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One Minute Memo®

California Court Adopts New Theory In Trying To Save *Gentry*

Deepening the split among California courts on the issue, California's Second District Court of Appeal held this week that the California Supreme Court's decision in *Gentry v. Superior Court* remains good law despite *AT&T Mobility v. Concepcion* and other U.S. Supreme Court cases confirming that the Federal Arbitration Act ("FAA") preempts state laws that discriminate against arbitration agreements. While the ruling does nothing to resolve the continuing uncertainty over whether *Gentry* is good law or not, it is noteworthy because the Court adopted *both* the Second Circuit's "vindication of statutory rights" exception to FAA preemption *and* a new theory positing that *Concepcion* only invalidates "categorical rules against class action waivers," and not rules that invalidate class action waivers only when a case-by-case test is satisfied.

Franco v. Arakelian Enterprises, No. B232583 (Nov. 26, 2012), involved a petition to compel individual arbitration of a putative employment class action claiming statutory pay for missed rest and meal breaks. The court previously had affirmed an order denying the petition (at 171 Cal. App. 4th 1277 (2009)), but took the case again to determine whether *Gentry* remains good law after *Concepcion* and *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp,* 130 S. Ct. 1740 (2011). *Gentry* is an important case because it established an unconscionability test for class action waivers in employment cases which was not expressly overruled in *Concepcion.* It also is frequently cited in opposition to arbitration motions outside the employment context, most often to support the claim that "unwaivable statutory rights" cannot be arbitrated and to oppose the argument that opt-out provisions in arbitration agreements defeat procedural unconscionability.

In rationalizing that *Gentry* has survived the continuing onslaught of FAA preemption decisions by the U.S. Supreme Court, *Franco* adopted the same "unwaivable statutory rights" argument employed by the Second Circuit in *In Re American Express Merchants Litigation*, 667 F.3d 204, 219 (2d Cir. 2012), *cert. granted sub nom American Express Co. v. Italian Colors Restaurant* (Nov. 9, 2012). That theory, which is under Supreme Court review, posits that arbitration cannot be ordered if statutory rights at issue in the case cannot be vindicated through arbitration due to the nature of the claims at issue. In addition, the court adopted a new theory claiming that *Concepcion* invalidated California's *Discover Bank* rule only because "it constituted a categorical rule against class action waivers in consumer contracts, thereby disfavoring arbitration." *Gentry*, on the other hand, created a case-by-case test for unconscionability rather than a categorical rule, thereby surviving *Concepcion*.

The new theory adopted in *Franco* plainly is based on a complete misreading of the *Concepcion* decision. Not only did the *Discover Bank* rule have a case-by-case test for unconscionability rather than a "categorical rule," but *Concepcion* simply did not draw the distinction claimed by *Franco*. Rather, the case held that any rule -- categorical or not -- that applies greater scrutiny to an arbitration agreement than to any other contract is preempted by the FAA, regardless of public policy consequences. This, of course, is the basis on which other California courts and federal district courts applying California law have held that *Gentry* effectively was overruled by *Concepcion*. In light of *Franco* and other decisions to the contrary, however, *Gentry* remains an obstacle to enforcing class action waivers.

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