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Ninth Circuit Defines Parameters for Removal of PAGA Actions

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California's Private Attorneys General Act of 2004 (PAGA) allows an "aggrieved employee" to recover civil penalties for certain violations of the California Labor Code. The amount of recovery in a PAGA action is based on the number of pay periods in which violations of the Labor Code have taken place with respect to each aggrieved employee.¹

For purposes of removal based on diversity, California courts have been divided over whether a defendant must establish the \$75,000 amount-in-controversy requirement based solely on civil penalties attributable to the plaintiff's individual claims or instead, whether a defendant can establish the minimum jurisdictional amount by aggregating the civil penalties attributable to the claims of all the aggrieved employees represented by the PAGA plaintiff. In *Urbino v. Orkin Services of California, Inc.*,² a divided panel of the U.S. Court of Appeals for the Ninth Circuit reversed a lower court decision and held that PAGA penalties cannot be aggregated for purposes of removal. Nevertheless, while the Ninth Circuit has resolved one disputed issue, its reasoning might well call into question other decisions interpreting the PAGA.

Removal of the *Urbino* Case

The plaintiff in *Urbino* filed a PAGA action against his former employer, alleging that it deprived him and other current and former nonexempt employees of their rightful meal periods, overtime and vacation wages, and accurate itemized wage statements, all in violation of various sections of the California Labor Code. The plaintiff sought civil penalties pursuant to the PAGA based on those purported violations.³ The defendant removed the action based on diversity jurisdiction. With respect to the jurisdictional amount, the defendant calculated that it could potentially be liable for over \$9,000,000 in civil penalties, well in excess of the \$75,000 jurisdictional amount.

The plaintiff moved to remand, arguing that under PAGA an individual has a separate and distinct claim that cannot be aggregated with other aggrieved employees' claims to meet the jurisdictional amount for removal. Based on the total penalties divided by the total number of aggrieved employees, the plaintiff argued that no one employee's penalties exceeded the

¹ See Lab. Code §§ 2698 *et seq.*

² Case Nos. 11-66944, 11-6700, and 12-55064, 2013 U.S. App. LEXIS 16718 (9th Cir. Aug. 13, 2013).

³ See *Urbino v. Orkin Services of California, Inc.*, 882 F. Supp. 2d 1152, 1155-56 (C.D. Cal. 2011).

\$75,000 jurisdictional minimum as each employee would be entitled to only approximately \$11,000 in penalties. The district court found that a PAGA action falls into the “common and undivided” exception to the anti-aggregation rule, citing the Ninth Circuit’s decision in *Eagle v. Am. Tel. & Tel. Co.*⁴ There, the Ninth Circuit held that the common and undivided exception applies to the aggregation of minority shareholders’ claims in a class action suit against the majority shareholder of a corporation, just as in a typical shareholder derivative suit under California law where “the source of the shareholders’ claim for the wrongful depletion of corporate assets is the common and undivided interest each shareholder has in a corporation’s assets and a right to share in dividends.” Citing the California Supreme Court’s decision in *Arias v. Superior Court*,⁵ the Urbino district court held that a PAGA action “is essentially a law enforcement action designed to benefit the public, not to compensate aggrieved employees” and, as such, it more closely resembled the same “common and undivided” interest in a derivative action. Although it noted that there was a split in California district court decisions on the issue, and that there was no controlling Ninth Circuit authority, the *Urbino* district court held that removal of a PAGA action could be based on the total amount of penalties that can be sought by the aggrieved employees as the proxy of the California Labor & Workforce Development Agency.

The Ninth Circuit’s Decision

In a short and split decision, the Ninth Circuit reversed. The circuit framed the issue by quoting from the U.S. Supreme Court’s decision in *Synder v. Harris*,⁶ holding that the claims of class members can be aggregated to meet the jurisdictional amount requirement only when they “unite to enforce a single title or right in which they have a common and undivided interest.” Such “common and undivided” interests involve more than simply having questions of fact and law common to the group. Instead, the defendant must owe an obligation “to the group and not to the individuals severally.” Applying this definition, the Ninth Circuit held that the common and undivided exception could not be applied to a PAGA action, where each employee “suffers a unique injury – an injury that can be redressed without the involvement of other employees.”

In opposition, the defendant argued that a PAGA action falls into the common and undivided interest exception because a PAGA plaintiff is not just asserting his own individual interest but also the state’s collective interest. In his dissent, Judge Sidney R. Thomas agreed with the analysis of the district court, pointing out that PAGA plaintiffs do not enjoy property rights or any other substantive rights under the statute they seek to enforce, but instead “represent the same legal right and interest as state labor law enforcement agencies – namely, recovery of civil penalties that otherwise would have been assessed and collected by the [State].” The Ninth Circuit majority dismissed this argument, however, holding that even if the above were true, a PAGA action still would not satisfy the federal requirements of diversity jurisdiction as “[t]he state, as the real party in interest, is not a ‘citizen’ for diversity purposes.” The circuit thus held that “the federal courts lack subject matter jurisdiction over this quintessential California dispute.”

The Impact of the Ninth Circuit’s Decision

While the Ninth Circuit’s decision is clear about the inability to aggregate claims in the removal of a PAGA action based on diversity, it did not address whether a PAGA action could be removed under the federal Class Action Fairness Act (CAFA), either because it is sufficiently “similar” to a federal class action or because it qualifies as a “mass action.” For instance, in *Baumann v. Chase Investment Services Corp.*,⁷ a California district court held that a defendant could remove a PAGA action under CAFA by aggregating the civil penalties. The plaintiff in *Baumann* appealed to the Ninth Circuit and the appeal was fully briefed, argued and submitted to the same panel as in *Urbino*. However, the panel vacated the submission of the case pending the U.S. Supreme Court’s decision in *Mississippi ex rel. Hood v. AU Optronics Corp.*⁸ In that case, the State of Mississippi sued a number of manufacturers and distributors of liquid crystal display panels under a consumer protection statute, and the Fifth Circuit allowed the defendants to remove under the “mass action” section of CAFA based on an aggregation of the individual claims that the State of Mississippi represented. Accordingly, whether PAGA penalties can be aggregated for purposes of CAFA removal remains an open question pending the Supreme Court’s decision in *Mississippi ex rel. Hood*.

4 769 F.2d 541 (9th Cir. 1984).

5 46 Cal. 4th 969 (2009).

6 394 U.S. 332, 335 (1969).

7 Case No. 2:11-cv-06667 (C.D. Cal. Oct. 26, 2011).

8 701 F.3d 796 (5th Cir. 2012), cert. granted, 133 S. Ct. 2736 (May 28, 2013).

The Ninth Circuit's interpretation of PAGA could also have effects outside the removal context. For instance, in *Machado v. M.A.T. & Sons Landscape, Inc.*,⁹ a district court dismissed a PAGA action because it was *not* brought as a representative action. Similarly, in *Cunningham v. Leslie's Poolmart, Inc.*,¹⁰ a district court, holding that a PAGA claim must be made on a representative basis, refused to compel arbitration of such a claim on an individual basis.

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9 2009 U.S. Dist. LEXIS 63414, *8 (E.D. Cal. July 23, 2009).

10 2013 U.S. Dist. LEXIS 90256, *27-38 (C.D. Cal. June 25, 2013).