

**RESOLUTION 04-07-2007**

**DIGEST**

Discovery: Existence of Arbitration Agreements

Amends Code of Civil Procedure section 2017.010 to permit discovery into the existence of valid arbitration agreements.

**RESOLUTIONS COMMITTEE RECOMMENDATION**

APPROVE IN PRINCIPLE

History:

No similar resolution found.

Reasons:

This resolution amends Code of Civil Procedure section 2017.010 to permit discovery into the existence of valid arbitration agreements. This resolution should be approved in principle because it cures the defect of current law by allowing both parties access to the same information regarding arbitration agreements before an adjudication is made.

When a party files a motion to compel arbitration, the court “*shall . . .* stay the action or proceeding until the application for an order to arbitrate is determined and, if arbitration of such controversy is ordered, until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies.” (Code Civ. Proc., § 1281.4 [emphasis added].) The problem is that once a party files a motion to compel arbitration alleging that there is a valid arbitration agreement, the responding party has no opportunity to conduct discovery into the validity of or other defenses to the arbitration agreement before the motion is heard.

It is inherently unfair that one party can bring a motion to remove the matter from the courts to arbitration without the other party having an opportunity to discover the existence of other information that might vitiate the alleged arbitration agreement. Justice requires that discovery regarding such agreements should be allowed before that issue is decided, especially when the court’s decision could potentially take the parties out of the judicial system and deprive a party of a trial by jury.

**TEXT OF RESOLUTION**

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 2017.010 to read as follows:

- 1 §2017.010
- 2       Unless otherwise limited by order of the court in accordance with this title, any party
- 3 may obtain discovery regarding any matter, not privileged, that is relevant to the subject
- 4 matter involved in the pending action or to the determination of any motion made in that
- 5 action, if the matter either is itself admissible in evidence or appears reasonably calculated to
- 6 lead to the discovery of admissible evidence. Discovery may relate to the claim or defense
- 7 of the party seeking discovery or of any other party to the action. Discovery may be obtained

8 of the identity and location of persons having knowledge of any discoverable matter, as well  
9 as of the existence, description, nature, custody, condition, and location of any document,  
10 tangible thing, or land or other property. The stay described in Section 1281.4 does not  
11 prohibit a party from obtaining discovery under this Act on the limited issues of whether an  
12 agreement to arbitrate was entered into or whether grounds exist to revoke the arbitration  
13 agreement before the court orders any party to arbitration. The court may order the type of  
14 discovery a party can conduct on the limited issues of whether an agreement to arbitrate was  
15 entered into or whether grounds exist to revoke the arbitration agreement or make any other  
16 order as may be just on those issues.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS:

Existing Law: Code of Civil Procedure section 1281.4 states that when a party files a petition to compel arbitration the court “shall, upon motion of a party to such action or proceeding, stay the action or proceeding” until the court rules on the application.

This Resolution: Would enable a litigant to conduct discovery on the limited issues of whether an agreement to arbitrate exists and whether there are any grounds to revoke the arbitration agreement before the court rules on a pending petition and/or motion to compel arbitration.

The Problem: A litigant is prohibited from conducting discovery on whether an arbitration agreement exists before a court rules on whether the parties should be sent to arbitration. Yet every litigant enters a courtroom with a constitutional right to a jury trial guaranteed by Article I, Section 7 of the California Constitution and the Fifth Amendment of the United States Constitution. The right to select a judicial forum is a “substantial right” not lightly to be deemed waived. (*Margaret Ann v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501, 1507.) Under Code of Civil Procedure section 1281.2, a court cannot order a litigant into arbitration unless it finds “an agreement to arbitrate the controversy exists.” With such a critical right at stake, the stay under Section 1281.4 bars a litigant’s right to conduct discovery on the limited issue of whether an agreement to arbitrate exists. But many times, discovery from the party compelling arbitration or third parties is needed to demonstrate there is no agreement to arbitrate and to oppose the motion to compel arbitration. To squelch this need, all an opposing party needs to do is file a motion to stay the proceedings.

Other statutes grant a party the right to conduct discovery before the court makes a ruling that could be dispositive of a party’s rights. Code of Civil Procedure section 437c, subdivision (h) gives a litigant the right to seek a continuance of the motion so a party has the opportunity to obtain discovery needed to oppose the motion. Implicit in this is the Legislature’s recognition that due process must afford the opposing party every reasonable opportunity to oppose a motion that could be dispositive of a claim or case. Under Section 1281.2, the court’s ruling is dispositive of a litigant’s right to a jury trial. This resolution would safeguard the same due process rights with minimal interference with the process of sending a case to arbitration.

The word “arbitration” is synonymous with notions like arbitration is the “favored” alternative method for resolving disputes and any doubt must be resolved in favor of arbitration. That may be true, but only after a court finds an agreement to arbitrate exists. There is no public policy in favor of ordering a litigant into arbitration when they have not agreed to arbitrate their claims. (*Lopez v. Charles Schwab* (2004) 118 Cal.App.4th 1224, 1229.)

This resolution would give every litigant a reasonable opportunity to contest or demonstrate the existence of an arbitration agreement.

#### IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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