



THE FLORIDA BAR

# LABOR & EMPLOYMENT LAW SECTION E - U P D A T E S

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Publications Sub-Committee Co-Chairs

## ***FLORIDA SUPREME COURT: PROPOSAL FOR SETTLEMENT STATUTE DOES NOT APPLY TO AN ACTION FOR BOTH DAMAGES AND EQUITABLE RELIEF***

This month, in *Diamond Aircraft Indus., Inc. v. Horowitch*, Case No. SC11-1371 (Fla. 2013), the Supreme Court of Florida issued an important ruling interpreting Florida's proposal for settlement statute. The case arose from a request for certification by the Eleventh Circuit Court of Appeals to the Florida Supreme Court concerning the application and interpretation of Section 768.79(1), Fla. Stat. (2011). The crux of the opinion is that if a complaint contains a request for equitable relief, then the proposal for settlement statute does not apply to the claims raised by the complaint even if "the equitable claim lacks serious merit."<sup>1</sup> Since the Court's ruling ostensibly means the statute will apply only in cases where monetary damages are the only relief sought, the opinion calls into question the continued viability of the statute in employment cases, which often seek damages and equitable remedies like reinstatement.

The Court explained that the statute was enacted to deter individuals from rejecting reasonable settlement offers.<sup>2</sup> That goal was accomplished by imposing attorneys' fees and costs on a plaintiff who rejects a monetary offer, proceeds to trial and has a verdict returned in the defendant's favor, or who obtains a judgment at least 25% less than the offer.<sup>3</sup> The statute specifically states that it applies "[i]n any civil action for damages."<sup>4</sup> Based on a strict construction of the statutory language, the Court's ruling appears reasonable.

However, in its opinion certifying the issue to the Florida Supreme Court, the Eleventh Circuit articulated very real concerns with the position that ultimately came to be the holding of the Supreme Court. The Eleventh Circuit noted:

If a plaintiff could simply "tack on" an equitable claim in the alternative to his claims for damages and thereby preclude the application of the statute, then he could avoid the application of the statute through artful pleading. This risk is particularly acute in a case like this one, in which the equitable claim is so lacking in merit.<sup>5</sup>

Accordingly, the Florida Supreme Court's opinion may well spawn litigation targeted at striking claims for equitable relief in cases in which the statute should arguably apply.

~ J. Evan Gibbs III of Constangy, Brooks & Smith, LLP.

### **Endnotes**

1. Case No. SC11-1371 (Fla. 2013) at 25.
2. *Id.* at 20.
3. FLA. STAT. § 768.79(1) (2011).
4. Note that the statute applies to cases pending in Florida U.S. district courts sitting in diversity jurisdiction since the proposal for settlement statute is considered "substantive" for *Erie* purposes. *Specialized Transp. of Tampa Bay, Inc. v. Nestle Waters N. Am., Inc.*, 2010 WL 3419816 (M.D. Fla. 2010).
5. *Horowitch v. Diamond Aircraft Indus., Inc.*, 645 F.3d 1254, 1263 (11th Cir. 2011).

## CLASS ACTION WAIVERS IN FLSA CASES UPHELD BY EIGHTH CIRCUIT

Arbitration agreements containing class waivers are enforceable in claims brought under the FLSA, the Eighth Circuit held this month in *Owen v. Bristol Care*, No. 12-1719 (8th Cir. Jan. 7, 2013). The district court had ruled that the agreement at issue, which prohibited employees from arbitrating FLSA cases on behalf of a class, was unenforceable based largely on the NLRB's recent decision in *D.R. Horton*. In *D.R. Horton*, the NLRB held a class waiver unenforceable in a similar FLSA challenge, finding that the waiver conflicted with the employees' Section 7 rights to engage in protected concerted activity. The Eighth Circuit distinguished *D.R. Horton* and reversed. First, the court noted that the NLRB limited its holding to arbitration agreements barring all protected concerted action, whereas the agreement at issue did not bar an employee from filing a complaint with the Department of Labor ("DOL"). Second, the appellate court observed that nothing in the agreement precluded any administrative agency, such as the DOL, from investigating and, if necessary, filing suit on behalf of a class of employees. Third, the court noted that *D.R. Horton* conflicted with the Supreme Court's decision in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), and most federal appellate decisions on the issue.

Nevertheless, this issue is far from settled. The U.S. Supreme Court is scheduled to hear argument next month in the case of *American Express Co. v. Italian Colors Restaurant* on whether the Federal Arbitration Act permits courts to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal law claim. Although *Italian Colors* does not involve FLSA claims, it may have an impact on the reasoning in *Owen v. Bristol Care*. The *D.R. Horton* case is also pending on appeal before the Fifth Circuit, with oral argument scheduled for February 5, 2013.

~ Jay P. Lechner of Greenberg Traurig, P.A.

## SECTION CALENDAR

### FEBRUARY 14-15, 2013

#### 13th Annual Update And Certification Review

The Peabody Orlando, 9801 International Drive, Orlando, FL 32819, [www.peabodyorlando.com](http://www.peabodyorlando.com)

- 13<sup>TH</sup> Labor and Employment Law Annual Update and Certification Review (1445R)  
2/14-15/2013
- Executive Council Meeting  
2/14/2013, 5:00 p.m. to 6:00 p.m.
- Reception  
2/14/2013, 6:00 p.m. to 7:30 p.m.

### MARCH 19, 2013

#### Audio Webcast

- The Reemployment Assistance Appeal Process (1573R)

### APRIL 5-6, 2013

#### Advanced Labor Topics 2013

Hawks Cay Island Resort, Marina & Villas, Duck Key, FL, [www.hawkscay.com](http://www.hawkscay.com)

- Advanced Labor Topics 2013 (1523R)  
4/5-6/2013
- Executive Council Meeting  
4/5/2013, 5:00 p.m. to 6:00 p.m.
- Reception  
4/5/2013, 6:00 p.m. to 6:30 p.m.
- Dinner  
4/5/2013, 6:30 p.m. to 8:30 p.m.

### MAY 14, 2013

#### Audio Webcast

- Immigration Law Issues for the Employment Lawyer (1574R)

### JUNE 4, 2013

#### Audio Webcast

- E-Discovery (1575R)

### JUNE 27, 2013

#### The Florida Bar Annual Convention

Boca Raton Resort & Club, 501 East Camino Real, Boca Raton, FL 33432, [www.bocaresort.com](http://www.bocaresort.com)

- Executive Council Meeting  
6/27/2013, 5:00 p.m. to 6:00 p.m.
- Reception  
6/27/2013, 6:00 p.m. to 7:00 p.m.

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