

California Law Limiting Employee Arbitration Agreement Waivers Cannot Stand after *Concepcion*, Court Finds

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The Federal Arbitration Act preempts California law disfavoring the enforcement of a class action waiver in employee arbitration agreements, the California Court of Appeal has ruled. *Iskanian v. CLS Transp. Los Angeles, LLC*, No. B235158 (Cal. Ct. App. June 4, 2012). The Court noted the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), overruled California law. (For more information, please see our article, [Supreme Court Strikes Down California's Prohibition of Class Action Waivers in Arbitration Agreements](#).) The Court also ruled the FAA preempted the plaintiff's claims under the California Private Attorney General Act ("PAGA"). Accordingly, it affirmed an order compelling arbitration and dismissing the employee's class claims for alleged Labor Code violations and upheld a class action waiver.

Background

Arshavir Iskanian worked as a driver for CLS Transportation Los Angeles, LLC. Iskanian signed an agreement with the company, requiring that all claims arising out of his employment to be submitted to binding arbitration. The agreement also included a class action waiver — a provision precluding class or representative actions in the arbitration proceeding.

Iskanian filed a class action against CLS, alleging it failed to pay overtime, provide meal and rest breaks, reimburse business expenses, provide accurate and complete wage statements, and pay final wages in a timely manner.

CLS asked the trial court to order arbitration based on the arbitration agreement. The trial court granted the employer's motion, ordered arbitration and dismissed Iskanian's class claims. Iskanian appealed.

Applicable Law

Section 2 of the FAA makes agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The U.S. Supreme Court said in *Concepcion* that arbitration agreements are enforced according to their terms, in the same manner as other contracts. The FAA's "saving clause" permits revocation of an arbitration agreement if "generally applicable contract defenses, such as fraud, duress, or unconscionability" apply.

In *Concepcion*, the U.S. Supreme Court directly addressed whether the FAA prohibited California's rule conditioning the enforceability of certain consumer arbitration agreements on the availability of class-wide arbitration procedures announced by the California high court in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 153 (2005). It found that, although the FAA savings clause preserved generally applicable contract defenses, "nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." Thus, the Supreme Court overruled *Discover Bank* as preempted because the rule interfered with the FAA's overarching purpose "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."

In *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), the California high court addressed whether a class waiver in an employment arbitration agreement was enforceable where the employee sought to recover alleged unpaid overtime. It found the right to receive overtime pay is unwaivable and that, under certain circumstances, a class action waiver would "impermissibly interfere with employees' ability to vindicate unwaivable rights and to enforce the overtime laws." It held that a class action waiver must be invalidated if, after applying various factors, a court determines that class arbitration is "likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration."

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Gentry Preempted by *Concepcion*

The plaintiff argued that the trial court erred in applying *Concepcion*, rather than *Gentry*'s public policy-based test. The Court of Appeal disagreed, finding *Concepcion* conclusively invalidated *Gentry*. It explained that, under *Gentry*, if the employee could demonstrate class arbitration would be a more effective, practical means of vindicating statutory rights, the case would be decided in class arbitration. However, the Court found *Concepcion* "thoroughly rejected the concept that class arbitration procedures should be imposed on a party who never agreed to them." *Concepcion* limited state-law rules impeding the FAA's objective of enforcing "arbitration agreements according to their terms so as to facilitate streamlined proceedings," the Court said. Nonconsensual class arbitration was inconsistent with the FAA because it would result in a slower, more costly proceeding, with fewer procedural safeguards for the employer, the Court found.

The plaintiff further argued that *Concepcion* should not apply because he sought to "vindicate statutory rights." This argument failed, the Court held, because "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."

The Court then rejected the plaintiff's remaining arguments. Among other things, it declined to follow the National Labor Relations Board's holding in *D.R. Horton*, 357 NLRB No. 184 (Jan. 3, 2012), which held "employers may not compel employees to waive their NLRA right collectively to pursue litigation of employment claims in *all* forums, arbitral and judicial." The Court declared it would not defer to the NLRB's analysis because "the FAA is not a statute the NLRB is charged with interpreting." It noted, "In reiterating the general rule that arbitration agreements must be enforced according to their terms, *Concepcion* (which is binding authority) made no exception for employment-related disputes."

In addition, the Court ruled the plaintiff could not pursue PAGA claims. The PAGA authorizes an aggrieved employee to bring a civil action to recover civil penalties "on behalf of himself or herself and other current or former employees." Lab. Code § 2699, subd. (a). The PAGA claims were not permitted, the Court said, because the FAA "preempts any attempt by a court or state legislature to insulate a particular type of claim from arbitration." Accordingly, the Court affirmed the order granting the employer's motion compelling arbitration and dismissing the class claims.

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While this decision provides employers with several positive developments, it is not necessarily the California courts' last word on arbitration. The California courts have shown a continual reluctance to enforce employment arbitration agreements. Employers should consult legal counsel when considering drafting or enforcing arbitration agreements.

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