ARBITRATION AND COLLECTIVE ACTIONS — NATIONAL LABOR RELATIONS ACT — SEVENTH CIRCUIT INVALIDATES COLLECTIVE ACTION WAIVER IN EMPLOYMENT ARBITRATION AGREEMENT. — *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016).

Since the Supreme Court decision in *AT&T Mobility LLC v. Concepcion*,[1] lower courts have generally upheld employment arbitration agreements — agreements to adjudicate employment disputes outside of court — that contain collective action waivers, which require employees to give up the right to bring cases collectively.[2] Recently, in *Lewis v. Epic Systems Corp.*,[3] the Seventh Circuit invalidated an employment arbitration agreement with a collective action waiver, creating a circuit split.[4] The court held that the agreement violated the National Labor Relations Act[5] (NLRA) and was unenforceable under the Federal Arbitration Act[6] (FAA). While the Seventh Circuit distinguished *Lewis* from *Concepcion*, the court missed an opportunity to fully flesh out its reasons for doing so, a move that would have strengthened the court's argument and furthered its contribution to the ongoing debate on how *Concepcion* applies to employment arbitration agreements. The *Lewis* court could have pointed out that the underlying concern in *Concepcion* — that invalidating the Concepcions' arbitration agreement under a state rule would have thwarted the purposes of the FAA — was not applicable to *Lewis* because judicial discretion was appropriately cabined in *Lewis* and because collective actions do not present the same procedural burdens as class actions.

On April 2, 2014, Epic Systems (Epic), "a health care software company," sent an email to its employee Jacob Lewis, requesting that he sign an arbitration agreement.[7] The agreement stipulated that "wage-and-hour claims could be brought only through individual arbitration."[8] Additionally, the agreement included a collective action waiver, which waived employees' "right[s] to participate in . . . any

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[1] 563 U.S. 333 (2011).

[2] *See* Stephanie Greene & Christine Neylon O'Brien, *The NLRB v. the Courts: Showdown over the Right to Collective Action in Workplace Disputes*, 52 AM. BUS. L.J. 75, 98 (2015).

[3] 823 F.3d 1147 (7th Cir. 2016).

[4] *See id.* at 1157. Since *Lewis*, the Ninth Circuit has also invalidated such arbitration agreements. *See* Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016). In contrast, the Second, Fifth, and Eighth Circuits have held that such agreements are enforceable. *See* D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 362 (5th Cir. 2013); Sutherland v. Ernst & Young LLP, 726 F.3d 290, 299 (2d Cir. 2013); Owen v. Bristol Care, Inc., 702 F.3d 1050, 1055 (8th Cir. 2013).

[5] 29 U.S.C. §§ 151–169 (2012).

[6] 9 U.S.C. §§ 1–16 (2012).

[7] *Lewis*, 823 F.3d at 1151.

[8] *Id.*

class, collective, or representative proceeding."[9] Lewis reviewed and accepted the agreement, as requested by Epic.[10]

Despite his acceptance of the arbitration agreement, Lewis later brought a collective action lawsuit against Epic in the Western District of Wisconsin instead of proceeding under individual arbitration. Lewis alleged that Epic "misclassif[ied] him and his fellow technical writers" and "depriv[ed] them of overtime pay" in violation of the Fair Labor Standards Act[11] (FLSA).[12] In a motion to dismiss and compel arbitration, Epic maintained that Lewis's claims were subject to the arbitration agreement.[13] While Lewis agreed that his claims fell under the agreement, he argued that the agreement's collective action waiver violated the NLRA and was unenforceable.[14] Under a provision in Epic's arbitration agreement, Lewis was entitled to bring his claim in court if the waiver was unenforceable.[15]

The district court denied Epic's motion, holding that Epic's collective action waiver was unenforceable and that Lewis was entitled to bring his claim in court.[16] To reach the conclusion, the court deferred to the National Labor Relations Board's (NLRB) interpretation of the NLRA.[17] The NLRB has interpreted section 7 of the NLRA, which guarantees employees the right to "concerted activities,"[18] to include the right to engage in class and collective actions.[19] Section 7 rights are then enforced by section 8, which prohibits employers from "interfer[ing] with [or] restrain[ing]" employees' section 7 rights.[20] Thus, under the NLRB's interpretation, a collective action waiver, such as the one in Epic's arbitration agreement, violates the NLRA.[21]

The Seventh Circuit affirmed.[22] Writing for the panel, Chief Judge Wood[23] adopted much of the district court's reasoning and held that

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[9] *Id.*

[10] *Id.*

[11] 29 U.S.C. §§ 201–219 (2012).

[12] *Lewis*, 823 F.3d at 1151.

[13] *See id.*

[14] *See* Lewis v. Epic Sys. Corp., No. 15-cv-82, 2015 WL 5330300, at *1 (W.D. Wis. Sept. 11, 2015). Lewis also argued that the court should invalidate the agreement because the waiver was unconscionable, but the district court did not reach this question. *See id.* at *1–3.

[15] *See id.* at *1.

[16] *See id.* at *2–3.

[17] *See id.* at *1 (citing the NLRB's interpretation of the NLRA in D.R. Horton, Inc., 357 N.L.R.B. 2277 (2012)). Courts generally agree that the NLRB's interpretation of section 7 of the NLRA is entitled to deference. *See* Note, *Deference and the Federal Arbitration Act: The NLRB's Determination of Substantive Statutory Rights*, 128 HARV. L. REV. 907, 917 (2015).

[18] 29 U.S.C. § 157 (2012).

[19] *See Lewis*, 2015 WL 5330300, at *1.

[20] 29 U.S.C. § 158.

[21] *See Lewis*, 2015 WL 5330300, at *2.

[22] *Lewis*, 823 F.3d at 1151.

[23] Chief Judge Wood was joined by Judges Rovner and Blakey. Judge Blakey sat by designa-

Epic's arbitration agreement was unenforceable under the NLRA and that Lewis was entitled to bring his claim in court.[24] Considering both precedents and the text, history, and purpose of the NLRA, the Seventh Circuit determined that the right of employees to engage in concerted activities under section 7 of the NLRA includes the right to file class and collective actions.[25] Even if the term "concerted activities" were ambiguous, the Seventh Circuit continued, the NLRB's interpretation would still warrant deference.[26] Thus, like the district judge, Chief Judge Wood concluded that the collective action waiver in Epic's arbitration agreement interfered with employees' rights in violation of the NLRA and was therefore unenforceable.[27] Indeed, Chief Judge Wood reasoned that the analysis "could probably stop here" — because the waiver was found to be unenforceable, Epic's arbitration agreement called for Lewis's claim to be brought in court.[28]

Yet, the Seventh Circuit went on to argue that even if the FAA applied, Epic's arbitration agreement would still be unenforceable.[29] Countering Epic's assertion that the FAA conflicts with and trumps the NLRA, the Seventh Circuit explained that the statutes actually do not clash at all.[30] Relying on a "heavy presumption"[31] that federal statutes complement each other, the court illustrated how the FAA and the NLRA fit together.[32] The FAA possesses a saving clause: arbitration agreements "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*."[33] Because illegality is one of these grounds, the illegality of collective action waivers under the NLRA fits neatly into the saving clause.[34] Thus, the court concluded, "the NLRA and FAA work[ed] hand in glove" to render Epic's arbitration agreement unenforceable.[35]

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tion from the Northern District of Illinois.

[24] *See Lewis*, 823 F.3d at 1151.

[25] *See id.* at 1152–53.

[26] *See id.* at 1153; *see also* Note, *supra* note 17, at 917.

[27] *See Lewis*, 823 F.3d at 1154–56. The Seventh Circuit noted that the Ninth Circuit had held that an arbitration agreement with a collective action waiver did not violate the NLRA. *See id.* at 1155 (citing Johnmohammadi v. Bloomingdale's, Inc., 755 F.3d 1072, 1077 (9th Cir. 2014)). However, the Seventh Circuit pointed out that employees could "opt out of the [arbitration] agreement without penalty" in the Ninth Circuit case, whereas Lewis had to accept Epic's arbitration agreement as "a condition of [his] continued employment." *Id.* Thus, the two cases were distinguishable, and the Seventh Circuit "ha[d] no need to resolve [the Circuits'] differences." *Id.*

[28] *Id.* at 1156.

[29] *See id.*

[30] *See id.* at 1157.

[31] *Id.*

[32] *See id.*

[33] 9 U.S.C. § 2 (2012) (emphasis added).

[34] *See Lewis*, 823 F.3d at 1157.

[35] *Id.*

Additionally, Chief Judge Wood addressed the circuit split that *Lewis* created with the Fifth Circuit's holding in *D.R. Horton, Inc. v. NLRB*.[36] The Fifth Circuit had concluded that the NLRA and FAA do not fit together under the FAA's saving clause because the NLRA is an "impediment to arbitration."[37] The Seventh Circuit chastised the Fifth Circuit for making "no effort to harmonize the FAA and NLRA" and noted that finding a conflict between the statutes makes no sense because "the NLRA is in fact *pro*-arbitration."[38] Unlike the Fifth Circuit, the Seventh Circuit also did not find "dicta"[39] from related Supreme Court precedents *Concepcion* and *American Express Co. v. Italian Colors Restaurant*[40] to be dispositive, concluding that "[n]either [case] goes so far as to say that *anything* that conceivably makes arbitration less attractive[, such as section 7 of the NLRA,] automatically conflicts with the FAA."[41] Additionally, the court argued that the Fifth Circuit's decision not to harmonize the NLRA and FAA "would render the FAA's saving clause a nullity" because "[i]llegality is a standard contract defense contemplated by the . . . saving clause."[42]

Lastly, Chief Judge Wood concluded that Epic's arbitration agreement was unenforceable for another reason: the agreement denied Lewis the substantive right to engage in concerted activities under section 7 of the NLRA.[43] Under Supreme Court precedent, arbitration agreements that prospectively waive a party's substantive right are unenforceable.[44] The court argued that the right to engage in concerted activities, which includes the right to class and collective actions, is substantive, rather than "merely procedural," because it is the core right protected by the NLRA.[45] Thus, Epic's arbitration agreement was unenforceable because the collective action waiver prospectively waived Lewis's substantive right to collective action.[46]

In *Lewis*, Chief Judge Wood relied mainly on the FAA's saving clause to hold that Epic's arbitration agreement was unenforceable, even if the FAA applied to the case.[47] The relevant Supreme Court

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[36] 737 F.3d 344 (5th Cir. 2013).
[37] *Id.* at 360.
[38] *Lewis*, 823 F.3d at 1158.
[39] *Id.* at 1157.
[40] 133 S. Ct. 2304 (2013).
[41] *Lewis*, 823 F.3d at 1158.
[42] *Id.* at 1159.
[43] *See id.* at 1160.
[44] *See id.* (citing *Italian Colors*, 133 S. Ct. at 2310).
[45] *Id.*
[46] *See id.*
[47] As explained, the *Lewis* court also made the argument that Epic's arbitration agreement was unenforceable because it prospectively waived Lewis's substantive right. However, scholars have warned that the Supreme Court essentially gutted this type of argument in *Italian Colors*. *See* Katherine V.W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitra-*

precedent is *Concepcion*, which held that the FAA's saving clause does not allow a state law to invalidate an arbitration agreement found in a consumer contract that contained a class action waiver.[48] Following *Concepcion*, the circuits have split on the question of whether *Concepcion*'s reasoning extends to employment arbitration agreements — that is, whether the FAA's saving clause allows the NLRA to invalidate arbitration agreements with collective action waivers.[49] Though the *Lewis* opinion provided careful responses to many arguments, an explicit, thorough analysis of the distinction between *Lewis* and *Concepcion* was missing. The court could have pointed out that the underlying concerns motivating *Concepcion* — that applying a state rule to invalidate the Concepcions' arbitration agreement would obstruct the objectives of the FAA — did not apply to *Lewis*, because *Lewis* did not involve undue judicial hostility toward arbitration agreements or procedural burdens posed by class actions. Accordingly, the court missed an opportunity to provide a stronger argument for why the FAA's saving clause allows the NLRA to invalidate Lewis's arbitration agreement.

According to the Supreme Court, the FAA's saving clause permits arbitration agreements to be invalidated by "generally applicable contract defenses, such as . . . unconscionability."[50] Yet, in *Concepcion*, the Supreme Court held that the FAA's saving clause did not allow the invalidation of an arbitration agreement with a collective action waiver in a consumer contract,[51] even though the agreement was unconscionable under a California common law rule — the *Discover Bank* rule.[52] In reaching its conclusion, the Court relied on a purposivist mode of reasoning.[53] The Court worried that the *Discover Bank* rule

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tion Under the Labor Law, 61 UCLA L. REV. DISCOURSE 164, 179 (2013); *The Supreme Court, 2012 Term — Leading Cases*, 127 HARV. L. REV. 198, 278 (2013). Thus, the argument on the FAA's saving clause was the court's strongest remaining argument.

48 *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 336–38, 343–44 (2011).

49 *See supra* note 4. However, the Second and Eighth Circuits held that such arbitration agreements are enforceable without analyzing the FAA's saving clause. *See* Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013); Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013).

50 *Concepcion*, 563 U.S. at 339 (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996)).

51 *Id.* at 343–44.

52 *See id.* at 338. Under the *Discover Bank* rule, when a class action waiver "is found in a consumer contract of adhesion . . . [that] predictably involve[s] small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money," then the waiver — and often, the arbitration agreement containing the waiver — is unconscionable. *Id.* at 340 (quoting Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005)).

53 After all, the Court did not find the text of the FAA's saving clause, which seemed to encompass the contract defense of unconscionability, to be controlling. *See id.* at 341–44; *see also* David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1244 (2013).

would thwart the purposes of the FAA in two ways.[54] First, the Court suspiciously viewed the *Discover Bank* rule as an instance of "judicial hostility towards arbitration," which the FAA was intended to counteract.[55] The Court observed that the FAA's saving clause does not encompass a state law rule "aimed at destroying arbitration."[56] Second, the Court worried that, in prohibiting class action waivers and thereby requiring class procedures, the *Discover Bank* rule negated the main benefits of arbitration — efficiency and speed, procedural informality, and lower costs to defendants.[57] The Court attributed much of this concern to the need to protect absent class members[58] in a class action.[59] Because of these two concerns, the *Concepcion* Court held that the FAA preempted the *Discover Bank* rule[60] and that the FAA's saving clause did not allow the Concepcions' arbitration agreement to be invalidated by the rule.[61]

Following the decision, practitioners, the NLRB, and courts have disagreed on how *Concepcion* applies to the employment context — specifically, on whether an employment arbitration agreement with a collective action waiver can be invalidated by the NLRA under the FAA's saving clause. On one side of the split, practitioners have predicted and the Fifth Circuit has held that employment arbitration agreements with collective action waivers are enforceable under *Concepcion*'s reasoning.[62] In *D.R. Horton*, the Fifth Circuit observed that like the *Discover Bank* rule, the NLRA prohibits class and collective action waivers and is "an actual impediment to arbitration," so the FAA's saving clause "is not a basis for invalidating [a collective action waiver] in [an] arbitration agreement."[63] On the other side of the split, the NLRB, the Seventh Circuit, and the Ninth Circuit have held that employment arbitration agreements can be invalidated by the NLRA

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[54] *See Concepcion*, 563 U.S. at 343 (suggesting that the *Discover Bank* rule "st[ood] as an obstacle to the accomplishment of the FAA's objectives").

[55] *Id.* at 342.

[56] *Id.* at 343 (citation omitted).

[57] *See id.* at 348–51.

[58] Absent class members are unnamed parties to a class action lawsuit who have not opted out of the class. Because absent class members generally do not participate actively in the case, their interests are usually guarded by more extensive procedural requirements. *See* Note, *Conflicts in Class Actions and Protection of Absent Class Members*, 91 YALE. L.J. 590, 592 (1982).

[59] *See Concepcion*, 563 U.S. at 347–50.

[60] *See id.* at 352.

[61] *See id.* at 343–44.

[62] *See* Andrée P. Laney, AT&T Mobility*'s Impact on Employers' Arbitration Agreements*, A.B.A. (Sept. 6, 2011), http://apps.americanbar.org/litigation/committees/corporate/articles/summer2011-att-mobility-arbitration.html [https://perma.cc/2TXK-5YP8]; *see also* D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 359–60 (5th Cir. 2013).

[63] *D.R. Horton*, 737 F.3d at 360.

under the FAA's saving clause because cases involving employment arbitration agreements can be distinguished from *Concepcion*.[64]

However, in creating the circuit split in *Lewis*, the Seventh Circuit missed an opportunity to provide a thorough analysis of why *Concepcion*'s reasoning does not apply to employment arbitration agreements. The *Lewis* court could have pointed out that the main concern in *Concepcion* — that invalidating the Concepcions' arbitration agreement under the *Discover Bank* rule would have been contrary to the purposes of the FAA — was caused by judicial hostility and class action procedures and was not applicable to *Lewis*.

First, the *Lewis* court could have eased the *Concepcion* Court's concerns about judicial hostility by explaining that the NLRA, a federal statute, allows for much less judicial discretion than the *Discover Bank* rule, a judge-made state law. In *Concepcion*, the Court worried that judges hostile to arbitration could make up common law contract defenses as a subterfuge for invalidating arbitration agreements.[65] Specifically, the Court feared that the judicial invocation of the contract defense of unconscionability in *Discover Bank* was "aimed at destroying arbitration."[66] Because the NLRA, a federal statute enacted by Congress, dictated the existence of the contract defense of illegality in *Lewis*, judges did not have the opportunity to make up a contract defense to invalidate the arbitration agreement.

Likewise, the Seventh Circuit could have distinguished *Lewis* from *Concepcion* by noting that the contract defense of illegality at issue in *Lewis* also granted judges less discretion than the defense of unconscionability did in *Concepcion*. Specifically, in *Concepcion*, the Supreme Court thought that judges applying the *Discover Bank* rule were more likely to hold arbitration agreements unconscionable than they would other types of contracts, even though the rule appeared to be neutral.[67] Holding arbitration agreements to be unconscionable requires subjective findings of "'oppression' or 'surprise' due to unequal bargaining power . . . [and] 'overly harsh' or 'one-sided' results."[68] Requiring these subjective findings confers discretion to judges, who might be hostile to arbitration agreements. In contrast, the contract defense of illegality provides no such discretion. An arbitration

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[64] *See* D.R. Horton, Inc., 357 N.L.R.B. 2277, 2287 (2012); *see also Lewis*, 823 F.3d at 1158; Morris v. Ernst & Young, 834 F.3d 975, 988–90 (9th Cir. 2016).

[65] *Concepcion*, 563 U.S. at 342 ("[J]udicial hostility towards arbitration . . . ha[s] manifested itself in a 'great variety' of 'devices and formulas' declaring arbitration against public policy." (quoting Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 406 (2d Cir. 1959))).

[66] *Id.* at 343.

[67] *Id.* at 343–44.

[68] *Id.* at 340 (quoting Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000)).

agreement is either illegal or not, depending on whether it violates a law — the NLRA in this case.[69]

Finally, the Seventh Circuit missed an opportunity to point out that the collective action procedures in *Lewis* would not raise the same concern of obstructing the FAA's objectives as the class action procedures did in *Concepcion*. The *Concepcion* Court worried that the *Discover Bank* rule's requirement of class procedures would thwart the purposes of the FAA by taking away the main benefits of arbitration — efficiency and speed, procedural informality, and lower costs to defendants.[70] The Court thought the need to protect absent class members especially contributed to this problem because protecting absentees would "necessitat[e] additional and different procedures and involv[e] higher stakes."[71] However, this concern is not applicable to *Lewis*. *Lewis* and other employment lawsuits under the FLSA, the Age Discrimination in Employment Act, and the Equal Pay Act involve collective actions.[72] Unlike class actions, collective actions are "opt-in," meaning "members must actively opt in to the lawsuit, by filing an individual consent to join."[73] As such, collective actions do not have absent class members[74] and do not raise the same concerns of obstructing the FAA's objectives as class actions did in *Concepcion*.

Even though the Seventh Circuit distinguished *Lewis* from *Concepcion*, the court did not provide extensive analysis on its reasons for doing so. It summarily dismissed the relevance of *Concepcion* in one paragraph,[75] despite the circuit split on whether *Concepcion*'s reasoning extends to the employment context. The court could have provided a robust analysis of why employment arbitration agreements with collective action waivers can be invalidated under the NLRA, while the Concepcions' agreement could not be invalidated under the *Discover Bank* rule. In this case, the court missed a chance to make a stronger argument for harmonizing the NLRA and FAA to allow for the invalidation of arbitration agreements.

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[69] One might argue that Chief Judge Wood's interpretation of the NLRA exhibited judicial hostility, because the NLRA could be read to uphold arbitration agreements with collective action waivers. *See Morris*, 834 F.3d at 995–96 (Ikuta, J., dissenting). However, because the NLRB first advanced the interpretation that Chief Judge Wood adopted, the interpretation could not have arisen out of judicial hostility.

[70] *See Concepcion*, 563 U.S. at 348–51.

[71] *Id.* at 348; *see also id.* ("[A]rbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.").

[72] *See* EVE H. CERVANTEZ & L. JULIUS M. TURMAN, ABA SECTION OF LABOR AND EMPLOYMENT LAW, INTRODUCTION TO CLASS ACTIONS AND COLLECTIVE ACTIONS 2 (2008).

[73] *Id.* at 2–3.

[74] *See id.* at 18.

[75] *See Lewis*, 823 F.3d at 1158.