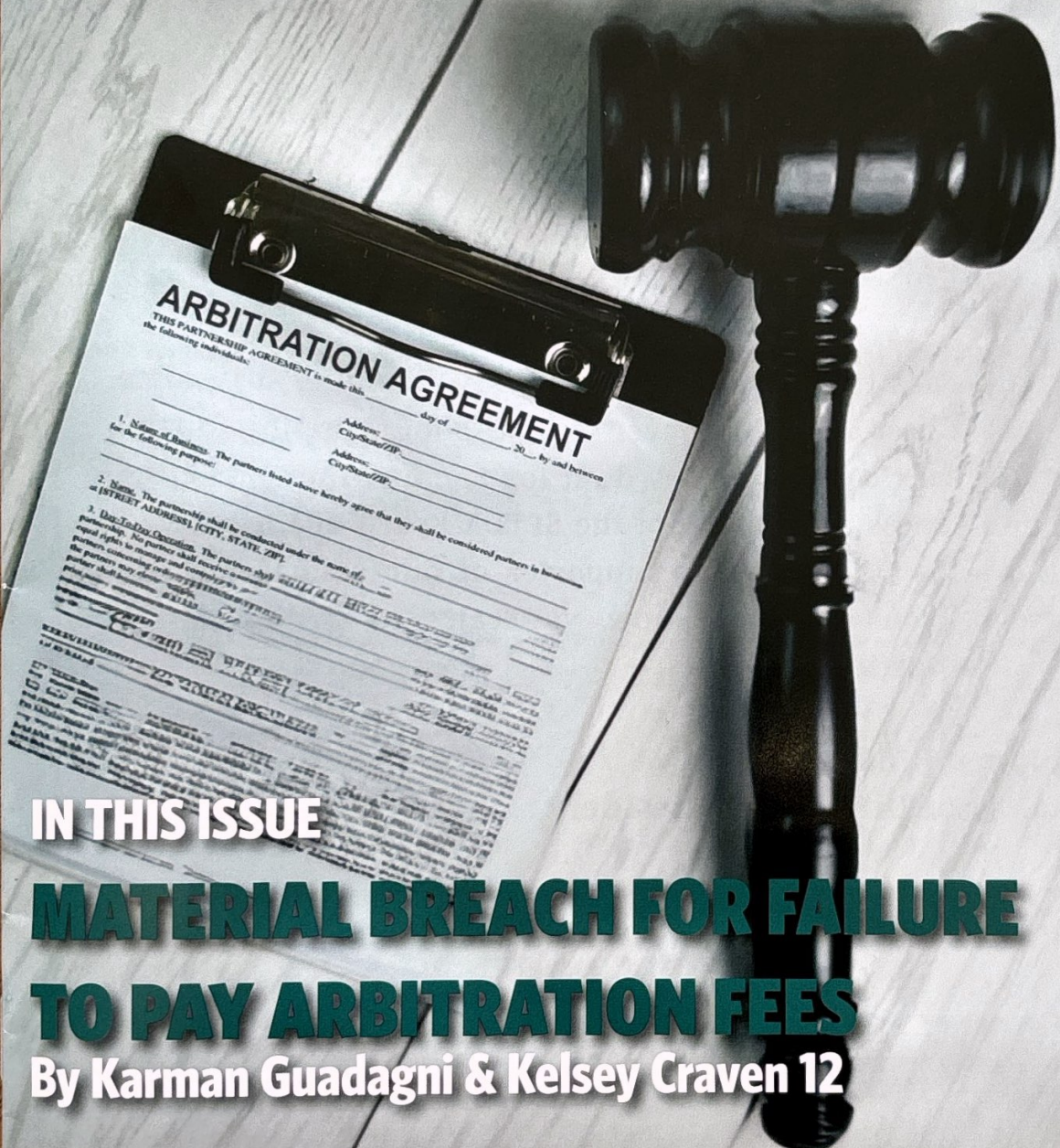


# The Trial Lawyer

FALL 2023



## IN THIS ISSUE

# MATERIAL BREACH FOR FAILURE TO PAY ARBITRATION FEES

By Karman Guadagni & Kelsey Craven 12

**THE WONDERS OF WAR ROOM WEDNESDAYS**

Page 18

**HOLDING ARBITRATORS ACCOUNTABLE: BRING THAT MOTION TO VACATE AN ARBITRATION AWARD**

Page 32

# **MATERIAL BREACH FOR FAILURE TO PAY ARBITRATION FEES**

BY KARMAN GUADAGNI & KELSEY CRAVEN



Forced arbitration agreements have become increasingly prevalent in the consumer and employment context over the past decade, as mandatory arbitration provisions now routinely appear in cell phone contracts, nursing home admission agreements, and employment agreements, to name a few. Despite the fact that many of these agreements are one-sided, like the respective bargaining power of the parties entering into them, consumer attorneys are increasingly facing petitions to compel their cases into arbitration which are being granted by courts still digging themselves out from the pandemic overflow. Although defendants are often required to bear the costs of arbitration,<sup>1</sup> they also maintain the power of the purse. All too often, defendants and their counsel needlessly delay in paying for the arbitration costs required to initiate or continue the arbitration proceedings, leaving plaintiffs in procedural limbo and with no mechanism for imposing consequences against the stalling defendants.

However, with the passage of two new statutes, Code of Civil Procedure sections 1281.97 and 1281.98, which went into effect as of January 1, 2020, the balance of power seems to have shifted (at least a bit). Pursuant to Section 1281.97, a failure to pay fees *before* arbitration can proceed is now considered a material breach of the arbitration “agreement.” Pursuant to Section 1281.98, a failure to pay fees *during* pendency of proceedings is now considered a material breach of the arbitration “agreement.” Where the drafting party of an arbitration agreement is deemed to have committed a material breach of the agreement, it waives its right to compel or continue in arbitration if it fails to pay the required costs or fees to initiate or continue a consumer or employment arbitration *within 30 days after the due date*. “Drafting party” is defined as “the company or business that included a predispute arbitration provision in a contract with a consumer or employee.” (Cal. Code Civ. Proc., § 1280(e).)

These code sections apply if the drafting party is required to pay the fees and costs “either expressly or through application of state or federal law or the rules of the arbitration provider.” (*Id.* at §§ 1281.97(a)(1), 1281.98(a)(1) [emphasis added].) Therefore, if there is no express language in the arbitration agreement or state or federal law requiring that the drafting party pay, review the rules of the arbitration provider to determine whether Sections 1281.97 and 1281.98 apply to your case. For example, the “JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness: Minimum Standards for Arbitration Procedures” states: “When the company is the claiming party initiating an arbitration against the consumer, the company will be required to pay all costs associated with the arbitration.”<sup>2</sup> Moreover, the arbitration provider may outline the requirements for the drafting party, i.e., defendants, to pay to initiate or continue the arbitration proceedings in their correspondence with the parties. For instance, the “JAMS Notice of Intent to Initiate Arbitration” letter we have received in consumer arbitration cases explicitly states, “Upon receipt of the balance of the Filing Fee from Respondent, JAMS will formally commence this matter...”

Although these are relatively new code sections, most courts to date have strictly enforced the 30-day payment

deadlines imposed by Sections 1281.97 and 1281.98, even if the delay in payment was inadvertent, brief, or not prejudicial. (*See, e.g., Espinoza v. Superior Ct. of Los Angeles Cnty.* (2022) 83 Cal.App.5th 761; *Daniels v. Securitas Sec. Servs. USA, Inc.*, No. SACV1800265CJCSKX, 2021 WL 2322938; *De Leon v. Juanita's Foods* (2022) 85 Cal.App.5th 740.) The current case law has also held that Sections 1281.97 and 1281.98 are not preempted by the Federal Arbitration Act (FAA). (*See, e.g., Gallo v. Wood Ranch USA, Inc.* (2022) 81 Cal.App.5th 621; *Espinoza, supra*; *Postmates Inc. v. 10,356 Individuals*, No. CV202783PSGJEMX, 2021 WL 540155.) A recently published case also held that Sections 1281.97 and 1291.98 are not limited to only mandatory pre-dispute arbitration agreements. (*See Williams v. West Coast Hospitals, Inc.* (2022) 86 Cal.App.5th 1054.)

Thus, if you find yourself facing arbitration in a consumer or employment case and the defendants are stalling in initiating the matter and paying the initial fee, consider or reconsider the timing of your follow up, as Sections 1281.97 and 1281.98 create potentially drastic consequences for a material breach for failure to pay arbitration fees which can benefit your client and increase the potential value of their case.

For example, both Sections 1281.97 and 1281.98 allow the employee or consumer to withdraw the claim from arbitration and proceed in a court of appropriate jurisdiction, an option that also includes the imposition of sanctions against



**Kelsey Craven** is an associate at Stebner Gertler Guadagni & Kawamoto. Her practice primarily focuses on institutional elder abuse litigation, with an emphasis on litigating cases involving pressure ulcers, falls, sexual abuse and other serious injury and death cases against residential care facilities for the elderly and nursing homes throughout California. Kelsey also has experience in the criminal realm working with capital defendants in Texas and experience in immigration law working with refugees.



**Karman Guadagni** is the Managing Partner at Stebner Gertler Guadagni & Kawamoto, a law firm specializing in elder abuse and neglect cases. Karman advocates on behalf of the elderly, dependent adults, and their families to compensate them for wrongs they have suffered and to fighting for reform within the long-term care industry. She has achieved successful results for plaintiffs in trial, mediation, and arbitration. Ms. Guadagni was selected as a Super Lawyer in 2022, and as a Rising Star among California's Super Lawyers from 2015 to 2021. She has served as a guest professor at Stanford Law since 2015 and is a frequent speaker and author on topics related to elder abuse and neglect. She is on the board of directors for SFTLA.

the drafting party in accordance with Section 1281.99. (See Cal. Code Civ. Proc. §§ 1281.97(b)(1), 1281.97(d), 1281.98(b)(1), 1291.98(c).) If you would like your case to proceed in superior court, it is not necessary to acquire an arbitrator's determination of default before returning to the trial court. (See *Williams, supra*, 86 Cal.App.5th 1054.) And even if you want your case to remain in arbitration, there are other remedies available. For example, Section 1281.97(b)(2) (failure to pay fees before arbitration) creates the option to compel arbitration and have the drafting party pay reasonable attorney's fees and costs for the arbitration. The employee or consumer may also have the arbitrator impose appropriate sanctions if they continue with arbitration after a material breach for failure to pay during arbitration pursuant to Section 1281.98(d).<sup>3</sup>

In our experience with these statutes, Sections 1281.97 and 1281.98 have led to great successes for plaintiffs and their counsel, despite much protest from the other side. In a recent matter, for example, after a plaintiff in an elder abuse case was compelled to JAMS arbitration, the respondents received an invoice for costs and fees in order to initiate the arbitration proceeding. The invoice explicitly stated that the respondents' payment was "due upon receipt" and that upon receipt of the filing fee, "JAMS [would] formally commence this matter." Respondents failed to pay the invoice until almost two weeks after the 30-day deadline per Section 1281.97. When notified that they were in material breach of the arbitration agreement and had waived their right to compel arbitration for their failure to timely pay the fees to initiate the arbitration proceedings, the respondents attempted to argue that Section 1281.97 did not apply, claiming that a matter alleging elder abuse or neglect did not meet the definition of "consumer arbitration" under the California Rules of Court's "Ethical Standards for Neutral Arbitrators Under Contractual Arbitration."<sup>4</sup> The issue was ultimately brought to the JAMS National Arbitration Committee ("NAC"), who concluded that the JAMS Minimum Standards, and the requirement that all respondents pay the costs of arbitration, applied. The JAMS NACS further held that respondents had waived their right to compel arbitration under Section 1281.2 for failure to pay within the 30-day deadline, and therefore, the claimant had the statutory right to withdraw the claim from arbitration and proceed in superior court.

However, there have also been instances in which an arbitrator or judge has found that Section 1281.97 or 1281.98 did not apply. For example, in another recent case, we filed a motion to vacate the order granting the defendants' motion to compel arbitration and stay proceedings after the defense counsel's failure to pay arbitration fees within the 30-day deadline pursuant to Section 1281.97. In their opposition, the defendants' counsel argued that Section 1281.97 did not apply because the language in the arbitration agreement explicitly stated that the California Code of Civil Procedure shall not govern the<sup>5</sup> agreement to arbitrate claims, which would include Section 1281.97. The trial court agreed, stating it was a "pure matter of contract interpretation," and denied the plaintiffs' motion. The plaintiffs subsequently filed a petition for writ of mandate, asking the appellate court to decide the issue of whether Section 1281.97 creates

an unwaivable statutory right such that an arbitration agreement that purports to waive this right violates public policy and is void and unenforceable. The writ was unfortunately denied, and the parties continued the matter in arbitration.

In sum, Sections 1281.97 and 1281.98 are important resources that should be in every plaintiff's attorney's tool kit when dealing with consumer and/or employment arbitration. If you have a case where there is an arbitration agreement or an order compelling arbitration, keep a close eye on the defendants' payment status and set calendar reminders of the 30-day due date (based often on the initial invoice and subsequent invoices) in order to potentially reap the rewards of these beneficial statutes. ■

## End Notes

1. See, e.g., *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 110-111.
2. The same policy also states that when a consumer initiates arbitration against the company, "the only fee required to be paid by the consumer is \$250... All other costs must be borne by the company, including any remaining JAMS Case Management Fee and all professional fees for the arbitrator's services." (See JAMS Consumer Arbitration Minimum Standards, available at <https://www.jamsadr.com/consumer-minimum-standards/> (last accessed July 26, 2023).)
3. For the full list of options, see Cal. Code Civ. Proc. §§ 1281.97(b-d), 1281.98(b-d), 1281.99.
4. California Rules of Court's "Ethical Standards for Neutral Arbitrators Under Contractual Arbitration," Standard 2, "Definitions" provides: "(d) 'Consumer arbitration' means an arbitration conducted under a predispute arbitration provision contained in a contract that meets the criteria listed in paragraphs (1) through (3) below.
5. 'Consumer arbitration' excludes arbitration proceedings conducted under or arising out of public or private sector labor relations laws, regulations, charter provisions, ordinances, statutes, or agreements.  
(1) The contract is with a consumer party, as defined in these standards;  
(2) The contract was drafted by or on behalf of the nonconsumer party; and  
(3) The consumer party was required to accept the arbitration provision in the contract."