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California Court Upholds Class Action and PAGA Waivers in Arbitration Agreement

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In *Iskanian v. CLS Transportation Los Angeles, LLC*, a California appellate court applied the Federal Arbitration Act (FAA) and the U.S. Supreme Court's interpretation of the FAA in *AT&T Mobility LLC v. Concepcion* to affirm a trial court's order granting a motion to compel individual arbitration of the plaintiff-employee's wage and hour claims, dismiss the plaintiff's class action claims, and preclude the plaintiff from pursuing claims under California's Private Attorney General Act other than the plaintiff's own individual PAGA claims. In so holding, the court concluded that the California Supreme Court's decisions in *Gentry v. Superior Court, Broughton v. Cigna Healthplans,* and *Cruz v. PacifiCare Health Systems* were all effectively overruled by *Concepcion*.

Iskanian involved the wage and hour claims of a former employee of CLS Transportation Los Angeles, LLC who signed a Proprietary Information and Arbitration Policy/Agreement (Agreement) during his employment. The Agreement included an arbitration clause, which required the employee and the company to submit all disputes to binding arbitration and precluded and waived the employee's and the company's right to assert class action claims and representative action claims in arbitration:

> [E]xcept as otherwise required under applicable law, (1) EMPLOYEE and COMPANY expressly intend and agree that class action and representative action procedures shall not be asserted, nor will they apply, in any arbitration pursuant to this Policy/Agreement; (2) EMPLOYEE and COMPANY agree that each will not assert class action or representative action claims against the other in arbitration or otherwise; and (3) each of EMPLOYEE and COMPANY shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person.

Despite having signed the Agreement, the plaintiff filed a wage and hour class action in court against the company in 2006. The plaintiff later amended the lawsuit in 2008 to add representative action claims under California Business and Professions Code section 17200 and PAGA.

The company moved to compel arbitration in 2007, and the trial court granted that motion. Shortly thereafter, the California Supreme Court issued its decision in *Gentry v. Superior Court*, which imperiled the validity of class action waiver clauses in employment arbitration agreements. As a result, an appellate court ordered the trial court to reconsider its decision compelling arbitration in light of *Gentry*. On remand, the company withdrew its motion to compel arbitration. But, after the

U.S. Supreme Court issued its decision in *AT&T Mobility LLC v. Concepcion* in 2011, as expected, the company filed another motion to compel arbitration, which the trial court again granted. The case was again appealed.

In its decision, the appellate court affirmed the order compelling arbitration. The court held that *Concepcion* overruled several California Supreme Court decisions (*Gentry, Broughton, and Cruz*) and at least one appellate decision (*Brown v. Ralphs Grocery Co.*). These decisions had, previously, sharply curtailed employer rights to enforce arbitral class and representative (PAGA) action waivers in employment arbitration agreements.

The court also rejected the employee's challenge to arbitration based on the National Labor Relations Board's (NLRB) *D.R. Horton* decision. The employee argued that *D.R. Horton* posed yet an additional obstacle to enforcement of arbitration agreements with class action waiver clauses on the ground that these agreements interfered with employee rights to engage in concerted, protected activity under the National Labor Relations Act.

The *Iskanian* decision held that the recent U.S. Supreme Court authority overruled California Supreme Court cases affecting the enforceability of arbitration agreements. In so holding, the court first observed that the FAA "makes agreements to arbitrate 'valid, irrevocable, and enforceable, save upon grounds as exist at law and in equity for the revocation of any contract.'" *Concepcion* explained that the FAA reflects a "liberal federal policy favoring arbitration" and, under the FAA, "[a]rbitration agreements . . . are enforced according to their terms, in the same manner as other contracts." The court in *Iskanian* further observed that California law follows similar principles governing the validity of arbitration agreements.

Following *Concepcion*, the court in *Iskanian* concluded that the FAA preempts state laws that prohibit arbitration of a particular claim. It also held that the FAA preempts those state laws or rules that may be facially proper, but nevertheless disfavor arbitration. In *Concepcion*, the U.S. Supreme Court held that the FAA preempted (and invalidated) California's *Discover Bank* rule, which precluded enforcement of class action waiver clauses in consumer arbitration agreements where the claim was that a defendant defrauded consumers individually of small amounts of money. Such a rule, per *Concepcion*, interfered with the "overarching purpose of the FAA . . . to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."

Because *Gentry* expressly relied in part on the rejected *Discover Bank* rule, the court in *Iskanian* had little difficulty concluding that *Gentry* was overruled by *Concepcion*. The court found that *Concepcion* "conclusively invalidates the *Gentry* test" because a successful plaintiff who prevailed under the *Gentry* test could then force the defendant to resolve disputed claims in class arbitration proceedings. The court recognized that such a result would be at odds with *Concepcion*, which "rejected the concept that class arbitration procedures should be imposed on a party who never agreed to them."

The court in *Iskanian* also concluded that *Concepcion* completely overruled Gentry because: (1) its reliance on state public policy to invalidate class action waivers was itself inconsistent with the FAA's mandate of enforcing arbitration agreement according to their terms; and (2) its reliance on the need to vindicate statutory rights (which, in *Gentry*, involved the right to minimum wages and overtime) also was insufficient to overcome the FAA's preemptive effect. Because *Gentry* therefore was an "obstacle" to the enforcement of the parties' agreement in accordance with its terms, it could not withstand the preemptive effect of the FAA.

As to the NLRB's analysis in *D.R. Horton*, the court determined that U.S. Supreme Court authority in *Concepcion* and other cases, and the FAA, a statute not administered by the NLRB, controlled, not the NLRB's interpretation of the National Labor Relations Act. Iskanian thus became one more in an ever-growing number of decisions that reject the Board's *D.R. Horton* decision, an appeal of which is pending before the U.S. Court of Appeals for the Fifth Circuit.

As for the PAGA/representative action waiver, the court in Iskanian expressly declined to follow *Brown v. Ralphs Grocery Co.*, which had held that because PAGA claims involved the assertion of "public rights," waiver clauses in arbitration agreements that precluded PAGA claims were per se invalid and unenforceable. Instead, the *Iskanian* court concluded that any state public policy prohibiting enforcement of a PAGA waiver in an arbitration agreement (as articulated by the court in *Brown*) was preempted by the FAA. Accordingly, the court held that *Concepcion* had overruled the California Supreme Court's decisions in *Broughton and Cruz*, which previously refused to enforce arbitration agreements involving representative action claims on similar grounds.

Iskanian will likely be brought before the California Supreme Court, as it now creates a clear conflict in California arbitration law jurisprudence. Irrespective of whether the California Supreme Court accepts review, *Iskanian* may encourage California employers that have not yet adopted arbitration programs to give the matter a second look.

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