

9th Circuit could soon rule on PAGA waiver legality

By Felix Shafir

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), placed significant constraints on state laws limiting the enforceability of arbitration agreements governed by the Federal Arbitration Act (FAA). After *Concepcion*, California courts disagreed over the enforceability of arbitration provisions waiving representative actions brought under the Private Attorneys General Act (PAGA), which permits employees to bring representative civil actions against employers to recover penalties for certain Labor Code violations.

Last year, the state Supreme Court held that, notwithstanding the FAA, an arbitration agreement "compel[ing] the waiver of representative claims under the PAGA" is "contrary to public policy and unenforceable as a matter of state law." *Iskanian v. CLS Transp. Los Angeles LLC*, 59 Cal. 4th 348 (2014).

Iskanian, however, failed to end the split of authority because numerous federal district courts have since declined to follow that decision. As a consequence, the law remains in flux.

The employer in *Iskanian* petitioned the U.S. Supreme Court to take up its case, especially given the division between the state and federal courts. But the employee in *Iskanian* emphasized that the 9th U.S. Circuit Court of Appeals had not yet decided whether to follow *Iskanian*, and urged the high court to wait for a 9th Circuit opinion on the issue. The high court denied review.

Today, that opinion is near, as the 9th Circuit is now poised to decide the enforceability of PAGA representative action waivers under the FAA. If the 9th Circuit declines to follow *Iskanian*, the U.S. Supreme Court may step in to conclusively settle the conflict.

The 9th Circuit May Soon Decide

Before *Iskanian*, the majority of federal district courts held that PAGA waivers must be enforced because any rule to the contrary would be preempted by the FAA after *Concepcion*. Since *Iskanian*, a majority of district courts have declined to follow *Iskanian*, concluding that the FAA preempts its rule against PAGA waivers. But a few district courts follow *Iskanian*.

The 9th Circuit could settle this conflict through several pending appeals: (1) *Sakkab v. Luxottica Retail North America*, 13-55184; (2) *Sierra v. Oakley Sales Corp.*, 13-55891; and (3) *Hopkins v. BCI Coca-Cola Bottling Co.*, 13-56126.

These appeals call on the 9th Circuit to decide the same issue confronted by the state Supreme Court in *Iskanian*: whether the FAA requires courts to enforce PAGA waivers. The briefing in the appeals is complete, and the parties are awaiting oral argument.

FAA's Applicability to Qui Tam Claims.

Iskanian concluded that the FAA does not mandate the enforcement of PAGA waivers because PAGA representative actions are brought by an employee on behalf of the state, with the state receiving 75 percent of the penalties recovered while the plaintiff and fellow employees receive the remaining portion. According to the state Supreme Court in *Iskanian*, since employees bring these PAGA claims as proxies for the state, a PAGA representative action resembles a federal qui tam claim filed under the False Claims Act (FCA), which "allow[s] individuals to share the recovery achieved by the reporting of false claims." *Iskanian* decided that "a PAGA claim lies

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outside the FAA's coverage" because the FAA does not preempt "a rule prohibiting the waiver of this kind of qui tam action on behalf of the state."

Iskanian's rationale, however, picks a side in an existing split of authority over the application of the FAA to FCA claims.

Unlike *Iskanian*, other courts have concluded that the FAA requires courts to enforce agreements to arbitrate FCA claims. E.g., *U.S. ex rel. Wilson v. Kellogg Brown & Root Inc.*, 525 F.3d 370 (4th Cir. 2008); *Deck v. Miami Jacobs Bus. Coll. Co.*, 2013 WL 394875 (S.D. Ohio Jan. 31, 2013). According to those courts, "[s]tatutory civil claims are subject to the arbitration process" and there is "no valid basis for placing the FCA claim in a different category." *U.S. v. Bankers Ins. Co.*, 245 F.3d 315 (4th Cir. 2001). As the *Deck* court explained, while an FCA qui tam claim is "necessarily 'brought in the name of the Government,' it still represents a claim belonging to the [p]laintiffs themselves" and is therefore subject to arbitration.

But some courts disagree and instead hold that the FAA does not mandate the enforcement of agreements to arbitrate FCA claims. E.g., *Winston v. Academi Training Ctr. Inc.*, 2013 WL 989999 (E.D. Va. Mar. 13, 2013); *Nguyen v. City of Cleveland*, 121 F. Supp. 2d 643 (N.D. Ohio 2000).

As a result, in assessing whether to follow *Iskanian's* rationale for refusing to enforce a PAGA waiver, the 9th Circuit might address the related question of whether it agrees with the contrary line of case law applying the FAA to FCA qui tam claims - the very type of qui tam claim that a PAGA representative action resembles in the state Supreme Court's view.

Limits on the FAA's Vindication Exception

Cases refusing to compel arbitration of FCA claims often do so based on the so-called "vindication" exception to the FAA. But the 9th Circuit's own precedent confirms this exception is inapplicable to state statutory claims (like PAGA claims).

Decades ago, in dictum, the U.S. Supreme Court indicated that it might be willing to invalidate agreements to arbitrate *federal* statutory claims where the agreements "operat[e] ... as a prospective waiver of a party's *right to pursue* statutory remedies." *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

This concept came to be known as the "vindication" principle. It is not founded on any exception to preemption contained in the language of the FAA. Instead, it derives from the "the congressional intention expressed in some other [federal] statute" where Congress itself has evinced an intention to exempt federal statutory rights from the FAA's scope. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985). In that narrow context, if a party cannot effectively vindicate a federal statutory claim in arbitration, an inherent conflict may exist between arbitration and the purpose of a federal law sufficient to override the FAA's mandate. See, e.g., *Shearson/Am. Exp. Inc. v. McMahon*, 482 U.S. 220 (1987).

It is this type of conflict between two federal laws - the FCA and the FAA - that has persuaded some courts not to apply the FAA to FCA claims.

In contrast, where the FAA and state law conflict, the U.S. Constitution's supremacy clause requires state law to give way. This is so because state laws are not of "equivalent dignity" with the FAA and therefore state law cannot create an exception to the FAA based on state public policy. *Nitro-Lift Tech. LLC v. Howard*, 133 S. Ct. 500 (2012).

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For years, the state Supreme Court has disregarded this distinction between federal and state laws, and extended the vindication principle to claims asserting state statutory rights. E.g., *Broughton v. Cigna Healthplans of Cal.*, 21 Cal. 4th 1066 (1999). In *Iskanian*, the court again relied on the vindication principle - finding representative PAGA claims necessary "to vindicate" the state's "interest in enforcing the Labor Code."

But the 9th Circuit has already rejected the state Supreme Court's expansion of the vindication principle to state law since this principle "does not extend to state statutes" under the U.S. Supreme Court's precedent. *Ferguson v. Corinthian Colls. Inc.*, 733 F.3d 928 (9th Cir. 2013). Consequently, even if the 9th Circuit were to agree that the FAA does not apply to FCA qui tam claims under the vindication principle, the court may nonetheless decline to apply this principle to PAGA waivers because PAGA claims are predicated on state law.

If the 9th Circuit declines to follow *Iskanian*, this conflict between state and federal courts may compel the U.S. Supreme Court to take up the issue of whether PAGA waivers are enforceable under the FAA. Moreover, review could be warranted even if the 9th Circuit were to follow *Iskanian*'s rationale, especially since *Iskanian* turns on a preexisting conflict over the application of the FAA to FCA claims. Only time will tell if the U.S. Supreme Court may one day strike down *Iskanian*'s rule.

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