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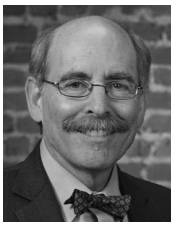

Michael Rubin

MCLE SELF-STUDY:

PAGA IS NOT DEAD YET! *VIKING'S* IMPACT LIKELY MINIMAL

INTRODUCTION

On June 15, 2022, after the United States Supreme Court decided *Viking River Cruises, Inc. v. Moriana*,[1] there was handwringing among workers' advocates about whether the Court had gutted California's Private Attorneys General Act (PAGA).[2] Social media was flooded with the message that "PAGA is dead!"

Reports of PAGA's demise turned out to be premature. Recent developments demonstrate that the practical impacts of *Viking* on PAGA will likely be minimal, while the majority decision announced several legal principles that will actually strengthen the State's power to protect workplace rights from contractual waiver. Below, we discuss the history of *Viking*, the legal strategies in the Supreme Court, what was and was not decided, and why California trial courts have almost uniformly refused to be bound by the majority's state-law-based holding.

THE RISE OF PAGA AND MANDATORY ARBITRATION AGREEMENTS

Enacted in 2003, PAGA allows "aggrieved employees" to step into the shoes of the State of California's Labor and Workforce Development Agency (LWDA) to bring enforcement actions against employers.[3] Once deputized by filing a PAGA notice and waiting the prescribed statutory time periods,[4] the plaintiff may bring claims for civil penalties on behalf of plaintiff and other "aggrieved employees" who have suffered one or more Labor Code violations, with 75% of the penalties going to the State and 25% shared among all "aggrieved employees."[5] PAGA plaintiffs may not recover back wages, other statutory penalties, or "victim-specific" relief.[6]

In 1992, just over 2% of American workers were subject to mandatory arbitration.[7] That percentage rose to almost 25% by the early 2000s and to 55% by 2018.[8] Employers used arbitration agreements not only to compel waiver of the judicial forum, but after workers pushed back by successfully pursuing class actions in arbitration, employers also began to use arbitration agreements to compel waiver of class and other collective action.

THE BLESSING OF CLASS ACTION WAIVERS IN MANDATORY ARBITRATION AGREEMENTS

In 2005, the California Supreme Court held in *Discover Bank v. Superior Court*[9] that class action waivers in consumer arbitration agreements violated public policy and were unenforceable. Two years later, the Court extended that ruling to employment arbitration in *Gentry v. Superior Court*.[10]

In *AT&T Mobility LLC v. Concepcion*[11] the United States Supreme Court reversed *Discover Bank*. The Court held that the FAA preempted California's public policy ban on class action waivers, because by forcing parties to arbitrate on a class-action basis despite their agreement not to, the *Discover Bank* rule interfered with several "fundamental attributes of arbitration."[12] No mention was made of class-action waivers in employment arbitration, but the Court's analysis seemed broad enough to swallow *Gentry* as well.

WOULD PAGA WAIVERS SUFFER THE SAME FATE?

In 2014, the California Supreme Court issued its landmark decision in *Iskanian v. CLS Transportation Los Angeles, LLC*.[13] Although most attorneys are familiar with *Iskanian*'s PAGA analysis, the case also held that *Concepcion*

had implicitly overruled *Gentry*, and that any state rule barring class action waivers in the employment context is preempted by the FAA.[14] The Court distinguished PAGA waivers, though, concluding that California's rule prohibiting contractual waiver of statutory PAGA rights was not preempted by the FAA, because a PAGA action is a type of "qui tam" action between the State as the real party in interest and the employer, yet the State never agreed to arbitrate anything.[15]

Concurring, Justice Chin joined by Justice Baxter agreed that PAGA waivers in arbitration agreements are unenforceable. They disagreed with the majority's reasoning, concluding that by forbidding an employee to assert a PAGA claim *in any forum*, the arbitration agreement required an unlawful contractual waiver of substantive rights.[16]

One year later, the Ninth Circuit reached the same result in *Sakkab v. Luxottica Retail N.A., Inc.*,[17] although on a different basis. The Ninth Circuit decided that the reason the FAA did not preempt California's prohibition of PAGA waivers was because the FAA's section 2 "savings clause" preserves any state law rule that applies equally to all contracts, and neither singles out arbitration agreements nor interferes with any fundamental attributes of arbitration. Because *Iskanian* barred enforcement of *any* contract requiring a PAGA waiver,[18] and because PAGA actions are fundamentally different from class actions (which impose a number of formal requirements on the parties and involve the due process rights of absent class members),[19] the Ninth Circuit concluded that the FAA does not preempt California's rule prohibiting waiver of statutory PAGA rights.[20]

The United States Supreme Court denied certiorari in *Sakkab* and more than a half dozen other federal and state cases applying the *Iskanian* rule in subsequent years.[21] During that period, California appellate courts issued numerous decisions following *Iskanian*.[22] Although employers continued to bring motions to compel arbitration in PAGA cases, including by asking courts to send the employee's "individual PAGA claim" to arbitration, the courts uniformly rebuffed these efforts. Instead, they concluded that PAGA claims could not be split into "representative" and "individual" components.[23]

STRATEGY IN BRIEFING AND ORAL ARGUMENT BEFORE THE SUPREME COURT

On December 15, 2021, the United States Supreme Court granted certiorari in *Viking*, an unpublished decision from the Second District Court of Appeal.[24] Court watchers speculated that the newly reconstituted United States

> ON CLOSER INSPECTION, THOUGH, IT WAS CLEAR THAT THE COURT HAD HANDED EMPLOYEES THREE SIGNIFICANT VICTORIES.

Supreme Court had taken the case to finally overrule *Iskanian*. The Justices who voted for certiorari were apparently so confident in the outcome that they took *Viking*, a case decided by a state rather than federal court (rather than one of the five other pending cert petitions raising the issue). They did so despite Justice Thomas' long-held position that the FAA—and thus, FAA preemption—does not apply in state court proceedings.[25]

The merits briefs submitted by Viking and its 10 *amici* made four main arguments: (1) *Iskanian* was poorly reasoned, because unlike true qui tam cases where the state maintains control, under PAGA the LWDA delegates complete authority and control to plaintiffs' counsel; (2) PAGA representative actions are no different from class actions, so *Concepcion*'s reasoning fully applies; (3) PAGA representative actions interfere with "bilaterality," a fundamental attribute of arbitration; and (4) FAA preemption is so powerful that it strips individuals of even substantive state law rights.[26]

Respondent Moriana's team, including one of the authors of this article, made a crucial strategic decision not to defend the reasoning of the *Iskanian* majority, which the United States Supreme Court had presumably targeted for overturning. Instead, respondent focused on the text and history of the FAA, arguing that nothing in the statutory text authorizes agreements to *prohibit* (rather than require) arbitration. Respondent also pointed out that representative disputes (including labor arbitrations) were commonly arbitrated in 1925, when the FAA was enacted.[27]

During oral argument, Justice Alito, the eventual author of the *Viking* majority, was the most vocal advocate for the employer's position that PAGA claims were just like class action claims, and that *Concepcion* therefore controls (a position he later abandoned in writing the decision). Justice Thomas reminded the parties that he believed the FAA had no application in state court.[28] Three of the four remaining conservative Justices—Gorsuch, Kavanaugh, and Barrett—asked relatively few questions, leading many court observers to predict that the United States Supreme Court intended to bless PAGA waivers in a 6-3 decision.[29] How wrong they were.

THE *VIKING* DECISION: PAGA LIVES TO SEE ANOTHER DAY

On June 15, 2022, the United States Supreme Court issued its decision. The top line was this: Moriana lost in an 8-1 decision, with Thomas in dissent.[30] On closer inspection, though, it was clear that the Court had handed employees three significant victories.

First, the Court agreed with Moriana that PAGA actions are materially different from class actions, rejecting Viking's argument that *Concepcion* controlled.[31] Only the three Justices who concurred in the result—Barrett, Kavanaugh, and Roberts—would have applied *Concepcion* to hold, as a matter of FAA preemption, that PAGA waivers are no less enforceable than class action waivers.[32]

Second, the Court held that the FAA does not preempt state law rules prohibiting contractual waivers of substantive state-law rights and remedies.[33] Thus, *Iskanian's* prohibition on "wholesale waiver[s] of PAGA claims" remains intact. This is perhaps *Viking's* most significant ruling, with the greatest long-term consequences for the preservation of other state law rules, and it echoes the reasoning of Justice Chin's concurrence in *Iskanian*[34] and the Ninth Circuit's reasoning in *Sakkab*.[35]

Third, the Court held that representative actions such as PAGA do not necessarily interfere with the bilateral nature of arbitration.[36] Therefore, that arbitration agreements may not be used to ban all representative actions, such as qui tam actions, wrongful death actions, securities derivative cases, etc. This ruling also confirms that representative PAGA claims may proceed in arbitration, if the parties agree.

Nonetheless, the Court concluded that the FAA preempts *Iskanian*'s "secondary" rule, which construed PAGA as allowing a plaintiff to join a large number of aggrieved employees' claims into a single action.[37] Because the FAA preempts state law rules compelling such "mandatory claims joinder," the Court held that employers may use arbitration agreements to split PAGA claims into their "individual" and "non-individual" components. This holding distinguishes between penalties based on violations suffered by the plaintiff and violations suffered by other aggrieved employees. Thus, arbitration is required of only the "individual PAGA claim."[38]

Rather than ending the decision there and remanding to the state courts to decide the remaining state law issues, the majority in Part IV of *Viking* chose to decide those state law issues for itself. First, it construed the severability clause in Viking's agreement (which preserved any "portion" of the PAGA ban that was still enforceable) as requiring Moriana to arbitrate her "individual" PAGA claim (even though the Court in Part II had declared the entire ban to be invalid). The majority also decided, under California law, that once a PAGA plaintiff is compelled to arbitrate an individual claim, plaintiff loses standing to pursue the remainder of plaintiff's claim because that party's is no different from any other member of the "general public."[39]

Justice Sotomayor wrote a brief but dazzling concurrence, pointing the way forward by explaining that whatever the majority might think what state law requires, the ultimate determination is entirely up to California courts.[40] While joining the majority opinion and thus providing the crucial fifth vote,[41] Justice Sotomayor made clear that she joined only with the understanding that because PAGA standing is purely a state-law issue, "if this Court's understanding of state law is wrong, California courts, in an appropriate case, **will have the last word.**" Justice Sotomayor concluded that ultimately, questions of state law statutory standing are for the state legislature.[42]

CALIFORNIA COURTS ARE HAVING THE LAST WORD

Well over a dozen California trial courts have already taken up Justice Sotomayor's invitation to have the "last word" on PAGA standing and, relying on the plain language of PAGA and the California Supreme Court's construction of that language in *Kim v. Reins Intl. California, Inc.*[43] California courts have begun to reject the *Viking* majority's conclusion that a PAGA plaintiff loses standing once the individual component of her PAGA claim is compelled to arbitration.[44] That same issue of PAGA standing has been fully briefed in at least four district courts of appeal as well. On July 20, 2022, the California Supreme Court granted review to decide that issue in *Adolph v. Uber*,[45] a PAGA-only action challenging Uber's alleged misclassification of a driver as an independent contractor. Although the petition for review in *Adolph* raised a different issue (involving the scope of delegation), the California Supreme Court requested supplemental briefing to address the impact of *Viking*. The Court then granted review limited to the question: "Whether an aggrieved employee who has been compelled to arbitrate claims under [PAGA] that are 'premised on Labor Code violations actually sustained by' the aggrieved employee . . . maintains statutory standing to pursue 'PAGA claims arising out of events involving other employees'. . . ."[46]

In *Kim*, the plaintiff had pleaded several Labor Code claims as well as a PAGA claim. His employer successfully compelled the individual Labor Code claims to arbitration,

and the court stayed the PAGA claim. Months later, Kim accepted a Cal. Code Civ. Proc. § 998 offer to settle his individual Labor Code claims, and the employer successfully moved for summary adjudication on the ground that Kim lost standing upon settling his underlying Labor Code claim.[47]

The California Supreme Court reversed based on PAGA's plain language, emphasizing:

> The plain language of [Labor Code] section 2699(c) has only two requirements for PAGA standing. The plaintiff must be an aggrieved employee, that is, someone "who was employed by the alleged violator" and "against whom one or more of the alleged violations was committed." (§ 2699(c).) Both requirements derive from readily ascertainable facts, and both are satisfied here. Kim was employed by Reins and alleged that he personally suffered at least one Labor Code violation on which the PAGA claim is based. Kim is thus an "aggrieved employee" with standing to pursue penalties on the state's behalf.[48]

The Court thus rejected the argument that Kim lost standing to act on behalf of the State once his own individual claims were resolved, that the Legislature did not condition PAGA standing on the plaintiff's injury, and that the employer's reading would undermine PAGA's purpose of vigorous Labor Code enforcement and deterrence.[49] Given *Kim* and related appellate court decisions, we believe the California Supreme Court will disagree with the United States Supreme Court and conclude that a plaintiff whose "individual PAGA claim" is sent to arbitration maintains standing to pursue PAGA claims on behalf of plaintiff's coworkers in court.[50]

As we said at the outset: PAGA has plainly survived to see another day.

THE RENEWED IMPORTANCE OF CONTRACT INTERPRETATION

Aside from the issue of PAGA standing, trial courts are now grappling with complicated state-law issues of contract construction as they attempt to apply *Viking* to different agreements. Some plaintiffs have conceded that their "individual PAGA claim" should be sent to arbitration. Many assert that their arbitration agreement differs from Moriana's and either does not cover PAGA claims at all (e.g., where representative action waiver does not apply to PAGA claims, has no severability clause, or has a different severability clause than that in *Viking*).[51]

Generally speaking, plaintiffs' attorneys should ask three questions when evaluating an arbitration agreement post-*Viking*. First, are PAGA claims covered? If not, the entire PAGA claim should remain in court. Second, does the arbitration agreement contain an unlawful PAGA representative action waiver (as in *Viking*)? If so, absent an applicable severability clause, the entire arbitration agreement may be unenforceable.[52] Third, if there is a severability provision, what does it provide? Does it require the court to strike the unlawful PAGA waiver, or may the court modify the agreement to send the individual PAGA claim to arbitration while the non-individual claim remains in court? There is no "one size fits all" answer to these questions because arbitration agreements vary widely. The important takeaway is to carefully examine the language of the arbitration agreement.

OTHER PAGA ISSUES LOOKING FORWARD

Assuming *Adolph v Uber* is decided in favor of continued PAGA standing, there will be several thorny issues remaining to be adjudicated. Every PAGA practitioner should be thinking about these issues in navigating the murky waters of *Viking River*.

First are the questions of claim preclusion and issue preclusion (also called res judicata and collateral estoppel), which ask whether, or to what extent and under what circumstances, will litigants be bound by the results of an "individual" PAGA arbitration. Related questions involve the impact of one such award on another, and the preclusive effect of different awards issued in different cases. Second are questions concerning the trial court's authority to stay litigation pending arbitration of an "individual" PAGA claim. Courts are already split on that issue.[53]

Looming in the background over all of these issues is PAGA's precarious political footing. On July 22, 2022, California's Secretary of State announced that a ballot initiative to repeal PAGA qualified for the 2024 ballot. If the initiative passes, it may not matter how the California Supreme Court rules in *Adolph* or how these other issues are resolved. Until then, though, PAGA has survived another existential court challenge, and continues to provide the most widely available, effective statutory

AS WE SAID AT THE OUTSET: PAGA HAS PLAINLY SURVIVED TO SEE ANOTHER DAY.

mechanism for protecting workplace rights, particularly on behalf of low-wage workers throughout California.

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1. *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022) (*Viking*).
2. Cal. Lab. Code §§ 2698-2699.8.
3. Cal. Labor Code §§ 2698, *et seq*.
4. Cal. Lab. Code § 2699.3(a).
5. *Arias v. Superior Court*, 46 Cal. 4th 969, 980 (2009).
6. *ZB, N.A. v. Superior Court*, 8 Cal. 5th 175, 197 (2019).
7. Alexander J.S. Colvin, *The growing use of mandatory arbitration*, Economic Policy Institute, April 6, 2018, available at www.epi.org/144131 (last visited Oct. 17, 2022).
8. *Id*.
9. *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005).
10. *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007).
11. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011),
12. *Id*. at 344.
13. *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014).
14. *Id. at* 364, *overruled in part by Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1913 (2022). The Court also foreshadowed the U.S. Supreme Court's 2018 decision in *Epic Systems, Inc. v. Lewis*, 138 S. Ct. 1612 (2018), rejecting *Iskanian*'s claim that his right to pursue a workplace class action was protected by section 7 of the National Labor Relations Act and sections 2 and 3 of the Norris-LaGuardia Act.
15 *Iskanian*, 59 Cal. 4th at 386 ("Simply put, a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the state[.]").
16. *Id*. at 395 (Chin, J., concurring).
17. *Sakkab v. Luxottica Retail N.A., Inc.*, 803 F.3d 425 (9th Cir. 2015).
18. *Id*. at 433.
19. *Id*. at 435.
20. *Id*. at 429, 439.
21. *See, e.g., Smigelski v. PennyMac Financial Services, Inc.*, 2018 WL 6629406 (Cal. App. 3 Dist., Dec. 19, 2018), *cert. denied*, 140 S. Ct. 223 (2019); *Tanguilig v. Bloomingdale's, Inc.*, 5 Cal. App. 5th 665 (2016), *cert. denied*, 138 S. Ct. 356 (2017); *Brown v. Superior Court*, 216 Cal. App. 4th 1302 (2013), *cert. denied*, *Bridgestone Retail Operations, LLC v. Brown*, 135 S. Ct. 2377 (2015).
22. *E.g., Tanguilig v. Bloomingdale's, Inc.*, 5 Cal. App. 5th at 677 (PAGA action not subject to arbitration "because the real party in interest in a PAGA suit, the state, has not agreed to arbitrate the claim."); *Betancourt v. Prudential Overall Supply*, 9 Cal. App. 5th 439, 447 (2017) ("[T]he fact that Betancourt may have entered into a predispute agreement to arbitrate does not bind the state to arbitration."); *Correia v. NB Baker Electric, Inc.*, 32 Cal. App. 5th 602, 622 (2019) ("Without the state's consent, a predispute agreement between an employee and an employer cannot be the basis for compelling arbitration of a representative PAGA claim because the state is the owner of the claim and the real party in interest, and the state was not a party to the arbitration agreement.").
23 *See Williams v. Superior Court*, 237 Cal. App. 4th 642, 649 (2015) ("[A] single representative PAGA claim *cannot* be split into an arbitrable individual claim and a nonarbitrable representative claim."); *Hernandez v. Ross Stores, Inc.*, 7 Cal. App. 5th 171, 178 (2016) ("There is no authority supporting Ross's argument that an employer may legally compel an employee to arbitrate the individual aspects of his PAGA claim while maintaining the representative claim in court.").
24. *Moriana v. Viking River Cruises, Inc.*, 2020 WL 5584508 (Cal. App. 2 Dist., Sep. 18, 2020), *cert. granted*, 142 S. Ct. 734 (2021).

25 *E.g.*, *Kindred Nursing Centers L. P. v. Clark*, 581 U.S. 246, 257 (2017) (Thomas, J., dissenting)

26. Available at https://www.scotusblog.com/case-files/cases/viking-river-cruises-inc-v-moriana/ (last visited Oct. 17, 2022).

27. Brief for Respondent, *Viking*, 142 S. Ct. 1906 (No. 20-1573), available at https://www.supremecourt.gov/DocketPDF/20/20-1573/215527/20220302165646882_Respondent%20Brief%20FINAL.pdf (last visited Oct. 17, 2022).

28. See oral argument transcript in *Viking*, available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-1573_5368.pdf (last visited Oct. 17, 2022).

29. *E.g.*, Corinne Spencer and Antwoin Wall, *Conservative Justices' Silence May Hint At Fate of PAGA Case*, Law360, April 1, 2022, available at https://www.law360.com/employment-authority/articles/1480031/conservative-justices-silence-may-hint-at-fate-of-paga-case (last visited Oct. 17, 2022).

30. *Viking*, 142 S. Ct. 1906.

31. *Id*. at 1920.

32. *Id*. at 1925 (Barrett, J., concurring).

33. *Id*. at 1924-1925.

34. *See* n. 15, *supra*.

35. *See* n. 16, *supra*.

36. *Viking*, 142 S. Ct. at 1912.

37. *Id*. at 1913.

38. *Id*.

39. *Id*. at 1925 ("When an employee's own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit.").

40. *Id*. at 1925 (Sotomayor, J., concurring).

41. *See* T. Bennet et al., *Divide & Concur: Separate Opinions & Legal Change* (2020) 103 Cornell L. Rev. 917 (explaining the weight to be given such "pivotal" concurrences).

42. *Viking River Cruises*, 142 S. Ct. at 1925-26 (Sotomayor, J., concurring).

43. *Kim v. Reins Intl. California, Inc.*, 9 Cal. 5th 73 (2020).

44. For example, in *Shams v. Revature LLC*, 2022 WL 3453068, at *3 (N.D. Cal. Aug. 17, 2022), the trial court held: "Although the Supreme Court suggests that under PAGA, Moriana lost standing to pursue her non-individual PAGA claims, because the California Supreme Court is the final arbiter of California law, this Court applies *Kim*'s interpretation of PAGA standing to this case." And in *Harper v. Charter Commc'ns*, LLC, 2022 U.S. Dist. LEXIS 161321, at *11-12 (E.D. Cal. 2022), the trial court not only rejected the *Viking* majority's PAGA standing analysis in light of *Kim*, but also invalidated the PAGA waiver altogether without requiring individual arbitration, based on severability clause language that the Court read as invalidating the waiver as a whole if any portion of it is found to be unenforceable.

45. *Adolph v. Uber Technologies*, 2022 WL 1073583 (Cal. App. 4 Dist., Apr. 11, 2022).

46. Available at https://supreme.courts.ca.gov/sites/default/files/supremecourt/default/2022-10/pendingissues-civil%20-%20101422_0.pdf (last visited Oct. 17, 2022).

47. *Kim v. Reins Intl. California, Inc.*, 9 Cal. 5th. at 82-83.

48. *Id*. at 83–84.

49. *Id*. at 86.

50. *See*, *e.g.*, *Johnson v. Maxim Healthcare Services, Inc.*, 66 Cal. App. 5th 924 (2021) (employee whose individual claims were time-barred could still pursue a PAGA claim on behalf of others because he met PAGA's two standing requirements: he was employed by the alleged violator, and he personally suffered at least one Labor Code violation on which the PAGA claim was based).

51. The waiver provision in Moriana's arbitration agreement provided: ""There will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective, representative or private attorney general action . . .." The severability provision provided: "In any case in which (1) the dispute is filed as a class, collective, representative or private attorney general action and (2) a civil court of competent jurisdiction finds all or part of the Class Action Waiver unenforceable, the class, collective, representative and/or private attorney general action must be litigated in a civil court of competent jurisdiction, but the portion of the Class Action Waiver that is enforceable shall be enforced in arbitration." *Viking*, 142 S. Ct. at 1910.

52. *Securitas Sec. Services USA, Inc. v. Super. Ct.*, 234 Cal. App. 4th 1109 (2015) (declining to enforce arbitration agreement that contained non-severable representative action waiver);

53. *See*, *e.g.*, *Jarboe v. Hanlees Auto Group*, 53 Cal. App. 5th 539, 557 (2020), *rev. denied* (Dec. 9, 2020) (no abuse of discretion to deny stay: "Because a PAGA claim is representative and does not belong to an employee individually, an employer should not be able dictate how and where the representative action proceeds." *But see Franco v. Arakelian Enterprises, Inc.*, 234 Cal. App. 4th 947, 966 (2015) ("Because the issues subject to litigation under the PAGA might overlap those that are subject to arbitration of Franco's individual claims, the trial court must order an appropriate stay of trial court proceedings.").