Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

The Biggest California Cases Of 2014: Midyear Report

By **Erin Coe**

Law360, San Diego (July 21, 2014, 1:44 PM ET) -- The California Supreme Court and the Ninth Circuit issued sweeping decisions in the first half of the year that will spur employers to put class action waivers in their arbitration agreements with workers, guide litigants on the use of statistical sampling in class actions and guarantee that bloggers enjoy the same free-speech rights as traditional journalists.

In one of the most closely watched legal battles, the state's Supreme Court held in a former limo driver's wage case against CLS Transportation Los Angeles LLC in June that employment arbitration agreements with mandatory class waivers are generally enforceable. In another, it determined in an overtime misclassification case against U.S. Bank NA in May that a class action trial plan relying on statistical sampling must be developed with expert input and afford the defendant an opportunity to impeach the model.

"These decisions radically influence how very significant numbers of wage-and-hour class actions are going to be handled in California for the foreseeable future," said David A. Lowe, a Rudy Exelrod Zieff & Lowe LLP lawyer who represents employees.

Here's a closer look at these and other major rulings from the first half of 2014:

Iskanian v. CLS Transportation

The California Supreme Court **ruled** June 23 that a 2007 California high court decision called Gentry, which regularly led to the invalidation of class waivers, was trumped by the Federal Arbitration Act in light of the U.S. Supreme Court's 2011 Concepcion ruling. But the court also held that representative claims under California's Private Attorneys General Act, which allows workers to sue on behalf of current or former workers to recover penalties for violations of the California Labor Code, couldn't be waived because it ran counter to public policy.

Since the intermediate appeals court had ruled that the entire arbitration agreement should be enforced, including the PAGA waiver, the California Supreme Court reversed the judgment in former limo driver Arshavir Iskanian's proposed wage class action against CLS.

This ruling and the court's **2013 decision** in Sonic-Calabasas A Inc., which held Concepcion triggered the reversal of a California law that allowed employees to take wage disputes to the labor commissioner before entering arbitration, show that the California Supreme Court is taking steps to re-examine more than 10 years' worth of arbitration precedents and fundamentally revamp state arbitration law in a way

that matches more closely the direction taken by the U.S. Supreme Court, according to Felix Shafir, a Horvitz & Levy LLP partner who defends class and representative actions.

“For many years, the California Supreme Court set many limits like Gentry on what kind of arbitration agreements wouldn’t permit class action waivers of wage-and-hour claims, but now that rule is dead,” he said. “We see the court revisiting old laws, and it will be interesting to see how far it goes. I don’t think the process is complete just yet since tension remains at the California Supreme Court and the U.S. Supreme Court.”

While the decision is likely to encourage employers to insert waivers to preclude class actions in their arbitration agreements with workers, employers won’t be able to block PAGA claims from being filed in court and should expect to face an uptick in these representative claims, according to Andra Greene, a complex business litigator atIrell & Manella LLP.

“Instead of many putative class actions being brought in the wage-and-hour arena, we are going to see the same claims brought as PAGA claims,” she said. “While they are not exactly class actions, they encompass a far greater number of people than an individual case can. Exposure for an employer in a PAGA case can be very large ... and can run into the millions of dollars depending on the number of alleged violations, the length of time of the alleged violations and the number of people.”

Both parties could still appeal the decision to the U.S. Supreme Court, but if the PAGA loophole stays intact, the California Legislature may try to block additional claims from being compelled to arbitration, according to Donald Falk, an appellate partner at Mayer Brown LLP.

“If the ruling does end up creating an exception for PAGA, is that an exception that the Legislature will try to duplicate in other circumstances?” he said. “Will there be efforts to structure other statutes to avoid arbitrability?”

Iskanian is represented by Glenn Danas, Ryan Wu, Raul Perez and Katherine Ward Kehr of Capstone Law APC and Scott L. Nelson of Public Citizen's Litigation Group.

CLS Transportation is represented by David Faustman, Yesenia Monique Gallegos, Cristina Armstrong and Ruwani Namal Munaweera of Fox Rothschild LLP and Leo Leyva ofCole Schotz Meisel Forman & Leonard.

The case is Iskanian v. CLS Transportation Los Angeles LLC, case number S204032, in the California Supreme Court.

Duran v. U.S. Bank

On May 29, the California Supreme Court **affirmed a decision** to decertify a 260-person class and strike down a $15 million trial court win for workers alleging U.S. Bank misclassified them as overtime-exempt, but it left the door open for a new trial and another push for class certification.

The state high court found that the trial court’s approach to sampling in the case was “profoundly flawed.” It noted that the trial court extrapolated classwide liability from a small sample of workers, basing its finding that the entire class had been misclassified on testimony about the work habits of 21 plaintiffs, and applying the average amount of overtime reported by the sample group to the class as a whole. It also held that class action trial management plans must allow for the litigation of relevant

affirmative defenses.

The court highlighted the significance of the U.S. Supreme Court's 2011 holding in the Wal-Mart Stores Inc. v. Dukes case that plaintiffs can't have trial-by-formula evidence that prevents defendants from litigating affirmative defenses, a departure from some state appeals courts that read Wal-Mart as only applying to cases involving injunctions and pattern-and-practice claims, according to Shafir.

"The Duran court took a much broader approach and said defendants have due process rights to litigate defenses," he said. "In its view, Wal-Mart is not some narrow standard that applies to certain types of class actions, but that this is a due process right that circumscribes how California class actions work."

Although the court stopped short of saying that statistical sampling couldn't be used to show liability and damages in wage class actions, it laid down markers for how statistical sampling and surveys should be done, he said. How those markers work in practice remains to be seen.

"The Duran court expressed skepticism of procedural tools like statistical sampling and formulas and directed trial courts to be vigilant to not allow these vehicles for efficiency to restrict defendants from presenting their case," said John Querio, an appellate litigator at Horvitz & Levy LLP.

The decision will have an important effect on how class actions are managed, according to Rex Heinke, co-head of Akin Gump Strauss Hauer & Feld LLP's Supreme Courtand appellate practice.

"The decision is likely to make it tougher to certify class actions," he said. "Trial courts have been instructed to look at the entire case and how it is tried as a practical matter. It's not enough to decide to try the liability issues as a class if a court can't also decide the affirmative defense issues on a classwide basis."

Duran is represented by Ellen Lake of Ellen Lake Law Offices and Edward Wynne of the Wynne Law Firm.

U.S. Bank is represented by Timothy Freudenberger, Alison Tsao and Kent Sprinkle of Carothers DiSante & Freudenberger LLP.

The case is Duran v. U.S. Bank NA, case number S200923 in the California Supreme Court.

Baumann v. Chase Investment

The Ninth Circuit also weighed in on California's unique claims under PAGA in a March ruling that limits employers' ability to boot PAGA cases from plaintiff-friendly state courts and could breed more PAGA litigation. The three-judge panel **addressed** the question of PAGA's similarity to so-called Rule 23 federal class actions, determining that the two weren't close enough to warrant the removal of a wage-and-hour suit against Chase Investment Services Corp. from state court.

The ruling reversed a district court's decision to keep the case in federal court under the Class Action Fairness Act, which determines that suits brought under statutes similar to Federal Rules of Civil Procedure 23 are subject to federal jurisdiction.

The panel concluded that Rule 23 and PAGA were more dissimilar than alike, noting that a PAGA action is at its core a civil enforcement action filed on behalf of and for the benefit of the state, not a claim for class relief. The Ninth Circuit in May **denied** Chase's petition for a hearing en banc.

The pro-employee ruling, which also held that PAGA claims can't be aggregated in determining the amount in controversy for purposes of establishing diversity jurisdiction, will allow for PAGA cases that assert violations of state wage-and-hour laws to stay in state court, according to Greene.

"Many employers prefer being in federal court than state court ... but the strategy for getting claims out of state court to federal court won't be available for purely PAGA actions," she said.

Baumann is represented by Glenn A. Danas and Ryan H. Wu of Capstone Law APC and Marc Primo of Initiative Legal Group APC.

Chase is represented by Carrie A. Gonell, John A. Hayashi, Samuel S. Shaulson and Allison B. Willard of Morgan Lewis & Bockius LLP.

The case is Joseph Baumann v. Chase Investment Services Corp., case number 12-55644, in the U.S. Court of Appeals for the Ninth Circuit.

Obsidian Finance v. Crystal Cox

In January, the Ninth Circuit **found** that a trustee subjected to criticism by a blogger for its role in a real estate bankruptcy needed to show the blogger had acted negligently, ruling in the case that bloggers and others who speak on issues of public concern are entitled to the same free-speech protections as traditional members of the press.

The three-judge panel reversed part of a lower court decision that held Obsidian Finance Group LLC did not need to show fault to establish liability against blogger Crystal Cox. Cox had accused Obsidian of tax fraud in its role as trustee in a real estate bankruptcy case, and was hit with a $2.5 million defamation verdict in 2011 over her posts. But the trial court erred in not granting Cox certain First Amendment protections, the panel ruled, citing U.S. Supreme Court cases that held the traditional media did not have greater constitutional privileges than other speakers.

"Blogging has become quite a big deal as more people engage in it as a source of information," Heinke said. "The ruling allows not just bloggers but anybody posting comments on the Internet to get First Amendment protection even if they are not part of the institutional press."

Obsidian is represented by Steven Wilker, Robyn Aoyagi and David Aman of Tonkon Torp LLP.

Cox is represented by Eugene Volokh of Mayer Brown LLP.

The cases are Obsidian Finance Group LLC et al. v. Crystal Cox, case number 12-35238 and 12-35319, in the U.S. Court of Appeals for the Ninth Circuit.

Salas v. Sierra Chemical

The California Supreme Court in June **revived** a former Sierra Chemical Co. employee's discrimination suit against the company, saying the plaintiff, who used someone else's Social Security number when applying for a job, could pursue the case because a state employee protections law was not preempted by federal immigration law.

Former Sierra employee Vincente Salas had argued that denying his right to bring his disability discrimination claim because he was an undocumented immigrant would weaken California's strong worker protection laws. The state high court agreed, concluding that Senate Bill 1818, which gives all workers, regardless of immigration status, state employee protections and remedies, wasn't preempted by federal law except to limit lost-pay damages for the period after an employer discovers the employee's ineligibility.

This case directly applies to a significant number of workers in the state because California has a large population of undocumented workers who are particularly vulnerable to being subjected to employment discrimination, according to Lowe.

The case also clarified how courts should apply the after-acquired evidence and unclean hands doctrines, which are commonly used by defendants in employment cases, he said. The after-acquired evidence defense is asserted when an employer discovers evidence after it allegedly wrongfully terminated an employee that would have led it to fire the employee anyway. The unclean hands defense is used to show the plaintiff engaged in improper conduct.

"Those kind of arguments come up in many employment cases, not just undocumented workers' cases, and are common tactics for defendants," Lowe said.

The California Supreme Court held that the after-acquired evidence doctrine can limit the damages but doesn't prevent a worker from bringing a claim, and that the unclean hands doctrine can't be used to prevent employees from bringing an important statutory claim like a claim for discrimination under the Fair Employment and Housing Act because those claims take precedence over that doctrine, according to Lowe.

"It's helpful that the California Supreme Court clarified doctrines that will impact a lot of employment cases," he said. "Salas is a very important decision that we will be seeing cited in the future."

Salas is represented by Christopher Ho of the Legal Aid Society.

Sierra Chemical is represented by Arnold J. Wolf of Freeman Firm.

The case is Vicente Salas v. Sierra Chemical Co., case number S196568, in the California Supreme Court.

--Editing by Elizabeth Bowen and Brian Baresch.
