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# The Private Attorney General Act: How to Manage the Unmanageable

Matthew J. Goodman

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# THE PRIVATE ATTORNEY GENERAL ACT: HOW TO MANAGE THE UNMANAGEABLE

Matthew J. Goodman\*

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## INTRODUCTION

In 2004, the California legislature added significantly to the State Labor Code when it passed the Private Attorney General Act (PAGA).<sup>1</sup> PAGA was enacted as a response to the growing disparity between California’s large labor force and the increasingly finite staff of the state’s enforcement agencies.<sup>2</sup> The PAGA successfully narrowed this gap by permitting any aggrieved employee—current or former—to bring an action on behalf of other similarly situated employees against their employer for a violation of the California Labor Code.<sup>3</sup> Essentially, the statute allows employees to step into the shoes of an attorney general and seek redress because the

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1. CAL. LAB. CODE § 2698 (West 2004).

2. See SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1809, at 6 (July 29, 2004).

3. CAL. LAB. CODE § 2699(a) (West 2004). See generally Ben Nicholson, *Business Beware: Chapter 906 Deputizes 17 Million Private Attorneys General to Enforce the Labor Code*, 35 MCGEORGE L. REV. 581, 583 (2004).

state is fiscally unable to do so on their behalf.<sup>4</sup>

Since its enactment in 2004,<sup>5</sup> “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.”<sup>6</sup> Annual PAGA filings have increased over 200 percent in the last five years, and over 400 percent since 2004.<sup>7</sup> The fact that PAGA claims cannot be waived by agreements to arbitrate contributes heavily to the prevalence of these suits.<sup>8</sup> Its popularity also comes from PAGA’s nature as a representative action, permitting aggrieved employees to sue on behalf of other employees; this can often make for a very large group of employees as plaintiffs, not unlike a class-action suit.<sup>9</sup>

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4. See SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 1809, at 5–6 (July 29, 2004).

5. The original statute was enacted in 2003 and the amended version in 2004. See Erich Shiners, *Chapter 221: A Necessary But Incomplete Revision Of The Labor Code Private Attorneys General Act*, 36 MCGEORGE L. REV. 877, 882 (2005) (explaining that three new provisions were added in the 2004 amendment, two were aimed at limiting the potential for frivolous lawsuits under PAGA, and the other to decrease potentially disproportionate penalty awards).

6. Robyn Ridler Aoyagi & Christopher J Pallanch, *The PAGA Problem: The Unsettled State of PAGA Law Isn’t Good for Anyone*, BENDER’S CALIFORNIA LABOR & EMPLOYMENT BULLETIN, No. 7 July 1, 2013.

7. See Matthew M. Sonne & Kevin P. Jackson, Sheppard Mullin Richter & Hampton, *Towards a “Manageability” Standard in PAGA Discovery*, ASS’N OF BUSINESS TRIAL LAWYERS REP., Vol. XVI, No.3 (Summer 2014).

8. See *Iskanian v. CLS Transp., Los Angeles, LLC.*, 59 Cal. 4th 348, 388–89 (2014) (explaining that because PAGA claims attempt to “vindicate the Labor and Workforce Development Agency in interest in enforcing the labor code,” such claims do not interfere with the Federal Arbitration Act, and accordingly, not subject to waiver through agreements to arbitrate). Class action claims, in contrast, are subject to waiver through agreements to arbitrate. See *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011). However, despite *Iskanian*, some district courts in California have refused to bar the waiver of PAGA representative actions. These courts reason that the PAGA waiver issue is one of federal law and *Iskanian* is merely a state court’s interpretation of the Federal Arbitration Act (FAA). As such, they argue they are not bound by *Iskanian*, and conclude that the “rule making PAGA claim waivers unenforceable is preempted by the FAA.” *Fardig v. Hobby Lobby Stores Inc.*, No.SACV 14-00561 JVS (ANx), 2014 WL 4782618 at \*3–4 (C.D. Cal. Aug. 11, 2014). See also *Nanavati v. Adecco USA, Inc.*, No. 14-cv-04145-BLF, 2015 WL 1738152 \* 6–9, (N.D. Cal. April. 13, 2015) (holding that FAA preempted rule against waiver of PAGA representative action, and collecting district court cases finding *Iskanian* persuasive and unpersuasive).

9. See generally *Urbino v. Orkin Services of California, Inc.*, 726 F.3d 1118, 1121 (9th Cir. 2013) (representative PAGA claim brought with over 800 plaintiffs); *Baumann v. Chase Inv. Services Corp.*, 747 F.3d 1117, 1120 (9th Cir. 2014) (representative PAGA claim brought with a class size over 100).

Indeed, PAGA claims often accompany class-action claims, and, after *Arias v. Superior Court*, can be pursued when a class cannot be established.<sup>10</sup> In that case, the court held that representative PAGA claims are not subject to the requirements of California Code of Procedure section 382,<sup>11</sup> California's class-action statute, because of PAGA's purpose as a law enforcement action.<sup>12</sup>

Although PAGA actions are not subject to section 382, PAGA suits are still representative actions in nature and seemingly parallel the class action model.<sup>13</sup> Due to the similarities, courts have been wary of encountering class action problems in PAGA suits and have even dismissed PAGA claims for grounds normally only associated with class actions, *i.e.*, manageability.<sup>14</sup> Manageability was developed as a concept to assess class actions, but its utilization in PAGA ultimately prevents concerns inherent in any large representative action: the adjudication of individualized issues resulting in (1) numerous hearings on individualized questions of law and fact, thus wasting scarce judicial resources; or (2) the adoption of "substantive, procedural, or evidentiary short-cuts around such hearings."<sup>15</sup>

Even those these concerns exist, not all courts have recognized the applicability of the manageability concept in California.<sup>16</sup> As a result, it is unclear whether a plaintiff can

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10. *Arias v. Superior Court*, 209 P.3d 923 (Cal. 2009)

11. California Code of Civil Procedure section 382 requires three elements: "[1] the existence of an ascertainable and sufficiently numerous class, [2] a well-defined community of interest, and [3] substantial benefits from certification that render proceeding as a class action superior to the alternatives." *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1021 (Cal. 2012).

12. *See id.* at 1017 (affirming Court of Appeals judgment that representative claims under PAGA were not subject to class action requirements). *See also* *Baumann v. Chase Inv. Services Corp.*, 747 F.3d 1117, 1121 (9th Cir.) ("[T]he California Supreme Court has . . . [held] that PAGA actions are not class actions under state law. The court found PAGA actions fundamentally different from class actions, chiefly because the statutory suits are essentially law enforcement actions") (citation omitted).

13. *Sonne & Jackson*, *supra* note 7.

14. *See, e.g.*, *Ortiz v. CVC Caremark Corporation*, No. C-12-05859 EDL, 2014 WL 117614, at \*3 (N.D. Cal. March 19, 2014) (dismissing PAGA claim because individual issues made the action unmanageable). The presence of individual issues is part of the community of interest requirement. *See supra* note 10.

15. Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1000 (2005).

16. *See* *Plaisted v. Dress Barns, Inc.*, No. 2:12-cv-01679-ODW(SHx), 2012 WL 4356158, at \*2 (C.D. Cal. Sept. 20, 2012) (holding that a finding of

bring a PAGA claim without fear of it being dismissed as unmanageable at trial, and on the defendant's side, whether they can attack a PAGA action on grounds of manageability. This uncertainty gives rise to the following question: at what point, if at all, should a court dismiss a PAGA claim containing hundreds, or even thousands, of employees with many individualized questions of fact and law on grounds of unmanageability? This Comment will explore this question and assert that notwithstanding the court's holding in *Arias*,<sup>17</sup> PAGA claims should necessarily be subject to manageability limitations, and dismissed when such limitations are exceeded.<sup>18</sup>

Part I of this Comment introduces the historic origins of PAGA, its legislative history, and its substantive reach and procedural scope.<sup>19</sup> Additionally, Part I examines the seminal case, *Arias v. Superior Court* and class action wage-and-hour decisions that have implications for similar PAGA claims.<sup>20</sup> Lastly, unmanageability will be introduced, and the dissension in the California federal courts regarding PAGA, FRCP Rule 23, and unmanageability will be explored.<sup>21</sup> Part II identifies the problems inherent in failing to control the manageability of large, complex PAGA actions.<sup>22</sup> Part III analyzes why the courts have the ability to dismiss PAGA claims as unmanageable, and why this is the most advisable course.<sup>23</sup> Part IV proposes a useable test in determining if a PAGA representative action would be unmanageable while litigating the claim.<sup>24</sup>

## I. BACKGROUND

### A. *Legislative History*

Prior to the enactment of PAGA, the enforcement departments of the State Labor and Workforce Development

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unmanageability because of the presence of individualized questions would obliterate the purpose of PAGA).

17. See *supra* notes 10–13 and accompanying text.

18. See discussion *infra* Part IV.

19. See discussion *infra* Part I.A.-B.

20. See discussion *infra* Part I.C.

21. See discussion *infra* Part I.D–E.

22. See discussion *infra* Part II.

23. See discussion *infra* Part III.

24. See discussion *infra* Part IV.

Agency (LWDA) failed to effectively enforce labor law violations.<sup>25</sup> This ineffectuality stemmed from the combination of a growing economy and severe budgetary shortfalls.<sup>26</sup> To help remedy this problem and crack down on the increasing number of labor law violations in a growing labor market, the legislature enacted PAGA; this effectively deputized more than 17 million workers to enforce the labor laws themselves.<sup>27</sup> Simultaneously, PAGA alleviated budgetary problems by increasing the flow of cash going into labor law enforcement: the statute provides that 75% of any award be recovered by the LWDA.<sup>28</sup> The remaining 25% is split among all the similarly situated employees.<sup>29</sup>

PAGA did not come without opponents, however, and this Comment seeks to address one of the early criticisms made upon the statute's enactment: the ability of employees to sue their employers on behalf of a class without having to fulfill class certification requirements.<sup>30</sup>

Employers also voiced concerns, arguing that PAGA would disproportionately favor employees and work to the detriment of already overburdened employers.<sup>31</sup> Specifically, they argued it was unfair that employee-plaintiffs could recover attorney's fees while employers could not.<sup>32</sup> Moreover, they posited the enactment "adds to an already unfriendly business climate in

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25. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 796 at 6 (September 10, 2003). One study concluded that at the pace the Division of Labor Enforcement (DSLE) was investigating labor violations in California restaurants, it would take over 100 hundred years to inspect each and every restaurant in California. See Nicholson, *supra* note 3, at 582.

26. See Nicholson, *supra* note 3, at 582.

27. See Nicholson, *supra* note 3 at 582. See also Halliwell v. A-T Solutions, 983 F.Supp.2d 1179, 1182 (S.D. Cal. 2013) ("The California legislature enacted PAGA to 'allow aggrieved employees, acting as private attorney generals, to recover civil penalties for Labor Code violations when the labor law enforcement agencies could not keep pace with the growth of the labor market'" (citing Arias v. Superior Court, 46 Cal.4th 969, 980 (2009)).

28. See CAL. LAB. CODE § 2699(i) (West 2014) (the money is also used for the education of employers and employees regarding their rights under the labor code); Reyes v. Macy's, Inc., 202 Cal. App.4th 1119, 1123 (Ct. App. 2011) ("[T]he relief [from PAGA] is in large part for the benefit of the general public rather than the party bringing the action.").

29. CAL. LAB. CODE § 2699(i) (West 2014).

30. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 796 at 7 (Sept. 10, 2003).

31. *Id.*

32. *Id.*

the state by encouraging suits against employers.”<sup>33</sup> Broader policy implications were also asserted—opponents feared PAGA litigation and penalties could potentially increase business costs, thus resulting in an exodus of business to states with more employer friendly laws.<sup>34</sup>

Other concerns included the unnecessary litigation of claims for minor violations, such as the size of font in an arbitration agreement,<sup>35</sup> and the trial court’s lack of ability to reduce excessive penalties for such violations.<sup>36</sup> Fortunately for employers, these two particular concerns of abuse were quickly curbed as the legislature followed up the original statute with an Amendment in 2004.<sup>37</sup> The same cannot be said of the other issues opponents voiced criticism about, and these concerns have been left to the courts to work out.<sup>38</sup> Specifically, the issues regarding the inapplicability of class action requirements for PAGA representative suits—asserted back in 2003—remain, and are the focus of this Comment.

## *B. Substantive and Procedural Scope of the PAGA*

### *1. The Substantive Reach of the PAGA*

The reach of the statute is simple: it allows a private action to be brought for the violation of numerous labor code provisions.<sup>39</sup> Penalties may not be awarded for mere technical violations of the Labor Code, such as any violation of a posting, notice, agency reporting, or filing requirement.<sup>40</sup> Once an appropriate provision is sued under, the employee need only

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33. See Nicholson, *supra* note 3 at 585.

34. See Shiners, *supra* note 5, at 881.

35. See Lenora M. Schloss & Carl A. Cohorn, *Assessing the Amended Labor Code Private Attorneys General Act*, 28 LOS ANGELES LAWYER, Feb. 2006, at 13.

36. See Shiners, *supra* note 5, at 888.

37. See Aoyagi & Pallanch, *supra* note 6 (explaining that although some steps have been taken to curb the abuse the opponents feared, “the legislature has left PAGA to the courts to work out the details of its application in practice.”).

38. *Id.*

39. The relevant provisions are contained in section 2699.5. See CAL. LAB. CODE § 2699.5 (West 2014).

40. CAL. LAB. CODE § 2699(g)(2) (West 2014). See Lenora M. Schloss & Carl A. Cohorn, *Assessing the Amended Labor Code Private Attorneys General Act*, 28 LOS ANGELES LAWYER, Feb. 2006, at 14 (calling § 2699(g)(2)—which was part of the PAGA amendment in 2004—the single most important change to PAGA because it eliminated a provision in the 2003 bill allowing for suits to be brought for harmless technical violations).

show that a violation occurred, not that they were actually harmed by the violation.<sup>41</sup>

Additionally, an “aggrieved employee” may bring an action “on behalf of . . . other current or former employees against whom one or more of the alleged violations was committed.”<sup>42</sup> An “aggrieved employee” is defined as a person who was employed by the alleged violator and against whom one or more of the alleged violations were committed.<sup>43</sup> But, the employee cannot bring suit if the LWDA decides to file a suit covering the same alleged misconduct.<sup>44</sup>

Notably, the statute contains no class action requirements, and, as mentioned above, PAGA representative actions are not required to meet class action requirements.<sup>45</sup> Thus, PAGA potentially functions as a “back-door” route to a class action lawsuit, which greatly increases the potential liability for an employer-defendant.<sup>46</sup>

## 2. Penalties and Attorney’s Fees within PAGA

The remedy provision in the PAGA statute functions as a default remedy available when no pre-existing civil penalty in the labor code exists.<sup>47</sup> If the default remedy applies, the civil penalty is \$500 dollars if the person does not employ one or more employees.<sup>48</sup> If the person employs one or more employees, the penalty is “one hundred dollars . . . for each aggrieved employee pay period for the initial violation and two hundred dollars . . . for each aggrieved employee per pay period

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41. See CAL. LAB. CODE § 2699(a) (West 2014); Shiners, *supra* note 5, at 879 (“[T]he act apparently does not require the employees to demonstrate actual harm.”).

42. See CAL. LAB. CODE § 2699(a) (West 2014).

43. See CAL. LAB. CODE § 2699(c) (West 2014).

44. CAL. LAB. CODE § 2699(h) (West 2014).

45. *Arias v. Superior Court*, 209 P.3d 923 (Cal. 2009).

46. See Schloss and Cohorn, *supra* note 40, at 13.

47. *Home Depot U.S.A., Inc. v. Superior Court*, 191 Cal. App. 4th 210, 222 (Ct. App. 2010) (applying PAGA penalty because no statutory penalty existed for violations of seating requirements in wage order promulgated by the Industrial Welfare Commission); see also *Amaral v. Cintas Corp. No. 2.*, 163 Cal. App.4th 1157, 1206–07 (Ct. App. 2008) (recognizing that violations of Labor Code § 210—failure to make payments—are not subject to PAGA default remedy because the provision provides its own penalty).

48. CAL. LAB. CODE § 2699(f)(1) (West 2014).

for each subsequent violation.”<sup>49</sup> The 2004 amendment<sup>50</sup> (SB 1809) added a provision designed to limit excessive liability imposed: trial courts were given discretion to reduce the civil penalty amount when “to do otherwise would [result in an award that is] unfair, arbitrary and oppressive, or confiscatory.”<sup>51</sup>

Another highly contested area of PAGA involves the provision on attorney’s fees: any employee who succeeds in his or her action is entitled to an award of reasonable attorney’s fees and costs.<sup>52</sup> The attorney collects the full amount of these fees although the prevailing plaintiff only receives twenty-five percent of the penalties.<sup>53</sup> The impact of this provision is further magnified because typical wage and hour cases (the most common type of PAGA action)<sup>54</sup> routinely generate fees in excess of \$100,000.<sup>55</sup> Thus, there is much incentive for plaintiff’s attorneys to bring these suits because the attorney’s fees can be quite large.<sup>56</sup>

### 3. Administrative and Notice Requirements

Before any PAGA action may be brought, certain administrative remedies must be exhausted. An employee must first notify his or her employer and the appropriate state agency of the specific Labor Code violation.<sup>57</sup> The next step

49. CAL. LAB. CODE § 2699(f)(2) (West 2014). *Cf.* Cal. Lab. Code § 210(a)(2) (West 2014) (imposing a \$200 dollar penalty for subsequent violations of failing to make a payment, or any willful or intentional violation, plus 25 percent of the illegally withheld amount).

50. *See* Shiners, *supra* note 5.

51. CAL. LAB. CODE § 2699(e)(2) (West 2014). *See generally* ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1809, at 5 (June 22, 2004) (explaining that this new provision was enacted to address the concern that the previous bill “provided no discretion to reduce penalties under the law and that significant inadvertent violations could lead to astronomical penalties”).

52. CAL. LAB. CODE § 2699(g)(1) (West 2014).

53. Shiners, *supra* note 5, at 890. *See generally* ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 796 (June 26, 2003) (opponents argued that this provision would lead to frivolous lawsuits with low penalty recoveries but high attorneys’ fees).

54. *See* Schloss and Cohorn, *supra* note 40, at 16.

55. *See* Lippold v. Godiva Chocolatier, Inc., No. C 10-00421 SI, 2010 WL 1526441, at \*4 (N.D. Cal. 2010) (collecting cases).

56. *See* Schloss and Cohorn, *supra* note 40, at 13 (explaining that PAGA has become known among employers and the defense bar as the “Bounty Hunter Law”).

57. CAL. LAB. CODE § 2699.3(a)(1) (West 2014).

depends on the type of labor law violation because there are three categories of violations and they each have their own implications.<sup>58</sup> To pursue a violation in the first category, which includes over 150 provisions specified in section 2699.5, the employee must notify the LWDA and wait thirty-three days for that agency to decide if they want to investigate the claim.<sup>59</sup> If they do not pursue the violation, the employee may commence a civil action pursuant to section 2699.<sup>60</sup>

The second category consists of health and safety violations contained within the California Occupational Safety and Health Act of 1973.<sup>61</sup> This category does not provide for private lawsuits; the Department of Occupational Safety and Health (DOSH) must inspect the workplace and issue a citation.<sup>62</sup>

The last category contains all labor code provisions that do not fall under the aforementioned categories.<sup>63</sup> To bring a suit in this category, an employee must first notify the employer and the LWDA of the suspected violation as well as the legal theories and facts supporting the violation.<sup>64</sup> Then, the employer may cure<sup>65</sup> the alleged violation within a thirty-three day timeframe. If the violation is not cured, the employee can file a civil action.<sup>66</sup>

### C. *The PAGA–Class Action Nexus*

#### 1. *Arias v. Superior Court*

Prior to *Arias*, it was clear PAGA actions *could* be brought as class actions.<sup>67</sup> However, after *Arias*, it was clear that

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58. *Id.*

59. CAL. LAB. CODE § 2699.3(a)(2)(A) (West 2014).

60. *Id.*

61. See Schloss and Cohorn, *supra* note 40, at 14.

62. See Schloss and Cohorn, *supra* note 40, at 14.

63. See Schloss and Cohorn, *supra* note 40, at 14.

64. See Schloss and Cohorn, *supra* note 40, at 14.

65. This “cure provision” was added in the 2004 amendment and will likely effectively reduce the litigation of less serious Labor Code infractions. Notably, employers are only allowed three cures per year for the same violation. See Shiners, *supra* note 5, at 887.

66. CAL. LAB. CODE § 2699.3(2)(A) (West 2014). If the violation is deemed cured by the enforcement agency, the employee can appeal that decision to the LWDA and then the superior court. See generally Schloss and Cohorn, *supra* note 40, at 15–16.

67. *Arias v. Superior Court*, 209 P.3d 923, 930 n.5 (Cal. 2009) (emphasis

PAGA actions *do not* need to satisfy the state class action requirements, which operates as a major benefit for employees wanting to bring large suits.<sup>68</sup> The court affirmed the lower court's holding, which relied on the language of the statute,<sup>69</sup> comparisons of the statutory language within section 17204 of the Business and Professions Code<sup>70</sup> and section 17203 of the Unfair Competition Law,<sup>71</sup> and most importantly, the purpose of a PAGA suit.<sup>72</sup> Additionally, the high court addressed three of the defendant's arguments.

The most colorable argument asserted that failing to apply class action requirements would violate an employer's right to due process.<sup>73</sup> Specifically, non-party aggrieved employees

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added).

68. *Id.* at 926. *See generally* CAL. CODE CIV. PROC. § 382 (West 2014) (a person may bring a class action when “the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . .”); *Brinker Restaurant Corp. v. Superior Court*, 273 P.3d 513, 523 (Cal. 2012) (“The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives.”); *Fireside Bank v. Superior Court*, 40 Cal. 4th 1069, 1089 (Ct. App. 2007) (“[T]he community of interest requirement embodies three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.”) (citation omitted).

69. The “notwithstanding any other provision of law” language indicates that PAGA actions could be brought without meeting the class action requirements. *Arias v. Superior Court*, 153 Cal. App. 4th 777, 779 (Ct. App. 2007), review granted and opinion superseded by 209 P.3d 923 (Cal. 2009).

70. The language in the PAGA statute was similar to section 17204, which permitted representative actions that were not brought as class actions; thus, the same should be permitted for PAGA actions. *See Arias*, 209 P.3d at 930.

71. Section 17203 of the UCL explicitly requires that representative actions brought under that statute comply with the class action statute—section 382 of the California Code of Civil Procedure. In contrast, the PAGA statute does not contain such language and, as such, does not require the same elements be met. *See id.*

72. The purpose being to “protect the public and penalize the defendant for past illegal conduct.” *Arias v. Superior Court*, 153 Cal. App. 4th 779 (Ct. App. 2007) (review granted and opinion superseded by 46 Cal. 4th 969 (2009)). This indicates that PAGA claims need not be brought as class action.

73. *Arias v. Superior Court*, 209 P.3d 923, 932. The other two arguments the defense asserted were: (1) not requiring the class action elements would lead to absurd results; and (2) the PAGA legislative history reveals an intent that any PAGA claim be brought as a class action. The first was dismissed because it was unsupported by the language of the statute, and the second because it was unsupported by the legislative history—the committee report comments did not explicitly refer to class actions. *See id.* at 930-32.

would be able to profit from the judgment of a prevailing plaintiff-employee through the use of collateral estoppel, but would not be bound following an adverse judgment because “they were not given notice of the action or afforded any opportunity to be heard . . . .”<sup>74</sup> Thus, the defendants argued that a one-way collateral estoppel violated their right to due process because they would be “bound by the judgment as to remedies other than civil penalties.”<sup>75</sup> If PAGA is “construed as requiring representative actions under the act to be brought as class actions” however, this result would be avoided.<sup>76</sup>

The high court concluded that no due process violation was at stake because of the nature of PAGA actions.<sup>77</sup> The California Supreme Court, speaking through Justice Kennard, reasoned that because a PAGA action “is designed to protect the public, and the potential impact on remedies other than civil penalties is ancillary to the action’s primary objective, the one-way operation of collateral estoppel in this limited situation does not violate the employer’s right to due process of law.”<sup>78</sup>

The implications of this decision are enormous. For one, it eases the process of bringing a PAGA representative action compared to a parallel class action. Secondly, by allowing employees to obtain non-penalty remedies through collateral estoppel, *Arias* increased the effect a PAGA representative action could have on employer liability.<sup>79</sup>

## 2. *The Increased Need for PAGA Representative Actions After Recent California State and Federal Court Decisions*

As stated above, PAGA actions are much less demanding than class actions after *Arias*. Still, given the choice, plaintiffs are better off pursuing a class action claim relative to a PAGA representative action: PAGA mandates that seventy-five percent of any civil penalties be distributed to the LWDA,

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74. *Id.* at 934.

75. *Id.*

76. *Id.* at 933.

77. *Id.* at 934.

78. *Id.* at 934.

79. JUDITH M. KLEIN ET AL., CAL. BUS. LAW DESKBOOK § 16:28 (2014) (explaining that after, a PAGA representative action can have a substantial impact beyond PAGA’s statutory civil penalties).

while plaintiffs and their attorney(s) in a class action receive the entire amount of any penalty.<sup>80</sup> After a variety of decisions, however, class claims—and specifically class claims for wage and hour violations<sup>81</sup>—have become more difficult to pursue, thus increasing the attractiveness of pursuing a PAGA action.<sup>82</sup>

The California Supreme Court decision *Brinker Restaurant Corp. v. Superior Court*,<sup>83</sup> held that employers need to only provide meal breaks, and not police them, “triggering the need for an individualized inquiry for most meal and rest break claims . . . .”<sup>84</sup> The more individualized inquiries there are, the lower the chance of class certification because common issues of law or fact will not predominate over individual issues—an important factor in the class action “community of interest” prong.<sup>85</sup>

*Duran v. U.S. Bank Natl. Assn.*<sup>86</sup> similarly made obtaining class action certification more difficult. There, the court determined that statistical evidence could not “be used as a substitute for establishing commonality or for avoiding individualized determination of individual issue[s] . . . .”<sup>87</sup>

80. See Aoyagi & Pallanch, *supra* note 6 (arguing that because 75% of a recovery would flow to the LWDA, there is a strong incentive to allocate settlement proceeds towards class action claims).

81. Wage and hour claims are the most common type of PAGA action. See Schloss and Cohorn, *supra* note 40, at 16.

82. See Schloss and Cohorn, *supra* note 40, at 16.

83. *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (Cal. 2012).

84. See Aoyagi & Pallanch, *supra* note 6; see also *Schiller v. David’s Bridal, Inc.*, No. 1:10-cv-00616-AWI-SKO, 2012 WL 2117001 (E.D. Cal. 2012) (explaining that the *Brinker* decision made class certification for missed meal breaks more difficult).

85. See *Brinker Restaurant Corp.*, 53 Cal.4th at 1022 (Cal. 2012). The other two factors in the community of interest prong are “class representatives with claims or defenses typical of the class . . . and . . . class representatives who can adequately represent the class.” *Id.* at 1021.

86. *Duran v. U.S. Bank Nat. Assn.*, 59 Cal.4th 1, 50 (Cal. 2014) (remanding to lower court to determine whether loan officers working for U.S. bank were misclassified as exempt employees outside salespeople under section 1171 of the California Labor Code).

87. GUIDE TO MULTISTATE LITIGATION § 2.2 n. 7 (2014) (citing *Duran*, 325 P.3d at 922). See also *Duran*, 325 P.3d at 933 (“There must be some glue that binds class members together apart from statistical evidence.”). Commentators have noted that this decision will likely result in a more even playing field for employers contesting certification of employee class actions. Kevin Lilly, *California Supreme Court Stabilizes The Law In State Misclassification Class Actions*, 21 NO. 6 WESTLAW JOURNAL CLASS ACTION 1, 2 (2014).

Statistical proof is only appropriate if the trial plan can firmly establish how individual issues can be managed at trial.<sup>88</sup> Thus, without being able to utilize statistical evidence, plaintiffs will have a more difficult time certifying a class.

In the federal courts, *Wal-Mart, Inc. v. Dukes*<sup>89</sup> gave bite to the commonality requirement for Rule 23 and section 382 class certification.<sup>90</sup> The Supreme Court heightened the commonality requirement by stating a plaintiff must identify among the class a common injury and common questions deemed *central* to the dispute.<sup>91</sup> Additionally, the Court held that Trial By Formula technique is not a permissible method for determining individualized damages.<sup>92</sup> The unavailability of this technique provides further incentive for Plaintiff's to forgo costly and difficult means of obtaining class certification, and, instead, focus on a PAGA claim.

These cases have made obtaining class action certification more difficult in California state court and federal court, and consequently increased the attractiveness of PAGA claims.<sup>93</sup>

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88. See *Duran*, 325 P.3d at 933–34.

89. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011).

90. See *id.* at 2551. In federal court, the commonality requirement is distinct from the predominance requirement. In California state court, the predominance requirement is an element within the commonality prong. Compare 7A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1763 (3d ed. 2010) (discussing the differences between Federal Rule of Civil Procedure Rule 23(b)(3), the predominance requirement, and Federal Rule of Civil Procedure Rule 23(a)(2), the common issues of fact and law requirement), with *Duran*, 325 P.3d at 930–31 (explaining that a plaintiff must show common issues of fact predominate as part of the community of interest prong).

91. *Dukes*, 131 S.Ct. at 2551 (2011). The “centrality” principle has been applied in California state court. See, e.g., *Williams v. Superior Court* 221 Cal.App.4th 1353, 1368 (2013) (applying *Dukes* and holding that the common issues must be central to the dispute).

For an argument criticizing the *Dukes* requirement of “centrality,” see A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L.REV. 441 (2013).

92. *Dukes*, 131 S.Ct. at 2561. The Trial By Formula technique permits individualized claims to be resolved through sample cases extrapolated to the claims of the entire remaining class; thus, it makes class claims more manageable by obviating the need for extensive individualized inquiry. *Id.*

93. See also *Comcast Corporation v. Behrend*, 133 S.Ct. 1426, 1432 (2013) (explaining that a plaintiff needs to be prepared to prove the requirements of Rule 23(a), it is not merely a pleading standard, also, the Court found that plaintiff's expert evidence, in and of itself, cannot satisfy predominance under FRCP Rule 23(b)(3)); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U.L. REV. 729 (2013) (arguing that in recent years, courts have made it more difficult for

Unsurprisingly, California plaintiffs will most likely pursue PAGA claims instead of class actions in the future.<sup>94</sup> The decisions also are relevant for PAGA because these principles are useful when assessing the manageability of the actions.<sup>95</sup>

#### D. *PAGA In The Federal Courts*

##### 1. *Does Federal Rule of Civil Procedure 23 Apply to PAGA Claims Within Federal Court?*

As was made clear in *Arias*, California Code of Civil Procedure section 382 does not apply to PAGA claims in California state court.<sup>96</sup> However, the holding did not settle whether Federal Rule of Civil Procedure 23 applies to PAGA in California *federal courts*. The answer is crucial. If answered in the affirmative, *Arias* will be unable to assist a Plaintiff seeking to bring a PAGA representative action that typically would be denied as a class action.

Additionally, with the emergence of the Class Action Fairness Act (CAFA), all class actions exceeding \$5 million must be brought in federal court.<sup>97</sup> Many class action claims are joined with PAGA claims;<sup>98</sup> thus, if the class claim is removed to federal court, the PAGA claim will be too. This increases the importance of the Rule 23 inquiry.<sup>99</sup>

The answer to this question, however, is decidedly mixed and brings much uncertainty for both PAGA plaintiffs and defendants in a federal court action. The courts finding that Rule 23 does apply to PAGA representative actions follow the reasoning of *Shady Grove Orthopedic Associates, P.A. v.*

plaintiffs to bring class action lawsuits).

94. Aoyagi & Pallanch, *supra* note 6.

95. See *Ortiz v. CVC Caremark Corporation*, No. C-12-05859 EDL, 2014 WL 117614, at \*3 (N.D. Cal. March 19, 2014) (citing *Duran* when discussing the availability of statistical evidence to establish liability for the PAGA claim).

96. *Arias v. Superior Court*, 209 P.3d 926.

97. 28 U.S.C.A. § 1332(d)(2) (West 2014).

98. See Aoyagi & Pallanch, *supra* note 6 (explaining that “PAGA claims have tended to ride the coattails of traditional class action claims”).

99. The PAGA claim follows because of the doctrine of supplemental jurisdiction. See 7A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 3567 (3d ed. 2010) (“Supplemental jurisdiction can be justified only if the supplemental claim is so closely related to the jurisdiction-invoking claim that they are part of the same case or controversy,” which is satisfied if they share a common nucleus of operative fact) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)).

*Allstate Ins. Co.*<sup>100</sup> There, the United States Supreme Court decided that because Rule 23 regulates procedure, it automatically applies in all civil actions in the district courts “regardless of its incidental effect upon state-created rights.”<sup>101</sup> As such, plaintiffs must still meet the requirement of Rule 23 when there is a state statute regulating procedure.<sup>102</sup> Following this analysis, a minority of California district courts have determined that because PAGA permits recovery for unnamed parties, it is essentially a procedural mechanism “by which litigants may recover for absent plaintiffs, akin to a class action,” and thus, Rule 23 applies.<sup>103</sup>

The majority of California federal courts have reached the opposite conclusion.<sup>104</sup> These courts distinguish PAGA as a procedural mechanism by reasoning that its purpose as a public protecting, law-enforcement statute transcends its procedural character.<sup>105</sup> Moreover, PAGA does not confer a private benefit onto the plaintiff and the represented employees—the benefit falls upon the public.<sup>106</sup>

Further support for Rule 23’s non-applicability is found in the recent 9th Circuit decision *Baumann v. Chase Inv. Services*

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100. *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 599 U.S. 393 (2010) (addressing the interplay between a New York statute limiting the availability of relief under class actions and Rule 23).

101. *Id.* at 1444.

102. *Id.*

103. *Fields v. QSP, Inc.*, No. CV 12-1238 CAS (PJWx), 2012 WL 2049528, at \*5 (C.D. Cal. June 4, 2012); *see also* *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*, 46 Cal. 4th 993, 943 (2009) (holding that PAGA does not create any property rights or other substantive rights, it is simply a procedural statute permitting an aggrieved employee to recover statutory penalties); *Thompson v. APM Terminals Pacific Ltd.*, No. C10-00677 JSW, 2010 WL 6309364, at \*2 (N.D. Cal. August 26, 2010) (PAGA claim in federal court must meet requirements of Rule 23); *Ivey v. Apogen Technologies*, No. 11CV366 DMS NLS, 2011 WL 3515936, at \*3 (S.D. Cal. August 10, 2011) (explaining that because section 2699(a) provides for the recovery of unnamed parties, it contravenes federal procedural requirements and Rule 23 applies).

104. *See, e.g., Villalpando v. Exel Direct Inc.*, No. 12-cv-04137 JCS, 2014 WL 1338297, at \*20 (N.D. Cal. Mar. 28, 2014).

105. *Id.*

106. *Sample v. Big Lot Stores, Inc.*, No. C10-03276 SBA, 2010 WL 4939992, at \*3 (N.D. Cal. Nov. 30, 2010); *see also* *McKenzie v. Fed. Exp. Corp.*, 765 F.Supp.2d 1222, 1234 (C.D. Cal. 2011) (holding that Rule 23 does not apply to Class Actions and that this view is consistent with *Arias*); *Cardenas v. McLane Foodservice, Inc.*, No. SACV 10-473 DOC (FFMx), 2011 WL 379413, at \*3 (C.D. Cal. Jan. 31, 2011).

*Corp.*<sup>107</sup> The 9th Circuit reasoned that because Rule 23 and PAGA are more dissimilar than alike, PAGA claims could not establish federal court jurisdiction under CAFA.<sup>108</sup> At least one lower court has interpreted this holding as resolving the question of whether Rule 23 applies to PAGA representative actions.<sup>109</sup>

This split creates undesirable uncertainty in the law for parties—but mainly employers—litigating a PAGA representative action.<sup>110</sup> Nonetheless, Rule 23 most likely will not apply to PAGA in Federal District Court, significantly easing the burden for plaintiffs in bringing their representative actions. However, there is still one lingering concept—well established in class action jurisprudence—that still poses an issue in PAGA cases: unmanageability.

### *E. Unmanageability and its Role in PAGA Suits*

#### *1. What Is Unmanageability?*

There exists a “commonly accepted rule of class actions: if the [action] is ‘unmanageable,’ it should be dismissed.”<sup>111</sup> Courts look towards manageability to assess whether a court can fairly and efficiently conduct a trial, or whether its magnitude and complexity prevent a fair adjudication.<sup>112</sup> It “ultimately involves a judgment concerning the usefulness of the expenditure of judicial resources entailed in the litigation

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107. *Baumann v. Chase Inv. Services Corp.*, 747 F.3d 1117 (9th Cir. 2014).

108. *Id.* at 1124 (9th Cir. 2014).

109. *Villalpando v. Exel Direct Inc.*, No. 12-cv-04137 JCS, 2014 WL 1338297, at \*20 (N.D. Cal. Mar. 28, 2014). *But see* *Ortiz v. CVC Caremark Corporation*, No. C-12-05859 EDL, 2014 WL 117614, at \*3 (N.D. Cal. March 19, 2014) (recognizing that *Baumann* supports the distinction between PAGA and Rule 23 class actions, but does not *decide* the issue); *Halliwell v. A-T Solutions*, 2014 WL 4472724, at \*3 (S.D. Cal Sep. 10, 2014).

110. TIMOTHY P. GLYNN, RACHEL S. ARNOW-RICHMAN & CHARLES A. SULLIVAN, *EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS* xxx (2d ed. 2011) (discussing the issues that stem from uncertainty in the law for employers).

111. *Blue Chip Stamps v. Superior Court*, 556 P.2d 755, 761 (Cal. 1976) (Mosk, J., dissenting). In federal court, one of the considerations in determining whether class certification is appropriate is possible difficulties in managing a class suit. *See* Fed. R. Civ. P. 23(b)(3)(D) (West 2014).

112. *In re LifeUSA Holding Inc.*, 242 F.3d 136, 148 (3d Cir. 2001) (vacating and remanding lower court’s order granting class certification because common issues did not predominate over individual ones, making the class unmanageable).

of a class action . . . .”<sup>113</sup>

Manageability has often been subsumed in the predominance class action requirement, which requires that common issues of fact and law predominate over individual issues.<sup>114</sup> Manageability can also be a consideration in other elements as well.<sup>115</sup> Unmanageability “may be reflected by such matters as the size or contentiousness of the class . . . or the presence of special individual issues.”<sup>116</sup> If enough evidence of unmanageability is found, the court denies class certification because going forward with the claim would transform the litigation into an enormous burden on the court’s resources, unable to be effectively managed or controlled.<sup>117</sup>

Unlike in federal court—where manageability is explicitly mentioned in Rule 23—section 382 says nothing of manageability.<sup>118</sup> Nonetheless, the concept of manageability is

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113. Note, Developments in the Law—Class Action: Fundamental Requirements for Class Suits, 89 HARV. L. REV. 1454, 1499 (1976). *See also* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 164 (1974) (explaining that manageability “encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit.”).

114. *See* Duran v. U.S. Bank Nat. Assn., 325 P.3d 916, 930–31 (Cal. 2014) (explaining that assessing the manageability of litigating individual issues is connected to the predominance inquiry, which is part of the community of interest prong); 7AA CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1780 (3d ed. 2010) (discussing the manageability consideration and its ability to help the court “in determining whether questions of law or fact common to the members of the class predominate . . .”).

115. A leading treatise considers the manageability inquiry as part of the superiority requirement. *See, e.g.*, WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG ON CLASS ACTIONS § 4:72 (5th ed. 2011) (explaining that manageability is the most critical concern “in determining whether a class action is a superior means of adjudication”). It has also been considered part of the ascertainability requirement. *See, e.g.*, Global Minerals & Metals Corp. v. Superior Court, 113 Cal. App. 4th 836, 849 (Ct. App. 2003) (“Manageability . . . is intertwined . . . with the question of ascertainability . . .”) (quoting Reyes v. Board of Supervisors, 196 Cal. App. 3d 1263, 1275 (1987)).

116. 7AA CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1780 (3d ed. 2010). *See also* 1 WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG ON CLASS ACTIONS § 4:72 (5th ed. 2011) (“[T]he cases most likely to be unmanageable are those involving myriad individual issues . . .”).

117. *In re Hotel Telephone Charges*, 500 F.2d 86, 91–92 (9th Cir. 1972) (reversing class certification because of unmanageability due to the predominance of individual questions, high administrative costs, and complexity).

118. *Compare* FED. R. CIV. P. 23(b)(3)(D) (West 2014) (stating that in assessing the predominance of common issues of law and fact with individual

firmly rooted in California case law; it was first recognized in *Diamond v. General Motors Corp.*<sup>119</sup> In *Diamond*, class certification was denied because the proceeding would be unmanageable due to many individualized issues.<sup>120</sup> Shortly after, another unmanageable class action was dismissed when the community of interest requirement was not met.<sup>121</sup>

The California Supreme Court first dismissed a class action as unmanageable in *Blue Chip Stamps v. Superior Court*.<sup>122</sup> The court weighed the potential of plaintiff's recovery—which was insubstantial—with the expensive administrative costs in identifying and processing claims.<sup>123</sup> Finding that substantial benefits did not accrue to the litigants and the court alike, the court dismissed the action as unmanageable.<sup>124</sup> The court did not dismiss for the presence of individual issues like the two previous cases; instead, the court intertwined manageability with weighing the burdens and benefits of the class action.<sup>125</sup> Notably, this manageability weighing assessment has been considered a factor distinct from the other more traditional requirements.<sup>126</sup>

Since PAGA representative actions are not subject to class action certification, the manageability assessment is gaining popularity because it concerns judicial economy and the efficiency of actions.<sup>127</sup> As the next section details, considering

issues of law and fact, the court should look at “the likely difficulties in managing the class), with CAL. CIV. PROC. CODE § 382 (West 2014).

119. *Diamond v. General Motors Corp.*, 20 Cal. App. 3d 374, 377–78 (Ct. App. 1971).

120. *Id.* (denying class certification, in part, because there were many individualized issues).

121. *Devidian v. Automotive Service Dealers Assn.*, 35 Cal. App. 3d 978, 985 (1973) (holding that there was no manageable community of interest).

122. *Blue Chip Stamps v. Superior Court*, 556 P.2d 755, 758-59 (Cal. 1976).

123. *Id.*

124. *Id.*

125. *Id.*

126. See RUTTER GROUP, CAL. PRAC. GUIDE CIV. PRO. BEFORE TRIAL Ch. 14-B 14:17.8 (2014) (identifying the weighing assessment as an “other factor” germane to class certification); see also *Reyes v. San Diego County Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1275 (Ct. App. 1987) (considering the manageability inquiry as part of ascertainability but also—and distinctly—an underlying admonishment of the Supreme Court to “weigh the respective benefits and burdens of a class action . . .”).

127. See e.g., *Ortiz v. CVC Caremark Corporation*, No. C-12-05859 EDL, 2014 WL 117614, at \*3 (N.D. Cal. March 19, 2014) (dismissing PAGA action as unmanageable because too many individualized assessments would be needed at trial).

manageability is proper because courts have inherent power to control their dockets when judicial economy is implicated.

## 2. *A Court's Ability to Control Its Docket*

Connected to the manageability issue is a court's "inherent power to control [its] dockets."<sup>128</sup> It has been long recognized that California courts "have inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them."<sup>129</sup> With this power, the courts are permitted to "[fashion] new forms of procedures when required to deal with the rights of the parties and manage the caseload of the court."<sup>130</sup> These powers comport with the Federal Rules of Civil Procedure, which are to be administered in order to secure "the just, speedy, and inexpensive determination of every action."<sup>131</sup>

Due to the complexity and size accompanying PAGA actions, the potential to clog up the courts with PAGA actions is large. Thus, the court's inherent power to control its docket becomes paramount.<sup>132</sup> Some courts have begun to utilize these inherent powers, and assess manageability when faced with complex PAGA claims.<sup>133</sup>

## 3. *Unmanageability in Action: PAGA Suits in Federal Court*

Notwithstanding the California Supreme Court's holding that PAGA suits are fundamentally different than a class

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128. *Thompson v. Housing Authority of City of Los Angeles*, 782 F.2d 829, 831 (9th Cir. 1986). *See generally* *Sonne & Jackson*, *supra* note 7, at 7 (arguing that the courts inherent power to control its docket is connected to manageability).

129. *Cottle v. Superior Court*, 3 Cal. App. 4th 1367, 1377 (Ct. App. 1992).

130. *Id.*; *see also* *Peat, Marwick, Mitchell & Co. v. Superior Court*, 200 Cal. App. 3d 272, 287 (Ct. App. 1988) (recognizing that these powers are "derived from the historic power of equity courts' and 'supervisory or administrative powers which all courts possess to enable them to carry out their duties'" (quoting *Bauguess v. Paine*, 22 Cal. 3d 626, 635 (1978))).

131. FED. R. CIV. P. 1; *see also* Defendants' Motion To Strike Any Class, Collective, or Representative Actions or Claims at 21, *Litty v. Merrill Lynch & Co. Inc.*, 2014 WL 5904904, at \*3 (C.D. Cal. Nov. 10, 2014) (No. CV. 14-0425 PA (PJWx) (arguing that dismissing unmanageable PAGA representative action secures the just, speedy, and inexpensive determination of the present action, while not obliterating the purpose of PAGA).

132. *See* *Sonne & Jackson*, *supra* note 7.

133. *See* discussion *infra* Part III.A.3.

action<sup>134</sup>—and thus not subject to class action requirements<sup>135</sup>—courts have been willing to dismiss PAGA claims for lack of manageability.<sup>136</sup> Other courts, however, reach the opposite conclusion and are unwilling to dismiss for unmanageability, reasoning it would obliterate PAGA’s purpose to “incentivize private parties to recover civil penalties for the government that otherwise may not have been assessed and collected by overburdened state enforcement agencies.”<sup>137</sup> These cases are discussed below.

In *Ortiz v. CVS Caremark Corp.*, an extremely large PAGA representative action,<sup>138</sup> the court determined the Plaintiff did not need to satisfy the class action requirements of Rule 23.<sup>139</sup> Nonetheless, the court found that the PAGA claim was unmanageable because it required too many individualized assessments.<sup>140</sup> The court noted that manageability issues were magnified in this wage and hour case because the plaintiffs had not shifted the burden to the defendant to counter liability. The result would have been to require the plaintiff to demonstrate liability as to thousands of individual aggrieved employees.<sup>141</sup>

The same result was reached in *Litty v. Merrill Lynch*, where the court granted a motion to strike the plaintiff’s PAGA

134. *Baumann v. Chase Inv. Services Corp.*, 747 F.3d 1117, 1121 (9th Cir. 2014).

135. See *supra* notes 10–13 and accompanying text.

136. See, e.g., *Ortiz v. CVS Caremark Corporation*, No. C-12-05859 EDL, 2014 WL 117614, at \*4 (N.D. Cal. March 19, 2014) (“[T]he Court does not conclude that PAGA claims are unmanageable in general, but only that the circumstances of this case make the PAGA claim here unmanageable because a multitude of individualized assessments would be necessary.”).

137. *Plaisted v. Dress Barns, Inc.*, No. 2:12-CV-01679-ODW(SHx), 2012 WL 4356158, at \*2 (C.D. Cal. Sept. 20, 2012).

138. The case involved thousands of employees in over 850 stores. See *Defendants’ Motion to Strike PAGA Representative Actions Allegations* at 13, *Ortiz v. CVS Caremark Corp.*, 2014 WL 117614, at \*4 (N.D. Cal. March 19, 2014) (No. CV 12-05859 EDL).

139. *Ortiz v. CVS Caremark Corp.*, 2014 WL 117614, at \*1 (N.D. Cal. March 19, 2014). See *supra* notes 76–85 and accompanying text.

140. *Ortiz v. CVS Caremark Corp.*, No. C-12-05859 EDL, 2014 WL 117614, at \*4 (N.D. Cal. March 19, 2014). The action involved claims for compensation for off-the-clock work, unreimbursed mileage, and under-reimbursed mileage, all of which would require highly individualized questions. *Id.* at \*4–5.

141. *Id.* Cf. *Alcantar v. Hobart Service*, No. ED CV 11-1600 PSG (SPx), 2013 WL 146323, at \*3 (C.D. Cal. Jan 14, 2013) (highly individualized, fact-intensive, mini-trials not likely because the burden was on the Defendants to prove “that they kept adequate records of meal breaks or relieved employees of their duties”).

representative action for wage and hour claims.<sup>142</sup> After initially rejecting class certification because individualized issues predominated, the court determined “[t]he circumstances of this case make the PAGA claim unmanageable because a multitude of individualized assessments would be necessary.”<sup>143</sup> Interestingly, in both cases, the courts applied *Arias*.<sup>144</sup> Nonetheless, both judges still dismissed the claims as unmanageable because of numerous individualized issues of fact and law: a result commonly reached when rejecting class action certification.<sup>145</sup>

Importantly, recent cases have continued to rely on *Litty & Ortiz*.<sup>146</sup> These courts have similarly held that PAGA representative actions are unmanageable when there are a large number of allegedly aggrieved individuals who would require a multitude of individual assessments to prove liability.<sup>147</sup>

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142. *Litty v. Merrill Lynch & Co. Inc*, No. CV 14-0425 PA (PJWx), 2014 WL 5904904, at \*3 (C.D. Cal. Nov. 10, 2014). This case, like *Ortiz*, would have involved the individualized inquiries of thousands of employees. See Defendants’ Motion To Strike Any Class, Collective, or Representative Actions or Claims at 21, *Litty v. Merrill Lynch & Co. Inc*, No. CV. 14-0425 PA (PJWx), 2014 WL 5904904, at \*3 (C.D. Cal. Nov. 10, 2014).

143. *Litty v. Merrill Lynch & Co. Inc.*, No. CV 14-0425 PA (PJWx), 2014 WL 5904904, at \*3 (C.D. Cal. Nov. 10, 2014).

144. See *Ortiz v. CVS Caremark Corp.*, No. C-12-05859 EDL, 2014 WL 117614, at \*2 (N.D. Cal. March 19, 2014) (recognizing that PAGA actions do not need to meet class action requirements in state court and federal court after *Arias*); *Litty v. Merrill Lynch & Co. Inc*, CV 14-0425 PA (PJWx), 2014 WL 5904904, at \*3 (C.D. Cal. Nov. 10, 2014) (dismissing for unmanageability even if the *Arias* holding applies to PAGA representative actions in federal court).

145. See, e.g., *Elliot v. ITT Corp.*, 150 F.R.D. 569, 585-86 (N.D. Ill. 1992) (denying class certification in a Truth in Lending Act claim because the number of individual fact issues would make the litigation unmanageable); *In re Fosamax Products Liability Litigation*, 248 F.R.D. 389, 403-04 (S.D. N.Y. 2008) (denying class certification on products liability claim because the amount of individual questions would make the action unmanageable).

146. See *Raphael v. Tesoro Refining and Marketing Co. LLC*, No. 2:15-cv-02862-ODW, 2015 WL 5680310, at \*3-4 (C.D. Cal. Sep. 25, 2015) (holding that PAGA claim was unmanageable and inappropriate because “[t]he Court would have to engage in a multitude of individualized inquiries. . . .”); *Amey v. Cinemark USA Inc.*, No. 13-cv-05669-WHO, 2015 WL 2251504, at \*16-18 (N.D. Cal. May 13, 2015) (dismissing PAGA claim when it would require “too great a number of individualized assessments. . . .”); *Bowers v. First Student Inc, Inc.*, No.2:14-CV-8866-ODW (Ex), 2015 WL 1862914, at \*4 (C.D. Cal. April 23, 2015) (striking PAGA representative claim because it involved a multitude of individualized assessments).

147. *Amey v. Cinemark USA Inc.*, No. 13-cv-05669-WHO, 2015 WL 2251504, at \*16-17 (N.D. Cal. May 13, 2015); *Bowers v. First Student Inc.*, No.2:14-CV-

Lastly, in *Rix v. Lockheed Martin Corp.* a PAGA group consisting of eighty-eight employees alleged fifteen separate Labor Code violations as to each employee, thus confronting the court with over 1,000 alleged Labor Code violations.<sup>148</sup> The court ultimately dismissed the PAGA action because it was not persuaded the plaintiff could establish the claims with common proof—a class action necessity.<sup>149</sup> Although the court did not explicitly dismiss the claim for lack of manageability, that conclusion is commonly reached when questions of fact and law, capable of common proof, do not exist.<sup>150</sup>

These cases illustrate courts are willing to dismiss a PAGA action if the suit would be unmanageable, which is a class action concept. However, because *Arias* seemingly dictates otherwise, it is no surprise that there are cases, such as *Plaisted v. Dress Barns*, which have concluded that striking or dismissing a PAGA suit as unmanageable is inappropriate.<sup>151</sup>

In reaching its conclusion, the *Plaisted* court addressed the defendant’s contentions regarding the unmanageability of the PAGA claim.<sup>152</sup> The defendant asserted that “courts regularly decline to allow ‘representative actions’ to proceed where the claims require individualized factual determinations, and individualized calculation of damages that are more than nominal amounts.”<sup>153</sup>

In addressing the first contention, the court recognized that PAGA’s purpose is to incentivize employees to sue employers for labor violations and recover penalties for the government.<sup>154</sup> This purpose would be obliterated if a PAGA action could not be maintained due to individual assessments

8866-ODW (Ex), 2015 WL 1862914, at \*4 (C.D. Cal. April 23, 2015)

148. *Rix v. Lockheed Martin Corp.*, No. 09cv2063-CAB (NLS), 2013 WL 9988381, at \*2 (S.D. Cal. Feb. 15, 2013).

149. *Rix v. Lockheed Martin Corp.*, No. 09cv2063-CAB (NLS), 2013 WL 9988381, at \*2 (S.D. Cal. Feb. 15, 2013). “The need for common proof dovetails with the Rule 23 requirements of commonality and predominance.” *Marlo v. United Parcel Services, Inc.*, 251 F.R.D. 476, 484 (C.D. Cal. 2008).

150. *See, e.g., Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 335 (3d. Cir 2011) (“A key question in a litigation class action is manageability—how the case can and will be tried, and whether there are questions of fact or law that are capable of *common proof*”) (emphasis added).

151. *Plaisted v. Dress Barns, Inc.*, No. 2:12-cv-01679-ODW(SHx) 2012 WL 4356158, at \*2 (C.D. Cal. Sept. 20, 2012).

152. *Id.*

153. *Id.*

154. *Id.*

because “every PAGA action in some way requires *some* individualized assessment regarding whether a Labor Code violation has occurred.”<sup>155</sup> The court was not persuaded by the second argument involving calculations because the cases the defendant relied upon involved individualized restitution calculations under California’s Unfair Competition Law (UCL). Restitution calculations, unlike the calculations needed here, are extremely fact-intensive and individualized.<sup>156</sup> In contrast, violating PAGA results in the recovery of statutory penalties in fixed amounts.<sup>157</sup> Therefore, the manageability problems inherent in a UCL case were not present in the PAGA claim here, and the defendant’s motion for judgment on the pleadings was denied.<sup>158</sup>

Another case that failed to strike a potentially unmanageable claim was *Echavez v. Abercrombie & Fitch Co. Inc.*<sup>159</sup> In addressing the defendants’ manageability argument, the court recognized the plaintiff would have difficulty establishing liability, which would be required for each individual she was seeking to recover on behalf of.<sup>160</sup> In similar fashion to the *Plaisted* decision, the court held that this was not a reason to strike a claim.<sup>161</sup>

All in all, the defendants in each of the above-mentioned cases expressed a similar concern: the difficulty and subsequent unmanageability in proving individual issues for many employees at trial. However, different results ensued. *Ortiz* even cited the *Plaisted* statement regarding the obliteration of the purpose of PAGA and still reached a different result.<sup>162</sup>

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155. *Id.*

156. *Id.*

157. *Plaisted v. Dress Barns, Inc.*, No. 2:12-cv-01679-ODW(SHx) 2012 WL 4356158, at \*2 (C.D. Cal. Sept. 20, 2012).

158. *Id.* at \*2–3.

159. *Echavez v. Abercrombie & Fitch Co. Inc.*, No. CV 11-9754 GAF (PJWx), 2013 WL 7162011, at \*10–11 (C.D. Cal. 2013).

160. *Id.*

161. *Id.* at \*11. (The court approvingly cited *Plaisted* for the proposition that PAGA’s purpose would be obliterated if a court ruled that a case was unmanageable because of individual assessments).

162. *Ortiz v. CVS Caremark Corporation*, 2014 WL 117614, at \*4 (N.D. Cal. March 19, 2014) (“To hold that a PAGA action could not be maintained because the individual assessments regarding whether a violation had occurred would make the claim unmanageable at trial would obliterate [PAGA’s] purpose, as every PAGA action . . . requires some individualized assessment . . . .”) (quoting

This dissension within California district courts creates a shroud of uncertainty for parties in a PAGA representative action. Such “uncertainty in the law can inflict real costs on employers, not only ex-post (litigation expenses and unexpected liabilities) but also ex-ante (in terms of risk aversion and investments in planning and compliance).”<sup>163</sup> What’s more, the ex-post costs augment in PAGA cases because they are lengthy, complex suits,<sup>164</sup> and progress further into litigation than a parallel class action that would have already been dismissed for failing to meet typical class action requirements. These costs also have an impact on the likelihood of a settlement in a PAGA action.<sup>165</sup>

#### 4. *The Unmanageability of PAGA Actions In State Court and the Implications of Unmanageable Cases*

These federal court decisions also have implications for PAGA representative actions in California state court. While not binding, unpublished federal court decisions are still persuasive authority in state court.<sup>166</sup> One of the before-mentioned cases (*Plaisted*) was recently cited in an opinion where the defendant argued the unmanageability of a PAGA claim.<sup>167</sup> The case was the unpublished decision,<sup>168</sup> *Nelson v.*

*Plaisted v. Dress Barns, Inc.*, 2012 WL 4356158, at \*2 (C.D. Cal. Sept. 20, 2012)).

163. TIMOTHY P. GLYNN, RACHEL S. ARNOW-RICHMAN & CHARLES A. SULLIVAN, *EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS* xxx (2d ed. 2011).

164. *See, e.g.*, *Driscoll v. Granite Rock Co.*, No. 1-08-CV-103426, 2011 WL 10366147, Cal. Super. Ct. September 20, 2011 (adjudicating PAGA action, where trial lasted fourteen days and involved 285 exhibits and fifty-five witnesses, which included an expert witness using statistical evidence to prove who was an aggrieved employee).

165. *See* Peter Toll Hoffman, *Valuation of Cases For Settlement: Theory and Practice*, 1991 J. DISP. RESOL. 1, 22 (1991) (discussing how litigation expenses, *inter alia*, influence the size and likelihood of a settlement). For how these costs influence PAGA actions and increase the chance of coercive settlements, see *infra* Part IV.B.1.

166. *Olinick v. BMG Entertainment*, 138 Cal.App.4th 1286, 1301 n.11 (Ct. App. 2006).

167. *See Nelson v. Southern California Gas Company*, No. B238845, 2013 WL 3008663, at \*18–19 (Cal. App. 2 Dist. June 10, 2013) (relying on *Plaisted* when reversing the lower court’s holding).

168. Although unpublished, and noncitable, *see* CAL. R. CT. 8.1115(a), this case is still important because it relied on the *Plaisted* analysis. As such, it indicates that California courts are willing to follow the federal courts in their analysis on this nascent issue.

*Southern California Gas Company*.<sup>169</sup> There, a Court of Appeal affirmed the lower court's denial of class certification, but reversed its concurrent denial of PAGA representative status on the basis of unmanageability; the lower court reached this conclusion because individual issues predominated.<sup>170</sup>

The *Nelson* court stated that after *Arias*, it was anomalous that the trial court could deny PAGA representative status when individual issues predominated.<sup>171</sup> The *Nelson* court also relied heavily on *Plaisted's* analysis regarding the inapplicability of manageability concerns within a PAGA action.<sup>172</sup> The absence of any other court dismissing a PAGA claim for unmanageability also influenced the judge's conclusion.<sup>173</sup>

Following the court's decision, the defendant's submitted a petition for rehearing<sup>174</sup> to the Supreme Court of California and an amicus letter in support of petition for review.<sup>175</sup> Although review was denied, these materials set forth: (1) why manageability can still be assessed in light of *Arias*; and (2) the potential for abuse stemming from disregarding the manageability problem in PAGA actions.<sup>176</sup>

The petitioner's key point is that *Arias* said nothing about manageability; the court merely held that certifying a class as mandated by Civil Procedure Code section 382 was not required.<sup>177</sup> For example, while a defendant should not be permitted to contest the inadequacy of a representative,<sup>178</sup> the

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169. *Nelson v. Southern California Gas Company*, (No. B238845), 2013 WL 3008663 (Cal. App. 2 Dist. June 10, 2013).

170. *Id.* at \*19 (reversing the lower court's decision which held that the individual issues predominated, thus making the case unmanageable).

171. *Id.* at \*16.

172. *Id.* at \*18.

173. *Id.*

174. *See* Respondent's Petition for Rehearing, *Nelson v. Southern California Gas Company*, No. B238845, 2013 WL 3008663, at \*19 (Cal. App. 2 Dist. June 10, 2013).

175. *See* Brief for CELC as Amici Curiae Supporting Respondents, *Nelson v. Southern California Gas Company*, No. B238845, 2013 WL 3008663, at \*19 (Cal. App. 2 Dist. June 10, 2013).

176. *See* Brief for CELC as Amici Curiae Supporting Respondents, at \*3-6, *Nelson v. Southern California Gas Company*, No. B238845, 2013 WL 3008663, at \*19 (Cal. App. 2 Dist. June 10, 2013).

177. *See* Respondent's Petition for Rehearing, at \*2, *Nelson v. Southern California Gas Company*, No. B238845, 2013 WL 3008663, at \*19 (Cal. App. 2 Dist. June 10, 2013).

178. *See generally* 7A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY

presence of numerous individual issues based on extensive records of declarations and depositions should not prevent the court from rendering a PAGA group trial unmanageable.<sup>179</sup> In other words, “*Arias* . . . did not hold that an unmanageable case becomes triable simply because counsel affixes the label ‘PAGA’ to it.”<sup>180</sup>

The argument in the *Amicus* letter struck a different vein: it focused on the negative implications that would result if courts ignored manageability in PAGA suits.<sup>181</sup> For one, strike suits<sup>182</sup> leading to “blackmail” settlements will be encouraged if a case must proceed to summary judgment and/or trial regardless of unmanageable individualized issues.<sup>183</sup> That is, a defendant would rather settle than continue litigating the expensive claim.<sup>184</sup>

The possibility of a meritless claim leading to a settlement increases in PAGA actions for two reasons: (1) they are commonly joined with class actions; and (2) PAGA contains a

KANE, FEDERAL PRACTICE AND PROCEDURE § 1765 (3d ed. 2010) (“[T]he adequacy of representation requirement is . . . of critical importance in all class actions and the court is under an obligation to pay careful attention to the . . . prerequisite in every case.”).

179. See Respondent’s Petition for Rehearing, at \*2, *Nelson v. Southern California Gas Company*, No. B238845, 2013 WL 3008663, at \*19 (Cal. App. 2 Dist. June 10, 2013).

180. See Respondent’s Petition for Rehearing, at \*9–10, *Nelson v. Southern California Gas Company*, No. B238845, 2013 WL 3008663, at \*19 (Cal. App. 2 Dist. June 10, 2013).

181. See Brief for CELC as Amici Curiae Supporting Respondents, at \*3–5, *Nelson v. Southern California Gas Company*, No. B238845, 2013 WL 3008663, at \*19 (Cal. App. 2 Dist. June 10, 2013).

182. “A strike suit is defined as litigation, usually based on no valid claim, brought either for nuisance value or to obtain a settlement.” Joshua D. Fulop, *Agency Costs and The Strike Suit: Reducing Frivolous Litigation Through Empowerment of Shareholders*, 7 J. BUS. & SEC. L. 213, 215 (2007) (quoting Erica Beecher-Monas, *Enron, Epistemology, and Accountability: Regulating in a Global Economy*, 37 IND. L. REV. 141, 177 n.202)).

183. See Brief for CELC as Amici Curiae Supporting Respondents, at \*2, *Nelson v. Southern California Gas Company*, No. B238845, 2013 WL 3008663, at \*19 (Cal. App. 2 Dist. June 10, 2013).

184. A “blackmail” settlement is a settlement in which “the defendant is bludgeoned into settling cases for more than they are worth.” Bruce Hay & David Rosenberg, “*Sweetheart*” and “*Blackmail*” Settlements in Class Actions: Reality and Remedy, 75 Notre Dame L. Rev. 1377, 1378 (2000). See also Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971) (“Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail.”).

penalty scheme allowing for a large amount of liability to be imposed.<sup>185</sup> The *Amicus* letter provides an illustrative example of a strike suit in the PAGA context: there are 10,000 employees in an action that, after four years, proceeds to trial; assuming that a violation is found and not fixed, the PAGA penalty of \$200 per week is triggered; for one employee, a potential recovery of more than \$40,000 would amount; this sum is then multiplied by 10,000 employees, and, the employer now faces a litigation risk of \$400 million.<sup>186</sup> Faced with this risk and litigation expense, a settlement for a bargain rate will look attractive.

Another issue involves the terms of the settlement. With the class action claim still joined, the defense will settle the majority of the proceeds towards that claim—with the plaintiff's attorney receiving one third of the amount—while the PAGA claim will be dropped or settled for a *nominal amount*. Plaintiffs will favor settling towards the class claim because those settlement funds are not allocated towards the State of California.<sup>187</sup>

To prevent these strike suits, the *Amicus* letter proposes a solution: “If at the time of class certification (and following adequate discovery) the trial court concludes that individual issues predominate, rendering unmanageable any group-wide determination of alleged Labor Code violations, the trial court in the exercise of discretion . . . can deny representative status.”<sup>188</sup> The remainder of this article explains why reaching this conclusion is necessary in PAGA representative actions.

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185. See CAL. LAB. CODE § 2699(f)(2) (West 2014). Subsection(f)(2) provides for a civil penalty of \$100 for each aggrieved employee per pay period for the initial violation and \$200 for each aggrieved employee per pay period for each subsequent violation. The “per pay period” scheme allows PAGA civil penalties to accrue up until trial.

186. See Brief for CELC as Amici Curiae Supporting Respondents, at \*3–4, *Nelson v. Southern California Gas Company*, No. B238845, 2013 WL 3008663, at \*19 (Cal. App. 2 Dist. June 10, 2013).

187. Brief for CELC as Amici Curiae Supporting Respondents, at \*3–4, *Nelson v. Southern California Gas Company*, No. B238845, 2013 WL 3008663, at \*19 (Cal. App. 2 Dist. June 10, 2013). See also Aoyagi & Pallanch, *supra* note 6 (arguing that there is incentive to settle towards the class claim).

188. Brief for CELC as Amici Curiae Supporting Respondents, at \*5, *Nelson v. Southern California Gas Company*, No. B238845, 2013 WL 3008663, at \*19 (Cal. App. 2 Dist. June 10, 2013).

## II. IDENTIFICATION OF THE LEGAL PROBLEM

The current state of PAGA representative actions leaves much uncertainty and liability for employers litigating any one of the numerous Labor Code violations in which PAGA applies.<sup>189</sup> The uncertainty stems from the inconsistent application of: (1) Rule 23 to PAGA claims; and, more importantly, (2) the *Arias* court's holding that PAGA representative actions do not need to meet class action requirements. These two concerns dovetail into one mass of confusion for employers regarding what they must do to obtain a dismissal of a large—and potentially unmanageable—PAGA representative action.

While at least two California district courts would hold that class action-sized PAGA groups are unsusceptible to the manageability concerns,<sup>190</sup> others are beginning to recognize the inherent manageability problems with PAGA claims, and thus, the undesirability of a trial on such claims.<sup>191</sup> However, without guidance from the California Supreme Court or the 9th Circuit, California's lower courts will continue to draw upon class action concepts to dismiss PAGA representative claims, which seemingly conflicts with *Arias*. Alternatively, if *Arias* is rigidly followed, the possibility of “blackmail” settlements through the use of strike suits remains. Therefore, it is up to the courts, or legislature, to clarify the limits of *Arias*, and articulate a test that can correctly identify the point in which a court must dismiss an unmanageable PAGA action.

## III. ANALYSIS

A. *It is Permissible for California Courts to Dismiss PAGA Representative Actions as Unmanageable*1. *Dismissing a PAGA Suit as Unmanageable Does Not Conflict With Arias v. Superior Court*

*Arias* held that in a PAGA representative action, a Plaintiff does not need to satisfy the requirements of California Code of Civil Procedure section 382.<sup>192</sup> This is *not* equivalent

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189. See *supra* note 151 and accompanying text.

190. See *supra* notes 150–62 and accompanying text.

191. See *supra* notes 135–48 and accompanying text.

192. *Arias v. Superior Court*, 209 P.3d 923, 935 n.5 (Cal. 2009).

to holding that PAGA plaintiffs do not need to satisfy any type of inquiry associated with class actions—*i.e.*, manageability. Notably, *Arias* did not mention manageability once in its opinion.<sup>193</sup>

The early California class action cases dismissing for lack of manageability do not appear to consider it a requirement.<sup>194</sup> It is a distinct conclusion reached upon failing to satisfy the other concrete requirements of section 382: community of interest, ascertainable class, and superiority. The applicability of the manageability inquiry to each of these prongs<sup>195</sup> also supports the conclusion that it is not a traditional “requirement” falling within the purview of the *Arias* holding.<sup>196</sup> Lastly, *Blue Chips* dismissed an unmanageable class action using a balancing test that is arguably unconnected to the traditional elements of section 382.<sup>197</sup> These cases, in conjunction with the *Arias* opinion failing to mention manageability once, give rise to an inference that *Arias* did not intend to relieve plaintiffs of establishing a manageable class exists.

Further, Section 382 of California’s Code of Civil Procedure fails to make any mention of manageability as a requirement; this is in contrast to Rule 23 and the statutes from thirty other states, which include manageability in their provisions.<sup>198</sup> This absence also supports the conclusion that manageability is not a strict requirement of §382, but instead, a consideration in all class actions, and an available option

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193. See *Arias*, 209 P.3d 923 (Cal. 2009).

194. See *supra* notes 111-13 and accompanying text.

195. See *supra* notes 114-17 and accompanying text.

196. See *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1304-305 (9th Cir. 1990) (considering the manageability in notifying class members of the suit, which is part of the “ascertainable class” requirement); *Dunbar v. Albertson’s, Inc.*, 141 Cal. App. 4th 1422, 1432 (Ct. App. 2006) (considering the manageability in determining individualized issues of liability, as part of the predominance requirement); 1 WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG ON CLASS ACTIONS § 4:72 (5th ed. 2011) (explaining that “[manageability] is the most critical concern in determining whether a class action is a superior means of adjudication.”).

197. See *Reyes v. San Diego County Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1274 (Ct. App. 1987) (explaining that the *Blue Chips* weighing of class actions benefits and burdens is not just a requirement, but an underlying admonishment by the supreme court).

198. See Erbsen, *supra* note 15, at 1056-57 and nn. 118-21 (examining all of the states class action statutes and noting that California is in the minority of states that has not adopted a manageability rule in its statute).

when other requirements are not satisfied.<sup>199</sup> Dismissing PAGA actions for lack of manageability should not be in conflict with *Arias*' admonishment that a Plaintiff does not meet class certification *requirements*.

## 2. *The Court Has The Inherent Ability to Dismiss Unmanageable PAGA Claims*

The court's ability to manage its docket becomes important when dealing with PAGA claims because the strict class action requirements do not apply, and because of the little amount of case law related to the proper treatment of PAGA cases.<sup>200</sup> Thus, the fundamental principles mentioned in *Cottle v. Superior Court* are important in preventing a PAGA action from becoming a back door to a class action case—and eventually a class settlement.<sup>201</sup> Indeed, cases such as *Ortiz*, *Litty* and *Rix*—and their dismissal of the PAGA claims for unmanageability—illustrate that courts have discretion to create workable solutions when faced with cases threatening the manageability of their docket.<sup>202</sup>

Although these three cases were in federal court, the inherent ability of courts to manage their caseload, as stated in *Cottle*, extends to California state court.<sup>203</sup> Those fundamental principles should apply to potentially unmanageable cases. To fail to do so would ultimately result in burdening the trial court's resources with complex and expensive litigation.<sup>204</sup>

## 3. *Federal District Courts in California Are Instructive on the Issue of Manageability and Should be Followed in California State Court*

Even if the manageability assessment is not considered

199. See *supra* notes 114–18.

200. Sonne & Jackson, *supra* note 7, at 7.

201. See *supra* notes 93–95 and accompanying text. See also Sonne & Jackson, *supra* note 7, at 7.

202. See, e.g., *Ortiz v. CVC Caremark Corporation*, No. 2-12-05859 EDL, 2014 WL 117614, \*at 3 (N.D. Cal. March 19, 2014) (dismissing PAGA claim as unmanageable because multitude of individualized assessments would be necessary).

203. See *Cottle v. Superior Court*, 3 Cal. App. 4th 1367, 1377 (Ct. App. 1992) (“California courts have fashioned new forms of procedure when required . . . to manage the caseload of the court.”) (emphasis added).

204. See *supra* notes 141–45 and accompanying text.

exempt from *Arias*' holding, and the court's inherent power to dismiss for PAGA actions is unpersuasive, dismissing a resource draining PAGA action is still advisable.

Although unpublished, *Ortiz*, *Rix* and *Litty* are persuasive authority in California state court.<sup>205</sup> The only cases going the other way were *Echavez & Plaisted*, with the latter stating: "To hold that a PAGA action could not be maintained because the individual assessments regarding whether a violation had occurred would make the claim unmanageable at trial would obliterate [PAGA's] purpose, as every action requires some individualized assessment . . . ." <sup>206</sup>

The difference in result may be explained by distinguishable facts and the procedural posture of *Plaisted*.<sup>207</sup> The *Plaisted* plaintiff not only failed to file a class action, but also failed to provide the court with a complete evidentiary record.<sup>208</sup> Conversely, in *Ortiz* and *Litty* the court had previously ruled that the plaintiff was unable to prove her class claims with common proof, and that individualized assessments were required to determine liability as to every other employee in the representative group.<sup>209</sup>

As such, the absence of a detailed record evidencing the numerous individualized assessments—which were necessary to determine liability—may explain the *Plaisted* court's reluctance to dismiss the PAGA claim because of

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205. *Olinick v. BMG Entertainment*, 138 Cal. App. 4th 1286, 1301, fn.11 (Ct. App. 2006).

206. *Plaisted v. Dress Barns, Inc.*, No. 2:12-CV-01679-ODW(SHX), 2012 WL 4356158, at \*2 (C.D. Cal. Sept. 20, 2012).

207. See Defendants' Motion To Strike Any Class, Collective, or Representative Actions or Claims at 21, *Litty v. Merrill Lynch & Co. Inc.*, No. CV 14-0425 PA (PJWx), 2014 WL 5904904, at \*19 (C.D. Cal. Nov. 10, 2014) (No. CV. 14-0425 PA (PJWx)).

208. See *Plaisted v. Dress Barns, Inc.*, No. 2:12-CV-01679-ODW(SHX), 2012 WL 4356158, at \*2 (C.D. Cal. Sept. 20, 2012) ("Plaisted failed to seek class certification within Local Rule 23-3's 90-day deadline . . .").

209. Compare *Ortiz v. CVS Caremark Corporation*, No. C-12-05859 EDL, 2013 WL 6326743, at \*11 (N.D. Cal. Dec. 2, 2013) (denying class certification because there would be many individualized determinations of thousands of employees), and *Litty v. Merrill Lynch & Co., Inc.*, No. CV 14-0425 PA (PJWx), 2014 WL 5904907, at \*4 (C.D. Cal. Aug. 4, 2014) (denying class certification because "the record demonstrates that the variation in how and where the [employees] perform their primary duties is fatal to commonality"), with *Plaisted v. Dress Barns, Inc.*, No. 2:12-CV-01679-ODW(SHX), 2012 WL 4356158, at \*2 (C.D. Cal. Sept. 20, 2012) ("Plaintiff Alexis Plaisted's deadline to file a motion for class certification . . . has expired").

manageability.<sup>210</sup> Had the court obtained such a record, the case may have gone the other way because the unmanageability of the *Plaisted* individual assessments would have been somewhat comparable to the *Ortiz* and *Litty* cases.<sup>211</sup>

Further, the only California state court decision at odds with *Ortiz*, *Rix*, and *Litty* is *Nelson v. Southern California Gas Company*, which is unpublished. It has no authority and is uncitable.<sup>212</sup> Nonetheless, the case is important because it illustrates that State courts are willing to follow district courts on the manageability issue.

*Nelson* relied heavily on *Plaisted*, but, as mentioned above, *Plaisted* may have come out differently had a record capable of adequately establishing the manageability problems been available.<sup>213</sup> Moreover, *Nelson* noted the absence of any case “specifically considering whether the trial court may deny a representative PAGA claim on the ground that individual questions would make the litigation unmanageable.” However, with *Ortiz* and the multitude of other cases following *Ortiz*, this is no longer true. Had those correctly decided cases been available, *Nelson* may have gone the other way as well.

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210. See Defendants’ Motion To Strike Any Class, Collective, or Representative Actions or Claims at 21, *Litty v. Merrill Lynch & Co. Inc.*, No. CV. 14-0425 PA (PJWx), 2014 WL 5904904, at \*19–20 (C.D. Cal. Nov. 10, 2014) (“*Plaisted* might well have been decided differently if, as here and in *Ortiz*, the court had already ruled that the plaintiff could not prove her class claims with common proof, and that individualized inquiries were necessary . . .”).

211. Compare Defendants Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 21–23, *Plaisted v. Dress Barns, Inc.*, No. 2:12-CV-01679-ODW(SHX), 2012 WL 4356158, at \*2 (C.D. Cal. Sept. 20, 2012) (arguing that the individualized inquiries needed in this case would create manageability problems because up to several hundred managers would have to testify at trial to determine who was an “aggrieved employee”), with *Ortiz v. CVS Caremark Corporation*, No. C-12-05859 EDL, 2013 WL 6326743, at \*11 (N.D. Cal. Dec. 2, 2013) (dismissing PAGA action because individualized assessments would have been necessary for thousands of employees, in order to determine who suffered labor code violations, and thus, was an aggrieved employee).

212. CAL. R. CT. 8.1115(a) (West 2014).

213. See *supra* notes 207–211 and accompanying text.

B. *The Prudential Concerns that would Result if Courts Could not Dismiss for Lack of Manageability*

1. *The Danger of Strike Suits and “Blackmail” Settlements*

The strike suit<sup>214</sup> becomes a threat in PAGA actions because plaintiffs can avoid the rigors of class action requirements. PAGA’s exemption allows complex representative actions to advance through the court system far longer than a normal class action— accruing litigation expenses all along the way.<sup>215</sup> This creates an incentive<sup>216</sup> for employers to settle even in the face of a potentially meritless claim.<sup>217</sup> Simply put, the potential risk of litigating a complex and large action, involving thousands of employees with many individualized issues, becomes undesirable. This is especially true with a PAGA case where penalties can accrue up to the point of trial.

In addition to litigation expenses, the presence (or absence) of insurance coverage plays a unique role in the strike suit or “blackmail” settlement. The common form of employer insurance, Employers Practice Liability Insurance (EPLI), generally does not cover wage-based claims and claims for fines and penalties.<sup>218</sup> Since PAGA assesses penalties and covers many wage and hour statutes, EPLI coverage will not extend to almost all the claims brought under PAGA.<sup>219</sup>

The unavailability of insurance necessarily puts additional risk on the employer because they may be personally liable, and simultaneously compels a potentially unmeritorious settlement.<sup>220</sup> The chance of settlement may also increase because the uninsured defendant is less

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214. See *supra* note 182 for the definition of a “strike suit.”

215. See Hoffman, *supra* note 165, at 22 (1991) (litigation expenses are a type of transaction costs and include: attorney’s fees, filing fees, deposition costs, and witness fees).

216. See *id.* (explaining why litigation expenses is a factor taken into account before settling).

217. Settling a unmeritorious claim for a less than its worth is defined as a “blackmail settlement.” See generally Hay & Rosenberg, *supra* note 184 at 1378.

218. Marc B. Heath, *Employers Practice Liability Insurance: A Practical Guide*, 25-DEC Vt. B.J. 51, 52 (1999) (discussing what EPLI does not cover).

219. See Cal. Lab. Code § 2699(f)(2) (West 2014).

220. See Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 371–72 (1991).

experienced than a claim adjuster—who would otherwise be handling the case for an insured—and more likely to negotiate unpredictably, *i.e.*, be “unduly pessimistic, excessively cautious, [and] anxious to avoid trial.”<sup>221</sup> Therefore, the unavailability of insurance for PAGA actions can have the deleterious effect of inducing a settlement for far more than it is worth.

The coercive settlement concept is well developed in the class action.<sup>222</sup> In what has been termed the “blackmail” settlement by commentators, the plaintiffs recover more than they should, “because the class counsel is able to threaten the defendant with a costly and risky trial.”<sup>223</sup> The “blackmail” thesis has been endorsed in the federal courts, with one Court of Appeals noting that it forces “defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability.”<sup>224</sup>

The possibility of a “blackmail” settlement looms even larger in PAGA actions because plaintiffs are not constricted by class action requirements, which could otherwise derail a large settlement.<sup>225</sup> For example, not having to meet the

221. *Id.*

222. *See* Hay & Rosenberg, *supra* note 184 at 1377.

223. *Id.* at 1378. *See generally* Charles Silver, “We’re Scared to Death”: *Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357, 1360–63 (arguing that there are four different versions of the blackmail thesis, one contends that blackmail occurs because of the undesirable expenses of litigation, while the other three posit that these settlements occur because of the consequences of trying the action (*i.e.*, bankrupting the defendant)).

224. *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1307–08 (7th Cir. 1995) *See also* *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015–16 (“[T]he suit is exceedingly unlikely to be tried . . . . The case [is] so unwieldy, and the stakes so large, that settlement becomes almost *inevitable*—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims.”) (7th Cir. 2002) (Easterbrook, J.) (emphasis added).

225. Once a class is certified, the risk-averse defendant is more likely to settle unfavorably because liability is determined by a lone jury in an all-or-nothing verdict. The plaintiff bringing a PAGA claim, however, need not worry about class certification; thus, the risk-averse defendant is even more likely to settle, and settle earlier, because failure to meet the traditional requirements wont result in dismissing the suit. *See* Hay & Rosenberg, *supra* note 184 at 1391 (“[C]ertification makes trial very risky for the defendant . . . .”). If a PAGA claim and a class action claim are brought together, blackmail settlements with the proceeds going towards the class claim are more likely in California state court. There, the plaintiffs need not pass class certification. In federal court, however, class certification must be met before a settlement can be approved. *See supra*

predominance of common issues of law and fact requirement increases the chance that there will be costly individualized assessments. The threat of expensive litigation, combined with the unavailability of insurance, will compel settlement for many employers and can work as a type of “legalized blackmail.”<sup>226</sup> However, courts can take the sting out of these threats if they start to consider manageability in every PAGA action, ultimately decreasing the chance of blackmail settlements.<sup>227</sup>

## 2. Purpose of PAGA May Be Undermined

The legislature enacted PAGA with one purpose: adequate enforcement of the Labor Code through incentivizing private parties to recover civil penalties by the government.<sup>228</sup> Still, the LWDA continues to be the primary enforcement agency and must be adequately staffed and funded to enforce violations worthy of their attention. To accomplish this, the legislature included a provision that allows the state to recover seventy five percent of the statutory civil penalties, while the aggrieved party only receives twenty-five percent.<sup>229</sup>

In enacting PAGA the legislature explicitly recognized the fiscal effect that PAGA would have: “increased penalty revenue to the General Fund and the LWDA.”<sup>230</sup> The recovery of civil penalties was much needed in California because “enforcement staff for state labor law agencies has fallen drastically behind the growth in the labor” market and “the budget picture is

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note 187.

226. See Handler, *supra* note 184 at 9.

227. A plaintiff’s attorney will no longer be able to threaten the possibility of numerous mini-trials and individualized assessments that would drain the defendant’s resources. Of course, a plaintiff will incur expenses as well with unmanageable actions but the one-way fee-shifting provision eases the burden on the plaintiff. See CAL. LAB. CODE § 2699(g)(1) (West 2014).

228. Plaisted v. Dress Barns, Inc., No:2-12-CV-01679-ODW (SHx), 2013 WL 1441997, at \*2 (C.D. Cal. April 8, 2013).

229. The Ninth Circuit has held that in PAGA actions, the State of California is the real party in interest. Urbino v. Orkin Services of California, Inc., 726 F.3d 1118, 1123 (9th Cir. 2013). The 75% is to be used in the “education of employers and employees about the rights and responsibilities” under the code, and for the enforcement of labor laws. Courts have said that “[t]he relief available is in large part for the benefit of the general public rather than the party bringing the action.” See *supra* note 28 and accompanying text.

230. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 796, at 2 (August 20, 2003).

getting worse, not better.”<sup>231</sup> The LWDA’s recovery of Civil Penalties effectuates the purpose of PAGA through the direct enforcement of the Labor Code and in the education of the laws more generally. Unfortunately, when plaintiffs pursue a PAGA strike suit as a back-door to a traditional class action settlement, both of these goals are undermined.

This subversion results because a typical PAGA class action lawsuit settles most of its proceeds towards the class action claim, while directing a nominal amount towards the PAGA claim, assuming it is not dropped altogether prior to settlement.<sup>232</sup> There is a large incentive to accomplish this because the plaintiffs no longer have to allocate 75% towards the state. While the plaintiffs and their attorneys benefit financially from this, the state emerges as the loser because the LWDA’s ability to educate and enforce remains unsupported. The bottom line: inadequate allocations in PAGA-class action settlements undermine the entire reason PAGA is exempt from class action requirements—its fundamentally different purpose as an enforcement action designed to protect the public.<sup>233</sup>

As mentioned above, settling a representative action becomes attractive to a defendant because of the transaction costs associated with litigating, and possibly losing, a large representative action. Permitting large settlements in PAGA actions with little money actually going towards PAGA<sup>234</sup> is not appropriate when PAGA’s enforcement purpose is substantially undermined.

Injecting a manageability assessment into PAGA actions does not negatively impact PAGA’s role as an enforcement action; instead, it draws a line for when an action susceptible to coercive behavior can no longer continue in the courts. It seems apposite that such an inquiry be applicable when the very reason PAGA claims are not subject to such requirements is substantially undermined.<sup>235</sup>

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231. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 796, at 4 (June 22, 2004).

232. See *infra* note 236 and accompanying text.

233. See *supra* note 12 and accompanying text.

234. This will only be the case when settlement is reached prior to class action certification. If class certification is not granted, there will be no class action claim to divert settlement funds into.

235. See *Baumann v. Chase Inv. Services Corp.*, 747 F.3d 1117, 1121 (9th Cir.) (“[T]he California Supreme Court has . . . [held] that PAGA actions are not class

Purposely settling towards the class claim is not just an undesirable possibility; it is a common occurrence in PAGA case law and the disparity in allocation is staggering.<sup>236</sup> Recognizing these allocations as askew, some courts have denied such settlements.<sup>237</sup> Others have found these small PAGA settlements reasonable, while not recognizing that it may be the high transaction costs—inherent in a PAGA suit—forcing the defense to settle.<sup>238</sup>

### 3. *A Manageability Assessment Can Save Judicial Resources*

Pursuing a class action suit greatly conserves judicial resources because numerous plaintiffs are able to consolidate otherwise disparate claims into a single suit.<sup>239</sup> Class actions also vindicate the rights of small claimants that could not otherwise bring suit because of the expense of litigation.<sup>240</sup> As mentioned before, courts have denied class action certification where individual issues predominate over common issues, stating that such situations would not further judicial economy.<sup>241</sup> Specifically, individual issues give rise to

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actions under state law. The court found PAGA actions fundamentally different from class actions, chiefly because the statutory suits are essentially law enforcement actions.”).

236. *See, e.g.*, *Garcia v. Gordon Trucking, Inc.*, No. 1:10-CV-0324 AWI SKO, 2012 WL 5364575, at \*2–3 (E.D. Cal. Oct. 31, 2012) (approving settlement for \$3.7 million with \$10,000 allocated towards PAGA); *Reed v. Thousand Oaks Toyota*, No. 56-2012-00419282-CU-OE-VTA, 2013 WL 8118716 (Cal. Sup. Ct. April 8, 2013) (class action settlement approved for \$108,624, with \$1,500 allocated towards PAGA penalties); *Bolton v. U.S. Nursing Corp.*, No. C 12-4466 LB, 2013 WL 5700403 (N.D. Cal. Oct. 18, 2013) (approving class action settlement for \$1,700,000, with \$15,000 allocated towards PAGA).

237. *Plaisted v. Dress Barns, Inc.*, No. 2-12-CV-01679-ODW (SHx), 2013 WL 1441997, at \*2 (C.D. Cal. April 8, 2013).

238. *See Franco v. Ruiz Food Products, Inc.*, No. 1:10-cv-02354-SKO, 2012 WL 5941801 (E.D. Cal. Nov. 27, 2012) (holding \$10,000, out of \$2,500,000, PAGA settlement reasonable and citing cases reaching similar results).

239. *See Erbsen, supra* note 15, at 999.

240. Justice Lewis Kaplan, a reporter to the Advisory Committee on the Federal Rules of Civil Procedure when Rule 23 was amended, pinpointed two purposes behind the class action device: “promoting judicial efficiency and vindicating the rights of small claimants.” *Federal Courts—Rules of Civil Procedure—In a Class Action, Absent Members of the Class are not Parties Subject to Counterclaims Under Rule 13*, 87 HARV. L. REV. 470, 474 n.23 (1973) (citing Kaplan, *A Prefatory Note*, in *The Class Action—A Symposium*, 10 B.C. IND. & COM. L. REV. 497 (1969)).

241. 7A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1780.1 (3d ed. 2010) (citing *Begley v.*

burdensome individual mini-trials, which result in “a diminution of judicial resources, and thus a reduction in judicial efficiency.”<sup>242</sup>

The fundamental concern for judicial efficiency should not vanish merely because PAGA is a law enforcement action diametrically distinct from a class action.<sup>243</sup> This is especially true when PAGA claims permit one-sided collateral estoppel,<sup>244</sup> a component of the doctrine of *res judicata*, resulting in an additional waste of judicial resources.<sup>245</sup> For example, a defense verdict at trial would achieve little judicial economy because nonparty employees would still be able to bring claims against the defendant. While the Supreme Court of California found the one-way operation permissible because PAGA is designed to protect the public, its effects must be considered in tandem with the other judicial efficiency concerns likely to occur in unmanageable PAGA cases.<sup>246</sup> Properly assessed, the one-way operation functions as an additional, unnecessary burden on the efficiency of the courts.

In sum, PAGA’s role as a law enforcement action—a purpose distinct from traditional class actions—should not permit waste of judicial resources;<sup>247</sup> both are procedural mechanisms designed to consolidate actions and achieve what individual suits cannot. The fact that PAGA claims are

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Academy Life Ins. Co., 200 F.R.D. 489 (N.D. Ga. 2001).

242. *Arch v. American Tobacco Co., Inc.*, 175 F.R.D. 469, 495 (E.D. Penn. 1997). *See also* *Dubose v. City of Morristown*, No. 2:07-CV-115, 2007 WL 3125280 (E.D. Tenn. 2007) (holding that “conducting mini-trials would be disastrously wasteful of judicial resources . . .”).

243. *See supra* note 235.

244. *Arias v. Superior Court*, 209 P.3d 923, 934 (Cal. 2009) (holding that nonparty employees, but not employers, may invoke collateral estoppel, and “use the judgment against the employer to obtain remedies other than civil penalties for the same Labor Code violations.”).

245. *See In re Methyl Tertiary Butyl Ether (“MTBE”) Products Liability Litigation*, 209 F.R.D. 323, 349-50 (S.D. N.Y. 2002) (explaining that the one-sided *res judicata* effect in this case “leads to the conclusion that class treatment of these claims would not be an efficient use of judicial resources”).

246. *See, e.g., Ortiz v. CVC Caremark Corporation*, No. C-12-05859 EDL, 2014 WL 117614, at \*3 (N.D. Cal. March 19, 2014) (dismissing suit because of the unmanageability in trying the many individualized assessments).

247. *See Reyes v. Macy’s Inc.*, 202 Cal. App. 4th 1119, 1123 (Ct. App. 2011) (“The purpose of PAGA is not to recover damages or restitution, but to create a means of deputizing citizens as private attorney generals to enforce the Labor Code.”); *Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489, 499 (Ct. App. 2011) (distinguishing PAGA actions and class actions because only the latter’s primary objective is to provide restitution).

consolidated to enforce the Labor Code for the good of the general public, and class actions to vindicate the rights of small claimants,<sup>248</sup> should not allow litigation of the former when scarce judicial resources would be used inefficiently.

#### IV. PROPOSAL

The federal courts in California are split on the applicability of the manageability analysis.<sup>249</sup> An increasing amount of courts conclude that manageability needs to be considered and a court should dismiss a PAGA suit when a trial would become too complex.<sup>250</sup> In contrast, at least two have determined that the difficulty in proving individual issues in a representative action—involving many employees—is not a reason to dismiss or strike a PAGA claim. At least one California State Appellate Court has followed the latter view. Because of this dissension, parties are left uncertain in a situation where there is much at stake, especially for the employer.

##### *A. California Courts Should Apply a Manageability Analysis to PAGA Representative Actions*

Courts assigned to a large PAGA representative action consisting of hundreds, or thousands, of employees should apply a manageability analysis predicated on California class action case law. In line with *Litty* and *Ortiz*, the threshold inquiry should consider the presence of individualized issues, and how difficult it would be to establish those issues at trial.<sup>251</sup> Once that is done, courts should look to the California Supreme

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248. See *San Antonio Tel. Co., Inc. v. American Tel. & Tel. Co.*, 68 F.R.D. 435, 441 (W.D. Tex. 1975) (“Rule 23 was originally designed to protect small or relatively small claimants . . .”).

249. See *supra* Part I.E.3.

250. See *supra* Part I.E.3.

251. As this article has discussed, the manageability inquiry is part of multiple class action requirements: superiority, ascertainability, and community of interest—*i.e.*, predominant common questions of law and fact. This comment proposes the community of interest prong as the correct framework for analyzing manageability for three reasons: (1) the federal court decisions have started to dismiss PAGA suits because of unmanageable individualized inquiry; (2) this inquiry is the one most likely to cause unmanageability problems in PAGA wage and hour claims; and (3) some of the other requirements, such as ascertainability, are not as relevant for PAGA because the employees are more easily identifiable, thus, limiting the administrative expenses.

Court's *Blue Chip* decision.<sup>252</sup> The court said that manageability should be assessed by weighing the “respective benefits and burdens and to allow maintenance of the [suit] only where substantial benefits accrue to both litigants and the courts.”<sup>253</sup>

If after weighing the benefits and burdens of trying the individual issues the court determines a complex and burdensome trial would result—wasting scarce judicial resources and draining the funds of both litigants in the process—the court should dismiss the case as unmanageable. The factors utilized used to weigh the problems individual assessments would create should include: (1) who has the burden of proof; (2) whether statistical sampling would be permissible;<sup>254</sup> and (3) the number of employees represented in the action.<sup>255</sup>

The applicability of the *Blue Chip* articulation is apt for PAGA representative actions because it is not a class action certification requirement mandated by statute. Instead, it is an “underlying admonishment the Supreme Court has given the trial courts”<sup>256</sup> that can be utilized to drive at the heart of what manageability seeks to prevent: a representative action

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252. *Blue Chip Stamps v. Superior Court*, 556 P.2d 755 (Cal. 1976).

253. *Id.* at 758.

254. *See Duran v. U.S. Bank Nat. Assn.*, 325 P.3d 916, 30–31 (Cal. 2014) (“Statistical methods cannot entirely substitute for common proof. . . . There must be some glue that binds class members together apart from statistical evidence.”).

255. The *Ortiz* court took into account all three of these factors. *See Ortiz v. CVC Caremark Corporation*, No. C-12-05859 EDL, 2014 WL 117614, at \*3 (N.D. Cal. March 19, 2014) (striking PAGA claim because burden of proof was on the defendant, statistical sampling would not have been appropriate, and there were many employees represented, thus all of these factors made the case more difficult to try).

256. *Reyes v. San Diego County Bd. of Supervisors*, 196 Cal. App. 3d 1263, 1274 (Ct. App. 1987). The *Reyes* and *Blue Chip* courts considered the articulation relevant when dealing with ascertainability and the administration costs of establishing the existence and identification of class members. This issue is not relevant for PAGA actions because all of the members are employees and easily identifiable. However, other courts have considered the admonishment applicable to class action certification in general, not only in regards to ascertainability, *see Davis-Miller v. Automobile Club of Southern California*, 201 Cal. App. 4th 106, 115 n.6 (Ct. App. 2011) (discussing the weighing of burdens and benefits outside of the ascertainability requirement, and stating that it is something the party seeking class certification must demonstrate in order to establish manageability). *See also Pinnacle Holdings, Inc. v. Simon*, 31 Cal. App. 4th 1430, 1435 (Ct. App. 1995).

that is not worth the time, effort, and money of the courts and the parties.

Moreover, when courts dismiss for unmanageability in this instance, it is not because a PAGA plaintiff has failed to show individual questions predominate over common questions of fact and law requirement. It will be dismissed because the burdens that would result from litigating such individual questions outweigh the benefits that would accrue to the parties and the court. The result: *Arias*' holding that PAGA suits should not be subject to class action requirements is left intact.

A manageability assessment also prevents the likelihood of strike suits and blackmail settlements.<sup>257</sup> Looking at the burdens and benefits resulting from a multitude of individual issues will expose complex suits that could not be conducted fairly and efficiently at trial. Additionally, if settlement occurs before class certification, most of the proceeds from PAGA claims may be allocated towards class claims. The LWDA's funding may decrease marginally, but the conservation of judicial resources that results from dismissing expensive, unmanageable PAGA actions will far outweigh what the LWDA would have recovered from strike suits and blackmail settlements.

#### CONCLUSION

PAGA was enacted as a unique and creative solution to a labor enforcement problem in California.<sup>258</sup> It is correctly considered different from a class action and, accordingly, should not be treated the same. However, this cannot mean that absolutely no class action inquiries should be assessed.

The manageability assessment is one of these inquiries that must be considered. Simply put, the burdens that result from not considering the concept are too great to go ignored.<sup>259</sup> With the application of this proposed assessment to both state and federal courts, PAGA will still operate as an effective law enforcement action designed to benefit the public; nothing in

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257. *See supra* Part III.B.1.

258. *See supra* Part I.A.

259. *See supra* Part III.B for a discussion of the prudential concerns implicated when ignoring manageability—i.e., “blackmail” settlements and waste of judicial resources.

considering manageability changes this. But in addition, the assessment will work to negate (1) “blackmail” settlements, (2) inefficient litigation through unduly complex suits, the waste of judicial resources,<sup>260</sup> and, (3) uncertainty in the law.

In sum, without legislature explicitly imposing a manageability requirement in PAGA actions, the *Blue Chip* weighing test is an appropriate solution to remedy the before-mentioned concerns. Some courts are already on the right track,<sup>261</sup> but a developed test will expeditiously prevent the clog in the judicial system PAGA suits can create. This test will help encourage the filing of PAGA suits that are the most meritorious and deserving of justice, while alleviating many concerns in the process.

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260. See *supra* Part III.B.

261. See *e.g.*, *Ortiz v. CVC Caremark Corporation*, No. C-12-05859 EDL, 2014 WL 117614, at \*3 (N.D. Cal. March 19, 2014).