Ogletree Deakins

California's Latest Concepcion Exception: Brown v. Superior Court of Santa Clara County

July 1, 2013

California courts do not like class action waivers. For years, many California courts refused to enforce them, exposing California businesses to class action liability regardless of any agreement with employees or customers to forgo class litigation. The Supreme Court of the United States' decision in AT&T Mobility v. Concepcion, was.....

California courts do not like class action waivers. For years, many California courts refused to enforce them, exposing California businesses to class action liability regardless of any agreement with employees or customers to forgo class litigation. The Supreme Court of the United States' decision in *AT&T Mobility v. Concepcion*, was supposed to change all that. It didn't.

The most recent example of this, *Brown v. The Superior Court of Santa Clara County*, is the latest in a string of California decisions post-*Concepcion* allowing an employee to litigate claims on a class or representative basis despite the fact that he or she had agreed to waive that right.

In the seminal case on the enforceability of class action waivers in California, *Discover Bank v. Superior Court*, the California Supreme Court held these waivers to be "unconscionable" when included in consumer contracts. Subsequent cases, such as *Gentry v. Superior Court*, extended this rule to employment agreements. These cases rendered class action waivers in California superfluous.

Enter *Concepcion*, the Supreme Court's decision that directly overturned *Discover Bank*. Without going too far into the weeds, class action waivers are typically included in arbitration agreements. Arbitration agreements are favored by many businesses because arbitration is often quicker and less expensive than litigation. By invalidating arbitration agreements that included class action waivers, state courts denied businesses these benefits. *Concepcion* essentially said that state courts can't do that anymore.

Since *Concepcion*, a number of California courts have found ways to limit or avoid its impact.

In the latest example, *Brown*, the plaintiffs, who were formerly employed as auto mechanics by defendant Morgan Tire & Auto, filed a putative class action complaint against Morgan Tire in California state court, claiming various wage and hour law violations. They also claimed violations of California's Unfair Competition Law, and critically, sought civil penalties under California's Private Attorneys General Act (PAGA).

Morgan Tire moved to compel arbitration pursuant to the parties' agreement to submit all employment-related disputes to arbitration "rather than to the courts or to governmental agencies." The parties' agreement also included a class action waiver, requiring any claims to "be mediated and arbitrated as individual claims." The trial court granted Morgan Tire's motion and the employees appealed.

The appeals court vacated the trial court's order compelling arbitration, holding the waiver to pursue claims on a representative basis unenforceable as applied to the PAGA claim.

The appeals court held that a PAGA action "is necessarily a representative action" because PAGA claims are brought on behalf of, not only the individual plaintiff, but also "other current and former employees." Additionally, the court explained that a plaintiff suing under PAGA acts—at least in theory—not for himself or herself, but "as a proxy or agent of the state's labor law enforcement agencies."

The court held that the class action waiver could not be enforced as to the PAGA claim because it "wholly prevents the exercise of a [state] statutory right intended for a predominantly public purpose." Yet neither federal law, nor *Concepcion*, includes an exception for state statutes "intended for a predominantly public purpose." Whether by accident or design, the court is paving new ground.

The practical impact of the decision is that—for now—employees may be able to get around class action waivers by asserting a PAGA claim. However, given that this same issue is pending before the California Supreme Court in *Iskanian v. CLS Transportation of Los Angeles* (S204032) in which the court granted review on September 19, 2012, and the U.S. Supreme Court's recent focus on class action issues (in cases such as *American Express Co. v. Italian Colors Restaurant* dealing with waivers of class arbitration, *Oxford Health Plans LLC v. Sutter*, about an arbitrator's decision that a contract authorized class arbitration, and *Genesis Healthcare Corp. et al. v. Symczyk*, which dealt with class actions brought under the Fair Labor Standards Act), the lasting impact of *Brown* remains to be seen.

Concepcion was supposed to change the way California courts treated class action waivers. For some California courts, it appears the more things change, the more they stay the same.

TOPICS