the abtl REPORT

As Recent Jury Verdict Shows, Retaliation for Reporting Workplace Harassment is Gender Neutral

By Frank Johnson, Johnson Fistel

On June 2, 2022, a Los Angeles County state jury awarded $440 million dollars in punitive damages to two men who claimed they were forced to quit their jobs at Southern California Edison ("SCE") due to retaliation for reporting sexual and racial harassment. *Alfredo Martinez, et al., v. Southern Ca Edison Co., et al.,* Case No. BC670461 (Sup. Ct. Los. Angeles). Attorneys for the men have stated that this is the largest punitive damages award in any employment retaliation case in U.S. history. And as this verdict demonstrates, plaintiffs who can prove they suffered adverse employment action because they reported harassment by their co-workers are entitled to the same protection as those who are the targets of the harassment.

Alfredo Martinez and Justin Page alleged that after they reported sexual harassment and racist language occurring in their workplace, upper management retaliated against them resulting in their constructive termination. Constructive termination is a form of termination where the employer makes working conditions so intolerable that the employee is forced to quit. The complaint, which was filed in August 2017, described a fraternity-like atmosphere that allowed and enabled constant racial and sexual harassment of employees

Page, who had been employed at SCE in 2015, said he witnessed multiple instances of sexual harassment directed towards women and himself, as well as derogatory racial language. Page ultimately reported this misconduct in 2017 to the SCE ethics hotline. Martinez, who had been a supervisor at SCE since 2001, alleged that two female employees came to him in 2017 and confided they had experienced sexual harassment. According to the plaintiffs' complaint, the two women went to Martinez because "he was just about the only supervisor who could be trusted and who had not engaged himself in any of the harassment." Martinez gathered information about the harassment from the two female workers and other victims and took it to upper management in an attempt to stop the harassment. After Martinez and Page reported their observations to senior management, however, their coworkers and superiors allegedly began a campaign of disrespect, gossip, and threats that effectively upended their jobs and made it intolerable to continue with their employment. SCE and its parent company denied the allegations, and argued that Martinez and Page were exploiting the plight of their coworkers in an effort to create liability. The jury disagreed.

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Inside

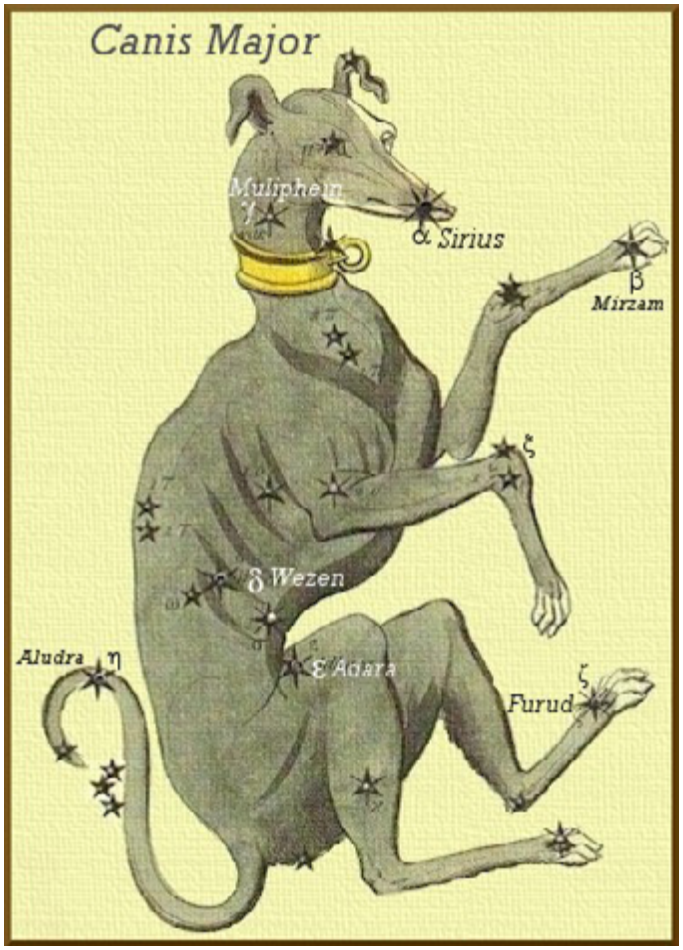
PRESIDENT'S LETTER:

Dog Days of Summer

By Hon. Lorna Alksne (Ret.)

Colleagues,

The Summer is winding down and we are feeling heat and humidity in San Diego—something quite foreign to us! Experiencing these "Dog Days of Summer" got me thinking: where does this phrase come from and what does it mean? Some quick research revealed that this phrase refers to the period of time following the rising of a star commonly known as the Dog Star, which has the formal name of Sirius. According to Wikipedia, the rising of this star in "Hellenistic astrology was connected with heat, drought, sudden thunderstorms, lethargy, fever, mad dogs and bad luck." (https://en.wikipedia.org/wiki/Dog_days) It seems that as far back as Homer's Iliad in the 8th century BC, people have been blaming the Dog Star for all sorts of maladies and weather conditions. Because the Dog Star was the brightest in the night sky, ancient astronomers took note of its rising and the natural events that typically appeared every summer—such as the flooding of the Nile River.



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In our current era we have experienced terrible floods, blistering heat, record droughts, severe storms, and all manner of misfortune that could be accurately grouped under the heading of "bad luck." Were the astronomers from centuries ago correct for blaming the Dog Star for these type of events? Of course, since I am neither a scientist nor an astronomer, I can't give a definite answer to that question. But it appears that humanity has been dealing with these adverse events for centuries, and the one constant across the ages is our hope for a better tomorrow. Seeing all the good work that members of ABTL perform each day fuels my hope, and I am excited to see everyone in a few weeks at the Annual Seminar at the Rancho Bernardo Inn. By then the "Dog Days of Summer" will be over, and I am confident we will experience better days for the legal profession and our beautiful San Diego. And I'm hoping many of you will join me in my new obsession, pickleball!

Hon. Lorna Alksne

Hon. Lorna Alksne (Ret.), President ABTL San Diego Chapter and Mediator at JAMS

...Retaliation for Reporting Workplace Harassment is Gender Neutral | *Continued from cover*

After a two-month trial, jurors found in the plaintiffs' favor and awarded them $24.6 million in compensatory damages. Notably, the jury also ordered SCE to pay Martinez $100 million in punitive damages, and ordered SEC's parent company (Edison International) to pay $300 million in punitive damages to the supervisor. Page was awarded $10 million in punitive damage from SCE, and $30 million in punitive damages from Edison International, bringing the total verdict to $464.6 million. In an unusual twist, the jury's punitive damage award exceeded what their attorneys requested by more than $140 million.

Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964 and, in California, the Fair Employment and Housing Act. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature may constitute sexual harassment when the conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment. Individuals of any gender can be the target of sexual harassment, which does not have to be motivated by sexual desire. It is similarly unlawful for an employer to retaliate against an individual for opposing employment practices that discriminate based on sex or for filing a discrimination charge, testifying, or participating in any way in a responsive investigation, proceeding, or litigation. And as these recent verdicts illustrate, jurors are willing to punish employers that do not take seriously allegations of racial or sexual harassment.

Frank Johnson is one of the founding partners of Johnson Fistel and has more than twenty-seven years of experience as a trial attorney focusing on complex civil litigation.

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Arbitrability of PAGA Claims: A Matter for the Supreme Courts

Part two of a four-part series by Caitlin Macker, Caldarelli Hejmanowski Page & Leer; Anne Wilson, Duckor Spradling Metzger & Wynne

The California Supreme Court Said No Arbitration of PAGA Claims.

For almost a decade, California courts held that employment arbitration agreements stipulating that the employee gave up the right to bring representative claims under the California Private Attorneys General Act of 2004 ("PAGA") (i.e., "PAGA waivers") were contrary to public policy and invalid. Specifically, in 2014, the California Supreme Court in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 360 determined that: (1) PAGA claims cannot be divided into a plaintiff's individual claim and non-individual claims on behalf of other employees; and (2) the right to bring a PAGA claim cannot be waived by an individual because the real party in interest is the State of California, which is not a party to the arbitration agreement between the employer and employee.

As a result of *Iskanian*, plaintiffs seeking to avoid arbitration of wage and hour claims in California have increasingly filed representative PAGA claims when the employment relationship is subject to an arbitration agreement. Under *Iskanian,* the entire PAGA claim would remain in state or federal court even where the employee and employer entered into a valid arbitration agreement containing a PAGA waiver. Since then, PAGA claim filings grew exponentially and "an employer's entrance fee to settle via mediation more than quadrupled," according to one San Diego retired judge turned Alternative Dispute Resolution Neutral.

SCOTUS Offers California Employers Some Respite.

In a long-anticipated case that started with a Petition for Writ of Certiorari to the Supreme Court of the United States filed on May 10, 2021 that was granted on December 14, 2021 and then argued on March 30, 2022 – on June 15, 2022, SCOTUS issued its decision in *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. ___, 142 S.Ct. 1906 and upended California law by finding that the Federal Arbitration Act ("FAA") "preempts the rule of [*Iskanian*] insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate."

Factual and Procedural Background in *Viking River Cruises*

In *Viking River Cruises,* plaintiff Angie Moriana signed an employment arbitration agreement that contained a class, collective, and representative PAGA action waiver. The agreement also contained a severability clause specifying that if any "portion" of the waiver remained valid, it would be "enforced in arbitration." Moriana filed a complaint against her former employer, Viking River Cruises, in Los Angeles Superior Court alleging both an individual claim for failure to timely pay her final wages, as well as a PAGA claim on behalf of herself and all other allegedly "aggrieved employees" who suffered Labor Code violations in California. Viking River Cruises moved to compel arbitration of Moriana's "individual" PAGA claim—meaning the claim that arose from the violation she suffered—and to dismiss her other PAGA claims.

The trial court denied Viking River Cruises' motion to compel, and the California Court of Appeal affirmed, holding that categorical waivers of PAGA standing are contrary to state policy and that PAGA claims cannot be split into arbitrable individual claims and non-arbitrable "representative" claims under *Iskanian*. Viking River Cruises appealed, and the Supreme Court of the United States granted certiorari.

SCOTUS Holds the FAA Preempts *Iskanian, in Part.*

Writing for the 8-1 Court, Justice Alito found that *Iskanian's* prohibition on contractual division of PAGA actions into "individual" and "non-individual" claims conflicted with FAA jurisprudence because it "unduly circumscribes the freedom of the parties to determine 'the issues subject to arbitration' and 'the rules by which they will arbitrate.' " The Supreme Court reaffirmed that arbitration is a matter of consent—particularly when it comes to compelling a class or representative claims.

Consequently, the Supreme Court held that the FAA preempts *Iskanian's* prohibition on splitting PAGA claims and Viking River Cruises was entitled to enforce the agreement with Moriana insofar as it mandated arbitration of her individual PAGA claim. This outcome was due, in large part, to the severability provision in Moriana's arbitration agreement. The Supreme Court noted that a PAGA waiver was invalid under *Iskanian* if construed as a "wholesale waiver" of such claims and that this aspect of the California Supreme Court's decision in *Iskanian* was not preempted by the FAA.

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The majority then concluded that the adjudication of Moriana's individual PAGA claim in arbitration necessitated dismissal of her remaining non-individual PAGA claims. Under PAGA's standing requirement, plaintiffs can maintain non-individual PAGA claims "only by virtue of also maintaining an individual claim in that action." So, "if an employee's own individual dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit."

Justice Sotomayor's Concurrence Offers that California "will have the last word."

In concurrence, Justice Sotomayor noted that the majority's reasoning for dismissal of the remaining non-individual PAGA claims was "based on available guidance from California courts, that Moriana lacks 'statutory standing' under PAGA to litigate her 'non-individual' claims separately in state court." She cautioned that the Court's "understanding of state law" on this issue may be wrong, and if so, California courts "will have the last word."

Justice Sotomayor added that, even if the Court's understanding of the standing requirement is correct, "the California Legislature is free to modify the scope of statutory standing under PAGA within state and federal Constitutional limits."

Moriana Petitioned SCOTUS for Rehearing.

Just three weeks after SCOTUS released its opinion overturning *Iskanian* in part, on July 6, 2022, Moriana filed a petition for rehearing on the isolated issue highlighted in Justice Sotomayor's concurrence. Specifically, Moriana argued the Supreme Court's opinion went beyond the federal question presented and involved the unbriefed issue of state-law contract interpretation and statutory construction, which exceeded the Court's authority.

California Supreme Court Poised to Address PAGA Standing Post-Viking River Cruises.

One month after SCOTUS overturned *Iskanian*, in part, the California Supreme Court granted review in *Adolph v. Uber Technologies,* No. S274671, signaling that it intends to address the impact of *Viking River Cruises* on state law PAGA standing.

Factual and Procedural Background in *Adolph*.

In *Adolph,* the plaintiff, an UberEATS driver, filed a class action complaint against Uber claiming that he and other drivers were misclassified as independent contractors. Uber moved to enforce its arbitration agreement with respect to the threshold question of whether the plaintiff was an employee or an independent contractor. The appellate court affirmed the trial court's denial, finding the arbitration agreement was unenforceable under *Iskanian*.

Uber petitioned the California Supreme Court for review on May 20, 2022. Following SCOTUS' decision in *Viking River Cruises,* the California Supreme Court granted Uber leave to file a supplemental brief to address the new opinion and subsequently granted review on July 20, 2022.

One of the primary questions the California Supreme Court is being asked opine on is whether California law allows an aggrieved employee who arbitrates their individual employment claims to pursue the representative PAGA claim. In other words, whether employment arbitration agreements can provide the same protective shield for employers in PAGA actions that they do in class actions. A decision will likely come in mid-2023.

In August, the California Supreme Court granted review to hear two other PAGA cases: *Wing v. Chico Healthcare & Wellness Centre* (S274939, Cal. Aug. 2022) and *Sanchez v. MC Painting* (S274780, Cal. Aug. 2022). With these three cases poised to be argued in the coming months, it appears that Justice Sotomayor's words may ring true and California courts will have the last word. But, *will* it be too late?

SCOTUS Denies Moriana's Petition for Rehearing.

On August 22 2022, the high court denied the petition for rehearing and issued a final judgment, leaving intact the Court's analysis of statutory standing under PAGA and the Court's analysis of the severability language in Viking River Cruise's arbitration agreement. Legal analysts postulate that because SCOTUS had an opportunity to clarify or even modify its holding that Moriana's representative PAGA claims must be dismissed for lack of standing, but declined to do so, therefore SCOTUS has effectively dictated the last word on the matter.

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Where PAGA Waivers Presently Stand.

In the wake of *Viking River Cruises,* trial courts have been flooded with motions to compel arbitration of individual PAGA claims and dismiss representative PAGA claims. The Complex Panel in Orange County Superior Court has reportedly decided to continue all such motions for 90 days while the Panel determines how best to address them. In San Diego Superior Court and Los Angeles Superior Court, trial courts are regularly vacating trial dates, staying the case, and scheduling status conferences for early 2023 to await word from the California Supreme Court.

Other defendants are seeking to apply *Viking River Cruises* retroactively to void pending settlements or vacate judgments.

In the meantime, employers should take a close look at their employment arbitration agreements and consider revising them to include a waiver of non-individual PAGA claims and a broad severability clause that ensures any remaining portion of the waiver must still be enforced – and don't forget that opt in requirement!

(This is the second of a four-part series on the ever-changing legal landscape of PAGA.)

Stay tuned...

Caitlin Macker, is and Associate at Caldarelli Hejmanowski Page & Leer LLP.

Anne Wilson is a member of Duckor Metzger & Wynne's employment law group and HIPAA compliance committee.

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The True Cost of Litigation

By Mark Mazzarella, Mazzarella & Mazzarella LLP

I was fortunate to have had some wonderful mentors over the years who imparted many memorable words of wisdom. Probably the one observation I have repeated more than any other came from one of my former Luce Forward partners, Jerry Davee, who told me to never forget: "Every case starts out about 'principle' and ends up about 'principal,' but somewhere along the line, the spelling of the word changes." It is generally true that the attorney's fees are the single greatest cost of litigation. But they are not the only cost.

Unfortunately, most of us are not likely to educate potential clients about the many costs of litigation, which can be much greater than any attorney's fees the client pays us. As "counselors at law" we have an obligation to provide prospective clients with the facts they should consider before proceed headlong into what may be years of litigation. That obligation is greater than simply providing the potential client with an assessment of the legal merit of their case. It is an obligation to counsel them about all the costs which they will pay along the way to the courthouse.

What follows is my list of "The True Cost of Litigation" which I discuss with prospective clients. Discussing these issues with potential clients is not just good lawyering—it is good business. To be sure, if done effectively, it will result in talking a lot of clients out of litigating. But clients who do not know what to expect up front are likely to be unhappy clients when they become enlightened years later. And, those clients whom you spared the trauma of litigation may become your best referral sources.

Attorney's Fees and Costs

Attorney's fees are generally the only "cost of litigation" that clients consider when it appears that litigation is in their future. Most clients know that lawyers are expensive, but they do not have a clue about the amount of attorney's fees that can be incurred in litigation, especially in protracted and hotly contested litigation. And they often do not even think about the "costs," which also can be considerable.

Minimizing the amount of attorney's fees and costs that likely will be incurred in a case is not just unfair to the client, it is also in invitation to disaster from the lawyer's perspective, especially for litigators. No lawyer wants to have a large unpaid bill, a fast-approaching trial, and a trial judge who does not have a date available for months to hear a motion to withdraw. And most of us are aware that the fastest way to become a defendant in a legal malpractice case is to seek to recover fees and costs from a client. As a result, most lawyers talk to prospective clients about the economic cost of litigation. The smart ones ask for substantial retainers, knowing that if a client isn't able or willing to make the financial investment in their services when they are trying to persuade a lawyer to represent them, they are not going to be any more likely to pay their lawyers after they are committed.

Opportunity Costs

Clients can save themselves a lot of money (and save their attorney a lot of unrewarding work) if they personally contribute necessary time to their case. I tell my clients that they can review and organize their documents better than someone in my office can, and for a lot less. They know the facts better anyone in my office, and with a little instruction on what to look for and how to organize what they find, they will do a better job making sense of a box full of loose paper or hundreds of emails. This important work can take days or even weeks of their time, but will result in substantial savings.

I explain what written discovery they should anticipate, which may require a lot of time to answer. I tell them they will need to prepare for and attend their own depositions, and if possible, the depositions of other witnesses. This too will take time, a lot of time.

Clients have lives beyond litigation. Time devoted to litigation has to come from somewhere. There is always an opportunity cost. If a client has a business to run, ask how the business will suffer if the client's attention needs to be turned elsewhere. Maybe a client wants to start a business, or go to school to advance their career, or write the great American novel, or travel, or spend time with their spouse, children, grandchildren. Will the demands of litigation cut into their exercise routine, their weekly golf outing, or poker game? Ask what will the client need to give up. You need them to be invested in the litigation. If they are not willing to make that investment, you—and they—need to know that fact upfront.

The Pursuit of Happiness

The pursuit of happiness was valued enough by our country's founders that it was inserted in the Declaration of Independence to be right up there with "life" and "liberty." I had an elderly and very wealthy client who was the plaintiff in a case with eight-figure damages, clear liability, and a

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lis pendens recorded against an $8.5 million asset. Several months before trial, he was stricken with a serious illness. After he recovered, he called me and said: "Settle the case for whatever you can. I'm not going to waste one more day of however many I may have left on a lawsuit." Every client should think about how much of their quality of life they are willing to surrender to the mercurial gods of litigation.

Is Everyone Onboard Who Needs to Be Onboard

Relationships will suffer from the cost, time commitment, and emotional strain of litigation. Time, money, and energy that otherwise would be spent on relationships is high on the list of critical "opportunity costs" that need to be considered. Important relationships will always suffer some degree of wear and tear because of litigation. But the degree of damage will increase substantially if those involved are not equally prepared to pay the costs of litigation. Whatever problems appear up front can be expected to grow with every bill paid, family event missed, and sleepless night. If you detect your clients, or those whose support your client will need, do not see eye-to-eye on the approach to the dispute, do not ignore it. Discuss it with your clients and those whose support they will need to make it to the finish line.

Litigation is Hazardous to Your Health

Most clients obsess about their cases. Many do not sleep well. They all will have periods of increased anxiety, stress, and perhaps even depression. They may gain weight, lose weight, increase consumption of alcohol or drugs, decrease consumption of healthy food, or stop exercising. Nobody needs to commission a study to determine if litigation is good for your health. It is not. The only question is, "how bad is it?" Young healthy clients may be able to withstand the rigors of litigation better than older clients or clients with preexisting conditions that could be worsened by stress and anxiety. But no one is immune to these hazards, it is just a matter of degree.

Payment of the Adverse Party's Attorney's Fees and Costs

Clients generally walk into a lawyer's office convinced of the merit to their case. They are not considering the possibility of losing, let alone losing and being ordered to pay their antagonist's attorney's fees and costs. In all cases costs are awarded to the prevailing party. Those can be significant, especially if there are a lot of experts, and the other party has perfected the right to recover expert witness fees with a CCP Section 998 offer. If a contract is involved, the potential for paying the opponent's attorney's fees can present a huge risk. If you do not candidly discuss this with your potential client (and confirm your discussion in your engagement letter) you are doing both your client and you a disservice.

Burned Bridges

It is usually safe to assume that once two people have duked it out in court, they are unlikely to kiss and make up. Clients need to consider what bridges will be burned as a result of litigation. The damage my go beyond the relationship between the litigants. Other friends or family members could "take sides." The client's future business prospects or existing customers may be impacted. Reputations may suffer. Clients need to consider this before they throw down the gauntlet.

Shattered Dreams

Another of my mentors, Bill Ravin, taught me to ask clients: "What do you hope to get out of the litigation?" If they want redemption, they should talk to their pastor, priest, rabbi or other spiritual guide. It will be cheaper, and more likely to make a difference. If they want revenge for some wrong done them, it is doubtful that you will be able to satisfy their blood thirst. In the end, you are likely to be their next target. What we lawyers are able to deliver must be capable of being reduced to a written judgment. If your client expects anything more, they are bound to be disappointed.

The Fatigue Factor

Cases can take a long time to get to trial. Then, there is the potential for appeal. Litigation is a marathon, not a sprint. Clients should not start something they are not willing to see through. That does not mean every client should be prepared to go to trial if need be. The client may not be willing to do that. That does not mean the client needs to wave a white flag. The game plan may be to engage in some amount of discovery and then seek to mediate a settlement. What is important is that the client is realistic about how much pain they are willing to endure, and you are realistic about the possibility of effecting an end game that concludes before your client has reached the limit of their endurance.

The Bottom Line

We have a tough job. It is stressful, demanding, sometimes contentious and can occupy way too much of our thoughts when "off work." But it is a walk in the park compared to the job of "litigation client." Clients need to understand that litigation is not an activity that they will be able to easily

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pigeonhole and then carry on with the rest of their lives as if the litigation did not exist. For as long as the litigation is pending, and potentially for a long time afterwards, the litigation will be front and center in their lives. They may not have any realistic way to avoid that result; or they may be willing to endure it because of their personal cost/benefit analysis. Our job is to do what we can to help them evaluate the true costs, and the potential benefits. A client who has decided to retain you after considering the true costs of litigation is much more likely to be a satisfied client.

Mark C. Mazzarella is Owner/Founder of Mazzarella & Mazzarella LLP. Over the past 42 years, he has tried over 90 cases from San Diego to Washington D.C., mostly before juries, but also before judges and arbitrators

Not So Fast California, Employer-Mandated Arbitration Clauses Are Still Alive

by Jason M. Kirby of KIRBY & KIRBY LLP

In late 2019, California Governor Gavin Newsom signed into law California Assembly Bill 51 ("AB 51"), which enacted Labor Code section 432.6. The lengthy statute prohibits employers from requiring employees to agree to arbitration as a condition of employment, continued employment, or the receipt of any employment-related benefit. Section 1 of AB 51 declares that, "it is the policy of this state to ensure that all persons have the full benefit of the rights, forums, and procedures established in the California Fair Employment and Housing Act ... and the Labor Code." AB 51 was enacted with the "purpose of ... ensur[ing] that individuals are not retaliated against for refusing to consent to the waiver of those rights and procedures and to ensure that any contract relating to those rights and procedures be entered into as a matter of voluntary consent, not coercion." While the main body of the statute does not mention arbitration as its primary purpose, its purpose is clear. The term "arbitration" only first appears in subsection (f), stating desirously, "Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act."

Shortly before going into effect, a variety of business interests filed suit in the United States District Court for the Eastern District of California, arguing that AB 51 was preempted by the Federal Arbitration Act. The District Court issued a temporary restraining order, and later a preliminary injunction, prohibiting AB 51's enforcement because, in the court's view, the newly enacted law was preempted by the Federal Arbitration Act.

Then, on September 15, 2021, the Ninth Circuit Court of Appeals issued its decision in *Chamber of Commerce v. Bonita,* 13 F.4th 766 (9th Cir. 2021). A divided panel reversed in part, holding that many portions of AB 51 did not conflict with the Federal Arbitration Act and were not preempted by it. The opinion characterized the statute as dealing with conduct before a valid agreement to arbitration is consummated—that is, the period of time before the Federal Arbitration Act comes into play. The majority concluded that AB 51 did not conflict with the Federal Arbitration Act, and arguably supported it.

Writing in dissent, Judge Sandra S. Ikuta make clear what she thought the majority should expect for this decision: reversal. Straight out of the gate Judge Ikuta stated: "Like a classic clown bop bag, no matter how many times California is smacked down for violating the Federal Arbitration Act (FAA), the state bounces back with even more creative methods to sidestep the FAA. And today the majority abets California's attempt to evade the FAA and the Supreme Court's caselaw by upholding this anti-arbitration law on the pretext that it bars only nonconsensual agreements."

Then, almost a year later, on August 22, 2022, a panel voted *sua sponte* to grant rehearing, with Judge William Fletcher and Judge Ikuta voting in favor. Judge Carlos F. Lucero—sitting by designation from the Tenth Circuit Court of Appeal, and the author of the original panel decision—voted against rehearing. With this order the panel withdrew its prior decision, and took the entire matter under resubmission.

While this battle is not over, the Ninth Circuit's panel decision to grant rehearing can hardly be viewed as a positive development for the future of AB 51. The real world application of AB 51 would unquestionably have a major impact on the future of employment arbitrations in California. It is also not hard to see that AB 51 would have a major impact on the existing body of case law that generally operates under the assumption that employment arbitration clauses exist at the election of employers. With these concepts in mind and the history of similar bills generated by the California legislature, it seems unlikely that AB 51 will survive rehearing by the Ninth Circuit. If it does survive, Judge Ikuta's stated views seem destined to be repeated by the Supreme Court of the United States. For the time being, it appears that employer-mandated arbitration clauses are far from dead in California.

For more than 20 years, Jason M. Kirby has represented hundreds of clients in litigation cases in San Diego and throughout California. Kirby's primary practice areas are business litigation and real estate litigation


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