PAINTINGS, PIPES AND PAGA

Written by Steven B. Katz

Rene Magritte's famous painting *La Trahison des Images* (The Treachery of Images) has flummoxed folks for a century:

There it is—a pipe—with the legend, "This is not a pipe." But it *is* a pipe. What slippery message is Magritte trying to send?

Well, it is not a pipe. It is an *image* of a pipe. You can't burn tobacco in it, or knock it on a table, or put it in your pocket. And while the title suggests the image of the pipe is treacherous, the real treachery is *ceci* ("this"). *Ceci* refers to the painting— not the pipe depicted in the painting. Or does it? "[W]ords are slippery." (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1138, fn. 6, quoting Adams, The Education of Henry Adams (1918) 451.)

Cases construing California's Labor Code Private Attorneys General Act (PAGA, Lab. Code, §§ 2699 et seq.) have a serious slippery word problem, and that problem is coming to a head because it is causing conflict and error.

The Fifth District Court of Appeal observed that PAGA "definitions and labels have at times hindered rather than aided the analysis of the legal issues and the establishment of clear precedent." (*Galarsa v. Dolgen California* (2023) 88 Cal.App.5th 639, 647.) The U.S. Supreme Court agrees. In *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639, 648, it pointed out "[a] n unfortunate feature of [the PAGA] lexicon:" California courts "tend[] to use the word 'representative' in two distinct ways." First, "PAGA actions are 'representative' in that they are brought by employees acting as representatives—that is, agents or proxies—of the State." (*Ibid.*) Second, "PAGA claims are also called 'representative' when they are predicated on code violations sustained by other employees." (*Id.* at 648-649.) This ambiguity has metastasized through the caselaw with use of "nonindividual" as a synonym of "representative," and "individual" as the antonym.

When "representative" or "nonindividual claim" refers to a claim brought as a representative of the state, then "individual claim" refers to a Labor Code claim for damages or statutory penalties that is the predicate for a PAGA claim for civil penalties. But when "representative" or "nonindividual claim" refers to a claim based on Labor Code violations suffered by other employees, then "individual claim" refers to a PAGA claim based only on Labor Code violations suffered by oneself.

If "representative" or "nonindividual" claim means:	Then "individual" claim means:
PAGA claims brought as a representative of the State of California	Labor Code claims brought by plaintiff as real party in interest (i.e., Labor Code violations that are predicate for PAGA claim)
PAGA claims based on violations suffered by employees other than the PAGA representative themself	PAGA claims based on violations suffered by the PAGA representative themself

Both types of PAGA claims—those based on violations suffered by others, and those based on violations suffered by oneself—are "representative" in the sense a plaintiff acts as a representative of the state, because "'"*every* PAGA action … is a representative action on behalf of the state."' … Plaintiffs may bring a PAGA claim *only* as the state's designated proxy, suing on behalf of *all* affected employees." (*Kim v. Reins International Cal., Inc.* (2020) 9 Cal.5th 73, 87.)

Today's conflict among the courts of appeal over the propriety of so-called "headless" PAGA actions is steeped in these ambiguities. In *Balderas v. Fresh Start Harvesting, Inc.* (2024) 101 Cal.App.5th 533, 536, the Second District held "an employee who does not bring an individual claim against her employer may nevertheless bring a PAGA action for herself and other employees of the company." It used "individual" in the first sense—a Labor Code claim for damages or statutory penalties that is the predicate of a PAGA claim for civil penalties. The Second District reversed a trial court's sua sponte dismissal of a PAGA action because the plaintiff did not also allege individual claims based on the underlying Labor Code violations. It carefully noted the trial court understood plaintiff to be "proceeding … solely under the PAGA, on behalf of the State of California for all aggrieved employees, including herself…." (*Id.* at 536.) But the trial court dismissed because she "'[wa]s not suing in her individual capacity'"—i.e., not bringing nonrepresentative claims for damages or statutory penalties for the underlying Labor Code violations. (*Id.* at 538.) But some courts (mis)understand *Balderas* to use "individual" in the second sense—a PAGA claim based only on Labor Code violations suffered by oneself—resulting in a split that has drawn the California Supreme Court's attention in spectacular fashion.

In *Leeper v. Shipt, Inc.* (2024) 107 Cal.App.5th 1001, review granted April 16, 2025, S289305, the plaintiff seized upon this confusion to file a PAGA representative action that waived all relief based on Labor Code violations she personally suffered to avoid her duty to arbitrate the claim individually. Although the California Supreme Court held in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, overruled in part by *Viking River Cruises*, at page 662, that such obligations were not enforceable, the U.S. Supreme Court held in *Viking River Cruises* that the Federal Arbitration Act preempted *Iskanian* insofar as it refused to enforce obligations to arbitrate that part of a PAGA claim based on Labor Code violations personally suffered by the plaintiff. Assuming that *Balderas* used "individual" in the second sense, Ms. Leeper argued that *Balderas* "accepted the plaintiff's and trial court's characterization of PAGA claims as capable of being asserted on behalf of aggrieved employees other than the named plaintiff." (*Leeper*, at 1012.) Since she alleged no "individual" PAGA claim, she reasoned, there was nothing that can be sent to arbitration under *Viking River Cruises*. The trial court agreed.

But in *Rodriguez v. Packers Sanitation Services LTD., LLC* (2025) 109 Cal.App.5th 69, the Fourth District, Division One, disagreed. First, it gave the facts in *Balderas* a different—and incorrect—spin, observing that "[i]n *Balderas*, the plaintiff filed a complaint for civil penalties under PAGA in which she did not seek PAGA relief for herself." (*Rodriguez*, at 76.) Because *Rodriguez* viewed *Balderas* as using "individual" in the second sense, it rejected the Second District's conclusion that Ms. Leeper was citing "dicta," concluding that "[t]he ability to assert a PAGA claim only on behalf of employees other than the named plaintiff is necessary" to *Balderas*'s holding. (*Rodriguez*, at 81, fn. 5.) Second, although it sharply criticized *Leeper*'s analysis of whether there is such a thing as a "headless" PAGA action, *Rodriguez* declined to reach it. (*Rodriguez*, at 80-81 & fn. 5.) Instead, it held that is an issue for a motion directed at the pleadings, not the motion to compel arbitration at issue. The latter is limited to the "asserted claims." Since Mr. Rodriguez waived his individual PAGA claim, regardless of whether his complaint stated a claim, he cannot be compelled to arbitrate a claim he does not assert.

The California Supreme Court has now taken up this conflict. No petition for review was filed in *Leeper*—just several requests for depublication. But once or twice a year the high court will order review on its own motion, as it did in *Leeper*. It later granted the petition for review in *Rodriguez*, deferring briefing pending its decision in *Leeper*. It will now take up whether there is such a thing as a "headless" PAGA claim, with all the rhetorical baggage the question entails.

To deal adequately with this baggage, the Supreme Court must break out of the "representative"/"individual"/"nonin dividual" morass. The Fifth District has provided a way.

In *Galarsa*, the Fifth District adopted a nomenclature that frees courts from these ambiguities: it abandoned all use of the word "representative" in *Viking River Cruises*'s second sense—reserving it only for the first sense—and "divid[ed] PAGA claims into two types: "'Type A' … for a claim seeking to recover a civil penalty imposed because of a Labor Code violation *suffered by the plaintiff*," and "'Type O' … for a claim seeking to recover a civil penalty imposed because of a Labor Code violation suffered by an employee other than the plaintiff." (*Galarsa*, at 647-649.)

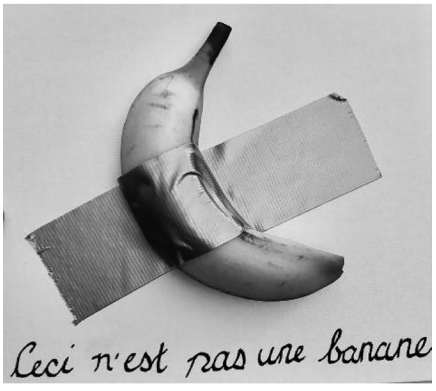
But other courts have so far ignored *Galarsa*. The California Supreme Court, in *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104, 1114, used "individual" for Type A, and "nonindividual" for Type O. *Leeper* used "individual" and "representative." (*Leeper*, at 1008-1009, review granted.) *Rodriguez* followed *Adolph*'s terminology (see *Rodriguez*, at 74-75), as does a later Second District opinion that agreed with *Leeper*, *Williams v. Alacrity Solutions Group, LLC* (2025) 110 Cal.App.5th 932.

Though cumbersome, the Fifth District's Type A/Type O terminology avoids the ambiguity inherent in using individual/representative or individual/nonindividual. Much confusion over the legal sufficiency of "headless" PAGA claims vanishes once clear, unambiguous language is adopted. I recommend the following language, which both avoids the ambiguities and follows the varying language used in the caselaw:

- "Representative:" Representative of the State of California.
- "Individual Type A [PAGA] claim:" That part of a representative PAGA claim based on Labor Code violations suffered by the plaintiff themselves.
- "Nonindividual Type O [PAGA] claim:" That part of a representative PAGA claim based on Labor Code violations suffered by other aggrieved employees.

As Justice Oliver Wendell Holmes taught: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." (*Towne v. Eisner* (1918) 245 U.S. 418, 425.) Maybe "A word is a banana peel" is a better way to put it. Let's try not to slip on one.

P.S. Unlike in Magritte, this is a photograph of an actual banana. So the statement is wrong. Unless "ceci" refers not to the fruit, but the board to which it is taped. Who knows? *Comedian*, a work of Maurizio Cattelan first shown at Art Basel Miami in 2019, consists of an actual banana duct-taped to the wall. It recently sold at auction for $6.2 million. The purchaser ate the banana. The one in the picture was a created by my art teacher daughter and cost less than $1.



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