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Recent Maverick Ruling in CA Appellate Court Finds *Concepcion* Does Not Overrule *Gentry*

By Sarah A. Good and Jessica R. Bogo

Although the U.S. Supreme Court in AT&T Mobility LLC v. Concepcion *found that the Federal Arbitration Act preempted California's* Discover Bank *rule, which invalidated class action waivers in arbitration agreements in consumer adhesion contracts, California's Second Appellate District has split on whether* Concepcion *applies to a similar California rule established in* Gentry. *One division of the District has followed the lead of the federal courts in California and found that* Concepcion *overruled* Gentry. *Another division has taken a contrary and unsupportable view. This debate within the Second Appellate District will be resolved when the California Supreme Court decides* Iskanian.

While the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), is more than a year and a half old, California state courts continue to inconsistently apply that decision to entrenched California case law concerning the enforceability of arbitration provisions. *Concepcion* held that the Federal Arbitration Act ("FAA") preempted the rule established in *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005), which found that class action waivers in arbitration provisions contained in consumer adhesion contracts were unconscionable and thus unenforceable. (See "U.S. Supreme Court Gives Green Light to Class Action Waivers in Consumer Contracts.")

A case on point is the November 26th decision by the California Court of Appeal for the Second Appellate District, Division One in *Franco v. Arakelian Enterprises, Inc.*, No. B232583, ___ Cal.Rptr.3d ___ [2012 WL 5898063] ("*Franco II*"). There, the court considered the viability of the four-factor inquiry established in *Gentry v. Superior Court*, 42 Cal.4th 443 (2007), in the employment arena to determine whether a class action waiver is enforceable in light of Concepcion. The court found that *Gentry* survived *Concepcion*, which is squarely at odds with another decision by the Second Appellate District—but from Division Two—in *Iskanian v. CLS Transportation Los Angeles, LLC*, 206 Cal.App.4th 949 (2012). In fact, the California Supreme Court granted review of *Iskanian* on September 19, 2012, and one of the issues presented is whether or not *Concepcion* impliedly overruled *Gentry* with respect to contractual class action waivers in the context of non-waiveable labor law rights. *Franco II* undoubtedly will be appealed and either will be considered at the same time as *Iskanian* or will be subject to a grant and hold until after *Iskanian* is decided.

In addition to being directly contrary to another decision from the Second Appellate District, the *Franco II* decision is not persuasive. The court's conclusion revolves around its characterization of the *Gentry* test as "set[ting] forth several factors to be applied on a case-by-case basis to determine whether a class action waiver precludes employees from vindicating their statutory rights." *Franco II*, 2012 WL 5898063, at *1. The court then contends that *Concepcion* only prohibits "a categorical rule against class action waivers" and leaves intact case-by-case multi-factor tests. *Id.* However, the *Discover Bank* rule was not "categorical" but depended upon the determination of several case-by-case factors such as whether or not "the disputes between the contracting parties predictably involve small amounts of damages" and whether or not there are allegations that "the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of small sums of money." See *Discover Bank*, 36 Cal.4th at 162 - 63. Moreover, *Concepcion* itself neither created a dichotomy between "categorical" and "case-by-case" rules nor concluded that the FAA only preempted the former.

It is no wonder then that *Franco II* flies in the face of decisions by eight different U.S. District Court Judges in California who have held that *Concepcion*, in overruling *Discover Bank*, effectively overruled *Gentry*. *See Steele v. Am. Mortgage Mgmt. Servs*., No. 2:12-cv-00085 WBS JFM, 2012 WL 5349511 (E.D. Cal. Oct. 26, 2012) (Shubb, J.); *Valle v. Lowe's HIW, Inc.*, No. 11-1489-SC, 2012 WL 4466523 (N.D. Cal. Aug. 30, 2012) (Conti, J.); *Morvant v. P.F. Chang's China Bistro, Inc.*, No. 11-CV-05405 YGR, 2012 WL 1604851 (N.D. Cal. May 7, 2012) (Gonzalez Rogers, J.); *Jasso v. Money Mart Express, Inc*., No. 11-CV-5500 YGR, 2012 WL 1309171 (N.D. Cal. April 13, 2012) (Gonzalez Rogers, J.); *Sanders v. Swift Trans. Co. of Ariz., LLC*, 843 F. Supp. 2d 1033 (N.D. Cal. 2012) (Cousins, J.); *Lewis v. UBS Fin. Servs., Inc.*, 818 F. Supp. 2d 1161 (N.D. Cal. 2011) (Armstrong, J.); *Murphy v. DirecTV, Inc.*, No. 2:07-cv-06465-JHN-VBKx, 2011 WL 3319574 (C.D. Cal. Aug. 2, 2011) (Nguyen, J.); *Morse v. ServiceMaster Global Holdings Inc*., No. C 10-00628 SI, 2011 WL 3203919 (N.D. Cal. July 27, 2011) (Illston, J.); *Zarandi v. Alliance Data Sys.* Corp., No. CV 10-8309 DSF (JCGx), 2011 WL 1827228 (C.D. Cal. May 9, 2011) (Fischer, J.). Indeed, there has been only one California District Court decision to the contrary. *See Plows v. Rockwell Collins, Inc.,* 812 F. Supp. 2d 1063 (C.D. Cal. 2011) (Carter, J.).

Franco II demonstrates the continuing hostility of California state courts to the enforcement of class action waivers in arbitration agreements. Although *Franco II*'s reasoning is incorrect, it will take several years for these issues to percolate through the appellate courts. While several decisions construing *Concepcion* likely will come down at the Ninth Circuit, the California Supreme Court, and the U.S. Supreme Court in the next two years, in the interim, companies need to anticipate some inconsistent results in California state courts until these issues have been ironed out.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

Sarah A. Good (bio)
San Francisco
+1.415.983.1314
sarah.good@pillsburylaw.com

Jessica R. Bogo (bio)
San Francisco
+1.415.983.1252
jessica.bogo@pillsburylaw.com