Arshavir Iskanian v. CLS Transportation Los Angeles, LLC

Year: 2013
Court: California Supreme Court
Case Number: S204032

UP filed a brief in opposition to a ruling that would allow insurance companies to take a "wait and see" approach to arbitration. In Iskanian, the court held that a company that waives its right to compel arbitration by failing to timely file the motion can still compel arbitration later—even on the eve of trial and after utilizing the benefits of the court system— if, at the time of waiver, it reasonably believed the motion was unlikely to succeed, and a change in law now makes its success more likely. A less-expansive version of this defense, known as the "futility doctrine," is available in the Ninth Circuit, but has long been disallowed in California state courts prior to Iskanian. Since the California Supreme Court decided Concepcion, which removed barriers to enforcing arbitration clauses, companies that already waived their right to compel arbitration have been attempting to persuade courts to ignore their waivers, and Iskanian is the answer they were looking for. UP pointed out that this is new, never-before recognized law in California; that the lax "more likely to succeed" standard allows insurers to have their cake and eat it, too; and, that the court erroneously applied its doctrine to pre-Concepcion arbitration clauses currently in litigation since case law provides numerous examples of successful pre-Concepcion motions to compel arbitration. Accordingly, UP asked the California Supreme Court to reverse Iskanian and restore longstanding California law disallowing this defense to waiver.UPdate 6/24/2014: The California Supreme Court remanded the case to determine whether the [Private Attorney General Act – PAGA] claims and the claims subject to the arbitration agreement can be bifurcated, among other issues. However, the Court held that Gentry (holding that a state's refusal to enforce a waiver of the right to class proceedings on the grounds of public policy is preempted by the Federal Arbitration Act) does not survive Concepcion. In other words, an arbitration agreement requiring an employee, as a condition of employment, to give up the right to bring representative PAGA actions in any forum (e.g. state court) is contrary to public policy. The FAA's goal of promoting arbitration as a means of private dispute resolution does not preclude the

state legislature from deputizing employees to prosecute labor code violations on the state's behalf.

UP's brief was drafted pro bono by Steven Jay Bernheim and Nazo S. Semerjian of The Bernheim Law Firm, and Exec. Dir. Amy Bach.