Appellate Report

U.S. Supreme Court holds that *Iskanian*'s rule that PAGA actions cannot be divided into individual and non-individual claims is preempted by the FAA

By Jeffrey I. Ehrlich

Arbitration; Federal Arbitration Act [FAA] preemption; PAGA claims

Viking River Cruises, Inc. v. Moriana (2022) __ U.S. __ (U.S. Supreme Court.)

Moriana filed a PAGA action against her employer, Viking River Cruises, Inc. (Viking). Her employment agreement with Viking included a mandatory arbitration clause, which itself included a class-action waiver provision that expressly barred arbitration of representative PAGA claims. In *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 382, the California Supreme Court held that a PAGA suit is a "representative action" in which the employee plaintiff sues as an "agent or proxy" of the State, making the State the real party in interest. As a result, class-action waivers are not enforceable to require arbitration of PAGA claims. California precedent also interprets the PAGA statute to contain what is effectively a rule of claim joinder – allowing a party to unite multiple claims against an opposing party in a single action. An employee with PAGA standing may seek any civil penalties the state can, including penalties for violations involving employees other than the PAGA litigant herself.

The U.S. Supreme Court held that the FAA preempts the *Iskanian* rule insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate. *Iskanian*'s prohibition on contractual division of PAGA actions into constituent claims unduly circumscribes the freedom of parties to determine the issues subject to arbitration and the rules by which they will arbitrate, and does so in a way that violates the fundamental principle that arbitration is a matter of consent.

Under the FAA, state law cannot condition the enforceability of an agreement to arbitrate on the availability of a procedural mechanism that would permit a party to expand the scope of the anticipated arbitration by introducing claims that the parties did not jointly agree to arbitrate. A state rule imposing an expansive rule of joinder in the arbitral context would defeat the ability of parties to control which claims are subject to arbitration by permitting parties to add new claims to the proceeding, regardless of whether the agreement committed those claims to arbitration. When made compulsory by way of *Iskanian*, PAGA's joinder rule functions in exactly this way. The effect is to coerce parties into withholding PAGA claims from arbitration. *Iskanian*'s indivisibility rule effectively coerces parties to opt for a judicial forum rather than forgoing the procedural rigor and appellate review of the courts to realize the benefits of private dispute resolution.

Ultimately, the Supreme Court held that *Iskanian*'s prohibition on wholesale waivers of PAGA claims is not preempted by the FAA. But *Iskanian*'s rule that PAGA actions cannot be divided into individual and non-individual claims is preempted, so Viking was entitled to compel arbitration of Moriana's individual claim. PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding. And under PAGA's standing requirement, a plaintiff has standing to maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action. As a result, Moriana would lack statutory standing to maintain her non-individual claims in court, and the correct course was to dismiss her remaining claims.

Federal Arbitration Act [FAA]; waiver of right to arbitrate; [no] need for showing of prejudice

Morgan v. Sundance, Inc. (2022) __ U.S. __, 142 S.Ct. 1708 (U.S. Supreme Court.)

Morgan sued Sundance, which owned the Taco Bell franchise where she worked, alleging that Sundance violated federal law concerning payment of overtime. Sundance initially defended against the lawsuit as if no arbitration agreement existed, filing a motion to dismiss (which the District Court denied) and engaging in mediation (which was unsuccessful). Then – nearly eight months after Morgan filed the lawsuit – Sundance moved to stay the litigation and compel arbitration under the FAA. Morgan opposed, arguing that Sundance had waived its right to arbitrate by litigating for so long.

The courts below applied Eighth Circuit precedent, under which a party waives its right to arbitration if it knew of the right; "acted inconsistently with that right"; and "prejudiced the other party by its inconsistent actions." The prejudice requirement is not a feature of federal waiver law generally. The Eighth Circuit adopted that requirement because of the "federal policy favoring arbitration. Other courts have rejected such a requirement. [*Editor's note*: Under California law, a finding that a party has waived arbitration by litigating the case before moving for arbitration is subject to a prejudice requirement.] (*St. Agnes Medical Center v. PacifiCare of California*

(2003) 31 Cal.4th 1187, 1203 ["In California, whether or not litigation results in prejudice also is critical in waiver determination"].) Reversed.

The Eighth Circuit erred in conditioning a waiver of the right to arbitrate on a showing of prejudice. Under the FAA, a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation. The federal policy is about treating arbitration contracts like all others, not about fostering arbitration.

The text of the FAA makes clear that courts are not to create arbitration-specific procedural rules like the one here. Section 6 of the FAA provides that any application under the statute – including an application to stay litigation or compel arbitration – "shall be made and heard in the manner provided by law for the making and hearing of motions" (unless the statute says otherwise). A directive to treat arbitration applications "in the manner provided by law" for all other motions is simply a command to apply the usual federal procedural rules, including any rules relating to a motion's timeliness. Because the usual federal rule of waiver does not include a prejudice requirement, Section 6 instructs that prejudice is not a condition of finding that a party waived its right to stay litigation or compel arbitration under the FAA.

Evidence; expert testimony; sufficiency of causation testimony

Kline v. Zimmer, Inc. (2022) __ Cal.App.5th __ (Second Dist., Div. 8.)

Kline underwent a total hip replacement surgery in 2007 and his doctor implanted an artificial joint called a Duron Cup, manufactured by Zimmer. The surgery failed and he underwent a revision surgery in 2008 to replace the Duron Cup with a different artificial joint. By March 2009, he was feeling "back to normal." But the pain returned by September 2010. For the next eight years, Kline was treated for hip and back pain. He sued Zimmer, claiming that the Duron Cup was defective, and but for that defect, his first surgery would have likely alleviated his hip problems. Kline prevailed at trial in 2015, but the case was remanded on appeal for a new trial limited to damages caused by the design defect of the Duron Cup.

In the retrial, the trial court excluded all medical testimony that was not expressed to a reasonable degree of medical probability. This meant that Zimmer could not call its expert, Dr. Sah, who was prepared to testify about "possible" alternative causes of Kline's pain, such as his weight, or a vitamin D deficiency. Kline prevailed again and the Court of Appeal reversed.

The Court of Appeal held that the trial court erred in barring Zimmer from calling its expert to testify as to "possible" causes of Kline's pain, even if the expert could not testify that it was medically probable that these alternative causes were "the" cause of Kline's pain. Because the plaintiff bears the burden of proof on causation, it is proper to require the plaintiff's expert to express a causation opinion to a reasonable degree of medical probability.

But this rule does not apply to the defendant's efforts to challenge or undermine the plaintiff's showing. The burden of proof on causation always rests with the plaintiff, not the defendant. Zimmer was entitled to put on a case that Kline failed to satisfy that burden. To accomplish this, Zimmer did not need to show it was more likely than not that a cause identified by Zimmer resulted in Kline's injuries. In other words, Zimmer did not need to show that a *different* cause was more likely than not the cause of Kline's injuries. (https://1.next.westlaw.com/Document/I2d85c9a0d-d4411ec8d48d9b78fa47086/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default) - co_footnote_B00042056311123)

All that Zimmer needed to show was that Kline's evidence was insufficient to prove Kline's injuries were more likely than not caused by Zimmer. It should have been permitted to do so by offering expert opinions offered to less than a reasonable medical probability that Kline's injuries may have been attributable to other causes.

Evasive or incomplete discovery responses; declarations that contradict discovery responses; summary judgment

Field v. U.S. Nat. Bank Ass'n. (2022) __ Cal.App.5th __ (Second Dist, Div. 8.)

Field sued U.S. Bank for wrongful foreclosure. During discovery, Field was asked in an interrogatory whether she contended that the bank had not mailed her the Notice of Trustee's Sale in compliance with section 2942b of the Code of Civil Procedure. If that was her contention, the interrogatory asked her to provide all facts related to that contention. Field responded with a one-word answer: "Unsure."

The bank then moved for summary judgment. Field opposed, arguing that the bank had not served her with the Notice. In a supporting declaration, Field stated that she had not received the notice. The trial court granted the motion. Affirmed.

It was unjust and improper for Field to swear during discovery she was "[u]nsure" whether Rushmore's notice was proper but then to contradict this position during summary judgment by swearing the notice was improper because she never got it.

What Field should have done was answer this simple contention interrogatory unambiguously, forthrightly, and truthfully. If her contention was she never got notice of the trustee's sale, she had to say so and to provide the facts related to this contention.

Field is right that her response of "Unsure" was ambiguous. Her ambiguity, in which counsel participated, is the

problem. Mail service is imperfect, but a claim of failure to receive something implies failure in the sending. Field's contention she did not receive notice was a necessary response to the interrogatory. To suggest otherwise when asked for "RELATED" facts is to misconstrue the question deliberately. Trial courts encountering such an abuse are free to disregard a later declaration that hopes to supplant tactical or slothful ambiguity with tardy specificity.

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