

*Symposium**

Pre-dispute Arbitration Clauses—Can They All Be Right?

By JAY FOLBERG**

CALIFORNIA IS IN the eye of the storm over the enforcement of pre-dispute arbitration clauses in consumer and employment cases. These non-negotiated agreements to arbitrate all future disputes, imbedded in contracts that are offered on a “take it or leave it basis,” curtail any meaningful opportunity to pursue a claim in court and limit the right to be part of a class action lawsuit. Plaintiffs’ attorneys have long opposed pre-dispute arbitration clauses and, along with consumer advocates, have lobbied for restrictions on their use. State legislative and judicial efforts to directly limit the enforcement of arbitration clauses have been thwarted by the shield provided by the Federal Arbitration Act (“FAA”) along with the preemption resulting from the Supremacy Clause. The California Legislature, aware of the preemption obstacle and the increasing use of private arbitration, passed bills that impact the implementation of “mandatory” arbitration by imposing the nation’s most strict ethics standards and disclosure requirements on arbitrators and provider organizations. These requirements have provoked judicial challenges and intense debate about the use of pre-dispute arbitration clauses in employment and consumer contracts.

As a self-confessed wobbler on the issue of mandatory arbitration,¹ I first suggested this symposium topic to the University of San Francisco Law Review editors and then welcomed the opportunity to

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1. The author chaired the Blue Ribbon Panel of Experts on Arbitrator Ethics, appointed by the California Judicial Council, which was mandated by California legislation to

read the timely articles they received from top scholars on the subject. Now that I have read these excellent articles, I sympathize with the judge who, after hearing a good argument by one lawyer, said “yes, you are right.” Then, after hearing the argument of opposing counsel, said “yes, you are also right.” The judge’s clerk whispered to the judge, “your Honor, they cannot both be right.” The judge responded, “yes, you are right, too.”²

The articles are summarized by my colleague Josh Davis in his essay, which follows, and I will not duplicate his effort or attempt to match his insightful analysis. Jean Sternlight and Stephen Ware appear to know one another’s reasoning and arguments as well as Presidential candidates on the debate circuit together who can anticipate what the other will say. They are each forceful and seem passionate in arguing why consumer and employment pre-dispute arbitration clauses should or should not be enforced. Can two eminent and knowledgeable scholars be addressing the same issue when they come to such different conclusions? Professor Sternlight in her article, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, zeroes in on the constitutional right to a jury trial and the strict requirements for waiver of that important safeguard. Professor Ware, in his response, focuses on the FAA and preemption. He too is opposed to “mandatory arbitration” but defines voluntary and mandatory differently from Sternlight.

At the risk of sounding like the above described ambivalent judge, they could both be right. Sternlight is narrowly focused on what an employee or consumer is potentially giving up. She would encase that decision with protection standards judicially created for the waiver of the right to a jury trial under the federal and state constitutions. Sternlight juxtaposes the right to a jury trial with the privately imposed mandate to use arbitration. Ware focuses more broadly on what the consumer or employee is getting by contracting for goods, services, or a job, and he supports the current judicial approach, in both federal and state courts, of only allowing more limited contract defenses as grounds to invalidate pre-dispute arbitration clauses. He contrasts the decision to accept a pre-dispute arbitration clause, even

create the arbitrator ethics standards. In this capacity, he served as a mediator between those for and against pre-dispute arbitration clauses.

2. This story takes many forms from multiple sources. Most memorable is the version told by Judge Daniel Weinstein (Ret.), who attributes the story to his father, a Rabbi, when explaining the rabbinical avoidance of imposed judgments. Daniel H. Weinstein, *You’re Right, Too or Why Mediation is Very Jewish* (1992) (unpublished manuscript, on file with the author).

on a take it or leave it basis, with the choice of doing without the goods or services or particular job, or paying more for the choice of how disputes will be resolved. (My thinking may be influenced by Josh Davis's analysis that the differences between Sternlight and Ware can be explained by her view of mandatory arbitration as a trial substitute and Ware's view of pre-dispute arbitration clauses as a dispute settlement device.) Each is correct in how they reason within their frame of reference or focus and given where they start. Of course it would be easier to side with Ware if there were no Seventh Amendment or equivalent state constitutional provisions, and with Sternlight if there were no Federal Arbitration Act and Supremacy Clause. However, these contradictory anchors do exist and pull their arguments in opposite directions.

Lewis Maltby, in his article, *Employment Arbitration and Workplace Justice*, does not side directly with either Sternlight or Ware, nor does he address the Seventh Amendment and FAA-preemption issues. He asks, not necessarily referring to Sternlight and Ware, how attorneys with similar values can see the increased use of employment pre-dispute arbitration clauses in such opposite ways? Maltby believes the answer lies in their different perceptions of how well our judicial system provides work place justice. Although he states that "[a]rbitration as a condition of employment is wrong, and should be opposed," he appears to either assume Sternlight and Ware are both right (or both wrong). More accurately, his article addresses access to a forum and justice for workers, rather than legal rights. In effect, he cuts through the theory and asks "arbitration compared to what?" Maltby answers this question by comparing the results of arbitration to litigation, from an employee's perspective, and finds that arbitration compares favorably. His most powerful conclusion, even if reached through extrapolation of quantifiable data, is that pre-dispute arbitration clauses double the number of employees able to actually pursue a claim.

Pre-dispute arbitration clauses in consumer and employment cases are no longer "one-size fits all" single agreements to arbitrate. They are drafted by sophisticated attorneys who have incorporated into these clauses multiple waivers of remedies and procedural options. Professor David Schwartz in his article refers to these exculpatory provisions as "remedy-stripping" clauses. Professor Schwartz begins where Sternlight and Ware stop. He assumes, for purposes of his article, that the consumer or employee's basic waiver of the right to trial is enforceable and that the resulting arbitration award on the merits of the claim will have the force of *res judicata*. This is how

arbitration works and why it is the subject of debate in this symposium. When the contract clause includes purported limitations on the nature of otherwise available claims, remedies, and procedures, does the completed arbitration preclude a court from considering the matters not arbitrated? In other words, if the clause limits a dismissed worker to actual damages for breach of the employment contract and expressly precludes any other damages or remedies, at law or in equity, even if provided by statute, does the arbitration award have res judicata effect on the tort or statutory claims, and remedies not arbitrated? Schwartz argues that courts should give the compelled arbitration "the narrowest preclusive scope that is consistent with established preclusion principles." He includes a separate analysis of why class actions limitations should not collaterally estop a successful plaintiff in arbitration from litigating classwide liability. So, Professor Schwartz may side with Professor Sternlight, but offers litigation hope for consumers and employers, even if Ware is right and Sternlight is not.

Ruth Glick provides an arbitrator's perspective on the new California legislation resulting from the proliferating use of pre-dispute arbitration clauses. As mentioned earlier, California has, in its own way, partially dealt with the FAA and preemption issues by legislating arbitrator ethics and disclosure requirements, which are most strict when applied to what Glick refers to as "imposed arbitration." (The national response to this California approach has confirmed that some consider California to be a national trend setter, while others view the state as a laboratory for bad government and weird ideas.) True to her exemplary neutrality as a respected arbitrator, Glick neither supports nor defends the imposition of pre-dispute arbitration clauses but does recognize it as a problem. She reports on the practical effect of the new arbitrator ethics standards promulgated by the California Judicial Council and arbitrator reactions to them, as well as on the court challenges based on preemption by the FAA and by the Securities and Exchange Act. Glick observes that although ethics standards may seem "to balance the inequities of non-negotiated contracts," they create unintended consequences for consumers/employees and "destabiliz[e] non-consumer arbitrations as well." She suggests several possible solutions that Sternlight and other critics of mandatory arbitration might agree to, like opt-in or opt-out provisions, as a type of deferred consent. Of course, she recognizes that those who impose arbitration clauses would not find these options satisfactory, but she offers other ideas and encourages more thoughtful deliberation, so as not to further destabilize commercial arbitration.

Well, even if all the contributors to this symposium cannot all be right, we know that the decision of the editors of the University of San Francisco Law Review to convene this symposium was right. Both the live symposium and this printed version have contributed to the dialogue and literature on this timely and important subject.

