Legal Opinion Letter

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ISKANIAN v. CLS TRANSPORTATION: WILL CALIFORNIA FALL IN LINE ON CLASS-WIDE ARBITRATION WAIVERS?

by
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On September 19, 2012, the California Supreme Court granted the plaintiff's petition for review of the Second District Court of Appeal's decision in *Iskanian v. CLS Transportation Los Angeles, LLC,* 206 Cal.App.4th 949 (2012). Depending on the Supreme Court's ultimate decision, *Iskanian* could represent a thawing of the California courts' hostility to the U.S. Supreme Court's pro-arbitration decision in *AT&T Mobility LLC v. Concepcion,* as Evan M. Tager and Kevin S. Ranlett wrote in a WLF *Legal Opinion Letter* last year—or an unfortunate doubling-down on that hostility.

Iskanian involves a collision between *Concepcion* and a pre-*Concepcion* decision of the California Supreme Court, *Gentry v. Superior Court.* In *Concepcion,* the U.S. Supreme Court held that the Federal Arbitration Act (FAA) preempted California's *Discover Bank* rule, which held that arbitration clauses barring class arbitration were unconscionable. In *Gentry,* decided four years before *Concepcion* and squarely based on *Discover Bank,* the California Supreme Court instructed lower courts to invalidate arbitration agreements barring class arbitration whenever—based on a four-factor test—the court concluded that individual actions would offer only random and fragmentary enforcement of the wage-and-hour provisions of the California Labor Code.

Iskanian is a putative wage-and-hour class action, brought pursuant to California's Labor Code Private Attorney General Act (the PAGA). The defendant moved to compel arbitration, pointing out that the plaintiff had signed an arbitration agreement which barred class arbitrations. The trial court granted the motion, but not long after, *Gentry* was decided, and the Court of Appeal reversed. Nearly four years later, when *Concepcion* was handed down, the defendant renewed its motion to compel arbitration and dismiss the class claims. The trial court granted the motion.

The Court of Appeal affirmed, rejecting nearly every argument which has been raised by the plaintiffs' bar since *Concepcion* for avoiding that decision's broad sweep. First, the court held that *Concepcion*—which held that nonconsensual class arbitration is inconsistent with the FAA—implicitly overruled *Gentry.* In response to plaintiff's argument that state-law PAGA actions *had* to be brought in court as class actions, the Court of Appeal pointed out that the U.S. Supreme Court has squarely held that states may not require a judicial forum for claims the parties have agreed to arbitrate. The court rejected the plaintiff's argument that the defendant had waived arbitration by failing to press the matter in the years between *Gentry* and *Concepcion,* concluding that such a motion would have been futile. Finally, the

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court refused to follow *D.R. Horton,* 357 NLRB 184 (Jan. 3, 2012), in which the National Labor Relations Board (NLRB) decided that imposing an arbitration agreement on one's employees which barred class arbitration of employment-related disputes violated the National Labor Relations Act.

Despite having played a somewhat lesser role at the Court of Appeal, the plaintiff elevated his PAGA claim to center stage in his petition for review by the California Supreme Court. Plaintiff argued that the Court of Appeal's decision conflicts with California decisions holding that PAGA claims must be brought as class claims, as well as violating U.S. Supreme Court precedent by requiring the state of California—a non-party to the arbitration agreement, but the real-party-in-interest to any PAGA suit—to forfeit its right to a representative action.

The plaintiff also insisted that *Gentry* survived *Concepcion,* arguing that *Gentry* rests on the notion of unwaivable statutory rights, rather than on unconscionability. The plaintiff further argued that *D. R. Horton* represented the NLRB's construction of the NLRA—and was therefore binding on California state courts—rather than an interpretation of the FAA. Finally, the plaintiff argued that the Court of Appeal's refusal to find that the defendant had waived its right to arbitration by failing to press the matter between *Gentry* and *Concepcion* imperiled the entire body of California law on waiver.

The defendant painted a very different picture of the PAGA statute in its answer to the petition. The defendant pointed out that employees have no absolute right to file a representative action under PAGA; such claims were barred in many different circumstances. Although the California Supreme Court did hold that waivers of the PAGA representative action were unenforceable, that decision was based on *Gentry,* which, according to the defendant, was implicitly overruled by *Concepcion.* Besides, the California Supreme Court has squarely held that PAGA was a purely procedural statute, conferring no substantive rights at all, and the U.S. Supreme Court had made it perfectly clear in *Concepcion* that arbitration agreements could waive procedural rights. The defendant criticized the NLRB for exceeding its authority in *D.R. Horton,* arguing that the Board not only interpreted the FAA for itself, but ignored *Concepcion* in the process. The defendant also noted that *Horton* was pending on appeal. Finally, the defendant distinguished earlier authorities on waiver, arguing that any attempt to press for arbitration before *Concepcion* would have been pointless, and that requiring the plaintiff to litigate in the interim wasn't prejudice sufficient to justify waiver.

Forcing PAGA plaintiffs to bring individual claims "is to effectively nullify the statute," plaintiff wrote in reply. Nothing in *Concepcion* required courts to allow parties to nullify rights which the state legislatures had made nonwaivable, according to the plaintiff. At the very least, PAGA could not be preempted by the FAA absent proof of manifest congressional intent—something that was, in the plaintiff's view, missing.

Last fall, the U.S. Supreme Court threw an interesting complication into the *Iskanian* mix, granting a petition for certiorari in *American Express Company v. Italian Colors Restaurant.* In *Italian Colors,* the Second Circuit held that courts should invalidate class action waivers whenever the plaintiff demonstrated that the expense of putting on his case, compared to the likely recovery, meant that the claim had to be adjudicated as a class or not at all. Given the similarities between *Italian Colors* and the *Gentry* court's four-factor test for invalidating class arbitration waivers, it seems likely that the Supreme Court briefing and decision in *Italian Colors* will cast a long shadow over *Iskanian. Italian Colors* will be argued at the Supreme Court on February 27, 2013, and should be decided by the end of the Court's term in June.

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