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One Minute Memo®

California Court Splits in Favor of Employers and Confirms Broad Scope of Arbitration Class Waiver Provisions

In *Iskanian v. CLS Transportation Los Angeles*, LLC, the California Court of Appeal recently confirmed that, in the employment context, the Federal Arbitration Act ("FAA") mandates enforcement of arbitration agreements that waive resort to class actions and representative actions. The court reached this conclusion as a result of the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*. The court's decision, however, is at odds with other California decisions that have failed to heed *Concepcion*'s wisdom. Whether the California Supreme Court will adopt the reasoning in *Iskanian*, or will follow a different path, remains in question.

Case Background

Arshavir Iskanian worked as a driver for CLS Transportation Los Angeles from March 2004 to August 2005. As a condition of his employment, Iskanian signed an arbitration agreement providing that "any and all claims" arising out of his employment were to be submitted to binding arbitration before a neutral arbitrator. The arbitration agreement also contained a class and representative action waiver that expressly provided that neither "class action [nor] representative action" procedures or claims could be asserted in any arbitration.

In August 2006, Iskanian filed a class action against CLS for failure to pay overtime and for failure to provide meal and rest breaks. The trial court granted CLS's motion to compel arbitration, finding that the arbitration agreement was neither procedurally nor substantively unconscionable. When Iskanian sought redress from the Court of Appeal, the court remanded the action to the trial court for reconsideration in light of then-recent California Supreme Court authority — *Gentry v. Superior Court* — holding that a class waiver provision in an arbitration agreement should not be enforced if certain factors indicate that class arbitration would be more effective than individual arbitration.

Following remand, CLS voluntarily withdrew its motion to compel arbitration. Iskanian added representative claims under California's Unfair Competition Law ("UCL") and the Labor Code Private Attorneys General Act of 2004 ("PAGA"). The trial court certified the action as a class action in October 2009.

Eighteen months later, in April 2011, the United States Supreme Court decided *AT&T Mobility LLC v. Concepcion* and held that California's "*Discover Bank* rule" — a state law establishing the unenforceability of class action waivers (as contained in arbitration agreements) in certain contexts — was preempted by the FAA. Soon thereafter, relying on *Concepcion*, CLS renewed its motion to compel arbitration and to dismiss the class claims. The trial court ruled for CLS, requiring arbitration and dismissing the class claims. Iskanian then filed his second appeal.

The Court's Holding

This time the Court of Appeal, recognizing that *Concepcion* has effectively invalidated the California Supreme Court's decision in *Gentry*, affirmed the order to compel arbitration, as it was required to do under a proper reading of Concepcion.

The court preliminarily noted that *Concepcion* identified two categories of state rules preempted by the FAA: (1) state laws that prohibit outright the arbitration of a particular type of claim, and (2) state rules that apply defenses under the FAA's section 2 saving clause "in a fashion that disfavors arbitration." The court embraced the same take-away point in regards to both: the FAA preempts state rules whenever they interfere with the "overarching purpose" of the FAA, which is to "ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." It was for that reason that California's *Discover Bank* rule — which conditioned enforceability of arbitration agreements on the availability of class-wide arbitration procedures — was invalid for interfering with the "overarching purpose" of the FAA.

The court acknowledged that *Concepcion* did not expressly address the validity of the California Supreme Court's decision in *Gentry*, but held that *Concepcion* "conclusively invalidates" *Gentry*. The court noted that *Concepcion* was firm in its ruling that class arbitration procedures cannot be imposed on a party who never agreed to them. The court also noted that *Gentry*'s holding — which required courts to determine whether to impose class arbitration on parties who contractually rejected it — conflicted with the objective of enforcing arbitration agreements according to their terms. States cannot, following *Concepcion*, require procedures that are inconsistent with the FAA, even if those procedures might be desirable for other reasons.

The court also rejected Iskanian's reliance on the recent *D.R. Horton* decision issued by the National Labor Relations Board ("NLRB"). The NLRB in *D.R. Horton* held that employer-imposed agreements to arbitrate employment-related disputes through individual arbitration — while disallowing class or collective claims — violated the National Labor Relations Act. The court reasoned that the NLRB was entitled to no deference because its opinion went beyond an analysis of the NLRA and ventured into a discussion of the FAA and *Concepcion*.

The court also rejected Iskanian's argument that his right to bring representative actions under PAGA was unaffected by FAA preemption. The court found that *Concepcion* clarified the broad nature of the FAA's reach when it noted the prohibition on any state law that "prohibits outright the arbitration of a particular type of claim." In the court's view, this would include PAGA claims. The court acknowledged that it was disagreeing with a recent appellate ruling in *Brown v. Ralphs Grocery Co.*, but reasoned that its conclusion was mandated by the U.S. Supreme Court's ruling in *Concepcion* and other binding precedent.

What Iskanian Means for Employers

Iskanian is one of the most significant pro-employer class action rulings since *Concepcion*. It constitutes a broad-based endorsement of arbitration provisions that contain class action and other representative waivers, and strongly encourages utilization of alternative dispute resolution procedures in connection with employee-employer grievances.

Nonetheless, employers should not be overly optimistic. The plaintiffs' bar will surely seek review of this decision by the California Supreme Court, which has a history of resisting arguments based on FAA preemption. And, California Supreme Court review is especially likely given the direct split now between *Iskanian* and *Brown*. Any such review would take the *Iskanian* decision off the books pending a disposition by the Supreme Court. Until then, *Iskanian*'s well-reasoned analysis is worth citing.

By: *David Kadue* and *Claudia Y.S. Wilson*

David Kadue is a partner in Seyfarth's Los Angeles office and *Claudia Y.S. Wilson* is an associate in the San Francisco office. If you would like further information, please contact your Seyfarth attorney, David Kadue at *dkadue@seyfarth.com* or Claudia Wilson at *cyswilson@seyfarth.com*.

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