Freedom to Use Arbitration to Resolve Disputes Deserves Protection for Businesses, Consumers

The Federal Arbitration Act

The history of the Federal Arbitration Act (FAA) and numerous U.S. Supreme Court decisions interpreting the broad scope and strength of the FAA set the stage regarding the significant limitations states have in enacting any statute that limits, interferes with, or prohibits the arbitration of disputes.

The FAA was enacted in 1925 and re-enacted in 1947, setting forth the national policy favoring resolution of disputes through arbitration. In enacting the FAA, Congress intended to address two problems: 1) the unwillingness of both state and federal courts to enforce arbitration agreements; and 2) the "failure of state statutes to mandate enforcement of arbitration agreements." *Southland Corp. v. Keating*, 465 U.S. 1 (1984). Accordingly, the scope of the FAA is broad and mandates the enforcement of any written arbitration agreement regarding the resolution of any dispute arising out of a transaction involving commerce. The only exception to this mandate is if the contract is unenforceable due to contractual defenses that exist and are applicable to ***any*** contract. *Id.* at 10-11.

The broad scope and strength of the FAA has been demonstrated repeatedly in numerous Supreme Court decisions. In *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), the Supreme Court struck down a state statute that set special notice requirements for arbitration agreements, as such notice requirements were not required for *all* other contracts. The Supreme Court stated that states may not "invalidate arbitration agreements under state laws that are applicable only to arbitration provisions." The special notice requirements imposed by the state placed "arbitration agreements in a class apart from 'any contract,' and singularly limit[ed] their validity. The State's prescription is thus inconsonant with, and is therefore pre-empted by, the federal law." *Id.* at 688.

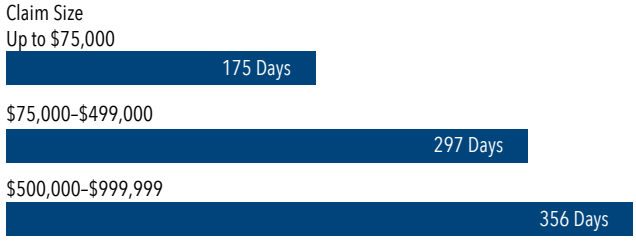
In 2011, the U.S. Supreme Court in *AT&T Mobility LLC v. Concepcion*, 562 U.S. 333 (2011) held that the FAA prohibits states from conditioning the enforceability of an arbitration agreement on the availability of class-wide arbitration procedures, as such a requirement would be inconsistent with the *intent* of the FAA to promote expeditious resolution of disputes through arbitration. The court explicitly stated: "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."

In 2012, the Supreme Court struck down a West Virginia statute that prohibited the arbitration of personal injury or wrongful death claims arising from a patient's stay at a nursing home as pre-empted under the FAA (*Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1021). The court issued the following statement:

> *"West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA. See ibid. See also, e.g., Preston v. Ferrer, 552 U.S. 346, 356, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008) (FAA pre-empts state law granting state commissioner exclusive jurisdiction to decide issue the parties agreed to arbitrate); Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 56, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) (FAA pre-empts state law requiring judicial resolution of claims involving punitive damages); Perry v. Thomas, 482 U.S. 483, 491, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987) (FAA pre-empts state law requirement that litigants be provided a judicial forum for wage disputes); Southland Corp. v. Keating, 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) (FAA pre-empts state financial investment statute's prohibition of arbitration of claims brought under that statute)."*

In 2015, the court once again invalidated a state court ruling in *DIRECTV, Inc. v. Imburgia*, and criticized California for discriminating against consumer arbitration agreements. In *DIRECTV*, a California court had applied an invalid rule of law to render an arbitration agreement unenforceable. Justice Breyer delivered the opinion of the court and stated that California's application of an invalid state law only to arbitration agreements and no other contracts, placed arbitration agreements on unequal footing with other contracts and, therefore, was pre-empted by the FAA. *DIRECTV*, 136 S.Ct. 463 (2015).

Arbitration Cases Take Less Time to Resolve (Median Time from Filing to Award)



Source: American Arbitration Association

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Just last year on May 15, 2017, the U.S. Supreme Court in *Kindred Nursing Centers Ltd. Partnership v. Clark*, 2017 WL 2039160, again invalidated a state court ruling from Kentucky that invalidated an arbitration agreement with a nursing home that was executed by family members who had a power of attorney for the patient. The Kentucky court determined that arbitration was such a significant issue that, in order for the agreement to be valid, the power of attorney form must *specifically* allow the individual to agree to arbitration on behalf of the principal or, in this case, the patient.

In a 7-1 decision written by Justice Elena Kagan, the Supreme Court emphatically rejected the Kentucky court's decision. In the opinion, the Supreme Court re-emphasized that "The FAA pre-empts any state rule discriminating on its face against arbitration—for example, a 'law prohibit[ing] outright the arbitration of a particular type of claim.'"

The Supreme Court also opined on the argument raised by the respondents, that the Kentucky ruling was not pre-empted under the FAA because the ruling was dealing only with the formation of the contract, not the enforcement of the contract. In the opinion, Justice Kagan responded as follows:

> *"[T]he respondents claim, States have free rein to decide—irrespective of the FAA's equal footing principle—whether such contracts are validly created in the first instance. Both the FAA's text and our case law interpreting it say otherwise... Adopting the respondents' view would make it trivially easy for States to undermine the Act—indeed, to wholly defeat it... If the respondents were right, States could just as easily declare everyone incompetent to sign arbitration agreements. (That rule too would address only formation.) The FAA would then mean nothing at all—its provisions rendered helpless to prevent even the most blatant discrimination against arbitration."* (citations omitted)

Comparing Arbitration versus Civil Litigation

Efficiency of Process

One of the most appealing attributes of arbitration is its efficiency compared to litigation. This attribute was explicitly recognized in *AT&T Mobility*, *supra*, as a key component of arbitration. According to the U.S. District Court Judicial Caseload Profiler, there were 27,956 cases filed in California in 2015. As of June 2015, approximately 2,175 cases had been pending in a federal district court in California for more than three years and the median time from filing of a civil complaint to trial was approximately 31 months. State courts also have seen an increase in delays for civil trials, given the reduced budgets they have been required to manage. In large cities such as Los Angeles, the number of civil cases pending for more than two years has tripled since 2012.

Comparatively, the 2011 American Bar Association's guide to the "Benefits of Arbitration for Commercial Disputes" states that one of the benefits of commercial dispute arbitration is it generally takes between 7 months to 7.3 months for issuance of a final award, compared to the median national average of 23.4 months for a civil case in a district court, which is better than the average in Northern California. A 2007 study by the American Arbitration Association, "AAA Arbitration Roadmap," provided the following statistics: for cases involving a claim of up to $75,000, the median time for a final resolution was 175 days; for claims between $75,000 and $499,999, the median time for final resolution was 297 days; and for claims between $500,000 and $999,999, the median time for final resolution was 356 days.

A 2011 Cornell University **study by Theodore Eisenberg and Elizabeth Hill**, "An Empirical Study of Employment Arbitration: Case Outcomes and Processes," said that data concerning employment arbitration demonstrated the mean time from the filing of an employment arbitration claim to the issuance of an award was 361.5 days.

Success Rates and Awards for Non-Class Action Cases

Although there is a general consensus amongst studies that arbitration is a more efficient and therefore cost-effective forum, the studies are mixed as to whether a consumer or employee fares better or worse in arbitration compared to litigation.

• **A 2006 study by Mark Fellows,** legal counsel at the National Arbitration Forum, "The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes," concluded that consumers and employees actually fare better in arbitration than in court. Fellows specifically analyzed data from California and found that consumers prevail in arbitration 65.5% of the time, as compared to 61% of the time in court. Additionally, California businesses paid an average of $149.50 in arbitration fees whereas consumers paid only an average of $46.63.

• In their study, **Eisenberg and Hill** also found: 1) for civil rights claims, there was no significant difference between the success rates of higher-paid employees in arbitration versus litigation; and 2) the win rate of lower-paid employees in civil rights arbitration is lower than the win rate of civil rights disputes in litigation. They cautioned, however, that this result is not because of the differences in litigation/arbitration, but rather is consistent with their theory that lower-paid employees cannot readily gain access to court and so more lower-paid employees pursue arbitration. They also found that the employee win rate in state court (56.6%) for higher-paid employees is closer to the arbitration win rate (65%) for the same employees. For noncivil rights disputes for higher-paid employees, the median arbitration award was $95,000 and the median litigation award was approximately $69,000.

• In a presentation to the George Washington University Law School in March 2011, **attorney Andrew Pincus** also agreed that the national data and evidence available demonstrates that consumers do the same, if not better, in arbitration than litigation, as one of the largest arbitration providers documented at least 45% of consumer arbitrations result in a damages award, while more than 70% of consumer-initiated securities arbitrations result in a recovery to the consumer.

• Comparatively, **a 2011 article by Alexander Colvin** published in Cornell University *ILR School,* "An Empirical Study of Employment Arbitration: Case Outcomes and

Process," concluded that the differences in litigation and arbitration awards are much more significant with employees obtaining higher awards in litigation than arbitration. Colvin cited a median damage award of $40,624 in arbitration to a median damage award in litigation of approximately $200,000. Colvin acknowledges, however, that this variation could be attributed to the different type of employment claims filed, lower-paid employees who would not be able to pursue a claim in court, the small number of large litigation verdicts that skew the results, as well as the right to appeal large awards that may be reduced or settled out.

• Similarly, a **2014 study conducted by Dr. Mark D. Gough** of Cornell University published in the *Berkeley Journal of Employment and Labor Law*, also concluded that average awards for discrimination plaintiffs in litigation was much higher, at approximately $800,000, versus an average arbitration award of $400,000.

Lower-Paid Employees' Access to Justice

One explanation for the differing opinions amongst scholars regarding success rates and size of awards for employees who individually arbitrate claims instead of pursuing litigation is the type of employee involved. Multiple scholars have found that employees who earn mid- to lower-level wages simply cannot obtain legal representation in court and cannot afford to pursue a case on their own.

One scholar has stated the reason lower-paid employees cannot obtain counsel is the "potential dollar recovery will simply not justify the investment of time and money of a first-rate lawyer in preparing a court action." *See* Theodore J. St. Antoine "*Mandatory Arbitration: Why It's Better Than It Looks*," (2008).

Lewis Maltby, president of the National Workrights Institute, set forth data showing that 95% of employees seeking legal representation are turned down by attorneys in an article titled "*Employment Arbitration and Workplace Justice*."

St. Antoine includes similar data in his study, which found: "The vast majority of ordinary, lower- and middle-income employees (essentially, those making less than $60,000 a year) cannot get access to the courts to vindicate their contractual and statutory rights. Most lawyers will not find their cases worth the time and expense. Their only practical hope is the generally cheaper, faster, and more informal process of arbitration."

In reference to the judicial system, Maltby stated "[a] dispute resolution system that renders perfect justice but cannot be accessed is worthless." Comparatively, arbitration allows an employee to pursue a claim either on his/her own or through legal representation, with much lower cost.

Colvin included a table in his article, *supra*, that demonstrated 82.4% of the employees who filed arbitration claims earned less than $100,000, thereby supporting prior findings that lower-paid employees are much more likely to pursue arbitration instead of litigation.

Eisenberg and Hill also issued a similar conclusion in their study, that lower-paid employees cannot readily gain access to civil courts.

Comparing Class Action Awards for Class Members versus Arbitration

While scholars may disagree regarding the amount of awards issued for single plaintiffs in arbitration versus litigation, the comparison is significantly different when the arbitration award is compared to the award received in a class action. As referenced above in the various studies, the median award in arbitration for an employee ranged between $40,000 and $95,000. Below are recent class action settlements/awards that indicate the amount each class member received versus the amount the class action attorneys received.

• *Starks v. Jimmy John's LLC*, Los Angeles Superior Court, BC501113, in which the plaintiff filed a consumer class action against the sandwich franchise, alleging it failed to put sprouts on her sandwich. The class action settled in July 2014 as follows: 1) $5,000 to the named plaintiff; 2) $1.40 coupon to each class member; and 3) $370,000 to the plaintiff's attorney for fees and costs.

• *McCrary v. Elations Company LLC*, Central District of California, in which the plaintiff alleged the defendant misrepresented the drink as improving joint comfort, joint health, and improving joint flexibility. The class action settled in August 2015 as follows: 1) $5,000 to the named plaintiff; 2) $6 per class action member who has proof of receipt of purchasing the drinks, for up to $18; 2) plaintiff's counsel costs award of $585,000; and 3) plaintiff's counsel attorney's fee award of $362,000.

• *Villa v. San Francisco Forty-Niners et al.*, Northern District of California, in which the plaintiff alleged there was price-fixing regarding National Football League (NFL)apparel. According to the terms of the proposed settlement reached in 2016, each consumer class member who provides evidence of their purchase of NFL apparel could receive up to one-third of the purchase price of the apparel. If the consumer did not have proof of purchase, the maximum the consumer could recover is $5 for a hat, $15 for a jersey, and $15 for a pair of shoes. In November 2016, the plaintiff's counsel filed a motion to award the named plaintiff an additional $5,000 as an incentive award, and requested $1.5 million in attorney's fees. As of the date of this publication, the court had not issued a ruling on this motion.

• *Sikora v. The Cheesecake Factory*, Los Angeles Superior Court, in which the plaintiffs alleged wage-and-hour violations including failure to reimburse employees for uniform costs. The case settled in June 2016 for approximately $1.8 million. The named plaintiffs received $7,500 each as an incentive payment. There were more than 10,000 employees as class members, leaving those individuals with a recovery of approximately $111.15. Plaintiffs' attorney fees were $616,000, plus another $50,000 for costs.

A *Wall Street Journal* article by Jonathan Sourbeer, "A Close Reading of My $20.91 Settlement Check" (November 23, 2014), effectively summarized the cost of tort litigation. In this article, an owner of a Toyota vehicle received a settlement check for $20.91 for the class action litigation regarding the

Attorneys Big Winners in Class Action Lawsuits
Example from Settlement

Starks v. Jimmy John's LLC (December 4, 2014)

unintentional acceleration alleged product defect in Toyota vehicles. The check was sent to the recipient for any potential personal injury or property damage, even though the recipient never claimed to have suffered either. The recipient went to the website referenced on the check to find out more about the lawsuit and learned that the court awarded attorney's fees totaling $200 million, plus $27 million for expenses. The 25 primary plaintiffs and class representatives received $395,270.

After learning this information, the recipient posed the following questions: "For me to get that $20.91 check is costing Toyota more than half a billion dollars in litigation, fees and the settlement awards. How much will that cost me in the future? Will it add $200 to the price of my next car? Or $500? Or $1,000? Maybe that's too much of an add-on in this case. But is it too much when we start totaling the lawsuits that hit all the products we buy every year? Why do we have so much litigation, and why are courts (and the juries of our peers), awarding so much money in situations when lawyers have produced so little, comparatively, for their clients? . . . . Ultimately, we're sticking it to ourselves."

In 2013, Mayer Brown, LLP released a study in which it analyzed 148 class actions pending in federal court. The study, "Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions," found: 1) after four years, only 83% of the cases had been resolved through settlement or dismissal, meaning 14% of the cases were still pending more than four years later; 2) only 33% of the cases were settled on a class-wide basis, meaning more than 65% of the cases did not provide any benefit to the class members; and 3) not one of the class actions ended in a final judgment on the merits of the claims, meaning the class members did not have their day in court.

Opponents' Attacks on Arbitration

Opponents of arbitration have set forth the following arguments regarding why they view arbitration as problematic: 1) arbitrators are biased against consumers/employees because the employer or company are "repeat players"; 2) there is no right to appeal in arbitration; 3) arbitration is confidential without any public access or knowledge; 4) the arbitration clauses are hidden in a stack of numerous pages and are not translated in the language spoken by the consumer/employee; and 5) arbitration clauses waive consumer and employees' substantive rights. Below is an analysis of the merit of these arguments.

California Law Reduces Any Risk of Biased Arbitrators/ Repeat Players

Opponents of arbitration claim that arbitration is unfair because the arbitrators are more likely to side with the employer or company who pays for the arbitration and from whom the arbitrator wants repeat business. In California, existing law significantly reduces the risk of any "repeat player" phenomenon or bias.

• First, in California, employers are required to pay for any cost of arbitration that would not be incurred in civil litigation. Accordingly, arbitrator fees must be paid for by the employer. Paying for arbitration is not necessarily something employers volunteer to do, but rather are required to do. *See Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83 (2000) (stating that an employee cannot pay any type of expense that the employee would not be required to pay if he or she filed the case in civil court).

• Second, under Code of Civil Procedure Section 1281.9, an arbitrator is required to disclose to all parties ***prior*** to the arbitration the following information: 1) familial relationships with any of the parties or lawyers involved; 2) personal relationships with any of the parties or lawyers involved; 3) service as an arbitrator for one of the parties or attorneys involved within the last five years, including all of the case information and the results of each case; 4) any other professional relationships with the parties or attorneys involved in the case; 5) any financial relationships with the parties or attorneys involved in the case; and 6) any other matter which might create doubt as to whether the arbitrator can be impartial.

This obligation to disclose is *ongoing* and an arbitrator has an ethical duty to disqualify him or herself at any time during the arbitration if impartiality is compromised. An arbitration award is subject to be vacated if there is misconduct, corruption, or failure to disclose required information by the arbitrator. *See* California Code of Civil Procedure Section 1286.2.

Once the disclosures are provided, an employee or consumer has an equal opportunity as the employer/business to pick an arbitrator from a panel of proposed arbitrators. For example, the American Arbitration Association's *Employment Arbitration Rules*, Rule 12, sets forth the manner in which an arbitrator is determined, including that both sides receive an identical list of proposed arbitrators from which they can select for the forthcoming arbitration. Presumably, if an arbitrator disclosed that he or she had numerous cases with the same employer or business and continually found in favor of that employer or business, a consumer or employee would not choose that arbitrator.

Moreover, the California Supreme Court has specifically mandated that an employment arbitration agreement provide for a "neutral arbitrator." *See Armendariz, supra*, 24 Cal.4th 83. In *Sanchez v. Western Pizza Enterprises, Inc.*, 172 Cal. App.4th 154 (2009) (overturned on other grounds), the court deemed an arbitration agreement unenforceable where the

employer picked the specific arbitrator to decide the case as the arbitrator was not "neutral."

• Finally, as highlighted in the Senate Judiciary Committee Informational Hearing on March 1, 2016, Paul Dubow with California Dispute Resolution Council indicated that plaintiffs' counsel are just as often "repeat players" in arbitration as defense attorneys. He indicated that if any of his colleagues actually demonstrate bias toward a company or defense attorney, they would never be utilized by the plaintiffs' bar.

Arbitration Awards Can Be Appealed/Vacated

Opponents claim that binding arbitration is not subject to appeal. While it is true that binding arbitration is not subject to a general right to appeal as civil litigation, there are multiple bases upon which an arbitration award shall be vacated.

California Code of Civil Procedure Section 1286.2 sets forth the following grounds to vacate an award: 1) the award was procured by corruption, fraud, or other undue means; 2) corruption by the arbitrators; 3) if misconduct by the arbitrator substantially prejudiced the rights of the party; 4) the arbitrator exceeded his/her powers and it affected the merits of the decision; 5) the rights of the party were substantially prejudiced due to the arbitrator's refusal to postpone a hearing or consider evidence; or 6) the arbitrator failed to make timely disclosures.

In 2010, the California Supreme Court held in *Pearson Dental Supplies, Inc. v. Superior Court*, 48 Cal.4th 665, that an arbitration award may be vacated if the award is based upon a legal error by the arbitrator and ultimately denies the employee the right to have a hearing on the merits of his claim. In 2013, another court vacated an award due to an arbitrator's failure to timely disclose a prior relationship between the arbitrator and defendant. The court stated that the appropriate inquiry is whether the failure to disclosure could create a reasonable doubt as to whether the arbitrator was impartial, not whether the arbitrator actually was biased. *See Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP*, 219 Cal.App.4th 1299. Accordingly, there are various grounds upon which to appeal and vacate an arbitration award.

Arbitration Not a Secret Forum with No Public Access

Arbitration proceedings do not have the same public access as civil courts that generally are open to the public. In California, however, the proceedings are not as secretive or confidential as presumed. In 2002, AB 2656 (Corbett; D-San Leandro) was introduced to address concerns regarding the secrecy of arbitration hearings and the fairness of these proceedings for consumers. AB 2656 was signed into law (Chapter 1158) and created Code of Civil Procedure Section 1281.96, which requires a quarterly report by all private arbitration companies that administer arbitration in California.

The quarterly reports must be published on the arbitration company's website, available to download without a fee, as well as available in a hard copy format with the following information: 1) if the arbitration was designed through a pre-dispute agreement and if the agreement identified the arbitration company as the provider; 2) the name of the parties involved; 3) the nature of the dispute; 4) if an employment dispute, the employee's wage/salary range; 5) who is the prevailing party in arbitration; 6) the total number of occasions the business or employer has been a party to an arbitration administered by the arbitration company; 7) the total number of occasions the business or employer has been a party to a mediation conducted by the arbitration company; 8) if the consumer party was represented by an attorney; 9) the date the private arbitration company received the demand for arbitration, the date the arbitrator was appointed, and the date of disposition by the arbitrator or private arbitration company; 10) the type of disposition of the dispute, if known, including withdrawal, abandonment, settlement, award after hearing, award without hearing, default, or dismissal without hearing; 11) the amount of the claim, the amount of the award, and any other relief granted, if any; and 12) the name of the arbitrator, his or her total fee for the case, and the percentage of the arbitrator's fee allocated to each party.

Although civil courts are open to the public and court documents generally are not confidential, a similar quarterly report of all civil disputes in California's courts regarding the parties involved, claims alleged, and outcomes, as that required for arbitration companies, is not available. Accordingly, while court hearings are accessible for the public to attend and court documents are available for review, the data arbitration companies are required to collect and report is much more comprehensive and accessible for the public to review. The public would have to review dockets across the state to create a report comparable to that required for arbitration companies.

Arbitration Agreements Cannot Be a Hidden Clause or in a Foreign Language

Just like any other contract, an arbitration agreement must have consent that is mutual, free, and communicated between the parties (Civil Code Section 1565). While adhesion contracts are permissible, the terms of the contract must be readily available for the party to review or such contracts will be deemed unenforceable. In *Sparks v. Vista Del Mar Child and Family Services*, 207 Cal.App.4th 1511 (2012), the court struck down an arbitration agreement that was contained in an employee handbook and was not prominently distinguished from the other clauses in the handbook or subject to a separate employee acknowledgment. The court determined there was no "consent" to the agreement by the employee.

Also, in *Carmona v. Lincoln Millenium Car Wash, Inc.*, 226 Cal.App.4th 74 (2014), a court deemed an arbitration agreement unenforceable as the agreement was not translated into Spanish, the employee's primary language, and therefore was unconscionable.

Arbitration Agreements Cannot Waive Statutory Rights

Both the California Supreme Court and the U.S. Supreme Court have explicitly stated that an arbitration agreement cannot waive a consumer's or employee's substantive rights or remedies. Arbitration is a choice of forum regarding where to resolve disputes. It does not and cannot reduce or eliminate

substantive rights of the consumer or employee. *See Armendariz, supra,* 24 Cal.4th 99-100: "The United States Supreme Court's dictum that a party, in agreeing to arbitrate a statutory claim, 'does not forgo the substantive rights afforded by the statute [but] only submits to their resolution in an arbitral ... forum' (*Mitsubishi Motors, supra*, 473 U.S. at p. 628 [105 S.Ct. at p. 3354]) is as much prescriptive as it is descriptive. That is, it sets a standard by which arbitration agreements and practices are to be measured, and disallows forms of arbitration that in fact compel claimants to forfeit certain substantive statutory rights." *See also Wherry v. Award, Inc.*, 192 Cal.App.4th 1242 (2011) (deciding an independent contractor arbitration agreement was unconscionable where it expanded the right to attorney's fees for Fair Employment and Housing Act (FEHA) violations to the company and reduced the time to file a FEHA claim for the employee from one year to 180 days; *Ajamian v. CantorCO2e, L.P.*, 203 Cal.App.4th 771 (2012) (denying arbitration where terms that required a California independent contractor to pay upfront costs, arbitrate in New York, and waive statutory rights was substantively unconscionable); and *Trivedi v. Curexo Technology Corp.*, 189 Cal.App.4th 387 (2010) (refusing to enforce arbitration agreement that provided the prevailing defendant with the right to obtain an attorney's fee award, which is inconsistent with FEHA).

Recent State Action

Legislative Activity

Despite the broad scope and strength of the FAA, each session legislators introduce multiple bills regarding arbitration. In California, the 2015–2016 session was extremely active in the arbitration arena:

- **AB 465 (R. Hernández; D-West Covina) (2015)** sought to prohibit pre-dispute employment arbitration agreements made as a condition of employment. The bill was sponsored by labor and the trial attorneys, and significantly opposed by the business community. Governor Edmund G. Brown Jr. vetoed the bill and expressed his concerns with pre-emption under the FAA, as well as noting the existing California protections with regard to pre-dispute, mandatory arbitration agreements.
- **AB 2667 (Thurmond; D-Richmond) (2016)** sought to prohibit pre-dispute arbitration agreements in any consumer contract that required the arbitration of disputes involving civil rights. The bill was cosponsored by the trial attorneys and opposed by the business community. The bill failed passage on the Assembly floor.
- **AB 2879 (M. Stone; D-Scotts Valley) (2016)** sought to prohibit pre-dispute arbitration agreements in any employment contract that required the employee to arbitrate claims under the Military and Veterans Code. The bill was never taken up for a floor vote in the Assembly and eventually was moved to the Assembly Inactive File.
- **SB 1078 (Jackson; D-Santa Barbara) (2016)** sought to regulate arbitration providers and arbitrators by limiting their ability to arbitrate different cases involving the same party, as well as imposing even stronger disclosure requirements. The Governor vetoed the bill and indicated his reluctance to impose stricter requirements without evidence of any problem.
- **SB 1007 (Wieckowski; D-Fremont; Chapter 626) (2016)** allows a party to request a certified shorthand reporter to transcribe a deposition or proceeding as a part of arbitration. The bill was signed by the Governor.
- **SB 1241 (Wieckowski; D-Fremont; Chapter 632) (2016)** makes voidable any choice of law or choice of venue provision in an employment agreement that designates a location or law other than California for litigation, including arbitration. This bill was signed by the Governor.
- **SB 33 (Dodd; D-Napa; Chapter 480) (2017)** prohibits the enforcement of an arbitration agreement with a federally or state-chartered depository institution for claims alleging a "purported contractual relationship" created without consent and with the use of the individual's personally identifiable information. This bill was signed by the Governor.

Given the signing of SB 33 by Governor Brown, there is no question that the trial attorneys will use this as a game plan for another legislative proposal in 2018 to ban arbitration for a specific claim. Despite the likelihood that such legislation is pre-empted by the FAA, the time to successfully challenge such legislation takes years in court, meaning more attorney's fees.

Federal Action

On July 31, 2014, President Barack Obama signed *Executive Order – Fair Pay and Safe Workplaces*, which included a provision that precludes pre-dispute arbitration agreements for federal contractors under certain conditions. The executive order states that any contract where the estimated value of supplies or services exceeds $1 million can arbitrate a tort, civil rights or sexual harassment claim only after the dispute arises and with the voluntary consent of the employee or independent contractor. The U.S. Department of Labor and Federal Acquisition Regulatory Council issued their final regulations and guidance implementing this executive order, with the prohibition on pre-dispute arbitration agreements effective as of October 25, 2016.

On October 7, 2016, several contractors filed a lawsuit in federal court in Texas, challenging this executive order and requesting a temporary restraining order to preclude the executive order from going into effect. On October 21, 2016, the court granted a preliminary injunction of the proposed order. In March 2017, President Donald Trump signed a law that essentially repealed the Fair Pay and Safe Workplaces Executive Order.

On May 5, 2016, the Consumer Financial Protection Bureau (CFPB) published proposed regulations that would essentially prohibit class action waivers included in pre-dispute arbitration agreements for financial contracts. These proposed regulations were based upon a CFPB-conducted study released in March 2015 regarding the impact of arbitration agreements and class action waivers with regard to financial products. In July 2017, the CFPB finalized the regulations. Shortly

thereafter, the U.S. House of Representatives passed a bill to stop the regulations from going into effect. The U.S. Senate approved this bill on October 24, 2017, with Vice President Mike Pence casting the deciding vote. President Trump signed the bill shortly thereafter.

On September 19, 2016, the Centers for Medicare & Medicaid Services (CMS) published a final rule prohibiting any nursing home facility that receives Medicare or Medicaid funding from requiring patients to sign pre-dispute arbitration agreements or signing arbitration agreements as a condition of employment. The rule was expected to go into effect on November 28, 2016. However, on October 17, 2016, a lawsuit was filed in the U.S. District Court for the Northern District of Mississippi challenging this regulation. On November 7, 2016, the judge issued a preliminary injunction to stop the regulation and proposed a ban on pre-dispute arbitration agreements from going into effect. CMS withdrew its appeal of the preliminary injunction banning implementation of the regulation on June 2, 2017, and then announced on June 5, 2017, a proposed revision removing the prohibition on pre-dispute arbitration agreements.

In November 2014, the National Labor Relations Board issued its decision in *Murphy Oil USA, Inc*, 361 NLRB No. 72 (2014), wherein it reaffirmed that an arbitration agreement which requires employees to waive their right to pursue a class action violates Section 7 of the National Labor Relations Act (NLRA) that allows employees to act in concert with one another with regard to employee rights and protections. The NLRB reached this decision despite the fact that numerous state and federal courts rejected the NLRB's prior holding on this issue in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).

On October 13, 2015, the U.S. Court of Appeals for the Fifth Circuit overturned the Board's decision in *Murphy Oil USA*, citing its holding in *D.R. Horton, Inc., supra*, and stated that the company did not commit an unfair labor practice by requiring employees to sign an arbitration agreement. The court did, however, uphold the NLRB's direction for the company to clarify the arbitration agreement to ensure employees understood that by signing the agreement, they were not waiving their right to file a charge with the NLRB. *See also Sutherland v. Ernst & Young*, 726 F.3d 290 (2nd Cir. 2013) (enforcing an employment arbitration agreement containing a class action waiver); *Owen v. Bristol Care, Inc.* 702 F.3d 1050 (8th Cir. 2013)(enforcing employment arbitration agreement with class action waiver, citing that the FAA was re-enacted 12 years after the NLRA, thereby expressing Congress' intent to protect arbitration despite earlier labor laws); and *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326 (11th Cir. 2014) (enforcing employment arbitration agreement containing a class action waiver and stating that when analyzing arbitration agreements, courts must do so "with a healthy regard for the federal policy favoring arbitration." (citations omitted).

However, in *Lewis v. Epic Systems Corporation*, 823 F.3d 1147 (7th Cir. 2016), the Seventh Circuit Federal Court of Appeal reached a different conclusion. In *Lewis*, the court refused to enforce an employment arbitration agreement containing a class action waiver because it would violate the NLRA. Following with this minority opinion, the 9th Circuit Court of Appeals in a 2-1 decision, ruled on August 22, 2016 in *Morris v. Ernst & Young*, 2016 WL 4433080, that arbitration agreements containing class action waivers violate the NLRA as it precludes employees from acting in concert with one another. On September 9, 2016, the NLRB asked the Supreme Court to review *Murphy Oil*. On January 13, 2017, the U.S. Supreme Court granted review, consolidating arguments with the *Epic Systems Corporation* and *Ernst & Young* cases for oral arguments held on October 2, 2017. A written opinion will likely be issued in January 2018.

CalChamber Position

The CalChamber supports the freedom of businesses to utilize arbitration as a means of resolving disputes. When an arbitration agreement is fair for both parties, courts should respect the parties' intent and enforce the agreement. Alternative dispute resolution options are beneficial to the parties involved and reduce the already-overcrowded dockets of our court system.

Any legislation that seeks to undermine the right of parties to agree to arbitration or enforcement of the terms of a valid contract should be rejected and likely is pre-empted under the FAA. Any efforts to limit, interfere with, or prohibit arbitration of any claim should be pursued at the federal level, given the breadth and strength of the FAA.

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