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Employment Law Commentary

Iskanian v. CLS Transportation: Second Time's the Charm for California Class Action Waivers in Arbitration Agreements

By Neil D. Perry

In early June, Division Two of the California Court of Appeal released an employer-friendly decision, *Iskanian v. CLS Transportation Los Angeles, LLC*, 2012 Cal. App. LEXIS 650 (Jun. 4, 2012), that adds another wrinkle to the uncertainty surrounding the enforceability of arbitration agreements and class action waivers in California. This case is of particular interest, as the Court of Appeal panel first reviewed the Iskanian/CLS arbitration agreement following the California Supreme Court's decision in *Gentry v. Superior Court*, 42 Cal. 4th 44 (2007) and granted a writ of mandate instructing the trial court to reconsider its decision to compel arbitration. Now, the same Court of Appeal panel has reviewed the Iskanian/CLS agreement in light of *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), and this time the court came to a very different conclusion.

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A Little Background

A few months into his employment with CLS Transportation, Arshavir Iskanian signed a "Proprietary Information and Arbitration Policy/ Agreement." This agreement required both Iskanian and CLS to submit all claims arising from Iskanian's employment to binding arbitration. Costs unique to the arbitration were to be paid by CLS and the agreement allowed for reasonable discovery, a written award, and judicial review of the award. Most importantly, the agreement included a robust waiver of the parties' rights to assert class or representative claims.

In August 2006, a year after his separation from CLS, Iskanian filed a putative class action lawsuit alleging a failure to pay overtime and other related claims. CLS moved to compel arbitration. The trial court found the parties' arbitration agreement neither procedurally nor substantive unconscionable and granted CLS's motion. Shortly thereafter, the California Supreme Court released Gentry, in which the court held that a class action waiver in an arbitration provision is unenforceable if it can be shown that class arbitration would be "a significantly more effective way of vindicating the rights of affected employees than individual arbitration." In light of this new authority, the California Court of Appeal issued a writ of mandate directing the trial court to reconsider its ruling.

On remand, CLS withdrew its motion to compel arbitration, believing the motion to be futile given Iskanian's low burden under *Gentry*. Litigation in the case continued and in 2009, the trial court certified a class. In April 2011, the U.S. Supreme Court issued its ruling in *Concepcion*, which reiterated the Federal Arbitration Act's (FAA) liberal policy of enforcing arbitration agreements (including those that contain class action waivers) as they are written. Given this new precedent, CLS renewed its motion to compel arbitration. The trial court subsequently dismissed Iskanian's class claims and ordered the case to arbitration.

Iskanian appealed the trial court's order and the California Court of Appeal panel that had issued the earlier writ of mandate took another look at the agreement in light of the *Concepcion* ruling. This time the court came to a different conclusion. In upholding the trial court's arbitration order, the *Iskanian* court challenged the continuing viability of the California Supreme Court's *Gentry* decision, disregarded as unpersuasive the National Labor Relations Board's decision in *D.R. Horton*, and contributed to a split of authority on the issue of whether representative Private Attorney General Act (PAGA) claims may be waived.

Concepcion Trumps *Gentry*?

Iskanian argued that the trial court should have applied *Gentry* in ruling on CLS's renewed motion for arbitration. In *Gentry*, the California Supreme Court found that class action waivers may—in certain circumstances—make it too difficult for employees to vindicate "unwaivable" rights such as the right to overtime pay. The test established in *Gentry* had the practical effect of making class action waivers extremely difficult to enforce.

The *Iskanian* court found that *Concepcion* "conclusively invalidates" *Gentry*. The court explained that, under *Gentry*, an employer could be required to submit to class arbitration. This directly conflicts with *Concepcion*, which thoroughly rejected the idea that class arbitration

High Court Throws Out Arizona's S.B. 1070, Rejecting Attempt to Make It a Crime for Undocumented Workers to Apply for or Obtain Employment in Arizona.

In August 2011 we reported on a Supreme Court opinion that upheld 2007 Arizona legislation that required, among other things, that Arizona employers use E-Verify laws to check the immigration status of new hires.[1] The opinion, *Chamber of Commerce of the United States v. Whiting*, was a validation of a growing trend among states to require employers to use E-Verify, even though federal law makes it optional only. The Supreme Court held that the policy was consistent with federal immigration policy and thus was not preempted. The opinion paved the way for other states to implement E-Verify requirements which could differ from federal law and from the laws of their sister states, creating a compliance hassle for companies operating across state borders.

Another Arizona law regulating illegal immigration came before the Supreme Court this term in *Arizona v. United States*, No. 11-182, and this time the Court found that it was preempted with barely a nod to *Whiting*. Several states have already followed in Arizona's footsteps enacting similar laws—Alabama, Georgia, Utah, Indiana, and South Carolina—and it is likely that many of these states' laws will be knocked down as well.

In 2010 Arizona legislators passed what is now known as S.B. 1070, which was designed to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States." (Note following Ariz. Rev. Stat. Ann. § 11-1051.) Among other things, S.B. 1070 makes it a misdemeanor to fail to comply with federal immigration law, including alien-registration requirements (Section 3). S.B. 1070 also makes it a misdemeanor for an unauthorized alien to seek or engage in work in Arizona (Section 5(C)). In addition, Section 6 allows officers to arrest without a warrant an individual whom the officer "has probable cause to believe . . . has committed any public offense that makes the person removable from the United States." Finally Section 2(B) requires, under some circumstances, an officer who conducts a

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should be imposed on a party that never agreed to it. The *Iskanian* court also rejected the notion that *Gentry*'s reliance on "public policy" (as opposed to unconscionability, which was at issue in *Concepcion*) some how took *Gentry* out of the reach of *Concepcion*. Acknowledging that *Gentry* had sound policy reasons for invalidating certain class action waivers, the *Iskanian* court simply found the reasons insufficient to trump the FAA's far-reaching effect under *Concepcion*.

D.R. Horton – NLRB's Interpretation Fails to "Withstand Scrutiny"

Iskanian also argued that the CLS arbitration waiver was unenforceable in light of the National Labor Relations Board's (NLRB or Board) recent decision in *D.R. Horton*, 357 NLRB No. 184 (2012). In *D.R. Horton*, the Board determined that class action waivers in arbitration agreements violated Section 7 of the National Labor Relations Act (NLRA) because class actions are a form of "collective concerted activity." The *Iskanian* court was unpersuaded by the Board's decision. The court explained that the NLRB is not charged with interpreting the FAA and thus, its discussion of the FAA in *D.R. Horton* was neither persuasive nor entitled to the court's deference.

The court also observed that *D.R. Horton* fails to withstand scrutiny under recent U.S. Supreme Court precedent in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), which requires that arbitration agreements be enforced according to their terms unless the FAA's mandate is overridden by a contrary "congressional command." As the *D.R. Horton* decision fails to identify such a command in the NLRA, the FAA's liberal policy of enforcement prevails.

A Split of Authority on Representative PAGA Claim Waivers

Iskanian also argued that the "public right" of representative actions under California's PAGA statute is unwaivable. This view is supported by the 2011 case *Brown v. Ralphs Grocery Co*., 197 Cal. App. 4th 489 (2011), where a California Court of Appeal went to great lengths to distinguish *Concepcion* in order to strike down an arbitration agreement waiving the right to bring PAGA representative actions.

Here, the *Iskanian* court respectfully disagreed with its sister court. While not unsympathetic to the idea that class action waivers in arbitration agreements may undermine the effectiveness of PAGA actions, the court found such concerns irrelevant in light of the clear and binding U.S. Supreme Court precedent on FAA preemption. The court noted that under such precedent, the FAA preempts any attempt by a court or state legislature to insulate a particular type of claim from arbitration—regardless of the purpose of the law.

The *Iskanian* court noted that the Ninth Circuit came to a similar conclusion in its recent decision in *Kilgore v. KeyBank, N.A*., 673 F.3d 947 (9th Cir. 2012). There, the Ninth Circuit held that federal preemption requires state law bend to conflicting federal law and that a state legislature cannot avoid preemption simply because it intends to do so. In *Kilgore*, the Ninth Circuit held that the FAA preempted California's stop, detention, or arrest to make efforts to verify the individual's immigration status.

The United States filed suit seeking to enjoin enforcement of S.B. 1070, arguing it is preempted. Both the Arizona District Court and the Ninth Circuit sided with the United States. In a divided decision, the Supreme Court held that three of the sections were preempted by federal immigration law. As to Section 5(C), the Supreme Court held that the criminal penalty imposed on the immigrant stands as an obstacle to the federal regulatory system, which already makes it illegal for employers to knowingly hire, recruit, refer, or employ unauthorized workers. (*Citing* 8 U.S.C. 1324a(a)(1)(A), (a)(2).) The federal system makes it a crime for employers to violate the law, but imposes only civil liability on employees. The Supreme Court concluded that Congress decided it would be inappropriate to impose criminal penalties on unauthorized *employees*, and thus this provision was preempted.

The only portion of the law that the Supreme Court did not invalidate was Section 2(B), requiring an officer to check the immigration status after conducting a stop, detention, or arrest. The Court held that this Section is not preempted on its face, but left open the possibility that it may be preempted or unconstitutional as interpreted and applied.

This decision may be good news for employers concerned about having to follow a myriad of state laws governing immigration, as it indicates willingness, despite the decision in *Whiting*, for the Supreme Court to reign in differing state laws regulating immigration. Further, it could encourage Congress to reform federal immigration law. In a press release, the White House stated—and some observers agree—that what this "decision makes unmistakably clear is that Congress must act on comprehensive immigration reform. A patchwork of state laws is not a solution to our broken immigration system."[2]

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1. Monica Castillo and Janie Schulman, *Ready Or Not, Here They Come: State E-Verify Laws and What Employers Should Know*, Employment Law Commentary Vol 23, No. 8, August 2011.
2. Press Release, The White House Office of the Press Secretary, Statement by the President on the Supreme Court's Ruling on Arizona v. the United States (June 25, 2012) *available at* http://www.whitehouse.gov/the-press-office/2012/06/25/statement-president-supreme-court-s-ruling-arizona-v-united-states.

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"*Broughton-Cruz*" rule, which prohibits arbitration of "public wrong"-type claims under California's Consumer Legal Remedies Act and Unfair Competition Law (UCL).

The *Iskanian* court concluded that, following *Concepcion*, the public policy reasons underpinning PAGA claims do not allow a court to disregard a binding arbitration agreement. The court did, however, express its belief that Iskanian would be able to pursue his PAGA claims on an individual basis in arbitration.[1]

It is unknown whether the California Supreme Court will grant review of this decision. What is clear is that the uncertainty surrounding the enforceability of arbitration agreements and class action waivers is far from over. Employers considering amending their arbitration agreements will want to keep track of these rapidly-changing developments.

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1. The court acknowledged that this issue is the subject of a split of authority and found the reasoning in *Quevedo v. Macys, Inc.*, 798 F. Supp. 2d 1122 (2011) (allowing individual PAGA claims) more persuasive than that of *Reyes v. Macy's, Inc.*, 202 Cal. App. 4th 1119 (2011) (finding individual claims precluded by the language of the PAGA statute).

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