**Consumer and Employment in California program**

5/31/23—12:30 p.m.

Presented by: Kim Loew Richard Chernick

**Third Party Discovery** (*see* recent Institute program on this subject for more details)

1. The FAA severely restricts discovery under FAA § 7
2. No discovery depos
3. Doc subpoenas enforced only if an arbitrator is present at a hearing (*see* *Hay Group* opinion and concurrence – “work-around” –360 F.3d 404 (3d Cir. 2004) (in tripartite cases only one arbitrator need attend in person)
4. No video/zoom hearing permitted for work-around (11th Cir. Case)
5. California law has recently been interpreted to restrict third party discovery unless the parties have agreed to incorporation of the California Discovery Act (CCP §§ 1283.1, 1283.05)
   1. *Aixtron v. Veeco*, 52 CA 5th 359 (2020)
   2. Unclear if agreement to incorporate the Discovery Act must be in the clause or can be a later (post-dispute) agreement
   3. Better view – parties ay agree at any time but should embody that agreement in an amendment to the clause or an order in the arbitration
6. This creates a conflict -- California law has been interpreted in the case of imposed arbitrations (and particularly statutory rights cases) to require, as an element of due process, that the consumer/employee has reasonable access to relevant evidence (*Armendariz*)
   1. We addressed this by amending our rules to allow third party discovery in consumer and employment cases (Rule 17(e))
   2. This provision has not been tested but we believe it is consistent with California law and not inconsistent with FAA (no preemption)
7. Do not overlook CCP § 1283 – preservation of testimony of a witness who will be unavailable to testify at the hearing (parity or non-party) – authorizes arbitrator to order preservation depositions
8. We believe that arbitrators have a duty to assist the parties to a process that assures reasonable opportunity to present all claims and defenses; arbitrator should be pro-active in promoting this goal – we are the process experts . . .
9. Q&A???

**Mass Torts:**

1. We apply the parties’ arbitration agreement without exception
2. This means that if the clause prevents consolidation, we will not allow it unless all parties and counsel agree
3. If the clause requires individual determinations of separate arbitrations, that is the process we provide
   1. For example, a Respondent’s effort to coordinate discovery among several cases to save unnecessary duplication or expense is not permitted unless all parties and all counsel agree
   2. We do not offer multidistrict-like procedures across multiple cases (as some providers allow) unless agreed by all
4. Because each case is unique,
   1. We do not share information/orders/awards across multiple cases or with other neutrals
   2. We do not consider decisions from other, similar cases (although we usually are unsuccessful in telling parties we are not interested in that sort of information
   3. We do not cite our own decisions in repetitive issues, but we are able to utilize that work product in subsequent cases – *i.e.,* no need to re-research or re-read cases relied on previously
   4. We bill for time actually incurred in each individual case – if prior orders help us to be more efficient in later cases, the parties will benefit from that efficiency (without noting that on billing entries)
5. In rare circumstances we will decide an issue institutionally (JAMS) in order to assure compliance with EMS/CMS (*e.g*., CCP § 998 issue)
6. Q&A???

**New Statutory Provisions re Payment in Consumer/Employment Cases (CCP §§ 1281.97, 1281.98, 1281.99)**

1. **Where there is a material breach of these provisions, the consumer may** 
   1. **withdraw from the arbitration and return to court**
   2. **compel arbitration and get order requiring payment and reasonable attorneys’ fees and costs**
   3. **Continue with the arbitration if the provider allows it**
   4. **Pay the required fees and seek reimbursement later (in the arbitration or in a separate action)**
2. **A material breach is effectively self-determined – either the payment was timely made , or it was not**
   1. **This is not subject to adjudication –rather the consumer/employee simply makes that determination/decision**
   2. ***See* *Williams v. West Coast Hospitals*, 86 CA5th 1054 (2022)**
3. **These provisions are not preempted by the FAA (*Gallo v. Wood Ranch*. 81 CA5th 621 (2022); *Espinoza v. Superior Court*, 83 CA5th 761 (2022)**
   1. **There is one federal district court case finding preemption(distinguishable) – *Belyea v. Greensky*, \_\_ F.Supp. 3d \_\_, 2022 WL 14965532 (N.D. Cal. 2022),**
   2. **We believe the no-preemption authority is correct**
4. **Sanctions are authorized by §§ 1281.98 and 1281.99**
   1. **If the consumer/employee proceeds in court, the court shall impose sanctions on the breaching party per § 1281.99**
   2. **If the matter proceeds in arbitration, the arbitrator shall impose “appropriate sanctions” on the breaching party, including monetary sanctions, issue sanctions, evidence sanctions or terminating sanctions. CCP 281.98**