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Postmates and the Enforcement of Arbitration Agreements

Awaiting review may be the next Supreme Court decision upholding the strong federal policy favoring arbitration and preempting state laws that purport to void arbitral accords.

By Anthony Michael Sabino

Lost in the controversy currently swirling about the U.S. Supreme Court is *Postmates, LLC v. Rimler*, ___ U.S. ___ (No. 21-119) (petition for *certiorari* filed July 26, 2021), a case that may yield the high bench's next proclamation regarding the preemptive impact of the Federal Arbitration Act (FAA) on contrary state laws. At the time of this writing, the Justices still await briefing by the respondent.

Postmates' most pertinent facts reflect California's marked proclivity to erect barriers to arbitration. Rimler was employed as a courier by Postmates, a subsidiary of Uber Technologies, Inc. He had agreed to arbitrate all controversies and waived any right to participate in representative lawsuits.

Ignoring his agreement, Rimler brought an action pursuant to the California Labor Code Private Attorneys General Act (PAGA). The proviso allows aggrieved employees to bring wage actions on behalf of themselves and fellow employees and requires the sharing of any recovery between the workers and the state. Simply put, it purports to convert workers into enforcers of California's labor regulations.

A state intermediate appellate tribunal ruled that an employee's right to proceed in court with a PAGA claim could not be displaced by a private arbitration agreement. The midlevel court's decision was predicated upon both California Supreme Court precedent invalidating arbitral accords found to conflict with collective litigation, and *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425 (9th Cir. 2015), wherein a sharply divided Ninth Circuit held that the FAA does not preempt the right to bring a representative claim under the PAGA.

In seeking review, Postmates' foremost argument is a familiar one: state judicial and legislative constructs that interdict arbitration, such as the PAGA, are preempted by the FAA. *See, inter alia*, 9 U.S.C. § 2 (agreements to arbitrate are "valid, irrevocable, and enforceable"). Moreover, this petitioner urges the high Court to perpetuate the already substantial line of recent cases that have uprooted obstacles to the strong federal policy favoring arbitration.

If the high bench grants *certiorari*, then insight as to how the Justices might rule can be gained by examining a triumvirate of contemporary arbitration rulings, the first of which is *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). There, the Supreme Court nullified a

California judicial doctrine which purported to both invalidate arbitral agreements and permit class litigation notwithstanding a contractual waiver. In an opinion by the late Justice Scalia, *Concepcion* eradicated this local construct, characterizing it as precisely the sort of impediment to arbitration which the FAA preempts.

The second leg of the triad is *Epic Systems Corp. v. Lewis*, 584 U.S. ___ (2018), which upheld the parties' agreement to waive any right to collective action, and returned them to arbitration. Writing for the Court, Justice Gorsuch opined that the "liberal federal policy favoring arbitration agreements . . . protect[s] pretty absolutely" such accords; he further urged the supreme bench to guard against "new devices" intended to confound contracts to arbitrate and to steadfastly reject allegations of conflict between the FAA and other statutory regimes.

The third and last component of this trio is *Lamps Plus, Inc. v. Varela*, 587 U.S. ___ (2019), wherein the respondent had likewise agreed to individually arbitrate any and all disputes with his employer, but nonetheless initiated a class action on behalf of himself and his co-workers. There Chief Justice Roberts reaffirmed the vitality of the strong federal policy favoring arbitration and the long line of precedents upholding it.

Predicting the actions of the Supreme Court is fraught with risk, but there are substantial reasons to contend that the Justices will grant *certiorari*, and thereafter the Court will enforce the parties' arbitral agreement.

First, California's PAGA is largely indistinguishable from the California judicial doctrine the high Court rejected in *Concepcion*; the holding setting aside that doctrine would seem to require the same treatment for PAGA, California's legislative effort.

Second, it is far more likely that the Supreme Court will continue the maxims of arbitration which it has espoused in recent years. The need for consistency and predictability tells us that the high bench should, once again, declare that the FAA preempts contradictory state edicts.

For all these reasons, we expect *Postmates* to be the next addition to the Supreme Court's pantheon of cases enforcing valid agreements to arbitrate, even where such accords nullify otherwise available options to proceed via class or representative action.

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