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Supreme Court saves an arbitration deadline from preemption by making it more palatable

In Hohenshelt v. Superior Court, the California Supreme Court preserved Civil Code §1281.98 from federal preemption by interpreting it to allow exceptions for excusable late payment of arbitration fees, softening earlier strict rulings and setting the stage for new disputes.

By Marc D. Alexander

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This is the second time we have written in the Daily Journal about *Dana Hohenshelt v. The Superior Court of Los Angeles County; Golden State Foods Corp (real party in interest)*. In an April 2024 Daily Journal article under the heading: "California: friend or foe of arbitration?", we scrutinized the earlier *Hohenshelt* majority opinion, authored by Justice Maria E. Stratton, and a dissent authored by Justice John Shepard Wiley Jr. Did California's rule in Civil Code §1281.98, requiring drafters of arbitration contracts to pay arbitration fees within 30 days of when they became due further the goal of promoting swift and economic arbitration, or did it unfairly burden arbitration contracts compared to other contracts? Judge Stratton explained that the rule promoted timely arbitration, helping to prevent non-payment of arbitration fees, resulting in delay and the sandbagging of employees and consumers. Justice Wiley, however, explained that §1281.98 resulted in federal preemption by the Federal Arbitration Act (FAA): "What preempts this statute is the decision to make *arbitration* the hostage of delay. … No other contracts are voided on a hair trigger basis due to tardy performance." *Hohenshelt v. The Superior Court of Los Angeles County; Golden State Foods Corp (real party in interest)*. 99 Cal.App.5th 1319 (2024). Numerous appellate decisions had strictly applied the 30-day payment rule to breaches by employers, allowing employees to elect to proceed in court.

The California Supreme Court, in a majority opinion authored by Justice Goodwin H. Liu on Aug. 11, 2025, has now ruled in *Hohenshelt*, holding that Civil Code §1281.98 is not preempted, but that it need not be so strictly interpreted as to necessarily result in a forfeiture of the right to arbitrate for even a minor breach of the 30-day payment rule. None of the justices seem to disagree that the rule was enacted to prevent employers and other "drafters of the arbitration contract" from delaying arbitration; that the statute addressed a real problem; or that the strict interpretation and rigorous application of the statute can result in loss of the right to arbitrate, giving employees and consumers the right to elect to litigate in court. What is at issue, however, is how strictly Civil Code § 1281.98 is to be interpreted, and whether its strict interpretation leads to federal preemption.

In an opinion that is an interpretive tour de force, Justice Liu saves §1281.98 from preemption with the finesse of Gene Kelly spinning and leaping with perfect balance while splashing through puddles.

The majority opinion holds §1281.98 is not preempted — if properly construed to harmonize with longstanding California doctrines that can excuse forfeiture when late payment is the product of good-faith mistake, inadvertence or other excusable causes. Because a strict reading of the plain language of the statute would not have supported the majority's interpretation of the statute, "background law" is used to contextualize §1281.98. Avoiding a rigid "hair-trigger" forfeiture, the court "harmonizes" §1281.98 with "background law" concerning relief from forfeiture (Civil Code §§3275 and 1511) and relief from mistake, inadvertence, surprise or excusable neglect (Code of Civil Procedure §473(b)).

Justice Liu acknowledges that a strict interpretation of §1281.98 could lead to federal preemption because of the burden placed on the right to arbitrate. The case has

been remanded to let the trial court decide whether Golden State's late payment should be excused and whether the employee suffered compensable harm from the delay. The case also disapproved of Court of Appeal decisions "to the extent" they adopted a strict, no-exceptions application of §1281.98.

Justice Corrigan, joined by Justice Jenkins, dissented, concluding §1281.98 still singles out arbitration for disfavored treatment compared to other binding agreements negotiated between the parties and is thus preempted by the FAA. In dissent, she pointed out that the majority opinion focused less on the plain meaning of the statute and more on how it could be saved by harmonizing "background law." According to Justice Corrigan, saving §1281.98 by "harmonizing" with other law means all employment and consumer contracts are converted into contracts where time is of the essence. This is the reverse of the default position in ordinary contract law when the contract is silent, namely that performance must be done in a reasonable time.

For Justice Corrigan, the fundamental problem is one of interpretation that essentially rewrites the statute to save it: "While the majority's construction may render the statute more palatable from a preemption standpoint, it does not appear to reflect a 'fairly possible' reading of what the Legislature actually had in mind."

Justice Groban, joined by Justice Evans, stresses an analytically prior question often will control: Did the parties' contract choose the California Arbitration Act (CAA) procedures at all? If so, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989) and Section 4 of the FAA directs that arbitration proceed in the manner provided for in the parties' agreement. That question was waived here, so the majority appropriately focused on §1281.98 and preemption.

The *Hohenshelt* decision vindicates the positions of both Justice Stratton and Justice Wiley in the earlier Court of Appeal decision — partly. Justice Stratton, because the California Supreme Court decision agrees that 1281.98 is not preempted. Justice Wiley, because the decision ameliorates the burden placed on arbitration by 1281.98 — a burden that Justice Wiley argued should result in federal preemption by the FAA.

So 1281.98 is saved from preemption.

We anticipate future fallout from the decision.

First, there will be increased litigation over "excused" payment for arbitration fees. In the arbitrations where this issue arises, there will be satellite litigation in the courts, delaying outcomes and increasing expenses. However, this may also have the salutary effect of moving along the large number of arbitration cases where the issue of excuse never arises, because the 30-days to pay rule has not been preempted.

Second, where delay is excused by a court, the court will also have to decide what constitutes compensable harm, and what is the proper remedy to apply. In discovery disputes, courts already are called upon to make similar decisions.

Third, as Justice Groban's concurrence highlights, whether the parties agreed to use the California Arbitration Act or other procedural frameworks is a threshold issue that was not addressed, because it had been waived. Consequently, the interaction between §1281.98 and the choices of the drafter of the arbitration agreement to apply the Federal Arbitration Act, the California Arbitration, the rules of the arbitral forum or some combination to procedure, may need to be clarified. And a definitive answer to those questions could affect how drafters of arbitration agreements choose the rules by which procedure will be governed in arbitration,

Fourth, the decision disapproves of a number of appellate decisions "to the extent inconsistent" with its ruling. The task will be left to other courts to decide exactly what parts of prior rulings are inconsistent with *Hohenshelt*.

Federal preemption is a constitutional issue, and thus potentially reviewable by the United States Supreme Court. The Supreme Court has been quite willing to review California arbitration cases that do not find preemption. Perhaps *Hohenshelt* is not the end of the larger story.

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