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Appellate & Constitutional Law Update

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California Supreme Court Narrowly Construes Statute Governing The Failure To Timely Pay Arbitration Fees To Avoid Federal Preemption

Hohenshelt v. Superior Court, S284498 – Decided August 11, 2025

The California Supreme Court today, by a 5–2 vote, rejected the theory that nonpayment of arbitration fees and costs always results in waiver of the right to arbitrate under Code of Civil Procedure section 1281.98. Having concluded that section 1281.98 does not create an inflexible and harsh rule that mandates an automatic waiver for any late payments, the Court held that the Federal Arbitration Act does not preempt the statute.

“Although section 1281.98 has been interpreted by various Courts of Appeal to impose an inflexible and sometimes harsh rule resulting in loss of arbitral rights, we reject that rigid construction and instead conclude that the statute does not abrogate the longstanding principle, established by statute and common law, that one party’s nonperformance of an obligation automatically extinguishes the other party’s contractual duties only when nonperformance is willful, grossly negligent, or fraudulent. . . . So understood, the operation of section 1281.98 does not deviate from ‘generally applicable state law contract principles.’”

Background:

California Code of Civil Procedure section 1281.98 provides that if an arbitration agreement in the employment or consumer context requires the party that drafted the agreement to “pay certain fees and costs during the pendency of an arbitration proceeding,” failure to pay those fees and costs within 30 days of their being due renders the drafting party in “material breach” of the agreement to arbitrate and waives the party’s “right to compel the employee or consumer to proceed with that arbitration.” (Code Civ. Proc., § 1281.98, subd. (a)(1).)

Dana Hohenshelt sued his former employer. The trial court granted the employer’s motion to compel arbitration and stayed proceedings pending that arbitration. After the employer failed to timely pay arbitration fees, Hohenshelt moved in the trial court to lift the stay under section 1281.98. The court denied that motion, and the Court of Appeal granted Hohenshelt’s writ petition challenging that order. In doing so, the Court of Appeal rejected the employer’s argument that section 1281.98 is preempted by the Federal Arbitration Act (FAA), agreeing with other Court of Appeal decisions that the statute and the procedures it prescribes “*further*—rather than *frustrate*—the objectives of the FAA to honor the parties’ intent to arbitrate and to preserve arbitration as a speedy and effective alternative forum for resolving disputes.” (*Hohenshelt v. Superior Court* (2024) 99 Cal.App.5th 1319, 1325-26.) The California Supreme Court granted the employer’s petition for review.

Issue Presented:

Does the FAA preempt California Code of Civil Procedure section 1281.98?

Court’s Holding:

No. Contrary to how the Courts of Appeal have interpreted it, section 1281.98 does not “impose an inflexible and sometimes harsh rule resulting in loss of arbitral rights.” Although the text of section 1281.98 provides that a drafting party is in material breach of the arbitration agreement and has waived its right to arbitrate if it does not make timely payment of the fees or costs required for arbitration, the Court held that the statute leaves room for “the longstanding principle, established by statute and common law, that one party’s nonperformance of an obligation automatically extinguishes the other party’s contractual duties only when nonperformance is willful, grossly negligent, or fraudulent.” Having read section 1281.98 to not “strip companies and employers of their contractual right to arbitration where nonpayment of fees results from a good faith mistake, inadvertence, or other excusable neglect,” the Court held the statute is not preempted by the FAA because, “[s]o understood,” the statute does not deviate from generally applicable state law contract principles, disfavor arbitration, interfere with fundamental attributes of arbitration, or invent special arbitration-preferring procedural rules.

What It Means:

- Before today, plaintiffs regularly used section 1281.98 to escape arbitration agreements—even when payments were merely days late and were unintentional. Multiple Court of Appeal decisions had endorsed that tactic and held that any late payment resulted in the automatic loss of the right to arbitrate.
- The California Supreme Court has now adopted a new reading of section 1281.98 that will give companies who have failed to timely pay arbitration fees and costs room to argue that any such late payments were not willful or grossly negligent, or resulted from a good faith mistake, inadvertence, or other excusable neglect. There will likely be significant litigation over what circumstances are sufficient to excuse delayed payments of arbitration fees and costs.
- Even under the California Supreme Court's narrowing construction, timely payment of arbitration fees and costs will remain a critical obligation and best practice for companies seeking to enforce arbitration agreements against California plaintiffs in consumer and employment cases.
- Justice Groban, joined by Justice Evans, concurred to emphasize that the Court did not address the employer's argument that by including in its arbitration agreement a provision that the parties' disputes would be governed by the FAA's procedural rules and the rules of whichever private arbitrator they selected, section 1281.98 and other California arbitration rules did not even apply. The concurrence leaves open the possibility that, in many cases, California courts will not have to assess section 1281.98 issues or engage in an FAA preemption analysis at all.

Gibson Dunn Appellate Honors



The Court's opinion is available [here](#). Gibson Dunn attorneys Jesse A. Cripps, Bradley J. Hamburger, Patrick J. Fuster, and Lindsey K. Tanita filed an amicus curiae brief in the matter on behalf of the California Employment Law Council, available [here](#).

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the California Supreme Court. Please feel free to contact the following practice group leaders:

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