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There Has Been a MisConcepcion: The FAA Does Not Foster the Waiver of Statutory Rights

Reyes v. Liberman Broad., Inc.¹

I. INTRODUCTION

In the ongoing dispute between Jesus Reyes and Liberman Broadcasting, Inc., the state courts in California must decide when and how employers can compel employees to arbitrate employment claims. This decision is made increasingly challenging by the existence of an ever-changing legal backdrop that has become progressively more employer-friendly. However, California courts must render a decision that does not infringe on employees’ statutory bargaining rights. Reyes is currently pending review based on the holding in another case, Iskanian v. CLS Transp. Los Angeles, LLC². The issue on review in both cases concerns the applicability of the Federal Arbitration Act (FAA) to class arbitration waivers in the employment contract context.

This paper first discusses the particular facts and proceedings in Reyes. Next, it will discuss the complicated legal landscape that affects the interpretation of class arbitration waivers in California. Then, this paper will analyze the California Court of Appeals’ rationale for its holding in Reyes. Next, this paper will construct an argument in favor of allowing employees to maintain bargaining rights in some circumstances, despite the existence of a class arbitration waiver in an employment contract. Finally, this paper will explore outside factors that may affect the Supreme Court of California’s ability to render a decision and analyze how the court’s reasoning could leave its own impact on the current legal landscape in California.

II. FACTS AND HOLDING

Jesus Reyes began working as a security officer for Liberman Broadcasting, Inc. (LBI) on April 24, 2009.³ Reyes remained employed at LBI until September of that year.⁴ In 2010, Reyes filed a class complaint claiming LBI committed wage and hour violations.⁵

On April 8, 2009, prior to commencing his employment with LBI, Reyes signed an arbitration agreement (Agreement) with LBI.⁶ The Agreement expressly stated that it was governed by the FAA,⁷ and required that all employment dis-

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¹ Reyes v. Liberman Broad., Inc., 146 Cal. Rptr. 3d 616 (2012).
³ Reyes, 146 Cal. Rptr. 3d at 619.
⁴ Id.
⁵ Id.
⁶ Id.
⁷ Id.
puteres between LBI and Reyes be resolved through final and binding arbitration.\textsuperscript{8} The Agreement was silent as to the availability of class arbitration and a purely textual reading of the Agreement suggested that only bilateral arbitrations were considered when it was drafted.\textsuperscript{9} The Agreement permitted discovery by both parties so that each side could sufficiently arbitrate the claim.\textsuperscript{10} However, the Agreement also allowed the "arbitrator to impose... appropriate limits on discovery."\textsuperscript{11} After Reyes acknowledged with his signature that he could read the Agreement in both English and Spanish, the Agreement was executed.\textsuperscript{12}

On May 27, 2010, Reyes filed a class complaint against LBI alleging several wage and hour violations.\textsuperscript{13} Reyes later added a representative claim in accordance with the Private Attorneys General Act (PAGA).\textsuperscript{14} LBI answered the amended complaint by asserting twenty-two affirmative defenses,\textsuperscript{15} yet, LBI did not assert the existence of the Agreement among them.\textsuperscript{16} Reyes sent a request for discovery to LBI,\textsuperscript{17} which led LBI to depose Reyes.\textsuperscript{18} LBI also raised objections to all of Reyes's discovery requests.\textsuperscript{19} The parties had a meeting where LBI agreed to provide some class-wide discovery as well as some statistically representative samples of particular requested information.\textsuperscript{20} The parties jointly agreed to conduct a class-wide mediation scheduled to occur on July 1, 2011.\textsuperscript{21}

In October and December of 2010, the trial court held two status conferences.\textsuperscript{22} In March of 2011, the trial court extended the deadline for class certification based on a stipulation between the parties.\textsuperscript{23} In July of 2011, the time of the scheduled class-wide mediation, LBI informed Reyes that the company intended to move to compel arbitration instead, which it did three days later.\textsuperscript{24} The trial court denied LBI's motion on the ground that LBI had waived its right to compel arbitration based on its "failure to properly and timely assert" that right.\textsuperscript{25} LBI subsequently appealed.\textsuperscript{26}

\textsuperscript{8} Id. The contract stated that LBI and Reyes must "agree to submit to final and binding arbitration all claims, disputes and controversies arising out of, relating to or in any way associated with" an employee's employment or termination. "Specific claims identified in the Arbitration Agreement include wage claims, unfair competition claims, and claims for violation of federal, state, local, or other government law." Id.

\textsuperscript{9} Id. Reyes, 146 Cal. Rptr. 3d at 619. The language of the Arbitration Agreement specifically states, "each party to the arbitration may represent itself/himself/herself, or may be represented by a licensed attorney." Id.

\textsuperscript{11} Id. Reyes, 146 Cal. Rptr. 3d at 619.

\textsuperscript{12} Id. LBI began depositions on September 1, 2010. Id.

\textsuperscript{13} Id. Objections were raised on October 11, 2010. Id.

\textsuperscript{14} Id.

\textsuperscript{15} Id. Note that between March 25, 2011 and May 10, 2011, LBI hired new legal representation.
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The California Court of Appeals reversed the trial court’s decision denying LBI’s motion to compel arbitration and awarded costs to LBI.\(^\text{27}\) The Court of Appeals set out a two-prong argument defending its holding. First, the court stated that LBI had not waived its right to compel arbitration.\(^\text{28}\) Second, the court concluded that the enforcement of the Agreement was not barred by the National Labor Relations Act (NLRA), since the NLRA did not apply to the dispute.\(^\text{29}\) On December 12, 2012, the Supreme Court of California granted review of this case and wrote a superseding opinion challenging the trial court’s rationale.\(^\text{30}\)

Reyes first alleged that LBI waived its right to compel arbitration.\(^\text{31}\) Pending review of Iskanian, Reyes also filed petitions alleging that the futility defense should not be available to LBI to excuse its delay when there was not actually a change in law but rather only an increased likelihood that the defendant would succeed.\(^\text{32}\) Reyes further stipulated that California case law had yet to determine the extent of an employee’s right to resist individual arbitration in order to vindicate his statutory rights.\(^\text{33}\) In response, LBI contended that it did not waive its right to compel arbitration because it could not do so until the United States Supreme Court rendered a decision in Concepcion.\(^\text{34}\) LBI further argued that Gentry, a case Reyes’s argument relied on, is no longer good law and even if it were, Reyes did not provide sufficient evidence to support a claim under the case.\(^\text{35}\)

### III. Legal Background

Public policy in the state of California carries a strong presumption in favor of settling disputes by arbitration rather than litigation.\(^\text{36}\) However, a party has no obligation to arbitrate unless he or she expressly consents in a valid and enforceable written contract to do so.\(^\text{37}\) Although federal and state law alike favor arbitration as an efficient and fairly cost-effective means of dispute resolution, a court may refuse to enforce an arbitration agreement based on contract principles or other laws.\(^\text{38}\) Yet, as a general practice, courts usually find an intention between the parties to uphold arbitration clauses.\(^\text{39}\)

California state law concerning arbitration agreements has been affected by two landmark United States Supreme Court cases: Stolt-Nielsen S.A. v. Animal-Feeds Int’l Corp\(^\text{40}\) and AT&T Mobility LLC v. Concepcion.\(^\text{41}\) Stolt-Nielsen held

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27. Reyes, 146 Cal. Rptr. 3d at 635.
28. Id. at 620
29. Id. at 633.
32. Id. at *15. See discussion of the futility doctrine, infra note 129.
33. Id.
34. Reyes, 146 Cal. Rptr.3d at 625.
35. Id.
37. Id.
38. Id.
39. Id.
that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding the party agreed to do so." 42 Concepcion held that the FAA preempts California the doctrine of unconscionability. 43 These holdings, their relationship to California state law cases, and the statutory rights implicated by these decisions will be discussed below.

A. Waiver by Inaction to Compel Right to Arbitration

California law recognizes a statutory exception to the presumption in favor of arbitration where the moving party has waived his or her right to compel arbitration. 44 However, as case law suggests, this is a difficult claim for the plaintiff to prevail on in light of changing precedent. In determining whether a party has waived its right to arbitration under California law, a court should consider the following factors:

(1) whether the party’s actions are inconsistent with the right to arbitrate;

(2) whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate;

(3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay;

(4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings;

(5) whether important intervening steps have taken place, and

(6) whether the delay affected, misled, or prejudiced the opposing party. 45

In Fisher v. A.G. Becker Paribas Inc., 46 the Ninth Circuit rendered a decision that made it virtually impossible for a plaintiff to successfully argue that a defendant waived its right to compel arbitration through inaction. 47 In that case, the Fishers brought a lawsuit against a stock brokerage firm alleging that the firm lost over $2 million of the Fisher’s savings through the mismanagement of their accounts. 48 The Fishers did not seek arbitration of their claims, as required by arbitration clause in the agreement they signed, but rather filed a claim in district court alleging violations of certain federal securities laws. 49 The defendant did not move to compel arbitration because, given that state law followed the intertwining doctrine, 50 it was likely that the gesture would have been futile. 51 However, after the

41. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).
42. Stolt-Nielsen, 559 U.S. at 684.
43. Concepcion, 131 S. Ct. at 1750-51.
44. Cal. CIV. PROC. CODE § 1281.2 (West 2012).
47. Id.
48. Id. at 693.
49. Id.
50. Id. at 695. The intertwining doctrine was a prior rule adopted by the Ninth Circuit that found that “when arbitrable and nonarbitrable claims arise out of the same transaction, and are sufficiently intertwined factually and legally, the district court should deny arbitration as to the arbitrable claims in order to protect the jurisdiction of the federal court and avoid any possible preclusive effect.” Id.
51. Id. at 693.
case was filed, the United States Supreme Court rendered a decision that overruled the intertwining doctrine.\textsuperscript{52}

The \textit{Fisher} court examined the three-and-a-half year delay “in light of the strong federal policy favoring the enforcement of arbitration agreements.”\textsuperscript{53} The court rationalized that before the intertwining doctrine was overruled, the arbitration agreement was unenforceable.\textsuperscript{54} Therefore, because the defendant filed its motion to compel arbitration after United States Supreme Court overruled the intertwining doctrine, the defendant did not act “inconsistently with a known existing right to compel arbitration.”\textsuperscript{55} The court further held that the time, money and effort the Fishers put forth to prepare for trial were not sufficient to prove that they were prejudiced by the three-and-a-half year lapse in time.\textsuperscript{56}

B. Statutory Rights and Class Action Waivers

Two federal statutes mentioned in the Reyes case are frequently analyzed in the employment contract context. The first statute is the FAA, which states that a written agreement to submit a controversy arising out of the agreement to arbitration is valid, irrevocable, and enforceable, “save upon such grounds as exist at law or in equity for the revocation of any contract.”\textsuperscript{57} California adopted its own state law version of the FAA which requires that a written arbitration agreement shall be enforced unless a court determines that the petitioner has waived the right to arbitration, there are grounds to revoke the arbitration agreement, or a party to the agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same or a related transaction and there is a possibility that the two court rulings will conflict.\textsuperscript{58} The United States Supreme Court has made it clear that the FAA’s “savings clause” does not protect state laws that discriminate against written arbitration agreements and state statutes must be applied in accordance with the Congressional intent of enacting the FAA.\textsuperscript{59}

The second statute is the NLRA, which was enacted in 1935.\textsuperscript{60} The NLRA created the National Labor Relations Board (NLRB) and serves two important functions in employment law.\textsuperscript{61} First, the NLRA guarantees employees the right to organize, work with labor organizations, bargain collectively through representation, and “engage in activities for the purpose of collective bargaining or other mutual aid or protection.”\textsuperscript{62} Second, the NLRA makes certain employer conduct unlawful as an unfair labor practice.\textsuperscript{63} Additionally, the NLRB interprets the NLRA to mean that employees bringing class-wide employment-related claims

\textsuperscript{52} Fisher v. A.G. Becker Paribas Inc., 791 F.2d at 697.
\textsuperscript{53} Id. at 693.
\textsuperscript{54} Id. at 697.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} 9 U.S.C.A. § 2 (West 2006).
\textsuperscript{58} CAL. CIV. PROC. CODE § 1281.2 (West 2012).
\textsuperscript{59} JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 2:14 (9th ed. 2012).
\textsuperscript{60} CAL. PRAC. GUIDE EMP. LITIG. Ch. 15-C.
\textsuperscript{61} Id.
\textsuperscript{62} Id. (citing N.L.R.A. §7, 29 U.S.C. §157).
\textsuperscript{63} Id.
are exercising rights protected by Section 7 of the NLRA. The Ninth Circuit has held that, under Fair Labor Standards Act and California's Labor Code, employment rights were analogous to "substantive statutory rights established for a public reason" and employer-enforced dispute resolution was unenforceable "to the extent that it barred claims for public injunctive relief."

In at least one instance, the Second Circuit has ruled that a class action waiver violates federal substantive arbitration law if enforcing the waiver would prevent plaintiffs from vindicating their federal statutory rights. In In re American Express Merchants' Litigation, the court considered whether a class action waiver was enforceable when the original agreement was alleged to be an illegal "tying agreement" enforced by a credit card company in violation of the Sherman Act. The court determined that while class action waivers are not per se unenforceable in the antitrust context, the economic evidence before the court suggested that plaintiffs would not be able to vindicate their statutory antitrust rights if they were unable to able to pursue their claims as a class. The following pages will segue from a broad discussion of these statutory rights to an analysis of the ways in which these rights are applied in cases concerning class action waivers.

C. Class Action Waivers and the Concepcion Case

In Discover Bank v. Superior Court, the Supreme Court of California rendered a landmark decision that declared a class arbitration waiver in a consumer adhesion contract unconscionable. In Discover Bank, the court reasoned that not all class action waivers were necessarily unconscionable, but the presence of certain unsavory factors would suggest that a class action waiver was illegal under California law. In that case, it was alleged by credit card holders that Discover Bank had a fraudulent practice of charging consumers small late payment fees before the payment was technically considered late under the contract. The court stated that a class action waiver would be unconscionable in a consumer contract of adhesion under a circumstance that involved a dispute between contracting parties involving little damages, where it is alleged the party with superior bar-

67. Id.
68. Id. at 199.
69. See McLoughlin, supra note 59.
71. Id. at 87.
72. Id. The court explained that waivers become unconscionable when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law.
73. Id.
74. Id. at 77.
gaining power intentionally cheated many consumers out of individually small sums of money.\textsuperscript{75} In that particular situation, the court found that California would be free to apply its own state unconscionability standard in favor of the consumers.\textsuperscript{76}

After \textit{Discover Bank}, the Supreme Court of California rendered a decision in \textit{Gentry v. Superior Court}\textsuperscript{77} that was believed to have expanded the \textit{Discover Bank} holding to include employment contracts.\textsuperscript{78} There, Gentry filed a class action lawsuit against Circuit City alleging the company committed overtime violations.\textsuperscript{79} Circuit City moved to compel individual arbitration in compliance with the class arbitration waiver contained in Circuit City’s “Dispute Resolution Rules and Procedures” manual.\textsuperscript{80} The court determined that “at least in some cases, the prohibition of class-wide relief would undermine the vindication of the employee’s unwaivable statutory rights” and may pose a considerable obstacle to the state’s enforcement of overtime laws.\textsuperscript{81}

The \textit{Gentry} court considered four factors that favored class actions for alleged wage-and-hour violation allegations in the employment context.\textsuperscript{82} First, the court concluded that wage-and-hour violation allegations tended to be individually modest.\textsuperscript{83} The court rationalized that class actions played an important function in enforcing state overtime statutes by permitting similarly situated employees who were subjected to the same unlawful employment practices a “relatively inexpensive way” to bring their case.\textsuperscript{84} Second, the court determined that a current employee who sued his employer without the insulation of a class complaint would be at a greater risk of retaliation.\textsuperscript{85} Third, the court noted that some employees may not bring an individual claim against their employer because they were unaware that the employer’s actions violated the employee’s rights.\textsuperscript{86} Fourth, the court looked at other practical obstacles that may prevent some class members from receiving complete vindication of their rights through individual arbitration, such as lack of access to an attorney or the transient nature of the employee’s work.\textsuperscript{87} The court concluded that, in determining whether a class arbitration waiver was proper in a given situation, a trial court should render a decision in light of these four factors to determine if a class arbitration would be a “significantly more effective practical means of vindicating” the employees’ rights.\textsuperscript{88}

The entire pro-plaintiff landscape set by the Supreme Court of California was ruptured by the United States Supreme Court’s decision in \textit{AT&T Mobility LLC v. Concepcion}.\textsuperscript{89} In \textit{Concepcion}, the Court expressly overruled the \textit{Discover Bank}

\textsuperscript{75} Id. at 87.
\textsuperscript{76} \textit{Discover Bank}, 30 Cal. Rptr. 3d at 87.
\textsuperscript{77} Gentry v. Superior Ct., 42 Cal. 4th 443, 453 (2007).
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 451.
\textsuperscript{80} Id.
\textsuperscript{81} Id. at 450.
\textsuperscript{82} Id. at 457-463.
\textsuperscript{83} Gentry v. Superior Ct., 42 Cal. 4th at 457.
\textsuperscript{84} Id. at 459.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 461.
\textsuperscript{87} Id. at 463.
\textsuperscript{88} Id.
\textsuperscript{89} AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).
holding in a 5-4 decision, finding that California unconscionability law was preempted by the FAA.90 The plaintiffs in that case brought a class action complaint against AT&T, alleging that AT&T had engaged in false advertising and fraud by charging customers sales tax on phones advertised by the company to be free.91 AT&T moved to compel individual arbitration as provided for in its consumer contract, but the Concepcions opposed the motion, alleging that the arbitration agreement was "unconscionable and unlawfully exculpatory under California law because it disallowed classwide procedures."92 The Court noted that the "principal purpose of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'"93 Through the Court's construction of its FAA analysis, it concluded that the rule set forth in Discover Bank interfered with contractual arbitration rights by allowing any party to a consumer adhesion contract to demand class-wide arbitration after the fact.94 The Court concluded that in passing the FAA, Congress had sought to achieve objectives that would be impossible under the Discover Bank rule. As such, the Court held that the FAA preempted the Discover Bank rule.95

D. California Law After Concepcion

California courts are currently struggling to determine if the express overruling of Discover Bank resulted in an implicit overruling of Gentry. While many California lower courts have altogether avoided discussion of Gentry after Concepcion, the Second District Court of Appeals in California entertained an argument that Gentry could have survived Concepcion.

In Kinecta Alternative Financial Solutions, Inc. v. Superior Court96, the California Court of Appeals suggested that Gentry and Discover Bank created two different tests to determine when a class arbitration waiver should be enforced, meaning that the two decisions should be considered separately.97 The court noted that Discover Bank applied specifically to unconscionability of class action waivers in adhesion contracts, whereas Gentry discussed the effect of a class action waiver on employees' de facto rights, which does not rely on any presence of unconscionability.98 In Kinecta, a plaintiff filed a class action complaint for damages, injunctive relief, and restitution against her employer, alleging that it had violated California's wage and hour laws.99 While the court briefly discussed the possibility that Gentry survived the overruling of Discover Bank, it ultimately found that the plaintiff had not met her burden of production of evidence, because she did not establish the existence of the four Gentry factors.100 However, the

90. Id. at 1753.
91. Id. at 1744.
92. Id. at 1744-1745.
93. Id. at 1748 (citing Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989)).
94. Id. at 1750.
95. Concepcion, 131 S. Ct. at 1753.
97. Id. at 516.
98. Id.
99. Id. at 511.
100. Id. at 517.
court did note that since *Gentry* has not been expressly abrogated or overruled, it was still binding law in California.\(^{101}\)

\[\text{E. Iskanian and Franco: Cases Also Pending Review}\]

Although numerous cases have questioned the continuing vitality of *Gentry* after the overruling of *Discover Bank*, the forthcoming review of *Iskanian v. CLS Transp. Los Angeles, LLC*\(^{102}\) by the Supreme Court of California may put an end to the confusion in California. In the original case, an employee brought a class action lawsuit against his employer, CLS, for failure to pay overtime, provide meals and rest breaks, reimburse employees for business expenses, provide accurate and complete wage statements and to pay final wages in a timely manner.\(^{103}\) While Iskanian was employed by CLS, he signed an arbitration agreement that contained an express waiver of class arbitration.\(^{104}\) The California appellate court found that the *Concepcion* decision conclusively invalidated the *Gentry* test because the *Gentry* test was founded on a mere policy rationale and could not preempt the FAA.\(^{105}\)

After Iskanian filed his opening brief, the NLRB issued a decision interpreting the application of the FAA to future employment disputes, after *Concepcion*.\(^{106}\) The NLRB found that a mandatory, employer-imposed arbitration agreement that requires all employment-related issues to be handled through bilateral arbitration violates Section 7 of the (NLRA, because it prohibits collective bargaining, a substantive employee right guaranteed by the NLRA.\(^{107}\) However, the *Iskanian* court refused to give the NLRB’s finding deference because its decision went beyond a discussion of the NLRB and involved an analysis of *Concepcion*, and other FAA-related authority.\(^ {108}\) The court reasoned that since the NLRB’s analysis was overly-expansive in scope and because *Concepcion* created no exception for employment-related disputes, the court owed its findings no deference.\(^ {109}\) However, on September 19, 2012, The Supreme Court of California granted a review of the original *Iskanian* decision.\(^ {110}\) According to the filings for the case on review, the Court will have to finally address whether *Concepcion* overruled *Gentry*.\(^ {111}\)

In addition to the *Reyes* case, another case, *Franco v. Arkelian Enterprises, Inc.*\(^ {112}\) has also been granted review, pending the outcome of the *Iskanian* case.\(^ {113}\) Unlike in *Iskanian*, the California Court of Appeals found that the employee,

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101. *Id.* at 516.
104. *Iskanian*, 142 Cal. Rptr. 3d at 375.
105. *Id.* at 379-380.
106. *Id.* at 381.
107. *Id.*
108. *Id.* at 381-382.
109. *Id.* at 382.
110. *Iskanian*, 286 P.3d 147.
113. *Id.*
Franko, lacked the means to pursue individual relief from violations of his unwaivable statutory rights, and that he would, therefore, not have been able to bring his case unless it was a class action suit. The Franco court found that certain parts of the Gentry opinion were still valid and were not in complete conflict with the FAA. The court rationalized that the plaintiff would have likely been unable to find an attorney to adequately represent him in a bilateral arbitration considering the modest size of the potential damage recovery. The court further found that enforcing class action waivers in similar situations would not force the employer to correct its illegal behavior.

After exploring the meaning behind these statutory rights, the effects of the United States Supreme Court’s holdings in favor of enforcing agreements as written, and the California case law that will attempt to reconcile all of these forces, it becomes easier to contextualize the issue the Supreme Court of California will seek to solve when it reviews the Iskanian decision. The remaining portions of this paper will analyze the current state of the Reyes decision, and will apply past decisions and analytical framework to predict the future of class action waivers in the employment law context, in California.

IV. THE INSTANT DECISION

The California Court of Appeals first decided Reyes in favor of upholding LBI’s arbitration agreement. Subsequently, the Supreme Court of California granted Reyes’s petition for review due to the case’s similarity to Iskanian, for which the California Supreme Court had already granted review. The Court of Appeals arrived at its decision in Reyes using a two-prong argument. First, the court found that LBI did not waive its right to compel arbitration, and second, that Reyes could not base his argument on NLRB’s analysis of the FAA because the NLRB’s rationale was inapplicable to the case.

Prong 1

The first prong of the court of appeal’s analysis focused on LBI’s right to arbitrate class actions under its Agreement with Reyes, California law, and other factors that indicated that the steps LBI took did not unduly prejudice Reyes’s case. The court relied on its holding in Kinecta in finding that the Agreement between Reyes and LBI did not authorize class arbitration, because the contractual language covered only bilateral arbitration. That court held that an arbitration

115. Franco, 149 Cal. Rptr. 3d at 561-563, 568.
116. Id. at 570.
117. Id. at 571.
120. Reyes, 146 Cal. Rptr. 3d at 634- 635.
121. Id. at 620-633. Other factors discussed include the fact that LBI had not delayed for too long of a period of time before seeking stay, LBI did not file a counterclaim before seeking a stay, and Reyes had not shown he was prejudiced by the delay. Id.
122. Id. at 622.
agreement that contained no express waiver of class arbitration and made no reference to third parties was limited to disputes between the plaintiff and defendant.\textsuperscript{123}

However, the Court of Appeals in Reyes went on to find that LBI could not have successfully moved to compel arbitration when the controversy first arose.\textsuperscript{124} LBI originally would not have been able to successfully compel arbitration under the Agreement under the California precedent. However, this changed after the United States Supreme Court’s decision in AT&T v. Concepcion.\textsuperscript{125} Therefore, the court found that LBI did not act inconsistently with intent to arbitrate by moving to compel arbitration only after Concepcion was decided.\textsuperscript{126} Since Concepcion changed unconscionability law in California, the court found that LBI’s decision to wait to move to compel arbitration until after that decision did not constitute a waiver of its right to arbitrate.\textsuperscript{127} This was because Concepcion was the first ruling that made it possible for LBI to enforce the Agreement as it was written.\textsuperscript{128} The court reasoned that Reyes’s argument that Concepcion did not create an entirely new law but merely increased LBI’s likelihood of success in enforcing the Agreement failed to recognize the futility doctrine\textsuperscript{129} did not require “entirely clear, uncontroverted authority barring the enforcement of the arbitration agreement.”\textsuperscript{130}

The Court of Appeals next considered the factors that traditionally demonstrate waiver of an arbitration agreement. The court reasoned that the “litigation machinery” had not been “sufficiently invoked” before LBI notified Reyes of its intent to arbitrate.\textsuperscript{131} The court noted that to find otherwise would require a record of substantial litigation and found that in this case the parties had made “only limited use of the judicial process.”\textsuperscript{132} The court then found that although LBI had waited thirteen months to move to compel arbitration, LBI had notified Reyes of its intent to enforce the Agreement one month after the Concepcion decision was

\textsuperscript{123} Id. at 621-622.
\textsuperscript{124} Id. at 627.
\textsuperscript{125} Id.
\textsuperscript{126} Reyes, 146 Cal. Rptr. 3d at 627.
\textsuperscript{127} Id. at 627-628. The court cited the Fisher case where defendant moved to compel arbitration over three years after the filing of the suit, did not raise arbitration as an affirmative defense, filed pretrial motions, and engaged in extensive discovery. Defendant moved to compel only after the Supreme Court rejected the “intertwining doctrine” . . . The court reasoned that the defendant ‘properly perceived that it was futile to file a motion to compel arbitration until’ the Supreme Court rejected the intertwining doctrine. The court thus held that defendants did not act ‘inconsistently with a known existing right to compel arbitration.” Id. at 626 (quoting Fisher v. A.G. Becker Paribas Inc, 791 F.2d 691, 691-697 (9th Cir. 1986)).
\textsuperscript{128} Id. at 629-630. “LBI could not enforce the Arbitration Agreement as written prior to Concepcion.” Id.
\textsuperscript{129} The futility doctrine is applied here to recognize that LBI would not have won their motion to compel arbitration prior to the Concepcion ruling and filing a motion to compel arbitration before the Concepcion decision would have been futile, or pointless because the court would have dismissed the motion under Gentry. Id. at 626-627.
\textsuperscript{130} Id. at 628.
\textsuperscript{131} Id. at 629.
\textsuperscript{132} Reyes, 146 Cal. Rptr. 3d at 629. The court determined that although the parties had engaged in meet and confer efforts for thirteen months, no discovery had actually been exchanged. Id.
handed down, and therefore the delay was justified and did not constitute a waiver.  

The court considered whether Reyes was prejudiced by LBI’s delay in moving to compel arbitration, but it ultimately found that Reyes had failed to prove that he suffered prejudice sufficient to bar enforcement of the Agreement. The record failed to indicate any other conduct by LBI that constituted potential prejudice to Reyes. The court noted that, in the context of class arbitration, mere evidence of delay was not sufficient evidence of prejudice. The court rejected Reyes’s argument that he was prejudiced by LBI’s “egregious delay” because LBI’s explanation for its delay proved to be reasonable and LBI gave Reyes timely notification of its intention to compel arbitration under the circumstances. In light of these facts, the court viewed the delay as more comparable to a one-month delay than to a thirteen month delay. The court held in favor of LBI’s right to compel individual arbitration of Reyes’s wage and hour claims.

Prong 2

In the second prong of its analysis, the court of appeals rejected Reyes’s argument that an order requiring individual arbitration would deprive him of his right to participate in NLRA-protected collective legal action. The court followed the reasoning of the Iskanian case and rejected the NLRB’s authority in interpreting the FAA. The court followed the recent trend of California courts of enforcing agreements to arbitrate according to their terms unless the FAA’s mandate was overridden by a Congressional provision.

133.  Id. at 631. LBI filed its motion to compel arbitration on July 5, 2011. Reyes’s motion for class certification was not set to be heard until October 17, 2011. The court held this was “far from waiting until the eve of trial to move for arbitration.” Id.

134.  Id. at 362.

135.  Id. “[T]here is no evidence that LBI used the judicial discovery process to gain information which it would not otherwise be able to obtain.” LBI participated in the limited discovery under belief that it had no meaningful alternative because the Arbitration Agreement was unenforceable as written. Id. at 631.

136.  Id. at 630.

137.  Id. at 631-632.

138.  Reyes, 146 Cal. Rptr. 3d at 632.

Even if delay alone may constitute prejudice in the individual arbitration context, that is not necessarily true in the class arbitration context, as class arbitration does not convey the same advantages as individual arbitration. Here, Reyes was not prejudiced by the 13-month delay alone because for 12 months, LBI could not invoke arbitration without being forced into class arbitration.

139.  Id. at 633.

140.  Id. “Section 7 of the NLRA ‘provides in relevant part that employees shall have the right to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.’” Id. at 634 (quoting 29 U.S.C. § 157).

141.  Id. “Iskanian rejected this reasoning, finding the NLRB’s analysis of the FAA unavailing. As the FAA is not a statute the NLRB is charged with interpreting.” Id.

142.  Id. at 634-635.
The petition for review granted by the Supreme Court of California directly concerns class action waivers in the employment law context, which will be reviewed in *Iskanian*. Once the Court determines the standards for enforceability of a class action waiver in an employment contract, and the applicable case law that California courts should apply, a final decision can be rendered in *Reyes*.

V. COMMENT

It is important to review the reasoning of the prior California state court decisions in order to determine how the Supreme Court of California will decide *Iskanian*, and therefore, the *Franco* and *Reyes* cases. This section will propose a rule for class arbitration waivers in the employment law context, which the Supreme Court of California could adopt as an exception to the regime of FAA preemption established by the United States Supreme Court in *AT&T v. Concepcion*.

An exception to the rule of FAA preemption, which would disallow class arbitration waivers in the employment law context, should be adopted because class arbitration of employment disputes is a crucial tool that employees must be able to use in order to exercise their statutory rights. However, as this section will discuss, the Supreme Court of California may choose not to differentiate employment contracts from other types of contracts, and apply the *Concepcion* rule. The *Concepcion* rule creates a blanket presumption that contracts signed by both parties are enforceable as written. Lastly, this section will discuss how a decision by the Supreme Court of California to reaffirm the validity of the *Gentry* test in California could affect the outcome of *Reyes*, and future California employment contract cases.

In reviewing the *Iskanian* case, the Supreme Court of California will render a decision that will affect both the *Franco* and *Reyes* cases. The lower courts in all three of these cases applied the FAA and California law differently, with respect to class arbitration waivers in the employment context. When the Supreme Court of California reviews the *Iskanian* decision, it will have a choice as to how it will review the issue. It could follow the lead of the lower courts in *Iskanian* and accept *Concepcion* as a broad rule without exceptions. Conversely, the Court could apply the *Franco* standards, and evaluate employment contracts in light of the employees' unwaivable de facto rights. This approach would allow the court to hold that the *Gentry* test is valid, and outside the scope of the *Concepcion* ruling.

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144. *Id.*
A. Argument that Gentry Survived Stolt-Nielsen and is Untouched by Concepcion

There is much debate in California courts as to whether the Gentry decision survived the United States Supreme Court’s ruling in Concepcion. Both Stolt-Nielsen and Concepcion created strong federal presumptions that arbitration agreements would be enforced according to the arbitration agreement’s terms. Stolt-Nielsen stated that a party could not be compelled to participate in class arbitration when the arbitration agreement was silent on the question of class-wide arbitration,147 whereas Concepcion held that the FAA prohibits states from conditioning the conscionability of certain arbitration agreements on the existence of class-wide arbitration procedures.148 As a result of these Supreme Court decisions, federal courts have created a very pro-employer atmosphere, over-turning class action waivers.

While it is important to focus on what Stolt-Nielsen and Concepcion discussed, it is arguably just as important to examine what those cases did not discuss. Neither case discussed contracts of adhesion in the employment context. Further, neither case discussed how to apply the FAA when a class arbitration waiver could waive an employee’s rights to effectively seek a remedy for his or her claim. Neither the U.S. Supreme Court nor the Supreme Court of California has resolved the apparent conflict between the FAA standard of enforceability and an employee’s right to act in concert, as guaranteed under the NLRA.149 California state court cases have struggled to determine how far reaching the U.S. Supreme Court decisions are and whether there is any room for a state court to determine exceptional cases without violating the FAA.

Some California state courts have identified possible loopholes in the United States Supreme Court decisions that would allow Gentry to survive Concepcion. Although the Kinecta court declined to formally render a decision as to the Gentry issue, the court contended that Gentry was still binding law in California state courts.150 The Kinecta court’s decision supports the argument that Gentry is still applicable in cases where a class action waiver would impair employees’ de facto rights, and where a class action would provide employees with the most practical and effective means of vindicating these rights.151

In Franco, the court advanced the notion expressed by the Kinecta court, that Gentry was not truly rooted in Discover Bank. Rather, the court explained that a plaintiff could not be compelled to arbitrate issues of unwaivable rights under circumstances where individual arbitration would render inadequate results.152

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152. Franco v. Arakelian Enters., Inc., 149 Cal. Rptr. 3d 530, 560-61 (2012). The court argued this case involves unwaivable employee rights and therefore more closely resembles Armendariz v. Found. Health Psychcare Services, Inc. There, the court held that an arbitration agreement could not serve as a
The *Franco* court found that in some instances, *Discover Bank* and *Gentry* were applications of the same general principle, even though the cases were largely based on different legal theories.\(^{153}\) The *Franco* court stated that since *Discover Bank* was based on a finding of unconscionability, it was subject to de novo review.\(^{154}\) On the contrary, a finding under *Gentry* is based on whether a class action would allow a better means for vindicating certain unwaivable statutory rights and was thus subject to discretionary determination subject to abuse of discretion review.\(^{155}\) Further, the *Franco* court found that, even though, under *Stolt-Nielsen*, a plaintiff relying on *Gentry* could not compel class arbitration if he had not contracted for this right, a plaintiff may still be able to able to adjudicate his case as a class action.\(^{156}\)

Although *Discover Bank* seems to broadly uphold arbitration agreements under the FAA, it cannot be ignored that the case dealt with consumer contracts and, as a class of people, consumers do not have the same unwaivable rights that employees enjoy. While *Discover Bank* focused on the intentional bad behavior of the companies enforcing the contracts and the relatively small amount of damages, those are only two of the factors considered under the *Gentry* framework.\(^{157}\) The remaining two factors deal directly with employees’ substantive right to seek collective relief in accordance with the NLRA.\(^{158}\) Applying the reasoning of *In re American Exp.*, one can see that the reasoning supporting *Gentry* is completely different from that found in *Concepcion* and *Discover Bank*. A *Gentry* claim rests on the combination of a federal statutory right and an inability to vindicate that right individually due to economic constraints.\(^{159}\) Adherence to the *Gentry* test will likely not be found to conflict with the FAA because the test is narrow, focuses on substantive rights, and is only triggered under this specific combination of circumstances.

Therefore, in reviewing the *Iskanian*, *Reyes* and *Franco* cases, the Supreme Court of California could find that class arbitration waivers in employment contracts are subject to a different standard of review than class arbitration waivers in other contracts, because employees have statutorily protected rights not afforded to other classes of people, such as consumers. Further, a finding that a class arbitration waiver conflicts with an employee’s ability to vindicate his or her protected rights is not comparable to a finding of unconscionability under California state law.\(^{160}\) The remedy for these employment violations will be to allow the employees to override the arbitration provision, certify a class, and bring their claim in court. This is not to say that all class arbitration waivers would become unenforceable in the employment context. However, it seems the issue of enforceability of a waiver will depend on the conduct of the employers and whether they use a class arbitration waiver as a sword to violate their employees’ rights.

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\(^{153}\) *Franco*, 149 Cal. Rptr. 3d at 561.

\(^{154}\) Id.

\(^{155}\) Id.

\(^{156}\) Id. at 533.


\(^{158}\) Id.

\(^{159}\) Id.

\(^{160}\) This was the issue in *Discover Bank* v. Super. Ct., 30 Cal. Rptr. 3d 76, 87 (2005).
B. Other Factors May Influence the Supreme Court of California's Decision

Based on the complicated legal landscape surrounding class arbitration waivers, it is easy to see how the Supreme Court of California could render a decision that is influenced by many factors. California was essentially publicly reprimanded in the Concepcion opinion for creating in the Discover Bank rule, in violation of the FAA. The United States Supreme Court specifically took issue with California's bypassing of the FAA on public policy grounds.

The Supreme Court of California seems reluctant to render a decision confirming or overruling Gentry. Three cases have accumulated as part of the Iskanian review. Additionally, even though lower courts in California sometimes discuss Gentry, the overwhelming majority of these courts have found the case inapplicable in almost every situation. This suggests that California courts are reluctant to resolve this issue and this procrastination has resulted in confusion.

The Iskanian case will likely be decided on two issues. First, the court will need to determine if an employee's right to bring a collective employment-related claim is a statutory right protected by Section 7 of the NLRA. If the court determines that employees have a statutory right to bring a class claim, then it will have to determine if a class action waiver violates this right. It is very likely that the Supreme Court of California will not challenge the United States Supreme Court's mandated application of the FAA again, unless the Court is satisfied that a stronger argument in favor of an exception exists.

However, the extent to which courts feel compelled to favor preemption by the FAA is unclear. It is important to note that Concepcion was only a 5-4 decision. Further, Justice Thomas's concurrence noted that he reluctantly joined the majority opinion because he was in favor of a more uniform rule that what was being enforced at the time. However, plenty of uniform rules carry exceptions.

C. A Finding Upholding Gentry Could Be a Win for Employees Everywhere

In Reyes, the court of appeals found that the plaintiff's initial claim was not a solid Gentry claim. However, that does not mean that the plaintiff in Reyes could not potentially benefit from an opinion by the Supreme Court of California validating the Gentry test. Since Concepcion, California courts have been reluctant to find that a plaintiff has established a case under Gentry. After Concepcion, it appears that lower courts in California have lacked uniformity in determining how much evidence is required to meet the Gentry test. The Second Circuit application of an FAA presumption, as articulated in In re American Express, focused on the combination of a statutory right and an economic incapability to

162. Id.
164. Reyes and Kinecta found that the plaintiff failed to meet the burden under Gentry. The only plaintiff to prove a successful case has been Franco. Franco v. Arakelian Enters., 294 P.3d 74 (Cal. 2013).
bring an individual claim. These issues are at the heart of the Gentry factors. The Supreme Court of California could arguably establish a California presumption disfavoring class arbitration waivers for wage and hours disputes. Such an exception could be based on a finding that most individual employees would lack the means to effectively arbitrate their rights because the potential damages are likely low and employees have a statutory right to pursue class relief under the NLRA.

A liberal construction of the Gentry test, which focuses on the combination of the existence of a statutory right and economic hardship that prevents the vindication of that right, could render Gentry directly applicable to Reyes. Reyes would first have the burden of demonstrating that a class arbitration waiver violated his rights as an employee under the NLRA. Then, Reyes would have to prove that vindicating his rights individually would cause him sufficient hardship. This would not be very difficult in many wage and hour disputes, since they tend to be relatively small.

While the court of appeals in Reyes said that Gentry was inapplicable to the case, there is some doubt as to whether that statement is correct. California courts have been hesitant to apply the Gentry test since Concepcion, which has caused much confusion regarding how the test should be used. The Supreme Court of California has the opportunity to create a legal environment that recognizes an employee’s statutory right to collective bargaining under the NLRA, and to create an exception for these cases under the FAA. A similar exception has been created by the Second Circuit, and such an exception would greatly benefit employees like Reyes.

VI. CONCLUSION

The Supreme Court of California has a difficult decision ahead in determining the applicability of the FAA to class arbitration waivers in the employment law context in California. An argument could be made that, in some instances, collective bargaining is essential to the preservation of employees’ unwaivable de facto rights, and that individual arbitration is insufficient to vindicate these rights. If the Supreme Court of California affirms Gentry, the court must clarify its application. Gentry would be most beneficial to Mr. Reyes if the court’s review of Iskanian finds that there is a presumption of a de facto waiver of an employee’s statutory rights in a wage and hour claim based on an employer’s behavior that has affected a class of employees.

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165. MCLAUGHLIN, supra note 157. See generally, In re American Express Merchants’ Litig., 634 F.3d 187 (2d Cir. 2011), stating that:
Class action lawsuits are well-recognized by the Supreme Court as a vehicle for vindicating statutory rights. This is especially true with respect to the Court’s recognition that the class action device is the only economically rational alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action.
Id. at 194.