Resolution Of PAGA Waiver Issue Reserved For Later Date

(June 5, 2015, 11:36 AM ET) --

Cary D. Sullivan

On June 1, 2015, the United States Supreme Court denied certiorari in Bridgestone Retail Operations LLC v. Brown, No. 14-790. The cert petition in Bridgestone arose out of the California Supreme Court's order remanding the case in light of its decision in Iskanian v. CLS Transportation Los Angeles LLC, 59 Cal. 4th 348 (2014). In Iskanian, the California Supreme Court held that a waiver of a representative Private Attorneys General Act claim in an arbitration clause of an employment contract was unenforceable.[1] On Jan. 20, 2015, the United States Supreme Court denied a petition for a writ of certiorari in CLS Transportation Los Angeles LLC v. Iskanian, No. 14-341. Notwithstanding these cert denials, another federal appellate court soon will provide some clarity to the enforceability of PAGA waivers.

At least three cases involving PAGA waivers are pending before the Ninth Circuit Court of Appeals: Hopkins v. BCI Coca-Cola Bottling Company, No. 13-56126; Sierra v. Oakley Sales Corp., No. 13-55891; and Sakkab v. Luxottica Retail North America Inc., No. 13-55184. Hopkins and Sierra are on appeal from the same judge from the U.S. District Court for the Central District of California. Sakkab is on appeal from the U.S. District Court for the Southern District of California.

Both Hopkins and Sakkab involve underlying disputes over the alleged misclassification of employees, which affected overtime pay and Sierra involves the miscalculation of employees' regular rate of pay used in calculating overtime pay. All three cases involve employment agreements that contain arbitration clauses and class waivers. They also include waivers of representative claims, which would include representative PAGA actions. The relevant portions of the employment agreements in each case read as follows:

- Hopkins: “[T]his arbitration agreement requires you and us ... to arbitrate any claims arising out of or related to your employment with BCI” and “[i]n addition, both I and BCI are giving up and waiving our rights to participate in class litigation or other representative or collective actions.”

- Sakkab: “You and company each agree that, no matter in what capacity, neither you nor the company will ... (2) file (or join, participate or intervene in) a class-based lawsuit or court case (including any collective action) that relates in any way to your employment with the company or (3) file (or join, participate or intervene in) a class-based arbitration (including any collective arbitration claim) with regard to any claim relating in any way to your employment with the company to the extent permitted by applicable law.” And “[t]he company expressly does not agree to arbitrate any claim on a class or collective basis.”

- Sierra: “You and Oakley each agree that, no matter in what capacity, neither you nor Oakley will ... (2) file (or join, participate or intervene in) a class-based lawsuit or court case (including any collective action) that relates in any way to your employment with Oakley; or (3) file (or join, participate or intervene in) a class-based arbitration (including any class or collective arbitration claim) with regard to any claim relating in any way to your employment with Oakley.” And “Oakley expressly does not agree to arbitrate any claim on a class or collective basis.”

When the plaintiffs filed these cases, alleging class and representative PAGA claims, the defendants moved to compel arbitration under the employment agreements. In each case, the district court granted the motion and dismissed the case, holding that the class and PAGA waivers are valid and enforceable.

On appeal, the appellants in each case argue that Iskanian is controlling and that PAGA waivers are unenforceable as a matter of state law. As the employment agreements bar representative PAGA claims, the argument goes, they deny employees the substantive statutory rights and remedies provided by PAGA, rendering the agreements unenforceable.

The appellants argue that the Federal Arbitration Act (FAA) does not preempt state contract laws that protect substantive rights from forfeiture and that California state contract law compels the conclusion that the employment agreements are unenforceable. The appellants distinguish AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), by arguing

that Concepcion barred class action procedures but did not prohibit any particular claims.

The appellees argue that the FAA preempts any California rule that attempts to bar a waiver of the right to bring representative PAGA claims, and because only Congress can exempt a law (PAGA or otherwise) from the FAA, the FAA requires that employment agreements be enforced according to their terms. The appellees argue that PAGA claims may be brought on an individual basis and that an individual's right to bring a representative PAGA claim is waiveable. The appellee in Hopkins also argues that regardless of whether an individual PAGA claim can be brought, the "effective vindication" exception applies only to federal statutes and, even if it could apply to state statutes, it would not apply here because the appellant may still recover in arbitration for his individual claims.

The Ninth Circuit heard oral argument in Hopkins, Sierra and Sakkab on June 3, 2015. The panel consisted of Judge Milan Smith, Judge Norman Randy Smith and Judge Joan Lefkow, sitting by designation from the Northern District of Illinois. During oral argument Judge N.R. Smith asked the appellants whether the state is the real party in interest in PAGA claims and how the current cases were similar to EEOC v. Waffle House Inc., 534 U.S. 279 (2002). Judge N.R. Smith pointed out that Justice John Paul Stevens in the Waffle House decision relied heavily on the EEOC's level of control over the action and the fact that the EEOC did not consent to the arbitration agreement in Waffle House; whereas the appellants here did agree to the arbitration agreements in these cases. Judge M. Smith focused on the similarity of PAGA claims to qui tam actions and he questioned whether the level of state control over a PAGA claim really matters. Judge Lefkow asked the lawyer for the amicus parties in Hopkins whether enforcing the PAGA waiver would eliminate the right to pursue a remedy. Amicus counsel responded that it would not because (1) the employees still can bring individual PAGA claims and (2) the state retains the right to bring a PAGA claim. Amicus counsel also argued that, even if it did, the effective vindication doctrine applies only to federal law, not state statutes.

If the Ninth Circuit reverses the district courts in these cases, there will be an opportunity for en banc review by eleven members of the court or for a writ of certiorari to the U.S. Supreme Court. If the Ninth Circuit affirms — upholding the enforceability of PAGA waivers — it will create a conflict between a federal circuit court and a state supreme court. Either way, the Ninth Circuit's decision will provide clarity for federal district courts in California dealing with PAGA waivers. But it will not affect California state courts' obligation to follow Iskanian. If the Ninth Circuit splits with the California Supreme Court, there will be

inconsistent results across state and federal courts in California, which would promote forum shopping and provide further support for a future cert petition to the U.S. Supreme Court.

The denial of certiorari in Bridgestone does not indicate that the Supreme Court ultimately will allow the Iskanian decision to stand; the court may grant cert in one of the pending Ninth Circuit cases after they are decided. For now, Bridgestone will be remanded to the California Court of Appeal for reconsideration in light of Iskanian. Nevertheless, it is likely that federal district courts in California will continue to reject the reasoning of Iskanian and enforce PAGA waivers unless or until the Ninth Circuit decides otherwise. See, e.g., Lucero v. Sears Holdings Mgmt. Corp., No. 14-cv-1620 AJB (WVG), (S.D. Cal. Dec. 2, 2014) ("The FAA preempts California's rule against arbitration agreements that waive an employee's right to bring representative PAGA claims."); Mill v. Kmart Corp., No. 14-cv-02749-KAW, 2014 (N.D. Cal. Nov. 26, 2014) ("In accordance with Concepcion, the FAA likewise preempts California's rule against PAGA waivers.") The U.S. Supreme Court obviously is aware of this issue and may just be waiting for the right case to address it.

—By Cary D. Sullivan and Jaclyn B. Stahl, Jones Day LLP

Cary Sullivan is a partner and Jaclyn Stahl is an associate in Jones Day's Irvine, California, office.

DISCLOSURE: Jones Day filed the petition for writ of certiorari on behalf of Bridgestone in this matter.

[1] A "PAGA" claim is a Private Attorney General Act claim, which allows an employee to bring a representative action "on behalf of himself or herself and other current or former employees" to recover civil penalties. The penalties are divided between the aggrieved employee and the state, specifically the Labor and Workforce Development Agency. See Cal. Labor Code § 2698 et seq.