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Clarity May Be Coming For Arbitration Provisions in Employment Agreements

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The United States Supreme Court decision of *AT&T Mobility, LLC v. Concepcion*, authored by Justice Scalia in 2011, held that state courts could not categorically invalidate waivers of class actions and class arbitrations, finding that such state court decisions were preempted by federal laws favoring the enforceability of arbitration agreements. The touchstone of the *Concepcion* ruling is that the courts may not exhibit "judicial hostility" to arbitration.

Concepcion never found fertile ground in California, and since it came out, California courts have strained to find grounds to strike down agreements containing arbitration provisions, particularly in the context of employment agreements that waive class actions.

The resistance *Concepcion* faced comes from previous California Supreme Court decisions that culminated in the 2007 *Gentry* decision, which permitted courts to invalidate arbitration agreements that waive the employees' option to bring class actions, based on two concepts: (1) unconscionability; and (2) unwaivable statutory rights.

Courts in the post-*Concepcion* era, using the doctrine of unconscionability, have carefully scrutinized employment agreements and the circumstances in which they were signed, finding numerous factors that may lead to the unenforceability of the arbitration provision in the employment agreement, and depending on the pervasiveness of the unconscionability, the entire employment agreement. Examples of such factors include the employer not providing the employee with a copy of the arbitration rules (e.g., the JAMS or AAA rules), or the employer not providing a translated copy of the agreement to a Spanish speaker.

The unwaivable statutory right that the courts in the post-*Concepcion* era have latched onto most firmly is the Private Attorneys General Act of 2004, or PAGA, which allows a single employee to bring a representative action on behalf of other employees for penalties for Labor Code violations. The courts have found that *Concepcion* does not apply to PAGA actions.

In 2013, the California Supreme Court will re-examine its *Gentry* decision. The specific context is the appeal of the *Iskanian* decision, one of the few California court of appeal decisions that fully applied *Concepcion* and upheld an arbitration agreement waiving employment class actions. In particular, the *Iskanian* court held that under *Concepcion*, employers and employees are free to enter into arbitration agreements that waive all forms of class and representative actions, specifically including PAGA actions.

The current state of the law on the enforceability of employment agreements containing arbitration provisions is confused. The year 2013 should bring clarity to this critical area of the law, and give California employers guidance on how to draft an enforceable arbitration agreement for their employees.