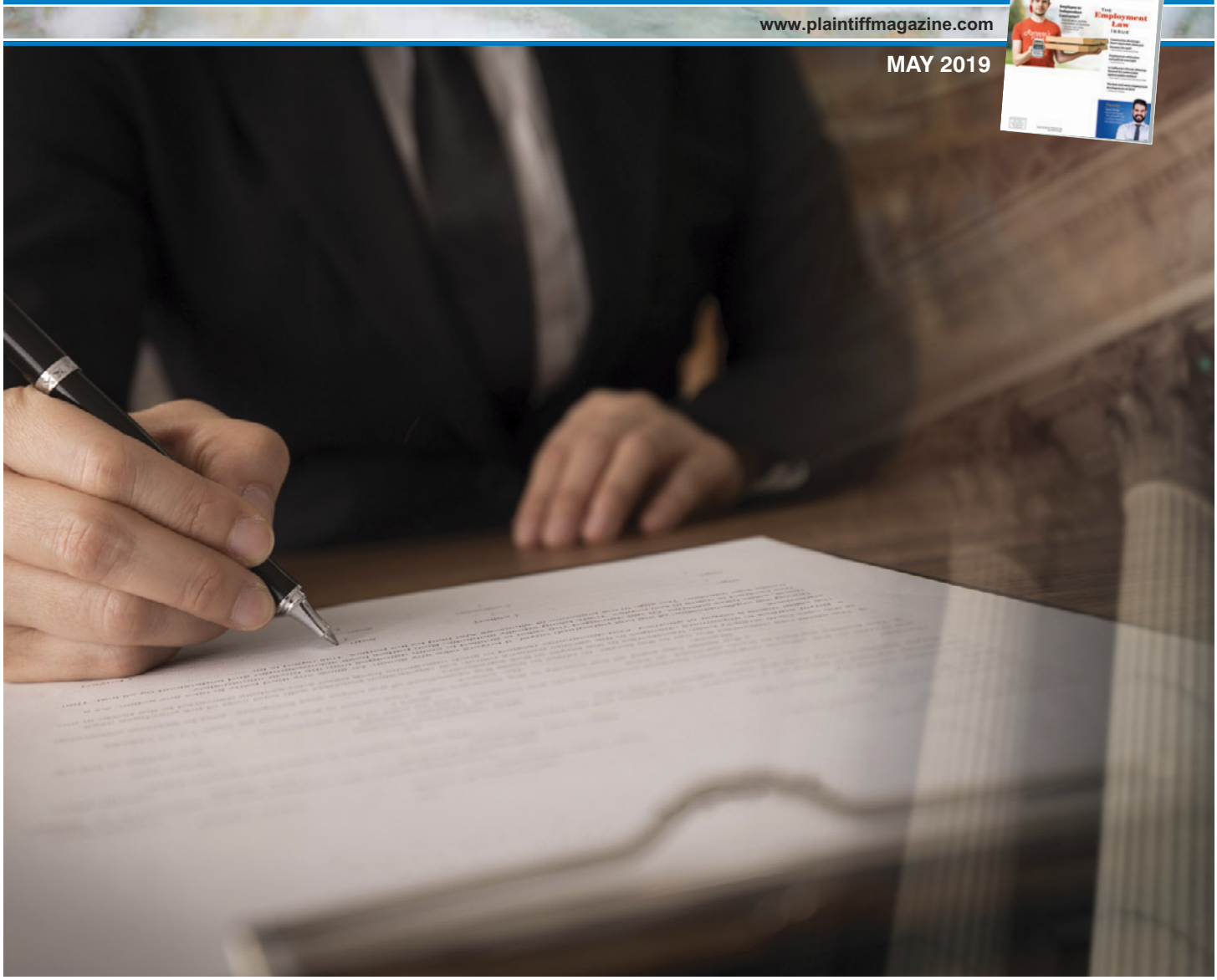

Arbitration and judicial oversight

Even in the face of an arbitration agreement, employment plaintiffs have a statutory right to initiate litigation in court under the California Arbitration Act

By Carole Okolowicz

Mandatory, pre-dispute, binding arbitration has become an unfortunate fact of life in employment law. Although courts treat arbitration agreements[1] in the context of employment as mutually agreed-upon and negotiated instruments, freely entered into and equally desired by employees and employers who do not want to "waste time" in the judicial system, those of us living in the real world know that is not the case. Workers are forced to sign these agreements as a condition of employment. Few workers know what they are giving up by signing an arbitration agreement. Employees often do not remember signing an arbitration agreement at the start of employment; "signing" often means clicking a box on a website.

As employment lawyers, if we know our client signed an arbitration agreement, we may just initiate arbitration (akin to filing a complaint) and get started. This article makes the case for filing in court first. Plaintiffs have a constitutional

and statutory right to file in court and doing so is not a breach of contract. Although you may end up in arbitration regardless, filing in court may be beneficial because there is a public filing, a case number which may expedite access to the court, and regular case management conferences. The court's authority during arbitration may be limited, but there are some potentially useful things a court can do.

Plaintiffs' right to file in court

The first thing to note is that a plaintiff has a constitutional and statutory right to file in court, even if she signed an arbitration agreement and even if you think that agreement will stand up in court. (See *Sargon Enterprises, Inc. v. Browne George Ross LLP* (2017) 15 Cal.App.5th 749, 766-68.) Filing in court is not a breach of contract, as an arbitration agreement that violates a party's statutory rights is void. (*Id*. at 764; see also *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 99 [holding that statutory rights for a public reason cannot be waived in an arbitration agreement].)

In *Sargon*, Sargon Enterprises filed a legal malpractice claim against law firm BGR, even though it had signed an arbitration agreement with the firm. (*Sargon, supra,* at 756-57.) BGR counterclaimed against Sargon for breach of contract for filing in court. After the court ordered arbitration and the arbitration concluded, Sargon opposed the award. Sargon contended that the arbitrator's award for breach of contract damages violated its statutory right to file in court and the Court of Appeal agreed.

The court found that plaintiffs have a statutory right to initiate litigation in court under the California Arbitration Act ("CAA"), which "represents a comprehensive statutory scheme regulating private arbitration in this state." (*Id*. at 766.) It held that the CAA "anticipates that a party to an arbitration agreement may file a lawsuit in court" because it sets forth the procedures by which the opposing party may compel arbitration. (*Id*. at 766-767; Code Civ. Proc., § 1292.4, 1281.7, 1281.2.) It also held that "a contract to arbitrate by no means precludes a party to the contract from initially resorting to the courts." (*Id*. at 769.) It is the courts that have the ultimate power to order parties into arbitration.

In *Sargon*, the court examined the legislative history of Code of Civil Procedure section 1281.12 of the CAA for the reasons a party might file in court instead of demanding arbitration, which included:

(1) the plaintiff may believe the claims are not subject to arbitration because the arbitration agreement is unenforceable on grounds of unconscionability or similar concepts;
(2) there may be a dispute about whether the particular claims at issue do or do not fall within the scope of an arbitration agreement;
(3) the plaintiff may contend that one or more of the statutory grounds for denying a petition to compel arbitration set forth in Code of Civil Procedure section 1281.2 exist, assuming the defendant does file a petition to compel arbitration in response to the plaintiff's filing of the lawsuit;
(4) the plaintiff may prefer a court trial or jury trial and simply be hopeful that the defendant will not assert any right to arbitrate the claims, for whatever reason [indeed, the defendant may decide that it prefers a court proceeding as well]; and
(5) the plaintiff might not even be aware that there is an arbitration agreement governing the controversy.

(*Sargon*, at 767-68.)

The court found no breach of contract, not only because plaintiffs have a constitutional (Cal. Const. art. 1 § 3(a)), right to petition and statutory (CAA) right to file in court, but also because the correct remedy if the dispute is arbitrable is specific performance of the contract, not breach of contract damages. (*Id.* at 767.)

Note that filing in court tolls the statute of limitations contained in the arbitration agreement. (Code Civ. Proc., § 1281.12; *Sargon*, at 765, citing *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665 [age discrimination under FEHA].)

A delegation clause does not preclude filing in court

The *Sargon* court also explained in a footnote the effect of a delegation clause on a plaintiff's right to file in court. (*Id*. at 769-70, fn. 4.) A delegation clause delegates the authority to decide the arbitrability of the matter to the arbitrator. Arbitrability involves the scope of the agreement, i.e., what types of claims the parties agreed would be covered. (See *Smythe v. Uber Technologies, Inc.* (2018) 24 Cal.App.5th 327; see also *Citizens of Humanity, LLC v. Applied Underwriters, Inc.* (2017) 17 Cal.App.5th 806.) *Sargon* explained that while arbitrability may be delegated to the arbitrator, the validity of the agreement, i.e., whether an agreement to arbitrate exists in the first place, is the province of the court.

As the court explained, holding otherwise creates "problems of circularity"; if the arbitrator finds the entire agreement, including the delegation clause, invalid, then the arbitrator has no authority to render that finding. (*Sargon*, *supra*, at 769-70, fn. 4.)

Delegation clauses were the subject of a recent, unanimous SCOTUS opinion, *Henry Schein Inc. v. Archer & White Sales, Inc.* (2019) 139 S.Ct. 524. In that case, the Court invalidated (as counter to the FAA) a judicially made exception to delegation clauses that allowed courts to decide whether a claim for arbitrability was "wholly groundless," even when a delegation clause assigned that decision to the arbitrator. But the Court reaffirmed that "[t]o be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists." (*Id*. at 530.)

After you file in court

Once plaintiffs file in court, defendants have a right to petition the court to compel the parties to arbitrate pursuant to the agreement. If the defendant does not take action, the case remains with the court. (*Id*. at 768.)

If the defendant petitions to compel arbitration, you may be able to oppose it on the grounds that the agreement is unenforceable, possibly as unconscionable and/or violative of the *Armendariz* requirements. As soon as you learn that your client signed an arbitration agreement, it is a good idea to familiarize yourself with *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, in which the California Supreme Court set forth the factors by which courts determine if an arbitration agreement is enforceable. You may have a strong basis upon which to fight enforcement.

Alternatively, if the court finds that there is an agreement, the court will not order arbitration if the right to compel arbitration has been waived by the petitioner or grounds exist for rescission of the agreement. (Code Civ. Proc., § 1281.2(a), (b).) One example of waiver of the right to compel arbitration is when a party substantially and unreasonably delays the proceedings. (*Engalla v. Permanente Medical Group* (1997) 15 Cal.4th 951, 983-984.) One ground for rescission is fraud in the inducement. (*Id*. at 973-981.)

Although many arbitration agreements are upheld, not all are, so it may be worth it to fight.

You are ordered to arbitration – but with court oversight

Most defendants do not sit on their right to petition the court to compel arbitration and most arbitration agreements are upheld, so why file in court when you are likely to end up in arbitration anyway? If you file in court first instead of going straight to arbitration, you have a few benefits that you otherwise would not have. One, there is a public filing; two, you have a case number, meaning expedited court access; and three, there are case management conferences. Though the court's powers are limited, it has some "vestigial" powers which may prove necessary.

Benefits to filing

Public filing

Private arbitration is just that, private. Unlike a court filing, the parties and their claims and defenses are not open to the press or anyone else except the parties and the arbitrator.[2] Secretive arrangements like this can be beneficial to employers that want to keep the number and types of employment claims against them hush-hush. Your client may also want to keep her claims private, which is a discussion you should have with your client. But a public filing may be beneficial. For example, there may be an important public policy aspect to your case. Reporters sometimes report on court filings, which then could open up a broader public discussion on the matter, perhaps leading to legislation. A public filing could expose the bad behavior of the defendants or bring forth new witnesses for your case.

Case number and judge

To be clear, even arbitration claimants who do not file a civil complaint have access to the courts for the limited purposes described below since the court's authority is pursuant to California law. But an initial filing in court may expedite your access to the court. This is because you will already have a case number and a judge (depending on the county). If, for example, the parties cannot agree on an arbitrator, it may be helpful to petition the court's involvement. If you already have a case number, you don't have to research the proper court. And if you have been assigned a judge, this may be the judge who will review the award at the conclusion of the arbitration.

Case management conferences

If you are ordered into arbitration by a court, your case is thereafter on the court's docket until resolved. As a result, the court will issue regular case management conferences. These are more limited than civil litigation CMCs because the court's authority is limited when it comes to arbitration. But a CMC could be useful if you have a defendant or an arbitrator who is delaying the arbitration. Case management conferences occur about every six months.

Court authority in arbitration

The benefit of having a case number and regular CMCs is that it may allow you easier access to the courts if need be. Courts have limited authority over what happens in arbitration. (*Moncharsh, supra,* at 11.) Courts cannot weigh in on the merits of a dispute (*Id*.; see also *AT&T Technologies, Inc. v. Comm. Workers of America* (1986) 475 U.S. 643, 649-50) or decide discovery disputes between the parties. (Code Civ. Proc., § 1283.05; *Berglund v. Arthroscopic & Laser Surgery Ctr. of San Diego, L.P.* (2008) 44 Cal.4th 528, 535-536.)

But courts do retain some "vestigial" jurisdiction over the arbitration. (*MKJA, Inc. v. 123 Fit Franchising, LLC* (2011) 191 Cal.App.4th 643, 659.) A court may appoint an arbitrator if the parties are unable to decide on one or if the agreed-upon arbitrator fails to act and no successor has been chosen. (Code Civ. Proc.,
§ 1281.6; *Bosworth v. Whitmore* (2006) 135 Cal.App.4th 536, 551.) If the agreement does not include an arbitration completion date, a court can set a date when petitioned. (Code Civ. Proc., § 1283.8; *Bosworth* at 539, 550.) A court can issue preliminary injunctions or take other protective measures to preserve assets or property in dispute, if an award would be rendered ineffectual without such actions. (Code Civ. Proc., § 1281.8.)

After completion of the arbitration, the arbitrator issues an award. The court then has the authority to determine if the arbitrator has issued an award on the merits, and if so, to either confirm, cor-

rect, or vacate the award. There are many grounds for vacating an award, including a violation of a party's statutory rights, as in *Sargon*. (Code Civ. Proc., § 1286.2; *Armendariz*, *supra*.)

If the arbitrator terminates the arbitration before issuing an award, for example, if one party does not pay the arbitration fees, the court has the authority to lift the stay of litigation and set the matter for trial. (See *Cinel v. Christopher* (2nd Dist. 2012) 203 Cal.App.4th 759, 762, 769; but see *Pinela v. Neiman Marcus Group, Inc.* (1st Dist. 2015) 238 Cal.App.4th 227, 238 ["a court may not lift a stay of litigation while arbitration remains pending, on the ground that the parties cannot afford to litigate."].)

Courts can review an arbitrator's discovery orders, but if a party seeks review (vs. a third party), the review is limited just as judicial review of an arbitration award is limited. (Code Civ. Proc., § 1286.2; *Berglund v. Arthroscopic & Laser Surgery Ctr. of San Diego, L.P.* (2008) 44 Cal.4th 528, 535.) Courts may not review the arbitrator's discovery order on the merits but only on the basis that the arbitrator exceeded his or her powers, the party's rights were substantially prejudiced by misconduct of the arbitrator, the arbitrator was corrupt, or a few other bases. (Code Civ. Proc., § 1286.2.) Third parties that appeal discovery orders to the court receive full judicial review on the merits because they are not bound by the arbitration agreement. (*Berglund*, *supra*.)

Conclusion

More and more employees are being forced to sign arbitration agreements as a condition of employment. Not all of these "agreements" are enforceable and, even if they are, filing in court may be beneficial to your client for a multitude of reasons, as set forth above.


Okolowicz

Carole Okolowicz is an associate with Lawless & Lawless *and has been practicing law since June 2018. She second-chaired her first trial with the* Veen Firm, P.C. *the day after her swearing-in ceremony at USF. Carole was a paralegal in personal injury firms for over a decade before joining Lawless & Lawless. She is originally from Milwaukee, Wisconsin but has lived in San Francisco since 2001.*

Endnotes:

[1] I use the term "arbitration agreement" as a term of art, to refer to the arbitration clause included with many employee handbooks. As noted, these are rarely agreed-upon.

[2] Arbitration is private, in that nonparties may be excluded. (JAMS Rule 23(c).) As for confidentiality, arbitrators are bound by a duty of confidentiality. (JAMS Rule 26(a) and AAA Employment Rule 23.) Neither JAMS nor AAA establish such a duty on the parties but note that parties may agree to confidentiality in the arbitration. Confidentiality clauses in arbitration agreements, which may prohibit parties from releasing award information, are common.