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What the U.S. Supreme Court's Decision in *Viking River Cruises, Inc. v. Moriana* Means for Employers

By Robert Dunn and Collin Vierra

Introduction

On June 15, 2022, the Supreme Court handed down its decision in *Viking River Cruises, Inc. v. Moriana*, 596 U.S. __ (2022). A five-justice majority led by Justice Alito held that the Federal Arbitration Act ("FAA")[1] preempts the rule in *Iskanian v. CLS Transportation Los Angeles*, 59 Cal. 4th 348, 380 (2014) that purported to preclude the division of actions under California's Private Attorneys General Act of 2004 ("PAGA")[2] into "individual" and "representative" actions through an arbitration agreement.[3] The effect of this holding is to permit employers to enter into arbitration agreements that require employees to arbitrate their individual claims and waive their right to assert representative PAGA claims in arbitration.[4] For the time being, this has the further effect of preventing employees subject to such agreements from bringing representative PAGA claims *at all*, as under PAGA, to have standing, an employee must assert both an individual claim and the representative PAGA claims in the same proceeding.[5]

This decision may have a significant effect not just on California employers, but on the viability of PAGA itself. Employers outside California may also benefit from the decision, as several States have proposed PAGA-like bills in recent years. However, a loosening of PAGA's standing requirement by the California Legislature—or potentially even by the California Supreme Court—could largely nullify the impact of the United States Supreme Court's decision.

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Statutory Background

The FAA was passed in 1925 in response to perceived judicial hostility to arbitration.[6] The FAA made arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract."[7] Under longstanding Supreme Court precedent, "[a]rbitration is strictly 'a matter of consent.'"[8] Therefore, a party may neither be compelled to arbitrate without having entered into a valid arbitration agreement,[9] nor prohibited from arbitrating when it has.[10] The FAA also preempts contrary State law.[11]

Passed in 2004, PAGA permits so-called "aggrieved employees" to initiate lawsuits against employers in the name of the State to remedy alleged violations of California's Labor Code. In these actions, plaintiffs therefore allege violations of law affecting not only themselves, but others. The California Legislature passed PAGA in part due to a belief that California's Labor & Workforce Department Agency ("LWDA") lacked sufficient resources to identify Labor Code violations and punish them appropriately, and that it was therefore necessary to enlist aggrieved employees in this effort.[12] Under California law, an aggrieved employee has standing to assert representative PAGA claims only if the employee also brings an individual claim for the alleged violations.[13] In *Iskanian*, the California Supreme Court also held that individual and representative PAGA claims are inseverable under State law.[14]

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PAGA is an unusual statute that has generated significant controversy. Although PAGA actions are initiated in the name of the State, PAGA plaintiffs may seek civil penalties that previously would have been recoverable only in LWDA enforcement actions. And if a PAGA plaintiff obtains a judgment or settlement, the employees whose rights purportedly were vindicated are entitled to 25 percent of the recovery.[15] Unsurprisingly given this financial incentive, PAGA suits have exploded since the law's passage. Indeed, as described in Eimer Stahl's amicus brief on behalf of the Chamber of Commerce in *California Business and Industrial Alliance v. Bonta*[16], in which the Chamber argued that PAGA violates the separation of powers doctrine under the California Constitution, even the LWDA and the California Legislature have acknowledged that PAGA suits impose significant costs on California employers. Data from California's Employment Development Department suggests that PAGA actions also harm employees by leading to business closures and layoffs.[17] In practice, the mere threat of a costly PAGA suit often is enough to force employers into costly settlements.[18] Certain politically influential industries therefore have lobbied the California Legislature to exempt their businesses from PAGA.[19] But most employers in the State are not so fortunate.

Supreme Court Decision

Viking River involved an employee who brought both an individual claim and representative PAGA claims against her employer.[20] Her employment agreement contained a clause committing any claims arising out of her employment to arbitration.[21] It also contained a waiver provision prohibiting her from bringing class or collective actions or representative PAGA claims in arbitration.[22] Finally, it contained a severability clause stating that if the waiver was found invalid, any class or collective actions or representative PAGA claims presumptively would be heard in court, but that if any portion of the waiver remained valid, that portion would remain enforceable in arbitration.[23]

In the underlying proceedings, the California Court of Appeal applied *Iskanian* to hold that because individual and representative PAGA claims cannot be severed, and because the plaintiff's employment agreement waived her right to assert representative PAGA claims in arbitration, her individual claims could not be heard in arbitration, either.[24] The court therefore concluded that the waiver provision was invalid, and that both the employee's individual and representative PAGA claims could proceed in court.[25] In practice, this would mean that to compel employees to arbitrate their individual claims, employers would have to agree to let employees bring representative PAGA claims in arbitration, as well.[26]

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The Supreme Court found that this would "condition the enforceability of an arbitration agreement on the availability of a procedural mechanism that would permit a party to expand the scope of the arbitration by introducing claims that the parties did not jointly agree to arbitrate."[27] This, the Supreme Court said, would violate the FAA, which leaves it to the parties to decide on "the issues subject to arbitration" and "the rules by which they will arbitrate."[28] As to the appropriate disposition, the Supreme Court stated that "PAGA provides no mechanism to enable a court to adjudicate [representative] PAGA claims once an individual claim has been committed to a separate proceeding," because PAGA grants standing only to "aggrieved employees," i.e., those also asserting an individual claim.[29] Therefore, because the employee was compelled to arbitrate her individual claim, PAGA precluded her from litigating her representative PAGA claims in court.[30]

Implications for Employers

In its immediate effect, *Viking River* provides a boon to California employers hoping to diminish their exposure to PAGA suits. By requiring employees (1) to agree to arbitrate individual employment claims, and (2) to waive their rights to bring representative PAGA claims in arbitration, employers can now be assured

that these employees will not be able to initiate representative PAGA suits against them. Indeed, were an employer to succeed in binding *all* of its employees to such agreements, it seemingly could avoid *all* representative PAGA claims, although it still would be subject to enforcement actions brought by the LWDA.

From the vantage of employer liability, *Viking River* therefore makes PAGA more akin to employment-related class actions, to which employers similarly can diminish their exposure by mandating that employees arbitrate their individual claims and waive their right to arbitrate class claims. The Supreme Court previously held that employees who sign arbitration agreements that specifically authorize only individual arbitration cannot arbitrate on behalf of a class,[31] and that employment-related arbitration agreements requiring waiver of class claims are enforceable.[32] In 2019, the Supreme Court also held that the FAA does not permit courts to compel class arbitration if an arbitration agreement is ambiguous as to whether such arbitration is allowed.[33] Nonetheless, it would be prudent for employers drafting arbitration agreements to make mandatory waivers of class or collective actions and representative PAGA claims clear.[34]

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The logic of *Viking River* need not stop with employee-initiated actions. For example, consistent with the majority opinion, corporations issuing stock seemingly could escape certain shareholder class actions by requiring all shareholders to submit their individual claims to arbitration and to waive their right to assert other shareholders' claims in arbitration. However, federal agencies, such as the Securities and Exchange Commission ("SEC"), could discourage these tactics. In 2012, for example, The Carlyle Group abandoned an effort to require shareholders to participate in individual arbitrations—rather than in securities class actions—to resolve allegations of wrongdoing, likely out of concern that the SEC would have blocked its initial public offering in consequence.[35]

Employers also have not been freed from all actions involving some form of representative standing. The majority opinion emphasized that the Supreme Court has "never held that the FAA imposes a duty on States to render all forms of representative standing waivable by contract."[36] This would include, among other actions, "[n]on-class representative actions in which a single agent litigates on behalf of a single principal," including shareholder-derivative suits.[37] *Viking River* therefore does not necessarily provide as ready an avenue for corporations to diminish their exposure to such suits.

With respect to PAGA in particular, a larger issue still remains for employers: The boon from *Viking River* to employers depends on California's requirement that a plaintiff assert an individual claim to have standing to assert representative PAGA claims. If the California Legislature were to remove that requirement, an employee could initiate a representative PAGA action without asserting any individual claim—and thus avoid being compelled to arbitrate. The Plaintiffs' Bar has already begun lobbying the California Legislature to make this very change. With unified party control of the legislative and executive branches in California, it is not difficult to imagine California addressing this issue promptly.

Alternatively, the California Supreme Court could overrule or modify *Iskanian* to loosen PAGA's standing requirement. Notably, in *Kim v. Reins International California, Inc.*, 9 Cal. 5th 73, 80 (2020), the California Supreme Court held that "[s]ettlement of individual claims does not strip an aggrieved employee of standing, as the [S]tate's authorized representative, to pursue PAGA remedies." In reaching this conclusion, the Court rejected the argument that a plaintiff must possess a continuing "injury" (i.e., one not resolved by settlement) to have standing to bring a representative PAGA claim, instead reasoning that "PAGA standing" is "defined . . . in terms of violations."[38] Therefore, the settling plaintiff in *Kim* retained standing when he settled his individual claim because he already had alleged a Labor Code violation.[39] It is possible that the California Supreme Court could attempt to bridge the gap between *Kim* and *Iskanian* by holding that *after* an employee resolves his individual claim in arbitration, he still may serve as the aggrieved employee-plaintiff in a subsequent representative PAGA action.

Indeed, although Justice Sotomayor joined the *Viking River* majority opinion "in full," she identified the possibility of California expanding PAGA standing in her concurrence, stating that "California is not powerless to address its sovereign concern that it cannot adequately enforce its Labor Code without [PAGA]."[40]

Although *Viking River* provides a boon primarily to California employers, at least nine other States have considered adopting statutes similar to PAGA in recent years,[41] and several of those bills propose standing restrictions similar to PAGA's. For example, Washington's proposed bill would grant standing only to an "aggrieved person," i.e., "a person against whom one or more violations of the provisions of this act was committed,"[42] which is similar to PAGA's definition of "aggrieved employee."[43] If these copycat bills pass with these standing restrictions intact, employers in these States also may be able to diminish their exposure to representative PAGA-like claims by requiring employees (1) to

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arbitrate individual claims, and (2) to waive their right to raise representative PAGA-like claims in arbitration.

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[1] 9 U.S.C. § 1 *et seq*.

[2] Cal. Lab. Code § 2698 *et seq.*

[3] *Viking River*, 596 U.S. __ (slip op., at 20).

[4] *Id.* at 20–21.

[5] *Id.* at 21.

[6] *Id.* at 7–8.

[7] 9 U.S.C. § 2 (emphasis added)

[8] *Viking River*, 596 U.S. __ (slip op., at 9 (quoting *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 299 (2010)).

[9] *See id.* (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010)).

[10] *See id.* at 8 (quoting *Kindred Nursing Ctrs., L.P. v. Clark*, 581 U.S. 246, 251 (2017)).

[11] *Id.*

[12] *Id.* at 1–2.

[13] *Id.* at 2.

[14] *Id.* at 7.

[15] *Id.* at 2.

[16] Case No. G059561, at 20–24 (Cal. Ct. App. Dec. 31, 2022), https://tinyurl.com/2rfpczfx.

[17] *Id.* at 23–24.

[18] *Id.* at 9, 22–23.

[19] *Id.* at 24–26.

[20] *Id.* at 5–6.

[21] *Id.* at 5.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 5–6.

[25] *Id.* at 7.

[26] *See id.*

[27] *Id.* at 18.

[28] *Id.* (quoting *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019)).

[29] *Id.* at 21 (citing Cal. Lab. Code §§ 2699(a), (c)).

[30] *Id.* at 21–22.

[31] *Stolt-Nielsen*, 559 U.S. 662.

[32] *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

[33] *Lamps Plus*, 139 S. Ct. at 1415.

[34] Employers entering into new arbitration agreements should be aware that in *Chamber of Commerce of the United States of America v. Bonta*, 13 F.4th 766, 771 (9th Cir. 2021), the Ninth Circuit held that California's Assembly Bill 51, which purports to prohibit employers from "requir[ing] any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of" the Labor Code, is not preempted by the FAA because the FAA does not "preempt[ ] [S]tate regulation of pre-agreement behavior in the absence of an executed arbitration agreement." *Id.* at 777–78. However, this decision rests on shaky footing, particularly in light of *Viking River*. In dissent, Judge Ikuta stated, "The majority's ruling conflicts with the Supreme Court's clear guidance . . . and creates a circuit split with the First and Fourth Circuits." *Id.* at 782 (Ikuta, J., dissenting). She further chastised California for repeatedly trying to circumvent

the FAA, and called Assembly Bill 51 "a blatant attack on arbitration agreements, contrary to both the FAA and longstanding Supreme Court precedent." *Id.* A petition for rehearing en banc is pending. Petition for Rehearing En Banc, *Chamber v. Bonta*, Case No. 20-15291 (9th Cir. Oct. 20, 2021).

[35] Kevin Roose, *Carlyle Drops Arbitration Clause From IPO Plans*, N.Y. Times DealBook (Feb. 3, 2012), https://dealbook.nytimes.com/2012/02/03/carlyle-drops-arbitration-clause-from-i-p-o-plans/.

[36] 596 U.S. __ (slip op, at 15).

[37] *Id.*

[38] *Kim*, 9 Cal. 5th at 84.

[39] *Id.*

[40] 596 U.S. __ (Sotomayor, J., concurring, at 1).

[41] *See* S.B. 0983 (2017) (Illinois); S. 139 (2019) (Vermont); H.B. 20-1415 (2020) (Colorado); A. 2548 (2020), S. 921 (2020) (New Jersey); H.B. 6475 (2021) (Connecticut); S.P. 525 (2021) (Maine); A.B. 5876 (2021), S. 12 (2021) (New York); H.B. 2205 (2021) (Oregon); H.B. 1076 (2021) (Washington).

[42] (H.B. 1076, Second Substitute House Bill) (2021).

[43] Cal. Lab. Code § 2699(c).