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Where 9th Circ. Lowe's Ruling Leaves PAGA Jurisprudence

By **Leah Kennedy and Carolyn Wheeler** (March 22, 2024, 5:40 PM EDT)

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Arbitration agreements have been successfully used by employers to bar many employees from seeking judicial remedies for violation of their rights under employment and labor laws.

The U.S. Supreme Court has repeatedly expressed its preference for the enforcement of arbitration agreements under the Federal Arbitration Act.[1] The court has also repeatedly upheld arbitration agreements that prohibit classwide resolution of disputes.[2]

One area in which employees in California have preserved significant access to the courts is in bringing claims under the Private Attorneys General Act. PAGA was enacted in 2004 to enable employees to bring enforcement actions under the Labor Code, which addresses issues of compensation and employee classification for wage and hour purposes, among other issues.

Prior to the law's enactment in 2004, only the state could sue an employer for most civil penalties available under the Labor Code, but the California Labor and Workforce Development Agency was too understaffed and underfunded to effectively enforce the law.

The California Legislature enacted PAGA to enable employees to step into the shoes of the state by suing their employers for civil penalties on behalf of themselves, other aggrieved employees and the state.

The question of whether PAGA claims can be forced into arbitration has roiled the state and federal courts for years, and recently the U.S. Court of Appeals for the Ninth Circuit weighed in to offer its understanding of the controlling decisions from the Supreme Court and the California Supreme Court on the issue of the arbitrability and viability of representative, or so-called nonindividual, PAGA claims.[3]

Although Johnson v. Lowe's Home Centers LLC was only **decided** on Feb. 12, it has been followed and applied by several federal district courts.[4]

There is a pending petition for en banc review in the Ninth Circuit. But while the Johnson decision's finality is far from certain, it is important to understand the legal landscape and controlling precedent that led to it.[5]

Additionally, there are a number of open questions not answered by Johnson, not least of which is whether PAGA will survive a proposition to repeal it.

Arbitrability of PAGA Claims

From the time of its enactment in 2004 until the U.S. Supreme Court decided otherwise in 2022, California courts did not consider PAGA claims to be arbitrable.[6]

In Iskanian v. CLS Transportation Los Angeles LLC, the California Supreme Court explained in 2014 that when employees sue under PAGA, they are the proxy or agent of the state because the

employees are simply stepping into the state's shoes as private attorneys general to pursue actions the state lacks the resources to bring on its own.[7]

This feature made PAGA a favored tool of workers' rights advocates. It not only enabled employees to bring claims against their employers in court and avoid employer-friendly arbitration, but it empowered them to bring collective claims in court, even when subject to arbitration agreements that prevent other forms of collective claims, such as class actions.

A Battle of Supreme Courts

In 2022, the U.S. Supreme Court dealt a significant **blow** to PAGA in its Viking River Cruises Inc. v. Moriana decision. The case involved a motion to compel arbitration of a former employee's PAGA claims.[8]

The arbitration agreement contained a waiver provision providing that the parties could not bring any dispute as a class, collective or representative action under PAGA.[9] The agreement also included a severability provision, specifying that any valid portions of the waiver would be enforced in arbitration even if other provisions were unlawful.[10]

Viking had moved to compel arbitration of the employee's individual claims and for dismissal of her nonindividual claims.[11] Following the precedent established in Iskanian, California courts had denied Viking's motion to compel, holding that categorical waivers of PAGA standing were contrary to California law and that a PAGA claim could not be split into an arbitrable individual claim and a nonarbitrable nonindividual claim.[12]

The Supreme Court reversed, rejecting long-standing state court jurisprudence and holding that the FAA partially preempted the employee's PAGA claim.[13]

After analyzing the PAGA waiver and severability provisions in the arbitration agreement, the court split the plaintiff's PAGA claim into an individual and a nonindividual component, holding that arbitration of the individual claim could be compelled under the terms of the employee's agreement with the employer, while the nonindividual claims could not be so compelled.[14]

The court then held that once a court compelled the individual claim to arbitration, the employee lost standing to maintain the nonindividual PAGA claim in court and that therefore dismissal of the nonindividual claims was appropriate.[15]

The decision was a blow to workers and to PAGA enforcement efforts, but Justice Sonia Sotomayor noted that if the court's understanding of the PAGA standing requirements was wrong, California courts could correct that misunderstanding and "have the last word" on the standing question, a matter of state law interpretation.[16]

One year after Viking River, in its highly anticipated decision in Adolph v. Uber Technologies Inc., the California Supreme Court accepted Justice Sotomayor's invitation and **rejected** the U.S. Supreme Court's interpretation of the PAGA standing requirements.[17]

The Adolph case concerned a PAGA claim by an Uber driver alleging that Uber had misclassified him as an independent contractor rather than an employee.[18]

The plaintiff was subject to an arbitration agreement similar to the one in Viking River in that it contained both a PAGA waiver and a severability provision.[19]

The court of appeal had affirmed the trial court's denial of Uber's motion to compel arbitration, but shortly after Uber filed a petition for review by the California Supreme Court, the U.S. Supreme Court decided Viking River.[20]

In its opinion in Adolph, the California Supreme Court rejected Viking River's holding that a plaintiff loses standing to bring nonindividual PAGA claims in courts once the court has compelled the plaintiff's individual PAGA claim to arbitration.[21]

Instead, it held that the two statutory requirements for standing under PAGA — allegations that the

plaintiff was employed by the alleged violator and suffered one or more of the alleged violations — were not affected by the enforcement of an agreement to arbitrate a plaintiff's individual claims.[22]

Therefore, Adolph's nonindividual PAGA claim would survive in court while his individual PAGA claim went to arbitration. The Adolph court also said that if the arbitrator determines the individual is not an aggrieved individual under PAGA, and that determination is confirmed in a final judgment in court, the individual then would lack standing to pursue the nonindividual claims.[23]

The Ninth Circuit's Decision in Johnson

In Johnson v. Lowe's, the Ninth Circuit considered the interplay of all of these prior decisions in assessing the U.S. District Court for the Eastern District of California's ruling granting the employer's motion to compel arbitration of the employee's individual PAGA wage claim and dismissing her nonindividual PAGA claims.

Applying Viking River and Adolph, the Ninth Circuit affirmed the decision compelling arbitration of the employee's individual claims, but vacated the order on her nonindividual claims and remanded those claims to the district court to apply Adolph.[24]

The Ninth Circuit expressly held that there is no inconsistency between Viking River and Adolph and that the California Supreme Court's view that PAGA prevents a plaintiff from waiving his right to pursue nonindividual PAGA claims in court is a permissible reading of the FAA and Viking River.[25]

Other Potential Challenges to Arbitration Agreements

With the Ninth Circuit's approval of Adolph in its Johnson decision, the bifurcation of PAGA claims is likely to be a hallmark of many PAGA actions.

However, attorneys should recognize that although Viking River has cabined the ability of employees to bring individual claims for Labor Code violations in court, outcomes in the Viking River and Adolph cases involved fact-specific analyses of the relevant arbitration agreements.

Attorneys must therefore carefully review arbitration agreements, as they are still susceptible to the same defenses to enforcement that existed before Viking River.[26]

Open Questions

Since the Viking River and Adolph decisions came down, a number of issues have arisen in trial courts. These remain open questions until higher courts ultimately address them.

Staying Nonindividual PAGA Claim

Perhaps the most critical question is whether courts must stay the nonindividual PAGA claims that remain in court pending the outcome of the arbitration of individual PAGA claims in a bifurcated proceeding. Dicta in the Adolph decision indicates that courts "may" stay the nonindividual claim.[27]

Preclusive Effect of Arbitration Outcome

A closely related question is whether the outcome of the individual PAGA claim in arbitration has a preclusive effect on the nonindividual claim that remains in court.

The Adolph court rejected Uber's argument that bifurcation would permit Adolph to relitigate whether he is an aggrieved employee to establish standing, noting that the arbitrator's determination, if confirmed and reduced to a final judgment, would be binding on the court.[28]

In his concurrence in the Johnson case, U.S. Circuit Judge Kenneth Lee opined that issue preclusion does not apply if the party sought to be precluded from litigating the issue did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.[29]

This scenario may arise when the amount in controversy in an individual arbitration is small in relation to the amount in controversy in a nonindividual court matter.[30]

Constitutional Standing

Adolph held that statutory standing under PAGA requires only that the plaintiff was employed by the alleged violator and suffered one or more of the alleged violations, but whether a plaintiff bringing a nonindividual PAGA claim in federal court in a bifurcated proceeding has Article III standing remains an open question.[31]

The Ninth Circuit recently remanded a matter to the district court to consider in the first instance whether a plaintiff has constitutional standing to bring his representative PAGA claim, with instructions to remand the matter to state court if the district court determines that the plaintiff lacks constitutional standing.[32]

Disclaiming Individual PAGA Claims

Some PAGA plaintiffs have taken the creative approach of disclaiming their individual PAGA claims to avoid arbitration entirely. Although some trial courts have accepted this approach, it is not clear whether the strategy will hold up.

It also raises ethical issues for attorneys, who have a duty to act in the best interests of clients who give up their right to significant penalties under this approach.

The Future of PAGA

Even as courts of appeal begin to address these open questions, the future of California's PAGA remains unclear.

In November 2024, Californians will vote on a proposition to repeal PAGA and replace it with the deceptively named California Fair Pay and Employer Accountability Act, which will give the California Labor and Workforce Development Agency exclusive authority for Labor Code enforcement and eliminate attorney fees.

If passed, the act will eliminate one of the few remaining forms of worker collective action in the courtroom that has not been decimated by forced arbitration agreements.

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[1] See, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991) (holding that individual discrimination claims can be forced into arbitration).

[2] See, e.g. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (in a consumer class action, holding that the FAA preempts a state law invalidating contracts that disallow class-wide arbitration).

[3] See Johnson v. Lowe's Home Centers LLC, 93 F.4th 459 (9th Cir. 2024).

[4] See Longboy v. Pinnacle Prop. Mgmt. Servs., LLC, 2024 WL 815550 at *11 (N.D. Cal. Feb. 23, 2024); Musharbash v. JPMorgan Chase Bank, 2024 WL 919186 at *6 (E.D. Cal. Mar. 1, 2024).

[5] Petition for Panel Rehearing and Rehearing en banc, Johnson v. Lowe's Home Centers, LLC, 93 F.4th 459 (9th Cir. 2024) (No. 22-16486 Dkt. No. 50, 2/26/2024).

[6] See, e.g. Iskanian v. CLS Transp. Los Angeles, LLC , 59 Cal. 4th 348, 360 (2014).

[7] Id. at 382.

[8] Viking River Cruises, Inc. v. Moriana , 596 U.S. 639, 647-48 (2022).

[9] Id. at 647.

[10] Id.

[11] Id. at 648.

[12] Id. at 649.

[13] Id. at 662.

[14] Id.

[15] Id. at 663.

[16] Id. at 664 (Sotomayor, J., concurring).

[17] Adolph v. Uber Techs., Inc. , 14 Cal. 5th 1104, 1121 (2023).

[18] Id. at 1115.

[19] Id.

[20] Id.

[21] Id. at 1121.

[22] Id. at 1120-21.

[23] Id. at 1123-24.

[24] Johnson, 93 F.4th at 462.

[25] Id. at 464-65.

[26] See, e.g., DeMarinis v. Heritage Bank of Com. , 98 Cal. App. 5th 776, 791 (2023) (finding the inclusion of a wholesale PAGA waiver and a non-severability provision in an arbitration agreement fatal to a motion to compel arbitration); Hasty v. Am. Auto. Ass'n of N. California, Nevada & Utah , 98 Cal. App. 5th 1041, 1065 (2023) (affirming denial of a motion to compel arbitration because the arbitration agreement was "permeated with unconscionability"); Duran v. EmployBridge Holding Co. , 92 Cal. App. 5th 59, 61 — 62 (2023), as modified (May 30, 2023) (affirming denial of a motion to compel arbitration because the arbitration agreement contained a provision explicitly carving out PAGA claims).

[27] Adolph, 14 Cal. 5th at 1125; see also Barrera v. Apple Am. Grp. LLC , 95 Cal. App. 5th 63, 95 (2023) (remanding for the trial court to determine whether a stay of plaintiffs' nonindividual PAGA claims would be appropriate under the circumstances).

[28] Adolph, 14 Cal. 5th at 1123 — 24.

[29] Johnson, 93 F.4th at 467 (Lee, J., concurring) (citations omitted).

[30] Id.

[31] Adolph, 14 Cal. 5th at 1120.

[32] Cooley v. ServiceMaster Co., LLC, 2024 WL 866123 at *2 (9th Cir. Feb. 29, 2024).