Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
July 2022

James F. Clapp
CLAPP & LAUINGER LLP

Jamie N. Herrick
CLAPP & LAUINGER LLP

The fate of PAGA claims after *Viking River Cruises*

IN A SURPRISING 8-1 DECISION, THE U.S. SUPREME COURT HELD THAT THE CALIFORNIA SUPREME COURT'S RULING IN *ISKANIAN* WAS PREEMPTED BY THE FAA

On June 15, 2022, the Supreme Court issued its much-anticipated decision in *Viking River Cruises v. Moriana* (June 15, 2022) ___ U.S. __, Case No. __. The Court considered whether the Federal Arbitration Act (FAA) preempts the California Supreme Court's holding in *Iskanian v. CLS Transportation of Los Angeles LLC* (2014) 59 Cal.4th 348, that pre-dispute waivers of representative claims under the Labor Code Private Attorneys General Act (PAGA) are void against public policy.

In a surprising 8-1 decision, the Court held the *Iskanian* rule was preempted, but not for the reasons urged by Viking. The Court agreed with Moriana that the FAA does not prevent the State of California from barring waivers of an employee's right to represent the State in PAGA claims. Instead, where *Iskanian* runs afoul of the FAA is in mandating the joinder of the named plaintiff's PAGA claim with the claims of the other aggrieved employees. By refusing to allow Moriana to waive her right to act as a representative on behalf of other employees, the *Iskanian* rule interferes with the parties' freedom to decide the scope of their arbitration, and thus contravenes the FAA.

In response to *Viking*, PAGA defendants that previously refrained from requesting arbitration in light of *Iskanian* will now move to compel arbitration of the named plaintiffs' individual claims and request dismissal of the representative claims. What recourse do plaintiffs have?

The severability clause

First, plaintiffs should review the severability clauses in their arbitration agreements. The outcome of a motion to compel arbitration might turn on the wording of that clause.

The agreement in *Viking* contained a unique severability clause. That clause provided that if any portion of the agreement's PAGA waiver was valid, that portion of the waiver had to be enforced in arbitration. Because the Court held the PAGA waiver was valid to the extent it prevented the plaintiff from representing the PAGA claims of other employees in arbitration, under the terms of the severability clause, that waiver had to be enforced by sending Moriana's individual claim to arbitration, dismissing the claims of the remaining employees.

In contrast to the clause in *Viking*, some severability clauses provide that if the PAGA waiver is unenforceable in *any* respect, the PAGA claim must be litigated in court rather than in arbitration. (See, e.g., *Montano v. Wet Seal Retail, Inc.* (2015) 7 Cal.App.5th 1248, 1258 n.6.) In such a case, the plaintiff will likely argue the PAGA waiver is invalid under *Iskanian* because it prevents plaintiff from representing the State of California in a

PAGA claim, and since the waiver is unenforceable in at least one respect, the severability clause requires the PAGA claim to remain in court.

Unconscionability

Second, plaintiffs should assess whether the PAGA waiver, to the extent it is invalid under *Iskanian*, renders the entire arbitration agreement unenforceable.

Generally, arbitration agreements are permeated by unconscionability if they contain two or more illegal terms. (See *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 124-25.) Courts have held that the presence of an illegal PAGA waiver can support a finding of substantive unconscionability. (*Franco v. Athens Disposal, Inc.* (2009) 171 Cal.App.4th 1277, 1303.) Plaintiffs should determine whether there are any other illegal or one-sided terms in the arbitration agreement. Multiple unfair terms, coupled with a showing of procedural unconscionability, might persuade the trial court not to enforce the agreement.

Waiver of the right to compel arbitration

Third, plaintiffs should determine whether the defendant has waived its right to compel arbitration.

Waiver is ordinarily defined as the voluntary relinquishment of a known contractual right. The Ninth Circuit and the

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
July 2022

California Supreme Court have adopted similar tests for determining whether the defendant has waived its arbitration rights. Generally, a plaintiff asserting waiver must prove the defendant acted inconsistently with its right to compel arbitration, and as a result, the plaintiff was prejudiced. (*United States v. Park Place Assocs.* (9th Cir. 2009) 563 F.3d 907, 921; *Iskanian*, 59 Cal.4th at 374-75.)

But on May 23, 2022, the Supreme Court issued its unanimous decision in *Morgan v. Sundance, Inc.* (May 23, 2022) __ U.S. __, Case No. 21-328, which clarified the doctrine of waiver in cases governed by the FAA. The Court held a plaintiff asserting waiver need not prove he or she was prejudiced by the defendant's delay in requesting arbitration. In ordinary contract cases, Justice Kagan explained, waiver turns on whether the defendant acted inconsistently with its contractual right, not on whether the plaintiff was prejudiced by the defendant's conduct. Requiring the plaintiff to prove the additional element of prejudice treats arbitration agreements differently from ordinary contracts, and thus, is inconsistent with the FAA.

Morgan assumed without deciding that questions of waiver under the FAA are governed by federal common law. Both the Ninth Circuit and the California Court of Appeal have held that when the arbitration agreement designates the FAA as controlling, issues of waiver are governed by federal rather than California law. (*Sovak v. Chugai Pharm Co.* (9th Cir. 2002) 280 F.3d 1266, 1270; *Aviation Data, Inc. v. American Express* (2007) 152 Cal.App.4th 1522, 1535.)

Employers will argue they did not knowingly waive their right to compel arbitration because, until *Viking*, any motion to compel would have been futile under *Iskanian*. Futility is a valid ground for delaying a motion to compel arbitration. (*Iskanian*, 59 Cal.4th at 376; *Fisher v. A.G. Becker Paribas Inc.* (9th Cir. 1986) 791 F.2d 691, 697.)

But plaintiffs should counter that a motion to compel arbitration would not necessarily have been futile. *Iskanian* left open the possibility that the trial court could bifurcate the PAGA claim, with the individual claim going to arbitration and the representative claim remaining in litigation. (*Iskanian*, 59 Cal.4th at 391-92.) Plaintiffs should argue a defendant that truly wished to preserve its arbitration rights should have asked the trial court to refer the plaintiff's individual PAGA claim to arbitration and stay the representative claim until the arbitration was complete.

This is exactly what the defendants did in *Young v. RemX, Inc* (2016) 2 Cal.App.5th 630. There, the defendants filed a motion to compel individual arbitration and asked the trial court to bifurcate and stay the PAGA claim. The trial court granted the motion. Plaintiff appealed, but the appellate court held the arbitration order was not appealable. Plaintiffs should argue that *Young*, which was published in 2016, provided a roadmap for what defendants should have done to preserve their arbitration rights prior to *Viking*.

A plaintiff claiming waiver must also show the defendant engaged in litigation activity that was inconsistent with its right to arbitrate. Such activity includes filing motions to dismiss, appearing at court hearings, and serving and responding to discovery. (See, e.g., *Nerwith v. Aegis Senior Cmtys. LLC* (9th Cir. 2019) 931 F.3d 935, 941-42; *Lewis v. Fletcher Jones Motor Cars, Inc.* (2012) 205 Cal.App.4th 436, 448-52.) On the other hand, merely requesting dismissal of a complaint on procedural grounds would not support a claim of waiver. (See, e.g., *United Computer Systems v. AT&T Corp.* (9th Cir, 2002) 298 F.3d 756, 765.) In general, the more actively the PAGA claim was litigated in court, the more likely the court will find the defendant waived its right to compel arbitration.

Possible legislative response to *Viking*

Finally, plaintiffs should monitor the efforts by the California Legislature to amend PAGA in response to the *Viking* decision.

Viking held that because Moriana's individual PAGA claim was subject to arbitration, the claims of the other aggrieved employees had to be dismissed because Moriana no longer had standing under the PAGA statute to litigate the employees' claims in court. In her concurring opinion, Justice Sotomayor invited the California Legislature to amend PAGA's standing requirement to allow plaintiffs whose individual claims are sent to arbitration to continue to prosecute non-individual claims in court.

It is likely the California Legislature will amend PAGA's standing rules and expressly provide that those rules apply retroactively to pending PAGA cases. Plaintiffs should try to delay dismissal of their PAGA claims until the legislation is passed and becomes effective.

Conclusion

Viking did not deliver the knock-out blow to PAGA claims that employers had hoped for. Employees have several possible arguments to avoid dismissal of their representative claims.

Mr. Clapp is a partner and Ms. Herrick a summer associate in Clapp & Lauinger LLP, *a law firm in Carlsbad that represents plaintiffs in class and representative actions.*