Circuit Split Widens Over Enforceability of Arbitration Agreements Containing Class/Collective Action Waivers

In **an article** in the Polsinelli blog "Polsinelli at Work," shareholder **James C. Sullivan** writes about how unsettled the law is on employer/employee arbitration provisions containing class/collective action waivers. For now, some guidance on the issue may depend upon where a case is filed, and the Supreme Court likely will resolve the conflicting lower court decisions on the issue.

"Five years ago, the United States Supreme Court in *AT&T Mobility LLC v. Concepcion* ruled, in a 5-4 decision written by Justice Scalia, that state laws prohibiting the enforcement of consumer contracts containing an arbitration provision with a class action waiver were contrary to the Federal Arbitration Act. Within a year of that decision, the National Labor Relations Board in *D.R. Horton* ruled that *Concepcion* did not apply in the context of employee rights under the National Labor Relations Act, specifically § 7 which vest employees with the right to engage in 'concerted activities,' " writes Sullivan.

The Fifth Circuit, the Second and Eleventh Circuits have ruled that class/collective action waivers in employer-employee arbitration agreements are enforceable. But in June 2016, the Seventh Circuit turned the tide, becoming the first federal court of appeals to adopt the NLRB's rationale in *D.R. Horton*. And later the Ninth Circuit adopted the reasoning of the Seventh Circuit.

Read the article.