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Mika v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op. 71 (Sep. 24, 2015)

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Mika v. Eighth Jud. Dist. Ct., 131 Nev. Adv. Op. 71 (Sep. 24, 2015)[1]

Contracts: Arbitration Agreements

Summary

The court denied extraordinary writ relief from the district court's decision to compel arbitration between Petitioners and their employer based on a long-form arbitration agreement signed only by the Petitioners, and federal law favoring arbitration agreements.[2]

Background

I.

Petitioners Donald Mika, Beryl Harter, and Dennis Tallman all signed short-form and long-form arbitration agreements with their former employer, and real party in interest, CPS Security (USA), Inc. The identical long-form agreements included a clause waiving the right to initiate or participate in any class action lawsuit against CPS or any of its representatives.

After disputes regarding minimum wage and overtime claims, Petitioners brought separate class action styled lawsuits against CPS in state court. The two suits were assigned to the same district court judge who denied Petitioners' motions for class certification and entered orders compelling individual arbitration of Mika's, Harter's, and Tallman's claims.

Petitioners argued the long-form arbitration agreement, including the class action waiver, was invalid because (1) it was not countersigned by CPS and (2) the class action waiver violates state and federal law.

Discussion

II.

While the parties did not adequately address the requirements for extraordinary writ relief through their briefs, the court still accepted mandamus review for two reasons. First, *Kindred v. Second Judicial Dist. Court*[3] may have led the parties to believe the lack of a right of interlocutory direct appeal made mandamus readily available. Second, petitioners presented a nonfrivolous argument that the National Labor Relations Act[4] (NLRA) invalidates class waivers in employment arbitration agreements even though the court's decision to invalidate class action waivers in consumer arbitration agreements in *Picardi v. Eight Judicial Dist. Court*[5] was contradicted by the subsequent decision of the U.S. Supreme Court in *AT&T Mobility LLC v. Concepcion*.[6]

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1 By Kory Koerperich.
2 *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 131 S. Ct. 1740 (2011).
3 Kindred v. Second Judicial Dist. Court, 116 Nev. 405, 409, 996 P.2d 903, 906 (2000).
4 National Labor Relations Act, 29 U.S.C. §§ 157, 158 (2014)
5 *See* Picardi v. Eighth Judicial Dist. Court, 127 Nev. 106, 251 P.3d 723 (2011).
6 *See Concepcion*, 563 U.S. 333, 131 S. Ct. 1740.

The court questioned any interpretation of *Kindred* that suggests a writ of mandamus should automatically be granted from an order compelling arbitration. Because NRS § 38.247(a)(1) does not provide for direct interlocutory appeals from an order compelling arbitration,[7] *Kindred* concluded that petitioners have no remedy available other than an extraordinary writ.[8] However, the court clarified that a party seeking writ relief still needs to show why an eventual appeal after final judgment will not serve as a "plain, speedy and adequate remedy" pursuant to NRS § 34.170.[9]

III.

The threshold question was whether the long-form arbitration agreement and class waiver clause were part of a valid contract even though CPS did not sign the agreement. The court concluded NRS § 38.219(1) requires an arbitration agreement be in writing, but does not require the agreement be signed to be enforceable.[10] It made sense for CPS not to pre-sign the long-form arbitration agreement because the signing employee had a 30-day opt-out period. Therefore, petitioners accepted the terms of the long-form agreement after they did not timely opt out during the 30-day period.

Petitioners Mika and Harter also argued that they sued additional defendants that were not parties to the CPS arbitration agreements and therefore those parties couldn't enforce the arbitration agreements. However, the court found the contract, by its own terms and by general principles of agency, included all of the defendants named in Petitioners Mika and Harter's complaint.

IV.

A.

The Supreme Court's decision in *Concepcion* abrogates this courts decision in *Picardi.* In *Picardi*, the Nevada Supreme Court ruled that class action waivers violate Nevada public policy, and that the Federal Arbitration Act (FAA) does not force states to enforce arbitration agreements that violate the public policy of the state.[11] Similarly, the California Supreme Court held in *Discover Bank v. Superior Ct.* that class action waivers are unconscionable in consumer contracts when the amounts disputed are too insignificant to be prosecuted individually, thus allowing the stronger party to escape liability.[12] However, in *Concepcion*, the U.S. Supreme Court held the Federal Arbitration Act preempted California's *Discover Bank* rule.[13]

Petitioners' argued, and the court rejected, that even though *Concepcion* abrogates *Picardi* just as fully as it abrogates *Discover Bank*, *Concepcion* is distinguishable from the facts of this case because (1) *Concepcion* is limited to consumer arbitration agreements; and (2) *Concepcion* only applies to cases in federal court, not state court.

The court ruled *Concepcion* prevents a state court from invalidating a class waiver in an arbitration agreement, when the claims involve commerce, on the basis that

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[7] Clark Cnty. v. Empire Elec., Inc., 96 Nev. 18, 20, 604 P.2d 352, 353 (1980).
[8] *Kindred*, 116 Nev. at 409, 996 P.2d at 906.
[9] NEV. REV. STAT. § 34.170.
[10] *See* Campanelli v. Conservas Altamira, S.A., 86 Nev. 838, 842, 477 P.2d 870, 872 (1970).
[11] *Picardi*, 127 Nev. at 114.
[12] Discover Bank v. Superior Ct., 113 P.3d 1100 (Cal. 2005).
[13] *Concepcion*, 563 U.S. at 350.

individual arbitration of the employee's state law claims for overtime and minimum wage would be ineffective. The court followed the analysis of the California Supreme Court in *Iskanian v. CLS Transportation Los Angeles, LLC*.[14] In *Iskanian*, the court decided that even if a rule against class waivers in arbitration agreements is stated narrowly, it is not saved from FAA preemption and *Concepcion*.[15] As a result, the California Supreme Court upheld a district court order compelling arbitration in a class action wage claim brought in the employment context.[16] Here, the court agreed with the reasoning of *Iskanian* and found that nothing in *Concepcion* suggests that FAA preemption does not apply broadly in other contexts such as state law wage and hour claims.

The court also found that as long as commerce is involved, the FAA applies. Thus, when the FAA applies, contradictory state law is preempted whether the claim is brought in federal or state court.[17] So, even though the right to a minimum wage is so important that the Nevada Constitution secures it,[18] petitioners are still not entitled to litigate on a class basis when petitioners have agreed to arbitrate claims on an individual basis.[19]

B.

Petitioners also argued, as decided by the National Labor Relations Board in *In re D.R. Horton, Inc. ("Horton I")*,[20] that the National Labor Relations Act provides a "contrary congressional command" that overrides the FAA.[21] Section 7 of the NLRA grants employees the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[22] Section 8(a)(1) of the NLRA then provides that an employer cannot "interfere with, restrain, or coerce employees" in exercising the rights established by Section 7. As arbitration agreements force employees to give up their Section 8 right to collective procedures for their own "mutual aid or protection," *Horton I* held that Section 8 of the NLRA made it illegal for employers to require employees to arbitrate employment-related claims on an individual basis.[23] The NLRB found its decision was not contrary to the FAA, because the FAA does not require enforcement of illegal contracts.[24]

However, in *D.R. Horton, Inc. v. NLRB ("Horton II")*, the Fifth Circuit overruled *Horton I*'s finding that class arbitration waivers were illegal.[25] The Fifth Circuit found that the NLRB's decision in *Horton I* essentially prohibited class waivers in arbitration

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[14] Iskanian v. CLS Transportation Los Angeles, LLC, 327 P.3d 129 (Cal. 2014).
[15] *Id.* at 135.
[16] *Id.*
[17] Marmet Health Care Center, Inc. v. Brown, 132 S. Ct. 1201, 1203 (2012).
[18] NEV. CONST. art. 15, § 16.
[19] *See Concepcion*, 563 U.S. at 350 ("States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.").
[20] In re D.R. Horton, Inc. (*Horton I*), 357 N.L.R.B. No. 184, 2012 WL 36274, *1 (Jan. 3, 2012).
[21] Accord Murphy Oil USA, Inc., 361 N.L.R.B. No. 72, 2014 WL 5465454, *12 (Oct. 28, 2014) (quoting CompuCredit Corp. v Greenwood, 132 S. Ct. 665, 668–69 (2012)).
[22] 29 U.S.C. § 157.
[23] *Horton I*, 357 N.L.R.B. No. 184, 2012 WL 36274 at *1.
[24] *Accord Murphy Oil USA, Inc*., 361 N.L.R.B. No. 72, 2014 WL 5465454 at *12.
[25] D.R. Horton, Inc. v. NLRB (*Horton II*), 737 F.3d 344, 359–61 (5th Cir. 2013).

agreements, and was therefore "an actual impediment to arbitration [that] violates the FAA."[26]

Ultimately, the court followed the overwhelming majority of courts, including *Horton II* and *Iskanian*, and found that *Horton I*'s invalidation of class arbitration waivers was inconsistent with the Supreme Court's interpretations of the FAA in *Concepcion*. The court reasoned that the FAA's broad policy favoring arbitration is not sufficiently contradicted by Sections 7 and 8 of the NLRA to permit invalidation of class waiver clauses in arbitration agreements.

V.

The court also upheld the district court's rejection of Petitioner Tallman's argument that CPS waived its right to compel arbitration when it removed Tallman's state court action to federal court and then litigated Tallman's Fair Labor Standards Act claims. To prove waiver of CPS' contractual right to arbitration, Tallman needed to show that "the party seeking to arbitrate (1) knew of his right to arbitrate, (2) acted inconsistently with that right, and (3) prejudiced the other party by his inconsistent acts."[27] Prejudice is the focus of the waiver analysis and may be shown when (1) the parties use discovery not available in arbitration, (2) the parties litigate substantial issues on the merits, or (3) compelling arbitration would require a duplication of efforts.[28]

The court found that there was no discovery that would not have been available through arbitration, because the parties stipulated to not conduct discovery until they resolved class certification. The court also found that the federal court did not consider the merits of Tallman's state law claims or the class certifications when it remanded those claims back to state court. Therefore, this was not a case where the party seeking arbitration "test[ed] the judicial waters" before it moved to compel arbitration.[29]

Finally, the court held that CPS did not automatically waive the right to compel arbitration by removing the action from state to federal court,[30] and that the issues in litigation were separate and distinct from any claims that should have been arbitrated. If anything, the court reasoned that the federal court proceedings actually helped eventual arbitration of Tallman's state-law claims.

Conclusion

The district court properly enforced the long-form arbitration agreement by compelling arbitration of Petitioner's claims on an individual basis. Petitioners and CPS had a valid class waiver clause even though CPS did not sign the long-form arbitration agreement. Thus, the FAA and *Concepcion* applied and preempted the state from invalidating the arbitration agreement even if the agreement might be contrary to the public policy of the state.

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[26] *Id.* at 359–60.

[27] Nevada Gold & Casinos, Inc. v. Am. Heritage, Inc., 121 Nev. 84, 90, 110 P.3d 481, 485 (2005).

[28] *Id.* at 90–91, 110 P.3d at 485.

[29] Dickinson v. Heinold Sec., Inc., 661 F.2d 638, 641 (7th Cir. 1981) (quoting Uwaydah v. Van Wert Cnty. Hosp., 246 F. Supp. 2d 808, 814 (N.D. Ohio 2002)).

[30] *See* Halim v. Great Gasby's Auction Gallery, Inc., 516 F.3d 557, 562 (7th Cir. 2008).