, at 8.

were at the forefront of the legislature's focus when enacting this statute because of their tendency to provide minimal notice or attention, or lack thereof, to the fact that such a clause was even included in the terms of the contract in the first place.<sup>78</sup> In *Doctor's Associates, Inc. v. Casarotto*,<sup>79</sup> a Subway franchise owner and his wife, Mr. and Mrs. Casarotto, brought suit in Montana State Court, alleging that Subway caused them to lose their life savings and their business to fail when Subway denied them a previously promised preferred business location.<sup>80</sup> The defendant, Doctor's Associates, Inc. (DAI), argued that the litigation should be dismissed, as per the arbitration agreement included on page nine of the contract between the parties.<sup>81</sup> The issue before the Montana State Court was whether or not Montana's law, which rendered arbitration agreements as null and void unless "notice that [the] contract is subject to arbitration" is "typed in underlined capital letters on the first page of the contract," invalidated this contract, as per the "Saving's Clause" in Section 2 of the FAA.<sup>82</sup> The FAA's "Saving's Clause" declares written arbitration agreements as "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>83</sup> Essentially, the Montana State Court had to decide whether Montana's law qualified as one that would trigger the application of the "Saving's Clause," thereby invalidating the arbitration agreement.<sup>84</sup> DAI successfully demanded arbitration of these claims at the trial level; however, the Montana Supreme Court reversed, finding that the Montana statute rendered this arbitration agreement as null and void, because the arbitration clause in this agreement was neither presented in the first page of the contract, nor was the writing underlined or in capital letters.<sup>85</sup> Thus, in light of the fact that the requirements of the state statute had not been met, the dispute amongst the parties was no longer subject to arbitration.<sup>86</sup>

This dispute ultimately reached the United States Supreme Court, which reversed the Montana Supreme Court's holding.<sup>87</sup> First, the Supreme Court stated that the lower court incorrectly relied on two prior Supreme Court cases, *Southland Corp. v. Keating*<sup>88</sup> and *Perry v. Thomas*.<sup>89</sup> In *Southland Corp.*, the Supreme Court held that Section 2 of the FAA applies to both state

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78. *See id.* at 8–9.

79. *See generally* *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

80. *See* Stone & Colvin, *supra* note 12, at 8.

81. *See Casarotto*, 517 U.S. at 683.

82. *Id.*

83. 9 U.S.C. § 2 (2012).

84. *See Casarotto*, 517 U.S. at 683.

85. *See id.* at 684.

86. *See id.*

87. *See id.* at 689.

88. *See Southland Corp. v. Keating*, 465 U.S. 1 (1984).

89. *See Casarotto*, 517 U.S. at 684; *see also Perry v. Thomas*, 482 U.S. 483 (1987).

and federal courts, and “withdr[aws] the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”<sup>90</sup> Further, in its *Perry* decision, the Supreme Court reinforced the following notion:

State law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the text] of § 2.<sup>91</sup>

To clarify, in both of these precedent cases, the Supreme Court reasoned that a state’s law rendered an arbitration agreement unenforceable as per the “Saving’s Clause” in Section 2 of the FAA, if and only if, the purpose of the law was to govern the legitimacy of a contract in general.<sup>92</sup> The Supreme Court was *not* referring to statutes enacted by state legislatures that were executed for the sole purpose of governing the validity of arbitration agreements.<sup>93</sup> Thus, since Montana’s law was strictly enacted to govern the validity of arbitration agreements within contracts, federal law preempted the state statute.<sup>94</sup> This is one of the many examples of a state’s attempt to provide increased protection to its employees and consumers against the overwhelming power of corporations to implement unfair policies into their contracts, and the Supreme Court’s ultimate rejection of the argument that the FAA can be undermined by state law specifically written for the purposes of arbitration agreements.<sup>95</sup>

#### IV. THE CIRCUIT SPLIT

The following subsections summarize the circuit split at issue, beginning with an analysis of the Seventh Circuit’s holding, followed by summaries of the Fifth, Eighth, and Second Circuit opinions.

##### A. THE SEVENTH CIRCUIT

In *Lewis v. Epic Systems Corp.*,<sup>96</sup> the Seventh Circuit, for the first time, agreed with the National Labor Relations Board (NLRB) and held that the preference for arbitration in the FAA did *not* trump Section 7 of the NLRA, which protects collective legal processes.<sup>97</sup> Additionally, the court held that Section 8 of the NLRA renders any contract provision that prevents an

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90. See *Southland Corp.*, 465 U.S. at 10, 12.

91. *Perry*, 482 U.S. at 493.

92. See *Casarotto*, 517 U.S. at 686.

93. See *id.*

94. See *id.* at 688.

95. See *Southland Corp.*, 465 U.S. at 16.

96. See *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016).

97. See *id.* at 1151.

employee from seeking class action relief unenforceable.<sup>98</sup> Epic Systems (Epic) is a healthcare software company that compelled its employees to agree to bring any wage or hour claims that they may have against the company solely by means of individual arbitration.<sup>99</sup> The employees were not required to sign a written agreement; rather, the company stated that employees manifested acceptance if they continued to work at Epic.<sup>100</sup> Jacob Lewis, an employee, had agreed to the terms of the arrangement; however, after his involvement in a dispute with Epic, Lewis chose to file his suit in federal court, claiming that Epic's denial of his overtime pay was a violation of his rights guaranteed by the FLSA.<sup>101</sup> When Epic moved to dismiss the claim, Lewis asserted that the arbitration agreement violated Section 7 of the NLRA as it prevented employees from filing concerted actions, and thereby could not be upheld.<sup>102</sup>

The court found that an analysis of the statutory language of Section 7 of the NLRA<sup>103</sup> was necessary to determine whether Epic's individual arbitration policy could co-exist with the rules of the statute.<sup>104</sup> The NLRB, as well as certain courts, had established that the right to bring a class action lawsuit constitutes a "concerted activity."<sup>105</sup> For example, in *Altex Ready Mixed Concrete Corp. v. NLRB*,<sup>106</sup> the Fifth Circuit provided that "[a] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is a 'concerted activity' under §7 of the National Labor Relations Act."<sup>107</sup> The Seventh Circuit found that both the history and purpose of Section 7 support this notion and reinforce an employee's right to bring a class action suit.<sup>108</sup> In beginning to scrutinize the statutory language, the court must consider whether any ambiguity exists by applying the ordinary definitions of each of the words to their usage in the statute.<sup>109</sup> The traditional definition of the word "concerted" is "jointly arranged, planned, or carried out . . ."<sup>110</sup> Further, "activities" are "thing[s] that a person or group does or has done," or "actions taken by a group in order to achieve their

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98. *See id.*

99. *See id.*

100. *See id.*

101. *See id.*

102. *See id.*

103. As noted previously, the language in Section 7 provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (2012); *see Epic Sys. Corp.*, 823 F.3d at 1151.

104. *See Epic Sys. Corp.*, 823 F.3d at 1152.

105. *See id.* at 1151.

106. *See generally Altex Ready Mixed Corp. v. NLRB*, 542 F.2d 295 (5th Cir. 1976).

107. *Epic Sys. Corp.*, 823 F.3d at 1152; *see generally Altex*, 542 F.2d at 295.

108. *See Epic Sys. Corp.*, 823 F.3d at 1152.

109. *See id.*

110. *Id.* at 1153.

aims.”<sup>111</sup> Thus, from the plain meaning of these words, the Seventh Circuit concluded that it was unambiguous that a class action proceeding cohesively fits into the definition of a “concerted activity.”<sup>112</sup>

Moreover, the congressional intent to classify class action lawsuits as a “concerted activity” under Section 7 of the NLRA is further supported by the notion that Congress intended for a broad interpretation of said phrase to encompass class action proceedings.<sup>113</sup> Prior to enacting the NLRA, Congress acknowledged that “a single employee was helpless in dealing with an employer,” and “that union was essential to give laborers opportunity to deal on an equality with their employer.”<sup>114</sup> Congress’s primary concern in enacting the NLRA was “to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment.”<sup>115</sup> Considering that class action lawsuits allow employees to “band together” and “equalize bargaining power,” the only plausible conclusion is that Congress intended to permit and protect them, and that no ambiguity exists.<sup>116</sup>

Even if one accepts Epic’s argument that Section 7 is ambiguous, the NLRB has interpreted both Section 7 and Section 8 as preventing employers from contracting class action litigation out of the terms of their agreements with employees.<sup>117</sup> With that said, the statutory language of Section 7 is unambiguous; however, assuming for a moment that it is in fact ambiguous, it is nevertheless given judicial deference according to the rule promulgated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>118</sup> The *Chevron* case established a two-part test regarding the interpretation of statutes.<sup>119</sup> The first part of the test asks whether the statute yields ambiguity.<sup>120</sup> In considering whether a statute is ambiguous, several factors are considered, such as the language of the statute, as well as the congressional intention in enacting it.<sup>121</sup> If it is found that a statute is, in fact, ambiguous, the second prong of the *Chevron* test explains that controlling weight should be given to an agency’s interpretation of the statute, unless such legislative regulations “are arbitrary, capricious, or manifestly contrary

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111. *Id.*

112. *See id.*

113. *See id.*

114. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937); *see also Epic Sys. Corp.*, 823 F.3d at 1153.

115. *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984); *see also Epic Sys. Corp.*, 823 F.3d at 1153.

116. *See Epic Sys. Corp.*, 823 F.3d at 1153.

117. *See id.*

118. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

119. *See id.* at 844.

120. *See id.*

121. *See id.*

to the statute.”<sup>122</sup> Thus, so long as the NLRB’s interpretation is not “arbitrary, capricious, or manifestly contrary to the statute,” it deserves the necessary deference and recognition that *Chevron* calls for.<sup>123</sup>

Applying the statutory interpretation and intent to the facts of *Epic*, one of the essential issues presented before the Seventh Circuit is whether Epic’s arbitration policy encroaches on an employee’s Section 7 NLRA rights, and the Seventh Circuit found that it did.<sup>124</sup> In sum, the contract between Epic and its employees stated that disputes arising over wages and hours had to be sorted out by means of arbitration, preventing employees from collectively litigating their claims.<sup>125</sup> Thus, it is facially apparent that the second portion of Epic’s contractual provision fiercely clashes with Section 7. In addition, Section 8 of the NLRA<sup>126</sup> comes into play at this time, invalidating actions implemented by an employer that directly conflict with the rights granted to an employee in Section 7.<sup>127</sup> Therefore, in light of all considerations taken collectively, the Seventh Circuit supports the assertion of this Note, in holding that Epic’s arbitration agreement violated both Section 7 and Section 8 of the NLRA, and was therefore unenforceable.<sup>128</sup>

## B. THE FIFTH CIRCUIT

In *D.R. Horton, Inc. v. NLRB*,<sup>129</sup> Horton, an employer, required his employees to sign waivers upon beginning their employment, and three aspects of the waivers are the focal point of this case: (1) providing that employees “voluntarily waive all rights to trial in courts before a judge on all claims between them;” (2) “all disputes and claims” would “be determined exclusively by final and binding arbitration,” including claims for “wages, benefits, or other compensation;” and (3) “the arbitrator [would] not have the authority to consolidate the claims of other employees,” and would “not have the authority to fashion a proceeding as a class or collective action, or to award relief to a group or class of employees in one arbitration proceeding.”<sup>130</sup> To summarize, Horton prohibited his employees from bringing concerted actions by means of arbitration.<sup>131</sup> In January of 2012, the NLRB held that the arbitration agreement violated Sections 8(a)(1) and (4) of the NLRA, which bestows upon employees a right to pursue concerted

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122. *Id.*

123. *See id.*

124. *See Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1154 (7th Cir. 2016).

125. *See id.* at 1155.

126. As mentioned previously, Section 8 states that any employer action that “interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in [Section 7]” constitutes an “unfair labor practice.” *See* 29 U.S.C. § 158 (2012).

127. *See Epic Sys. Corp.*, 823 F.3d at 1155.

128. *See id.* at 1156.

129. *See D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 348, 364 (5th Cir. 2013).

130. *Id.* at 348.

131. *See id.*

legal action.<sup>132</sup> On appeal, the Fifth Circuit disagreed, and held that the Board did not give necessary deference to the FAA,<sup>133</sup> enacted by Congress to “provide[] the legislative framework for the enforcement of arbitration agreements and arbitral awards in the United States.”<sup>134</sup>

The NLRB’s holding on this matter coincides with the holding of the Seventh Circuit.<sup>135</sup> Therefore, an analysis of why the NLRB’s decision on this matter was correct will allow one to effectively understand why the Fifth Circuit’s reversal was arguably improper.<sup>136</sup> Here, the NLRB and the Fifth Circuit clash over whether the FAA is impervious, whereby the NLRB says it is not, and the Fifth Circuit says that the FAA reigns supreme over all other federal statutes post-dating it.<sup>137</sup> The Fifth Circuit’s assumption is incorrect. The answer lies in understanding that it is unnecessary to assess whether the FAA trumps the NLRA, because the two statutes do not conflict with one another at all, and unbeknownst to the Fifth Circuit, there is “statutory room” for the two to peacefully coexist.<sup>138</sup>

An understanding of the FAA’s “Saving’s Clause” is necessary in order to recognize the possibility of peaceful cohesion between the FAA and the NLRA.<sup>139</sup> Though part of the FAA provides for the enforcement of any written contract to arbitrate, the “Saving’s Clause” in Section 2 of the FAA, entitled, “Validity, Irrevocability, and Enforcement in Agreements to Arbitrate,” states that,

A written provision in any . . . agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>140</sup>

Given what we know about Sections 7 and 8 of the NLRA (the right to pursue concerted legal action), if an employer’s arbitration clause prohibits collective action amongst employees, an initial conflict results between the FAA’s clause, mentioned above, and the NLRA. However, the conflict soon dissipates because Section 2 of the FAA provides a solution.<sup>141</sup> “[S]ave upon such grounds as exist at law or in equity,” means that the FAA will invalidate an arbitration agreement, should the agreement impinge on a right granted to an employee under other federal legislation.<sup>142</sup> In other words, an arbitration

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132. *See id.* at 349; *see also* Sullivan & Glynn, *supra* note 63, at 1015, 1030.

133. *See D.R. Horton, Inc.*, 737 F.3d at 348.

134. Salomon & de Villiers, *supra* note 62.

135. *See generally* Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016).

136. *See generally* Sullivan & Glynn, *supra* note 63.

137. *See id.* at 1015.

138. *See* Lareau, *supra* note 1.

139. *See id.*

140. 9 U.S.C. § 2 (2012).

141. *See* Lareau, *supra* note 1.

142. *See id.*; *see also* 9 U.S.C. § 2.

agreement between an employer and an employee becomes illegal once it denies an employee his or her right to engage in concerted activities.

Through this analysis, the NLRB clearly exemplified a simple way for the FAA and the NLRA to cohabitate, and arguably invalidated the Fifth Circuit's rationale that the FAA is essentially the supreme law of the arbitration land.<sup>143</sup> Finally, it is worth noting that the Fifth Circuit recognized the power of the NLRB's holding.<sup>144</sup> Specifically, the court stated, "[w]e add that we are loath to create a circuit split. Every one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB's rationale, and held arbitration agreements containing class waivers enforceable."<sup>145</sup> This notion sheds light on the length that a court will go to keep its opinion consistent with that of other courts, absent any blatantly unfounded or unjustified holding. Although the Fifth Circuit did not side with the holding of the NLRB, it nevertheless recognized the strength of the Board's argument, and did not outwardly dismiss its reasoning. Thus, the NLRB, through the analysis of the FAA's "Saving's Clause," allows one to further understand why there is no need to establish an inconsistency between the FAA and the NLRA, and continues to strengthen the Seventh Circuit's holding and rationale.

### C. THE EIGHTH CIRCUIT

Next, in *Owen v. Bristol Care, Inc.*,<sup>146</sup> Bristol Care appealed from a decision of the United States District Court for the Western District of Missouri, which denied its motion to compel arbitration in a suit brought by its former employee.<sup>147</sup> The subject employee, by means of the FLSA, wanted to initiate a class action lawsuit on behalf of other employees who were in a similar situation.<sup>148</sup> Bristol Care hired plaintiff as an administrator at one of its residential care facilities in Missouri in 2009.<sup>149</sup> Upon his hiring, plaintiff signed an agreement providing for

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 whether arising out of, relating to or associated with . . . any . . . legal theory that Employee may have against the Company or that the Company may have against the Employee.<sup>150</sup>

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143. See Lareau, *supra* note 1.

144. See *id.*

145. *Id.*

146. See generally *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

147. See *id.* at 1051.

148. See *id.*

149. See *id.*

150. *Id.*

Additionally, among other provisions that were included, there was a waiver that prevented the parties “from arbitrating claims subject to [the] Agreement as, or on behalf of, a class.”<sup>151</sup>

Plaintiff brought this class action suit against Bristol Care in September 2011, claiming that Bristol Care intentionally misclassified him and other similarly situated employees to prevent them from receiving overtime pay.<sup>152</sup> Relying on *D.R. Horton*, Bristol Care argued that nothing in the FLSA indicates the barring of class action waivers in arbitration agreements.<sup>153</sup> The Eighth Circuit reversed the holding of the district court, finding that the employee did not point to anything in either the text of the FLSA or in the legislative history to prove that Congress intended to bar employees from agreeing to arbitrate FLSA claims individually, and further, the court found that the FLSA and the FAA could cohesively exist amongst one another, without causing any friction.<sup>154</sup>

The Supreme Court has repeatedly taken a liberal position in favor of arbitration agreements, requiring that courts uphold the terms of an arbitration agreement in a contract absent any “contrary congressional command” of another statute that would override the federal superiority of the FAA.<sup>155</sup> One would not be required to search for such a “contrary congressional command,” as it would be evident in the text of the statute, or in its legislative history.<sup>156</sup> Thus, the burden of proving that Congress has, in fact, intended to restrict the use of arbitration in any of its legislation is on the party seeking to invalidate the arbitration agreement from their contract (in this case, the burden of proof was on plaintiff).<sup>157</sup> Therefore, in an attempt to prove that the FLSA does in fact contain a “contrary congressional command,” the plaintiff looked to Section 216(b) of the FLSA, as this section recognizes “[t]he right . . . to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to such any action.”<sup>158</sup> The Eighth Circuit rejected the plaintiff’s argument, finding that the provision was not strong enough to render a “contrary congressional command,” because the FLSA also states that “[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing.”<sup>159</sup> The rationale was that if an employee must provide written consent in order to involve him or herself in a class action suit, then they should also have the power to waive such participation.<sup>160</sup>

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151. *Id.*

152. *See id.*

153. *See id.* at 1052.

154. *See id.* at 1051–52.

155. *See id.* at 1052.

156. *See id.*

157. *See id.*

158. *Id.*; 29 U.S.C. § 216(b) (2012).

159. *Owen*, 702 F.3d at 1052.

160. *See id.* at 1052–53.

After the textual analysis was not accepted by the Eighth Circuit, the plaintiff next looked to the legislative history of the NLRA to demonstrate congressional intent to override the FAA.<sup>161</sup> Specifically, the plaintiff referenced statements that were made during the passage of the NLRA in 1935, arguing that the purpose of the Act is “to secure for employees the full right to act collectively to ensure that employers and employees should possess equality of bargaining power.”<sup>162</sup> Additionally, the plaintiff pointed to the congressional intent of the NLRA to expand the Norris-LaGuardia Act, passed three years before the NLRA, to “prevent employers from imposing contracts on employees that would require employees to forgo engaging in collective actions.”<sup>163</sup> This legislative history of the NLRA, according to the plaintiff, rendered the conclusion that Congress had undoubtedly intended to protect employees from having to agree to arbitrate claims individually.<sup>164</sup>

Once again, the Eighth Circuit rejected this argument, finding that the FAA was reenacted in 1947, which was twelve years after the passage of the NLRA, fifteen years after the Norris-LaGuardia Act, and nine years after the enactment of the FLSA in 1938.<sup>165</sup> The court interpreted this reenactment to mean that Congress intended for its arbitration protections to remain unscathed, notwithstanding the prior passage of these three major pieces of legislation.<sup>166</sup> Importantly, Eighth Circuit Judge Gruender acknowledged the consistency of this circuit’s opinion with all other courts of appeals that have been presented with this issue, that is, that arbitration agreements containing class action waivers are permitted by major labor relations statutes.<sup>167</sup> One could argue, as in *D.R. Horton, Inc.*,<sup>168</sup> that even though it was not the driving force of the opinion of the court, there was hesitation to create a circuit split, and this factor certainly played a role in the outcome of this case. This disinclination suggests that courts do, in fact, appreciate the holding of the NLRB in *D.R. Horton, Inc.*, and that the court might have given greater deference to the NLRB’s stance, had the issue of a circuit split not been on the horizon.

#### D. THE SECOND CIRCUIT

Further, in *Sutherland v. Ernst & Young LLP*,<sup>169</sup> the issue presented was whether an employee could abrogate a class-action waiver provision in the arbitration agreement she signed upon beginning employment, when, absent

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161. *See id.*

162. *Id.* at 1053 (internal quotation marks omitted).

163. *Id.*

164. *See id.*

165. *See id.*

166. *See id.*

167. *See id.* at 1054.

168. *See* Lareau, *supra* note 1.

169. *See Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013).

the waiver, she was left without an impetus to file a claim under the FLSA.<sup>170</sup> Plaintiff Sutherland worked for Ernst & Young as an audit employee from September 2008 to December 2009.<sup>171</sup> Sutherland received an annual salary of \$55,000 and was not entitled to overtime pay for working more than a forty-hour workweek.<sup>172</sup> According to Sutherland, she often worked anywhere between 45–50 hours per week, and therefore, had it not been for her title as a “salary only” employee, she would have been entitled to overtime.<sup>173</sup> Upon beginning her employment with Ernst & Young, Sutherland signed an offer letter, which contained two important arbitration provisions: (1) “Neither the Firm nor an Employee will be able to sue in court in connection with a Covered Dispute,” and (2) “Covered Disputes pertaining to different [e]mployees will be heard in separate proceedings.”<sup>174</sup> Notwithstanding the terms of her agreement with Ernst & Young, Sutherland filed a class action suit to recover 151.5 hours of overtime work that she did not receive compensation for, which, amounted to more than \$1,500.<sup>175</sup>

Ernst & Young filed a motion to dismiss, arguing that as per the terms of the arbitration agreement, not only was plaintiff barred from bringing her claim in court, but additionally, she was not permitted to bring a class action suit against Ernst & Young, as all claims required individuality.<sup>176</sup> In response, plaintiff alleged that the arbitration agreement in its entirety was invalid, because compelling plaintiff to solely raise a claim on an individual basis was contrary to the protection she was entitled to under the FLSA.<sup>177</sup> Specifically, she contended that the costs accompanied by an individual claim would far surpass the amount in controversy, thereby eliminating any financial incentive to bring this action.<sup>178</sup>

Ultimately, on appeal, the Second Circuit held that the FLSA did not include anything that prohibited the enforcement of a class-action waiver provision in an arbitration agreement, and that the expense of an individual claim was not enough to invalidate a class-action waiver.<sup>179</sup> Much of the Court’s rationale stemmed directly from the Eighth Circuit’s holding in *Owen*, thereby referencing the deference that each circuit court accords one another on a case-by-case basis.<sup>180</sup> Similar to *Owen*, the Second Circuit began with an assertion that the FLSA does not contain a “contrary congressional command,” which would allude to the invalidation of an arbitration

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170. *See id.* at 292.

171. *See id.* at 293.

172. *See id.*

173. *See id.*

174. *Id.* at 294.

175. *See id.*

176. *See id.*

177. *See id.*

178. *See id.*

179. *See id.* at 298.

180. *See id.* at 297.

agreement.<sup>181</sup> The plaintiff in *Sutherland*, in an attempt to reply to this argument, contended that as per Section 216(b) of the FLSA, “[a]n action to recover the liability . . . may be maintained against any employer . . . in any Federal or State Court of competent jurisdiction by any *one or more employees for and in behalf of himself or themselves or other employees similarly situated*.”<sup>182</sup> Just as the Eighth Circuit had done in *Owen*, the Second Circuit pointed to Section 216(b)<sup>183</sup> to negate plaintiff’s argument, and quoted the following from the *Owen* decision: “[e]ven assuming Congress intended to create some right to class actions, if an employee must affirmatively opt in to any such class action, surely the employee has the power to waive participation in a class action as well.”<sup>184</sup>

In the second part of the holding, the Second Circuit concluded that Ernst & Young’s arbitration agreement, requiring Sutherland to raise any and all claims on an individual basis, did not prevent her from “effectively vindicating” her rights, a protection guaranteed to her under the FLSA.<sup>185</sup> Though Sutherland contended that individual arbitration was exceedingly expensive, the Court, citing *Italian Colors*, found that although the “effective vindication doctrine” is raised when attempting to quash “a provision in an arbitration agreement forbidding the assertion of certain statutory rights . . . the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”<sup>186</sup> In other words, nothing was statutorily preventing plaintiff from individually arguing this claim by means of arbitration, aside from her own discouragement of embarking on such an uphill financial battle. While it is likely that many other individuals would not have brought this claim individually due to the financial burden it would yield, the Second Circuit would surely hold that this argument was not strong enough to invalidate the arbitration agreement.<sup>187</sup>

The holdings and rationales of each court stem from their individualized determinations of whether the FAA and NLRA are capable of cohesive existence. It has been established that the circuits that do not accept the concept of cohesion between the two statutes—the Fifth, Second, and Eighth Circuits—have upheld class action waivers in arbitration agreements as legally enforceable.<sup>188</sup> To the contrary, the Seventh Circuit—the sole court

181. *See id.* at 296.

182. *Id.* (citing 29 U.S.C. § 216(b) (2012)).

183. “No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.” *See id.* at 296; *see also* 29 U.S.C. § 216(b).

184. *See Ernst & Young*, 726 F.3d at 297; *see also Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052–53 (8th Cir. 2013).

185. *See Ernst & Young*, 726 F.3d at 298.

186. *See id.* at 298; *see also Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2306 (2013).

187. *See generally Ernst & Young*, 726 F.3d 290.

188. *See Lareau, supra* note 1.

that allows for statutory coexistence—has refused to recognize the validity of such an agreement.<sup>189</sup> The crux of the disagreement derives from the FAA’s “Saving’s Clause,” which, as has been analyzed extensively throughout the course of this Note, provides a light at the end of the tunnel for statutory coexistence between the NLRA and the FAA. Importantly, the Seventh Circuit’s finding of statutory cohesion should not be taken lightly, because according to *Chevron*, great deference is to be afforded to an agency’s interpretation of a statute, so long as said interpretation is not “arbitrary, capricious, or manifestly contrary to the statute.”<sup>190</sup> Thus, the ability of the Seventh Circuit to provide for the FAA and NLRA to stand separate and distinct from one another should be recognized and adhered to.

## V. NOW WHAT? SUGGESTIONS FOR THE FUTURE

### A. IMPLEMENTATION OF INTERNAL DISPUTE-RESOLUTION PRACTICES

Many large companies that implement mandatory arbitration agreements into their contracts also maintain “internal dispute-resolution” practices in an attempt to resolve conflicts *prior* to a claim having to reach the arbitration phase.<sup>191</sup> A federal statute requiring the implementation of said practices in *all* companies that enforce arbitration agreements would be extremely beneficial to employees, and would vastly reduce the amount of claims that would result in arbitration. This internal dispute-resolution practice would serve as a compromise between employers and employees because it would encourage conflicts to reach settlements and agreements “in-house.”

Although this solution would not alleviate all of the issues associated with arbitration, such as the issue of proper notice to employees or consumers, these types of procedures have found great success in corporations that have implemented them.<sup>192</sup> One of these American companies is Anheuser-Busch Companies, Inc., a brewing company based in St. Louis.<sup>193</sup> Although Anheuser-Busch does indeed require employees to sign mandatory arbitration agreements, before coming anywhere near actual arbitration of a claim, the company’s local management first steps in and assesses the complaint, followed by the mediation of any claims.<sup>194</sup> A study conducted by Bales and Plowman proved that this system provides great success in avoiding arbitration; the study found that from 2003–2006, 95% of claims were resolved at the local management phase.<sup>195</sup> Further, regarding

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189. See generally *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016).

190. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

191. See *Stone & Colvin*, *supra* note 12, at 23.

192. See *id.*

193. See *id.*

194. See *id.*

195. See *id.*

the actions that made it to the second phase—the mediation phase—seventy-two of the eighty-seven total claims (or 83%) were settled.<sup>196</sup> This means that under this internal dispute-resolution system, only 1% of cases reached the arbitration phase.<sup>197</sup> Naturally, this proposed solution would not completely relieve any and all negative feelings employees may have towards arbitration agreements, as the fear of, for example, effective notice, would still remain a grave trepidation for employees.<sup>198</sup> Needless to say, however, if all corporations were required to implement internal dispute-resolution practices, one would surmise that these companies could yield similar results to those of Anheuser-Busch, and the amount of disputes that actually reached the arbitration phase would significantly decrease.

Another example of a company with an even more extensive internal dispute-resolution initiative is TRW, an automotive manufacturing company.<sup>199</sup> Features of TRW's internal dispute-resolution measures consist of mediation, local management complaint procedures, and peer review panels, whereby similarly-established employees at the company will take on the form of a jury and decide complaints that they are presented with.<sup>200</sup> As with Anheuser-Busch, the amount of complaints that reached the arbitration phase at TRW was extremely minimal.<sup>201</sup> Within the first three years of the company's initiative, only seventy-two cases reached the mediation phase (which followed both the management complaint procedures and the peer review panels), and only three cases in total reached arbitration.<sup>202</sup> Additionally, as if these procedures were not already worthy of applause on TRW's behalf, in the rare occurrence that a case did, in fact, reach arbitration, the company went so far as to render such arbitration decisions *binding* on the company if the company were to have lost, and *not binding* on the employee, should the company win.<sup>203</sup> To clarify, this meant that should an employee lose at arbitration, the employee maintained a right to bring the action to court.<sup>204</sup> Obviously, these internal dispute-resolution procedures, though extremely employee-friendly, are few and far between, as there are not many companies that duplicate such favorable terms in the contracts with their employees; however, both of these companies' "in-house" procedures shed light on the need for all companies to have at least some form of initiative to decrease the amount of claims that reach the arbitration phase.<sup>205</sup>

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196. *See id.*

197. *See id.*

198. *See id.*

199. *See id.* at 23–24.

200. *See id.* at 24.

201. *See id.*

202. *See id.*

203. *See id.*

204. *See id.*

205. *See id.*

One could argue that a counterargument to this proposed suggestion is that these “in-house” internal dispute practices and procedures might still result in unfriendly employee practices, because too much leverage would be given to the company in determining the destiny of the dispute. For example, the members of the “in-house” mediation team might feel pressure to give unnecessary deference to the company in analyzing disputes, because after all, these individuals are also employees of the company. Thus, a legitimate fear of employer retaliation arises, should the mediation team, or any other “in-house” internal dispute-resolution group decide in favor of the employee, and against the company. In light of this concern, companies should also form an *independent* internal dispute-resolution committee, comprised of individuals who do not work for the company. This heightened suggestion is helpful in that it is extremely likely to continue to reduce the number of cases that reach the arbitration phase of litigation while at the same time maintaining an unbiased opinion about the circumstances surrounding the dispute.

In sum, to create a more fluid and comprehensive set of requirements for companies to follow in the future, companies that compel class action waivers in arbitration agreements should implement a two-tier internal-dispute resolution system to reduce the number of actions that actually reach the arbitration phase. The first is to create an independent team of managers—untainted and distinct from the internal management of the company—who would first review the employee’s claim and analyze its legitimacy. If this team of independent managers determines that the employee’s claim is in fact justifiable, step two of the internal-dispute resolution would then be triggered. The second step is the creation of an internal independent mediation team. This team would attempt to settle the claim and assist in reaching an appropriate solution prior to the action reaching arbitration. This two-tier internal-dispute resolution system would likely yield similar success in comparison to companies that already have similar systems in place.

#### **B. AMENDING THE FAA TO MORE ADEQUATELY ADDRESS THE RIGHTS OF EMPLOYEES**

Another proposed solution is for Congress to amend the FAA, as this would solve the potential predicament of the preemption of state legislation on the matter.<sup>206</sup> One possibility is for Congress to extend the protection that employers receive within the realm of arbitration.<sup>207</sup> An attempt at this has already been made through the proposal of the Arbitration Fairness Act (AFA).<sup>208</sup> Had the AFA been enacted, the FAA would have been amended to

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206. *See id.* at 25.

207. *See id.*

208. *See id.*

include that “no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.”<sup>209</sup> By means of this proposal, the AFA would have disposed of obligatory arbitration agreements in any of the disputes in the areas mentioned in the clause above.<sup>210</sup> The AFA has arguably been proposed with employees and consumers specifically in mind, as Congress has previously commented on the lack of choice employees and consumers have in regards to entering into a mandatory arbitration agreement.<sup>211</sup> Importantly, the AFA was first proposed in 2009, and several versions have since been proposed, with a more recent proposal initiated by Senator Al Franken and Representative Hank Johnson in 2015.<sup>212</sup> Though it appears doubtful that Congress would presently pass the AFA, the mere fact that the proposal has been at the forefront of discussion for over approximately six years speaks to the importance of this issue, and the dire need for greater employee protection against arbitration.<sup>213</sup>

## CONCLUSION

The Seventh Circuit took the initial step of straying from the decision of not one, but three United States Circuit Courts on the contested issue of class action waivers in arbitration agreements. This Note has argued that with the Seventh Circuit’s most recent decision, a circuit court has finally decided on this issue correctly, as these mandatory waivers violate Section 7 and Section 8 of the NLRA, as well as the FLSA. Further, contrary to the holdings of the Fifth, Second, and Eighth Circuits, the Seventh Circuit’s holding neither conflicts with the interpretation of the FAA, nor does it disturb the cohesion of the FAA and the NLRA, as the analysis of the FAA’s “Saving’s Clause” in this Note rebuts any argument of incompatibility between the two pieces of legislation. Naturally, though extremely influential, none of these circuit court holdings are black-letter law; thus, there is a critical need for federal guidance, to not only protect the rights of an employee, but to settle the matter once and for all.

Although granting federal protection to employees in this situation would rock the corporate world, companies have been successful in implementing alternative internal dispute-resolution procedures that have prevented a dispute from undergoing immediate arbitration. This proves that these waivers are not the only means by which an employer can effectively settle claims outside of court, as this Note has suggested alternative routes for Congress: enacting a statute requiring the creation of internal dispute

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209. *Id.*

210. *See id.*

211. *See id.*

212. *See id.*

213. *See id.*

departments within all companies, or amending the FAA to properly address the rights of employees in these circumstances. Nonetheless, it is clear that without some sort of federal guidance, this fiercely contested issue will remain at the forefront of our judicial system for quite some time, with continued uncertainty circulating the corporate arbitration realm.

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