On August 22, 2016, the U.S. Court of Appeals for the Ninth Circuit joined the fray among the federal appellate courts by invalidating an arbitration agreement that prohibited employees from aggregating their claims in a class or collective proceeding. In a case in which the National Labor Relations Board (“NLRB”) was not even a party, the court in *Morris v. Ernst & Young* adopted the NLRB’s 2012 decision in *D.R. Horton Co.*, 357 NLRB No. 184 (2012), holding that agreements waiving the right to pursue such actions in any forum violated employees’ rights to engage in “concerted activity” under the National Labor Relations Act (“NLRA”). (9th U.S. Circuit Court of Appeals, Case No. 13-16599, August 22, 2016). In doing so, the court joined the 7th Circuit Court of Appeals, while rejecting the decisions of the 2nd, 5th and 8th Circuits, which refused to adopt *Horton* – thus setting up a classic “circuit split” that will have to be resolved by the Supreme Court.

The case centered on the legality of a “concerted action waiver” that required Ernst & Young employees to pursue legal claims against the company only in arbitration and in “separate proceedings” as individuals. After a U.S. District Court ordered the plaintiffs’ claims to be arbitrated pursuant to their agreements, an appeal was filed with the Ninth Circuit. Addressing the issue of the legality of such agreements for the first time, the court held by requiring its employees to sign the waiver as a condition of their employment, Ernst & Young interfered with the “substantive right” of its employees to act concertedly in seeking to resolve disputes they had with the company. In rejecting an argument that its decision disfavored arbitration, the court stated that the same result would apply if an employer allowed “rolls of the dice or tarot cards” instead of arbitration to resolve workplace disputes, so long as it was coupled with a restriction on concerted activity.
In a strong dissent, Circuit Judge Ikuta essentially questioned whether the two-judge majority even knew what governing legal standard applied, since they did not attempt to apply the test that the Supreme Court has repeatedly applied in determining whether other federal statutes run afoul of the Federal Arbitration Act ("FAA"). Calling the decision "breathtaking in its scope and error," Judge Ikuta inquired into whether there was a "congressional command" in the NLRA to preclude class waivers in arbitration. Concluding that there is not, she dismissed the majority's conclusion that the FAA and NLRA were "capable of co-existence" as irrelevant.

Although this decision is certainly a blow to employers who wish to enforce class arbitration waivers as a means of eliminating class-based claims, all is not lost. The majority in Morris noted that an employee who could have opted out of an individual dispute resolution agreement and chose not to would not be able to avoid the effects of the "concerted action waiver," thereby enabling employers who have implemented such "opt out clauses" to continue enforcing their agreements. In addition, while Morris is otherwise binding on any employer which is seeking to enforce such a waiver in federal court, it should not apply to state court proceedings given the California Supreme Court’s 2014 decision in Iskanian v. CLS Transport, 59 Cal.4th 348 (2014), that rejected D.R. Horton. Accordingly, employers using opt out clauses or who find themselves in state court, will likely continue to be able to proceed as if D.R. Horton does not exist, while awaiting the Supreme Court’s grant of certiorari in the appropriate case to resolve the issue.