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CALIFORNIA APPELLATE COURT ISSUES PRO-EMPLOYER RULING IN FAVOR OF CLASS ACTION WAIVERS IN ARBITRATION AGREEMENTS

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On Monday, June 4, the Court of Appeal for the Second Appellate District of California affirmed a Los Angeles Superior Court decision upholding an arbitration agreement between an employer and employee that included a class action waiver provision. *Iskanian v. CLS Transp. Los Angeles, LLC*, No. B235158.

For the time being, the decision is being hailed by employers as an unusually—for a California appellate court—pro-employer interpretation of the U.S. Supreme Court's 2011 opinion in *AT&T v. Concepcion*, 131 S. Ct. 1740. In *Concepcion*, the Supreme Court reiterated that the preemptive effect of the Federal Arbitration Act (FAA) ensures that arbitration agreements are enforced according to their terms. In so doing, the Supreme Court rejected California case law that had invalidated arbitration agreements containing class action waivers as unconscionable: "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."

Iskanian worked as a driver for CLS Transportation. He 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 stating that "class action and representative action procedures shall not be asserted, nor will they apply, in any arbitration pursuant to this Policy/Agreement"; the parties would not "assert class action or representative action claims against the other in arbitration or otherwise"; and the parties "shall only submit their own, individual claims in arbitration." Iskanian subsequently brought a complaint against CLS, alleging that it failed to pay overtime, provide meal and rest breaks and other claims. Iskanian brought his claims as an individual, as a putative class representative and in a representative capacity under California's Labor Code Private Attorneys General Act (PAGA). After the Supreme Court decided *Concepcion*, the trial court granted CLS's motion to compel arbitration and dismissed Iskanian's class claims, finding that pursuant to *Concepcion*, enforcement of the arbitration agreement on its terms was required, and therefore the class and representative waivers were effective. Iskanian appealed. He contended that despite the *Concepcion* opinion, for public policy reasons, California law still prohibits arbitration agreements from "interfering with a party's ability to vindicate statutory rights" through class action waivers. The court of appeal disagreed, viewing Iskanian's argument as irrelevant

in the wake of *Concepcion*'s holding that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."

The court of appeal in *Iskanian* also summarily rejected a recent National Labor Relations Board decision, *D.R. Horton*. In *D.R. Horton*, the NLRB held that a mandatory, employer-imposed agreement requiring all employment-related disputes to be resolved through individual arbitration (and disallowing class or collective claims) violated the National Labor Relations Act because it prohibited the exercise of substantive rights protected by Section 7 of the NLRA. The court of appeal noted that it would likely defer to the NLRB if *D.R. Horton* only involved application of the NLRA. The court of appeal concluded, however, that because *D.R. Horton* interpreted the FAA and discussed *Concepcion*, and because "the FAA is not a statute the NLRB is charged with interpreting, we are under no obligation to defer to the NLRB's analysis." As the court of appeal noted, in reiterating the general rule that arbitration agreements must be enforced according to their terms, *Concepcion* made no exception for employment-related disputes.

And, finally, the court of appeal disagreed with a different California Second Appellate District panel's recent decision in *Brown v. Ralph's Grocery Co.*, 197 Cal. App. 4th 489 (2011). The *Brown* court found that *Concepcion* dealt with the individual right of a consumer to pursue class action remedies in court or arbitration and did not apply to representative actions under California's Private Attorneys General Act (which authorizes an aggrieved employee to bring an action to recover civil penalties on behalf of himself and other current or former employees). The *Brown* court therefore held that a waiver of PAGA representative actions is unenforceable under California law.

Relying on *Brown*, Iskanian argued that, given the clear intent of the California Legislature to benefit the public by providing for representative actions under PAGA, the public right of representative actions under PAGA is unwaivable. The court of appeal was not persuaded. Although recognizing that private attorney general laws may be "severely undercut by application of the FAA," the *Iskanian* court of appeal concluded that "the United States Supreme Court has spoken on the issue, and we are required to follow its binding authority." "The FAA preempts any attempt by a court or state legislature to insulate a particular type of claim from arbitration."

The *Iskanian* holding creates a split in California appellate court authority. Not surprisingly, Iskanian's attorneys have indicated that they will appeal the decision to the California Supreme Court. Especially in light of the split in authority, the supreme court is likely to agree to take the case, and employers will not be permitted to rely on *Iskanian* as authority while the appeal is pending. But, as long as it remains good law, *Iskanian* is useful for employers currently facing class or representative claims brought by California employees subject to a class action waiver provision in an otherwise enforceable arbitration agreement.

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