



THE STATE BAR OF CALIFORNIA

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– COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION

ADR – 2005 – 10

TO: Larry Doyle, Chief Legislative Counsel, State Bar of California

FROM: State Bar's Committee on Alternative Dispute Resolution

RE: Proposal to amend Code of Civil Procedure section 1281.2 to make a petition to compel arbitration pursuant to section 1281.2 the *exclusive* procedural means of seeking to compel arbitration of a controversy alleged to be subject to an arbitration agreement.

COMMITTEE AND CONTACT:

Committee on Alternative Dispute Resolution (“ADR Committee”)

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DIGEST:

Under existing law, a party who contends that a claim brought by another party in court is subject to an arbitration agreement may file a petition to compel arbitration of that claim, pursuant to Code of Civil Procedure sections 1280 et seq. There is also case law holding that

parties may resort to various other procedural options to assert their arbitration rights. Other potential options might include a motion for summary judgment, a demurrer, a cause of action for declaratory relief, a motion for judgment on the pleadings, a motion in limine to exclude all of evidence of claims subject to arbitration, and a motion for directed verdict. The premise of that case law has been questioned. The proposed statutory amendments would make a petition to compel arbitration the exclusive procedural means to assert that a claim filed in court must be submitted to arbitration.

PURPOSE:

This legislation is invited by a question raised in *Kalai v. Gray* (2003) 109 Cal.App.4th 768, which also provides an explanation of existing law, the perceived problem, and how this proposal would remedy the problem. In *Kalai*, the plaintiff had entered into an agreement for construction of improvements on his home that included an arbitration clause. A dispute arose with the contractor. Instead of initiating arbitration, Kalai filed a complaint in superior court. The defendant, rather than filing a petition to compel arbitration pursuant to Code of Civil Procedure section 1281.2, filed a motion for summary judgment based upon the arbitration agreement. The Court of Appeal concluded that the claim asserted by Kalai was governed by the arbitration agreement, rejected the defendant's argument that Kalai had waived his right to arbitrate, and ordered that Kalai could arbitrate his claim in accordance with the parties' arbitration agreement if he chose to do so. *Id.* at 778.

In its opinion, the court observed the following about *Charles J. Rounds Co. v. Joint Council of Teamsters No. 42* (1971) 4 Cal.3d 888, the case that supported defendant's use of a motion for summary judgment to resolve arbitrability:

“We must also note that *Charles J. Rounds Co.*, is over 30 years old, and its basic premise, that defendants may resort to various procedural options to assert their arbitration rights, might not reflect the current thinking on enforcement of arbitration provisions. As the Supreme Court has stated more recently, ‘Title 9 of the Code of Civil Procedure . . . represents a comprehensive statutory scheme regulating private arbitration in this state. (§ 1280 et seq.)’ (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 [10 Cal.Rptr.2d 183, 832 P.2d 899].) That scheme includes ‘procedures for the enforcement of agreements to arbitrate.’ (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 830 [88 Cal.Rptr.2d 366, 982 P.2d 229].) It occurs to us that allowing an entirely distinct summary judgment procedure, with distinct remedies and consequences, is perhaps inconsistent with the characterization of Title 9 as ‘comprehensive,’ and inconsistent with the very specific rights and procedures contained therein.

“For example, one of the provisions of Title 9 specifies that when an issue pending in court has been ordered into arbitration, either by that court or another, the litigation shall be *stayed* at the request of any party until the completion of the arbitration. Not dismissed, which is the necessary result of a summary judgment, but stayed. (Code Civ. Proc., § 1281.4.) Title 9

also specifies which arbitration orders are directly appealable, and which must be challenged, if at all, from a final judgment after arbitration. Code of Civil Procedure section 1294 allows a direct appeal from an order denying a petition to compel arbitration, but no appeal from an order compelling it. A summary judgment procedure, by contrast, allows the opposite. A court's decision to enforce an arbitration agreement (and thus to grant summary judgment) is appealable. A decision to deny enforcement would not be appealable because it would not result in a judgment. In light of these inconsistencies, it is not entirely clear that *Charles J. Rounds Co.*, remains good law.”

Kalai at 774, fn. 1.

This proposed statutory amendment is intended to address the observations made by the court in *Kalai*. The proposed legislation is limited in scope. It is *not* intended to limit or have any impact on existing law concerning the filing of any motions in court to obtain any relief other than an order that the claim or claims asserted in court must be determined in arbitration. It is not intended to preclude, for example, a motion for summary judgment on the grounds that the plaintiff has *no* viable claims whatsoever to assert, whether in court or in arbitration. *See, e.g., Martinez v. Scott Specialty Gases, Inc.* (2000) 83 Cal. App. 4th 1236 (summary judgment in favor of defendant affirmed where all of plaintiffs’ claims were within the scope of an arbitration agreement, and court found that plaintiffs’ conduct in pursuing a lawsuit and refusing to arbitrate resulted in a waiver of the right to arbitrate).

ILLUSTRATIONS:

Kalai illustrates the issues raised by this proposal.

DOCUMENTATION:

The ADR Committee is not aware of any documentary evidence (e.g., studies, reports, or statistics) that supports the conclusion that there is a problem.

HISTORY:

The ADR Committee is not aware of any similar bills that have been introduced.

PENDING LITIGATION:

The ADR Committee is not aware of any pending litigation that would be impacted by this legislation if enacted.

LIKELY SUPPORT & OPPOSITION:

The plaintiffs' bar may support the proposed legislation, arguing that it would expressly limit the procedural means of seeking an order that the claim or claims asserted in court must be determined in arbitration, properly and consistent with the comprehensive statutory scheme regulating contractual arbitration in California. In addition, the plaintiffs' bar may contend that defense counsel have attempted to use other procedural mechanisms improperly, such as motions for summary judgment as a means of seeking dismissal of claims initiated in court rather than in an arbitration.

The defense bar may argue that *Charles J. Rounds Co. v. Joint Council of Teamsters No. 42* (1971) 4 Cal.3d 888 expressly authorized the option of moving for summary judgment when a plaintiff files suit instead of initiating arbitration, and that summary judgment affords a different remedy than a motion to compel arbitration. Granting of summary judgment, some have argued, does not permit further arbitration, whereas a motion to compel arbitration does. Moreover, defense counsel may argue, the proposed statute would place an undue restriction on the use of procedural mechanisms that may be appropriate under the circumstances of any given case.

A more neutral argument that might be made in support of the proposed legislation is that it deals with a procedural issue only, and is not intended to have a substantive impact on whether claims that are asserted in court can or must be asserted in arbitration. In *Kalai*, the defendant argued that the granting of its motion for summary judgment did *not* permit further arbitration by the plaintiff (whereas a motion to compel arbitration would have permitted such arbitration). The Court of Appeal rejected that argument, found that plaintiff did not waive his right to arbitrate merely by filing his claim in court, and held that plaintiff could arbitrate his claims if he chose to do so. As a matter of substance, this is the same result that would have been reached following the granting of a motion to compel arbitration by the defendant. In a different case, presenting different facts, the court in *Martinez* found that plaintiff's conduct did result in a waiver of the right to arbitrate, so the granting of defendant's motion for summary judgment precluded further pursuit of plaintiff's claims in court or in arbitration. As discussed above, the proposed legislation is not intended to preclude a motion for summary judgment on the grounds that the plaintiff has *no* viable claims whatsoever to assert, whether in court or in arbitration, and the procedural limitation imposed by this legislative proposal is not intended to have an impact on the approach taken in *Martinez*.

FISCAL IMPACT:

None expected.

GERMANENESS:

The proposed legislation would address issues that have been raised in litigation concerning the procedural means of asserting that claims are subject to arbitration, and is consistent with the comprehensive statutory scheme regulating contractual arbitration in California. The problem is a technical one, which may not be readily recognized by persons other than lawyers familiar with litigation and the law of arbitration.

TEXT OF PROPOSAL:

Section 1281.2 of the Code of Civil Procedure is amended to read:

“Section 1281.2. On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

(a) The right to compel arbitration has been waived by the petitioner; or

(b) Grounds exist for the revocation of the agreement.

(c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. This subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295.

Filing a petition pursuant to this section is the exclusive means by which a party to an arbitration agreement may seek to compel arbitration of a controversy alleged to be subject to that arbitration agreement.

If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit.

If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies.

If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of

all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding.”