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CALIFORNIA SUPREME COURT AFFIRMS CLASS ACTION WAIVERS, REJECTS WAIVERS OF PRIVATE ATTORNEYS GENERAL ACT CLAIMS

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In another long-awaited decision that businesses hoped would clarify the enforcement of arbitration agreements under California law, on Monday, June 23, 2014 the California Supreme Court in *Iskanian v. CLS Transportation* split on the two issues before it. The California high court held that class action waivers in arbitration agreements are enforceable, but that waivers of proceeding on a representative basis on claims under the Labor Code Private Attorneys General Act of 2004 (PAGA) are not enforceable. The decision upholding class action waivers is good news for companies across a wide spectrum of business. But the different result for PAGA representative claims may result in more PAGA lawsuits against employers – and further complicated procedural gymnastics.

Background on *Iskanian v. CLS Transportation*

Plaintiff Arshavir Iskanian entered into an agreement with his employer, defendant CLS Transportation (CLS), under which he agreed to submit to binding arbitration "any and all claims" arising out of his employment. The arbitration agreement also expressly prohibited Iskanian from pursuing both class and representative claims "in arbitration or otherwise." Despite his December 2004 agreement to arbitrate "any and all claims" arising out of his employment, Iskanian sued CLS in Los Angeles County Superior Court alleging California wage and hour violations. CLS moved to compel arbitration and the trial court agreed. Shortly after, the California Supreme Court decided *Gentry v. Superior Court*, which held that if a court finds that class arbitration would be a more effective means to vindicate the rights of the litigants than individual suits or arbitrations, then the class arbitration waiver should be invalidated to allow the litigants to "vindicate [their] unwaivable rights" in arbitration. In light of the *Gentry* decision, the Court of Appeal issued a writ of mandate to the trial court to reconsider its decision to compel Iskanian to arbitrate his claims.

CLS, likely concerned that the trial court would reverse its decision, withdrew its motion to compel arbitration and the case moved forward in court. Iskanian eventually filed an amended complaint adding an unfair competition law claim under §17200 of the California Business and Professions Code as an individual and putative class representative well as a claim under PAGA seeking to recover penalties for various labor code violations. The parties conducted discovery and in late October 2009 Iskanian moved to certify a class and the court granted his motion.

Later, the US Supreme Court issued its decision in *AT&T Mobility LLC v. Concepcion*, which gutted the California Supreme Court decision in *Discover Bank v. Superior Court* that had limited class action waivers in consumer arbitration agreements. The next month, CLS renewed its motion to compel Iskanian to arbitrate his claims arguing that the *Concepcion* decision also invalidated *Gentry*. Over Iskanian's objection that CLS had waived its right to seek arbitration when it withdrew its motion two years earlier, the trial court ruled for CLS and again ordered Iskanian to arbitrate his claims and dismissed the class claims with prejudice. The Court of Appeal upheld the order and the California Supreme Court granted review.

The Good News

As previewed above, the California Supreme Court upheld the CLS agreement's class action waiver and acknowledged that post-*Concepcion, Gentry* is preempted by the Federal Arbitration Act (FAA) because *Concepcion* held state law limitations on class waivers cannot interfere with the "fundamental attributes of arbitration" even if requiring a party to litigate his/her claims individually would be ineffective. Therefore, a wide range of businesses – including employers – may continue to craft their arbitration agreements to prohibit class and collective claims for relief.

In reaching this decision, the court also rejected Iskanian's argument that class action waivers violate Section 7 of the National Labor Relations Act as in the controversial National Labor Relations Board (NLRB) opinion in *D.R. Horton Inc. v. Cuda*. Following the Fifth Circuit's rejection of a similar argument the *Iskanian* court found no conflict between the FAA and the NLRA with respect to procedural rights citing back to Conception and its emphasis on preserving the informality of arbitration proceedings over the procedural formalities of class actions. It is important to note, however, that the *Iskanian* court recognized that if an arbitration agreement were to lead an employee to believe that he or she were not permitted to file unfair labor practice claims with the NLRB, that agreement would violate the NLRA.

The Other News

The court distinguished Iskanian's representative PAGA claims from the class action waivers in *Concepcion* and *Gentry*. After analyzing whether PAGA claims were waivable under California law, the court ruled that PAGA was "one of the primary mechanisms for enforcing the Labor Code" and "established for a public reason" therefore, it would be contrary to California public policy to require an employee to waiver the right to bring a PAGA claim in a pre-dispute employment agreement.

Next the court looked at whether PAGA was nevertheless preempted by the FAA. The court reasoned that PAGA was not preempted by the FAA because it is "outside the FAA's coverage." The court held that the FAA applies to private contractual disputes between an employer and employee, whereas PAGA claims are disputes involving Labor Code violations between the employer and the state – which includes the state's agents under PAGA such as the Labor and Workforce Development Agency or aggrieved employees. Thus, because the state is the real party in interest – receiving 75% of the civil penalties to be recovered in a PAGA action, and the state is bound by the outcome – the court held that PAGA claims do not interfere with the FAA and the cases construing it.

In reaching its holding on PAGA, the California Supreme Court drew heavily on analogies to *qui tam* (whistleblower) actions. This may foreshadow the possibility of the court also refusing to enforce arbitration agreements as to *qui tam* (whistleblower) claims. If so, more *qui tam* (whistleblower) litigation may be on the horizon.

What Happens Next?

The court reversed the order compelling arbitration and remanded the case to the trial court. Because the arbitration provision at issue did not allow for PAGA representative claims in court or in arbitration, the court ended the opinion with questions for the parties to address on remand: (1) Will the parties agree on a single forum for resolving the PAGA claim and the other claims? (2) If not, is it appropriate to bifurcate the claims, with individual claims going to arbitration and the representative PAGA claim to litigation? (3) If such bifurcation occurs, should the arbitration be stayed? (4) Are Iskanian's PAGA claims time barred and has CLS waived its ability to challenge the timeliness of the PAGA claims?

Best Practices

Now is the time to review your California arbitration agreements for compliance with *Iskanian* and to include a class action waiver if you don't already have one. Be mindful of overly broad language regarding to arbitrable employment claims that may violate the NLRA. Consider what forum (court or arbitration) your company would prefer when defending PAGA representative claims – as arbitration has its own risks and benefits.

For more information on this recent decision and other California class action related matters, please contact one of the Squire Patton Boggs lawyers listed in this publication.

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