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ADR Case Update – Plaintiffs Retain PAGA Standing, Even If Individual Claims Arbitrated

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Private Attorney General Act Plaintiffs retain standing to litigate non-individual claims in court when their individual claims are subject to arbitration (Cal. Sup. Ct.).

In *Adolph v. Uber Technologies, Inc.* (July 17, 2023) 14 Cal.5th 1104, Erik Adolph worked as a driver for Uber Technologies, Inc. delivering food to customers through the company's Uber Eats platform. He filed a wage and hour action alleging individual and class claims that ultimately included a cause of action brought under the Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.). Uber moved to compel arbitration under Adolph's employment agreement that included an arbitration clause. The trial court denied the motion, which was affirmed by the court of appeal.

Uber filed a petition for review. During the time the petition was pending, the U.S. Supreme Court decided *Viking River Cruises, Inc. v. Moriana*, 142 S.Ct. 1906 (2022), which held that the indivisibility of individual versus representative PAGA claims articulated in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, was preempted by the Federal Arbitration Act. Under *Viking*, an employee who has been compelled to arbitrate their individual PAGA claims lacked standing to pursue PAGA claims involving other employees. The California Supreme Court granted review.

Reversed and remanded. Each state's highest court remains the final arbiter of that state's law. Consequently, the California Supreme Court reasoned that because *Viking* did not interpret federal statutes similar to PAGA, they were not bound to its holding and interpretation of California law. Under California law, PAGA standing only requires that plaintiff be an "aggrieved employee," who was employed by the alleged violator and suffered from the alleged violation. Therefore, where plaintiffs pursue PAGA actions that include both individual and non-individual claims, orders compelling arbitration of individual claims do not divest an aggrieved employee's standing to bring PAGA claims on behalf of other employees.

What's Next for PAGA? The November 2024 ballot will contain a measure titled **"Fair Pay and Employer Accountability Act,"** which proposes to repeal PAGA in California. (Please click link for more information from BallotPedia).

District Court should have allowed arbitrator to decide question of arbitrability – whether a jury waiver provision was unconscionable had no bearing on the enforceability of the delegation clause (9th Cir.).

In *Holley-Gallegly v. TA Operating, LLC*, 74 F.4th 997 (July 24, 2023), Plaintiff Kenneth-Gallegly worked as a truck mechanic for TA Operating, LLC. As a condition of his employment, he signed an arbitration agreement that delegated questions of arbitrability to the arbitrator. Plaintiff subsequently brought a class action in state court base upon alleged employment law violations. TA removed the action to federal court, and filed a motion to compel arbitration. The district court denied the motion, finding; (1) the delegation clause procedurally unconscionable as a contract of adhesion because it was required as a condition of employment; and (2) substantively unconscionable because it required Plaintiff to waive his right to a jury trial if the agreement was determined to be unenforceable. After concluding the court – not the arbitrator – was empowered to decide the question of arbitrability, the district court found the agreement as a whole was unconscionable and unenforceable. TA appealed.

"Stated differently, the jury waiver provision had no relevance to the question of whether the delegation of arbitrability to the arbitrator was unconscionable because it would only apply (if ever) after the agreement was found unenforceable."

Vacated and remanded. Because the jury waiver provision applied only if the agreement was unenforceable, and had no bearing on the enforceability of the delegation clause, the district court erred in its analysis of unconscionability. Stated differently, the jury waiver provision had no relevance to the question of whether the delegation of arbitrability to the arbitrator was unconscionable because it would only apply (if ever) after the agreement was found unenforceable. Consequently, the court vacated the district's court's order denying TA's motion to compel, and remanded for the district court to order the arbitrator to decide the issue of arbitrability.

Last-leg delivery drivers are part of unbroken stream of interstate commerce and exempt from Federal Arbitration Act, even though goods were repackaged in supply chain center before delivery to franchisees (9th Cir.).

In *Carmona v. Domino's Pizza, LLC*, 73 F.4th 1135 (July 21, 2023), Edmond Carmona was one of three truck drivers employed by Domino's Pizza, who filed a putative class action for Labor Code wage and hour violations. Domino's sells ingredients used to make pizzas to its franchisees. The ingredients are shipped from suppliers outside of California to Domino's Southern California Supply Chain Center, where they are repackaged, though not altered, for delivery by the Plaintiffs to local franchisees. Domino's moved to compel arbitration based upon agreements Plaintiffs had signed. The district court declined to compel arbitration because the drivers were a "class of workers engaged in foreign or interstate commerce," such that their claims were exempted from the Federal Arbitration Act ("FAA") by 9 U.S.C. Section 1. The Ninth Circuit affirmed. The Supreme Court granted certiorari, vacated, and remanded for reconsideration in light of *Southwest Airlines Co. v. Saxon*, 42 S. Ct. 1783 (2022), which held that "workers who physically load and unload cargo on and off airplanes" were exempt under Section 1.

"Although the goods stopped at a warehouse for a time, they were not altered, so the stream of commerce remained unbroken."

Affirmed. Under 9 U.S.C. Section 1, transportation workers engaged in foreign or interstate commerce are exempt from the FAA. In *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, (9th Cir. 2020), the Ninth Circuit concluded that delivery drivers who transport goods shipped in interstate commerce for the last leg of the shipment to their destination were part of, and therefore engaged in, one continuous stream of commerce. The Supreme Court specifically chose not to address the question of whether last–leg drivers were exempt under Section 1 in

Saxon and, therefore, left *Rittmann* as binding precedent. Plaintiffs were essentially identical to the delivery drivers in *Rittmann*, who completed the journey of goods shipped in interstate commerce. Although the goods stopped at a warehouse for a time, they were not altered, so the stream of commerce remained unbroken. The district court correctly denied the motion to compel arbitration.

Arbitration fees must be received (not mailed) within bright-line 30-day period following due date or employer loses ability to compel arbitration.

In *Doe v. Superior Court (Na Hoku, Inc.)* (Sept. 8, 2023) 2023 WL 5813102, Jane Doe worked for Na Hoku, Inc., and sued Defendant for sexual harassment. Defendant successfully moved to compel arbitration. The American Arbitration Association (AAA) sent a letter on September 1 seeking a deposit to cover the arbitrator's anticipated compensation and expenses, noting that "payment … is due upon receipt of this notice … . As this arbitration is subject to California Code of Civil Procedure 1281.98, payment must be received 30 days from the date of this letter to avoid closure of the parties' case." Defendant mailed a check on September 30, which was received on October 5. Plaintiff moved to vacate the arbitration order, arguing that Defendant's failure to pay within the statutory date was a material breach of the arbitration agreement. The trial court disagreed, concluding that Section 1281.98 required payment - not necessarily receipt - within the 30-day period. Plaintiff sought a writ of mandate to vacate that order.

"Fees not received within the bright–line 30–day limit constitutes a material breach regardless of circumstances, including when the check was mailed, thus allowing employees to avoid arbitration and pursue their claims in court."

Writ granted. Section 1281.98 (a)(1) requires fees to be paid within 30 days after the due date. Here, the statute's legislative purpose clearly supported Plaintiff's interpretation. The strict breach provision for non-payment was meant to deter employers from withholding payment to hinder employees asserting their legal rights. Fees not received within the bright–line 30–day limit constitutes a material breach regardless of circumstances, including when the check was mailed, thus allowing employees to avoid arbitration and pursue their claims in court.

Judicial estoppel prevented bank from arguing opposing party could not opt out of arbitrating her accrued discrimination claims where it previously represented to trial court she could (9th Cir.).

In *Perez v. Discover Bank*, 74 F.4th 1003 (9th Cir. July 24, 2023), Illiana Perez, a noncitizen recipient of the Deferred Action for Childhood Arrivals program, entered into a student loan agreement with Citibank, N.A. that included an arbitration provision that extended to Citibank's successors. Discover Bank acquired the note of Perez's loan. Perez subsequently applied for a consolidation loan from Discover. The application contained an arbitration clause that included an opt-out provision allowing the applicant to reject arbitration within 30 days. Perez's application was declined and she sued for discrimination. Discover moved to compel arbitration. Perez opposed the motion on unconscionability grounds. Discover countered that Perez could opt out of arbitration as the 30-day deadline had not yet passed. Consequently, the trial court granted the motion. Perez then rejected the arbitration provision and moved for reconsideration. Upon reconsideration, Discover argued Perez's opt-out could not apply to claims that accrued prior to the opt-out. The trial court disagreed and declined to compel arbitration. Discover appealed.

Affirmed. A party is judicially estopped from making an argument when (1) its current position is clearly inconsistent with its earlier position; (2) the party has succeeded in persuading a court to accept its earlier position; and (3) the party, if not estopped, would derive an unfair advantage or impose an unfair detriment on the opposing party. A party derives an unfair advantage when invoking the new position creates the possibility of prevailing on the very position it successfully discredited. Here, during the reconsideration hearing, Discover argued that Perez's opt-out was ineffective in the current suit because it only applied to future claims, which contradicted its position during the hearing on the motion to compel that the arbitration provision was not unconscionable because Perez could still opt out in writing. Based on this argument, the trial court found the provision was not unconscionable. Thus, Discover had succeeded in persuading the court to accept that position. Finally, if Discover were allowed to maintain its current, inconsistent argument, it could force Perez to arbitrate her discrimination claims despite avoiding a finding of unconscionability by representing to the trial court that she could opt out of arbitrating those claims.

"A party derives an unfair advantage when invoking the new position creates the possibility of prevailing on the very position it successfully discredited."

Federal Arbitration Act grants appellate jurisdiction only to denial of motion to compel arbitration and not to denial of motion to dismiss, even though denial of both motions appeared in one order (9th Cir.).

In *Boshears v. PeopleConnect, Inc.*, 76 F.4th 858 (9th Cir. Aug. 3, 2023), Plaintiff John Boshears sued Defendant PeopleConnect, Inc., alleging that it violated his right of publicity by using his photo on its website, Classmates.com. PeopleConnect responded by seeking two forms of relief. First, it sought to compel Boshears to arbitrate his claims under section 4 of the Federal Arbitration Act (FAA). Second, it sought to dismiss Boshears's complaint under Fed. R. Civ. P. 12(b)(6), arguing that it was entitled to section 230 immunity under the Communications Decency Act (47 U.S.C. § 230). In a 26-page document labeled a single "order," the district court denied both requests for relief. PeopleConnect filed an interlocutory appeal, attempting to challenge both denials by relying on the FAA as the basis for interlocutory appellate jurisdiction.

Dismissed in part, vacated in part, and remanded. Section 16(a) of the FAA allows appeals from orders denying motions to compel arbitration. However, it does not authorize an interlocutory appeal from an order denying a motion to dismiss. An order is a written direction or command from the court, not the document in which that command is delivered to the parties. Thus, two orders – one denying the motion to compel arbitration and one denying the motion to dismiss – do not become one for purposes of Section 16(a) simply by appearing in the same document. Rather, the document prepared by the district court constituted two separate orders: denial of the motion to compel arbitration that was appealable, and denial of the motion to dismiss that was not.

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Nonsignatory car manufacturer may not compel arbitration under doctrine of equitable estoppel, where claims arose under warranty and not sales contract (rejecting *Felisilda v. FCA US, LLC*).

In *Kielar v. Superior Court (Hyundai)* (August 16, 2023) 94 Cal.App.5th 614, Plaintiff Mark Kielar sued Hyundai Motor America for breach of warranty obligations. Hyundai – a nonsignatory manufacturer - successfully moved to compel arbitration as a third-party beneficiary of the sales contract (that included an arbitration clause) between Kielar and the dealership under the doctrine of

equitable estoppel. The trial court followed *Felisilda v. FCA US LLC* (2020) 53 Cal. App. 5th 486, in granting the motion. Plaintiff sought a petition for writ of mandate challenging the order compelling arbitration.

Petition granted. The appellate court observed the issue is on review before the California Supreme Court and joined those recent decisions that have disagreed with *Felisilda*. (*Montemayor v. Ford Motor Co.* (2023) 92 Cal.App.5th 958; *Ford Motor Warranty Cases* (2023) 89 Cal.App.5th 1324, review granted July 19, 2023, S279969). The doctrine of equitable estoppel is an exception to the general rule that a nonsignatory to an agreement cannot compel arbitration, or be compelled to arbitrate, pursuant to an arbitration agreement. A nonsignatory may invoke an arbitration clause to compel a signatory to arbitrate when the claims against the nonsignatory are "intimately founded in and intertwined" with the underlying contractual obligations. Nevertheless, merely referencing an agreement with an arbitration clause is insufficient. The plaintiff's actual dependence on the underlying contract is necessary. The trial court erred in applying the doctrine because Plaintiff's claims did not emerge from the sales contract with the dealership. Instead, the complaint referenced Hyundai's written warranty, which was not a part of the sales contract with the dealership. Consequently, the appellate court granted the petition for writ of mandate and vacated the order compelling arbitration.

"The appellate court observed the issue is on review before the California Supreme Court …"

Likewise, nonsignatory car manufacturer could not compel arbitration based upon equitable estoppel where Plaintiffs' claims based upon the manufacturer's warranties were not intimately founded and intertwined with the agreements (lease and retail installment sales contract) that included arbitration clauses.

In *Yeh v. Superior Court (Mercedes-Benz USA, LLC)* (Sept. 6, 2023) 95 Cal.App.5th 264, petitioners Jaquelyn Yeh and David Chin, husband and wife, leased a Mercedes-Benz from Mercedes-Benz of Walnut Creek (the dealer), and in May 2020 at the end of the lease, signed a Retail Installment Sales Contract (RISC) with the dealer to finance the purchase of the vehicle. Both the lease and the RISC contained arbitration agreements. They alleged that Mercedes-Benz USA, LLC (MBUSA), as the manufacturer or distributor of the vehicle, provided them with two express warranties and a separate implied warranty of merchantability. They further alleged the vehicle had undisclosed defects covered by the warranties. They took the vehicle to the dealer, which was authorized by MBUSA for repairs, but despite multiple attempts, the vehicle could not be fixed. Petitioners filed suit naming only MBUSA alleging claims solely under the Song-Beverly Consumer Warranty Act. MBUSA moved to compel arbitration arguing that (1) it had standing to compel arbitration as a third-party beneficiary of both the lease and the RISC, and (2) petitioners should be compelled to arbitration under the doctrine of equitable estoppel. The trial court granted the motion. While the court rejected MBUSA's argument that it was a third-party beneficiary of the agreements, it agreed with MBUSA's equitable estoppel argument, relying on what was then the only California appellate opinion on the issue, *Felisilda v. FCA US LLC* (2020) 53 Cal.App.5th 486. Petitioners filed a petition for writ of mandate with the appellate court challenging the order compelling arbitration.

"To trigger estoppel, the plaintiff must actually rely on the terms of the agreement to impose liability on the nonsignatory."

Petition granted. A nonsignatory may invoke an arbitration clause when the causes of action against the nonsignatory are tied to obligations under the

contract. By relying on contract terms in a claim against a nonsignatory defendant, a plaintiff may be equitably estopped from repudiating an arbitration clause in the agreement. To trigger estoppel, the plaintiff must actually rely on the terms of the agreement to impose liability on the nonsignatory. Here, Petitioners alleged that MBUSA provided implied and express warranties for the vehicle that were not part of the agreements between them and the dealer. Moreover, MBUSA was not mentioned in the agreements between petitioners and the dealer; it did not have any obligations under those agreements, and Petitioners' claim against MBUSA did not rely on the terms of those agreements. Accordingly, the claims against MBUSA were not founded in the agreements, so equitable estoppel did not apply.

Superior Court must review arbitration award on the merits where arbitration agreement so provides.

"However, the court erred when it concluded the parties were at liberty to ordain in which court (superior or appellate) the review on the merits should occur in the first instance, such that it was constrained to defer to what it understood to be the parties' intent. Consequently, the judgment entered was not informed by the type of comprehensive review and assessment of the record on the merits that the arbitration agreement contemplated."

In *Housing Authority City of Calexico v. Multi-Housing Tax Credit Partners* (Aug. 28, 2023) 94 Cal.App.5th 1103, a dispute arose among participants in a project to develop affordable housing within the framework of a federal low-income housing tax-credit program. At the heart of the parties' dispute was a contract with an arbitration clause that required judicial review of any arbitration award. The agreement stated that the arbitrator's findings "shall be reviewable on appeal … as if said decision and supporting findings of fact and conclusions of law were entered by a court with subject matter and present jurisdiction. After finding in favor of the Defendants, the Plaintiffs appealed to the Superior Court, which declined to undertake a review on the merits.

Reversed. In *Cable Connection, Inc. v. DIRECTTV, Inc.* (2008) 44 Cal.4th 1334, the California Supreme Court upheld an agreement that mandated judicial review on the merits of an arbitration award. Here, the trial court correctly entered an order confirming and declining to vacate the arbitration award, such that a judgment could be entered and appealed. However, the court erred when it concluded the parties were at liberty to ordain in which court (superior or appellate) the review on the merits should occur in the first instance, such that it was constrained to defer to what it understood to be the parties' intent. Consequently, the judgment entered was not informed by the type of comprehensive review and assessment of the record on the merits that the arbitration agreement contemplated. Therefore, the judgment was inherently incomplete requiring reversal.

While employers could compel arbitration of former Applebee's employees' individual PAGA claims, the aggrieved employees retained standing to bring their non-individual PAGA claims in court.

In *Barrera v. Apple American Group, LLC* (Aug.31, 2023) 2023 WL 5620678, Plaintiffs Mario Barrera and Francisco Varguez sued defendants—a nationwide restaurant chain—to recover civil penalties under the Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.) for various Labor Code violations suffered by them and by other employees. Defendants moved to compel arbitration. The trial court denied the motion. Defendants appealed based on the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.) and *Viking River Cruises, Inc. v. Moriana,* 142 S.Ct. 1906 (2022), claiming Plaintiffs were compelled to arbitrate their individual claims and lost standing to pursue their remaining non-individual PAGA claims.

"However, plaintiffs retain standing for their non–individual PAGA claims after their individual claims are compelled to arbitration if they allege that they are an aggrieved employee "who was employed by the alleged violator," and someone "against whom one or more of the alleged violations was committed."

Reversed in part. PAGA claims based on violations the plaintiff personally sustained are "individual" claims that may be subjected to mandatory arbitration, while PAGA claims based on violations that other employees sustained are "non–individual" claims that may not be subjected to mandatory arbitration. However, plaintiffs retain standing for their non–individual PAGA claims after their individual claims are compelled to arbitration if they allege that they are an aggrieved employee "who was employed by the alleged violator," and someone "against whom one or more of the alleged violations was committed." Here, the signed arbitration provision covered Plaintiffs' PAGA claims since it applied to "all legal claims." However, the qualifying language that any arbitration between the parties must be made "on an individual basis" indicated that only individual PAGA claims may be arbitrated. It was irrelevant that the arbitration provision did not mention PAGA claims by name based on the provision's unambiguous language. In short, Plaintiffs maintained standing to bring their representative non–individual PAGA claims because they alleged that they suffered Labor Code violations while employed by the Defendants.

Receiver appointed to recover profits paid to investors in Ponzi scheme may be compelled to arbitrate under agreements signed by receivership entities (9th Cir.).

In *Winkler v. McCloskey*, 2023 WL 6301667 (Sept. 28, 2023, 9th Cir.), the district court appointed Geoff Winkler as receiver to recover profits paid to investors in a Ponzi scheme operated through Essex Capital Corporation, which was subject to a Securities and Exchange Commission enforcement action. Winkler filed an action against various investors alleging fraudulent transfers from the receivership entities to the investors. The investors moved to compel arbitration bases upon operating agreements with Essex that included arbitration clauses. The district court denied the motion under the holding in *Kirkland v. Rune (In re EPD Investment Co.)*, 821 F.3d 1146 (9th Cir. 2016), that affirmed the bankruptcy court's denial of a motion to compel arbitration by a bankruptcy trustee who engaged in a Ponzi scheme. The investors appealed.

"Although a receiver's recovery ultimately benefits defrauded investors, a receiver stands in the shoes of the receivership entities, not in the shoes of the creditors."

Reversed and remanded. *Kirkland* did not control because the standing of a bankruptcy trustee is different from that of a receiver. Unlike a bankruptcy trustee, a receiver has no explicit statutory authority to act on behalf of the receivership entity's creditors. Although a receiver's recovery ultimately benefits defrauded investors, a receiver stands in the shoes of the receivership entities, not in the shoes of the creditors, and may be bound by an arbitration clause signed by the receivership entities. However, the fact that Winkler was acting on behalf of the receivership did not conclusively establish that he was bound by the arbitration clauses in the operating agreements since the district court did not analyze whether Winkler's claims under the California Uniform Fraudulent Transfer Act arose out of those agreements.

Finally, the Federal Arbitration Act did not preempt the California Division of Labor Standards Enforcement's action against Uber and Lyft because the state was not a party to individual driver's arbitration agreements.

In *In re Uber Technologies Wage and Hour Cases* (Sept. 28, 2023) 2023 DJDAR 9981, the People of the State of California and the Labor Commissioner through

the Division of Labor Standards Enforcement sued Uber and Lyft, alleging that they violated California's Unfair Competition Law by misclassifying rideshare and delivery drivers as independent contractors, thereby depriving them of wages and benefits afforded with employment status. Defendants moved to compel arbitration under the arbitration agreements they executed with the drivers. They also argued that the Federal Arbitration Act precluded Plaintiffs from pursuing in court some of the types of relief sought, such as restitution under the UCL, and unpaid wages and business expenses, characterizing these forms of relief as "individualized" or "driver–specific." The trial court denied the motions to compel arbitration and Defendants appealed.

"Recent decisions by California appellate courts have followed Waffle House, holding that public agencies bringing enforcement actions as authorized by statute are not bound by arbitration agreements between private parties."

Affirmed. There are six theories by which a non–signatory may be compelled to arbitrate: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil–piercing or alter ego; (5) estoppel; and (6) third–party beneficiary. Here, the People and the Labor Commissioner were not parties to the arbitration agreements at issue, and no other theory supported compelling arbitration. In *E.E.O.C. v. Waffle House*, 534 U.S. 279 (2002), the Supreme Court held that the EEOC was not bound by employee arbitration agreements because it had discretion to determine whether to file suit and what relief to pursue. Recent decisions by California appellate courts have followed *Waffle House*, holding that public agencies bringing enforcement actions as authorized by statute are not bound by arbitration agreements between private parties. The trial court's order denying the motions to compel arbitration was correct and affirmed.

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