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Supreme Court Holds FAA Preempts California Prohibition on Waiver of Joint PAGA Claims

On June 15, 2022, the Supreme Court held in *Viking River Cruises* v. *Moriana* that a rule of California law that prohibits contractual waivers of claims under California's Private Attorneys General Act is invalid as applied to an employee plaintiff bringing an action on behalf of other employees.

Background

Under California's Private Attorneys General Act (PAGA), an employee may act as a private attorney general to recover civil penalties from an employer for violation of the California Labor Code. A plaintiff in a PAGA action is considered to be acting as the State's agent, with 75% of the recovery paid to the State. A PAGA action is similar to a class action or a collective action in that the employee seeks damages as a representative of other employees. This case involves the interaction between PAGA actions and the FAA.

Respondent Angie Moriana worked as a sales representative for petitioner Viking River Cruises for about a year. After leaving the company, she filed a PAGA suit against Viking, alleging that she and other Viking employees had sustained violations of the California Labor Code. Viking invoked Moriana's employment contract, which required her to bring any employment disputes through individualized arbitration, and it moved to compel individual arbitration and to dismiss Moriana's non-individual claims.

Viking and Moriana disagreed as to which line of precedent should govern the relationship between a PAGA claim and the FAA. In 2014, the California Supreme Court determined that an arbitration agreement was unenforceable as to a PAGA claim because such an agreement would constitute a waiver of public protections. *Iskanian* v. *CLS Transp. Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014). In effect, *Iskanian* held that, because every PAGA claim is understood to be the State's claim and the State did not agree to arbitrate, such a claim cannot be subject to an arbitration agreement and falls outside the FAA. Before the United States Supreme Court, Moriana argued that California law has clearly and consistently invalidated contractual waivers of the ability to bring a representative claim in any forum and the arbitration agreement should not be enforced with respect to Moriana's PAGA action.

Viking, by contrast, argued that the *Iskanian* rule is preempted by the FAA and that enforcement of the *Iskanian* rule in California is incompatible with Supreme Court precedent, including *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011), and *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612 (2018). In those cases, the Supreme Court held that the FAA preempted California law's preclusion of bilateral arbitration with respect to class actions and collective actions, respectively. Relying on those cases, Viking argued that PAGA claims are similarly preempted by the FAA and that Moriana's arbitration agreement with Viking should be enforced.

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The trial court denied Viking's motion to compel arbitration, and the California Court of Appeal affirmed. After the California Supreme Court denied certiorari, the United States Supreme Court granted review to determine whether the FAA requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA.

The Supreme Court's Decision

In an 8-1 decision, the Supreme Court reversed the decision of the California Court of Appeal and held that the *Iskanian* rule is preempted by the FAA "insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." Justice Alito wrote the majority opinion, joined by Justices Breyer, Sotomayor, Kagan, and Gorsuch, with Chief Justice Roberts and Justices Kavanaugh and Barrett joining in part. Justices Sotomayor and Barrett also filed concurring opinions, with the latter joined by Justice Kavanaugh and in part by Chief Justice Roberts. Justice Thomas dissented.

The majority opinion explained that the word "representative" is used in the PAGA context in two different senses—first, in that the employees act as representative agents of the State, and second, in that a PAGA action may be brought on behalf of other employees. In the first sense, every PAGA action is representative, but in the second sense, a PAGA action may be either individual (arising out of the plaintiff's own injury) or representative (premised on violations sustained by other employees). With respect to the second category, the Court noted that it would be incompatible with the FAA to compel a party to submit to class arbitration when it had only agreed to traditional bilateral arbitration. Under the FAA, parties have control over the issues they choose to subject to arbitration, and allowing additional claims through this sort of class joinder would eliminate that control.

The Court found that the same was not true with respect to the first category of cases—where the plaintiff acts as an agent of the State. In coming to that conclusion, the Court disagreed with Viking's suggestion that the *Iskanian* rule's total prohibition on PAGA waivers is preempted by the FAA because all PAGA claims are representative. Instead, the Court found that a single agent acting for a single principal is consistent with bilateral arbitration.

Based on that distinction, the Court held that the FAA preempts the *Iskanian* rule with respect to non-individual claims, but that the *Iskanian* rule remains valid insofar as it prohibits a "wholesale waiver of PAGA claims" on the grounds that the plaintiff is acting as an agent of the State. As a result, the Court concluded that Viking is entitled to compel arbitration with respect to Moriana's individual claim, and once that claim is split from the non-individual claims, Moriana lacks standing to litigate non-individual claims in court.

In a brief concurrence, Justice Sotomayor noted that California courts have "the last word" on whether the Court's understanding of California law with respect to standing is correct, and that the California legislature could modify PAGA standing requirements for non-individual actions within the confines of the California and federal constitutions.

Justice Barrett also wrote separately, joining the Court's opinion only with respect to its discussion of the incompatibility between claim joinder under PAGA and the FAA. She wrote in concurrence to say that she would go no further than that, and viewed the remaining discussion—including the discussion of Moriana's standing to litigate non-individual claims—to be unnecessary. Justice Kavanaugh joined Justice Barrett's concurrence in full, and Chief Justice Roberts joined in part. Unlike Justices Barrett and Kavanaugh, however, the Chief Justice joined the Court's discussion of the history of the *Iskanian* rule and the facts involved in the present dispute.

Justice Thomas dissented on the ground that he does not view the FAA as applying to state-court proceedings. He thus would have affirmed the judgment of the California Court of Appeal.

Implications

The *Viking River Cruises* decision is another in a line of cases in which the Supreme Court favors enforcement of an arbitration agreement more strongly than California courts. The opinion is notable in that it garnered support from eight of the nine

Justices, in full or in part. But the Court did not fully accept Viking's position as to the FAA's preemptive effect, and the disagreement among the Justices as to questions of standing makes the full impact of the decision unclear. In particular, the concurring opinions leave open the door for California courts or the legislature to modify the scope of an employee's statutory standing under PAGA in an effort to allow them to bring non-individual claims in court.

It also remains to be seen how this decision will affect California's AB 51, which prohibits the use of mandatory arbitration agreements as a condition of employment. In response to a challenge to that law, the Ninth Circuit upheld the ban, *Chamber of Commerce of United States* v. *Bonta*, 13 F.4th 766 (9th Cir. 2021), but it has deferred a petition for rehearing en banc while awaiting the *Viking River Cruises* opinion. Employers should continue to monitor those issues and ensure that existing arbitration agreements take account of any changing circumstances.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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