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PERSPECTIVE

California Supreme Court Review: October 2022

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This article explores two cases recently accepted by the California Supreme Court for review. These cases build upon the contract drafting and arbitration topics that this column has previously examined, suggesting both that the Court is focused on assessing the power dynamics in common contracts and that companies operating in California have a multitude of reasons to reevaluate their existing agreements.

Forum Selection Clauses and Pre-dispute Jury Waivers

On Sept. 14, the California Supreme Court granted a petition to decide whether the Court of Appeal correctly held that an action must remain in California despite the contractual forum selection clause – a limited question, but one that will undoubtedly have significant implications for all contracts involving California residents. In *Gerro v. Blockfi Lending LLC*, S275530, borrower Gerro brought two lawsuits against lender BlockFi and BlockFi's loan payment processor, Scratch Services, in California. The loan agreement underlying the dispute included a Delaware forum selection clause, a Delaware choice of law clause, and an irrevocable and unconditional waiver of the borrower's right to a trial by jury. The trial court enforced the forum selection clause, staying the borrower's case in California pending resolution of the dispute in Delaware. The Court of Appeals reversed, stating that although California law "favors the enforceability of forum selection clauses," California courts will "refuse to defer to the selected forum if to do so would substantially diminish the rights of California residents in a way that violates our state's public policy." *Gerro v. Blockfi Lending LLC* (Cal. Ct. App., June 14, 2022, No. B307156) 2022 WL 212800, at *7. According to the appellate court, enforcing the forum selection clause and allowing the case to be litigated in Delaware would diminish Gerro's rights because pre-dispute contractual jury waivers are contrary to California's policy and Delaware courts' previous upholding of pre-dispute contractual jury waivers fails to demonstrate that "Delaware would enforce Gerro's right to a jury trial." Id. at *7-8.

It is likely that *Gerro* will impact numerous existing contracts and will force companies to adjust how they craft their agreements moving forward. If the Court chooses to uphold the appellate court's decision, then companies with contracts containing both a non-California forum selection clause and a pre-dispute jury waiver will have to either demonstrate that the forum they selected will uphold California's public policy or accept that they will have to litigate their cases in California. In this scenario, the law will likely remain that contractual pre-dispute jury waivers are essentially superfluous and unenforceable, as they are against California policy. Such a ruling might also nullify any forum selection provision that selects a court of equity, such as Delaware Chancery Court, where juries typically do not exist.

Alternatively, the Court could choose to reverse all or part of the appellate court's decision. If it reverses finding that Delaware courts will sufficiently uphold California's public policy, companies will have more leeway when drafting forum selection clauses. However, the pre-dispute jury waiver will likely remain unenforceable given the Court's prior decision in *Grafton Partners v. Superior Court* (2005) 36 Cal. 4th 944, 951, 967 (holding that the right to a jury trial is a fundamental right in California that cannot be waived in a pre-dispute agreement.").

Arbitration of PAGA Claims

In our prior articles, we addressed two upcoming decisions by the Court relating to arbitration agreements. Here, we explore another upcoming decision related to arbitration, *Adolph v. Uber Technologies, Inc.*, S274671,

In *Adolph*, an Uber driver brought a Private Attorneys General Act (PAGA) claim in court alleging that he and other drivers were misclassified as independent contractors. The terms of the contract that the driver had signed included an arbitration clause and a waiver of the right to bring claims on a class or representative basis. The trial court found that such a waiver is unenforceable, and the Court of Appeals affirmed, choosing to follow the existing rule of *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal.4th 348 (2014), that the waiver of representative claims in any forum is unenforceable. *Adolph v. Uber Technologies, Inc.* (Cal. Ct. App., April 11, 2022, No. G059860) 2022 WL 1073583, at *3.

Since the appellate court's ruling, the U.S. Supreme Court issued *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct 1906 (2022), abrogating *Iskanian*, holding that a plaintiff who has submitted their "individual" portion of a PAGA claim to arbitration lacks standing under state law to pursue a PAGA claim on behalf of others.

In deciding Adolph, the Court will determine whether an aggrieved employee who has been compelled to arbitrate PAGA claims for violations actually sustained by the aggrieved employee ("individual claims") maintains statutory standing to pursue PAGA claims arising out of events involving other employees ("non-individual claims") in a separate forum. As such, *Adolph* should be on the radar of any California business with "employees."

If the Court follows *Viking River*, employers will be able to contract away representative PAGA claims as well, unless and until the California Legislature chooses to amend the PAGA statute to make it so representative claims are not

dependent on individual claims. However, if the Court finds that an employee maintains statutory standing to bring non-individual claims even when they agree to arbitrate individual claims, employers can expect to be burdened by having to fight on these individuals on two battlefronts – in arbitration and in court – if they choose to include an arbitration provision in their employment contracts.

Adolph and the two upcoming decisions discussed in our previous articles, *Quach v. California Commerce Club, Inc.*, S275121, and *Ramirez v. Charter Communications, Inc.*, S273802, suggest that the Court is particularly focused on arbitration agreements and defining the landscape of such agreements and the parties' respective rights. Arbitration agreements continue to be a ubiquitous part of modern contracts across multiple contexts, and companies – along with employees and consumers – should maintain vigilance in how the landscape may be shifting so that they can evaluate the enforce ability of their existing arbitration clauses and make necessary changes to meet their goals.

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