Legal Opinion Letter

WLF Washington Legal Foundation

Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

Vol. 21 No. 18 August 17, 2012

CALIFORNIA COURT ENFORCES CONTRACT REQUIRING INDIVIDUALIZED ARBITRATION

by
Evan M. Tager and Kevin S. Ranlett

In *Iskanian v. CLS Transportation Los Angeles, LLC*, 206 Cal. App. 4th 949 (2012), California's Second District Court of Appeal recently upheld a provision in an employment contract requiring employees to arbitrate wage-and-hour disputes on an individual basis. The decision may signal a thawing of the California courts' hostility to the U.S. Supreme Court's pro-arbitration ruling last year in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

In *Concepcion*, the Supreme Court held that the Federal Arbitration Act ("FAA") preempts California's "*Discover Bank*" rule—named for a California Supreme Court decision—that consumer arbitration agreements that prohibit class arbitration are unconscionable. Since *Concepcion* was decided, plaintiffs' lawyers have tried to limit its scope in a variety of ways. Generally, they have been unsuccessful. But some California state courts have been receptive to one argument or another, especially in the employment context.

Iskanian is a welcome break from that trend. In that case—a putative wage-and-hour class action—the Court of Appeal roundly rejected virtually every argument for evading *Concepcion* that has been ventured by the plaintiffs' bar.

First, the court rejected the plaintiff's argument—made routinely in post-*Concepcion* litigation—that the defendant had waived its right to compel arbitration by not pressing the issue earlier. The defendant initially had moved to compel arbitration, but then withdrew it after the California Supreme Court held in *Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007), that the California Labor Code requires class procedures when they "would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration." After the Supreme Court decided *Concepcion*, the defendant in *Iskanian* renewed its motion to compel arbitration. The *Iskanian* court rejected the argument that the defendant had waived its right to compel arbitration, explaining that *Gentry* had made earlier efforts to compel arbitration futile.

The *Iskanian* court also made short work of another recurring argument of the plaintiffs' bar—that *Concepcion* does not apply in cases arising in state court. The argument rests on the fact that Justice Thomas, one of the five Justices in the majority in *Concepcion*, had dissented in prior arbitration cases on the ground that the FAA does not apply in state court. Plaintiffs' lawyers have urged state courts to presume that Justice Thomas would join the four *Concepcion* dissenters in rejecting FAA preemption if a state court were to refuse to enforce an agreement to arbitrate on an individual basis. The *Iskanian* court responded that

---

Evan M. Tager and **Kevin S. Ranlett** are partners with the law firm Mayer Brown LLP in its Washington, D.C. office. They represented AT&T Mobility in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

"[t]his is pure speculation, and it is belied by Justice Thomas's concurring opinion in *Concepcion*, which contains no indication that the holding should apply only in federal court . . . ." The court further observed that "following *Concepcion*, the United States Supreme Court has granted petitions for writ of certiorari vacating judgments arising in state courts, and directing the courts to consider *Concepcion*."

On the merits, the *Iskanian* court rejected every argument raised by the plaintiff. To begin with, the court rejected the notion that *Concepcion* held only that the FAA preempts the *Discover Bank* rule, while leaving in place the supposedly more nuanced *Gentry* standard. The court held that "the *Concepcion* decision conclusively invalidates the *Gentry* test," reasoning that "*Concepcion* thoroughly rejected the concept that class arbitration procedures should be imposed on a party who never agreed to them." As the court explained, "[a] rule like the one in *Gentry*—requiring courts to determine whether to impose class arbitration on parties who contractually rejected it—cannot be considered consistent with the objective of enforcing arbitration agreements according to their terms."

The court also squarely rejected the subsidiary argument that *Concepcion* does not apply when the plaintiff desires to pursue a class action in order to "vindicate statutory rights." The court stated that this rationale is "irrelevant in the wake of *Concepcion*," which held that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."

The court next rejected the plaintiff's reliance on the NLRB's ruling in *D.R. Horton, Inc.*, 357 NLRB 184 (Jan. 3, 2012). In *D.R. Horton* (which is now on appeal to the Fifth Circuit), the NLRB ruled that the National Labor Relations Act ("NLRA") forbids arbitration clauses that require employees to forgo class actions. The court first declined to defer to the NLRB's ruling because it implicates the FAA, a statute that the NLRB is not charged with interpreting. The court then proceeded to reject the NLRB's analysis, explaining that *Concepcion* "made no exception for employment-related disputes." The court further concluded that "the NLRB's attempt to read into the NLRA a prohibition of class waivers is contrary to another recent United States Supreme Court decision"—*CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012)—in which the Court reiterated that, absent a contrary congressional command, agreements to arbitrate federal claims must be enforced according to their terms. Because the NLRB "identified no 'congressional command' in the NLRA prohibiting enforcement of an arbitration agreement pursuant to its terms," the court explained, the NLRB's ruling "does not withstand scrutiny in light of *Concepcion* and *CompuCredit*."

The *Iskanian* court likewise refused to follow the decision of a divided panel from a different district in *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854 (2011). The majority in *Brown* had held that claims under the Private Attorney General Act ("PAGA") for civil penalties on behalf of all affected employees are exempt from arbitration notwithstanding *Concepcion*. The *Iskanian* court accepted the plaintiff's premise that "PAGA was enacted with the intent of promoting the public interest" and "expressly provides for representative actions." Nevertheless, the court concluded, the Supreme Court "has spoken on the issue, and we are required to follow its binding authority." Under *Concepcion*, "any state rule prohibiting the arbitration of a PAGA claim is displaced by the FAA," even if the arbitration provision prohibits representative actions, thereby precluding one employee from recovering PAGA penalties on behalf of all other employees. "[G]iving effect to the terms of the arbitration agreement here, [the plaintiff] may not pursue representative claims against [his employer]"—whether under PAGA or under California's infamous Unfair Competition Law.

This decision indicates that the California appellate courts may finally be bringing California into line with Supreme Court arbitration precedents. Given how definitively the court rejected so many of the post-*Concepcion* arguments that have been advanced by the plaintiffs' bar, there is reason for optimism that state trial courts will begin enforcing arbitration agreements that require individual arbitration—just as their counterparts on the federal bench have been doing.

Plaintiffs have petitioned the California Supreme Court for review of the Court of Appeal's decision. The decision whether to grant review is expected by mid-October.

Copyright © 2012 Washington Legal Foundation ISBN 1056 3059