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STANDING TO SUE – WHAT DOES IT MEAN?

By Erin K. Tenner, Esq.

The U.S. Chamber of Commerce has also filed an amicus curiae brief in the *Adolph v. Uber*[1] case which addresses the issue of standing to sue. What is standing to sue? It is the foundational right to bring a lawsuit. One must have a stake in the outcome of an action to bring a case. In the context of PAGA cases, the question that has arisen about standing is a matter of whether breaking a PAGA action down into two actions: 1) A PAGA case brought on behalf of the state, and 2) a non-PAGA action brought on behalf of other employees, entitles the claimant to penalties for the same violations in both cases.

This is an interesting issue, because in a PAGA action, when both claims remain together, most of the money paid in settlement is paid in penalties to the state. What happens if penalties are awarded in arbitration to the claimant and represented employees? Can the state in the slower moving court action still get any penalties? California Civil Code sections awarding penalties clearly state that an employer cannot be required to pay the same penalties to both an individual and to any state agency. However, the standing issue will not concern these statutes at all, because it is a jurisdictional statute. It will only look at whether the individual who has already been paid in arbitration or settlement can then maintain a lawsuit on behalf of the state when the individual no longer has a stake in the outcome. The answer should clearly be "no." But it's never that simple. The answer to whether the same penalties are being sought will likely come down to how the settlement agreement is drafted or how the arbitration award is written. PAGA cases are being stayed once part of the case is assigned to arbitration or settled while this issue is making its way through the court system.

As for arbitration of PAGA claims in the first place, see my article in last month's issue of California Auto Dealer *"Understanding Arbitration of PAGA Claims."* The whole conversation about PAGA has gotten very confusing because different courts, and different lawyers, talk about "individual" claims and "representative" claims, and mean different things.

The PAGA statute, which is a state statute, allows combining into one case, claims brought on behalf of the state and claims brought on behalf of other employees. One "representative" is permitted to represent both the state and other employees in one case. In some instances, attorneys were settling the cases with the employees, including with the representative employee, and then going to court and arguing that the representative employee no longer had standing to bring the

[1] *Adolph v. Uber Technologies, Inc.*, Cal. Ct. App. Case No. G059860

PAGA case on behalf of the state, because they had settled their claims. They no longer had a stake in the outcome of the PAGA case. It was a valid argument.

Then the *Iskanian* Court, which was precedent in arbitration of PAGA cases since 2014 and until *Viking*, said that "PAGA claims cannot be split into arbitrable 'individual' claims and non-arbitrable 'representative' claims."[2] The U.S. Supreme Court had even denied review of the decision in 2015, making it the law of the land. However, the Supreme Court completely reversed course in *Viking*. *Viking* says the two cases can be split and the action representing employees can go to arbitration but the action representing the state cannot.

In addition, it added some confusion to the issue. It re-defined the two types of claims. It said it is ok to divide the claims into two claims, but let's call them "individual" claims and "non-individual" claims, rather than "individual" claims and "representative" claims, since both are really representative claims. While their assessment was accurate, it created confusion because what was previously called an individual claim (the claim representing employees) is now being called a "non-individual" claim by the Court and what was previously being called a representative claim (the claim representing the state) is now being called an "individual" claim by the Court.

The Supreme Court calls both the claims brought on behalf of the state and the claims brought on behalf of the individuals "representative" claims – because in both cases someone other than the individual bringing the case is being represented by the individual bringing the case. Most lawyers, however, still refer to an "individual" claim as the claim representing individual employees even though the U.S. Supreme Court in *Viking* refers to the "individual" claim as the claim brought on behalf of the state. Therein lies the most confusing part of these cases. The Supreme Court in *Viking* refers to the portion of the claim brought on behalf of other employees as the "non-individual" claim.

Whether you call them individual and non-individual claims or individual and representative claims, the question of standing is a question of whether one case can continue if the other is resolved. The answer in each case is likely to be different and subject to determination by the court in each case.

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[2] *Viking River Cruises, Inc. v. Moriana* 142 S. Ct. 1906, 1911 citing *Iskanian*