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PIERCING THE MYSTIQUE OF CLASS ACTION WAIVERS: ARE THEY EFFECTIVE?

To the general practitioner or interested member of the public, it may look like the law is in constant flux as to whether class action waivers contained in arbitration agreements are enforceable. More and more, American businesses are turning to arbitration as a way of reducing the costs of litigation and avoiding class action lawsuits. This is because the Federal Arbitration Act ("FAA") has been held to require courts to enforce arbitration provisions as the parties have agreed. If a state or court tries to change the agreement to arbitrate certain claims, the courts have held that such attempts are preempted by the FAA, which requires arbitration provisions to be enforced according to their terms.

Recent cases have clarified whether bans on class action waiver provisions will be preempted so as to allow them to be enforced under the FAA. A typical class action waiver clause provides that only "individual" claims can be brought and that class, representative, or combined/collective claims cannot be brought. If the waiver provision is geared to claims made in arbitration, it will be enforced by virtue of the FAA, 4 U.S.C. §§ 1 *et seq.*, which preempts attempts by state courts or legislatures to curtail arbitration. The simple refrain adopted by the federal courts is that the purpose of the FAA is to enforce arbitration provisions, as written. If the waiver is contained in a provision that pertains to litigation as opposed to arbitration, the FAA will not be applicable, leaving the parties to grapple with whether the class action waiver is unenforceable by virtue of state policy or contract doctrines.

One caveat regarding arbitration and the impact of the FAA is found in the "savings clause" contained in section 2 of the FAA: an arbitration clause "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." It was widely recognized that the savings clause would apply to contractual defenses, such as waiver, estoppel, or unconscionability. Thus, it came as no surprise that the California Supreme Court in *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005) invalidated a class action waiver in an arbitration clause in a consumer credit contract on the ground that it was an illegal and unconscionable exculpation from liability clause. The Court's rationale was that since the typical consumer claim would be small, the only way for consumers to vindicate fraudulent or other wrongful conduct would be through a class action. A class action waiver under these circumstances amounted to an exculpatory contract (since the only way to vindicate the wrongs is through a class action), which would be illegal—and thus unconscionable.

However, this was not the end of the story. Six years later, the U.S. Supreme Court in *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011) held that the result in *Discover Bank*, a court ordered class action arbitration, would be inconsistent with the goals of the FAA (to afford efficient and streamlined procedures) and thus be preempted notwithstanding the "savings clause." It is not enough to say that the class action waiver was unconscionable or exculpatory. It also must not result in something that is inconsistent with the goals of the FAA.

Concepcion has also been held to apply to class action waivers in employment arbitration agreements. *Iskanian v. CLS Transportation Los Angeles*, LLC, 59 Cal.4th 384 (2014). However, *Iskanian* held representative claims brought under the California Private Attorney Generals Act of 2004 ("PAGA") could proceed, if the parties so intended, in arbitration. PAGA authorizes private individuals to bring suits for labor violations on behalf of the State, with 75% of the recovery going to the State. The Court reasoned that allowing PAGA claims to be arbitrated would not run afoul of the FAA because the FAA was geared to resolving private disputes. "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.

Nonetheless, some lower federal courts refused to follow *Iskanian* and held that PAGA claims could be waived in arbitration agreements. Recently, the Ninth Circuit in *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015) settled the question by following *Iskanian*. It held that PAGA claims did not interfere with the procedural aspects of arbitration by imposing impediments to streamlined arbitration which were found when class action procedures were imposed in arbitration. PAGA does not require, for example, notice to the class or any showing of typicality or adequacy of representation. It simply allows the plaintiff to act as a representative of the State. The court left open the question of whether the PAGA claims were to be litigated in court or arbitrated, notwithstanding its conclusion that representative PAGA claims could not be waived. It noted that Luxottica had specifically agreed not to arbitrate a claim on a "representative" basis. The Court remanded the case for the trial court to determine whether the parties agreed to arbitrate PAGA representative claims.* The U.S. Supreme Court may yet weigh in on this case. An extension has been granted to Luxxottica to file a petition for certiorari until June 16, 2016.

In summary, class action waiver clauses are alive and well, and businesses that could be the victims of class action lawsuits should consider requiring customers or consumers to arbitrate on an individual basis. The arbitration clause should be drafted as bilateral as possible to avoid unconscionability attacks. Further, thought should be given to provisions would withstand attacks of financial unfairness, such as requiring the company to advance arbitration fees (both for the provider and neutrals). The company could try to recoup these fees with a provision that permits the arbitrator to allocate the costs of arbitration, or the company can simply agree to absorb those costs. Further, the location of the arbitration should be pegged to the residence of the customer or consumer to avoid claims that it would be too expensive to travel to the location of the company. Lastly, the choice of law clause should apply the law of the state of the consumer or customer. As a safeguard in the event that a court refuses to enforce a class action waiver, the arbitration clause should clearly provide that the company does not agree to a class-wide or collective arbitration, so that the matter can remain in court.

* The Court assumed that the trial court would decide the issue of whether the parties intended to arbitrate PAGA claims foreclosing any argument that such a decision must be made by the arbitrator. An arbitration agreement could be broad enough to empower the arbitrator to make that decision, however.