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Dubious trial dates causing defendants to flee ADR

By Eric Bonholtzer

As Bob Dylan once said, "The times, they are a-changin'." No quote could be more apt in the legal field in light of budget cutbacks, courtroom closures and delayed trials. However, one significant change that has gone overlooked in the shadow of the cutbacks is the growing trend of defendants fighting to have a jury trial instead of going to arbitration — despite having signed arbitration agreements. With trial dates now being scheduled further and further away, some crafty attorneys are trying to get out of the very agreements their clients wanted. Thankfully for litigants seeking a speedy resolution through alternative dispute resolution, there is a way to fight back.

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There has been a steady increase of defense counsel trying to keep their cases in the judicial system. While there are many reasons for this, including recent studies that arbitrators may be more favorable in certain scenarios than juries, one of the most prominent motivations seems to be linked to the budget cutbacks and the delays. It's common knowledge that a trial date gets parties to the settlement table. Something about that Sword of Damocles makes litigants weigh potential exposure and the probability of proving liability. However, with trial dates getting more remote, so is the incentive to settle. From a defendant's standpoint, there is no advantage to settling a case for true value when there is no date out there when a judgment might be rendered against them. Instead, it behooves a deep-pocket defendant to wait it out in hopes of forcing the other side into accepting a smaller settlement. Faced with this reality, plaintiffs' attorneys would be wise to look toward arbitration if they wish to speed the process to settlement or judgment.

For a lawyer seeking this option, a problem often arises in that most clients are not attorneys and fail to recognize the importance of an arbitration agreement. While this can occur in numerous situations, the most common is in employment and medical contexts as clients will sign an arbitration agreement and then a claim will not arise until years or even decades later. By the time a lawyer gets involved, a client will likely not remember if he or she signed an arbitration agreement, even if asked. This poses a significant problem because one of the few grounds for not enforcing an arbitration agreement is waiver.

In refusing to compel arbitration, the Court of Appeal in *Lewis v. Fletcher Jones*, 205 Cal. App. 4th 436 (2012), reiterated that while state and federal law reflect the strong public policy favoring arbitration, a court can refuse to enforce an ADR agreement on grounds that would revoke any contract, which includes waiver. This is precisely what the court did, basing its decision on the 2003 state Supreme Court case *Saint Agnes Medical Center v. PacifiCare of California*, 31 Cal. 4th 1187, which adopted the 6-factor federal test for determining if waiver occurred. Under the *Saint Agnes test*, no one factor is determinative; instead, each has to be examined in context.

The first thing a court will look at is if the party seeking to compel arbitration has acted inconstantly with the right to arbitrate — an unwary lawyer can inadvertently waive a client's right to arbitrate by doing very little. In *Guess?, Inc. v. Superior Court*, 79 Cal. App. 4th 553 (2000), the court gave great weight to simply answering a complaint and participating in discovery. In *Adolph v. Coastal Auto Sales, Inc.*, 184 Cal. App. 4th 1443 (2010), the court noted that two demurrers were filed and the party seeking to compel failed to mark arbitration in its case management conference statement. While these are just a few factors that these courts considered, it is important to realize how otherwise standard litigation steps can be used to find waiver.

Second, the court will look to see if the litigants were well into preparation of a lawsuit before notifying the other party. For this factor, the court will examine the procedural posture of the case and determine whether there has been litigation of the merits.

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The third factor is closely related, as the court will decide if there has been unreasonable delay. While that might sound promising for fighting waiver, in *Guess?* the court found a time period of less than four months between filing a lawsuit and a motion to compel constituted unreasonable delay.

The fourth factor is inapplicable to plaintiffs because it asks if a defendant seeking arbitration has filed a counterclaim without asking for a stay, but any defendant should be aware of this prong.

The fifth factor is whether the side seeking to compel arbitration has taken advantage of discovery not available under the arbitration agreement, which means it is essential to read the agreement carefully.

The final factor is determining if prejudice has resulted. Thankfully for those fighting waiver, the state Supreme Court explained in *Saint Agnes* that prejudice typically will only be found where the petitioning party has substantially undermined the incentives to arbitrate or "substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration." However, the same court cautioned litigants in a subsequent decision, *Burton v. Cruise*, 190 Cal. App. 4th 939 (2010), that "a petitioning party's conduct in stretching out the litigation process itself may cause prejudice."

Since waiver is determined on a case-by-case basis, it is important to know each factor well and to be careful in each action taken. Ideally that would mean once a client comes in, even if the client does not remember if he or she signed an arbitration agreement, to demand the client's file and specifically ask for the arbitration agreement, if any exists. Thankfully, the *Saint Agnes* court was clear that the mere filing of a lawsuit does not result in waiver, so if filing is an absolute necessity, do so, but then immediately seek the file. If the other side is being uncooperative, send a discovery request, but limit it to the arbitration agreement and refuse to respond to discovery on the grounds of seeking arbitration.

These tips will help ensure that you do not inadvertently waive your client's right to arbitration and that if a doctor, employer or other contracting party "intended to subject matters to binding arbitration," they are going to be compelled to do just that.

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