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Employment Law Alert

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California Appellate Court Says Class Action Waivers Permissible After *Concepcion*

The United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, ___ U.S. ____, 131 S.Ct. 1740 (2011), continues to erode state law rules that deny enforcement of arbitration agreements containing waivers of class and representative actions. *Concepcion* holds that the Federal Arbitration Act (FAA) preempts the rule established by the California Supreme Court in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), that class action waivers in consumer contracts may be unconscionable, and thus unenforceable, in many circumstances. *Concepcion* did not address, however, the California Supreme Court's decision in *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), an employment action which held that, as a matter of public policy, a class action waiver may not be enforced if class-wide arbitration "would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration." Now, in *Iskanian v. CLS Transp. Los Angeles, LLC*, No. B235158 (June 4, 2012), the California Court of Appeal, Second Appellate District, Division Two, has held that the *Gentry* rule is invalid in light of *Concepcion*, and that the FAA's preemptive effect extends to waivers of representative actions brought under the Private Attorney General Act (PAGA). This new ruling promises to be short-lived, however, because the California Supreme Court almost certainly will grant review.

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Iskanian is a wage and hour class action in which the plaintiff had signed an arbitration agreement providing that class and representative action procedures would not be used. The trial court had granted a motion to compel arbitration before *Gentry* was decided. In the first appeal in the case, the Court of Appeal reversed based on *Gentry*, and following remand the defendant-employer decided not to renew its motion to compel arbitration. After *Concepcion* was decided, however, the employer renewed its motion, and the trial court granted it.

In the plaintiff's second appeal, the court began by analyzing *Concepcion*'s repudiation of the *Discover Bank* rule. *Concepcion* holds that the FAA preempts that rule because it conflicts with the FAA's "overarching purpose" of ensuring that arbitration agreements will be enforced according to their terms. The *Iskanian* court then held that, for the same fundamental reasons, *Concepcion*'s "conclusions invalidate the *Gentry* test." Under

Concepcion, therefore, it makes no difference that *Gentry* rests on public policy grounds, while *Discover Bank* used an unconscionability rationale, or that wage and hour actions vindicate important statutory rights.

Next, the *Iskanian* court declined to follow the National Labor Relations Board's (NLRB's) decision in *D.R. Horton* that class action waivers violate section 7 of the National Labor Relations Act (NLRA). The court disagreed with *D.R*. *Horton*'s analysis, and explained that the NLRB's decision was not entitled to the deference that courts often give to administrative agencies. On the latter point, *Iskanian* explained that *D.R. Horton* rests primarily on the NLRB's analysis of the FAA and *Concepcion* rather than its interpretation of the NLRA. Only the NLRB's interpretation of the NLRA, one of the statutes it is responsible for administering, would be entitled to deference.

The *Iskanian* court then turned to *Concepcion*'s impact on the plaintiffs' PAGA claim. Disagreeing with *Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489 (2011), a decision by Division Five of the Second District, *Iskanian* holds that the FAA compels enforcement of arbitration provisions that exclude representative actions even though "PAGA serves to benefit the public and that private attorney general laws may be severely undercut by application of the FAA." In this regard, the court agreed with the Ninth Circuit's recent decision in *Kilgore v. KeyBank, N.A.*, 673 F. 3d 947 (9th Cir. 2012), which holds that the FAA preempts state statutes that plainly promote public interests and that otherwise would bar enforcement of class and representative action waivers.

Finally, in a holding that may be helpful even in long-pending actions, the *Iskanian* court affirmed the trial court's conclusion that the employer had not waived its right to compel arbitration even though it withdrew its motion after the Court of Appeal had remanded the arbitration issue for reconsideration in light of *Gentry*. At the time, the *Gentry* rule almost certainly would have resulted in denial of the motion, and the employer had promptly renewed its motion to compel arbitration after *Concepcion* was decided. Further, the plaintiff was not prejudiced by the passage of time even though discovery had occurred and the parties had extensively briefed class certification issues.

Although *Iskanian* is quite favorable to employers, it has all the hallmarks of a case in which the California Supreme Court is likely to grant review, which would make the opinion uncitable. Not only does the opinion conflict with *Brown* on the PAGA-representative

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action issue, but its holding squarely presents the important question of whether *Concepcion* invalidates the *Gentry* rule. We will be monitoring *Iskanian*, as well as other post-*Concepcion* decisions, and will issue further Alerts as major developments occur.

Miller Law Group exclusively represents business in all aspects of California employment law, specializing in litigation, risk management, wage and hour class actions, ERISA litigation, and appellate law. If you have questions about your workplace obligations, please contact Michele Ballard Miller (mbm@millerlawgroup.com) or M. Michael Cole (mmc@millerlawgroup.com), or call (415) 464-4300. To learn more about our firm, visit our website at www.millerlawgroup.com.

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