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Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2023

Appellate Reports

IN *ADOLPH*, CALIFORNIA SUPREME COURT DECLINES TO FOLLOW HIGH COURT ON ARBITRATION OF PAGA ACTIONS

Adolph v. Uber Technologies, Inc. (2023) __ Cal.5th __ (Cal. Supreme Court)
Who needs to know about this case? Lawyers litigating PAGA cases where the client's individual claim is subject to arbitration
Why it's important: Declines to follow U.S. Supreme Court's conclusion in *Viking River Cruises* that, under California law, a plaintiff who is compelled to arbitrate his or her individual claims loses standing to continue to maintain a representative PAGA action against the employer based on violations that injured other employees. Lays out the procedure to follow, with respect to the resolution of non-individual PAGA claims where an employee's individual PAGA claims are ordered to arbitration.

Synopsis

In *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, the Court (a) held that a predispute categorical waiver of the right to bring a PAGA action is unenforceable; and (b) that PAGA made unenforceable an agreement that, while providing for arbitration of alleged Labor Code violations sustained by the plaintiff employee ("individual claims"), compels waiver of claims on behalf of other employees ("non-individual claims").

In *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906, the United States Supreme Court considered a predispute employment contract with an arbitration provision specifying that "in any arbitral proceeding, the parties could not bring any dispute as a class, collective, or representative PAGA action." It also contained a severability clause specifying that if the waiver was found invalid, any class, collective, representative, or PAGA action would presumptively be litigated in court. But under that severability clause, if any 'portion' of the waiver remained valid, it would be 'enforced in arbitration.'"

In *Viking River*, the high court left intact the *Iskanian* rule that predispute categorical waiver of PAGA claims are unenforceable under California law. But the Court further held that a PAGA plaintiff who is compelled to arbitrate his or her individual claims loses standing (as a matter of California law) because, in the Court's view, under PAGA's standing provision a plaintiff can maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action.

The California Supreme Court declined to follow *Viking River*'s interpretation of PAGA's standing requirements. Because the highest court of each state ... remains the final arbiter of what is state law, the Court concluded that it was not bound by the high court's interpretation of California law.

In *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 83, the Court held that PAGA's standing provision, Labor Code section 2699, subdivision (c), has only two requirements: The plaintiff must allege that he or she is (1) someone who was employed by the alleged violator and (2) someone against whom one or more of the alleged violations was committed. The *Kim* court declined to impose additional standing requirements not found in the statute.

Analysis

As *Kim* and later appellate decisions made clear, a worker becomes an "aggrieved employee" with standing to litigate claims on behalf of fellow employees upon sustaining a Labor Code violation committed by his or her employer. Standing under PAGA is not affected by enforcement of an agreement to adjudicate a plaintiff's individual claim in another forum. Arbitrating a PAGA plaintiff's individual claim does not nullify the fact of the violation or extinguish the plaintiff's status as an aggrieved employee.

The operative complaint alleges that plaintiff Adolph experienced Labor Code violations while driving for Uber. Under *Kim*, Adolph's allegations that Labor Code violations were committed against him while he was employed by Uber suffice to confer standing to bring a PAGA action.

The centerpiece of PAGA's enforcement scheme is the ability of a plaintiff employee to prosecute numerous Labor Code violations committed by an employer and to seek civil penalties corresponding to those violations. The Legislature enacted PAGA on the premise that Labor Code violations sustained by the plaintiff employee are often only a fraction of the violations committed by an employer that is engaged in unlawful workplace practices. As explained in *Kim*, "PAGA standing is not inextricably linked to the plaintiff's own injury. Employees who were subjected to at least one unlawful practice have standing to serve as PAGA representatives even if they did not personally experience each and every alleged violation. (§ 2699(c).) This expansive approach to standing serves the state's interest in vigorous enforcement." (*Kim*, 9 Cal.5th at p. 85.)

An interpretation of the statute that impedes an employee's ability to prosecute his or her employer's violations committed against other employees would undermine PAGA's purpose of augmenting enforcement of the Labor Code. Hence, where a plaintiff has filed a PAGA action comprised of individual and non-individual claims, an order compelling arbitration of individual claims does not strip the plaintiff of standing to litigate non-individual claims in court.

Where a PAGA plaintiff is ordered to arbitrate his or her individual PAGA

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claim, the trial court may exercise its discretion to stay the non-individual claims pending the outcome of the arbitration pursuant to section 1281.4 of the Code of Civil Procedure. Following the arbitrator's decision, any party may petition the court to confirm or vacate the arbitration award under section 1285 of the Code of Civil Procedure. If the arbitrator determines that the plaintiff was an aggrieved employee in the process of adjudicating the individual PAGA claim, that determination, if confirmed and reduced to a final judgment (Code Civ. Proc., § 1287.4), would be binding on the court, and the plaintiff would continue to have standing to litigate the non-individual claims. If the arbitrator determines that the plaintiff is not an aggrieved employee and the court confirms that determination and reduces it to a final judgment, the court would give effect to that finding, and the plaintiff could no longer prosecute any non-individual claims due to lack of standing.

Short(er) takes

Admissibility of evidence of subsequent molestation in molestation case
Evid. Code sections 1106, 783 and 352. ***Jane S.D. Doe v. Superior Court (Mountain View School District)*** (2023) __ Cal.5th __ (Cal. Supreme)

Doe brought action against the school district to recover for sexual abuse committed by her fourth-grade teacher when she was eight years old, alleging negligent hiring, retention, and supervision, failure to warn, train and educate against abuse, and failure to report abuse. In ruling on her motion in limine, the Superior Court ruled that evidence of subsequent molestation of former student by teenaged family friend was admissible as evidence of cause of some of former student's emotional distress injuries and related damages. Doe petitioned for writ of mandate, which was denied. The Supreme Court granted review and reversed.

Evidence Code section 1106, subdivision (a), generally protects – or shields – civil litigants who allege "sexual harassment, sexual assault, or sexual battery" by barring evidence of a "plaintiff's sexual conduct ... to prove consent by the plaintiff or the absence of injury to the plaintiff." But subdivision (e) of section 1106 also specifies: "This section shall not be construed to make inadmissible any evidence offered to attack the credibility of the plaintiff as provided in Section 783." In turn, section 783, subdivision (d), provides that a trial court may allow introduction of evidence "regarding the sexual conduct of the plaintiff," so long as that evidence "is relevant pursuant to Section 780" (governing witness credibility, generally) and "not inadmissible pursuant to Section 352" (governing a court's discretion to exclude relevant evidence under certain circumstances).

Section 1106, subdivision (e), may permit admission of evidence that would otherwise be excluded under section 1106, subdivision (a). But such admissibility is subject to the procedures set out in section 783 and especially careful review and scrutiny under section 352. The Legislature devised section 783 to protect against unwarranted intrusion into the private life of a plaintiff who sues for sexual assault, by identifying and circumscribing evidence that may be admitted to attack such a person's credibility. Correspondingly, section 352, as applied in this setting, requires special informed review and scrutiny, designed to protect such a plaintiff's privacy rights and to limit the introduction of evidence concerning such a person's sexual conduct. The record shows, however, that in this case these crucial protections appear not to have been applied. Accordingly, the case should be remanded to the trial court for further proceedings consistent with the Court's opinion.

Meaning of "injury in fact" and "loss of money or property" for purposes of UCL standing; diversion of staff time as satisfying UCL standing requirements
California Medical Association v. Aetna Health of California Inc. **(2023) __** Cal.5th __ (Cal. Supreme Court)

The California Medical Association (CMA) brought action against a healthcare insurer seeking an injunction for alleged violations of the Unfair Competition Law (UCL), Bus. & Prof. Code section 17200, et seq., by imposing unwarranted restrictions on network physicians' medical referrals. The Superior Court entered summary judgment for the insurer. The Court of Appeal affirmed. The Supreme Court granted review and reversed.

Held: The UCL's standing requirements are satisfied when an organization, in furtherance of a bona fide, preexisting mission, incurs costs to respond to perceived unfair competition that threatens that mission, so long as those expenditures are independent of costs incurred in UCL litigation or preparations for such litigation. When an organization has incurred such expenditures, it has "suffered injury in fact" and "lost money or property as a result of the unfair competition" as required by the UCL's standing provision, Business & Prof. Code section 17204. In this case, which arises on appeal from summary judgment for the defense, the record discloses a triable issue of fact as to whether the plaintiff association expended resources in response to the perceived threat the health insurer's allegedly unlawful practices posed to plaintiff's mission of supporting its member physicians and advancing public health. The evidence was also sufficient to create a triable issue of fact as to whether those expenses were incurred independent of this litigation. For these reasons, the trial court erred in granting summary judgment for the defense.

Medicare Act preempts statutory and common-law claims against Medicare Advantage (MA) plans
Quishenberry v. UnitedHealthcare, Inc. (2023) __ Cal.5th __ (Cal. Supreme Court)

Larry Quishenberry's 85-year-old father was enrolled in United Healthcare's MA plan. He died after being discharged from a skilled-nursing facility. Larry sued the MA plan and the healthcare administrator who managed his father's MA benefits, pleading state-law claims for negligence, wrongful death,

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and elder abuse based on allegations that the MA plan and the administrator breached a duty to assure that his father received the skilled-nursing benefits promised by the MA plan.

The Court held that all of these claims were preempted by 42 U.S.C. § 1395w-26(b)(3), which provides, "The standards established under this part shall supersede any State law or regulation (other than State licensing laws or State laws relating to plan solvency) with respect to MA plans which are offered by MA organizations under this part." Although the term "standards" is not defined in the Medicare Act, the Court understood the phrase "[t]he standards established under this part" to refer to the provisions of Part C of Medicare and the federal regulations promulgated pursuant to Part C.

The Court held that the statute preempted all of Quishenberry's claims because all of the claims were grounded on the "standards" within the plan, the federal regulations, and the Medicare Act, which govern the services provided by MA plans. In the Court's view, "Congress did not categorically carve out and save from preemption state-law claims based on duties that duplicate federal standards, common law actions, or statutes of general applicability. Instead, it intended the standards established under Part C to supersede any state-law duty with respect to MA plans, regardless of whether that duty is grounded in statutory or common law, and even when the state-law duty is not inconsistent with and instead is based on and duplicates standards established under Part C."

Judicial estoppel; party asserting inconsistent positions in the same lawsuit

Perez v. Discover Bank (9th Cir. 2023) __ F.4th __

Discover Bank sought to compel Iliana Perez to arbitrate her claims that the bank unlawfully discriminated against her based on citizenship and immigration status when it denied her application for a consolidation loan for her student loan. When Perez initially sued, the bank moved to compel arbitration. Perez argued that the arbitration clause was unconscionable. During the hearing on the motion, the bank opposed her unconscionability argument by claiming that the clause had an opt-out provision and that if Perez sent an opt-out that day, she would not be bound by the arbitration provision. The district court granted the motion to compel arbitration.

Shortly after the hearing, Perez notified the bank that she wished to reject the arbitration agreement in her consolidation application. Therefore, she filed a motion for leave to file a motion for partial reconsideration, asking the court to reverse its decision compelling arbitration. In opposition, the bank argued that Perez's opt-out could not apply to her discrimination claim because that claim accrued prior to her opt-out. The court granted Perez's motion and rescinded the portion of its prior order compelling Perez to submit her discrimination claims to arbitration. The court found that Perez's opt-out of the Discover agreement applied to her discrimination claims. The bank appealed. Affirmed.

Judicial estoppel protects the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment and prevents the perception that either the first or the second court was misled. We find a party is estopped from making an argument when 1) its current position is clearly inconsistent with its previous position; 2) the party has succeeded in persuading a court to accept that party's earlier position; and 3) the party, if not estopped, would derive an unfair advantage or impose an unfair detriment on the opposing party.

Because Discover's past position clearly contradicts its current position on whether Perez could opt out of the Discover agreement for her discrimination claims, Discover persuaded the court to accept its previous position, and absent estoppel, Discover would derive an unfair advantage, Discover is estopped from arguing that Perez's opt-out does not apply to her discrimination claims.

Jeffrey I. Ehrlich is the principal of the Ehrlich Law Firm *in Claremont. He is a cum laude graduate of the Harvard Law School, an appellate specialist certified by the California Board of Legal Specialization, and an emeritus member of the CAALA Board of Governors. He is the editor-in-chief of Advocate magazine, a two-time recipient of the CAALA Appellate Attorney of the Year award, and in 2019 received CAOC's Streetfighter of the Year award.*