2022: A Momentous Year for PAGA

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- The past year saw appellate courts weigh in on a number of critical questions regarding the Private Attorneys General Act (PAGA), headlined by the U.S. Supreme Court's ruling in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), which held that agreements to arbitrate PAGA claims on an individual basis are enforceable under the FAA.
- In other key appellate rulings, *Estrada v. Royalty Carpet Mills, Inc*., 76 Cal. App. 5th 685 (2022), created a split in authority regarding whether PAGA claims can be struck or limited before trial as unmanageable; *Shaw v. Superior Court*, 78 Cal. App. 5th 545 (2022), held that courts may stay overlapping PAGA cases under the exclusive concurrent jurisdiction doctrine; and *LaFace v. Ralphs Grocery Co*., 75 Cal. App. 5th 388 (2022), confirmed that PAGA confers no right to a jury trial.
- While many of these decisions were clarifying, others created new controversies or intensified other longstanding ones. Trial courts struggled with how to apply *Viking River Cruises* to a plaintiff's "non-individual" PAGA claims, leading the California Supreme Court to agree to step in. The state high court will also weigh in on the split over manageability created by the *Estrada* decision. And the controversy over whether a nonparty aggrieved employee may intervene to challenge a settlement continued, with appellate rulings now spanning a broad spectrum.

The Private Attorneys General Act (PAGA) generated significant attention in 2022 when the U.S. Supreme Court decided *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022), a case that many predicted could sound the death knell for the law, if not for private attorney general enforcement schemes more broadly. (So far, that prediction has not come true.) However, *Viking River Cruises* was far from the only significant development in PAGA jurisprudence over the last year. Below is a brief summary of the highlights from a busy year of significant appellate decisions.

U.S. Supreme Court Weighs in on PAGA Arbitrability

Any retrospective of 2022 has to begin with the *Viking River Cruises* decision, which held that an agreement to arbitrate PAGA claims on an individual basis is enforceable under the Federal Arbitration Act (FAA), notwithstanding contrary state law. The Court held that therefore, where an enforceable agreement exists, the plaintiff's "individual"

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claim must be compelled to arbitration. Interpreting state law, the Court then held that the "non-individual" claims must be dismissed for lack of statutory standing.

The decision has sown much confusion in trial courts, which have observed that the U.S. Supreme Court's interpretation of state law is not necessarily binding. Federal courts have generally followed the U.S. Supreme Court, while results in state courts were mixed. Many state courts implored the California Supreme Court to provide guidance, and the state high court obliged by granting review in *Adolph v. Uber Technologies, Inc*., 2022 WL 1073583 (Cal. Ct. App. Apr. 1, 2022). A decision in Adolph is expected later this year. In the meantime, state trial courts are overwhelmingly staying "non-individual" claims in this circumstance in deference to the forthcoming decision.

Split of Authority Emerges Over PAGA Manageability Requirement

In the groundbreaking decision of *Wesson v. Staples the Office Superstore, LLC*, 68 Cal. App. 5th 746 (2021), the California Court of Appeal (2nd District) ruled that trial courts have inherent authority to strike or limit PAGA claims before trial to ensure that they can be manageably litigated and tried. At the time, *Wesson* was arguably one of the most important PAGA decisions ever issued, vindicating an argument that defendants had been making in trial courts for years, with limited success.

In 2022, *Estrada v. Royalty Carpet Mills, Inc*., 76 Cal. App. 5th 685 (2022), complicated matters by expressly disagreeing with *Wesson*. The Court of Appeal (4th District) held that trial courts may address manageability issues by limiting the evidence that may be admitted at trial, but held that "a court cannot strike a PAGA claim" before trial "based on manageability." *Id*. at 697. The California Supreme Court has granted review to resolve the split. (To read an analysis concluding that *Wesson* is the better reasoned case, click here.)

Court of Appeal Approves Stay of Overlapping Cases Under Exclusive Concurrent Jurisdiction Rule

Because the filing of a PAGA claim does not categorically bar a different plaintiff from filing a second PAGA lawsuit over the same alleged violations, it is not uncommon for a single defendant to find itself defending multiple, serial PAGA claims in separate lawsuits. In *Shaw v. Superior Court*, 78 Cal. App. 5th 245 (2022), the Court of Appeal held that trial courts may stay later-filed cases under the exclusive concurrent jurisdiction rule, which provides that when two or more courts have concurrent subject matter jurisdiction over a dispute, the court that first asserts jurisdiction does so to the exclusion of others. Trial courts had often granted stays on this basis even before *Shaw*, but the decision brings some welcome certainty to the issue for defendants.

Controversy Continues Over Whether Aggrieved Employees May Intervene to Challenge PAGA Settlement

In 2021, a split developed in the Court of Appeal regarding whether a nonparty "aggrieved employee" to a PAGA action may intervene to challenge a PAGA settlement. PAGA settlements require court approval, and this circumstance typically arises when two plaintiffs pursue separate PAGA lawsuits in parallel, with one proceeding to settlement first.

The California Supreme Court granted review last year to resolve the split, and appellate decisions in 2022 provided little clarity. In February, in *Saucillo v. Peck*, 25 F.4th 1118 (9th Cir. 2022), the 9th Circuit held that the question must be analyzed under Article III for cases in federal court, and concluded that nonparty aggrieved employees have no standing to intervene in a federal action. Then in August, in *Porras v. Chipotle Servs*., LLC, 2022 WL 3499646 (Cal. Ct. App. Aug. 18, 2022), a panel of the California Court of Appeal (5th District) adopted what it called a "middle ground," ruling that courts should ask whether the would-be intervenor has an "immediate, pecuniary, and substantial stake" in the potential penalties. In *Porras*, because the would-be intervenor stood to recover only a miniscule fraction of a multimillion dollar settlement, that interest was lacking.

Court of Appeal Rules That PAGA Provides No Right to a Jury

In *LaFace v. Ralphs Grocery Co*., 75 Cal. App. 5th 388 (2022), the California Court of Appeal finally decided an issue that had evaded appellate review: there is no right to a jury trial in a PAGA action. Although practitioners had largely reached consensus on this issue prior to *LaFace*, some PAGA plaintiffs had continued to seek jury trials. *LaFace* forecloses this option for now, holding that neither the California Constitution nor PAGA itself suggests a right to a jury trial.

PAGA Survives Constitutional Challenge

Finally, in June, PAGA survived a state constitutional challenge in *California Business & Industrial Alliance v. Becerra*, 80 Cal. App. 5th 734 (2022). The challenger raised several theories, but the court focused on a single theory in particular: that PAGA violates California's separation of powers doctrine by allowing private citizens to sue on the state's behalf without providing for sufficient prosecutorial discretion by the executive branch. The challenge was widely considered a longshot (PAGA has survived numerous similar challenges over the years), and highlights that no matter what twists and turns the law takes in 2023, employers should expect that PAGA is here to stay.

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