Examining the Ninth Circuit's View on Iskanian v. CLS Transportation Los Angeles, LLC: An Update on California's Enforcement of Arbitration Clauses

In *Sakkab v. Luxottica Retail North America, Inc.*, No. 3:12-cv-00436-GPC-KSC, 2015 WL 5667912 (9th Cir. 2015), the Ninth Circuit held last month in a 2–1 decision that the Federal Arbitration Act ("FAA") does not preempt the California Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 359 (2014), which held, among other things, that an employer's arbitration agreement cannot require employees to waive representative claims under California's Private Attorneys General Act of 2004 ("PAGA"), Cal. Labor Code §§ 2698–2699.5 (2004), as a condition of employment. Because both opinions are extensive and complex—*Iskanian*'s three opinions total 70 pages and *Sakkab*'s two opinions total 50 pages—the analysis below provides only a brief overview of the core aspects of the majority opinions' discussions of the interplay between the FAA and PAGA.

In *Iskanian*, the plaintiff, Iskanian, had an arbitration agreement with the employer-defendant, CLS, which provided in part that "class action and representative action procedures shall not be asserted, nor will they apply, in any arbitration," and that the parties "shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person." 59 Cal.4th at 360–61. Iskanian filed a class action against CLS in which he alleged CLS had committed a number of California Labor Code violations. Iskanian brought, among other things, a claim under the PAGA, *id.*, which permits citizens to bring cases alleging Labor Code violations on behalf of the State. *See id.* at 360.

Immediately after the U.S. Supreme Court issued its opinion in *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011), CLS moved to dismiss the class's claims and

compel arbitration. The trial court granted CLS's motion and the Court of Appeal affirmed. Rejecting Iskanian's argument that "the PAGA does not allow representative claims to be arbitrated," the Court of Appeal held that he was not permitted to pursue his PAGA claim under his arbitration agreement. *Iskanian*, 59 Cal.4th at 362.

On appeal, the majority framed the issue as whether the arbitration agreement's waiver of PAGA claims is "permissible under state law and, if not, whether the FAA preempts a state law rule prohibiting such waivers." *Id.* at 378. The court observed that the "unwaivability" of some statutory rights is derived from California Civil Code sections 1668 and 3513, both of which are derived from public policy considerations. *Iskanian*, 59 Cal.4th at 382–83. The former "codifies the general principle that agreements exculpating a party for violations of the law are unenforceable," and the latter "codifies the general principle that a law established for a public reason may not be contravened by private agreement." *Sakkab*, 2015 WL 5667912, at *3 (footnotes omitted). The court concluded that the arbitration agreement's waiver of PAGA claims was against public policy and in violation of both sections 1668 and 3513, and therefore unenforceable under California law.

Nonetheless, the court acknowledged "*Concepcion* made clear [that] a state law rule may be preempted when it 'stand[s] as an obstacle to the accomplishment of the FAA's objectives.'" *Iskanian*, 59 Cal.4th at 384 (quoting *Concepcion*, 131 S.Ct. at 1748). The court concluded that "the rule against PAGA waivers does not frustrate the FAA's objectives." *Id.* The court reached this conclusion after a survey of the FAA's text and legislative history, and the U.S. Supreme Court's FAA case law. *See id.* at 384–87. That survey led the court to reason that a PAGA claim is outside the scope of "the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship." *Id.* at 386. In the court's view, although "the FAA aims to promote arbitration of claims belonging to the private parties to an arbitration agreement[,] . . . [i]t does not aim to promote arbitration of claims belonging to a government agency." *Id.* at 388. This is because PAGA claims are public enforcement actions. *Id.* And because a PAGA dispute is between an employer and the state, the court held that "California's public policy of prohibiting waiver of PAGA claims . . . does not interfere with the FAA's goal of promoting arbitration as a forum of private dispute resolution." *Id.* at 388–89.

Justice Chin, joined by Justice Baxter, concurred in the majority's judgment, but for different reasons. Justice Werdegar concurred with the majority's conclusions as to Iskanian's PAGA claims. *Id.* at 397. Thus, the California Supreme Court held unanimously that an employer may not lawfully condition employment on the employee's agreeing to an arbitration agreement that waives PAGA claims.

Sakkab required the Ninth Circuit to determine whether the FAA preempts "the *Iskanian* rule." In that case, as in *Iskanian*, plaintiff Sakkab's employment agreement with the defendant-employer, Luxottica, had an arbitration clause that prohibited any "class-based lawsuit, court case or arbitration (including any collective or representative arbitration claim)." *Sakkab*, 2015 WL 5667912 at *1. In 2013 (that is, pre-*Iskanian*), Sakkab brought, among other things, a representative PAGA claim against Luxxotica for various California Labor Code violations. The district court, relying on *Concepcion*, "concluded that the FAA would preempt a state rule barring waiver of PAGA claims." *Id.* Accordingly, the district court dismissed Sakkab's suit and compelled arbitration of his claims.

Luxxotica argued that the FAA preempts the *Iskanian* rule. After considering the history of the PAGA statute and the U.S. Supreme Court's FAA preemption cases, the Ninth Circuit panel majority held that the FAA does not preempt the *Iskanian* rule.

The court observed that under U.S. Supreme Court precedent, a "generally applicable" state law contract defense may render an arbitration agreement unenforceable unless it conflicts with the FAA's objectives, in which case it is preempted. *Id.* at *4 (citing *Concepcion*, 131 S.Ct. at 1748). The majority explained that a state law contract defense is not preempted by the FAA if it is generally applicable to *any* contract, not just arbitration agreements. The majority found that the *Iskanian* rule is one such defense under California law, noting that the rule bars any waiver of PAGA claims. *Id.*

The Ninth Circuit then turned to the issue of whether the *Iskanian* rule conflicts with the FAA's purposes. According to the court, the FAA has two primary purposes: (1) to overcome judicial hostility to arbitration, and (2) to ensure enforcement of the terms of arbitration agreements. *Id.* at *6. The court held that the *Iskanian* rule is

not contrary to either purpose. As to the former, the Ninth Circuit explained that the *Iskanian* rule "expresses no preference regarding whether individual PAGA claims are litigated or arbitrated," but rather "provides only that representative PAGA claims may not be waived outright." *Id.* at *6. The rule therefore "does not prohibit the arbitration of any type of claim." *Id.*

The court explained that "[a] defense interferes with arbitration if . . . it prevents parties from selecting the procedures they want applied in arbitration." *Id.* In *Concepcion*, for example, the Supreme Court held the FAA preempted rule at issue in that case—California's rule that held class waivers in arbitration agreements were unconscionable. *Id.* The Ninth Circuit found that the *Iskanian* rule does not "diminish parties' freedom to select the arbitration procedures that best suit their needs" and thus it does not prevent parties from agreeing to arbitrate PAGA claims. *Id.* at *3. This, in the court's view, "is a critically important distinction between the *Iskanian* rule and the rule at issue in *Concepcion*." *Id.* The Ninth Circuit therefore concluded that the *Iskanian* rule does not conflict with the FAA because the rule only prohibits wholesale waivers of PAGA claims and leaves parties with the option of arbitrating PAGA claims. *Id.* at *11.

The Ninth Circuit thus held that "the waiver of Sakkab's representative PAGA claims may not be enforced." *Id.* at *12. The court therefore reversed and remanded the case. Luxxotica, however, has filed a petition for rehearing en banc.

- Author
- Recent Posts

Philip Johnson

Phil graduated from UC Hastings in 2012 and currently is a law clerk to the Honorable Lawrence J. O'Neill.

Latest posts by Philip Johnson (see all)

- Examining the Ninth Circuit’s View on Iskanian v. CLS Transportation Los Angeles, LLC: An Update on California’s Enforcement of Arbitration Clauses - November 24, 2015
- Opinion Analysis: Berkeley Hillside Preservation v. City of Berkeley - April 2, 2015