California Unfair Competition Defense Podcast

Episode 9

Greenberg Traurig, LLP

Speaker 1 (00:00):

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Lisa Simonetti (00:21):

Greetings all, and welcome to GT's Unfair Competition Podcast. I'm Lisa Simonetti, and my co-host is Greg Nylon. Today we are pleased to have a guest speaker, Dan Turner. Dan, can you tell us a little bit about your practice?

Daniel Turner (00:34):

Thank you, Lisa. I'm a mediator and an arbitrator with Adjudicate West's employment panel. I'm based in Los Angeles, and I mediate all sorts of employment related disputes ranging from individual harassment and discrimination actions, to wage and hour class actions, as well as PAGA representative actions.

Lisa Simonetti (00:54):

Thank you, Dan. So Greg, do you want to tee up the discussion for today?

Greg Nylen (00:59):

Sure. For years, there was really nothing unique about arbitrating UCL claims, including so-called private attorney general claims. And on that point, you can take a look at a case called Myers v. Univest Home Loan Inc. in 1993 West Law 307747. It's a northern district of California 1993 case which ordered arbitration of the UCL private attorney general claims at issue in the case. The California Supreme Court then carved out an exception for CLRA claims that was later extended to UCL claims. And that line of authorities started with Broughton v. Cigna Healthplans. That's 21 Cal.4th 106, 1999, in which the California Supreme Court held that injunctions under the CLRA are "Beyond the scope of an arbitrator to properly enforce," but damage claims under the statute may be severed and are arbitral. Then Broughton was extended to UCL actions by several courts of appeal, which held that claims to restitution under the statute may be severed and are arbitral restitutionary discouragement.

(02:13):

One of those cases was Warren Guthrie v. HealthNet. That's 84 Cal.App.4th 804 at 817, a 2000 case. Also, take a look at Coast Plaza Doctor's Hospital v. Blue Cross of California. That's 83 Cal.App.4th 677 at 693. 2000 case which held also that the injunction portion of the case should be stayed pending completion of arbitration on the restitutionary discouragement claim. I can also take a look at Groom v. HealthNet. That's 82 Cal.App.4th 1189 at 1198-99, 2000 case. And also take a look at Arriaga v. Cross County Bank, 163 F. Supp. 2nd 1189 at 1198, Southern District of California 2001 case. That case refused

to follow Broughton with respect to arbitration agreements governed by the FAA and ordered the entire UCLA claim to arbitration. The cases I just reviewed should be read in light of the United States Supreme Court's decision holding that the FAA does permit arbitration agreements to contain class action, and in some cases, representative action waivers.

Lisa Simonetti (03:28):

Okay, Dan. Let's circle back to the PAGA piece. Can you give us a brief overview of what PAGA is exactly?

Daniel Turner (03:34):

Sure. PAGA stands for the Private Attorney General Act of 2004 that California legislature adopted in that year. Basically, PAGA authorizes "aggrieved employees" to file lawsuits to recover civil penalties on behalf of themselves, other employees, and the state of California, provided they satisfy certain administrative prerequisites with the state of California.

Lisa Simonetti (04:05):

What is an "aggrieved employee," and what administrative requirements must they satisfy in order to file a PAGA action?

Daniel Turner (04:13):

PAGA defines an aggrieved employee as "any person who is employed by the alleged violator, in this case the employer, and against whom one or more of the alleged Labor Code violations were committed." And that's stated right in the statute under Labor Code Section 2699 C. In order for an aggrieved employee to satisfy PAGA's administrative requirements, an employee must file notice. It's typically a letter or a copy of the proposed complaint with the Labor Workforce Development Agency, otherwise known as the LWDA, it's a California agency, identifying the specific Labor Code violations the employer has allegedly violated.

(04:59):

Once the aggrieved employee properly exhausts his or her administrative remedies with the LWDA, he or she is deputized, essentially, by the state of California to act on behalf of the state of California and file a PAGA action. This means that the aggrieved employee may file a PAGA action that seeks penalties for any Labor Code violations that may have occurred against him or her as well as against other employees of the employer. If there is any recovery by either settlement agreement or judgment, 75% of any civil penalties assessed are to be given to the state of California, while the remaining 25% are distributed to the aggrieved employees. So if it sounds like a bounty hunter law, to some extent, it is.

Lisa Simonetti (05:56):

Since PAGA was adopted in 2004, how often has it been used by "aggrieved employees" to enforce alleged violations of the Labor Code?

Daniel Turner (06:05):

Well, interestingly, there were not all that many PAGA notices filed with the LWDA in the years following the passage of PAGA in 2004. In fact, from 2004-2007, there were only about 400 PAGA notices filed with the LWDA each year. Then starting in 2012, a year in which there were 2,000 PAGA notices filed with the LWDA, PAGA filings really took off. This upward trend continued over the next several years as there were approximately 4,400 PAGA notices that were filed each year from 2014-2018.

Greg Nylen (06:50):

Why is it that the filing of PAGA actions really exploded in 2012?

Daniel Turner (06:55):

It really all starts with the US Supreme Court's 2011 decision in a case entitled AT&T Mobility v. Concepcion. It was a case that permitted the use of class action waivers in arbitration agreements governed by the Federal Arbitration Act. In that case, plaintiffs entered into an agreement for the sale and servicing of cellular phones with AT&T. The contract provided for arbitration of disputes between the parties. However, it also required that claims be brought in the party's individual capacity, and not as a plaintiff or as a class member in any purported class or representative proceeding. The way the case proceeded was, plaintiff filed a complaint which was later consolidated with a punitive class action, alleging that AT&T had engaged in false advertising and fraud by charging sales tax on phones it advertised as free. AT&T moved to compel arbitration under the terms of the contract, and plaintiff supposed that motion by arguing that the arbitration agreement was unconscionable under California law as it disallowed class-wide procedures.

(08:11):

The trial court and the Ninth Circuit denied the motion to compel arbitration because the ruling of the arbitration provision was unconscionable because, number one, AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions. And two, the holding in Discover Bank was not preempted by the FAA, because that rule was simply a refinement of the unconscionability analysis applicable to contracts generally in California. The US Supreme Court weighs in and reverses the Ninth Circuit, ultimately holding that the Federal Arbitration Act or FAA preempted previous decisions prohibiting enforcement of arbitration agreements containing class action waivers. Accordingly, from 2011 forward, businesses and employers began adopting arbitration agreements containing class action waivers that required consumers and employees to bring claims only in an individual arbitration in their individual capacity, rather than in court as part of a class action.

Greg Nylen (09:28):

And you mentioned Discover Bank. The cite for that is Discover Bank v. Superior Court, 36 Cal.4th 148 at 153, 2005. It's important to note that Concepcion held only that class action waivers were permitted. It did not hold that the FAA preempted state law regarding the unconscionability of a waiver of an employee's right to pursue a representative action under PAGA. And on that point, see Brown v. Ralph's Grocery Company 197 Cal.App.4th 489 at 503, it's a 2011 case. And also see Kilgore v. KeyBank NA, 718 F.3rd 1052 at 1060, Ninth Circuit 2013 in which the court declined to address whether the Broughton rule we talked about earlier is preempted by the FAA, because the Ninth Circuit held that claims for injunctive relief that only benefited approximately 120 class members and related only to past harms as the conduct at issue had ceased fell outside Broughton. Dan, did California court's weigh in on whether the FAA preemption employees right to pursue a PAGA representative action. Can you take us through the Iskanian role?

Daniel Turner (10:49):

Sure. Even though employers began including class action waivers in their arbitration agreements with employees after Concepcion, it was unclear whether arbitration provisions compelling the waiver of representative claims under PAGA were enforceable. In fact, numerous federal district courts as you noted, ruled that PAGA waivers must be enforced under the FAA, while California courts consistently ruled that PAGA claims could not be compelled to arbitration. In 2014, the California Supreme Court

ruled in Iskanian v. CLS Transportation Los Angeles. The cite for that is 59 Cal.4th 348. And again, that was in 2014. The court ruled that compelling the waiver of representative claims under PAGA is contrary to public policy and unenforceable as a matter of state.

(11:50):

Since the California Supreme Court held that the FAA does not prohibit a state law prohibiting the waiver of PAGA representative actions and arbitration agreements, the filing of PAGA cases and PAGA only cases, as we talked about before, they exploded as class action waivers increasingly limited the filing of class actions in both state and federal court. And it's important to note in Iskanian, one of the basis for the court's ruling was the court ruled that a PAGA claim could not be split into an individual in a representative claim in order to send the individual claim to arbitration. That was a key part of the ruling.

Greg Nylen (12:36):

What impact did the Iskanian rule have on PAGA actions for employees that had executed arbitration agreements containing class and/or representative waivers?

Daniel Turner (12:46):

From 2014 to the present, wage and hour cases usually proceeded as follows: plaintiff's counsel would file a standalone PAGA action, as such actions could not be sent to arbitration even if the arbitration agreement contained a class and/or representative action waiver. California courts repeatedly denied employers motions to compel arbitration of PAGA actions based on the holding in Iskanian. And really, for almost a decade, PAGA actions remained in California state court even if an employee's individual Labor Code claims were compelled to arbitration. So for all practical purposes, the Iskanian rule was an effective way for employees and their council to work around the US Supreme Court's ruling in Concepcion and pursue claims on a representative basis. That's why PAGA actions became so popular in California for the last 10 years.

Greg Nylen (13:45):

And in Viking River Cruises v. Moriana, the United States Supreme Court has recently weighed in on whether a PAGA claim can be sent to arbitration, pursuant to an arbitration agreement containing a waiver of representative actions. Can you tell us how Viking River Cruises made it to the United States Supreme Court?

Daniel Turner (14:04):

Sure. In Viking River Cruises, plaintiff sued her employer seeking recovery of civil penalties under PAGA. Viking moved to compel plaintiff's PAGA claim to arbitration, arguing that the US Supreme Court's recent decision in Epic Systems Corp v. Lewis, and the cite for that is 138 S. Ct. 1612, 2018. Viking River Cruises argue that that case overruled Iksanian.

Greg Nylen (14:34):

Did the Epic Systems case involve a PAGA claim or a similar statute?

Daniel Turner (14:38):

No, not at all. While Epic Systems did not involve a PAGA claim, the US Supreme Court held that the FAA requires that arbitration agreements must be enforced according to their terms, including terms

providing for individualized proceedings. And therefore, an arbitration agreement that requires an employee to arbitrate claims individually does not violate employees' rights to engage in concerted activity via federal class action procedures. In addition, the court warned lower courts to "be alert to new devices and formulas that would achieve much of the same result," and declared that a rule seeking to declare individualized arbitration proceedings off-limits is such a device. Defendant's counsel used this reasoning and this language to support its argument that Iskanian's prohibition against PAGA waivers had, in effect, been overruled.

Greg Nylen (15:39):

Did the Court of Appeal agree that Epic Systems had overruled Iskanian?

Daniel Turner (15:43):

So the trial court disagreed and denied defendant's motion to compel, and the California Court of Appeal affirmed. In doing so, the Court of Appeal noted that California courts routinely ruled that pre-dispute waivers of PAGA claims were unenforceable even after the ruling in Epic Systems. So in addition, the Court of Appeal rejected the company's characterization of PAGA claims as a "transparent device" to preclude individualized arbitration proceedings, as PAGA was adopted in 2004, long before the court's ruling in Concepcion and Epic. Court of Appeal decided to follow Iskanian and continued to view pre-dispute PAGA waivers precluding PAGA actions in any form as an attempt to exempt employers from responsibility for violations of the Labor Code. The Court of Appeal also rejected Viking's assertion that plaintiff's individual PAGA claim or "individual PAGA claim" should be compelled to arbitration based on a language of the arbitration agreement.

(16:51):

The court noted that there was no such thing as an individual PAGA claim in its view, and such claims are representative actions as they are brought on the state of California's behalf by a deputized aggrieved employee. The employee is merely acting, the court went on to hold, as the proxy or the agent of the state's labor law enforcement agencies. And the court ruled, represents the same legal right and interest as those agencies, namely recovery of civil penalties that otherwise would've been assessed and collected by the LWDA. Regardless of whether there's such a thing as an individual PAGA claim, the Court of Appeal noted that plaintiff's complaint contained a single cause of action under PAGA, and the only relief she was seeking was statutory penalties for Labor Code violations. She was not seeking to recover her on her underlying Labor Code claims. Accordingly, the court ruled that plaintiff alleged no personal claim seeking compensation that might be individually arbitrated. So they denied or agreed with a denial of the defendant's motion to compel arbitration.

Greg Nylen (18:05):

And what did the United States Supreme Court have to say about all this?

Daniel Turner (18:09):

So in a much anticipated decision on June 15th, 2022, the US Supreme Court finally issued its ruling in Viking River Cruises. The court ultimately ruled that an employee who has signed a representative action waiver can be compelled to arbitration to arbitrate the employee's individual PAGA claim. The court ruled that the FAA preempted the Iskanian rule "insofar as it precludes the division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." The court stated that this indivisibility rule effectively coerces parties to opt for a judicial form that forgoes the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution. And

that's a quote the court is using, and they're quoting a case that has been relevant for a long time in this area of law, Stolt-Nielsen, which is found at 559 US at 658.

(19:20):

It's important to note that the court held that the representative waiver, which purported to waive representative PAGA claims, was invalid if construed as a wholesale waiver of a PAGA claim. And under the court's holding, that aspect of Iskanian was not preempted by the FAA. So the agreement remains invalid insofar as the arbitration agreement was interpreted in that manner. The severability clause in the arbitration agreement at issue, however, provided that if the waiver provision was invalid in some respect, any portion of the waiver that remained valid must still be enforced in arbitration. Thus, based on this clause, Viking River Cruises was entitled to enforce the agreement insofar as it mandated arbitration of plaintiff's individual PAGA claim and the lower court's refusal to do so based on the rule, again, articulated in Iskanian that PAGA actions cannot be divided in individual and non-individual claims, was preempted.

Greg Nylen (20:30):

What happens to the employee's representative PAGA claim?

Daniel Turner (20:33):

As for the plaintiff's non-individual PAGA claim, the court stated that those claims may not be dismissed simply because they're representative. Instead, the court ruled that PAGA as currently drafted provides no mechanism to enable a court to adjudicate non-individual claims once the individual claim has been sent to arbitration. The court ruled that under PAGA's standing requirement, plaintiff lacked statutory standing under PAGA to continue to maintain her non-individual claim, i.e. her representative PAGA claim in court once her individualized PAGA claim was paired away from the PAGA action and sent to arbitration. As the court stated, "Moriana lacks statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss her remaining claims."

(21:32):

That the court ruled on its interpretation of PAGA's procedures and standing requirements perhaps explains why Justice Breyer, Kagan, and Sotomayor joined in the opinion after appearing hostile to Viking River Cruises' position at oral argument. In fact, Justice Sotomayor invited the California legislature or the California courts to essentially correct the court's ruling if the court's interpretation of PAGA's standing requirements was wrong. As Justice Sotomayor stated in her concurring opinion, "The court reasons based on available guidance from California courts that Moriana lacks statutory standing under PAGA to litigate her non-individual claims separately in state court. Of course, if this court's understanding of state law is wrong, California courts in an appropriate case will have the last word. Alternatively, if this court's understanding is right, the California legislature is free to modify the scope of statutory standing under PAGA within state and federal constitutional limits. With this understanding, I joined the court's opinion."

(22:53):

So even though Viking River Cruises is a victory for employers for the time being, it might prove to be a temporary one if either the California legislature or California courts accept Justice Sotomayor's invitation to weigh in on PAGA's standing requirements.

Greg Nylen (23:12):

Have either the legislature or California courts decided to accept Justice Sotomayor's invitation?

Daniel Turner (23:19):

So not surprisingly, a little more than a month after the ruling in Viking River Cruises, the California Supreme Court granted review of Adolf v. Uber Technologies, Inc. In that case, council for plaintiff who was a driver for Uber Eats and was classified as an independent contractor, requested that the California Supreme Court addressed the US Supreme Court's interpretation of state law and hold that a PAGA plaintiff does not lose standing when the individual PAGA claim is submitted to arbitration. So many observers believe that the fact that the California Supreme Court granted review may indicate that it intends to reach the Viking River Cruises' question and might address Justice Sotomayor's analysis. So thus, the California Supreme Court may decide this issue probably at some point in 2023.

Greg Nylen (24:17):

Lisa, can you also tell us about the legislative reaction to the US Supreme Court allowing class and representative action waivers?

Lisa Simonetti (24:25):

Sure, Greg. No problem. There has been a significant reaction to the increasing use of class action and representative action waivers. In California, there's AB51 which added Labor Code Section 4320.6, and it prohibits employers from requiring employees and applicants to waive any right, forum, or procedure, including the right to file a civil action or complaint as a condition of employment or continued employment.

(24:50):

However, it is important to note that AB51 has been subjected to challenge on preemption grounds under the FAA. In Chamber of Commerce v. Bonta, a complex and controversial decision, the Ninth Circuit reverse the state that had been placed on enforcement of AB51 by the district court. The Ninth Circuit concluded that because AB51 was focused on conduct of the employer prior to entering into an arbitration agreement, the statute did not conflict with the FAA, and the state was free to regulate that conduct and prohibit employers from requiring mandatory arbitration as a condition of employment. Accordingly, employers could not seek to require California applicants and employees to enter into mandatory arbitration as a condition of employment. But the Ninth Circuit has recently withdrawn this ruling and has agreed to rehear the matter.

(25:38):

Then at the federal level, we have the "ending forced arbitration of sexual assault in Sexual Harassment Act of 2021." Signed on March 3rd, 2022, this invalidates pre-dispute arbitration agreements that preclude a party from filing a lawsuit in court involving sexual assault or sexual harassment claims. In addition, the law applies retroactively. Interestingly, the bill passed with bipartisan support in both the House and the Senate. Then there also is the "forced arbitration injustice repeal," or FAIR Act. The bill would prohibit companies from enforcing arbitration agreements requiring workers and consumers to bypass court and bring legal disputes in private arbitration. The bill passed the House of Representatives, but has gained no traction in the evenly divided United States Senate and is unlikely to become law.

Greg Nylen (26:29):

So in conclusion, it looks like there will almost certainly be further activity in the California Legislature and California Supreme Court in response to Viking River Cruises. And likely in the United States Supreme Court, there will be action after that. It remains to be seen how far the courts will ultimately go

in treating the arbitrability of PAGA claims like the courts did in the era when cases like Myers v. Univest Home Loan where the law regarding the general arbitrability of UCL claims.

(27:00):

And bringing back the movie review. For this episode, I chose the 2001 film Ghost World directed by Terry Zwigoff who directed the great documentary about R. Crumb that was released in 1994, and it's also a must-see if you haven't. It's hard for me to believe this film came out more than 20 years ago. In addition to Steve Buscemi, Thora Birch, and others, the film stars a 17-year-old Scarlet Johansson in one of her first significant roles, and I remember distinctly seeing the film and thinking at the time that she was going to be a huge star.

(27:32):

The film is a really funny, biting, coming-of-age story based on the graphic novel by Daniel Close. The story centers around two best friends, one of whom develops a friendship with the character played by Buscemi after they both play a prank on him that turns out differently than they expected. The film is much more than a cute romance, however. It's a great exploration of outsiders growing up and friendship growing apart. It's an underrated classic in my opinion, and has a 93% rating on Rotten Tomatoes for a reason, and is streamable through multiple platforms. Go check it out.

Lisa Simonetti (28:03):

Thanks, Greg. And special thanks to you, Dan, for joining us.

Daniel Turner (28:06):

Thanks for having me. Really appreciate it.

Lisa Simonetti (28:08):

You can email questions to UC Defense at gtlaw.com. See you next time.