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California Supreme Court Saves but Guts Anti-Arbitration Statute

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In *Hohenshelt v. Superior Court*, the California Supreme Court held that California Code of Civil Procedure Section 1281.98—a do-or-die statute requiring employers to pay arbitration fees within 30 days or waive the right to arbitrate altogether—is not preempted by the Federal Arbitration Act ("FAA"). While it is not the precise outcome employers may have hoped for, many employers are correctly viewing the decision as a win, because in saving the statute from preemption, the Court effectively defanged it to foreclose its harshest consequences.

For years as we have reported time and time again, the California Court of Appeal had interpreted Section 1281.98 as imposing a strict, inflexible rule: Any late payment by an employer, regardless of the reason, resulted in an automatic forfeiture of the right to arbitrate. Of course, this harsh statute very much reflects the California legislature's naked and abiding hostility to arbitration, hostility which has had to be curbed by the United States Supreme Court multiple times over the decades.

Citing various "generally applicable state law contract principles" against forfeitures—and overruling no fewer than ***11*** published Court of Appeal decisions—the Court concluded the statute does not mean what it plainly says when it provides that an employer "waives its right to compel the employee . . . to proceed with that arbitration" if it fails to pay the arbitration fees within 30 days. Period! Cal. Civ. Proc. Code § 1281.98(a)(1).

Despite the absence of *any* support for a more charitable interpretation, the Court saved the statute from oblivion by concluding it is aimed only at deterring *willful* nonpayment of arbitration fees and therefore does *not* automatically strip parties of arbitration rights, provided the delay results from a good-faith mistake, inadvertence, or other excusable neglect. With this ruling, the worst-case scenarios keeping many employers and their lawyers up at night—the automatic and irreversible forfeiture of arbitration rights due to a calendaring error or other honest mistake, a natural disaster, or similar reason—should no longer be a concern.

In a rare but spirited dissent, Justice Corrigan (joined by Justice Jenkins) argued that the majority's interpretation is clearly at odds with the statute's text, and noted that even the majority's interpretation runs afoul of the FAA's equal-treatment principle by imposing unique and burdensome requirements on arbitration agreements—*e.g.*, by effectively imposing a "time is of the essence" default presumption with respect to arbitration agreements but not any other type of contract.

As Justice John Shepard Wiley Jr. so eloquently put it in his dissent in the appellate court: "By again putting arbitration on the chopping block, this statute invites a seventh reprimand from the Supreme Court of the United States." But, alas, there is only so much time the high court can spend trying to fix California law in this area, and who can really blame them if they have grown weary!

Of course, employers should still make every effort to pay arbitration fees on time, if for no other reason than to avoid a dispute over whether any failure to do so was "willful" – something the plaintiffs' lawyers will inevitably assert in every instance. In the meantime, employers (and their lawyers) can breathe a small sigh of relief knowing that a calendaring error or payment lost in transit will not, by itself, result in an automatic forfeiture of their right to arbitrate.

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