Daily Journal

U.S. Supreme Court,
Labor/Employment,
Civil Litigation,
California Supreme Court
Dec. 21, 2021

In employment arbitration, it's déjà vu all over again!

Once again, the U.S. Supreme Court returns to its 30-plus year game of Whac-A-Mole with the California judiciary. Last week, the high court agreed to review the enforceability of arbitration agreements that waive PAGA claims.

STEVEN B. KATZ
Partner, Constangy, Brooks, Smith & Prophete LLP

1800 Century Park E Fl 6
Los Angeles , CA 90067

Phone: (310) 597-4553

Email: skatz@constangy.com

USC Law School

Steven is resident in the firm's Century City office. He represents employers in class actions and multi-plaintiff disputes.

See more...

Once again, the U.S. Supreme Court returns to its 30-plus year game of Whac-A-Mole with the California judiciary. Ever since *Perry v. Thomas*, 482 U.S. 483, 492 (1987), the court has regularly struck down California's latest effort to limit arbitration, only to see another one -- carefully crafted around the court's last ruling -- pop up in its place. This time, it is the ban on enforcing agreements to arbitrate claims under California's Private Attorneys General Act, Labor Code Sections 2699 et seq., on an individual basis established in *Iskanian v. CSL Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014). Last week, the

In Employment Arbitration, It's Déjà Vu All Over Again!

By Steven B. Katz | Dec. 21, 2021

Supreme Court granted certiorari in *Viking River Cruises, inc. v. Moriana* (20-1573), on a petition raising a single issue: "Whether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under the California Private Attorneys General Act."

Iskanian is the decision in which the California Supreme Court was compelled to recognize that its earlier ruling in *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), was preempted by the FAA. In *Gentry*, the court extended the ban on class relief waivers in consumer arbitration established in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), to employment arbitration. *Gentry* brushed aside all consideration of FAA preemption. But the U.S. Supreme Court in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), held *Discover Bank* preempted by the FAA. *Concepcion* compelled the California Supreme Court in *Iskanian*, a scant seven years after *Gentry*, to reverse itself and concede the validity of the same preemption arguments it dismissed the first time around.

Although *Iskanian* reversed *Gentry*, it saved the corollary to *Gentry* established in *Franco v. Athens Disposal Co.*, 171 Cal. App. 4th 1277 (2009), and *Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489 (2011), which applied the *Gentry* rule to representative PAGA actions, although at least 11 federal district courts held before *Iskanian* that the FAA preempted the *Franco-Brown* rule.

Iskanian, like *Gentry* before it, brushed aside all consideration of FAA preemption. And like *Gentry*, did so on grounds that do not withstanding scrutiny. This doubtless explains why it is facing its *Concepcion* in the new *Viking Cruises* case.

Iskanian's majority held that "a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between the employer and the *state*, which alleges directly or through it agents -- either the Labor and Workforce Agency or aggrieved employees -- that an employer has violated the Labor Code." *Iskanian*, 59 Cal. 4th at 386-87. This holding was based on an extension of the U.S. Supreme Court's decision in *EEOC v. Waffle House*, 534 U.S. 279 (2002), which held that an otherwise enforceable private arbitration agreement does not bind the government in a direct enforcement action.

The problem with this holding is that when an employer seeks to enforce a representative relief waiver against an employee, the *state's* claim is not being waived or abrogated. Rather, the employee's personal statutory right to act as an "agent" of the state for PAGA purposes is being subject to arbitration. As *Iskanian* conceded, the U.S. Supreme Court "has found the FAA applicable to statutory claims between parties to an arbitration agreement." *Iskanian*, 59 Cal. 4th at 384. It remains so when private parties act is relators in PAGA cases, which are variety of qui tam suit. *See id.* at 382.

Justice Ming Chin's concurrence in *Iskanian* noted the problems in the majority's rationale and focused instead on the rationale that PAGA is a mechanism necessary for the "effective vindication of statutory rights," giving the state a heightened interest in actions under PAGA, which interest may not be compromised by private actors who are "standing in the shoes" of the state. *Id.* at 395-97. But Justice Chin's rationale also does not stand up to scrutiny. The U.S. Supreme Court's "effective vindication" cases -- *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013) -- make crystal-clear that the FAA only yields in certain cases to "effective vindication" of *federal* statutory rights -- not state ones.

Evidently dissatisfied with both rationales, when the 9th U.S. Circuit Court of Appeals sustained *Iskanian* against FAA challenge in *Sakkab v. Luxottica N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015), on a third ground: Since PAGA claims are not subject to Rule 23 (or a state analog) representative actions "do not require the formal procedures of class arbitrations." *Id.* at 436. At the time, *Sakkab* drew a withering dissent making the obvious comparison between *Iskanian* and *Discover Bank*. But today, after California's 2nd District Court of Appeal applied class action-type manageability concerns to PAGA representative actions in *Wesson v. Staples the Office Superstore*, LLC, 68 Cal. App. 5th 746 (2021), it is impossible to contend that PAGA representative claims are any less a departure from traditional bilateral arbitration than are class actions.

That the decisions cannot agree on the rationale for avoiding FAA preemption, and none of the stated rationales stand up to scrutiny, does not bode well for the fate of *Iskanian*. Casting its survival into even more serious doubt is the existence of a strong rationale for preemption.

The FAA provides that agreements to arbitrate "shall be 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 Section 2. The U.S. Supreme Court has consistently interpreted this so-called "savings clause" to "establish[] a sort of 'equal treatment' rule for arbitration contracts." *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018). "A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Kindred Nursing Centers Ltd. Partnerships v. Clark*, 137 S. Ct. 1421, 1426 (2017). Under this equal-treatment rule, contract defenses which apply to particular types of contracts are not "generally applicable." *See, e.g.*, *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 533-34 (2012).

Epic Systems warns that "an argument that a contract is unenforceable *just because it requires bilateral arbitration* is a different creature" from "traditional, generally applicable contract defense[s]" -- "A defense of that kind, *Concepcion* tells us, is one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability." *Epic Systems*, 138 S. Ct. at 1623. *Iskanian*'s illegality defense to representative relief waivers in PAGA arbitration is precisely this kind of impermissible defense to enforcement under the FAA.

A more perfect parallel to *Gentry* could not be imagined. In *Gentry*, the California Supreme Court rejected arguments that its rule was preempted by the FAA. Seven years later, after the U.S. Supreme Court hands down *Concepcion*, the California Supreme Court is forced in *Iskanian* to reverse *Gentry*. Now -- seven years after *Iskanian* -- the U.S. Supreme Court hands down *Kindred Nursing* and *Epic Systems*, showing that when the California Supreme Court brushed aside FAA preemption concerns in *Iskanian*, it was on no firmer ground than it was in *Gentry*. *Viking Cruises* will likely be the new *Concepcion*. □