FCRA Focus - Recent Developments in California's Arbitration Landscape
Host: Dave Gettings
Guest: Elizabeth Holt Andrews
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Dave Gettings:

Hey, everyone. Welcome to another edition of *FCRA Focus*, the podcast that discusses all things credit reporting. Today, our focus is on a particular forum where FCRA cases frequently wind up, that's arbitration. We're going to talk about a state where we frequently see FCRA cases, California, the perfect storm. To help, we are joined by an *FCRA Focus* newcomer, my colleague Elizabeth Holt Andrews from our San Francisco office.

Elizabeth is licensed as an appellate specialist by the State Bar of California, which is a rare credential that is held by only a small handful of attorneys out on the West Coast. She specializes in financial service appeals and she's been tracking a California Supreme Court case for us about arbitration, and she's here to talk about it. As a podcast rookie to *FCRA Focus*, Elizabeth also dressed up for this performance without realizing it's only recorded on audio. So, Elizabeth, you look great. No one's ever going to know.

Elizabeth Andrews:

But what about – I have this great FCRA costume, Dave, I'm so disappointed.

Dave Gettings:

You can describe it as well you want. No one's ever going to see it. It will just be our secret about how cool the FCRA costume looks.

Elizabeth Andrews:

Well, I appreciate your having me on. Since I can't show off my costume, my biggest challenge is really going to be to try to remember that I need to always say FCRA, and not that other thing that people say sometimes, which is "Fic-ra".

Dave Gettings:

If you say "Fic-ra", we're going to stop recording.

Elizabeth Andrews:

I'm going to get kicked off this podcast before I even start.

Dave Gettings:

You will.

Elizabeth Andrews:

So, I will do my very best to focus on that.

Dave Gettings:

So, why don't you give us a little bit of background of the California Supreme Court case we're here to talk about?

Elizabeth Andrews:

Absolutely. So, there's this case out here in California on the West Coast that's generating considerable interest in the business community. It's a case called *Hohenshelt v. Superior Court*. And it has a lot of interest locally, but I also think it really has national implications as well, because, as you know, it's not just Hollywood. California tends to be way out in front of all kinds of national trends. That's really as true in consumer law, as in anything else. It's really the Golden State, you know, we're kind of a bellwether nationally. So, I think this case –

Dave Gettings:

For both good and bad.

Elizabeth Andrews:

For better or worse, Dave, that's right. This is kind of a bellwether, this case. So, I think people nationwide really should watch this closely. So, before I start talking about what this case is about, I just want to mention something that I think is easy to overlook. Which is, California is so big that is actually, believe it or not, Dave, it is the largest judicial system in the Western world, just the state of California.

Dave Gettings:

I did not know that.

Elizabeth Andrews:

It is far bigger than the federal judiciary, for example.

Dave Gettings:

You learn something new every day on *FCRA Focus*.

Elizabeth Andrews:

Isn't that amazing? So, for purposes of appeals and stuff like that, it is statistically harder to get a petition for review granted in the California Supreme Court, even then to get the US Supreme Court to take up a case. The volume is bigger in California, even than in the federal judiciary.

And on top of that, there are only seven justices on the California Supreme Court. Whereas, the U.S. Supreme Court has nine. So really, the California Supreme Court accepts really a vanishingly small proportion of civil petitions. So, huge kudos to this petitioner's counsel for getting the California Supreme Court to even take this case. As we're going to get into, the petitioners were helped by a very fiery dissent in the Court of Appeal from a justice down in Los Angeles, named John Shepherd Wiley. It really helped them kind of get the Court's attention.

What's going on in this case? Let me paint you a picture, Dave. Let's say, you're a bank, and we'll call you – how about Bank of Dave?

Dave Gettings:

That's a really good name. I'm not sure I would bank at Bank of Dave, but let's go with it for the purpose of the podcast.

Elizabeth Andrews:

I hear great things about Bank of Dave.

Dave Gettings:

Interest rates are through the roof.

Elizabeth Andrews:

It's just really stellar institution, Bank of Dave. I have a lot of faith in Bank of Dave. So, Bank of Dave issues credit cards, among other things. Let's say, I am a consumer and I decide that I want a credit card from Bank of Dave. So, I applied to Bank of Dave.

Dave Gettings:

Bank of Dave, by the way, has not given you a credit card, Elizabeth.

Elizabeth Andrews:

Well, let's say that I slipped through the cracks somehow and you in fact do issue me, Elizabeth Andrews, a credit card. Now, it's important to note, I'm a California resident and I am applying for this card in California, and that's important for reasons we're going to see. So now, I've got this credit card from Bank of Dave, and let's say, I become disgruntled. Heaven only knows why, but for example, I decide that Bank of Dave has falsely and nefariously reported to all the credit reporting agencies that I am delinquent on my credit card payments. And I complain and you won't fix it. Now, we know Bank of Dave would never actually do that. But as I said, I'm disgruntled.

So, off I go, Federal District Court, California, and I file an FCRA case against Bank of Dave, *Andrews v. Bank of Dave*. Now, are you with me so far?

Dave Gettings:

I'm with you.

Elizabeth Andrews:

Okay. So, when I opened my credit card with Bank of Dave, what interesting clause might I have agreed to?

Dave Gettings:

We can probably cut to the chase. So, you're going to agree to an arbitration clause because Bank of Dave is run by a very, very competent CEO, who also hosts a podcast, and you sue me in federal court. I'm going to file a motion to compel arbitration. I'm going to argue that the credit card terms and conditions contain a binding arbitration clause, and all activities associated with this card are within the scope of the dispute. So, I'm going to file a motion and see what the court does.

Elizabeth Andrews:

This is clearly not Bank of Dave's first rodeo here. So, say you file a great motion, and the federal district court says, "You know what, Bank of Dave, you're right. I agree with you. Motion to compel arbitration granted." What's going to happen after that?

Dave Gettings:

Well, I think now, most likely the case is going to get stayed. Used to be the case, might get dismissed or might get stayed, but I think, based on a recent Supreme Court case, the case is probably getting stayed as to Bank of Dave.

Elizabeth Andrews:

Yes, that's right. Out in the Ninth Circuit, federal district court judges used to have discretion until very recently, to either dismiss or stay a case when they grant one of these motions to compel arbitration. But the U.S. Supreme Court in May of this year engaged in one of their favorite pastimes, which is spanking the Ninth Circuit. And they gave them a unanimous 9-0 spanking and said, "No, no. No more dismissing these cases without prejudice. You're going to stay them. They're going to stay in your court and you're going to sit on them while the parties go off to arbitration."

In our case, case gets stayed, you drag me, kicking and screaming off to arbitration. I'm not happy about it, but I really can't do anything about it. So, what in your experience, Dave, how exactly does that arbitration get off the ground running from a practical standpoint?

Dave Gettings:

Well, sometimes the consumer never files, which is always the dream. But we'll put that –

Elizabeth Andrews:

Nice try, Dave.

Dave Gettings:

– to the side.

Elizabeth Andrews:

Nice try. I'm going for it, I'm disgruntled.

Dave Gettings:

All right. So, the consumer is going to file in a tribunal, whether it's AAA or JAMS or someplace else, whatever the arbitration clause requires.

Elizabeth Andrews:

Right. So, ball’s in my court, I'm the consumer. So, let's say I go to AAA and I file a demand. And I say in my demand, "Bank of Dave violated the FCRA." And they reported me as delinquent, and, "I am not, and by golly, they are going to pay for this." Then, I send you a copy of this demand that I submit to AAA. Now, Dave, in your experience, is arbitration free?

Dave Gettings:

No, which some consumers are starting to take more advantage of day after day. You know, it's going to cost money, and depending on the rules, most of it will probably be born by the business. Although, they'll typically be a relatively small consumer filing fee.

Elizabeth Andrews:

That's right. That's right. So, at the end of the day, if Bank of Dave wants to arbitrate this consumer action. For the most part, Bank of Dave is paying for it. Fair enough?

Dave Gettings:

Fair enough.

Elizabeth Andrews:

Fair enough. So, as soon as I, the disgruntled consumer, file my arbitration demand in the AAA, what's AAA going to do? What's the first thing they do?

Dave Gettings:

They're going to appoint a case manager, then they're going to

send out an invoice.

Elizabeth Andrews:

An invoice, correct. Now, let's say, Dave, that this invoice is for $100 million.

Dave Gettings:

Because I did not draw up my arbitration clause very carefully, apparently.

Elizabeth Andrews:

This is a gold-plated arbitration right here, Dave. So, super expensive. Say, you get this invoice, $100 million, it's due 30 days from receipt. Now, let's say Bank of Dave pays that $100 million, but you pay it on day 31. Oops. Or, let's say, you pay $99 million on day 29, and then you say, "Whoops, screwed up. Here's the extra million three days later."

Dave Gettings:

Which actually, you know, but putting aside the $100 million, this can happen all the time.

Elizabeth Andrews:

Oh, yeah.

Dave Gettings:

Based on experience. A lot of times that clients, if clients want to pay, sometimes, it's got to go to their invoicing department, it's got to get cataloged, it's got to get paid. It is not difficult to see how this could happen.

Elizabeth Andrews:

Not at all. In some instances, I've even seen AAA invoices the wrong amount, and then everything really gets all screwed up.

Dave Gettings:

Or it doesn't have the proper matter number on there –

Elizabeth Andrews:

All kinds of things.

Dave Gettings:

– or doesn't get uploaded to the client's website. Yeah, there's all sorts of ways.

Elizabeth Andrews:

Exactly. It can be a mess pretty fast. So, if any of these little oopsies happen, sort of de minimis, they don't really delay anything, but they don't really hurt anybody. If you're Bank of Dave and you're paying $100 million for this thing, what would you expect to happen with these little oopsies, these little bumps in the road?

Dave Gettings:

I'd probably check the AAA rules and see what happens if there's an issue, and hopefully try to rectify it.

Elizabeth Andrews:

Very good. So, what might you find when you go look at those rules for this type the situation.

Dave Gettings:

Well, had you not told me about it before this podcast, I wouldn't know, but I would find AAA's Rule 54, remedies for nonpayment.

Elizabeth Andrews:

What does that say, Dave? What's Rule 54 say?

Dave Gettings:

I'm going to spare the listeners the entire thing, but basically, it says, if an invoice isn't paid in full, AAA may inform the parties and ask a second time for payment or may order suspension of the arbitration until the delinquent party paid. And if they still don't pay after being notified. and given plenty of opportunity, then, it's arbitrator's discretion as to whether to terminate the proceedings.

Elizabeth Andrews:

Right. In other words, there's sort of this process that happen. So, in sort of these de minimis examples that I gave you, you pay a day later, you pay the wrong amount, and then later on you pay the right amount, is the paying party here, what's sort of your expectation for these little oopsies?

Dave Gettings:

I would expect I'd be able to fix my mistake.

Elizabeth Andrews:

Yes, you would expect that, and that's pretty natural because that's how arbitration works. They have rules for dealing with these types of situations.

Dave Gettings:

But foreshadowing, that might not be how California works.

Elizabeth Andrews:

I'm here to tell you, Dave, in California, you're done-zo. Arbitration's over. If you don't pay that invoice within 30 days, you're out of there. You have waived your right to invoke your arbitration clause. Now, what happens in practicality, AAA is going to send me the disgruntled consumer a letter, and they say, "Hey, Bank of Dave has – they've waived arbitration. What do you want to do, disgruntled consumer?" What do you think I'm going to do as soon as I get that letter?

Dave Gettings:

You are going to agree that arbitration has been waived.

Elizabeth Andrews:

Absolutely. Then, what am I going to do?

Dave Gettings:

You're going to file back in federal court or at least tell the court you want to reopen the case.

Elizabeth Andrews:

I'm headed straight back to that stayed case, and I'm going to say, motion to reopen.

Dave Gettings:

So, Elizabeth, we haven't gotten there yet. We actually may never get there, but I think you're going to talk about the California statutes. Does this apply to only arbitration or also to a class action waiver? Because they tend to go hand in hand.

Elizabeth Andrews:

They do, and the statute does not really specify one way or the other.

Dave Gettings:

Let's talk a little bit about the statute as a sort of natural segue.

Elizabeth Andrews:

This is sort of this wild result. You think, how in the world would this ever happen? The answer is, there are these new statutes in California, and they just went into effect in January of this year, 2024. It's actually a pair of new statutes in the Code of Civil Procedure. One of them covers so-called delinquent opening fees in arbitration, and the other one covers the continuing fees that the arbitrator likes to charge as the case goes along. They sort of amount to the same thing. For those keeping track at home, this is California Code of Civil Procedure 1281.97 and .98. Those are the two statutes.

What they say is that, if you're the party who drafted the arbitration clause, and then you invoke it, which in this case would be you, Bank of Dave, then you better pay that invoice in 30 days, or you forfeit your right to arbitrate forever completely.

Dave Gettings:

Does the statute say 30 days or just say in accordance with whatever the tribunal requires?

Elizabeth Andrews:

It says 30 days. So, in this case, say to continue with our little hypothetical here. If you missed your 30-day deadline, and then you got a letter from the arbitrator under that Rule 45, and it said, "Hey, you're delinquent. Pay up in two weeks, or we're going to dismiss this." Then, you pay up in two weeks. Your expectation is okay. I mean, we're done, we're fixed. That would not be true in California. The 30 days is set by statute. Regardless of what deadline the arbitration tribunal might give you. So, we kind of started down this road, Dave. What kind of problems do you see with the statute right off the bat?

Dave Gettings:

Well, it's kind of draconian.

Elizabeth Andrews:

It sure is.

Dave Gettings:

It's a problem, it could be an issue for whoever missed the deadline. And if the goal of the arbitration clause is to affect the party's expectations, this certainly does not do that.

Elizabeth Andrews:

It doesn't. And you know what else, what happens to your hundred million dollars that you paid one day late?

Dave Gettings:

Well, I'd assume I can get it back, but I'm not the expert, you are, so let me know.

Elizabeth Andrews:

I don't know either. The statue ain't going to help you get it back. Maybe you can go argue with AAA and say, "Hey give me this back." But maybe they will, maybe they won't. The statue does not help you out in that regard. So, good times, right? So, this seems like this sort of incredible thing, but this is what the *Hohenshelt* case is about. The defendant, who in that case was an employer, it was a labor and employment lawsuit. This happened to that defendant. Now, it was in $100 million. But the basic facts are the same.

The employer, who is the defendant, got sued by their employee, or their, I should say, their erstwhile employee, and they made a de minimis –

Dave Gettings:

I have never used the erstwhile in my entire life. And as soon as this podcast is done, I'm going to go look it up.

Elizabeth Andrews:

What?

Dave Gettings:

So, I appreciate that.

Elizabeth Andrews:

Dave, we got to expand your horizons over here.

Dave Gettings:

Never. Never.

Elizabeth Andrews:

That's like one of my favorite words.

Dave Gettings:

Although, I do tell my wife and kids that I invented the word ginormous, because I think I'm the person I've ever heard use it, and they don't believe me.

Elizabeth Andrews:

It's a portmanteau.

Dave Gettings:

You learned something new.

Elizabeth Andrews:

Giant and enormous. It's a good one. We could have a whole podcast on portmanteaus, Dave. It would be really good.

Dave Gettings:

That's also a word I don't understand.

Elizabeth Andrews:

That's when you combine two words.

Dave Gettings:

Okay.

Elizabeth Andrews:

Like a nomlet, is a nom, non, nom tasty omelet, a nomlet.

Dave Gettings:

Never heard that either.

Elizabeth Andrews:

Yes. Anyway, what were we talking about? Oh, *Hohenshelt*. In the *Hohenshelt* case, this employer makes this very de minimis late payment, and they did cure it within the delinquency deadline. But the 30-day deadline had passed. So, the arbitrator said to the employer, hey, you know, you're late, employer got to pay up in two weeks, employer pays in two weeks. But meanwhile, goes back to the trial court. It was in this case, the state trial court. So, state trial court looks at this and says, "Well, motion to reopen, looks like it's granted, didn't make your 30-

day deadline." So, the employer is a little bit up a creek, because they didn't – and there's an interlocutory order to reopen. So, what do we know about interlocutory orders, Dave?

Dave Gettings:

So, generally, no right to appeal, right?

Elizabeth Andrews:

No right to appeal. So, the employer has to file a writ petition and essentially beg the Court of Appeal to take this up, which they do, essentially voluntarily. They let the employer go to the front of a line on the appellate side, and they look at this case, and they affirm the trial court. And they say, "Yep, the employer has waived its right to proceed in arbitration due to these late payments." The Court of Appeal just was kind of applying the statute as it was written. It's not an ambiguous statute, but there was a very notable dissent.

Dave Gettings:

Is this the scathing dissent you were talking about earlier?

Elizabeth Andrews:

Exactly, exactly.

Dave Gettings:

All right. So, what did it say?

Elizabeth Andrews:

So, what it says is, Justice Wiley, he wrote this dissent. He himself is a former U.S. Supreme Court clerk, and he pointed out that there are six previous instances in which the U.S. Supreme Court has struck down or invalidated California statutes that are hostile to arbitration, like this one. You'd love it, Dave. He literally bullet points these six prior instances. Then, he says, basically, do you want to have a seventh California? Because the FAA, the Federal Arbitration Act, the Federal Statute, it says that you can't single out arbitration causes specifically for disparate treatment.

Here, there are no other types of contracts in California that are voided on a hair trigger due to tardy performance. As Justice Wiley said, "Only arbitration contracts face this firing squad." So, pretty fiery. Justice Wiley is not messing around with this, and wound up is very effective. It helped this employer get the California Supreme Court's attention on this case. I'm pretty sure that's exactly what Justice Wiley was intending to do with this dissent. So, here we are, Dave. The first two briefs have been filed in the State Supreme Court. Final reply brief is coming due in January. I expect it will get argued in 2025 some time. So, Dave, stay tuned.

Dave Gettings:

So, in 2025 – would you expect to have a decision in 2025 or just an argument in 2025?

Elizabeth Andrews:

Could be end of 2025. We could get a decision as early as sometime in the next 12 months. Interesting aside, it is in the state constitution that once a case has been argued and submitted on appeal, in any appeal court in the state, if the decision issues more than 90 days after that case is submitted, the appellate justices do not get paid. So, you don't have to wait long after oral argument, usually, to get your opinion. In other words, that never happens. They are never going to let it go more than 90 days. They got bills to pay too.

Dave Gettings:

So, assuming the court decides the issue head on, we are either going to get a decision in California in 2025 that says, the statute is constitutional. Oh, is it a constitutional challenge or some –

Elizabeth Andrews:

It's preemption. It's preemption under the Federal Arbitration Act.

Dave Gettings:

Got it. So, you're either going to get a decision that says, in California it, is acceptable to void an arbitration clause if payment is not made within 30 days or the opposite. And they'll say, the statute is preempted.

Elizabeth Andrews:

Exactly. Exactly. That's right. I think we should look in our crystal ball a little bit Dave, because I think that realistically, this is probably going to be the subject of a cert petition either way to the U.S. Supreme Court. If the California Supreme Court affirms and upholds this statute, then I think that cert petition is going to have a great chance of being granted, and the U.S. Supreme Court will take this up. That's my prediction, you hear it here first, Dave.

Dave Gettings:

Yeah. So, we mentioned earlier, California being a bellwether.

Elizabeth Andrews:

Absolutely.

Dave Gettings:

If the law turns out to be that you have to make payment in arbitration within 30 days or the arbitration clause is void, do we see other states with maybe similarly less business-friendly legislatures trying to enact similar statutes?

Elizabeth Andrews:

I think we could, because why not? You know, California is famously hostile to arbitration. They seem to almost pride themselves on it. But California is not the only state that would like to give consumers this, frankly, huge boost. I don't think we're going to see it in the more business-friendly states. I think we might start to sort of see a split nationwide between blue states and red states, business-friendly, more consumer-friendly along these lines.

Dave Gettings:

I didn't ask you or we didn't talk about this before, Elizabeth. So, if you don't know the answer, please say, "I don't know." But we talked about class action waivers just briefly, which often go hand-in-hand with arbitration provisions. Is the arbitration provision specifically void, or is the breadth of voidness, to the extent that's a word, potentially roping in the class action waiver too?

Elizabeth Andrews:

That's a great question. I don't – to be honest, I don't know that the legislature in California has really thought through this as much as you might think. It really doesn't address that question. So, I would say, the statute gives you no guidance at all on that question. Enterprising plaintiffs' attorneys may well go down that road pretty quickly, Dave. But I think that the short answer is nobody knows the answer to that right now.

Dave Gettings:

Got it. So, Elizabeth, you are done recording your first *FCRA Focus* podcast. How did it compare to your expectations?

Elizabeth Andrews:

I got to say, I was telling my husband about this last night, about how excited I was, and what a true watershed moment this is in my entire professional career.

Dave Gettings:

A big moment.

Elizabeth Andrews:

His question, Dave is, why don't we have a call-in portion, because he was going to call in. I expected it to probably be kind of a crank call, but he was really hoping to get in here on this discussion. He's a non-lawyer.

Dave Gettings:

You can put that in the suggestion box for 2025. We will see if it happens.

Elizabeth Andrews:

Absolutely. We'll look forward to it. Thank you so much for having me on. It was a great chatting with you.

Dave Gettings:

Thanks, Elizabeth. I'd like to thank everyone for listening to today's podcast. And don't forget to visit our blogs, consumerfinancialserviceslawmonitor.com and troutmanfinancialservices.com. And please subscribe to our podcast at all your favorite podcasting locations. Thanks for listening.

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