9th Circ. Continues Calif.'s Chipping Away At Arbitration

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On Sept. 28, 2015, in *Shukri Sakkab v. Luxottica Retail North America Inc.*, No. 13-55184, the Ninth Circuit upheld the rule established by the California Supreme Court in *Iskanian v. CLS Transportation Los Angeles LLC*, 59 Cal. 4th 348 (2014), that a waiver of a representative California Private Attorneys General Act claim in an arbitration clause of an employment contract is unenforceable.[1]

The panel in *Sakkab* also heard two related cases on the same day, *Hopkins v. BCI Coca-Cola Bottling Co.*, No. 13-56126, and *Sierra v. Oakley Sales Corp.*, No. 13-55891, but has not yet issued decisions in those cases. The majority in *Sakkab* held that the Federal Arbitration Act did not preempt the rule announced in *Iskanian* and therefore the PAGA waiver in Sakkab's employment agreement was unenforceable. This represents a significant departure from the recent trend in enforcing the FAA broadly to allow for contractual waivers of class and representative actions.

In determining whether the FAA preempted the rule in *Iskanian,* the court analyzed the applicability of *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), which held that the FAA preempts state laws that disallow class waivers in arbitration agreements. In an effort to distinguish *Sakkab* from *Concepcion* and explain why the FAA does not preempt the *Iskanian* rule, the court reasoned that the *Iskanian* rule applies to all contracts, not just arbitration agreements. It noted that the FAA only preempts generally applicable state contract defenses "that 'interfere[] with arbitration.'" Citing *Concepcion*, the court explained that "[a] defense interferes with arbitration if, for example, it prevents parties from selecting the procedures they want applied in arbitration." The court took a narrow view of *Concepcion*, focusing on only one part of the court's rationale — the unacceptable imposition of classwide arbitration procedures.

The *Sakkab* majority distinguished representative PAGA claims from class actions by explaining that class actions are a procedural device whereas a PAGA claim is a statutory cause of action. The court interpreted the FAA to preempt only procedural *rules* that interfere with arbitration (e.g., rules invalidating class action waivers), not rules that invalidate procedural *mechanisms* that allow for representative actions such as PAGA waivers.

The court stated:

An employee bringing a PAGA action does so 'as the proxy or agent of the state's labor law enforcement agencies' who are the real parties in interest. ... [T]he employee-plaintiff does not vindicate absent employees' claims, for the PAGA does not give absent employees any substantive right to bring their 'own' PAGA claims.

...

Because representative PAGA claims do not require any special procedures, prohibiting waiver of such claims does not diminish parties' freedom to select the arbitration procedures that best suit their needs.

This, the court noted, is the critical distinction between the *Iskanian* rule and the rule at issue in *Concepcion*. But by focusing on whether the *Iskanian* rule affects the rights of absent parties, the court ignores the effect on the parties to the contract. Allowing a PAGA claim to proceed notwithstanding a contractual waiver limits the scope of the FAA by narrowing the definition of a contract defense that "interferes with arbitration."

The court rejected the idea that the *Iskanian* rule should be preempted because it upsets the parties' contractual expectations, stating that any general contract defense would do so. But where parties have contractually agreed to arbitrate all claims on an individual basis, the *Iskanian* rule allows employees to demand arbitration on different terms, which is what the FAA was designed to prevent. The court also rejected the idea that the *Iskanian* rule should be preempted because defendants face high stakes in PAGA actions, making arbitration less attractive. "[T]he FAA would not preempt a state statutory cause of action that imposed substantial liability merely because the action's high stakes would arguably make it poorly suited to arbitration." As such, the court explained that the FAA does not preempt a rule prohibiting PAGA waivers "just because the amount of penalties an aggrieved employee is authorized to recover for the state makes the formal procedures of litigation more attractive than arbitration's informal procedures." The court has again chipped away at the FAA, which previously considered the difference between what the parties agreed to before and after application of the rule of the forum state and used that comparison in deciding whether the goal of arbitration was frustrated by the rule.

The majority concluded that "the *Iskanian* rule does not conflict with the FAA, because it leaves parties free to adopt the kinds of informal procedures normally available in arbitration." In *Concepcion*, the U.S. Supreme Court emphasized that arbitration is a matter of contract law and that courts must honor the parties' expectations. Under the majority opinion, the rule in the Ninth Circuit now seems to be that if class arbitration procedures are not required by the rule of the forum state, then the FAA is inapplicable.

The dissent would have held that the *Iskanian* rule is preempted by the FAA and affirmed the district court's ruling, which enforced the PAGA waiver and compelled individual arbitration. The dissent explained that "[t]he ... rule [at issue in *Concepcion*] and the *Iskanian* rule are sufficiently analogous to guide [its] decision." It discussed the similarities between class actions and PAGA claims and noted how waivers of each usually appear together. The result of the *Iskanian* rule, the dissent explained, is to "allow[] any party to an employment contract to demand arbitration of a representative PAGA claim *ex post*." The dissent also noted that the *Iskanian* rule makes arbitration slower, requires more formal and complex procedures, and exposes defendants to substantial unanticipated risks — essentially saying the *Iskanian* rule should fail for all the reasons set forth in *Concepcion*.

The majority opinion is now the law of the Ninth Circuit and will continue to be so unless or

until the case is reheard by the panel, reheard en banc or the Supreme Court agrees to take the case upon a petition for writ of certiorari. If further review is unavailing, *Sakkab* likely will lead to a rash of representative PAGA claims that no doubt will be heralded by the plaintiffs' bar. Of course, given the importance of the issues at stake, the final chapter to this story may yet be written.

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[1] A PAGA claim is a Private Attorneys 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 Section 2698 *et seq*.