

Q&A with the Hon. James V. Selna
By Kristin Murphy



[Editorial Note: Judge Selna attended Stanford University where he was Editor of the Stanford Daily and graduated Phi Beta Kappa in 1967. He did not move far, graduating Order of the Coif in 1970 from Stanford Law School. He was in private practice at O'Melveny & Myers from 1970 to 1998. He was appointed to the Orange County Superior

Court in 1998 where he served until 2003. President George W. Bush nominated Judge Selna to the United States District Court for the Central District of California on January 29, 2003. The United States Senate confirmed Judge Selna on March 27, 2003.]

Q: You spent 25+ years in private practice at a big law firm. What are the two things you miss most about that time, if anything?

A: I miss some of my colleagues and some of the clients. Because I retired from O'Melveny, I'm recused from any O'Melveny cases, so I don't have any trouble socializing with my former partners.

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Towards a “Manageability” Standard in PAGA Discovery

By Matthew M. Sonne and Kevin P. Jackson

The Labor Code Private Attorneys General Act of 2004 (“PAGA”) deputizes an aggrieved employee to sue for civil penalties on behalf of the State of California. Cal. Lab. Code §§ 2698 *et seq.* Although a PAGA action is viewed as a “representative action,” it is “fundamentally different than a class action.” *McKenzie v. Fed. Express Corp.*, 765 F. Supp. 2d 1222, 1233 (C.D. Cal. 2011). The difference between PAGA actions and class actions is tied to the PAGA’s underlying purpose—to allow private attorneys general to step into the shoes of the State of California and bring claims on behalf of the California Labor and Workforce Development Agency (“LWDA”). In other words, PAGA suits are “essentially law enforcement actions,” not standard class actions used by plaintiffs to sue one defendant efficiently. *See Baumann v. Chase Inv. Services Corp.*, No. 12-05644, 2014 WL 983587 (9th Cir. March 14, 2014).



Nevertheless, courts and practitioners alike have struggled with a standard for managing PAGA suits because they are representative in nature and on their face, seem to parallel the class action model. Yet most courts, including the California Supreme Court, have found that PAGA suits are not confined to the strict class certification requirements of Fed. R. Civ. P. 23 and CCP § 382. *See Arias v. Sup. Ct.*, 46 Cal. 4th 969 (2009); *Baumann, supra*; *cf. Thompson v. APM Terminals Pacific Ltd.*, 2010 WL 6309364 (N.D. Cal. Aug. 26, 2010). Nevertheless, the inherent “individualized issues” present in PAGA actions may make case management of such cases particularly troublesome. In particular, questions about



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The President's Message

By Jeffrey H. Reeves



The second half of the year is shaping up nicely for ABTL-OC. Here is an update.

The Public Law Center is the only legal services organization in Orange County that provides pro bono representation to the indigent, and this month our Chapter continued its proud tradition of supporting the PLC with our 15th Annual Wine

Tasting Fundraiser for Public Law Center. The event, held on June 4, was quite a success. While the donations are still being tallied, it is already clear that ABTL raised a remarkable amount for PLC thanks to your generosity and that of our board members and their respective law firms. Not only were table sales strong, but the board enthusiastically responded to the traditional "President's Challenge," which generated close to \$30,000 in additional donations for the PLC.

Attendees also soaked up valuable insights on multi-district litigation from the dinner panel that included the Honorable James Selna, Marc Seltzer and Thomas McConville, who presented in a program entitled "**Toyota: Anatomy of a Complex MDL.**" The PLC also bestowed its coveted "Community Partner of The Year" awards to Manatt, Phelps & Phillips, LLP, Law Firm of the Year; Grace E. Emery (posthumously), Attorney of the Year; and CHOC Children's, Community Partner of the Year.

ABTL will be continuing its recent annual tradition of supporting Habitat for Humanity by staffing two Build Days in Santa Ana on June 20 and 27. Volunteers from Crowell & Moring, Gibson Dunn, Haynes Boone, Latham & Watkins, Orrick, Paul Hastings and Rutan are lined up to help build homes for needy families.

On September 10 we will be presenting a panel of judges discussing "What I know Now that I Wish I Knew Then." That should be an interesting discussion. Please mark your calendars.

As the host Chapter for the ABTL's 41st Annual Seminar, scheduled for October 15-19, 2014, at the recently renovated JW Marriott Ihilani on Oahu, our

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The Risk of Snatching Defeat from the Jaws of Victory—*Lane v. Francis Capital Management* and Using or Losing Federal Arbitration Act Preemption

By James P. Carter



You read that title right. No accidental transposition of “defeat” and “victory” here. That very risk – snatching defeat from the jaws of victory – was played out quite dramatically in the recent California Court of Appeal case of *Lane v. Francis Capital Management*, 224 Cal. App.4th 676 (2014). The result? California businesses using employee and consumer arbitration agreements

should take note of this important lesson – the growing trial court trend in this “fluid and volatile area of law” is to require actual and sufficient proof of interstate commerce before allowing the preemptive force of the Federal Arbitration Act (9 U.S.C. § 1 et seq. “FAA”) to compel arbitration.

Lane Facts

Keith Lane sued his employer, Francis Capital Management (“FCM”), alleging wrongful termination and a host of California Labor Code violations, including failure to pay wages. *Lane, supra*, 224 Cal. App.4th at 680. Lane alleged that he was a Los Angeles County resident, that FCM existed under California law and had its principal place of business in Los Angeles County, and that FCM’s alleged wrongdoing occurred in Los Angeles County. *Id.* Lane alleged nothing regarding whether FCM was or was not engaged in interstate commerce.

FCM responded with a motion to compel arbitration because Lane agreed to arbitrate “wage, hour and benefit claims” and all other disputes arising from his employment. *Id.* at 681. Lane opposed FCM’s motion based on both unconscionability and the assertion that California Labor Code Section 229 saved Lane’s wage claims from arbitration. *Id.* at 681-682. Section 229 provides that “[a]ctions . . . for the collection of due and unpaid wages claimed . . . may be maintained without regard to the existence of any private agreement to arbitrate.” Lane relied on *Hoover v. American Income Life Insurance Company*, 206 Cal.App.4th 1193, 1206-07 (2012), which held that Section 229 prohibited a Texas employer from compelling a California insurance sales employee to arbitrate wage claims because the arbitra-

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The Proper Care and Feeding of Partners & Clients: Effective Communication Skills for Junior and Mid-Level Associates

By Kristyn Kohut

On Wednesday, March 5, 2014, ABTL’s Young Lawyers Division (YLD) hosted a program designed to educate junior and mid-level associates on effective and successful communication with partners and clients. YLD Chair Shiry Tannenbaum moderated a discussion with Laura Kohut Hoopis, the managing partner of Kohut & Kohut LLP; Christy G. Lea, a partner at Knobbe, Martens, Olson & Bear LLP; and Penelope Parmes, a partner with Troutman Sanders LLP. The panelists shared relevant (and often entertaining) anecdotes to help illustrate several key themes:

- Always be proactive – for example, ask partners and clients what methods of communication they prefer and how often they want to be in touch, communicate immediately when a problem arises and offer solutions, and, offer to handle various aspects of a case;
- Seek out and develop relationships with partners and clients that complement your personality and goals;
- Be mindful that developing relationships with partners is great training for creating client relationships;
- Be positive and use common sense, particularly when dealing with complications;
- Share your level of experience with any given task, so a partner can provide appropriate guidance or point out helpful references;
- Strive to be a reliable team player in all situations; and
- Never make the same mistake twice.

Each partner and client will have different preferences and idiosyncrasies, of course, but the guiding principles and tips that the learned practitioners shared with the group certainly will help junior and mid-level associates navigate the challenging formative years of practice to make a positive and lasting impression.

◆ *Kristyn Kohut is a business litigation associate at Kohut & Kohut LLP.*

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Q: You got very high profile trial experience very early on as a young lawyer in the IBM cases. How do you think those cases or those trials shaped you as a young lawyer, and how important do you think it is for young lawyers to get trial experience early on?

A: The IBM case in particular really spanned the early years of my career. I started out as a Second Year Associate. When we went to trial I was the Junior Partner, the fourth person in the court room for the Memorex case. Participating in a big trial is really good practice with large law firms. It was really formative in seeing the mass of information, depositions, documents and what not, and then seeing how it comes together as you go to trial. Very formative experience.

Q: How would you encourage young lawyers to get that type of experience with fewer and fewer of those large cases going to trial?

A: Well, I'm not sure that the comparable experiences are available. Today it's rare that even a Senior Associate gets a stand-up role in the trial certainly a major trial. I think law firms should try and provide those opportunities. In the Memorex case in 1978, there were four of us who were the principal lawyers in the court room. But a number of the mid-level Associates got cameo roles, a small witness here, a small witness there. And I wish people would do that and pass out those opportunities. Every firm and really every lead trial lawyer has his own theory or growing theory about how you try the case.

For some people it's basically a one person show. For others, it's a series of cameos. There is no one right way to present your case in a jury trial action. I have seen all those used effectively. But there certainly ought to be opportunities for younger lawyers. Younger lawyers shouldn't overlook deposition as an opportunity. It's a real-time skill interrogating someone. And the skills that you would use in deposition are really comparable and transferrable to what you would do in a court room. When you are taking a deposition of an adverse party, it's just like cross-examining. You are building the record and making sure that you cover all you want and lock them in. Those skills are really important in terms of the stand-up skills in a court room.

Q: What can a lawyer do or what have they done to really impress you at a trial or important hearing?

A: Certainly a degree of preparedness with realistic views of the case, the strength and weaknesses. I think a lawyer gains a lot of credibility points if a lawyer

gives up an argument. I remember a major anti-trust case involving Johnson & Johnson, on one side, and Stephen Susman of Susman Godfrey, on the other. I granted summary judgment on some of the claims and there was no problem, no hard feelings. They went to trial on the theories that they had. I think a good trial lawyer needs to be gracious in defeat and to figure out what they really need. In most cases one theory or one arrow in the bulls eye does it.

Q: What has been the biggest change in your day to day routine since moving from the Orange County Superior Court to the Central District?

A: When I was on the Superior Court, most of my time was either on a civil panel or complex panel so I was in trial almost all of the time. Maybe because I wanted to do trials there were plenty of trials to take on. At the District Court, the law and motions calendar is much heavier. There is a 12(b)(6) Motion in almost every case of any significance. Most cases will have the end of discovery Summary Judgment Motion.

Q: You have a reputation for running a very efficient court room. How do you manage attorneys and your staff to maintain that efficiency?

A: I think that it comes out of my time in private practice. A busy lawyer is an efficient lawyer and I try to translate that philosophy in chambers and in the court room. For example, my clerks draft a tentative ruling for a civil law and motion. We talk about what the motion really needs at the front end. It's one thing if it is a contested Motion to file a Second Amended Complaint, discusses a cutting-edge issue, or is dispositive of the case. Each requires a different degree of attention. When you need to build a Chevy build a Chevy. When you need to build a Cadillac build a Cadillac. In the court room I demand that lawyers be efficient on the civil side. I give the lawyers a time budget on every civil case. I give them a realistic amount of time to be in front of the jury. Time is split and they use it the way they will. I have only had one instance in which a lawyer out of the District totally ignored the time budget to his peril. On the whole, I think lawyers tend to over-try their cases. Forcing them to compact the case down to what it is really about is really helpful. Another thing I do is limit examinations to two rounds, direct cross, and redirect recross. In state court often it's a ping pong contest that goes back and forth, back and forth and back and forth. If we go two rounds and I sense that there has been some unfairness, okay you can put on some redirect, but I tell people up front to concentrate your examinations and be compact, cover the ground all at once.

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Q: What kind of qualities do you look for in your staff and clerks?

A: I look for three things in clerks: people who are bright; people who can write; and people who are nice. The latter you would think would be self-evident. I have always had great clerks in terms of personal relationship level. After the first year I really felt what a small world this is because everybody has to get along with one another. Probably 80% tested by human interactions on a business day or with my clerks, my judicial assistant, my clerk and deputy. Everybody gets along, I've had the same clerk and deputy all 11 years, same judicial assistant, same court reporter for all but two of those years and great administrative clerks who have been very talented and really nice people.

Q: Finally, do you have any advice for young associates coming up at a big law firm?

A: Get out in your community and take on opportunities in court. The ABTL is a great opportunity to wade in and go meet judges. I personally enjoy ABTL particularly because it's a neutral environment, if you will, where I feel free to talk to any lawyer even if they have something in front of me. We just don't talk about the matter. I think that part of my job is to get out there and let people see another half of me so that they are more comfortable when they come into my court room. If you have chatted with somebody at the reception part of an ABTL meeting, I think you could take some sense of the judge's measure and almost by definition you come into the court room a little bit more comfortable because you know something about that person. The Federal Bar Association is another venue for doing that. And I think young associates should pursue opportunities in the court room such as pro bono activities or public counsel. Some opportunities are more sophisticated than others. Some scams can be very sophisticated and really need the skills that someone might have in a large law firm.

The ABTL thanks Judge Selna for his time.

◆ *Kristin Murphy is a litigation associate in the Orange County office of Latham & Watkins LLP.*

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concerning the proper scope of discovery in these hybrid actions. Should PAGA discovery co-extend with the general parameters of class certification discovery?

This article provides a brief history of the PAGA and its future role in California courts. Three noteworthy decisions have been issued that analyze the scope and limitations of PAGA discovery in light of its non-class nature. In short, the PAGA's purpose is to provide aggrieved employees with an efficient and effective private mechanism to redress harm. PAGA lawsuits run contrary to their intended purpose when they borrow class-action discovery models that encourage protracted, expensive, and unwieldy litigation. Manageability of PAGA suits is therefore necessary to ensure that PAGA's efficiency directive is fulfilled.

Background on PAGA Representative Actions

California purportedly enacted PAGA because of inadequate financing and staffing to enforce state labor laws. 2003 Cal. Stat. Ch. 906, §§ 1-2. If the LWDA declines to investigate an alleged labor law violation or issue a citation, an aggrieved employee may commence a PAGA action against an employer "personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations." *Arias, supra* at 980. "[T]he civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation." Cal. Lab. Code § 2699(f)(2). But the LWDA, and not the aggrieved employees, receives a majority of the recovery. Indeed, the LWDA receives seventy-five percent of the penalties collected in a PAGA action, and the aggrieved employees receive the remaining twenty-five percent. *Id.*, § 2699(i); *see also Baumann, supra; cf. Urbino v. Orkin Servs. of Calif.*, 725 F.3d 1118 (2013) (suggesting that the PAGA representative, and not all "aggrieved employees," is entitled to the entire twenty-five percent as an incentive for bringing the action).

Rise in PAGA Actions in California Courts

Historically, plaintiffs either initiated PAGA suits as class actions or asserted PAGA claims in tandem with other alleged class violations against one defendant employer. However, a new wave of stand-alone PAGA claims have flooded the courts. Annual PAGA filings have increased over 200 percent over the past 5 years and 400 percent since 2004, when PAGA was enacted. *See Emily Green, "An alternative to employee class actions," Los Angeles Daily Journal (April 16, 2014.)* The

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square peg of stand-alone PAGA cases cannot continue to be placed into the round hole of class action discovery models. PAGA cases require their own case management model.

Particularly troubling is the significant expense and length of many PAGA lawsuits. For instance, in *Driscoll v. Granite Rock Co.*, 2011 WL 10366147 (Cal. Super. Ct. September 20, 2011), a PAGA representative action went to a bench trial that lasted 14 days and involved 55 witnesses and 285 exhibits, including expert witnesses who used statistical evidence to prove violations as to each “aggrieved” employee. The need for workable solutions to handling PAGA actions, in light of their expense and manageability concerns, is becoming increasingly dire. PAGA would run contrary to its intended purpose if it actually incentivizes protracted and lengthy litigation. Nowhere is this problem more acute than in discovery practice—the primary perpetrator of time and cost. Despite the dearth of case law on the subject, three decisions are instructive concerning the proper scope in managing PAGA lawsuits.

The Garvey Approach to Manageability: Bifurcating Discovery

One of the few decisions to address the issue of managing a PAGA representative action is *Garvey v. Kmart Corporation*. *Garvey v. Kmart Corp.*, No. 11-02575 WHA, 2012 WL 2945473, at *6 (C.D. Cal. July 18, 2012). In *Garvey*, Judge Alsup of the U.S. District Court for the Northern District of California was asked to certify a statewide class of cashiers who worked in Kmart retail stores throughout California who alleged they were denied a “suitable seat.” *Id.* It should be noted that prior to PAGA, there was no mechanism for an employee to seek private redress for alleged violations of this seating provision, which is contained in the Industrial Welfare Commission Wage Orders. Thus, while *Garvey* was a class action, the sole claim was brought under the PAGA. *Id.* Plaintiff sought to represent approximately 5600 individuals from 100 stores. *Id.* In addressing plaintiffs’ class certification motion, Judge Alsup recognized the potential manageability problems inherent in the proposed PAGA class:

“This order only certifies a class comprised of cashiers working in the Tulare Kmart store, and not statewide for all California Kmarts, as plaintiff had requested. As discussed with counsel at the hearing, there are possible problems of manageability concerning statewide certification. This certified class of cashiers working in the Tulare Kmart store will be tried

to completion, through trial and subject to decertification if warranted. This will illuminate the extent to which there are genuine issues that preclude class certification on a statewide basis. Therefore, this order holds in abeyance the extent, if at all, any other Kmart stores will be certified.”

Id. The *Garvey* approach to PAGA manageability concerns is noteworthy because it is simple and pragmatic—it bifurcates the entire litigation into two phases. The first phase operates as a test phase, limiting discovery and trial to focus on one store, rather than 100 stores. This approach was similar to that taken by the Court in *Currie-White v. Blockbuster, Inc.*, No. C09-2593 MMC (MEJ), 2010 U.S. Dist. LEXIS 47071, at *9-11 (N.D. Cal. Apr. 15, 2010), another PAGA seating case. In *Currie-White*, the plaintiff attempted to discover contact information for more than 9,000 individuals from over 500 stores in California. *Id.* The court denied plaintiff’s motion to compel the broad information requested, and instead limited discovery to the two stores in which plaintiff worked, as well as an additional ten stores. *Id.*; see also *Martinet v. Spherion Atlantic Enterprises, LLC*, No. 07cv2178 W (AJB), 2008 U.S. Dist. LEXIS 48113, at *2-4, 6 (S.D. Cal. June 20, 2008) (in a mixed PAGA and putative wage-hour class action, plaintiff sought statewide discovery and defendant successfully limited discovery to the single location where the plaintiff was employed); *Franco v. Bank of America*, No. 09cv1364-LAB (BLM), 2009 U.S. Dist. LEXIS 111873, at *2, *10-11 (S.D. Cal. Dec. 1, 2009) (court denied plaintiff’s motion to compel discovery of contact information for all similarly situated employees statewide, instead limiting discovery to the locations where plaintiff had worked).

In sum, this proposed first phase may serve to conserve time, expense, and judicial resources by providing a plaintiff with the opportunity to test and potentially dispel the many manageability issues inherent in PAGA actions. Further, a defendant litigating in this phase would not be subjected to the costly and burdensome discovery practice required when defending against a class comprised of potentially thousands of current and former employees.

Rix v. Lockheed Martin Corp.: PAGA Discovery Is Not Class Action Discovery

In *Rix v. Lockheed Martin Corporation*, Magistrate Judge Stormes of the U.S. District Court for the Southern District of California considered the scope of PAGA discovery after permitting a PAGA claim to proceed despite refusing to certify the class action. *Rix v. Lockheed Martin Corp.*, No. 09cv2063 MMA, 2012 WL 13724 (S.D. Cal. Jan. 4, 2012). In *Rix*, after the Court denied class certifi-

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cation, defendant moved to strike, or in the alternative, dismiss plaintiff's PAGA representative claim, arguing that it could not proceed because it "would be unmanageable, impracticable, and raise serious due process concerns." *Id.* Plaintiff opposed, "arguing that the case could be decided on common evidence," and the Court denied defendant's motion. *Id.* Subsequently, plaintiff sought to compel broad and expansive discovery as to each allegedly "aggrieved employee," including contact information, documents supporting the classification of each employee, and all time and payroll information. *Id.*

Defendant opposed the motion to compel this PAGA discovery, arguing that plaintiff "should not be allowed to defeat a Motion to Strike by arguing the action can be adjudicated based on common evidence and then force [defendant] to produce the same burdensome evidence it formerly disavowed in order to proceed with the PAGA claim." *Id.* The Court agreed with defendant, noting that "adjudication of the PAGA claim will require 90 individualized inquiries into whether each and every one of the [employees] was properly categorized as exempt for each and every relevant work week. Plaintiff has sought every fact, witness and document related to whether each of the 90 [employees] was properly categorized as exempt for each of the 148 relevant workweeks." *Id.* The Court proceeded to deny the motion to compel discovery, reminding plaintiff that he had represented that "the PAGA claim would be 'manageable' because the case can be made with common evidence[.]" *Id.*

The *Rix* Court correctly focused on the manageability of the PAGA action when determining the proper scope of discovery. Because a PAGA action is not akin to a typical class action, the discovery parameters should likewise not be identical. Applying a "manageability" standard to PAGA actions is gaining traction in California's federal courts.

Even with Appropriate Restraints, Certain PAGA Suits May Be Inherently Unmanageable

In contrast to the *Rix* and *Garvey* courts, which sought to limit the scope of PAGA suits through appropriate limitations on discovery and case management, at least one court has determined that a PAGA action might simply be unmanageable.

Indeed, in *Ortiz v. CVS Caremark Corporation*, the U.S. District Court for the Northern District of Califor-

nia became the first court to dismiss a PAGA action for being unmanageable. *Ortiz v. CVS Caremark Corp.*, Case No. 12-05859 EDL, 2014 WL 1117614 (N.D. Cal. Mar. 19, 2014). There, the plaintiff brought a class action and PAGA representative action for a multitude of alleged wage and hour violations. *Id.* After the Court denied class certification, defendants moved to strike the PAGA representative action, arguing that it must satisfy the requirements of Rule 23, and that it could not for the same reasons that class certification was denied. Citing *Arias* and *Baumann*, the Court rejected defendant's argument that PAGA actions must satisfy the requirements of Rule 23 in federal courts.

Notwithstanding the inapplicability of the requirements of Rule 23, however, the Court found that plaintiff's PAGA action—and not PAGA actions generally—was unmanageable because the circumstances dictated a "multitude of individualized assessments [.]" *Id.* The Court's analysis was driven by the applicable burdens of proof on the plaintiff's claims, all of which would require plaintiff to demonstrate liability as to each individual aggrieved employee. *Id.* Common proof—such as written policies applicable to all employees—would not have been sufficient to establish liability.

The Court's Inherent Powers to Supervise PAGA Actions

Because PAGA cases are unbounded by the rigorous class action requirements, and because there is little case law concerning the proper treatment of PAGA actions, the Court's ability to control its docket becomes paramount. California courts "have inherent equity, supervisory and administrative powers as well as inherent power to control litigation before them." See *Cottle v. Sup. Ct. (Oxnard Shores Co.)*, 3 Cal. App. 4th 1367 (1992), citing *Baugess v. Paine*, 22 Cal. 3d 626, 635 (1978); *Western Steel & Ship Repair, Inc. v. RMI, Inc.*, 176 Cal. App. 3d 1108, 1116-1117 (1986). These powers allow courts to fashion "new forms of procedures when required to deal with the rights of the parties and to manage the caseload of the court." See *Cottle, supra*, at p.1377.

These fundamental principles apply to the unique issues posed by PAGA representative actions. As demonstrated by the *Garvey*, *Rix*, and *Ortiz* decisions, courts have latitude to create workable solutions so that a PAGA case does not become a backdoor to class action discovery for what purports to be an "enforcement action."

Conclusion

Effective management of PAGA cases begins with discovery, and there are many procedural devices available to

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tion agreement did not purport to include statutory wage claims and because the employer failed to establish the interstate commerce grounds necessary to trigger FAA preemption of Section 229. FCM's reply briefly argued in a footnote that FAA preemption was triggered, making *Hoover* distinguishable, because "Mr. Lane was a security analyst at a firm which manages capital investments." *Lane*, 224 Cal. App.4th at 682.

The trial court denied FCM's motion to compel, finding that the agreement was impermissibly unconscionable and that because FCM failed to prove FAA preemption, *Hoover* controlled. On that last point, the trial court reasoned and warned: "[r]eviewing courts have declined to consider the issue of FAA preemption where the issue was not addressed or fully developed in the trial court." *Id.*

On appeal, FCM argued that the prohibition against arbitration in Section 229 must "give way" under FAA preemption, citing the controlling and squarely on-point United States Supreme Court case of *Perry v. Thomas*, *supra*, 482 U.S. 483 (1987). In *Perry*, the Court considered the very Section 229 argument subsequently advanced by Lane, and definitively held: "Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement **within the coverage of the Act**. . . . This clear federal policy places § 2 of the Act in unmistakable conflict with California's § 229 requirement that litigants be provided a judicial forum for resolving wage disputes. Therefore, under the Supremacy Clause, the state statute must give way." *Perry*, 482 U.S. at 489-491 (emphasis added). The *Perry* Court was not asked to nor did it address whether the employer was engaged in interstate commerce, or whether FAA preemption had been triggered.

The good news for California businesses from the *Lane* decision is that the Court of Appeal sided with FCM in part, finding that its arbitration agreement **was** sufficiently conscionable and covered all but Lane's unpaid wages claim (saved by Section 229). *Lane*, *supra*, 224 Cal. App.4th at 680. The distressing news and the lesson to be learned is found in the Court's conclusion that "FCM neither sought to nor succeeded in presenting facts sufficient to support a finding of FAA preemption." *Id.* at 687. As a result, FCM could not use the otherwise clearly applicable and controlling *Perry* holding above to fold all of Lane's claims into arbitration.

FAA Preemption and Proving It Up

The FAA's preemptive power sought by California businesses to avoid statutory and case-law based restrictions on arbitration derives from its own language, directing that a written arbitration provision in "a contract evidencing a transaction **involving commerce** . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). Thus, the controlling national policy in favor of arbitration was born, **but** only where interstate commerce is involved. As the *Hoover* Court held: "if the FAA [does] not apply, the exception favoring federal preemption and arbitration [does] not operate." *Hoover*, *supra*, 206 Cal.App.4th at 1208.

Who, then, bears the burden of proving up the basis for FAA preemption? "A party seeking to enforce an arbitration agreement has the burden of showing FAA preemption." *Lane*, 224 Cal. App.4th at 687; *see also*, *Woolls v. Superior Court*, 127 Cal.App.4th 197, 211 (2005). That party's burden is satisfied when it has shown that its activities "bear on interstate commerce in a substantial way." *Citizens Bank v. Alafabco, Inc.*, *supra*, 539 U.S. 52, 56-57 (2003).

What activities bear on interstate commerce? As answered in California case law: "The United States Supreme Court has interpreted the term 'involving commerce' in the [FAA] as the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power. . . . Because the statute provides for 'the enforcement of arbitration agreements within the full reach of the Commerce Clause,' . . . it is perfectly clear that the [FAA] encompasses a wider range of transactions than those actually 'in commerce'—that is, 'within the flow of interstate commerce' 'Congress' Commerce Clause power "may be exercised in individual cases without showing any specific effect upon interstate commerce" if in the aggregate the economic activity in question would represent "a general practice . . . subject to federal control." . . . Only that general practice need bear on interstate commerce in a substantial way." *Hedges v. Carrigan*, 117 Cal.App.4th 578, 585-586 (2004) (citations omitted).

Contrasts In Proof and Outcomes

While the *Lane* decision is the most recent appellate decision touching on FAA preemption, it is not the only case in which proof was found lacking.

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In the *Woolls* case, a homeowner, Woolls, hired Turner to expand Woolls' residence. Under the terms of their construction contract, disputes were to be resolved in arbitration. Over Woolls' objection, Turner and Woolls proceeded to arbitrate a dispute that arose between them. When Turner prevailed, Woolls sought to vacate the award on the grounds that the arbitration provisions did not comply with California Business and Professions Code, Section 7191. After the trial court denied Woolls' motion, Woolls sought appellate relief.

Woolls, supra, 127 Cal.App.4th at 200-204. In an effort to preserve his award, Turner argued that FAA preemption prohibited Section 7191 from invalidating the arbitration provisions. *Id.* at 211. The Court of Appeal disagreed as it reversed and vacated Turner's award:

"Turner does not cite any authority for the proposition that an agreement between a California homeowner and a California contractor to renovate a single family residence in La Canada, California, involves interstate commerce so as to implicate the FAA. . . . Turner did not make any evidentiary showing in furtherance of his assertion this transaction involves interstate commerce. Although Turner argued the issue of federal preemption in his papers below, Turner did not submit any declarations to show the instant transaction involves interstate commerce." *Id.* at 212-213.

In *Hoover*, where the employer lost the benefit of arbitrating a wage claim preclusive Section 229 because the employer did not prove a basis for FAA preemption, the Court commented on the employer's lacking proof:

"The only established facts are that Hoover was a California resident who sold life insurance policies. Even though [the employer] is based in Texas, there was no evidence in the record establishing that the relationship between Hoover and [the employer] had a specific effect or 'bear[ing] on interstate commerce in a substantial way.' [Citation.] Hoover was not an employee of a national stock brokerage or the employee of a member of a national stock exchange. [Citation.] Unlike the plaintiff in *Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 Cal.App.4th 1276, 1287, 58 Cal.Rptr.3d 5, Hoover did not work in other states or engage in multi-million dollar loan activity that affected interstate commerce by negotiating with a bank that was headquartered in another state." *Hoover, supra*, 206 Cal.App.4th at 1207-1208. The *Giuliano* decision cited by the *Hoover* decision offers an instructive contrast in proving grounds for FAA preemption, and a corresponding favorable outcome.

In *Giuliano*, the employee, Giuliano sued his employer, Inland Empire Personnel, Inc., alleging a failure to pay wages (bonus and severance), a breach of the employment contract, and seeking declaratory relief to the ef-

fect that Empire's arbitration agreement failed to meet the requirements set out by the California Supreme Court in *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83 (2000). *Giuliano, supra*, 149 Cal.App.4th at 1276. Giuliano also argued that Section 229 saved his wage claims from arbitration.

Empire filed a motion to compel arbitration, and raised FAA preemption in an effort to defeat Giuliano's Section 229 assertion. *Id.* at 1280, 1282-1283. Although Giuliano alleged in his complaint that Empire was engaged in "business throughout Arizona and California" and admitted in his declaration that he had "attend[ed] meetings, site visits and grand opening ribbon cuttings" in other states (*Id.* at 1287), Empire went further in proving the basis for FAA preemption. As recited by the Court of Appeal: "In support of its motion, Empire submitted the declaration of its executive vice president and chief legal officer Larry Day, who attested that: (1) Empire engages in interstate commerce by acquiring, developing, and selling residential and commercial properties in both California and Arizona, and by shipping supplies from other states to California and Arizona; and (2) Giuliano actively assisted Empire's multistate activities by negotiating loans with a bank that is headquartered outside of California." *Id.* at 1283. Attempting to avoid FAA preemption and save his wage claims from arbitration, Giuliano contended that his "employment contract did not involve interstate commerce because Empire does not operate in two states—its principal offices are in California, the employment agreement was signed in California, Giuliano worked in California, Giuliano paid state income taxes in California, and Giuliano was terminated in California." *Id.*

In reversing the trial court's denial of Empire's motion to compel and finding that FAA preemption is appropriate, the Court of Appeal held: "The record was undisputed regarding the interstate nature of Empire's activities, Giuliano's business trips outside California, and Giuliano's negotiation of business loans from out-of-state lenders. Given Empire's undisputed interstate business activities and the broad construction we must give to the phrase 'evidencing a transaction involving commerce' (9 U.S.C. § 2; *Allied-Bruce, supra*, 513 U.S. at p. 277, 115 S.Ct. 834), Giuliano's declaration was legally insufficient to create a factual dispute regarding Empire's interstate activities. The record is more than sufficient under *Allied-Bruce* to support a finding, as a matter of law, that Giuliano's employment contract involved interstate commerce." *Giuliano*, 149 Cal.App.4th at 1287.

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planning is well underway. Dan Sasse is chairing the statewide committee organizing the event, and Paul Gale, Adina Stowell and I are assisting Dan on that committee from O.C. The theme for this year's seminar is "The Science of Decision-Making", and promises to provide valuable educational programming in a breathtakingly beautiful setting.

I hope to see you all there, and in the meantime, thank you all for your continued support of ABTL-OC.

♦ *Jeffrey H. Reeves is managing partner at Gibson, Dunn & Crutcher LLP*

-PAGA Discovery: Continued from page 7-

ensure that discovery is appropriately focused in scope and burden. Practitioners may utilize early motion practice, whether aimed at the pleadings or discovery disputes, to tee up the issue of whether a particular PAGA case is manageable. Courts can also streamline this process—and avoid extensive discovery disputes—by adopting early case management procedures in PAGA cases that bring the issues of manageability to the forefront. Parties may also submit input on the nature of the underlying claims, the burdens of proof, and the scope of discovery that is necessary. Courts may then craft solutions to ensure that such cases are manageable before unwieldy discovery becomes the tail that wags the PAGA dog.

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So What Now?

FAA preemption provides a business with a means of overcoming California statutory and case-law driven prohibitions or limitations on arbitration, and enjoying the benefit of their bargained-for alternative forum for dispute resolution. Where facts are available, a business seeking to compel arbitration with the force of FAA preemption must do more than simply raise the FAA preemption specter. Detailed declarations of credible fact proving the adequate existence of interstate commerce should now be considered a routine requirement in supporting a motion to compel arbitration under FAA preemption. And such efforts certainly would not be hurt if a business were to incorporate a succinct representation in its arbitration agreement like: "[Individual] and [Company] agree that [Company] is engaged in transactions that involve interstate commerce." Losing arbitration rights when the facts and FAA preemption are otherwise available to save them is truly like snatching defeat from the jaws of victory. And nothing stings quite like that.

♦ *James P. Carter is a partner in the Employment Law practice of Paul Hastings, LLP*

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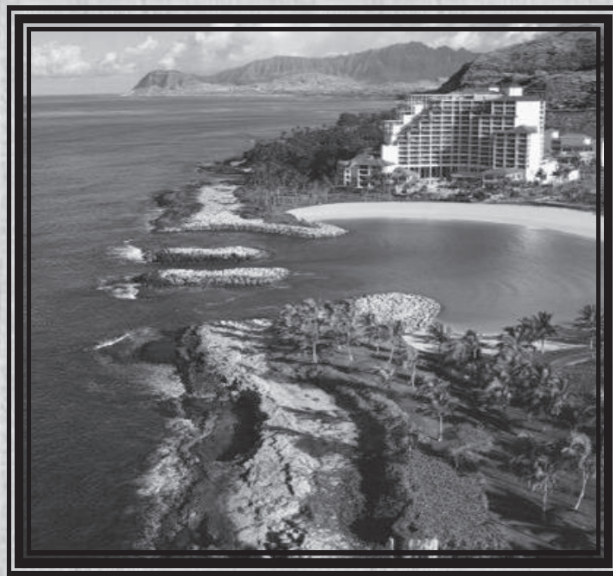
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