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New Decisions Support Waiver Of Class and Representative Arbitration Claims

By Jeffrey A. Berman, Kristen Agnew and Brian P. Long

A California appellate court and two federal district courts in California have issued significant rulings addressing class and representative action waivers in arbitration agreements.

The *Network Capital Funding* Decision

In *Network Capital Funding Corp. v. Papke*, the California Court of Appeal held that where an arbitration agreement is silent on the issue, the trial court, rather than the arbitrator, should determine the threshold issue of whether the agreement authorizes either class arbitration or arbitration of a representative claim under the California Private Attorneys General Act ("PAGA").

Erik Papke and Network Capital Funding entered into a written agreement to submit their employment-related disputes to binding arbitration. The agreement was silent on the issues of class arbitration and representative actions.

When Papke served a demand for class arbitration, including a representative claim, Network Capital responded with an action for declaratory relief in Orange County Superior Court, seeking a judicial determination that (1) it is the court's responsibility to determine whether the arbitration agreement authorized class arbitration, and (2) the arbitration agreement prohibited class arbitration. The trial court granted Network Capital the requested relief. Papke appealed.

On appeal, Papke argued that the Federal Arbitration Act ("FAA") requires that the issue of arbitrability of claims—whether an arbitration agreement encompasses a particular dispute—be decided by the arbitrator. Papke cited a case in his favor, *Sandquist v. Lebo Automotive, Inc.*, 228 Cal. App. 4th 65, 78-79 (2014). Nonetheless, the Court of Appeal disagreed, stating that the general presumption of deference to the arbitrator does not apply to the threshold question of whether a particular claim is subject to arbitration. The Court of Appeal reasoned that because a "party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so," the trial court (and not the arbitrator) should decide whether the parties agreed to class arbitration, "absent a clear and unmistakable agreement to the contrary."

As to whether the arbitration agreement here authorized class arbitration, its language was silent on the issue, and Papke failed to point to any extrinsic evidence of the parties' intent. The Court of Appeal thus concluded that the trial court had properly determined that the agreement did not authorize class arbitration.

The split between *Network Capital* and *Sandquist* may lead the California Supreme Court to address this issue. The U.S. Supreme Court, meanwhile, has yet to issue a definitive ruling as to whether the court or the arbitrator is to address the threshold issue of whether an arbitration agreement authorizes class arbitration.

The *Ortiz* and *Langston* Decisions

On October 1 and 17, 2014, the United States District Courts for the Eastern and Central Districts of California joined a growing group of California federal district courts enforcing not only class waivers contained in arbitration agreements, but the waiver of representative actions. The courts thus enforced an agreement to arbitrate PAGA claims on an individual basis only.

The parties in *Oritz v. Hobby Lobby Stores, Inc.* entered into an arbitration agreement providing that all employment-related disputes be "arbitrated with Employee and Company *as the only parties* to the arbitration." Similarly in *Langston v. 20/20 Companies, Inc.*, an arbitration agreement between the plaintiff and his employer required that all employment claims be resolved through arbitration, and it prohibited the consolidation of claims into class or representative actions. In both *Ortiz* and *Langston*, the plaintiffs filed putative class actions and representative PAGA claims. The employers asked the courts to compel arbitration on an individual basis only.

In both cases, the employees argued that the PAGA representative action waivers were unenforceable. The employees cited the recent California Supreme Court decision in *Iskanian v. CLS Transp. of Los Angeles*, which held that compulsory PAGA waivers are "contrary to public policy and unenforceable as a matter of state law."

The district courts, however, declined to follow *Iskanian*, because that decision contradicts the U.S. Supreme Court's 2011 decision in *AT&T Mobility LLC v. Concepcion*. Consistent with *Concepcion*, the district courts held that the FAA's primary objective is to ensure that arbitration agreements are enforced according to their terms. Further, the district courts held that to the extent that PAGA does not permit the individual arbitration of claims, PAGA is preempted by the FAA. As stated in *Ortiz*: "When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." In rejecting *Iskanian*'s reasoning, the courts held that federal law is clear that a state is without the right to interpret the appropriate application of the FAA. The district courts thus held that the FAA preempts California's rule against arbitration agreements that waive an employee's right to bring representative PAGA claims, and that representative PAGA action waivers are enforceable.

What *Ortiz*, *Langston*, and *Network Capital Funding* Mean for Employers

Ortiz, *Langston*, and *Network Capital Funding* represent a line of judicial authority favoring the enforcement of individual arbitrations in employment disputes. While most of the California federal district courts that have addressed the issue hold that agreements to individually arbitrate PAGA claims are enforceable under the FAA and *Concepcion*, state court decisions come to the opposite result.

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