

Timing is Everything: Court of Appeal Rules That Plaintiff's Failure To Demand Arbitration In Medical Malpractice Case Until Shortly Before Trial Resulted In Loss Of Plaintiff's Right To Binding Arbitration Against Defendant Doctor

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An open question in California case law is when a petition to compel arbitration should occur. The California Arbitration Act provides, under Code of Civil Procedure Section 1281.2, that a petition to compel arbitration will be granted unless the "right to compel arbitration has been waived", but does not express a deadline. Case law on point, largely expressed in the California Supreme Court decision in Saint Agnes Medical Center v. PacifiCare of California (2003) 31 Cal.4th 1187 ("Saint Agnes"), generally holds that there will be no waiver of the right to arbitration absent a finding that the petitioning party's conduct in pursuing litigation of a dispute has substantially undermined the important public policy favoring arbitration or where the petitioning party's conduct substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration.

Two cases on point, Sobremonte v. Superior Court (1998) 61 Cal.App.4th 980 ("Sobremonte") and Groom v. Health Net (2000) 82 Cal.App.4th 1189 ("Groom")- both of which were cited in Saint Agnes, arrived at substantially different conclusions based on similar fact patterns using the same fact based criteria.

In Sobremonte, the Court of Appeal set forth six factors to consider in whether a waiver has taken place:

- "(1) whether the party's actions are inconsistent with the right to arbitrate;
- (2) whether 'the litigation machinery has been substantially invoked' and the parties 'were well into preparation of a lawsuit' before the party notified the opposing party of an intent to arbitrate;
- (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay;
- (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings;
- (5) 'whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place'; and

(6) whether the delay 'affected, misled, or prejudiced' the opposing party."

Sobremonte, supra, 61 Cal.App.4th at 992. Based on that criteria, the Court of Appeal in Sobremonte found that a bank defendant waived its rights to arbitrate a dispute with its customers by waiting to demand arbitration until its customers spent 10 months preparing their case for a full trial at a considerable expenditure of time and money, including over 200 hours in trial preparation. However, in Groom, which was decided after Sobremonte, the Court of Appeal reversed an order denying a petition to compel arbitration even though the petitioning party did not file a motion to compel until 11 months after the filing of the complaint and after the petitioning party demurred four times to the original and amended complaints. The Court of Appeal in Groom found no waiver "simply from the time and expense of opposing [the petitioning party's] demurrers and drafting amended pleadings." Groom, supra, 82 Cal.App.4th at 1197.

In Saint Agnes, the California Supreme Court analyzed both Sobremonte and Groom, and without over turning either decision, confirmed that the Sobremonte factors were "relevant" and "proper" in considering waiver claims. The Court in Saint Agnes also acknowledged that the issue of waiver is a question of fact and the trial court's finding, if supported by substantial evidence, is binding.

A difficulty for practitioners has been the application of the Sobremonte factors in light of the disparate holdings in Sobremonte and Groom. In that regard, some light appears to have been shed on this contradiction by the recent decision in Burton v. Cruise (2010) DJDAR 18393 ("Burton"). In Burton, an action concerning a medical malpractice case involving a liposuction procedure, the plaintiff filed a Complaint in April 2008, filed a Case Management Statement in July 2008 without requesting arbitration and then attended a Case Management Conference where the trial court set a trial date in April 2009. The parties then went through discovery and designated experts. In February 2009, the plaintiff, for the first time, sought arbitration. A Petition to Compel was then filed in March 2009, which was denied. The trial court, in its decision, found that the defendant doctor's claim of prejudice, i.e. that experts which were retained were for a jury trial and not an arbitration panel, and the passage of time, demonstrated sufficient prejudice. On appeal, the Court of Appeal acknowledged the obvious dichotomy in the Sobremonte and Groom cases but ruled that the Sobramonte holding should control. Quoting the Court in Burton:

"[o]n a closer, policy-based analysis, St. Agnes seems more wedded to Sobremonte than to Groom. Although we believe the cases are not necessarily inconsistent, to the extent there is a conflict, it is Groom which is the odd man out."

The Burton case is indeed important. The decision provides that a waiver can occur even where seemingly questionable claims of prejudice are made. The most important factor does appear to be time. Therefore, any party which desires arbitration, given the Burton case, should strongly consider demanding arbitration at least by the time the Court sets a trial date.

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