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9th Circ. Illustrates Split Over Calif. PAGA Claim Treatment


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Law360, New York (March 15, 2017, 1:25 PM EDT) -- In reversing the district court's ruling in Valdez v. Terminix[1], the Ninth Circuit recently highlighted the difference in federal and state treatment of California Private Attorneys General Act claims. The federal circuit court ruled that PAGA claims may be compelled to arbitration notwithstanding the fact that the government, while technically a party to the litigation, is not a party to the arbitration agreement. The court felt strongly enough that "the dispositive issue or issues have been authoritatively decided" that it denied oral argument. But while this issue may be settled within the Ninth Circuit, California state courts have reached the opposite conclusion, demonstrating the growing split between state and federal courts on the issue. Compare Wulfe v. Valero Ref. Co.-California[2] with Hernandez v. Ross Stores Inc.[3]

Acceptance of PAGA Arbitration Within the Ninth Circuit

Following Iskanian v. CLS Transportation Los Angeles LLC[4], the Ninth Circuit held in Sakkab v. Luxottica Retail North America Inc. that agreements "waiving the right to bring representative PAGA claims ... are unenforceable under California law."[5] District courts within the Ninth Circuit, however, have routinely held that PAGA claims may be compelled to arbitration. See, e.g., Hernandez v. DMSI Staffing LLC[6] (PAGA claim does not require procedures "inconsistent with the FAA," because it does not require class certification, notice, or opt-out, and its preclusive effect is limited); Zenelaj v. Handybook Inc.[7] ("Defendant in this case has not shown that arbitration of these claims would be particularly complex, cumbersome, time-consuming, or expensive."); Mohamed v. Uber Technologies Inc.[8] ("PAGA imposes no procedural requirements on arbitrators ... beyond those that apply in an individual labor law case.").

The Ninth Circuit addressed this distinction in Sakkab, holding that "[t]he Iskanian rule prohibiting waiver of representative PAGA claims does not diminish parties' freedom to select informal arbitration procedures." While the Sakkab court recognized the potential problem of an individual's employment contract binding non-signatories to arbitration, it reasoned that "[b]ecause a PAGA action is a statutory action for penalties brought as a proxy for the state, rather than a procedure for resolving the claims of other employees, there is no need to protect absent employees' due process rights in PAGA arbitrations." The Ninth Circuit confirmed this position last year in Wulfe, which affirmed a federal district court's order compelling arbitration of a PAGA claim under an arbitration provision similar to the one in Valdez, which required "any legal dispute … [to] be submitted to final and binding arbitration rather than through the courts or to a jury" and expressly applied to

"any dispute with the Company or its employees, such as personal injury claims, or claims of discrimination based on race, national origin, gender, religion, age or disability or claims under any federal or state statute."

Rejection of PAGA Arbitration in California State Court

California state courts have gone the opposite direction. Last December, for example, the California Court of Appeal affirmed the trial court's ruling in Hernandez v. Ross Stores Inc.[9], denying a motion to compel arbitration of a portion of a PAGA claim. Similar to Valdez, the Hernandez arbitration provision applied to "any disputes arising out of or relating to the employment relationship." In Hernandez, however, the state court of appeal rejected the argument that "Hernandez must first arbitrate her individual disputes showing she was an 'aggrieved party' under PAGA" before she could proceed with her PAGA claim in court. The court focused on the fact that "this case involves a dispute, claim, or action brought on behalf of the state by Hernandez [while] Hernandez did not allege any individual claims or disputes."

This was at least the second time the California Court of Appeal has rejected a litigant's attempt to compel arbitration of a dispute underlying a PAGA claim where no separate 'claim' had been made. See Williams v. Superior Court.[10] Like Hernandez, the Williams court also rejected the notion that PAGA claims could be compelled to arbitration. The court reasoned that, by its nature, a petitioner "does not bring [a] PAGA claim as an individual claim, but as the proxy or agent of the state's labor law enforcement agencies ... [and thus] cannot be compelled to submit any portion of its representative PAGA claim to arbitration, including whether he was an 'aggrieved employee.'"

Why the Difference?

Valdez provides another data point in the growing split between federal courts in the Ninth Circuit and California state courts on the issue of whether PAGA claims may be compelled to arbitration. The distinction seems to be based on how courts characterize PAGA claims — whether courts view the claims as being brought by an individual or the state. The federal district court in Valdez addressed this issue:

> On the one hand, the claim belongs to the state, and the state has not waived the judicial forum. The logical underpinning of Iskanian — lack of state consent to modification of the state's claim — suggests that an individual plaintiff also cannot impose a particular forum on the state's claim, either. On the other hand, the state may have somewhat less interest in the specific choice of forum than it does in enforcement and recovery of some kind, and even a government agency prosecuting the state's claim may be to some degree constrained by the actions of an individual plaintiff.

The U.S. Supreme Court previously addressed the inverse situation in EEOC v. Waffle House Inc.[11] In Waffle House, an individual entered into an employment agreement containing an arbitration provision with Waffle House. When the U.S. Equal Employment Opportunity Commission later attempted to assert an ADA claim, on behalf of the individual, Waffle House moved to compel arbitration. The court was presented with the question of "whether the fact that [the employee] has signed a mandatory arbitration agreement limits the remedies available to the EEOC." The court held that "[t]he statute clearly makes the EEOC the master of its own case," and "the FAA does not require parties to arbitrate when they have not agreed to do so."

With PAGA claims, the state obviously has not agreed to arbitration. On the other hand, individual plaintiffs are masters of their own cases with control over the litigation. Additionally, PAGA's notice provisions allow the state to enforce applicable Labor Code provisions before an individual files a PAGA claim.

Ultimately, this disparate treatment serves only to reinforce the traditional plaintiff and defense strategies. Plaintiffs will look to file and keep their claims in state court, while corporate defendants will look for ways to remove the claims so they can compel arbitration.

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[1] Valdez v. Terminix, No. 15-56236, 2017 WL 836085 (9th Cir. Mar. 3, 2017)

[2] Wulfe v. Valero Ref. Co.-California, 641 F. App'x 758 (9th Cir. 2016)

[3] Hernandez v. Ross Stores Inc., No. E064026, 2016 WL 7131651 (Cal. Ct. App. Dec. 7, 2016)

[4] Iskanian v. CLS Transportation Los Angeles LLC, 59 Cal.4th at 382–83 (2014)

[5] Sakkab v. Luxottica Retail N. Am. Inc., 803 F.3d 425, 430 (9th Cir. 2015)

[6] Hernandez v. DMSI Staffing LLC, No. C–14–1531 EMC, 2015 WL 458083, at *6 (N.D.Cal. Feb. 3, 2015)

[7] Zenelaj v. Handybook Inc., No. 14–CV–05449–TEH, 2015 WL 971320, at *8 (N.D.Cal. Mar. 3, 2015)

[8] Mohamed v. Uber Technologies Inc., No. C–14–5200 EMC, 2015 WL 3749716, at *25 (N.D. Cal. June 9, 2015)

[9] Hernandez v. Ross Stores Inc., No. E064026, 2016 WL 7131651 (Cal. Ct. App. Dec. 7, 2016)

[10] Williams v. Superior Court, 237 Cal. App. 4th 642 (2015)

[11] EEOC v. Waffle House Inc., 534 U.S. 279 (2002)