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Justices Pass on Second Opportunity to Resolve the California PAGA Divide in the Bridgestone Case

By John Lewis on June 3, 2015

For a second time the U.S. Supreme Court declined to hear a case challenging a California Supreme Court holding that the state's Private Attorneys General Act (PAGA) could not be waived in a mandatory arbitration agreement. The January 5, 2015, certiorari petition in *Bridgestone Retail Operations, LLC v. Brown*, No. 14-790 asserted:

> This case presents an issue of exceptional importance not only because it is an attempted end-run around this Court's decision in [*AT&T Mobility v. Concepcion*] but also because it allows states to evade the [Federal Arbitration Act (FAA)] more broadly by rendering any claims non-arbitrable simply by deeming it brought "on behalf of the state." (Petition at 3-4).

In a January 21, 2015, posting we discussed the denial of certiorari in a predecessor case, *CLS Transp. Los Angeles LLC v. Iskanian*, No. 14-341, leaving in place the California Supreme Court's June 23, 2014, ruling that PAGA claims could not be waived in an arbitration agreement.

The plaintiffs in *Bridgestone* alleged various wage and hour violations under the California Labor Code and invoked PAGA to collect civil penalties for the same labor code violations. As with *Iskanian*, the U.S. Supreme Court declined certiorari on June 1, 2015.

The denial of certiorari in *Iskanian* and now in *Bridgestone* leaves a gulf between state and federal courts in California over whether arbitration agreements can entirely waive an employer's ability to seek classwide or multiparty representational relief and the impact of the FAA on the resolution of employment-related claims. Our postings on October 22, 2014, January 6, 2015, and January 21, 2015, detailed that growing divide between California state and federal courts on these issues.

Indeed, further federal appellate review of PAGA claims is imminent. The Ninth Circuit will hear three cases presenting questions of whether the FAA requires that PAGA waivers be enforced: *Sakkab v. Luxottica Retail North America, Inc.*, No. 13-55184; *Hopkins v. BCI Coca-Cola Bottling Company of Los Angeles*, No. 13-56126; and *Sierra v. Oakley Sales Corp.*, No. 13-55891.

The denial of certiorari in *Bridgestone* will also likely lead to an increase in PAGA filings in California courts even though that Act remains shrouded in much uncertainty that was unchanged by the *Iskanian* decision. For example, while the *Iskanian* opinion referenced handling of arbitral and PAGA claims, it cited to an earlier decision under state procedures where a threshold arbitral resolution of individual claims was not required by the FAA. See *Iskanian v. CCS Trans. LA., LLC,* 327 P.3d 129 (Cal. 2014). Plainly, a different outcome is required when the FAA is applicable and the arbitral claims must be resolved first. A recent case under California procedure points to that result. In *Franco v. Arakelian Enterprises,* 234 Cal. App. 4th 947 (2015), the court of appeals cautioned: "[b]ecause the issues subject to litigation under PAGA might overlap those that are subject to arbitration of Franco's individual claims, the trial court must order an appropriate stay of trial court proceedings. The stay's purpose is to preserve the status quo until the arbitration is resolved, preventing any continuing trial court proceedings from disrupting and rendering ineffective the arbitrator's jurisdiction to decide the issues subject to arbitration."

So, one way or another, federal and state courts will continue to expend much energy on PAGA, the FAA's impact on it, and required procedures to protect litigants as well as other employees if cases are permitted to go forward in court. Employers should review their arbitration agreements in light of these developments, making sure they are premised on the FAA, if possible, and that any PAGA or representation action waivers are severable so as not to make the entire agreement potentially unenforceable.

Bottom Line

Companies should now review their arbitration agreements and waivers to ensure they have the greatest chance of enforcement based on the FAA. Companies with California employees also must continue to monitor PAGA waiver cases as they make their way through the courts so they are not caught unaware by the changing legal landscape.

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California Supreme Court Again Considers the Validity of Class and Representative Action Waivers

By John Lewis and Dustin Dow on June 23, 2014

Today, in a highly-anticipated decision, the California Supreme Court in *Iskanian v. CLS Transportation Los Angeles, Inc.* (Case No. S204032), resolved several long-standing questions regarding the impact of class and representative action waivers under California law. The Court's prior *Discovery Bank v. Superior Court* (2005),decision was invalidated by the U.S. Supreme Court in *AT&T Mobility v.Concepcion.*

The 48-page majority opinion in *Iskanian* found that after *Concepcion,* class action waivers in arbitration agreements are generally enforceable—thus overturning *Gentry v. Superior Court,* 42 Cal.4th 443 (2007). The *Iskanian* court also affirmed the appeals court holding that plaintiffs cannot rely on the NLRB's decision in *D.R. Horton* (2012) 357 NLRB No. 184, to sidestep agreements requiring individual arbitration. But the California Supreme Court reversed the Court of Appeal on the issue of California Private Attorney General Act ("PAGA") claims and representative action waivers. It found that the Federal Arbitration Act ("FAA") "does not preempt a state law that prohibits waiver of PAGA representative action in an employment context."

In *Iskanian,* plaintiff Arshavir Iskanian signed a mandatory arbitration agreement that contained a class and representative action waiver providing: "[E]xcept as otherwise required under applicable law, (1) EMPLOYEE and COMPANY expressly intend and agree that class action and representative action procedures shall not be asserted, nor will they apply, in any arbitration pursuant to this Policy/Agreement; (2) EMPLOYEE and COMPANY agree that each will not assert class action or representative action claims against the other in arbitration or otherwise; and (3) each of EMPLOYEE and COMPANY shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person." As a private litigant, the California Supreme Court held that *Iskanian* is bound to that agreement by *Concepcion.* But as a PAGA representative, suing on behalf of the state to enforce California labor law, the Iskanian decision limits the impact of waivers barring representative actions.

BOTTOM LINE: Although the California Supreme Court affirmed the validity of class-action waivers in arbitration agreements, the Court found an exception for representative actions as a matter of public policy. Whether that exception will withstand FAA preemption analysis in federal courts remains to be seen.

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The California Divide: Federal Courts Refuse to Follow State Supreme Court's Iskanian Decision

By John Lewis and Dustin Dow on October 22, 2014

One of the last barriers to full enforcement of arbitration agreements with class action waivers sustained another blow last week. A California federal district court disagreed with the California Supreme Court in holding that an employment arbitration agreement can waive an employee's right to pursue a representative claim under the state's Private Attorney General Act ("PAGA"). Langston v. 20/20 Companies, Case No. EDCV 14-1360 JGB (C.D. Cal. Oct. 17, 2014).

It is well known by now that the U.S. Supreme Court has taken a favorable view of arbitration agreements that waive a litigant's ability to pursue class or representative action claims, either in court or arbitration. Since 2009, the Court has chiseled away at the obstacles and procedural rules preventing enforcement of such arbitration agreements based upon the Federal Arbitration Act ("FAA"). Indeed, in AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), the Court held that the FAA's policy of enforcing arbitration agreements pre-empted a California rule requiring the availability of class-wide arbitration.

But California courts remain undaunted. This summer, the California Supreme Court held that Concepcion did not require individual arbitration of a claim brought under PAGA where the individual litigant represents a class on behalf of the government—even though the individual remains in control of the litigation. That case, Iskanian v. CLS Transp., L.A., LLC, 327 P.3d 129 (Cal. 2014), currently is pending on certiorari before the United States Supreme Court. The petition in CLS Transp., L.A. LLC v. Iskanian, No. 14-341, raises the question addressed by the district court: "Is an employee's waiver in an arbitration agreement of a collective or 'representative action' under [PAGA] so distinguishable from a 'class action' waiver that it is immune from the otherwise preemptive effect of the Federal Arbitration Act as held by this court in AT&T Mobility v. Concepcion?" (citation omitted).

Now, for the third time, a federal district court has refused to follow the Iskanian court's lead. In Langston, the Central District of California held that Concepcion does require enforcement of an employment arbitration agreement, even if that means compelling individual arbitration of PAGA claims. The judge in Langston explained that Concepcion instructed that an arbitration agreement cannot be invalidated by impermissible application of a policy "in a fashion that disfavors arbitration." Nevertheless, the Iskanian court held PAGA waivers in arbitration agreements to be unconscionable, even though it acknowledged that an employee could choose on his or her own to waive the government's right to bring a PAGA claim. The district judge seized on this apparent illogic that he interpreted to be in conflict with Concepcion: "That inconsistency illuminates the fact that, it is not the individual's ability to waive the government's right that drives the [Iskanian] court's rule, but rather the court's general disfavor for pre-existing agreements to arbitrate such claims individually." Thus,

Langston joined two previous California federal district courts (See Ortiz v. Hobby Lobby Stores, Inc., No. 2:13-cv-01619 (E.D. Cal. Oct. 1, 2014), and Fardig v. Hobby Lobby Stores, Inc., No. SACV 14-00561 JVS (C.D. Cal. Aug. 11, 2014)) in upholding the enforceability of an agreement to individually arbitrate, despite the presence of PAGA representative claims.

The U.S. Supreme Court may soon decide whether this latest conflict between the California state and federal courts warrants clarity following in the footsteps of Concepcion. Until then, the scope of the full enforcement of an employment arbitration agreement depends on which court is considering it.

As a result, a third federal court has now disagreed with the California Supreme Court's Iskanian result, widening the divide between enforcement of arbitration agreements in federal and state courts. In California state court, an arbitration agreement cannot waive an individual's ability to pursue PAGA representative claims on behalf of the government. At least in some federal courts, the Concepcion rule continues to require enforcement of arbitration agreements, even if that requires individual arbitration of a PAGA claim.

The Bottom Line: A split is growing between California state and federal courts over whether a defendant can compel the arbitration of PAGA claims.