

Arbitration and Mediation

STRATEGIC CONSIDERATIONS

Arbitration

Judicial Arbitration

California Rules of Court, Rule 3.811. Cases subject to and exempt from arbitration

a) Cases subject to arbitration

Except as provided in (b), the following cases must be arbitrated:

1. In each superior court with 18 or more authorized judges, all unlimited civil cases where the amount in controversy does not exceed \$50,000 as to any plaintiff;
2. In each superior court with fewer than 18 authorized judges that so provides by local rule, all unlimited civil cases where the amount in controversy does not exceed \$50,000 as to any plaintiff;
3. All limited civil cases in courts that so provide by local rule;
4. Upon stipulation, any limited or unlimited civil case in any court, regardless of the amount in controversy; and
5. Upon filing of an election by all plaintiffs, any limited or unlimited civil case in any court in which each plaintiff agrees that the arbitration award will not exceed \$50,000 as to that plaintiff.

(Subd (a) amended effective January 1, 2004.)

Cal Rules Court, rule 3.811(b)

b) Cases exempt from arbitration

The following cases are exempt from arbitration:

1. Cases that include a prayer for equitable relief that is not frivolous or insubstantial;
2. Class actions;
3. Small claims cases or trials de novo on appeal from the small claims court;
4. Unlawful detainer proceedings;
5. Family Law Act proceedings except as provided in Family Code section 2554;
6. Any case otherwise subject to arbitration that is found by the court not to be amenable to arbitration on the ground that arbitration would not reduce the probable time and expense necessary to resolve the litigation;
7. Any category of cases otherwise subject to arbitration but excluded by local rule as not amenable to arbitration on the ground that, under the circumstances relating to the particular court, arbitration of such cases would not reduce the probable time and expense necessary to resolve the litigation; and
8. Cases involving multiple causes of action or a cross-complaint if the court determines that the amount in controversy as to any given cause of action or cross-complaint exceeds \$50,000.

CCP Section 1141.20

- a) An arbitration award shall be final unless a request for a de novo trial or a request for dismissal in the form required by the Judicial Council is filed within 60 days after the date the arbitrator files the award with the court.
- b) Any party may elect to have a de novo trial, by court or jury, both as to law and facts. Such trial shall be calendared, insofar as possible, so that the trial shall be given the same place on the active list as it had prior to arbitration, or shall receive civil priority on the next setting calendar.

Contractual Arbitration

Plaintiffs will resist. Why?

- Better chance of recovery with a sympathetic jury
- No right of appeal with arbitration
- Costs

Maximizing Success

- Written Agreement
- Clear consent to arbitration
- Language which states that the parties have agreed to have their dispute submitted to arbitration and that the arbitrator's award shall be binding
- Language which states that the parties agree to have judgment be entered upon the award
- Specific where the award will be enforced
- State how the arbitrator will be selected
- Agreement must not be one sided or lopsided

Armendariz v. Foundation Health, 24 Cal. 4th 83 (2000)

- Seminal California case on arbitration agreements in employment context
- Court held that discrimination claims asserted pursuant to California's Fair Employment and Housing Act ("FEHA") may be subject to binding arbitration
- Must have consideration in exchange for the employee agreeing to arbitration
- Neutral arbitrator
- Allow for more than minimal discovery
- Require a written decision by the arbitrator
- Allow for types of relief otherwise available in court
- Not require employees to pay unreasonable costs or any arbitrator fees or expenses

Lamps Plus, Inc. v. Varela, No. 17-988 (Apr. 24, 2019)

- United States Supreme Court
- 5-4 Decision
- Courts may compel class action arbitration only where the parties expressly declare their intention to be bound by such actions in their arbitration agreement
- Courts are prohibited from inferring from an ambiguous agreement that parties have consented to arbitrate on a class wide basis

Mediation

Mediation: A non-binding resolution

- Private Mediation
 - Costs Money
- Court Provided Options
 - No cost or reduced fee
- Examples for Various Courts
 - Los Angeles Superior Court: Mandatory Settlement Conference
 - San Diego Superior Court: Reduced cost mediators from panel
 - Orange County Superior Court: Reduced cost mediators from panel or Early Neutral Evaluation
 - United States District Court for the Central District of California: (1) Settlement Conference with judge; (2) mediation with neutral selected from panel (first 3 hours free); or (3) private mediation
 - United States District Court for the Southern District of California: Early Evaluation Conference

Mediation and Confidentiality

- Evid. Code § 1119: Confidential
 - Communications, negotiations, settlement offers
 - Statements made and writings prepared in connection with mediation
 - Evidence
 - Mediation Statements
 - Negotiations
 - Communications
- Evid. Code § 1120: Doesn't make admissible evidence non-admissible
- Evid. Code § 1121: No report, opinion, recommendation, or finding can be submitted to Court by mediator
- Evid. Code § 1127: Mediator cannot testify and can seek attorney's fees and cost against party seeking testimony

Mediation: Disclosure of Confidentiality

Cal. Evid. Code § 1129

- Effective January 1, 2019
- Attorney must provide the client with confidentiality disclosure regarding mediation and obtained client's signed acknowledgement
- *Cassel v. Super. Ct.*, 51 Cal. 4th 113

Mediation Strategies

- How to begin
 - Introduction argument of case with all parties
 - Separate rooms for all parties
- Bracketing
- Mediator Proposals

Enforcing Agreements Reached at Mediation

- Draft release v. memorandum of understanding
- Signed by opposing party
- Language that it is enforceable or binding or words to that effect
- Contains all essential terms
 - Confidentiality Provision
 - Cal. Civ. Code § 1542 Waiver
 - Confession of Judgment
 - Acceleration Clause
 - Retention of Jurisdiction

Questions?



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