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PERSPECTIVE

Iskanian denied, so what now?

By Matthew Schechter

Over the last three to four years in California, ever since the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 321 (2011), decisions coming from California's appellate courts have slowly, but inexorably, turned to allowing arbitration agreements that, pre-*Concepcion*, would have been unlikely to survive. *Concepcion*, of course, overruled *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), and held that the Federal Arbitration Act (FAA) preempts California case law prohibiting arbitration agreements that excluded class actions.

Indeed, the holding in *Concepcion* led to the most significant shift in the arbitration landscape in California, that being the California Supreme Court's opinion last summer in *Iskanian v. CLS Transp*. Los Angeles LLC, 59 Cal. 4th 348 (2014). Iskanian was significant on two fronts — one favoring employers, the other employees. First, on the employer side, it explicitly held that in light of *Concepcion*, the court's prior decision in *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), was no longer good law. In overruling *Gentry*, which, in practice, had led to courts invalidating class waiver provisions in employment arbitration agreements in wage and hour cases, *Iskanian* effectively opened the door to employers to include class action waivers in arbitration agreements as such waivers were preempted by the FAA.

While the demise of *Discover Bank* and *Gentry* was a boon to employers, the decision was not without something for employees as well. Thus, while class action waivers are now enforceable, waivers of representative claims under the Private Attorney General Act (PAGA) are not. While one would think that forbidding the enforcement of PAGA waivers would, like prohibiting class action waivers, run up against FAA preemption, the *Iskanian* court said otherwise: "Simply put, a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the state, which alleges directly or through its agents — either the Labor and Workforce Development Agency or aggrieved employees — that the employer has violated the Labor Code."

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CLS Transportation, unsurprisingly, sought review by the U.S. Supreme Court as to the determination that PAGA waivers remained unenforceable, in light of the FAA and the holding in *Concepcion*. The expectation that certiorari would be granted was heightened when, in the months after *Iskanian*, multiple federal district courts in California issued decisions rejecting *Iskanian* and holding that waivers of representative claims under PAGA in arbitration agreements are enforceable. See, e.g., *Langston v. 20/20 Companies Inc.*, 14-01360 (C.D. Cal.); *Fardig v. Hobby Lobby Stores*, 14-00561 (C.D. Cal.) and *Ortiz v. Hobby Lobby Stores Inc.*, 13-01619 (E.D. Cal.). In essence, these decisions find that while California is entitled to interpret California statutes, such as PAGA, such decisions are not binding on federal courts who have jurisdiction to interpret federal statutes such as the FAA. Thus, given the holding in *Conception*, the FAA preempts such PAGA waivers. So one can imagine the surprise when, on Jan. 20, CLS Transportation's petition for certiorari was denied.

As much as the *Conception* and *Iskanian* decisions changed how arbitration agreements are read and enforced in California, the denial of certiorari in *Iskanian* will be just as impactful. Because *Iskanian* remains the law in California state courts, while federal courts seem disinclined to follow that decision and instead apply *Conception*, we face the potential for mischief, conflicting opinions, and forum shopping. Employers, naturally, will continue to include arbitration agreements that contain PAGA waivers as part of their employment contracts. Employees faced with such PAGA waivers will bring suit in state court so *Iskanian*'s invalidation of such waivers will control. At the same time, they will make every possible effort to avoid asserting federal claims, as well as to defeat diversity, so employers can not remove such suits to federal court and seek invoke FAA preemption to enforce the PAGA waiver.

On top of all that, a recent California Court of Appeal case denied an employer's motion to compel arbitration when the arbitration agreement not only contained a PAGA waiver, but also a non-severability clause, making the entire arbitration agreement null and void. See *Monsanto v. Wet Seal Inc.*, B244107 (Cal. App. 2nd Dist., Jan. 7, 2015). Thus, not only will employers and employees be fighting over where a case will be tried, but how the arbitration agreement is drafted will also take on new importance.

The U.S. Supreme Court will need to address this issue at some point, but, unless the right case is already in the court system working its way up the ladder, it won't be anytime soon. In the meantime, as some lawsuits will stay in state courts, while others will end up in federal district courts, we can expect to continue to see conflicting opinions on the validity of PAGA waivers for the foreseeable future, keeping the law unsettled and making things interesting for employers and employees alike.

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