

New Legislation Affecting Mandatory Arbitration in Consumer Cases

By: Glenn Mau, Esq.



Legislation signed on September 30, 2002 by Governor Gray Davis adds another wrinkle to mandatory

arbitration in consumer cases.¹ The new and amended rules regarding private mandatory arbitration are summarized as follows:

California Code of Civil Procedure § 1284.3 (new)

prohibits a consumer arbitration in which the consumer must pay the fees and costs of the opposing party, the arbitration provider, the arbitrator or witnesses if the consumer

does not prevail, and requires a private arbitration company in a consumer arbitration to waive fees and costs (exclusive of arbitrator fees) for an "indigent consumer" defined as a person whose gross monthly income is less than 300% of the federal poverty guidelines (in 2002, for one person, the federal poverty line is \$8,860).

California Code of Civil Procedure § 1281.96

(new) requires private arbitration companies to publish at least quarterly the following information on consumer arbitrations they have handled: (1) the name of the nonconsumer party, (2) the type of dispute, (3) who was the prevailing party, (4) how often the nonconsumer party has used the private arbitration company, (5) if the consumer was represented by an attorney, (6) dates of the demand,

appointment of the arbitrator and disposition, (7) type of disposition, (8) the amount of the claim, award and relief granted, and (9) the arbitrator, the fee and allocation to the parties.

California Code of Civil Procedure § 170.1

(amended) adds that a sitting judge shall be disqualified if: (1) he or she has discussed or participated in discussions within the last two years

concerning prospective employment as a dispute resolution neutral; and (2) either (a) those discussions were with a party in a case before the judge; or (b) the case involves issues relating to the enforcement of an agreement to submit a dispute to ADR.

California Code of Civil Procedure

§ 1281.9 (amended) requires that a proposed neutral must disclose the same matters added in *Code of Civil Procedure* § 170.1(a)(8), which was added, as noted above.

California Code of Civil Procedure § 1281.92

(new) prohibits a private arbitration company from administering any consumer arbitration case if in the year prior the company had a financial interest in any party or attorney for a party, or where a party or attorney, in the year prior, had a financial interest in the private arbitration company.

California Code of Civil Procedure § 1280.1

(new) voids any immunity or limitations of liability provisions in agreements with private arbitration companies in consumer cases.

"...adds another wrinkle to mandatory arbitration in consumer cases."

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¹ Assembly Bill Nos. 2504, 2574, 2656, 2915 and 3030.

California Code of Civil Procedure § 1286.5 (new) prohibits an arbitrator or private arbitration company from further administering the case if the court vacates an award in a consumer arbitration. ■

This new legislation comes on the heels of numerous appellate cases over the past couple of years in which the courts have refused to enforce mandatory arbitration agreements on the grounds that they were one-sided and unfair. (See, e.g., *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 [employment arbitration clause unenforceable where damages were limited, did not allow adequate discovery, and employee had to pay fees and costs of arbitration]; *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094 [arbitration agreement prohibiting class treatment of small individual claims, and was a “take it or leave it” proposition was unenforceable].)

However, the impact of this new legislation may not have a tidal wave effect on the arbitration industry since many of the arbitration services (e.g., Judicial Arbitration and Mediation

Services, American Arbitration Association, National Arbitration Forum) have all implemented new rules since July 1st that shift fees in consumer cases from the consumer to the business entity involved. In addition, although not uniform, arbitrators have made more detailed disclosures on prior dealings with the parties and their attorneys.

The most significant impact of this new legislation is that a consumer will not need to pay the fees and costs of the opposing party, the provider, the arbitrator or any witnesses if the consumer loses, even if the arbitration agreement or contract provides for the recovery of attorney’s fees and costs. The challenge to at least this aspect of the new legislation

is anticipated in the near future.

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