

## Discovery Issues

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“A Non-Party to Arbitration is Entitled to Full Review by the Court of the Arbitrator’s Adverse Discovery Orders”

Our California Supreme Court has recently held that in a discovery dispute involving a non-party to an arbitration proceeding, the dispute must first be submitted to the Arbitrator. Thereafter, the non-party is entitled to full judicial review of the Arbitrator’s discovery order. This recent ruling in the matter of *Daniel L. Berglund v. Arthroscopic Laser Surgery Center of San Diego, LP* ( (July 18, 2008; DJDAR 10967) essentially gives a non-party to an arbitration two opportunities in different forums, to oppose a discovery motion which affects the non-party: Once at arbitration, and again when the Arbitrator’s discovery order is given full judicial review by the Court.

In *Berglund*, the Plaintiff filed a complaint in the San Diego Superior Court for battery, breach of fiduciary duty and negligence based on medical care and treatment he received from the Defendant Surgery Center. Plaintiff alleged, among other things, that one of his treating physicians was impaired from abuse of narcotics at the time he received treatment. Plaintiff served on Defendant a subpoena requesting the production of certain documents, including medication logs pertaining to “missing medications, prescription and/or other chemical substances”. Defendant objected on the grounds that the documents were statutory and privileged pursuant to Evidence Code section 1157 and Health and Safety Code section 1370. Thereafter, the Court granted a motion by Defendants other than Defendant Surgery Center to compel contractual arbitration, and a retired judge became the Arbitrator. However, because the Surgery Center was not a party in the arbitration agreement, Plaintiff’s case against it was not subject to arbitration and remained pending in the Superior Court. Plaintiff and the Surgery Center later settled the court action, and the court approved it as a good faith settlement. Plaintiff’s complaint against the Surgery Center was then dismissed with prejudice.

Almost a year later in the arbitration proceeding, Plaintiff served the Surgery Center (who remained a non-party to the arbitration), with a discovery subpoena for the production of the Surgery Center’s “documents reflecting inventory lists of narcotics medications which were discovered missing”. The Surgical Center asserted that the documents were still privileged and sought a protective order from the Superior Court, also on the basis that it was not a party to the arbitration. Thereafter, Plaintiff filed with the Arbitrator a motion to compel production of the subpoenaed documents. The Arbitrator concluded that he had jurisdiction to rule on the motion, and directed the Surgery Center to produce the requested documents for the Arbitrator’s *in camera* review. Shortly afterwards, the Superior Court denied the Surgery Center’s motion for a protective order. The Court ruled that the Arbitrator, not the Court, had jurisdiction over Plaintiff’s arbitration subpoena and that the Arbitrator was empowered to compel production of the subpoenaed documents. The Surgery Center appealed.

The Supreme Court confirmed that Code of Civil Procedure Sections 1283.1 and 1283.05

grant Arbitrators authority over discovery in certain arbitration proceedings. Code of Civil Procedure Section 1283.05 (a) provides that after the appointment of an Arbitrator, the parties to the Arbitration have the same rights to take depositions and obtain discovery and to “exercise all of the same rights, remedies and procedures, and be subject to all of the same duties, liabilities and obligations in the Arbitration” as provided in the statutory provisions governing subpoenas (Code of Civil Procedure Sections 1985-1997), and in the Civil Discovery Act (Code of Civil Procedure Section 1216.010, et. seq.). The Court concluded that parties to arbitration have a right to discovery , and because section 1283.05 (a) incorporates the Civil Discovery Act which permits discovery from non-parties, the right to discovery in an Arbitration also includes discovery from non-parties.

The court next examined the Arbitrator’s power to enforce discovery, and held that in an arbitration proceeding, the Arbitrator’s power to enforce discovery resembles that of a judge in the civil action in the superior court (*Alexander v. Blue Cross of California* (2001) 88 Cal.App.4th 1082, 1090). This authority included the Arbitrator’s authority to also enforce discovery orders against non-parties through the imposition of sanctions as permitted in the Civil Discovery Act.

The Supreme Court agreed with the majority of the Court of Appeal Justices that a discovery dispute arising out of Arbitration must first be submitted to the Arbitrator and not the Court. This conclusion followed logically from Code of Civil Procedure section 1283.05. The Court also concluded that section 1283.05 specifically links an Arbitrator’s discovery orders to arbitration awards, thereby making Arbitrator discovery orders neither more nor less conclusive, final, and enforceable than an arbitration award on the merits.

The Court still had to answer the question of whether the Arbitrator’s award was conclusive and final as to *non-parties*. The Court answered this question “No”. Without consent, a non-party to an arbitration agreement cannot be compelled to arbitrate a dispute. The Supreme Court construed section 1283.05 (c) as allowing full judicial review of arbitrator discovery orders against non-parties, because it reasoned this would lead to the most reasonable result. This result would preserve the legal rights of non–parties who did not consent to arbitration in the first place. The Court further reasoned that this would promote judicial economy by requiring discovery disputes arising out Arbitration to be first submitted to Arbitrators, who may be able to resolve many if not all of those disputes, while at the same time, protecting the legal rights of non-parties by still allowing for full judicial review of any adverse discovery order against the non-party issued by the Arbitrator.

This ruling may be viewed through the lens of the Supreme Court’s concern, as stated in the decision, with the judiciary’s primary function of protecting legal rights- including the rights of non-parties to a contractual Arbitration who may be subject to an Arbitrator’s discovery order.