Lawyer Insights

In High Stakes Battle Between Arbitration and PAGA, Wins, Losses, and Questions

By Christopher Pardo, Roland Juarez and Elizabeth Sherwood
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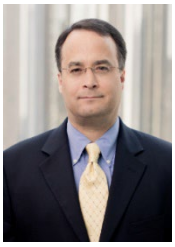


The legal path between employee arbitration agreements under the Federal Arbitration Act (FAA) and nonindividual representative claims under the California Private Attorney General Act (PAGA) has been anything but smooth. Two new (albeit unpublished and uncitable) cases, *Piran v. Yamaha Motor,* No. G062198, 2024 WL 484845 (Cal. Ct. App. Feb. 8, 2024)(unpub.) (*Yamaha*) and *Cooley v. ServiceMaster,* No. 23-15643, 2024 WL 866123 (9th Cir. Feb. 29, 2024) (*ServiceMaster*), help to illustrate the challenges and unanswered questions lingering in the wake of this rapidly developing area of law.

Because both the U.S. Supreme Court's 2022 decision in *Viking River Cruises v. Moriana,* 596 U.S. 639, 142 S. Ct. 1906, 213 L. Ed. 2d 179, reh'g denied, 143 S. Ct. 60, 213 L. Ed. 2d 1145 (2022) (*Viking River*) and the California Supreme Court's responsive 2023 decision in *Adolph v. Uber Technologies,* 14 Cal. 5th 1104, 532 P.3d 682 (2023) (*Adolph*) are key to understanding *Yamaha* and *ServiceMaster,* each is summarized below.

Viking River overturned-in-part California Supreme Court precedent that PAGA claims, both by an individual employee on the employee's own behalf (individual claims) and by the individual as a representative of other employees (nonindividual claims or representative claims), could be neither severed from each other, nor subjected to arbitration. In a decision authored by Supreme Court Justice Samuel Alito (followed by two separate concurrences by Justices Sonia Sotomayor and Amy Coney Barrett), the Supreme Court noted that individual plaintiffs can validly consent to arbitration of their individual PAGA claims. As such, those claims must be subject to arbitration as preempted by the FAA.

With respect to nonindividual PAGA claims, SCOTUS walked a narrower line. Despite holding that these claims could theoretically continue in litigation, SCOTUS noted that a prospective employee representative would lose standing to pursue an individual PAGA claim in court once his or her claims were compelled to arbitration. As such, Justice Alito reasoned, nonindividual PAGA claims should also be dismissed once individual claims are compelled to arbitration. See *Viking River*, 596 U.S. at 663. However, in her concurrence, Justice Sotomayor noted that California courts were the ultimate arbiters of standing under PAGA, and "if this court's understanding of state law is wrong, California courts, in an appropriate case, will have the last word."

California's last word on standing came in *Adolph*, in which the California Supreme Court held that PAGA plaintiffs would maintain their standing to pursue nonindividual PAGA claims even after their individual claims were compelled to arbitration in accordance with *Viking River. Adolph*, 14 Cal. 5th at 1128. The plaintiff in *Adolph* suggested a procedure under which a plaintiff would arbitrate the primary standing

issue—whether the plaintiff is "an aggrieved employee" under PAGA—after which the arbitrator's standing decision would become binding on a reviewing court presiding over non-individual PAGA claims. The California Supreme Court stated that Uber failed to put forth "a convincing argument why this manner of proceeding would be impractical or would require relitigating Adolph's status as an aggrieved employee …" Ultimately, despite discussing how a broad standing requirement could lead to alleged abuses of PAGA, the California Supreme Court deflected these issues to the California legislature to resolve "if it chooses."

While *Adolph* was pending, other cases grappling with arbitration in the PAGA context were winding their way through the California court system. These included, inter alia, *Yamaha* and *ServiceMaster*.

In *Yamaha*, plaintiff Piran amended her class-action complaint to include individual and nonindividual PAGA claims only after defendant Yamaha moved to compel all of her claims into arbitration. *Yamaha*, 2024 WL 484845 at *2. This tactical move paid off for Piran in the first instance; the Superior Court of Orange County refused to compel arbitration of Piran's individual PAGA claims and stayed all of her PAGA and class-based claims pending arbitration of her non-PAGA and nonclass-based claims. Accordingly, *Yamaha* appealed to the Fourth District Court of Appeal, Division 3. While Yamaha's appeal was pending, *Adolph* was decided.

Relying upon *Adolph* and an in-depth discussion of its interaction with *Viking River*, the Fourth District affirmed-in-part and reversed-in-part. Specifically, the Fourth District held that it was error under *Viking River* not to compel Piran's individual PAGA claims to arbitration. Similarly, in accordance with *Adolph*, the Fourth District held that the nonindividual representative PAGA claims should remain in court, stayed pending the outcome of arbitration, and that Piran would maintain standing to litigate them thereafter.

Further, the Fourth District held that Yamaha failed to properly brief the trial court's "purported error in staying the class claims pending completion of the arbitration," because Yamaha had "not articulated how any alleged error by the trial court was prejudicial." For reference, *Yamaha*'s supplemental brief following *Adolph* reads in relevant part:

Adolph does not impact the issue of whether the trial court's order "staying" Piran's "class claims" violated California law and the FAA by failing to give effect to the arbitration agreement's requirement of individualized arbitration … Nothing in *Adolph* discusses standing to pursue class action claims, nor attempts to call into doubt binding U.S. Supreme Court precedent holding class action waivers are enforceable under the FAA.

Appellant's supplemental brief, *Yamaha Motor Corp., U.S.A. v. Piran,* 2023 WL 5432185, at *6 (Aug. 7, 2023) (emphasis in original). Clearly, *Yamaha* argued that the trial court's order was wrong. However, neither *Yamaha*'s supplemental brief nor its opening brief contain the word "prejudice," nor does either make an obvious argument regarding the same. See generally, *Yamaha Motor Corp., U.S.A. v. Piran,* 2023 WL 3873552, at *6 (May 23, 2023).

Weeks after the Fourth District's decision in *Yamaha,* federal courts waded into the fray with *ServiceMaster.* Like *Yamaha*, *ServiceMaster*'s procedural history hinged on the tension between *Viking River* and *Adolph.* Prior to *Viking River*, defendant ServiceMaster successfully removed the case to federal court under the Class Action Fairness Act, and then moved to compel arbitration of plaintiff Cooley's individual claims. Initially, his non-individual PAGA claims were stayed pending

arbitration. However, after *Viking River* was decided, the district court dismissed Cooley's nonindividual, representative claims, determining that he did not have standing.
Following *Adolph,* Cooley appealed the dismissal to the Ninth Circuit. Deferring to the California Supreme Court's interpretation of California state law, the Ninth Circuit held that "Cooley has standing to bring his representative PAGA claims." But the federal analysis did not end there. Because "Article III standing is a separate inquiry," which is a "question of federal law, not state law," the Ninth Circuit remanded the case to the district court to assess whether Cooley had Article III standing to proceed in federal court. The decision's final line foreshadows a potential outcome: "[i]f the district court determines that Cooley does not have constitutional standing [under Article III], then this case must be remanded back to state court, where Cooley does have standing …"

Following *Adolph, Yamaha,* and *ServiceMaster,* employers are left with both questions and answers. It seems relatively clear now that employees must arbitrate their individual PAGA claims in the event of a binding arbitration agreement, while their nonindividual representative PAGA claims should be stayed pending those arbitral proceedings.

However, the full impact, and the contours thereof, of final arbitration decisions on the nonindividual PAGA claims that were stayed will be determined as they wind their way through arbitration, the courts and potential appeals. For example, if an arbitrator's decision that a plaintiff is not an "aggrieved" individual under PAGA is binding on a court, then there could be active litigation in regard to dismissal of the stayed non-individual PAGA claims.

Another critical consideration following *ServiceMaster* is that it remains to be seen whether PAGA plaintiffs will be deprived of Article III standing. *ServiceMaster,* 2024 WL 866123 at *2. If there is no Article III standing, then removal to federal courts will not be available. See, e.g., *Allen v. Similasan*, No. 12CV0376-BTM-WMC, 2013 WL 12061830, *2 (S.D. Cal. Aug. 7, 2013) (discussing the requirement of Article III standing in the context of both federal question and diversity jurisdiction); *Nunley v. Cardinal Logistics Management,* No. EDCV2201255FWSSP, 2022 WL 5176867, *2-3 (C.D. Cal. Oct. 5, 2022) (remanding a diversity and class action fairness act case for failure of Article III standing); *McGowen, Hurst, Clark & Smith v. Commerce Bank*, 11 F.4th 702, 708 (8th Cir. 2021) (discussing prerequisite of Article III standing in diversity case).

Particularly when proceeding in state appellate courts, employer defendants are also well-advised to remember the Fourth District's refusal to consider arguments about staying non-PAGA class claims in the absence of clear and fulsome briefing on prejudice, and ensure that all such issues are fully and appropriately briefed in making similar appeals.

Given the rocky terrain and uncertain footing, California employers should consult their attorneys regarding the best strategy to employ in the face of PAGA claims.

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