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Horton hears a death knell

By Kenneth D. Sulzer and Steven B. Katz

In *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), *rev'd in relevant part, D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344 (5th Cir. 2013), the National Labor Relations Board held that Section 7 of the National Labor Relations Act barred employers from including class relief waivers in employment-related arbitration agreements, and that any attempt to do so constituted an unfair labor practice. In October, the U.S. Supreme Court will hear oral argument in a trio of cases — *Epic Systems Corp. v. Lew-*

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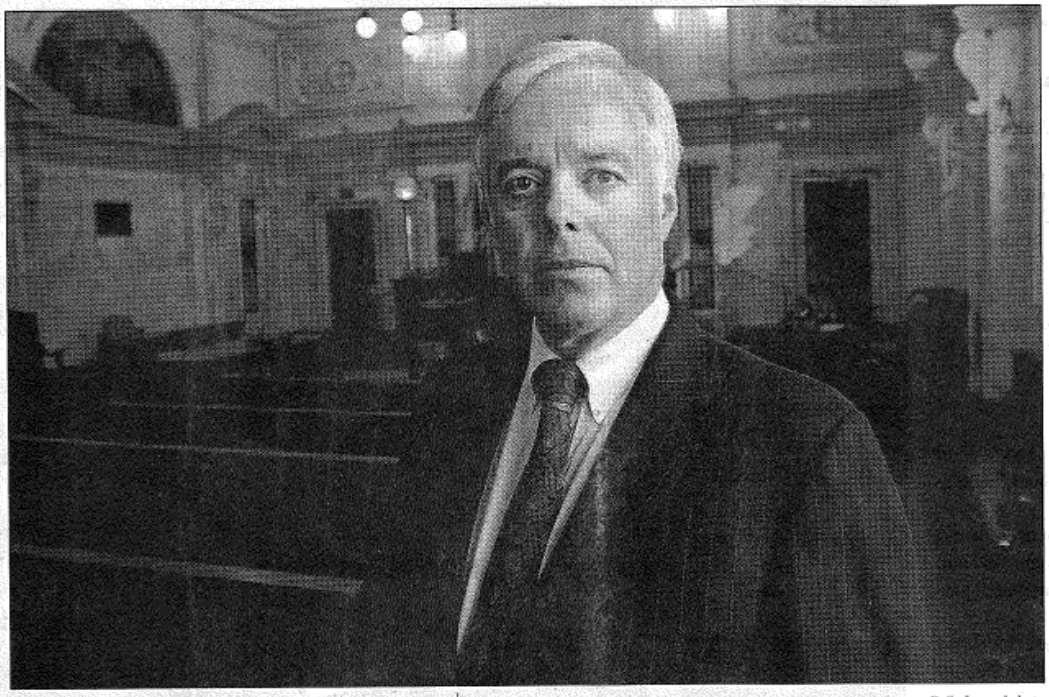

Daily Journal photo

9th Circuit Judge Richard Tallman, questioning plaintiffs' attorney Shannon Liss-Riordan, said her suggestion to send the Uber classification case back to district court was "making a mockery of the judicial process."

9th Circuit panel reluctant to decide Uber worker case now

By Matthew Blake
Daily Journal Staff Writer

Lawyers and an appellate panel talked past each other Wednesday about Uber drivers' employment status and arbitration contracts, with judges on while Uber argues freelance classification gives workers a flexibility that they desire.

But the hotly anticipated oral argument did little to move the case, and its underlying issues of misclassification

She presented a case decided last year by the Georgia Supreme Court that if the named plaintiff of a putative class action opts out of an arbitration agreement, as Douglas O'Connor did, they may represent a class of workers

Bay Area cities sue oil companies

San Francisco, Oakland seek pay for sea-level rise

By James Getz
Daily Journal Staff Writer

The cities of Oakland and San Francisco have sued five corporate oil giants, asking state court judges to order abatement funds to pay for damage to city properties caused by climate change-fueled sea level rise.

As with similar suits that Marin County, San Mateo County and the city of Imperial Beach filed in state courts in July, the new actions allege the oil companies knew for decades that burning their fossil fuels would lead to climate change but deceived consumers while making and marketing their products.

These actions, the San Francisco and Oakland suits allege, created a public nuisance that will cause billions of dollars of damage in the cities, for which the oil companies are responsible. *People v. BP P.L.C., et al.*, CGC-17-561370 (S.F. Super. Ct., filed Sept. 19, 2017); *People v. BP P.L.C., et al.*, RG17875889 (Alameda Super. Ct., filed Sept. 19, 2017).

Unlike the previous suits against three dozen fossil fuel companies, San Francisco's and Oakland's actions target only the "five largest investor-owned producers of fossil fuels in the world": BP P.L.C., Chevron Corp., ConocoPhillips Co., ExxonMobil

NLRB rule will fall regardless of whether NLRA trumps FAA

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is, Ernst & Young LLP v. Morris, and *NLRB v. Murphy Oil USA, Inc.* — raising the question of whether *D.R. Horton* is valid.

The parties — and most commentators — are treating the argument as a showdown between Section 7's protection of "concerted activity," on the one hand, and the Federal Arbitration Act's requirement that arbitration agreements be enforced in accordance with their terms. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 321 (2011).

Even if the court is unwilling to hold that the FAA trumps the NLRA, the *D.R. Horton* rule is still doomed. That is because *D.R. Horton* is based on a misconstruction of Section 7. If the court is not inclined to hold that FAA invalidates *D.R. Horton*, the court would still be obliged to either reject *D.R. Horton* outright as being based on a legally erroneous construction of Section 7, or return the question to the NLRB for reconsideration — a board appointed by a new president and unlikely to follow *D.R. Horton*'s reasoning.

Section 7 of the NLRA affords employees "the right to ... engage in other concerted activities for the purpose of ... mutual aid or protection." 29 U.S.C. Section 157. Up until 1975, the NLRB applied a two-step analysis to Section 7. First, it "consider[ed] whether some kind of group action occurred." Second, if "group action" took place, then it "consider[ed] whether that action was for the purpose of mutual aid or protection." *Meyers Industries, Inc.*, 268 N.L.R.B. 493, 494 (1984), *enforcement denied and remanded sub nom. Prill v. N.L.R.B.*, 755 F.2d 941 (D.C. Cir. 1985).

In 1975, in *Alleluia Cushion Co., Inc.*, 221 N.L.R.B. 999, 1000 (1975), the NLRB abandoned its traditional two-step analysis and held that it "will find an implied consent" if a single employee acts with the purpose of "mutual aid or protection" and no other employee objects. Over the ensuing years, *Alleluia*'s departure from board precedent was repeatedly criticized by the U.S. Courts of Appeal, including the 9th Circuit. *See, e.g., N.L.R.B. v. Bighorn Beverage*, 614 F.2d 1238, 1242 (9th Cir. 1980).

Nine years later, the NLRB held "that the concept of concerted activity first enunciated in *Alleluia* does not comport with the principles inherent in Section 7 of the Act." *Meyers*, 268 N.L.R.B. at 498. The D.C. Circuit remanded *Meyers* to the board to reconsider its rejection of *Alleluia*, and the board held that the traditional construction of Section 7 — not *Alleluia* — was the "construction that is mostly responsive to the central purposes for which the Act was created." *Meyers Industries, Inc.*, 281 N.L.R.B. 882, 883 (1986), *aff'd sub nom. Prill v. N.L.R.B.*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied sub nom. Meyers Industries, Inc. v. N.L.R.B.*, 487 U.S. 1205 (1988).

Fifteen years after the NLRB restored the traditional construction of Section 7, and two years before *D.R. Horton* was decided, the general counsel of NLRB concluded that a rule like the one eventually adopted by the board in *D.R. Horton* "would be a return to the concept of 'constructive concerted activity' that the Board rejected in *Meyers*." Nat'l Lab Rel. Bd., Gen'l Counsel Memorandum No. 10-06, at p. 6 (June 16, 2010). This conclusion is unassailable. The modern Rule 23(b)(3)-type class action is the very antithesis of "concerted activity," as that term is understood in *Meyers* — and traditionally — because it is not "engaged in with or on the authority of other employees." In fact, the modern class action is not even an attempt to reach out to, and secure the consent, of other class members. It is not a mechanism to facilitate joinder of claims — it is a mechanism to permit representation of absent parties. It is not "concerted" — it is virtual.

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Epic Systems Corp. v. Lewis; Ernst & Young v. Morris; NLRB v. Murphy Oil
Oral Argument:
Oct. 2, 2017

Even if the court is unwilling to hold that the FAA trumps the NLRA, the *D.R. Horton* rule is still doomed.

Rule 23 is based on a law article published by Harry Kalven Jr. and Maurice Rosenfield that was published in 1940. "The Contemporary Function Of The Class Suit," 8 U. Chi. L. Rev. 684 (1940-41). The Notes of the Advisory Committee on Rules to the 1966 amendments to Rule 23 cites Kalven and Rosenfield as a source of the committee's criticisms of previous iterations of the rule. Their article is very clear on this point. What they called for — and what the drafters created in Rule 23 — was an alternative to joinder in litigation. Kalven and Rosenfield wrote: "What is needed, then, is something over and above the possibility of joinder. ... There are basically two methods for doing this. The first is to organize the various claimants prior to suit and make them all parties plaintiff to the litigation; this is committee technique. The second is to ignore the various claimants until a decree has been obtained and then to hold open the decree and to permit them upon solicitation under court auspices to participate in the benefits of the decree. The suit in form will be brought initially by any member of the group who, unchosen and unasked and without soliciting consents from the others or organizing them prior to trial, volunteers to assert the rights of all. This is the technique of the class suit." *Id.* at 688.

While the Rule 23(b)(3)-type class action does not fit within the *Meyers* rubric for "concerted activity," it fits *Alleluia*'s rubric like a glove. The general counsel was right.

In *D.R. Horton* the NLRB was simply not honest. It necessarily departed from *Meyers* and the traditional construction of Section 7, and resurrected *Alleluia*, but it did not acknowledge that it was doing so. Instead, it cited *Meyers* for the new rule it was announcing.

By citing *Meyers* for the rule of *Alleluia*, the board engaged in a kind of administrative legerdemain. It left employers scratching their heads over the standard for concerted activity in the post-*D.R. Horton* world. Is it *Meyers*? *Alleluia*? Some mixture of the two? If the latter, how does the mixture work? Is it *Alleluia* for class relief waivers and *Meyers* for everything else? Is there a longer list of factual settings in which *Alleluia* should be applied? If so, how is that list defined? Does the board get to choose one or the other depending on its views of the broader purposes of the NLRA? Or its views of sound labor policy? Or whim?

D.R. Horton does not represent sound administrative practice. It is a bedrock principle of administrative law that "[a]n agency in its deliberations is under an obligation to follow, distinguish, or overrule its own precedent." *Local 777, Democratic Union Organizing Committee v. N.L.R.B.*, 603 F.2d 862, 872 (D.C. Cir. 1978). "[I]t is also a clear tenet of administrative law that if the agency wishes to depart from its consistent precedent it must provide a principled explanation for its change of direction." *National Black Media Coalition v. FCC*, 775 F.2d 342, 355 (D.C. Cir. 1985). The board "may not depart sub silentio, from its usual rules of decision to reach a different, unexplained result in a single case." *Shaw's Supermarkets, Inc. v. N.L.R.B.*, 884 F.2d 34, 36-37 (1st Cir. 1989). The board flouted this principle when it decided *D.R. Horton*.

Dr. Seuss' Horton the Elephant (who heard a Who) said, "So call a big meeting. Get everyone out. Make every Who holler! Make every Who shout! Make every Who scream! If you don't, every Who is going to end up in a beezle-nut stew!" Dr. Seuss understood what concerted activity really is. Perhaps if the NLRB had re-read their Seuss before deciding D.R. Horton, they would not be in the stew.

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