Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

5th Circ. Poised To Weigh NLRB Class Waiver Ban

By **Abigail Rubenstein**

Law360, New York (February 01, 2013, 3:20 PM ET) -- The Fifth Circuit is scheduled to hear arguments Tuesday in the appeal of the National Labor Relations Board's controversial D.R. Horton ruling, a case that attorneys say could not only determine the fate of class action waivers in the employment context but also whether decisions that involved former NLRB member Craig Becker can stand.

At oral arguments Tuesday, homebuilder D.R. Horton will ask the appeals court to overturn the NLRB's Jan. 2, 2012, decision that the company's mandatory arbitration agreement violated federal labor law because workers cannot be forced to waive their right to bring class or collective claims in any forum.

And the company recently teed up another potentially major issue in the case when it filed a letter with the Fifth Circuit asserting that the D.C. Circuit's Jan. 25 decision that President Barack Obama's January 2012 recess appointments to the NLRB were unconstitutional also means the 2010 appointment of Craig Becker was invalid, and that the NLRB therefore lacked a quorum when it issued the ruling.

“It's a big case that has gotten bigger because of this constitutional issue,” said Ronald Meisburg of Proskauer Rose LLP, a former NLRB general counsel and board member.

The NLRB's position that workers cannot be forced to sign arbitration agreements containing class action waivers caused controversy among employers because it stands in sharp contrast to the Supreme Court's April 2011 ruling in AT&T Mobility LLC v. Concepcion, which upheld class action arbitration waivers in the consumer context.

The use of class waivers by employers became increasingly common in the wake of Concepcion, so the board's ruling set the stage for a high-stakes fight over the validity of class waivers in the employment realm.

“At the most basic level what's at stake [in D.R. Horton] is the validity of arbitration agreements with class action waivers,” said Ross H. Friedman of Morgan Lewis & Bockius LLP, whose firm filed a brief on behalf of The Council on Labor Law Equality in support of D.R. Horton.

“They are really a nice tool for employers to have as they can really act as a huge cost savings from having to defend against in particular wage-and-hour cases, which are so rampant these days,” Friedman said.

Those on the management side contend not only that the board's ruling conflicts with Concepcion and other pro-arbitral Supreme Court rulings, but also that it stretches the definition of what the National Labor Relations Act protects beyond its limits to give employees access to the procedural mechanism of a class action.

“It converts the National Labor Relations Act into a super class action statute, and that's not what the framers had in mind,” said Marshall Babson of Seyfarth Shaw LLP, a former NLRB board member who filed an amicus brief supporting D.R. Horton on behalf of the U.S. Chamber of Commerce.

But employee advocates say the board's ruling is in keeping with labor law precedent and ensures that the statute will continue to protect workers.

“At the most immediate level, this case is about whether the right of workers to band together to remedy workplace violations will continue to be protected,” said Michael Rubin of Altshuler Berzon LLP, who filed briefs in the case on behalf of labor.

“As a practical matter, if workers have to sue or arbitrate their employers on an individual basis, workers won't be able to get access to attorneys, won't be able to prove pattern-and-practice claims, and won't be able to afford the sort of discovery that is necessary to establish employer policies in many instances,” Rubin said. “There will be far less statutory enforcement and far more statutory violations.”

And D.R. Horton's decision to raise the possibility that former board member Becker was not properly seated has raised the stakes of the case even higher, lawyers told Law360.

“The basic question is about whether the board is owed deference on one thing, but D.R. Horton would like to make it about the power of the NLRB to decide anything,” Rubin said.

A ruling in D.R. Horton's favor on the challenge to Becker's appointment would impact a significant number of past board decisions, since it could call into question any decision the former board member signed off on.

In its letter to the court, D.R. Horton maintained that the D.C. Circuit's recent decision in Noel Canning v. NLRB, which said the disputed appointments of Sharon Block, Richard F. Griffin Jr. and Terence Flynn didn't conform to the requirements of the U.S. Constitution's recess appointments clause, showed that the NLRB lacked a quorum when it ruled in D.R. Horton because Becker's appointment would also be invalid under the court's reasoning.

The Supreme Court has said that the NLRB needs three members to act, so the invalidation of Becker's appointment to the board would have only had two properly appointed members when it issued the D.R. Horton decision.

“Before the Noel Canning decision there were a multitude of reasons why we believe the NLRB's ruling was wrong, and now we have yet another reason thanks to the D.C. Circuit,” said Ron Chapman Jr. of Ogletree Deakins Nash Smoak & Stewart PC, who represents D.R. Horton in the case.

An NLRB spokeswoman did not respond to a request for comment.

The board filed a motion Thursday for supplemental briefing on the issue raised in D.R. Horton's letter, noting its disagreement with the Noel Canning ruling, which the government is expected to appeal, but the Fifth Circuit said Friday that the motion would be "carried with the case," meaning the court will not address it at this time.

As significant as a ruling on the issue of Becker's status might be, lawyers told Law360 that the Fifth Circuit may or may not ultimately decide to rule on the issue.

As a general rule, courts address the merits of the case before reaching constitutional issues, so where the board stands on the NLRB's position on class action waivers could end up determining whether the Fifth Circuit takes the argument concerning Becker's appointment into account.

“We will have to wait and see what the Fifth Circuit will do, they could reverse on the merits and not reach the constitutional issue, they could affirm on the merits but vacate on the constitutional issue or they can go right to the constitutional issue and forget about the merits,” Meisburg said. In its ruling on the arbitration agreement, the NLRB explicitly rejected a memorandum that Meisburg issued as general counsel of the NLRB in 2010.

But whatever the Fifth Circuit decides, few expect the appeals court's ruling to be the last word on employer arbitration agreements containing class waivers.

For one thing, the court's decision is not binding on the NLRB and will technically only hamper the board's efforts to get its rulings enforced in that circuit. The question of whether the D.R. Horton ruling deserves deference has already been raised in other circuits, including the Eighth Circuit, which rejected the board's logic in D.R. Horton, and the Ninth Circuit, where the issue is pending.

But even apart from those technicalities, most attorneys expect the issue to ultimately be resolved by the Supreme Court regardless of whether the Fifth Circuit sides with the company or the board.

“I think it is likely to end up at the Supreme Court,” Babson said. “It is a very important issue regarding the metes and bounds of two very important statutes, the Federal Arbitration Act and the National Labor Relations Act.”

Ron Chapman Jr. of Ogletree Deakins Nash Smoak & Stewart PC will argue the case for D.R. Horton.

Kira Dellinger Vol will argue the case for the NLRB.

The case is D.R. Horton Inc. v. NLRB, case number 12-60031, in the U.S. Court of Appeals for the Fifth Circuit.

--Editing by John Quinn and Jeremy Barker.