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The Defense Bar Should Not Panic Over Iskanian V. CLS

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In Iskanian v. CLS Transportation Los Angeles LLC, 59 Cal. 4th 348 (2014), the California Supreme Court held that a waiver of a representative Private Attorney General Act claim in an arbitration clause of an employment contract was unenforceable.[1] On Jan. 20, 2015, the U.S. Supreme Court denied a petition for a writ of certiorari in CLS Transportation Los Angeles LLC v. Iskanian, No. 14-341.

Since the denial of certiorari, numerous sources have predicted the defense bar will see a drastic rise in the number of PAGA claims by employees in California. Although a ruling by the Supreme Court would have brought clarity to this area of the law, the denial of certiorari in this one case does not mean the floodgates have opened. There are several reasons for the defense bar not to be pessimistic: (1) the Supreme Court's denial says nothing about the merits of Iskanian; (2) another petition for certiorari on this issue remains pending before the Supreme Court, and the issue is also presently before the Ninth Circuit; and (3) federal district courts in California have overwhelmingly held that the Federal Arbitration Act requires enforcement of PAGA waivers.

Rule 10 of the Supreme Court Rules states that a petition for certiorari "will be granted only for compelling reasons." Rule 10 lists several examples of when the court may exercise its discretion to grant certiorari including, but not limited to, when there is a circuit split, when a federal circuit court is in conflict with a state supreme court, or when a state supreme court has made a ruling on federal law that is inconsistent with other state supreme courts or a federal circuit court. At this time, no federal circuit court has ruled on the issue presented by Iskanian (although the Ninth Circuit may do so soon). The Supreme Court granted roughly 1 percent of the petitions for certiorari filed in the 2013 term — the denial of certiorari in Iskanian is neither a surprise nor is it a determination of the law on the merits.

Another petition for certiorari is still pending before the Supreme Court on a similar issue in a different case, Bridgestone Retail Operations LLC v. Brown, No. 14-790.[2] The denial of certiorari in one case does not mean the court will decline to hear a similar issue in another case (consider, for example, the recent cases regarding the constitutionality of same-sex marriage). Further, Bridgestone frames the issue differently than Iskanian. The petition in Iskanian argued that representative PAGA claims are similar to class actions and, as such, are preempted by the FAA under AT&T Mobility LLC v. Concepcion,

131 S. Ct. 1740 (2011). The petition in Bridgestone agrees, but also focuses on the fact that the FAA applies to all statutory claims arising out of an employment relationship and does not contain an implicit exception for private plaintiffs' claims merely because state law considers them to be brought "on behalf of the state." The court could grant the petition in Bridgestone notwithstanding its denial of the Iskanian petition.

In addition, a pending appeal before the Ninth Circuit in Hopkins v. BCI Coca-Cola Bottling Company, No. 13-56126, could further solidify the issue for the lower federal courts. The district court in Hopkins ruled that the PAGA waiver in the arbitration clause at issue was valid and precluded the employee's representative PAGA claim. The court dismissed the employee's lawsuit, and the employee appealed. Briefing on the appeal was completed in November 2014, and oral argument should be scheduled soon.

Regardless of what happens in the federal appellate courts, federal district courts in California have overwhelmingly decided that the FAA requires enforcement of PAGA waivers. This was true before the Iskanian decision and, with one exception, has remained true since the Iskanian decision.

In one of the first published decisions on this issue, Quevedo v. Macy's Inc., 798 F. Supp. 2d 1122 (C.D. Cal. 2011), the court stated that "requiring arbitration agreements to allow for representative PAGA claims on behalf of other employees would be inconsistent with the FAA." Id. at 1142. The court ruled that the applicable arbitration provision barring the employee from bringing a representative PAGA claim was enforceable and any individual PAGA claims were arbitrable. Id. No less than 10 district court decisions have followed suit.

In Parvataneni v. E-Trade Financial Corp., 967 F. Supp. 2d 1298 (N.D. Cal. 2013), the court explained that "an arbitration agreement that denies a plaintiff the right to pursue a representative PAGA claim is still a valid agreement." Id. at 1305. The court ruled that the arbitration agreement was valid even though it prevented the employee from bringing a representative PAGA claim, and it noted that the employee could arbitrate his individual PAGA claims. Id.; see also Morvant v. P.F. Chang's China Bistro Inc., 870 F. Supp. 2d 831, 846 (N.D. Cal. 2012) ("The Court must enforce the parties' Arbitration Agreement even if this might prevent Plaintiffs from acting as private attorneys general."); Grabowski v. C.H. Robinson Co., 817 F. Supp. 2d 1159, 1181 (S.D. Cal. 2011) ("Plaintiff's California Private Attorney General Act claim is arbitrable[] and [] the arbitration agreement's provision barring him from bringing that claim on behalf of other employees is enforceable.").

For district court cases decided after Iskanian, see Lucero v. Sears Holdings Mgmt. Corp., No. 14-cv-1620 AJB (WVG) at *6 (S.D. Cal. Dec. 2, 2014) ("The FAA preempts California's rule against arbitration agreements that waive an employee's right to bring representative PAGA claims."); Mill v. Kmart Corp., No. 14-cv-02749-KAW at *7 (N.D. Cal. Nov. 26, 2014) ("In accordance with Concepcion, the FAA likewise preempts California's rule against PAGA waivers." (citing Langston v. 20/20 Cos., No. EDCV 14-1360 JGB SPx at *7 (C.D. Cal. Oct. 17, 2014); Chico v. Hilton Worldwide Inc., No. CV 14-5750-JFW SSx at *12 (C.D. Cal. Oct. 7, 2014); Ortiz v. Hobby Lobby Stores Inc., No. 2:13-cv-01619 at *9 (E.D. Cal. Oct. 1, 2014))).

The denial of certiorari in Iskanian is no indicator that the Supreme Court ultimately will allow that decision to stand. The Supreme Court may grant certiorari in Bridgestone or in a similar case once the Ninth Circuit weighs in on the issue. In the meantime, federal district courts in California have almost unanimously rejected the reasoning of Iskanian and likely will continue to enforce PAGA waivers. That should provide the defense bar with reason for optimism.

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[1] A "PAGA" claim is a Private Attorney General Act claim, which allows an employee to bring a representative action "on behalf of himself or herself and other current or former employees" to recover civil penalties. The penalties are divided between the aggrieved employee and the state, specifically the Labor and Workforce Development Agency. See Cal. Labor Code § 2698 et seq.

[2] Jones Day filed the petition for writ of certiorari on behalf of Bridgestone in this matter.
