SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
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SB 940 (Umberg)
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AM

SUBJECT

Civil disputes

DIGEST

This bill prohibits an arbitrator from entertaining or accepting, from the time of appointment until the conclusion of the arbitration, either of the following: (1) any offers of employment or new professional relationships as a lawyer, expert witness, or consultant from a party or lawyer for a party in the pending arbitration; or (2) any offers of employment as a dispute resolution neutral in another case involving a party or lawyer for a party in the pending arbitration without the prior written consent of the parties, as specified. The bill also prohibits sellers from requiring a consumer, as a condition of entering into a contract, to agree to a provision that requires the consumer to adjudicate outside of California a claim arising in California or deprive the consumer of the substantive protection of California law with respect to a controversy arising in California, as specified. The bill allows consumers the option to have a dispute adjudicated pursuant to the Small Claims Act instead of through arbitration, as specified. The bill authorizes the State Bar to create a program to certify alternative dispute resolutions firms, as provided. This bill also allows depositions to be taken and discovery obtained in discovery proceedings, as specified.

EXECUTIVE SUMMARY

Arbitration is an alternative method for resolving legal disputes. Instead of going through the formal, public court process, the parties to the dispute submit their evidence and legal arguments to a private arbitrator (or a panel of arbitrators) who decides the case. Critics of arbitration point out that it can be one-sided, especially when it is forced upon the party with much less bargaining power, and that it lacks the transparency of the public court system, among other things. Mandatory arbitration clauses, especially in employment and consumer contracts, have been a topic of significant controversy over the years as a form of alternative dispute resolution. This bill seeks to enact various changes related to arbitration with the goal of making the process more equitable to both parties involved.

This bill is author sponsored and supported by the Consumer Attorneys of California and the California Employment Lawyers Association. The bill is opposed by various organizations, including those that represent business, retailers, property and casualty insurers, commercial real estate, the building industry, and the arbitration and mediation industry.

PROPOSED CHANGES TO THE LAW

Existing federal law provides, pursuant to the Federal Arbitration Act (FAA), that a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. (9 U.S.C. § 2.)

Existing state law:

1) Governs arbitrations in California pursuant to the California Arbitration Act (CAA), including the enforcement of arbitration agreements, rules for neutral arbitrators, the conduct of arbitration proceedings, and the enforcement of arbitration awards. (Code Civ. Proc. § 1280 et. seq.)
    a) The CAA generally requires a person serving as a neutral arbitrator pursuant to an arbitration agreement to comply with the ethics standards for arbitrators adopted by the Judicial Council. (Code Civ. Proc. § 1281.85.)

2) Provides that depositions may be taken and discovery obtained in arbitration proceedings in every agreement to arbitrate any dispute, controversy, or issue arising out of or resulting from any injury to, or death of, a person caused by the wrongful act or neglect of another and in any other arbitration proceeding, to the extent the parties by their agreement so provide, as specified in a) though e), inclusive, below.
    a) After the appointment of the arbitrator or arbitrators, the parties to the arbitration have the right to take depositions and to obtain discovery regarding the subject matter of the arbitration, and, to that end, to use and exercise all of the same rights, remedies, and procedures, and be subject to all of the same duties, liabilities, and obligations in the arbitration with respect to the subject matter thereof, as provided in Chapter 2 (commencing with Section 1985) of Title 3 of Part 4 of the Code if Civil Procedure, and pursuant to the Civil Discovery Act, as if the subject matter of the arbitration were pending before a superior court of this state in a civil action other than a limited civil case, subject to the limitations as to depositions set forth in e), below.

b) The arbitrator or arbitrators themselves have the power, in addition to the power of determining the merits of the arbitration, to enforce the rights, remedies, procedures, duties, liabilities, and obligations of discovery by the imposition of the same terms, conditions, consequences, liabilities, sanctions, and penalties as can be or may be imposed in like circumstances in a civil action by a superior court of this state under the provisions of the Code of Civil Procedure, except the power to order the arrest or imprisonment of a person.
c) The arbitrator or arbitrators may consider, determine, and make such orders imposing such terms, conditions, consequences, liabilities, sanctions, and penalties, whenever necessary or appropriate at any time or stage in the course of the arbitration, and such orders are to be as conclusive, final, and enforceable as an arbitration award on the merits, if the making of any such order that is equivalent to an award or correction of an award is subject to the same conditions, if any, as are applicable to the making of an award or correction of an award.
d) For the purpose of enforcing the duty to make discovery, to produce evidence or information, and to impose terms, conditions, consequences, liabilities, sanctions, and penalties upon a party for violation of any such duty, such party shall be deemed to include every affiliate of such party, as specified.
e) Depositions for discovery are not to be taken unless leave to do so is first granted by the arbitrator or arbitrators. (Code Civ. Proc. § 1283.05.)

3) Requires a proposed neutral arbitrator to disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial, including certain specified disclosures.
    a) Requires the proposed neutral arbitrator to disclose all matters required to be disclosed to all parties in writing within 10 calendar days of service of notice of the proposed nomination or appointment. (Code Civ. Proc. Sec. 1281.9(b).)
    b) Allows a party to disqualify the arbitrator. (*Id*. at subd. (a).)
    c) Provides a proposed arbitrator is disqualified if they fail to make the required disclosures and a party to the arbitration serves a notice of disqualification within 15 calendar days of the failure. (Code Civ. Proc. § 1281.91(a).)
    d) Provides a proposed arbitrator that complies with the disclosure requirements is disqualified if a party to the arbitration serves a notice of disqualification within 15 calendar days of the initial disclosure. (*Id*. at subd. (b).)

4) Requires the court to vacate the arbitration, subject to certain procedural requirements, if the court determines any of the following:
    a) the award was procured by corruption, fraud or other undue means;
    b) there was corruption in any of the arbitrators;
    c) the rights of the party were substantially prejudiced by misconduct of a neutral arbitrator;

d) the arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted;
e) the rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor, by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of the CAA; or
f) an arbitrator making the award either: (i) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (ii) was subject to disqualification upon specified grounds but failed upon receipt of timely demand to disqualify themselves as required by that provision. (Code Civ. Proc. § 1286.2(a).)

5) Prohibits employers, in contracts entered into, modified, or extended on or after January 1, 2017, from requiring an employee who resides and works in California, as a condition of employment, to agree to a provisions that either: (a) requires the employee to adjudicate outside of California a claim arising in California; or (b) deprives the employee of the substantive protection of California law with respect to a controversy arising in California.
    a) Provides that such a provision is voidable by the employee. If such a provision is rendered void at the employee's request, then the matter must be adjudicated (litigated or arbitrated) in California and California law shall govern the dispute.
    b) Authorizes a court to award a plaintiff enforcing their rights under this provision reasonable attorney's fees, as specified.
    c) Provides a specified exception to these provisions for any employee who is in fact individually represented by legal counsel in negotiating the terms of an agreement. (Lab. Code § 925.)

6) Establishes, through the Small Claims Act, small claims divisions in each superior court and establishes procedural guidelines for minor civil disputes in order to expeditiously, inexpensively, and fairly resolve such matters (Code Civ. Proc. § 116.110 et seq.)
    a) Provides that small claims divisions have jurisdiction over specified cases, including for recovery of money and enforcement of delinquent tax payments, if the amount demanded does not exceed specified amounts ranging from $5,000 to $8,125. In addition to this jurisdiction, the small claims court has jurisdiction over actions brought by a natural person that do not seek more than $12,500. (Code Civ. Proc. §§ 116.220, 116.221.)
    b) Provides that small claims actions do not require formal pleadings outside of a simplified claim form and do not permit pretrial discovery. Plaintiffs may not be represented by an attorney and have a limited right to appeal. The hearing and disposition must be informal with the objective to dispense

justice promptly, fairly, and inexpensively. (Code Civ. Proc. §§ 116.310-116.330, 116.510-116.530, 116.710.)

7) Requires all attorneys who practice law in California to be licensed by the State Bar of California and establishes the State Bar, within the judicial branch of state government, for the purpose of regulating the legal profession. (Cal. const., art. VI, § 9; Bus. & Prof. Code § 6000 et seq.)
    a) Provides that the State Bar is governed by a Board of Trustees (Board) comprised of 13 members, six of whom are public members and seven of whom are licensed attorneys. (Bus. & Prof. Code § 6010 et. seq.)

8) Requires the State Bar to establish and administer a program for certifying legal specialists and authorizes the State Bar to establish a program for certifying entities that certify legal specialists under rules adopted by the Board.
    a) A certified specialist who fails to comply with the requirements of the Legal Specialization Program of the State Bar will have the certification suspended or revoked under rules adopted by the Board.
    b) The State Bar has the authority to set and collect appropriate fees and penalties for this program. (Cal. Rules of Court, rule 9.35.)

Existing California Rules of Court, Ethics Standards for Neutral Arbitrators in Contractual Arbitration:

1) Requires covered arbitrators to make basic disclosures regarding potential conflicts of interest and requires compliance with certain standards of conduct.
    a) Provides for various disclosures that the arbitrator must make on behalf of themselves, and on behalf of the arbitration company, respectively. (Standards 7 and 8.)
    b) These disclosures include, among others, familial relationships with a party or lawyer in the arbitration, significant personal relationships with a party or lawyer for a party, compensated service as an another dispute resolution neutral other than an arbitrator, and various other professional relationships or financial interests. (Standards 7 and 8.)

2) Provides that, from the time of appointment until the conclusion of the arbitration, an arbitrator must not entertain or accept any offers of employment or new professional relationships as a lawyer, an expert witness, or a consultant from a party or a lawyer for a party in the pending arbitration. (Standard 12(a).)

3) Provides, with respect to offers for employment or professional relationships *other than* as a lawyer, expert witness, or consultant, that:
    a) a proposed arbitrator must disclose a written disclosure to all parties, within 10 calendar days of service of notice of the proposed nomination or appointment, if, while that arbitration is pending, they will entertain offers of

employment or new professional relationships in any capacity other than as a lawyer, expert witness, or consultant from a party or a lawyer for a party, including offers to serve as a dispute resolution neutral in another case;

b) if the arbitrator discloses that they will entertain such offers of employment or new professional relationships while the arbitration is pending, the disclosure must also state that the arbitrator will inform the parties as required, below, if the arbitrator subsequently receives an offer while that arbitration is pending; and

c) a party may disqualify the arbitrator based on this disclosure by serving a notice of disqualification in the manner and within the time specified in Section 1281.91(b) of the Code of Civil Procedure (within 10 calendar days of service of notice of the proposed nomination or appointment). (Standard 12(b).)

4) Provides that if, in the disclosure made pursuant to 3), the arbitrator stated that they will entertain offers of employment or new professional relationships other than as a lawyer, expert witness, or consultant, the arbitrator must then, from the time of appointment until the conclusion of the arbitration, inform all parties to the current arbitration of any such offer and whether it was accepted, as specified. If the arbitrator fails to inform the parties of an offer or an acceptance, such failure constitutes a failure to comply with the arbitrator's obligation to make a disclosure required under these ethics standards. However, if an arbitrator has informed the parties in a pending arbitration about an offer as required, receiving or accepting that offer does not, by itself, constitute corruption in, or misconduct by, the arbitrator. Additionally, if the arbitrator has informed the parties in a pending arbitration about an offer as required, then the arbitrator is not subject to disqualification on the basis of that offer or the arbitrator's acceptance of that offer. (Standard 12(d).)

5) Requires an arbitrator to be truthful and accurate in marketing the arbitrator's services. An arbitrator may advertise a general willingness to serve as an arbitrator and convey biographical information and commercial terms of employment, but must not make any representation that directly or indirectly implies favoritism or a specific outcome. An arbitrator must ensure all personal marketing activities and any activities carried out on the arbitrator's behalf, including those of a provider organization that the arbitrator affiliates with, comply with this requirement. (Standard 17(a)).

6) Provides that an arbitrator must not solicit business from a participant in the arbitration while the arbitration is pending, and an arbitrator must not solicit appointment as an arbitrator in a specific case or specific cases.

a) For this standard, "solicit" generally means to communicate in person, by phone, or through real-time electronic contact to any prospective participant in the arbitration concerning the availability for professional employment of

the arbitrator in which a significant motive is pecuniary gain. (Standard 17(a).)

This bill:

1) Authorizes the State Bar to create a program to certify alternative dispute resolution firms.
    a) If the State Bar opts to create a certification program, the State Bar is required to establish procedures for a firm to become a certified alternative dispute resolution firm that include, but are not limited to, a requirement that the firm verify all of the following:
        i. the firm requires, at a minimum, its arbitrators to comply with the Ethics Standards for Neutral Arbitrators in Contractual Arbitration as adopted by the Judicial Council pursuant to Section 1281.85 of the Code of Civil Procedure;
        ii. the firm requires, at a minimum, its mediators to comply with ethical standards that are equivalent to the Rules of Conduct for Mediators in Court-Connected Mediation Programs for General Civil Cases as provided in Rules 3.850 to 3.860, inclusive, of the California Rules of Court;
        iii. the firm has procedures in place for persons to make complaints regarding the failure of an arbitrator or mediator of the firm to comply with the standards described in paragraph i) or ii), above; and
        iv. the firm has procedures to remedy failures of arbitrators or mediators to comply with the standards described in paragraph i) or ii), above.

2) Codifies the ethical rule, under Standard 12(a), described above, that, from the time of appointment until the conclusion of the arbitration, an arbitrator shall not entertain or accept any offers of employment or new professional relationships as a lawyer, expert witness, or consultant from a party or lawyer for a party in the pending arbitration.
    a) Prohibits, during that same time period, an arbitrator from entertaining or accepting, in a consumer arbitration case, any offers of employment as a dispute resolution neutral in another case involving a party or lawyer for a party in the pending arbitration unless all parties to the pending arbitration, including the lawyers in the arbitration, have conferred and agreed in writing, before any solicitation of the arbitrator, to allow offers of future employment as a dispute resolution neutral to be made to the arbitrator.

3) Adds to the current statutory list of disclosures that an arbitrator must make, with respect to consumer arbitration cases, any solicitation made within the last two years by, or at the direction of, the private arbitration company to a party or lawyer for a party to the consumer arbitration. Provides that, during the pendency of the

arbitration, no solicitation shall be made of a party to the arbitration or of a lawyer for a party to the arbitration.
   a) Solicitations made before January 1, 2025, are not required to be disclosed.

4) Allows a consumer to be given the option of having a dispute adjudicated pursuant to the Small Claims Act if a consumer contract requires a dispute under the contract to be adjudicated by a specific alternative dispute resolution entity and the dispute meets the requirements of the Small Claims Act (i.e. the action brought by a natural person does not seek more than $12,500.)

5) Authorizes depositions to be taken and discovery made in arbitration proceedings subject the provisions in § 1283.05 of the Code of Civil Procedure.

COMMENTS

1. Stated need for the bill

The author writes:

SB 940 makes various changes to the state arbitration law in order to better even the playing field for consumers. Arbitration is a formal method of alternative dispute resolution (ADR) involving a neutral third party who makes a binding decision. An arbitration decision or award is legally binding on both sides and enforceable in the courts unless parties stipulate otherwise. This process helps alleviate pressure on local and federal courts and can provide a cheaper and more expedient process for resolving disputes. It is most commonly used for commercial disputes, international trade, and consumer and employment matters.

The massive increase in consumer versus business arbitration has subsequently led to the rise of businesses that offer arbitration services for entities that require arbitration in consumer or employee contracts. Much like a court of law, these large firms decide the outcomes of complex and expensive disputes. Consumers and employees are often forced to arbitrate any issues that would have been judicable in court due to a provision in a contract agreement. The certification and regulations of these firms are limited.

Additionally, there is a significant repeat "employer/arbitrator pairing" effect: employers that use the same arbitrator on multiple occasions win more often and have lower damages awarded against them than do employers appearing before an arbitrator for the first time. Private arbitration firms that administer the arbitrations (firms like JAMS and AAA) often operate with defendant companies on a regular basis without disclosing a conflict of interest to the consumer plaintiff.

SB 940 attempts to solve many of the issues that plague the arbitration process in California by changing solicitation practices, creating a process for state bar certification, and making forum selection more equitable.

2. Background on arbitration

Generally, supporters of arbitration assert that private arbitration provides a cheaper, faster, more efficient form of dispute resolution than the overburdened courts, because they are able to limit discovery, set their own rules for presenting evidence, schedule proceedings at their own convenience, and select the third party who will decide their cases. However, critics of private arbitration contend that it is an unregulated industry, which is often costly and unreceptive to consumers. Consumer advocates view mandatory arbitration as putting consumers and businesses employees on an uneven playing field that creates an inclination by arbitrators to decide cases in favor of businesses. They further view arbitration as an expensive process which also puts consumers at a disadvantage by imposing procedural limitations on their ability to pursue their legal claims. This is especially true in cases where the business has pre-selected the company in the contract who will arbitrate the claim. Critics contend that arbitrators have far less incentive to be fair to both sides when they owe their engagement to the business that will repeatedly appear before them, unlike the consumer party who did not choose the arbitration company and is not likely to be the source of future work for the arbitrator.

On March 1, 2016, the Senate Judiciary Committee held an informational hearing on the topic of private arbitration agreements, entitled "The Federal Arbitration Act (FAA), the U.S. Supreme Court, and the Impact of Mandatory Arbitration on California Consumers and Employees." In that hearing, many issues facing consumers and employees who are subject to arbitration clauses contained in standardized, take-it-or-leave-it, or "adhesive" contracts were brought to light. That hearing also brought to light the various difficulties facing the state in addressing some of the underlying, fundamental harms faced by consumers and employees as a result of federal preemption and U.S. Supreme Court precedent interpreting the FAA.

3. Federal Preemption and the FAA

The FAA was enacted by the U. S. Congress in 1925 in response to widespread judicial hostility to arbitration agreements. Section 2 of the FAA generally provides that a written provision in any contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. (*See* 9 U.S.C. Sec. 2; similar language is contained within the CAA at Code Civ. Proc. § 1281.)

The concept of preemption derives from the "supremacy clause" of the federal Constitution, which provides that the laws of the United States "shall be the supreme Law of the Land."[1] Courts have typically identified three circumstances in which federal preemption of state law occurs:

> (1) express preemption, where Congress explicitly defines the extent to which its enactments preempt state law; (2) field preemption, where state law attempts to regulate conduct in a field that Congress intended the federal law exclusively to occupy; and (3) conflict preemption, where it is impossible to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.[2]

In assessing whether a state law is preempted by the FAA, three key aspects of the law surrounding arbitration and preemption are especially relevant. First, the federal courts have ruled that the FAA was intended to promote arbitration.[3] Second, state laws or rules that interfere with the enforcement of arbitration agreements are preempted, except on such grounds as exist at law or in equity for the revocation of any contract.[4] Third, state laws that explicitly or covertly discriminate against arbitration agreements as compared to other contracts are also preempted.[5]

4. Choice of law provisions in consumer contracts

California has a history of protecting against potentially one-sided contractual arrangements. Most useful to the discussion of this bill is Section 925 of the Labor Code, which was enacted in 2016 via SB 1241 (Wieckowski, Ch. 632, Stats. 2016). That statute prohibits employers from requiring an employee who resides and works in California, as a condition of employment, to agree to a provisions that either: (a) requires the employee to adjudicate outside of California a claim arising in California; or (b) deprives the employee of the substantive protection of California law with respect to a controversy arising in California. This bill seeks to enact a similar provision for consumer contracts. The bill, just like Labor Code Section 925, provides that any such provision in a contract with a consumer is voidable by the consumer. If the consumer requests that such a provision is void, then the matter is to be adjudicated in California and California law shall govern the dispute. Under the bill, a court may award a consumer who is enforcing their rights under this provision reasonable attorney's fees in addition to injunctive relief and any other remedies available. The bill specifies that adjudication includes both arbitration and litigation. Lastly, the bill states this provision

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[1] U.S. Const., art. VI, cl. 2.
[2] *English v. Gen. Elec. Co.* (1990) 496 U.S. 72, 78-80.
[3] *Epic Sys. Corp. v. Lewis* (2018) ___U.S.___ [138 S.Ct. 1612, 1621].
[4] 9 U.S.C. Sec. 2; *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339.
[5] *Epic Sys. Corp.*, 138 S.Ct. at 1645-1646.

only applies to a contract entered into, modified, or extended on or after January 1, 2025.

This provision could potentially implicate the FAA. However, a California appellate court recently opined on this issue in regards to Labor Code Section 925, and stated that this section does not on its face conflict with the FAA. (*Zhang v. Superior Court of Los Angeles County* (2022) 85 Cal.App.5th 167 at 183.)[6] As this provision is substantially similar to Section 925 of the Labor Code, it is likely that a court could find it also does not facially conflict with the FAA.

5. Small claims court provision

In California, civil cases are divided into three separate categories roughly depending on the amount of money in controversy. Generally, cases that involve a demand of $12,500 or less for natural persons are adjudicated in small claims courts. Each county is mandated to establish such small claims divisions and to provide individual assistance to advise small claims litigants and potential litigants without charge. These cases are extremely informal, attorneys are generally not permitted to take part, and plaintiffs have a limited right to appeal. The object of such procedures is to dispense justice promptly, fairly, and inexpensively.

This bill seeks to give a consumer the option of choosing to have a claim adjudicated in small claims court instead of through arbitration if the amount of the claim meets the requirements of the Small Claims Act. The bill specifies that it applies to a contract entered into, modified, or extended on or after January 1, 2025. This provision could potentially implicate the FAA since it allows a consumer to choose not to arbitrate a claim subject to an arbitration agreement. However, it should be noted that some arbitration companies specifically include a similar provision in their arbitration rules. For example, AAA's consumer arbitration Rule 9 allows consumers and businesses to seek relief in a small claims court for disputes or claims that fall within the scope of the small claims court's jurisdiction.[7] JAMS also states on its website that it will only arbitrate claims if the arbitration contract meets certain "minimum standards of fairness" that include, among other things, that "no party shall be precluded from seeking remedies in small claims court for disputes or claims within the scope of its jurisdiction."[8] The fact that two of the largest arbitration providers in the country recognize that adjudicating claims eligible for small claims court may not be well suited for arbitration indicates that this provision may not frustrate the purpose of the FAA.

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[6] This case is currently pending appeal in the California Supreme Court; however, the issues on appeal are not whether or not Section 925 of the Labor Code is preempted under the FAA, but questions of law related to other contract issues. (*Zhang v. Superior Court* (S277736) review granted Feb. 15, 2023.)
[7] Rule 9, AAA Consumer Arbitration Rules, available at https://www.adr.org/sites/default/files/Consumer-Rules-Web_0.pdf at p. 16.
[8] *Minimum Standards for Arbitration Procedures*, JAMS, (May 1, 2024), available at https://www.jamsadr.com/consumer-minimum-standards/.

6. Solicitation prohibitions for arbitrators

In 2001, SB 475 (Escutia, Ch. 362, Stats. 2001) was enacted to require the Judicial Council to adopt ethical rules for arbitrators as a result of a mutually shared concern by then Governor Davis, former Chief Justice George, and former Senator Escutia, the Chair of this Committee at that time, that the Legislature take a look at the growing use of private judges and how the growing use of private judges raised serious questions of fairness and the creation of a dual justice system that favors the wealthy litigant over the poor litigant. In 2002, the Ethics Standards for Neutral Arbitrators in Contractual Arbitration were adopted by the Judicial Council and are "intended to guide the conduct of arbitrators, to inform and protect participants in arbitration, and to promote public confidence in the arbitration process," and require covered arbitrators to make basic disclosures regarding potential conflicts of interest and to comply with certain standards of conduct. (Standard 1(a).) These ethical standards have been amended over the years. In addition, the CAA requires a proposed neutral arbitrator to make specified disclosures and allows a party to disqualify the arbitrator within certain timelines based on those disclosures or improper non-disclosures. (Code Civ. Proc. § 1281.9.) These ethical standards and requirements for neutral arbitrators are not subject to negotiation and may not be waived. (Code of Civ. Proc. § 1281.85.)

This bill seeks to build upon the current ethical rules and disclosure requirements under California law by: (1) generally prohibiting an arbitrator from being offered future cases involving either party during the pendency of the arbitration, without the prior written consent of both parties, including the attorneys in the arbitration; and (2) requiring arbitrators to disclose certain targeted solicitation activities made by, or at the direction of, the private arbitration company to a party or a lawyer for a party to a consumer arbitration, and prohibits such activities during the pendency of an arbitration.

The California Employment Lawyers Association, a supporter of the bill, provides an example of why these provisions are needed stating:

> One of our member's recent arbitration experience illustrates how the "repeat player" phenomenon loads the deck against employees in mandatory arbitration. In 2013, our member's client sued his employer to recover unpaid sales commissions that were owed to him; however, buried in his employment "agreement" was a clause requiring all disputes to go to arbitration. During the pendency of the arbitration, the arbitrator disclosed that he had accepted forty four additional matters from the same defense firm representing the defendant in that case. He is now awaiting a motion to disqualify the arbitrator because of the bias and prejudice created by the arrangement between the arbitrator and the defense.

These provision of the bill are substantially similar to SB 1078 (Jackson, 2016), which was vetoed by then Governor Brown. Governor Brown stated the following in the veto message:

Arbitrators in California are already subject to stringent disclosure requirements under existing state law and Judicial Council standards. I am reluctant to add additional disclosure rules and further prohibitions without evidence of a problem. Further, the existing Judicial Council procedure for amending arbitrator ethics standards is a deliberative and public process that can more appropriately consider additional requirements.

7. Authorizes depositions and discovery in arbitration

Under the CAA, depositions are allowed in any dispute, controversy, or issue arising out of or resulting from any injury to, or death of, a person caused by the wrongful act or neglect of another subject to the provisions in Section 1283.05 of the Code of Civil Procedure. However, they are only allowed in other instances if the arbitration agreement allows or the parties agree to incorporate the provisions in Section 1283.05 of the Code of Civil Procedure. Section 1283.05 of the Code of Civil Procedure specifies how depositions and discovery is to be conducted in arbitration cases. That section states that the arbitrator has the power to enforce the rights, remedies, procedures, duties, liabilities, and obligations of discovery by the imposition of the same terms, conditions, consequences, liabilities, sanctions, and penalties as can be or may be imposed in like circumstances in a civil action by a superior court of this state under the provisions of this code, except the power to order the arrest or imprisonment of a person. (Code of Civ. Proc. § 1283.05(b).) It also only allows depositions to be taken unless leave to do so is first granted by the arbitrator. (*Id*. at subd. (e.).) This bill would instead allow for depositions to be taken in any arbitration, not just ones resulting from any injury to, or death of, a person caused by the wrongful act or neglect of another, and also allows discovery to be conducted as provided under Section 1283.05 of the Code of Civil Procedure.

The California Dispute Resolution Council, who is in opposition to this bill, writes that they support this provision but seek an amendment to state that discovery shall only be taken when leave to do so is granted by the arbitrator in the same manner that the bill does for depositions.

8. Certification

This bill authorizes the State Bar to create a program to certify alternative dispute resolution firms. If the State Bar decides to create such a program, the bill requires it to establish procedures for a firm to become certified that include, but are not limited to, verifying that the firm requires its arbitrators to comply with the Ethics Standards for Neutral Arbitrators in Contractual Arbitration as adopted by the Judicial Council pursuant to Section 1281.85 of the Code of Civil Procedure and that it requires its mediators to comply with ethical standards that are equivalent to the Rules of Conduct for Mediators in Court-Connected Mediation Programs for General Civil Cases as provided in Rules 3.850 to 3.860, inclusive, of the California Rules of Court.

Additionally, the firm must verify it has procedures in place for persons to make complaints regarding the failure of an arbitrator or mediator of the firm to comply with those standards and has procedures to remedy failures of arbitrators or mediators to comply with those standards. The State Bar already certifies licensed attorneys as specialists in certain areas of the law pursuant to California Rule of Court 9.3.5.

9. Contract clause

The bill does not appear to violate Article I, Section 10 of the U.S. Constitution, known as the Contract Clause, which provides that, "[n]o state shall…pass any…law impairing the obligation of contracts." (U.S. Const., art. I, § 10.) It is well-established that the Contract Clause does not prevent the government from regulating the terms of future contracts. Given that this bill only applies prospectively to contracts entered into after January 1, 2025, the Contract Clause is not implicated.

10. Proposed amendment

The author has proposed an amendment to State Bar certification provisions described in Comment 8, above, which would specify that the complaint procedures a firm has for mediators must be substantially similar to the complaint procedures specified in Article 3 (commencing with Rule 3.865) of Chapter 3 of the Rules of Court.

The specific amendment is: [9]

On page 4, in line 16, after the period insert:

For mediators, those complaint procedures shall be substantially similar to the complaint procedures specified in Article 3 (commencing with Rule 3.865) of Chapter 3 of Division 8 of Title 3 of the California Rules of Court.

11. Statements in support

The California Employment Lawyers Association writes in support stating:

> Arbitration Service Providers ("Providers") play a critical role in the arbitration process. They create the rules, assemble the pool of arbitrators from which arbitrators for specific cases will be drawn, create the arbitrator lists that the parties use to strike and rank arbitrators, and in some cases actually appoint the arbitrator(s) for a specific case and rule on parties' challenges to arbitrators' service. But the current rules are deficient in numerous respects. […]

[9] The amendments may also include technical, nonsubstantive changes recommended by the Office of Legislative Counsel.

> The impact of arbitrators' repeat dealings with the same party is very troubling. A recent study by Cornell University's ILR Review journal examined results of 11 years of employment arbitration cases administered by the American Arbitration Association (AAA). Their findings show a significant repeat "employer/arbitrator pairing" effect: employers that use the same arbitrator on multiple occasions win more often and have lower damages awarded against them than do employers appearing before an arbitrator for the first time.[…]
>
> Another ethical issue that SB 940 addresses is a market reality that creates serious financial conflicts between Providers and employers.[…] For example, a[] Provider like JAMS stands to make thousands, if not millions of dollars, if they are named as the arbitration service provider in a company's standard employment or consumer agreements. Right now, these providers are putting on seminars on "how to win in arbitration" and holding private meetings with companies to try to lure their business. In one situation, we were informed that a proposed specialized panel of arbitrators was shown to prospective arbitration users in advance in an effort to get their business. Those kinds of practices, whether done by the arbitrators or by their agents, should not be permitted. And Providers and repeat players in arbitration should be required to disclose marketing and solicitation of cases.

The Consumer Attorneys of California write that they support the prohibition on sellers forcing consumers into out-of-state arbitrations stating:

> Forced arbitration provisions are an ever-growing aspect of consumer transactions and employment relationships. Over half of America's nonunionized workforce, about 60 million people, has been forced to sign arbitration agreements as a condition of employment. Under these terms, consumers, and workers whose rights have been violated cannot pursue their claims in court, and instead must submit their claims to an arbitration proceeding that overwhelmingly favors businesses and employers. These agreements routinely bar class claims, meaning the employee is forced to proceed alone in the arbitration. An increasing number of businesses are imposing choice of venue and choice of law contractual provisions on Californian consumers to evade California law. These contractual provisions allow businesses to pick laws or venues of other states (and even other countries) to govern a consumer's legal dispute if one arises. Accordingly, Californian consumers who are forced to agree to these contractual terms must travel to another state or country to litigate or arbitrate a legal claim. Given the expense and burdens of going to another forum, this ultimately means that a consumer is unlikely to vindicate his or her legal rights.

12. Statements in opposition

A coalition of various organizations, such as the Civil Justice Association of California and the California Chamber of Commerce, write in opposition to the bill stating:

> Because some arbitration companies offer dozens or hundreds of arbitrators, any one of whom could be providing service as an arbitrator at any time for a party that frequently uses arbitration, SB 940 would ban reasonable and routine communications by arbitration companies with their most frequent users.
>
> SB 940 would also prohibit an arbitrator, during an arbitration, from entertaining any offers of employment as a dispute resolution arbitrator from a party to the arbitration. If a party to an ongoing arbitration is a frequent user of arbitration, this ban constitutes an unworkable barrier to the arbitrator scheduling subsequent work and creates logistical challenges for arbitration companies as they try to keep track of which arbitrators are available or unavailable.[…]
>
> SB 940 would create impractical and logistical barriers that reduce the effectiveness of arbitration as a faster, less expensive alternative to civil litigation. […] Arbitration allows workers, consumers, and businesses to resolve disputes without costly, lengthy lawsuits in a less contentious and burdensome manner that frees congested civil courts to administer justice in the complicated cases that are not suitable for the arbitration process. Legislation frustrating its use, without a compelling public policy reason, should be avoided.

The California Dispute Resolution Council, who is in opposition to this bill, writes that they believe:

> The [certification] process as set forth in the bill will be misleading. Certification often tells users that a certified business is superior to and has more experience than a business that is not certified. In addition, certification may aid users to discern for themselves the competency of the business. Yet, under SB 940, a firm can become certified almost immediately after its creation without ever having to conduct an arbitration or mediation and before it acquires either competency or experience. Secondly, the users of arbitration and mediation are frequently attorneys who are either aware of the reputed competency or experience of an arbitrator or mediator, or have the means to find out. CDRC recognizes that there are occasional circumstances where a party appears in an arbitration or mediation without an attorney. In that situation, the unrepresented party is the user and may not be aware of the ethical standards or know how to file a complaint.

The California Dispute Resolution Council also writes in opposition to the disclosure requirements and prohibitions on solicitations stating:

> The typical practice of most providers is to send a list of proposed arbitrators to the attorneys representing the parties (or to a party in the less frequent instances where the party is self- represented). The recipients then select the arbitrator and the arbitrators on the list who are not selected are likely to be unaware that they were under consideration. Even if providers were required to notify

arbitrators when the list is sent, there would be no need for the proposed statute because the arbitrator will have had no contact with the attorneys or parties during the process and would have had no influence over or be influenced by the provider's decision to include the arbitrator's name on the list.

SUPPORT

California Employment Lawyers Association
Consumer Attorneys of California

OPPOSITION

American Property Casualty Insurance Association
California Building Industry Association
California Business Properties Association
California Chamber of Commerce
California Dispute Resolution Council
California Retailers Association
Civil Justice Association of California
MC3 Mediator Certification, Inc.

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 1078 (Jackson, 2016) S*ee* Comment 4 above.

SB 1241 (Wieckowski, Ch. 632, Stats. 2016) S*ee* Comment 4 above.

AB 267 (Swanson, 2011) was substantially similar to AB 335 (Fuentes, 2009) and AB 1403 (Swanson, 2007), and was vetoed for similar reasons by Governor Brown.

AB 1090 (Monning, Ch. 133, Stats. 2009.) specified that the ethics standards adopted by the Judicial Council are nonnegotiable and shall not be waived.

AB 335 (Fuentes, 2009) was substantially similar to AB 1403 (Swanson, 2007) and was vetoed by Governor Brown for similar reasons.

AB 1403 (Swanson, 2007) would have made void and unenforceable as against public policy any provision in an employment contract that requires an employee to use a forum other than California, or to agree to a choice of law other than California law, to resolve any dispute with an employer regarding employment-related issues that arise in California. The bill was vetoed by Governor Brown, stating, this "bill creates

unnecessary and unhelpful uncertainties for the employers and employees concerning issues of federal preemption."

AB 1740 (Assembly Judiciary Committee, 2005) would have provided that an agreement entered into or renewed on or after January 1, 2006, establishing a forum outside of this state for the hearing of specified matters relating to a California consumer would be contrary to public policy and void and unenforceable. The bill was never set for a hearing in this Committee.

SB 475 (Escutia, Ch. 362, Stats. 2001) was enacted to require the Judicial Council to adopt ethical rules for arbitrators.

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