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Forcing arbitration fee payments in 30 days now requires court review of contract principles

CCP SECTION 1281.98 AND A NEW PARADIGM REQUIRED BY *HOHENSHELT V. SUPERIOR COURT*

How does one know that our California Supreme Court has done something significant with a body of procedural or substantive law? Answer: When it concludes a majority opinion by disapproving of no less than eight appellate-court decisions to the extent inconsistent with the majority view.

In *Hohenshelt v. Superior Court* (2025) 18 Cal.5th 310, the Supreme Court was asked to decide whether the Federal Arbitration Act (FAA; 9 U.S.C. section 1 et seq.) preempts California Code of Civil Procedure section 1281.98, a provision of the California Arbitration Act (CAA) that governs the timing of the payment of fees in employment and consumer arbitrations, with potential adverse consequences for nonpayment or late payment. The answer? No, as long as section 1281.98 is read and applied using basic contract principles, as opposed to a literal reading of the statute, the approach taken by prior appellate cases interpreting section 1281.98.

The Court emphasized that section 1281.98 must coexist with "longstanding principles" of contract law, including relief from forfeiture. This signals a broader judicial trend: Statutory arbitration protections will be interpreted through a contract-law lens unless the Legislature unmistakably says otherwise. By narrowing the statute to avoid FAA preemption, the Court effectively preserved its constitutionality but, at the same time, limited its practical force.

Background

In 1925, through the FAA, Congress sought to make written arbitration agreements "valid, irrevocable, and enforceable" and to ensure that parties who contract for arbitration are held to that choice. The FAA created a national pro-arbitration policy, but it was never intended to be a complete procedural code. The FAA primarily governs enforcement of arbitration agreements, not the procedural mechanics of arbitration itself.

The CAA was enacted to create a comprehensive, state-level procedural framework for arbitration in California courts, filling gaps left by the FAA, for example, through discovery rules and fee-payment deadlines.

In 2020, California enacted sections 1281.97–1281.99 to prevent employers and others from compelling arbitration and then stalling the process by failing to pay required arbitration fees. These statutes were designed to prevent "procedural limbo" and ensure that arbitration – once compelled – actually proceeds.

Section 1281.97 addresses the failure to pay initial fees. If the drafting party fails to pay within 30 days of the due date, it is deemed to be in material breach and in default, and it waives the right to compel arbitration. The employee/consumer may either return to court or compel arbitration with fee-shifting. Section 1281.98 concerns failure to pay continuing fees. It contains the same structure as section 1281.97. Section 1281.99 adds teeth to sections 1281.97 and 1281.98 by requiring courts to impose monetary sanctions, including attorney's fees and potential evidentiary or terminating sanctions, when a drafting party breaches the arbitration agreement by failing to pay arbitration fees. This ensures meaningful consequences for strategic nonpayment, resulting in strategic delays.

The *Hohenshelt* case specifically addresses section 1281.98. The default rule in section 1281.98 is that when the party who drafted an arbitration agreement is responsible for paying fees and costs to an arbitrator, that party must pay an arbitrator's invoice "within 30 days after the due date," and "the arbitration provider shall issue all invoices to the parties as due upon receipt." While the parties may contract around the default rule "if the drafting party fails to make timely payment, it waives its right to compel the employee or consumer to proceed with that arbitration." The employee or consumer may choose to "[w]ithdraw the claim from arbitration" and proceed in court or "[c]ontinue the arbitration" if the arbitrator agrees. On its face, the statute suggests no ifs, ands or buts about it; the employee or consumer is in the driver's seat, or so it had appeared to numerous appellate court judges.

The *Hohenshelt* decision

In *Hohenshelt,* Dana Hohenshelt sued his former employer. The trial court granted the employer's motion to compel arbitration and stayed proceedings pending that arbitration. After the employer failed to pay the arbitration fees promptly, Hohenshelt moved in the trial court to lift the stay under section 1281.98. The court denied that motion, but the Court of Appeals granted Hohenshelt's writ petition challenging that order. The California Supreme Court granted the employer's petition for review. The Court summarized the provisions of section 1281.98 as outlined above. The Court held that the FAA does not preempt section 1281.98. But to achieve that result, the Court offered a new interpretation of section 1281.98.

"…although section 1281.98 has been interpreted by various Courts of Appeal to impose an inflexible and sometimes harsh rule resulting in loss of arbitral rights, we reject that rigid construction and instead conclude that the statute does not abrogate the long-standing principle, established by statute and common law, that one party's nonperformance of an obligation automatically extinguishes the other party's contractual duties only when nonperformance is willful, grossly negligent, or fraudulent…

The Legislature sought to deter companies and employers from engaging in *strategic* nonpayment of arbitration fees, but we find no indication that it intended to strip companies and employers of their contractual right to arbitration where nonpayment of fees results from a good faith mistake, inadvertence, or other excusable neglect."
(18 Cal. 5th at 323.)

In other words, looking at prior law, a ruling denying pre-emption should have led to a rejection of the appellate court's decision in favor of removal of the case from arbitration. Instead, the Court chose to harmonize section 1281.98 with the FAA, avoiding preemption while making it harder for employees to escape contractual arbitration.

The Court disposed of the pre-emption claim by holding that section 1281.98 is not preempted by the FAA because, as properly understood, it does not impose automatic forfeiture for any late payment ("automatic" forfeiture of the right and obligation to arbitrate would have thus frustrated the intent of the FAA, a classic ground for pre-emption). Instead, the Court read the statute through the lens of general contract principles, holding that forfeiture occurs only when the nonpayment is willful, fraudulent, or grossly negligent. This is the doctrinal pivot that forces a reevaluation of every pending and future case involving late arbitration fees.

The best insight to the Court's thinking is found here: "because the procedures in the FAA are not comprehensive, every state has enacted its own arbitration act to fill in gaps left by the FAA. Those state rules govern so long as they are consistent with the FAA's mandate that "an agreement in writing to submit to arbitration ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist ... for the revocation of any contract." (9 U.S.C. section 2; see *Volt, supra,* 489 U.S. at p. 476 ["There is no federal policy favoring arbitration under a certain set of procedural rules...."].) [other citations omitted].")
(18 Cal. 5th 310, 327-328.)

The Court decided that the law about contractual arbitration and the potential for nonpayment of fees best reflects the will of the people if the challenged statutory interpretation shifts from strict liability to a culpability-based standard. The Court clearly had no desire to find pre-emption, but at the same time, found that a "properly understood" section 1281.98 was the best way to justify rejection of pre-emption. Where untimely payment is not willful, fraudulent, or grossly negligent, a party may not lose the right to continue the arbitration.

The Court cited a number of code sections that support excuses for delay (Civil Code sections 3275 and 1511 and Code of Civil Procedure section 473).

The *Hohenshelt* Court rejected FAA preemption by adopting a different reading of the CAA that instead looked to contract law and to facts that would justify relief from forfeiture of the right to arbitrate under the agreement drafted by the defendant entity. All of the disapproved appellate cases in one way or another read section 1281.98 narrowly and with a "strict" construction. Those cases are:

- *Gallo v. Wood Ranch USA, Inc.* (2022) 81 Cal.App.5th 621;
- *Espinoza v. Superior Court* (2022) 83 Cal.App.5th 761;
- *De Leon v Juanita's Foods* (2022) 85 Cal.App.5th 740 ;
- *Williams v. West Coast Hospitals, Inc.* (2022) 86 Cal.App.5th 1054;
- *Doe v. Superior Court* (2023) 95 Cal. App.5th 346 ;
- *Suarez v. Superior Court* (2024) 99 Cal.App.5th 32 ;
- T*rujillo v. J-M Manufacturing Co., Inc.* (2024) 107 Cal.App.5th 56;
- *Colon-Perez v. Security Industry Specialists, Inc.* (2025)108 Cal. App.5th 403;
- *Sanders v. Superior Court* (2025) 110 Cal.App.5th 1304.

The decision in *Hohenshelt* significantly reshapes both pending and future litigation under Code of Civil Procedure section 1281.98 for litigating parties and their counsel. In fact, it is not unfair to suggest that *Hohenshelt* is a significant disruption to the plaintiffs' bar, which had relied on a strict-liability framework built into sections 1281.97 and 1281.98 that provided significant options for the plaintiff, the non-drafting party in the consumer and employment pre-dispute arbitration setting.

The Court appeared to view the problem of nonpayment as a matter of fairness, best addressed by lower-court judges through a fact-based determination of whether the nonperformance was willful, grossly negligent, or fraudulent. It appears the Court not only did not view nonpayment or late payment as always strategic, but also, at least implicitly, it is just as likely the result of excusable neglect.

Of interest is the fact that the Court's decision does not affect section 1281.99. The dissent by Justice Corrigan comments on this omission:

> …although the validity of section 1281.99 is not before us, that statute sheds light on the legislative intent question. Its text requires that a drafting party found to be in material breach "pay the reasonable expenses, including attorney's fees and costs, incurred by the employee or consumer as a result of the material breach." (§ 1281.99, subd. (a).) In addition to these monetary sanctions, however, section 1281.99 says the court may impose an evidentiary, terminating, or contempt sanction on the drafting party "unless the court finds that the one subject to the sanction *acted with substantial justification* or that other circumstances make the imposition of the sanction unjust." (*Id.,* subd. (b), italics added.) The exception thus presumes that a finding of material breach will result from a delinquent payment *even when the defaulting party acted with substantial justification.* It is difficult to square this provision with the majority's construction of section 1281.98.
> (18 Cal.5th at 358.)

One might imagine the majority would respond that the very exception justifies relief from forfeiture for mistake or excusable neglect. Thus, there is no need to alter or even address section 1281.99.

It is worth noting that *Hohenshelt* shows how far our Supreme Court has traveled since *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83. While few truly believe that arbitration clauses are actually negotiated in most consumer and employment contracts, that barn door is essentially closed. We are left with *Hohenshelt,* in which the Supreme Court chose to limit orders lifting stays to those cases where evidence is presented to the Court of willful or strategic late or nonpayment of fees that have the effect of unreasonable and inexcusable delay in what should be an expeditious process for the resolution of the dispute.

Implications for pending cases

Trial courts must now revisit motions that relied on the prior appellate cases now disapproved. Many employee victories premised on bright-line deadlines are now vulnerable.

Existing orders lifting stays may be reconsidered. Because the Supreme Court clarified that trial courts must evaluate culpability, not merely timing, parties who previously lost under the strict rule may seek reconsideration or renew motions to compel arbitration. An aggrieved party may decide to pursue writ relief when the trial court applied the now-disapproved strict liability standard.

Trial judges will likely have to hold fact-intensive evidentiary hearings. The trial judge will then have to determine why the payment was late, whether the delay was willful, grossly negligent, or fraudulent, and whether the employee suffered compensable harm as a result of the delay.

Employees lose the certainty of the bright-line rule. Pending cases where employees relied on the prior automatic-breach doctrine now face delays, discovery into employer billing practices, and potential loss of the right to return to court. This is a significant shift in leverage.

Trial judges will have to evaluate the circumstances of delay. Employers have more room to argue "substantial compliance" or excusable delay. While the law still requires timely fee payments, the landscape is less foreboding regarding the consequences of late payment. In many cases, this diminishes the settlement pressure plaintiffs previously enjoyed in mass arbitration cases.

Implications for future cases

Because inadvertent or minor delays no longer trigger forfeiture, employers will more frequently succeed in keeping cases in arbitration. The Legislature's deterrent purpose remains, but the bite of the statute has been dulled. There will likely be new forms of litigation over what counts as "gross negligence."

The *Hohenshelt* Court did not define the boundary between ordinary negligence and gross negligence. Future cases will litigate lost invoices, internal processing delays, miscommunications with arbitration administrators, and payment system errors.

Employers will be more intent on documenting payment processes to show good faith and avoid findings of gross negligence. Employees will focus on proving culpability rather than mere lateness. What is likely to happen is that counsel will treat section 1281.98 motions as mini trials rather than procedural shortcuts.

Judges have their own new set of considerations. Since the statute is no longer self-executing, the judge will have to make credibility findings and evaluate intent, thereby increasing the burden on trial courts, which were, for the most part, passive observers.

Conclusion

Before *Hohenshelt,* many argued that plaintiffs regularly used section 1281.98 to avoid arbitration agreements – even when payments were merely days late and unintentional. The employer-side bar argued that prior Court of Appeal decisions had endorsed that tactic and held that any late payment automatically forfeited the right to arbitrate.

We now have a new reading of section 1281.98 that will give companies that have failed to pay arbitration fees and costs promptly room to argue that any such late payments were not willful or grossly negligent, but resulted from a good-faith mistake, inadvertence, or other excusable neglect. As stated herein, there will likely be significant litigation over what circumstances are sufficient to excuse delayed payments of arbitration fees and costs.

But a note of caution is in order. As Justice Liu in his majority opinion stated, "the Legislature sought to deter companies and employers from engaging in strategic nonpayment of arbitration fees." (*Id.*, 18 Cal. 5th at pp. 310, 323.) Accordingly, timely payment of arbitration fees and costs will remain a critical obligation and best practice for companies seeking to enforce arbitration agreements against California plaintiffs in consumer and employment cases.

There is at least one published lower court decision since *Hohenshelt.* In *Wilson v. Tap Worldwide, LLC* (2025) 114 Cal.App. 5th 1077: Arbitration was preserved. In *Tap Worldwide*, the Court of Appeal held that an untimely payment was not, as a matter of law, strategic, willful, grossly negligent, or fraudulent.

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