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PERSPECTIVE

The Adolph and post-Viking River world of PAGA cases

By Wynne Carvill

Since last year's decision by the Supreme Court of the United States in *Viking River Cruises, Inc. v. Moriana* (2022) U.S. ___, 142 S.Ct. 1906, there has been considerable uncertainty regarding the future of Private Attorneys General Act (PAGA) cases in California. With the recent Supreme Court of California decision in *Adolph v. Uber Technologies, Inc.* (S274671, July 17, 2023), a great deal of that uncertainty is now resolved.

In *Viking River*, the court held that a PAGA plaintiff's individual claim could be sent to arbitration notwithstanding California law to the contrary, and once the individual claim was sent to arbitration, as a matter of federal law on standing, that individual plaintiff would no longer be able to pursue the representative or non-individual action in federal court. However, the decision left open the possibility for state law to develop in a way that would allow a representative action to proceed even if the individual claim was sent to arbitration. As a result, after *Viking River*, some California lower courts ruled that an arbitration clause purporting to waive non-individual PAGA claims is unenforceable under state law and that the individual PAGA plaintiff continues to have standing to pursue non-individual PAGA claims even after the individual claim is sent to arbitration. (E.g., *Nickson v. Shemran, Inc.* (2023) 90 Cal.App.5th 121; *Seifu v. Lyft, Inc.* (2023) 89 Cal.App.5th 1129.)

These issues arose in an unpublished decision decided shortly before *Viking River*. (*Adolph v. Uber*



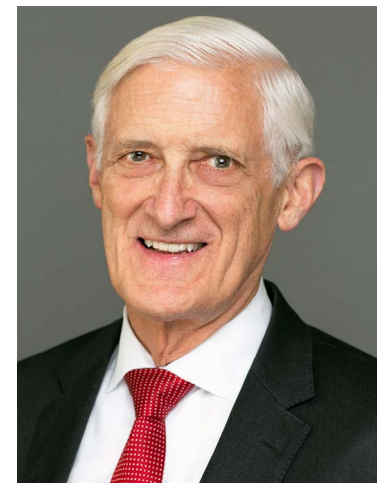
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Technologies, Inc. (Apr. 11, 2022 WL 1073583).) Relying on earlier California law (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 379), the appellate court in *Adolph* held that PAGA claims were not subject to arbitration and that an arbitration clause prohibiting an employee from bringing a PAGA case on behalf of other employees was unenforceable. Immediately after *Viking River*, the California Supreme Court took review of *Adolph* to address the issue of “whether an aggrieved employee who has been compelled to arbitrate claims under PAGA ... maintains statutory standing to pursue ‘PAGA claims arising out of events involving other employees’ ... in court.” (Slip Op. at 2.) In its *Adolph*

decision, the California Supreme Court answered that question affirmatively.

On the key issue of standing under the PAGA statute, the court noted that a plaintiff must be what the statute defines as an “aggrieved employee,” which means “any person employed by the alleged violator and against whom one or more of the alleged violations was committed.” (Labor Code § 2699(c).) Standing thus depends on the fact that the plaintiff has suffered one or more violations; it does not depend on whether the plaintiff's individual claim has been ordered to arbitration. Such an order “does not strip the plaintiff of standing to litigate non-individual claims in court.” (Slip Op. at 16.)

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On the other hand, what happens in arbitration does affect standing. If the arbitrator determines that a plaintiff is an aggrieved employee and that determination is confirmed and reduced to a final judgment, then that determination is binding on the court and the plaintiff has standing to continue to litigate his non-individual claims. Conversely, if the arbitrator decides that the plaintiff is not an aggrieved employee and that is confirmed and reduced to a final judgment, then he or she is not an aggrieved employee and does not have standing to pursue his non-individual claims in court. (Id. at 17.)

In the context of rejecting the ar-

gument that sending the individual PAGA claim to arbitration has the effect of severing the individual and representative components of the case into separate and distinct actions, the court notes that California Code of Civil Procedure § 1281.4 contemplates staying of the court action when an issue involved in the case is ordered to arbitration. This reference suggests that, in PAGA cases where the individual claim is sent to arbitration, the usual practice will be to stay the court action until the arbitration is concluded. (Id. at 18.) One obvious virtue of this approach is to avoid conflicting determinations on whether the plaintiff did or did

not suffer a statutory violation.

This decision confirms the approach taken by most intermediate appellate courts in the wake of *Viking River* and removes the uncertainty that existed in some quarters regarding how PAGA cases will proceed in the future. For better or worse, PAGA litigation will continue to be a major arena for California employment litigation, but it will now often be a two-step process if there is a valid arbitration provision. First, the contest will be in arbitration and concern whether the individual plaintiff suffered a statutory violation, and then if plaintiff succeeds, the representative action covering

the other potentially aggrieved employees will proceed in the trial court.

Given this two-step process, both sides may continue to benefit from mediating the case before it proceeds to arbitration. The outcome of the latter could either end the plaintiff's case entirely or open the defendant to major discovery and related burdens that often arise in representative actions. An early resolution may benefit everyone.

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