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In Focus

Recent legislative efforts in California provide lessons for other states confronting forced arbitration.

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As any trial lawyer knows, forced arbitration is one of today's biggest threats to consumer and employee protections. Until a federal fix corrects the damaging decision in *AT&T Mobility LLC v. Concepcion*,[1] individual states must continue their efforts to eliminate forced arbitration at the local level.[2] But keep in mind that any state law addressing forced arbitration may raise preemption issues with the Federal Arbitration Act (FAA).[3]

In the Golden State, we have already enjoyed some success on this front. In 2011, the Consumer Attorneys of California (CAOC) successfully sponsored legislation to prohibit the use of forced arbitration in actions involving California's hate crimes statute.

In 2015, the state legislature passed a bill—which Gov. Jerry Brown later vetoed—that prohibited the use of forced arbitration agreements as a condition of employment.[4] Brown rationalized that a ban was too far-reaching and might be preempted by the FAA, but he suggested that legislation targeting specific abuses in the forced arbitration/employment contract context could be a better solution.[5]

CAOC responded in 2016 by sponsoring five bills that targeted specific arbitration-related abuses. The legislature passed three of the bills, two of which became law on Jan. 1, 2017. The remaining two bills fell short but kept this crucial discussion going among legislators. We worked to highlight particularly abusive uses of forced arbitration—for example, against the elderly and veterans or in civil rights cases—as well as other approaches to curb the impact of forced arbitration on California's citizens.

Recent Successes

Employers are increasingly requiring employees to litigate or arbitrate out of state or to follow the laws of another state. A new law will stop this practice in California by prohibiting out-of-state choice of law or forum provisions in any employment contract, including in a forced arbitration clause.[6]

States can regulate forced arbitration provisions in contracts, as long as the regulations do not have a disproportionate effect on arbitration.[7] The Louisiana Supreme Court upheld a similar law that imposes an outright ban on such clauses.[8]

States also can address procedural issues related to forced arbitration.[9] California law gives defendants a unilateral right to an immediate appeal when they lose a motion to compel arbitration. Unfortunately, this appeal right creates a two- to three-year delay in the middle of a case. For many elderly plaintiffs facing their final months, this delay can deny them their day in court.

A proposed bill originally eliminated this automatic right to appeal in cases brought under the California Elder and Dependent Adult Civil Protection Act when the senior had received a preference for an accelerated time line to set a trial date due to age and health.[10] We worked out amendments, however, with the nursing homes, and the new law achieves the same goal by creating an expedited appeal time frame of no more than 100 days.[11]

The one bill that was vetoed clearly avoided preemption and was meant to regulate companies providing arbitration services.[12] It aimed to curb abuses by corporate parties and arbitration providers in generating new business *before* handling the matter at hand. The FAA is silent about the private companies that administer arbitrations; therefore, states can and should act in this area. California has fairly strong ethical and disclosure rules for arbitrators, but there is room for improvement.

The bill prohibited an appointed arbitrator in consumer arbitrations from entertaining or accepting any offers of employment in another case involving a party or lawyer for a party in the pending arbitration without both parties' written consent.

It also added prohibitions and disclosure requirements relating to certain solicitations made by a private arbitration company, such as discussions or negotiations to designate the company as the arbitrator in specific contracts for a party or a lawyer for a party in a pending arbitration. The veto was not based on preemption grounds—the governor declared a belief that arbitrators are already subject to stringent disclosure requirements in California.[13]

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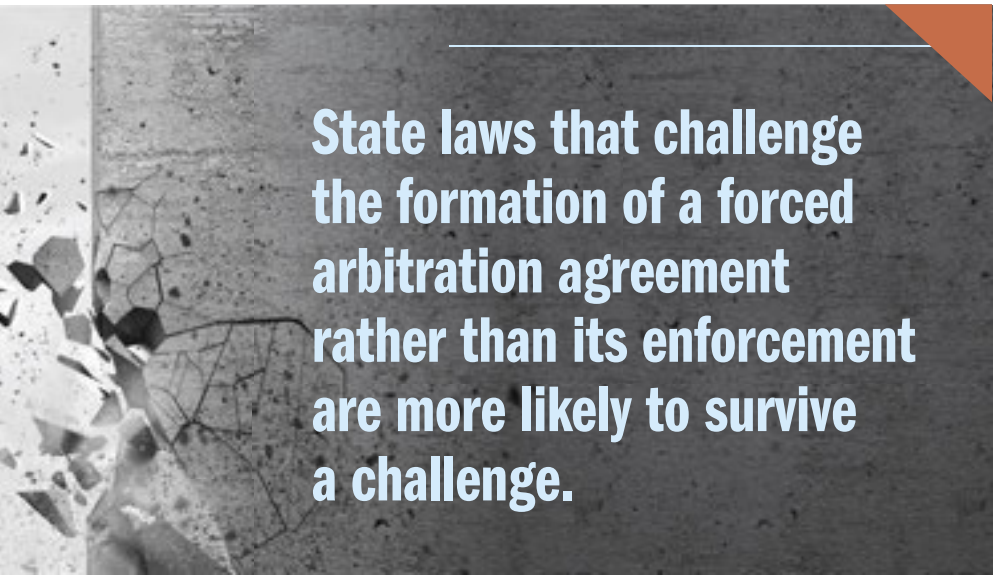

State laws that challenge the formation of a forced arbitration agreement rather than its enforcement are more likely to survive a challenge.

Keeping the Issue Alive

One legislative approach focused on the FAA's "generally applicable contract defense" saving clause, which allows states to regulate contracts that are fraudulent, made under duress, or unconscionable.[14] The FAA presumption in favor of arbitration does not apply "when there is no private, consensual agreement" to arbitrate, so state laws that challenge the formation of a forced arbitration agreement rather than its enforcement are more likely to survive a challenge.[15]

The two bills that did not pass the legislature were based on this premise; one prohibited requiring a person—as a condition of entering into a contract for goods and services—to waive any legal right or forum for a violation of California's civil rights law.[16]

The second bill prohibited requiring a person to waive any legal right or forum for a violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA) as a condition of employment.[17] USERRA prohibits employment discrimination against a person on the basis of past military service, current military obligations, or intent to serve. We believe these bills, if passed, would survive preemption challenges.

Unfortunately, neither bill had the necessary votes to proceed—though we were close. Both bills received strong coalition support from major labor and consumer groups.

Even when legislation doesn't succeed, it is important to keep the issue of forced arbitration alive with legislators. As we begin 2017, trial lawyers in California will continue to fight forced arbitration and hope that those in other states will as well.[18]

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Notes

1. 563 U.S. 333 (2011).
2. *See* David Seligman & Nat'l Consumer Law Ctr., *The Model State Consumer & Employee Justice Enforcement Act* 5 (2015), www.nclc.org/images/pdf/arbitration/model-state-arb-act-2015.pdf. (Despite federal agencies' recent push for reform by the Consumer Financial Protection Bureau and other federal agencies, "there is a continuing need for state action concerning forced arbitration.").
3. 9 U.S.C. §2 (1947).
4. A.B. 465, 2015 Reg. Sess. (Calif. 2015).
5. Veto Message from Edmund G. Brown Jr., Gov. of Calif., to Members of the Calif. Gen. Assembly (Oct. 11, 2015), www.gov.ca.gov/docs/AB_465_Veto_Message.pdf.
6. 2016 Cal. Legis. Serv. Ch. 632 (West).
7. *See, e.g.*, *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151 (9th Cir. 2013) ("[T]he Supreme Court reasoned that even general contract defenses, such as unconscionability, are preempted if they 'stand as an obstacle to the accomplishment' of 'ensur[ing] that private arbitration agreements are enforced according to their terms.'") (citing *Concepcion*, 563 U.S. at 343–344).
8. *Sawicki v. K/S Stavanager Prince*, 802 So. 2d 598 (La. 2001) (upholding La. Rev. Stat. Ann. §23:921A (1999)).
9. *Rosenthal v. Great W. Fin. Secs. Corp.*, 926 P.2d 1061 (Cal. 1996) (There is an "unassailable proposition that States may establish the rules of procedure governing litigation in their own courts, even when the controversy is governed by substantive federal law.") (citing *Felder v. Casey*, 487 U.S. 131, 138 (1988)) (internal quotations omitted).
10. California's trial preference statute allows a party to file a motion for the court to accelerate a matter for trial, with a trial date set within 120 days of the motion being granted. It applies to people over 70 with serious health concerns and to minors under 14 in personal injury and wrongful death cases. Cal. Civ. Proc. Code §36(a)–(b) (2009).
11. 2016 Cal. Legis. Serv. Ch. 628 (West).
12. S.B. 1078, 2015 Reg. Sess. (Calif. 2016).
13. Veto Message from Edmund G. Brown Jr., Gov. of Calif., to Members of the Calif. State Senate, (Sept. 25, 2016), www.gov.ca.gov/docs/SB_1078_Veto_Message.pdf.
14. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995); *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).
15. Seligman, *supra* note 2, at 13.
16. A.B. 2667, 2015 Reg. Sess. (Calif. 2016).
17. A.B. 2879, 2015 Reg. Sess. (Calif. 2016).
18. We would like to thank the AAJ team, and particularly Daniel Hinkle, who provided invaluable legal analyses on short time frames during the legislative year.

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