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Viking River Who? Another Cautionary Tale About Arbitration Agreement Drafting

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A recent unpublished California Court of Appeal decision, *Hegemier v. A Better Life Recovery LLC*, Cal. Ct. App., 4th Dist., No. G061892, demonstrates the potential consequence of drafting an arbitration agreement without foreseeing every way a future plaintiff might attempt to pick it apart.

Almost two years ago, in *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022),the United States Supreme Court held that the Federal Arbitration Act preempts the rule from *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014) that Private Attorneys General Act (PAGA) actions could not be divided into individual and representative claims brought on behalf of other allegedly "aggrieved employees." This decision paved the way for employers to enforce agreements requiring individual arbitration even in the context of a PAGA action, by compelling the "individual" component of the PAGA claim to arbitration. (Under California Supreme Court precedent, the "non-individual" component remains in court, where it is generally stayed until arbitration concludes.)

In attempting to follow this now-familiar playbook, the employer in *Hegemier* hit a snag. The arbitration agreement contained a provision exempting from arbitration "claims that are not subject to arbitration under current law." The trial court interpreted this to mean that PAGA claims categorically were excluded from the agreement, because at the time the agreement was signed, *Viking River* had not yet been decided, and *Iskanian* would have precluded arbitration of the PAGA claims.

The Court of Appeal agreed. Without further clarifying language such as "under current law, as it may be interpreted in the future," the court interpreted the reference to "current law" to mean "a fixed 'snapshot' of claims that were deemed not arbitrable at the time the agreement was signed." Slip op. at 11. Therefore, "among the types of claims the alleged agreement exempts from binding arbitration is that which *Iskanian* declared an employee could not be compelled to arbitrate based on a predispute agreement — both the individual and non-individual components of a PAGA claim." *Id.* at 2.

The *Hegemier* court acknowledged other Court of Appeal decisions reversed orders denying arbitration of individual PAGA claims based on pre-*Viking River* arbitration agreements (for example, as we reported here). However, it distinguished those cases based on the "unambiguous language"

limiting the scope of the agreement to arbitrable claims under "current law." *Id.* at 12.

Hegemier's interpretation of "current law" is certainly open to criticism. Ordinarily, we consider the task of a court interpreting statutory law as explaining what the law meant all along, rather than creating new law. Indeed, the *Viking River* decision concludes that *Iskanian*'s prohibition against arbitration of the individual component of a PAGA claim was wrong the day it was decided. *Viking River*, 596 U.S. at 662 (holding this rule "is incompatible with the [Federal Arbitration Act]").

Ironically, while the exclusion of claims not arbitrable under "current law" in *Hegemier* was meant to ensure the arbitration agreement was enforced to the fullest extent, it was turned against the employer and ultimately *excluded* claims from arbitration that otherwise would have been arbitrable. As we have reported (here and here), *Hegemier* was hardly the first case to do so. Rather, it is the latest sober reminder that reminder that class and representative action plaintiffs will often seize on any plausible argument to avoid an arbitration agreement, and will sometimes find a receptive audience.

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