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## Class Action Waivers Good in California, PAGA Waivers Perhaps

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In *Iskanian v. CLS Transportation of Los Angeles*,<sup>1</sup> an important decision on employment agreements that contain pre-dispute class and collective action waivers, the California Supreme Court held that its prior decision in *Gentry v. Superior Court*<sup>2</sup> was abrogated by U.S. Supreme Court precedent, and that a state's refusal to enforce a class action waiver on grounds of state public policy or unconscionability is preempted by the Federal Arbitration Act. The California Supreme Court likewise rejected the argument that a class waiver is unlawful under the National Labor Relations Act. However, the state high court also held that neither Supreme Court precedent nor the FAA preempts state law that prohibits waiver of an employee's right to bring a "representative" action under California's Private Attorneys General Act.

*Iskanian* arose out of a putative class and representative action by a limousine driver against his former employer, a transportation company, alleging various wage and hour violations. The company initially moved to compel arbitration based on an arbitration agreement signed by the driver during his employment that contained a class and representative action waiver. The company later withdrew its motion after the California Supreme Court issued its decision in *Gentry*, which held that a class waiver would not be enforced if it would undermine the vindication of employees' unwaivable statutory rights.<sup>3</sup> The company later renewed its motion after the U.S. Supreme Court issued its 2011 decision in *AT&T Mobility LLC v. Concepcion*.<sup>4</sup> The driver opposed the motion claiming the class and representative action waiver was nevertheless unenforceable and the company had waived its right to compel arbitration.

The trial court granted the company's renewed motion, and the California Court of Appeal affirmed. The appellate court held that despite the public policy served by the PAGA, the FAA, as interpreted by *Concepcion*, requires enforcement of agreements waiving PAGA actions.<sup>5</sup> Moreover, the court of appeal held, *Concepcion* overruled the *Gentry* Rule, which states that California's interest in classwide resolution of employees' wage and hour claims, in many circumstances, trumps a class action waiver in a FAA-governed arbitration agreement.<sup>6</sup>

1 Case No. S204032 (2014).

2 42 Cal. 4th 443 (2007).

3 *Id.* at 458-59.

4 563 U.S. 321 (2011).

5 *Iskanian v. CLS Transp. Los Angeles, L.L.C.*, 206 Cal. App. 4th 949, 965 (2012).

6 36 Cal. 4th 148 (2005).

*Gentry* relied on the California Supreme Court's earlier decision in *Discover Bank v. Superior Court*, which held that state public policy supported the availability of classwide relief for small, individual fraud claims and trumped an arbitration clause that required bilateral, nonclass arbitration. *Concepcion*, however, overruled *Discover Bank*, holding that the FAA preempts state laws that condition enforceability of certain arbitration agreements on the availability of classwide arbitration procedures. In finding that *Gentry* was no longer good law after *Concepcion*, in *Iskanian* the court of appeal reasoned that the FAA preempts state law rules, whether court or legislatively made, that impose obstacles to the enforcement of FAA-governed arbitration agreements. According to the court of appeal, despite the fact that PAGA actions, unlike class actions, are "law enforcement actions" designed to protect the public, *Concepcion's* broad pronouncement that FAA-governed arbitration agreements must be enforced according to their terms applied to PAGA claims.

In the California Supreme Court opinion, authored by Justice Goodwin Liu, the majority agreed with the court of appeal that *Concepcion* abrogated *Gentry* and other earlier California Supreme Court precedent to the extent that such prior authority allowed California courts to refuse to enforce class waivers on grounds of public policy or unconscionability. "*Concepcion* held that because class proceedings interfere with fundamental attributes of arbitration, a class waiver is not invalid even if an individual proceeding would be an ineffective means to prosecute certain claims," the majority said. Thus, in light of *Concepcion*, the FAA preempts the *Gentry* Rule that the validity of a class waiver turns on whether individual arbitration or litigation could be designed to approximate the advantages of a class proceeding.

The majority's opinion also rejected the plaintiff's argument that *Gentry* survived *Concepcion* based on the California Supreme Court's decision in *Sonic-Calabasas A Inc. v. Moreno*.<sup>7</sup> The court distinguished the principles articulated in *Sonic II* from *Gentry*, stating: "*Sonic II* recognized that the FAA does not prevent states through legislative or judicial rules from addressing the problems of affordability and accessibility of arbitration. But *Concepcion* held that the FAA does prevent states from mandating or promoting procedures incompatible with arbitration. The *Gentry* Rule runs afoul of this latter principle."

In upholding the validity of class waivers, the court joined a wide majority of other courts and further rejected the argument that the NLRA renders class waivers unenforceable, a position adopted by the National Labor Relations Board in *D.R. Horton Inc. v. NLRB*.<sup>8</sup> The court also held that the company, by withdrawing its motion to compel because it believed it was unenforceable under *Gentry*, did not waive its right to enforce the arbitration agreement when *Concepcion's* pronouncements later made clear that it was enforceable.

The California Supreme Court's majority opinion, however, disagreed with the court of appeal regarding the enforceability of the PAGA waiver, holding that "the FAA's goal of promoting arbitration as a means of private dispute resolution does not preclude [California's] Legislature from deputizing employees to prosecute Labor Code violations on the state's behalf. Therefore, the FAA does not preempt a state law that prohibits waiver of PAGA representative actions in an employment contract."

Despite finding that the FAA requires enforcement of pre-dispute class waivers, the majority concluded that an employer could not require an employee to waive the right to bring a PAGA representative action, at least pre-dispute. The majority examined the purpose of PAGA and distinguished the substantive right to bring a PAGA representative action from the class action procedure. The PAGA allows private citizens to seek civil penalties on behalf of California's Labor and Workforce Development Agency, with 75 percent of such penalties going to the state agency and 25 percent to the employee bringing the action and the group of employees the private litigant purports to represent. "PAGA was clearly established for a public reason, and agreements requiring the waiver of PAGA rights would harm the state's interests in enforcing the Labor Code and in receiving the proceeds of civil penalties used to deter violations," the court noted. While the majority seemingly left open the issue of whether an employee could forgo his or her right to bring a PAGA action after he or she becomes aware of Labor Code violations, the court stated that "it is contrary to public policy for an employment agreement to eliminate this choice altogether by requiring employees to waive the right to bring a PAGA action before any dispute arises."

The majority determined that the FAA does not preempt its decision that PAGA waivers are contrary to public policy and thus unenforceable as a matter of state law because "the FAA aims to ensure an efficient forum for the resolution of private disputes, whereas a PAGA action is a dispute between an employer and the state Labor and Workforce Development Agency." Because PAGA deputizes employees to act on behalf of the state, representative actions under PAGA, the court said, enforce the state's interest in penalizing and deterring employers who violate California's labor laws. Unlike class actions for damages, PAGA representative actions do not involve the bilateral arbitration of private disputes between employers and employees which the FAA was intended to cover.

7 57 Cal. 4th 1109 (2013).

8 737 F.3d 344 (5th Cir. 2013).

The California Supreme Court also rejected the company's argument that the PAGA violates the principle of separation of powers under the California Constitution.

The full impact of the court's decision regarding PAGA waivers is not yet known. While *Iskanian* makes clear that mandatory pre-dispute PAGA waivers are invalid in California, the decision can be read to leave open the door to both post-dispute PAGA waivers and pre-dispute PAGA waivers so long as they are not compulsory.

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