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Are Orders Denying Class Cert. Appealable In PAGA Cases?

By **Felix Shafir and John Querio** (March 19, 2018, 3:15 PM EDT)

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For decades, plaintiffs who brought class actions in California courts could immediately appeal orders denying class certification under the so-called death knell doctrine.[1] California courts allowed such appeals because these orders "effectively rang the death knell for class claims."[2]

But the ever-growing number of representative claims under California's Private Attorneys General Act have led to a recent reassessment of this decades-old rule in cases where plaintiffs allege both class claims and PAGA representative claims. California courts of appeal have increasingly decided that the death knell doctrine does not authorize immediate appeals from orders denying class certification in cases that also include PAGA representative claims.

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These decisions have not definitively settled the matter. Since the California Supreme Court has yet to take up the death knell doctrine's applicability to lawsuits alleging PAGA claims, plaintiffs continue to argue that Court of Appeal opinions refusing to apply the doctrine to such lawsuits are wrongly decided. Moreover, some appellate courts have exercised their discretionary authority to treat premature appeals as writ petitions to reach the merits of a challenged order where the death knell doctrine did not authorize an appeal from that order.

It remains to be seen whether the California Supreme Court will intervene to address the death knell doctrine's applicability to cases alleging both class and PAGA claims. In the interim, the issue is likely to recur in California's intermediate appellate courts, as parties continue to disagree over whether plaintiffs can pursue death knell appeals in cases alleging PAGA claims.

In California, Orders Denying Class Certification are Generally Appealable

Under California law, an appeal may generally "be taken only from the final judgment in an entire action."[3] Pursuant to the death knell doctrine, an order denying class certification is immediately appealable in California because the state's courts treat the complete denial of class certification as "the practical equivalent of a final judgment" for absent individuals whom the named plaintiff seeks to represent.[4]

The death knell doctrine is based on the premise that, "'without the incentive of a possible group recovery[,] the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment and then seek appellate review of an adverse class determination.'"[5]

The death knell doctrine therefore authorizes an appeal from an order denying class certification when only individual claims remain in the case, since "the persistence of viable but perhaps de minimis individual plaintiff claims" following the elimination of the representative portion of the lawsuit is the specific circumstance that "creates a risk [th]at no formal judgment will ever be entered."[6] Thus, for example, "orders that only limit the scope of a class or the number of claims

available to it are not similarly tantamount to dismissal and do not qualify for immediate appeal under the death knell doctrine."[7] "[O]nly an order that entirely terminates" the representative portion of a lawsuit "is appealable."[8]

Cases Have Declined to Apply the Death Knell Doctrine to PAGA Lawsuits

Class actions are not the only form of representative action under California law. PAGA also authorizes representative claims, which are not subject to class certification requirements in California courts.[9]

"PAGA authorizes an employee who has been the subject of particular Labor Code violations" to seek penalties "on behalf of himself or herself and other aggrieved employees."[10] When "a representative action [is] brought" under PAGA, "the judgment in such an action is binding not only on the named employee plaintiff but also on ... any aggrieved employee not a party to the proceeding."[11]

"Since [PAGA's] enactment in 2004, 'it has become common practice for plaintiffs in employment actions to assert a PAGA claim, as the potential civil penalties for violations can be staggering and often greatly outweigh any actual damages.'"[12] "Annual PAGA filings have increased over 200 percent" in recent years, "and over 400 percent since 2004."[13] "PAGA claims often accompany class action claims."[14]

That plaintiffs who sue in California state courts cannot be compelled to arbitrate their PAGA representative claims "contributes heavily to the prevalence" of PAGA claims.[15] The popularity of PAGA claims also derives from the availability of representative relief under PAGA, since this "can often make for a very large group of employees as plaintiffs, not unlike a class action suit."[16]

But several California courts of appeal have concluded that the same representative relief that contributes to the popularity of PAGA claims also prevents plaintiffs from immediately appealing orders denying class certification where their lawsuits allege both class claims and PAGA claims.

The first published California appellate decision to reach that conclusion was Munoz v. Chipotle Mexican Grill.[17] In Munoz, the plaintiffs sued their former employer for alleged wage-and-hour violations, asserting class claims. One of the plaintiffs also asserted PAGA representative claims. The plaintiffs appealed after the trial court denied their class certification motion, claiming the trial court's order was immediately appealable under the death knell doctrine.

The Court of Appeal disagreed and dismissed the plaintiffs' appeal, holding that the presence of the PAGA claims barred application of the death knell doctrine.[18] The Court of Appeal decided that the main consideration justifying an immediate appeal under the death knell doctrine — that "the plaintiff would have no financial incentive to pursue his or her own case to final judgment just to preserve the ability to appeal the denial of the plaintiff's class certification motion" — was missing in light of the PAGA representative claims.[19]

The appellate court explained that a PAGA representative claim seeks relief "on behalf of similarly 'aggrieved' employees" and that where a defendant "has had many employees with earnings over many pay periods," the representative "recovery could be quite substantial."[20] Moreover, the court emphasized that a "prevailing PAGA plaintiff may recover his or her attorney fees and costs as well."[21]

The Court of Appeal determined that, "[g]iven the potential for recovery of significant civil penalties if the PAGA claims are successful, as well as attorney fees and costs, [the] plaintiffs have ample financial incentive to pursue the remaining representative claims under the PAGA and, thereafter, pursue their appeal from the trial court's order denying class certification" following a final judgment.[22] That only one of the two plaintiffs had asserted PAGA representative claims made no difference to the appellate court, since the plaintiff who had not asserted these claims "could still benefit from a successful prosecution of the PAGA claims ... in addition to whatever recovery she may have on her individual non-PAGA claims."[23]

The Court of Appeal therefore held that the order denying class certification was a "nonappealable order because the PAGA claims remain in the trial court and the 'death knell' doctrine does not apply

under these circumstances."[24]

Several other courts of appeal have since agreed with Munoz, holding that the death knell doctrine did not authorize an immediate appeal from either orders denying class certification or orders in putative class actions compelling plaintiffs to arbitrate their non-PAGA claims on an individual basis, where PAGA representative claims remained in the trial court.[25]

As one court explained, "every appellate court that has addressed this issue since Munoz (the first published appellate case to address the question) has … found the death knell doctrine inapplicable when a PAGA claim remains pending after the termination of class claims" because the "underpinnings of the death knell doctrine are lacking" under those circumstances.[26]

Despite this emerging consensus among California's intermediate appellate courts, the California Supreme Court has not yet stepped in to definitively resolve the issue, and plaintiffs continue to argue that Court of Appeal opinions refusing to apply the death knell doctrine to lawsuits involving PAGA claims were wrongly decided.[27] Also, some plaintiffs have sought to manufacture appellate jurisdiction by voluntarily dismissing PAGA claims after a trial court has issued an order denying class certification or compelling individual arbitration of non-PAGA claims asserted on a classwide basis.[28]

Moreover, courts have not yet reached a consensus on how to proceed where defendants argue that the death knell doctrine is inapplicable to appeals because PAGA claims remain in the trial court.

California appellate courts have the discretionary authority to "treat a premature appeal" as a petition for a writ of mandate challenging the order appealed from.[29] In cases alleging both class and PAGA claims, some courts of appeal have exercised this discretionary authority to review the merits of orders denying class certification or compelling individual arbitration of class claims, treating the appeals as writ petitions.[30]

Some courts invoking this discretionary authority have agreed that orders denying class certification or compelling individual arbitration of class claims are not appealable under the death knell doctrine, but nonetheless reached the merits of the challenged orders because they determined that justifications existed for treating the appeal as a writ petition.[31] Other courts have exercised this authority to completely sidestep the issue of appealability.[32] And yet other courts have declined to exercise this authority, concluding that the extraordinary circumstances necessary to justify writ relief were absent.[33]

The continuing disagreement between plaintiffs and defendants over the death knell doctrine's applicability to cases involving both class claims and PAGA claims, as well as the variety of ways in which appellate courts have confronted this question when it has arisen, may yet result in the California Supreme Court granting review to definitively resolve the issue. In the meantime, attorneys representing employees may confront tough choices as they assess whether, and under what circumstances, to allege PAGA claims.

The increasing prevalence of PAGA claims in California class actions stems in part from the view that PAGA claims afford attorneys representing employees a helpful fallback option for seeking substantial civil penalties in the event an arbitration agreement precludes the class claims or class certification is denied. But plaintiffs attorneys might be less interested in asserting PAGA claims if these claims threaten to interfere with the attorneys' efforts to pursue class relief.

After all, unlike class action damages, 75 percent of any civil penalties recovered under PAGA "goes to the Labor and Workforce Development Agency, leaving the remaining 25 percent for the 'aggrieved employees.'"[34] Moreover, PAGA claims may be subject to more limitations than non-PAGA claims.[35]

Given the potential trade-offs between class claims and PAGA claims, it is unsurprising that some attorneys representing employees prefer to dismiss or even forego asserting PAGA claims if they fear those claims will preclude immediate appellate review of orders denying class certification or compelling individual arbitration of class claims.[36] Not all such attorneys follow that approach, though, as shown by the growing number of "'PAGA-only' lawsuits" — actions that assert only representative claims under PAGA without also seeking individual or class relief.[37]

The death knell doctrine's applicability to class actions alleging PAGA claims is an issue that the California Supreme Court will likely have to decide. Until then, it will be interesting to follow how the Munoz rule — foreclosing immediate appeals from orders denying class certification or compelling individual arbitration of class claims — may influence whether attorneys for employees continue to combine class claims and PAGA claims in a single lawsuit.

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[1] In re Baycol Cases I and II (2011) 51 Cal.4th 751, 757-758 (Baycol).

[2] Id. at p. 757.

[3] Baycol, supra, 51 Cal.4th at p. 756, internal quotation marks omitted.

[4] Id. at p. 757.

[5] Baycol, supra, 51 Cal.4th at p. 758.

[6] Baycol, supra, 51 Cal.4th at pp. 757-759.

[7] Id. at pp. 757-758.

[8] Id. at p. 758.

[9] See Arias v. Superior Court (2009) 46 Cal.4th 969, 980-987 (Arias).

[10] Williams v. Superior Court (2017) 3 Cal.5th 531, 538-539, 545.

[11] Arias, supra, 46 Cal.4th at p. 985.

[12] Comment, The Private Attorney General Act: How to Manage the Unmanageable (2016) 56 Santa Clara L. Rev. 413, 415, fn. omitted (hereafter Comment).

[13] Ibid.

[14] Id. at p. 416.

[15] Comment, supra, 56 Santa Clara L. Rev. at p. 415.

[16] Ibid.

[17] Munoz v. Chipotle Mexican Grill Inc. (2015) 238 Cal.App.4th 291.

[18] See Munoz, supra, 238 Cal.App.4th at pp. 310-312.

[19] See id. at pp. 308, 310-311.

[20] Munoz, supra, 238 Cal.App.4th at pp. 310-311.

[21] Id. at p. 311.

[22] Munoz, supra, 238 Cal.App.4th at p. 311.

[23] Id. at p. 309.

[24] Munoz, supra, 238 Cal.App.4th at p. 294.

[25] See Cortez v. Doty Brothers Equipment Co. (2017) 15 Cal.App.5th 1, 8-9 (Cortez); Da Loc Nguyen v. Applied Medical Resources Corp. (2016) 4 Cal.App.5th 232, 242-244 (Nguyen); Young v. Remx Inc. (2016) 2 Cal.App.5th 630, 634-636 (Young); Landy v. Midway Rent a Car Inc. (June 30, 2016, B264640) 2016 WL 3640481, at pp. *2-*3 [nonpub. opn.]; Banta v. American Medical Response Inc. (Feb. 22, 2016, B255239) 2016 WL 6933230, at p. *2 (Banta) [nonpub. opn.]; Rodriguez v. Robert Half International Inc. (Nov. 20, 2015, D067147) 2015 WL 7307869, at p. *3 (Rodriguez) [nonpub. opn.]; Miranda v. Anderson Enterprises Inc. (2015) 241 Cal.App.4th 196, 200-203.)

[26] Cortez, supra, 15 Cal.App.5th at pp. 8-9.

[27] See, e.g., Nguyen, supra, 4 Cal.App.5th at p. 243.

[28] See Cortez, supra, 15 Cal.App.5th at p. 9.

[29] Munoz, supra, 238 Cal.App.4th at p. 312.

[30] See Cortez, supra, 15 Cal.App.5th at pp. 9-11; Nguyen, supra, 4 Cal.App. 5th at pp. 244-245; Bartoni v. American Medical Response West (2017) 219 Cal.Rptr.3d 46, 56 (Bartoni), review den. and opn. ordered nonpub. Aug. 30, 2017, S243277.

[31] See Cortez, supra, 15 Cal.App.5th at pp. 8-11; Nguyen, supra, 4 Cal.App.5th at pp. 242-245.

[32] See Bartoni, supra, 219 Cal.Rptr.3d at p. 56.

[33] See Young, supra, 2 Cal.App.5th at p. 636; Banta, supra, 2016 WL 6933230, at p. *2; Rodriguez, supra, 2015 WL 7307869, at p. *3; Munoz, supra, 238 Cal.App.4th at p. 312.

[34] Arias, supra, 46 Cal.4th at pp. 980-981.

[35] See Soderstrom, The Unintended Consequences Of 'PAGA-Only' Lawsuits (April 8, 2016) Law360 [as of March 16, 2018] (hereafter Soderstrom).

[36] See, e.g., Cortez, supra, 15 Cal.App.5th at p. 9.

[37] See Soderstrom, supra,.
