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The In-House Counsel Interview: Jonathan Gulsvig of Professional Plastics, Inc.

By Darrell P. White

This installment features Jonathan S. Gulsvig, General Counsel, Professional Plastics, Inc.

Q: Can you describe your career path?

My career path is rooted in Southern California. I attended UCLA, graduated early, and went right on to Chapman University, Dale E. Fowler School of Law. Externing for the Hon. Andrew J. Guilford was my best experience in law school. I learned first-hand how courtrooms and chambers function, analysis of litigation matters from chambers, and more than I could possibly describe in this short interview.

After law school, I worked as a litigation associ-

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Nonparty Discovery in California Arbitration: How to Get What You Want

By Leilani L. Jones

Opting for arbitration requires attorneys to balance efficiency and procedural protections. The implications of arbitration are something clients certainly have to carefully consider both when drafting arbitration provisions, and after initiating a demand. While arbitration can in many respects streamline the civil discovery process, one of the largest roadblocks for cases in California arbitrations is "streamlining" discovery from nonparties. This article explores the challenges presented by third party discovery in arbitration, and proposes strategies for obtaining such discovery efficiently and expeditiously.

Alternative dispute resolution tends to make sense to most businesses implementing preventive measures for future litigation. Clients, lawyers, and judges can generally agree that arbitration is the more "cost-effective" way to resolve disputes, especially in California. While arbitration is theoretically a low-cost option for dispute resolution, almost all parties (particularly the party defending) bristle at climbing expenditures during discovery. This is all despite the perception of more "streamlined" processes in arbitrations. On balance, arbitrators, employing less formal procedures for discovery disputes, can typically cut to the chase faster than a civil judge. Parties often resolve issues via letter brief and telephonic hearing, if necessary, instead of formal noticed motions with accompanying separate statements. The Judicial Arbitration and Mediation Services, Inc.'s ("JAMS") own "Arbitration Discovery Protocols" specifically

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"ensure that an arbitration will be resolved much less expensively and in much less time than if it had been litigated in court." *Accessed* at https://www.jamsadr.com/arbitration-discovery-protocols.

The Facts and Fictions of Third Party Discovery in Arbitration

Once in arbitration, the fact-finding process can be a challenge simply between the parties, where extracting necessary evidence from the opposition is an uphill battle in itself. Typically, arbitrators are able to resolve these disputes expediently. Unfortunately, the same cannot be said when it comes to obtaining discovery from nonparties outside of the four corners of the applicable agreement or clause. In most commercial disputes, parties take for granted the potential necessity of such information—they certainly are not prioritizing or thinking about it when drafting contracts at the outset. The problem is arbitrators lack the statutory or contractual authority to monitor and enforce third-party discovery absent parties' forethought. So what options are there?

The California Civil Discovery Act sets forth arbitration discovery rights. The Act only authorizes arbitrators to issue third-party subpoenas, with the same force as a civil judge, if the nature of the dispute is personal injury or wrongful death. *See* Cal. Code Civ. P. § 1283.1. In such cases, section 1283.05 of the Code applies, stating 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 (§§ 1985 to 1997) and in the Civil Discovery Act (§§ 2016.010 et seq.) "as if the subject matter of the arbitration were pending before a superior court of this state in a civil action …." Because section 1283.05(a) incorporates the Discovery Act, and that law permits discovery from nonparties (§§ 2020.010 et seq.), the right to discovery in such cases includes discovery from nonparties.

This statutory authority, however, does not automatically apply in cases that *don't* involve personal injury or wrongful death. *See* Cal. Code Civ. P. § 1283.05(b). In all other cases, the arbitrator can only utilize the authority granted by the Discovery Act if the arbitration agreement explicitly provides for third-party discovery. *Id*. This is a pitfall for many litigators who, when initiating arbitration, are stuck with an agreement (or merely a clause) that does not unambiguously mention third-party discovery—and simply referencing the right to conduct discovery won't do the trick. Indeed, the Code of Civil Procedure makes clear that "[o]nly if the parties by their agreement so provide, may the provisions of Section 1283.05 be incorporated into, made a part of, or made applicable to, any other arbitration agreement." *Id*., subs. (b). According to that language about "incorporat[ion]," it seems a mere nod to discovery generally is not enough.

Getting What You Need from Nonparties: Easier Said Than Done

But even when parties are actually in arbitration, the discovery-seeker faces other challenges with regard to third party discovery under California law. They may try to send a subpoena to the third party, and hope that the nonparty will respond in good faith. Wiser third parties will request a copy of the applicable arbitration agreement, eventually seeing that it doesn't permit discovery from nonlitigants. In this situation, there really is no option for a party to enforce discovery if the agreement does not incorporate section 1283.05. In fact, probably the only available route is to initiate a miscellaneous action in civil court, either in California or in the out-of-state forum. Both present risks. As far as California goes, the court is under no obligation to force compliance, especially because the Discovery Act is specific regarding nonparty subpoenas. It's also safe to say an out-of-state judge is unlikely to enforce a California subpoena issued out of an arbitration forum. Moreover, judicial review of third-party discovery disputes during arbitration imposes huge delays to the information gathering process. Third parties may even use judicial review as a tactic to create delay sufficient to dissuade the arbitrating parties from seeking documents from them in the first place.

If the arbitration agreement does incorporate section 1283.05, at least the party is in a hypothetically better position, and the process of enforcement should be easier. Emphasis on "should be." Despite so many cases circumventing the court system in favor of ADR, California case law is thin on commentary about how third-party discovery functions in arbitration. The California Supreme Court has stated that, at least in cases subject to section 1283.05 (*i.e.*, personal injury), the "arbitrator's powers to enforce discovery resem-

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ity exclusion. Accordingly, *Gilbert* should not, by itself, discourage a policyholder from challenging a carrier's denial of coverage on these bases.

Summary

When dealing with insurance claims arising from lawsuits involving breach of contract causes of action, policyholders should not accept a carrier's denial of coverage at face value. As described above, an insurer's denial may be unsupported by the law. In particular, the form of a cause of action should not dictate whether coverage is provided, and the standard exclusion for contractual liability is more limited than its name may imply.

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THANK YOU FOR MAKING OUR ANNUAL HOLIDAY GIFT GIVING A SUCCESS!

The Orange County Chapter of ABTL collected donations totaling over $1,900 to help some needy children in our community enjoy the holiday season.

We also had a wonderful showing of support for the Orange County Superior Court's adoption program.

Thank you to our wonderful members and supporters as none of this would be possible without you. Happy New Year!

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bles that of a judge in a civil action in superior court…including the authority to enforce discovery against nonparties through imposition of sanctions." *Berglund v. Arthroscopic & Laser Surgery Ctr. of San Diego, L.P.*, 44 Cal. 4th 528, 535 (2008). In *Berglund*, a party filed a lawsuit against a number of health-care providers for negligent care. Plaintiff served a subpoena for the production of medical logs on a defendant, the Arthroscopic & Laser Surgery Center ("ALSC"). They unsurprisingly objected. The other defendants successfully moved to compel arbitration; meanwhile, the suit against ALSC settled and was dismissed with prejudice. At that point, the arbitrator was asked to direct ALSC—a dismissed nonparty to all proceedings—to produce documents. ALSC challenged that order in court via a request for protective order. The California Supreme Court denied the protective order since "the proper forum for a nonparty to challenge the discovery sought by a party to the arbitration" is the arbitration proceeding itself; "the arbitrator's power to enforce discovery resembles that of a judge in a civil action," so it is "reasonable to infer that the Legislature intended discovery disputes arising out of arbitration to be initially litigated before the arbitrator." *Berglund*, *supra*, at 535.

With that reasoning, the *Berglund* court held that "all discovery disputes arising out of arbitration must be submitted first to the arbitral, not the judicial forum." *Id*. at 535-36. Importantly, the Supreme Court's holding in *Berglund* that discovery disputes must be initially submitted to the arbitrator was based on the arbitrator's power to control discovery pursuant to Cal. Code Civ. P. § 1283.05. Arguably, non-personal injury disputes with agreements incorporating 1283.05 fall in this same category. But there is a risk that a decision-maker considers third-party discovery outside the scope of the statute if not a personal injury or wrongful death case, regardless of whether the parties incorporated the relevant statute. Even with *Berglund's* lack of clarity, parties should optimistically include a reference to section 1283.05. At best, when push comes to shove, the third-party discovery meets the *Berglund* test, and nonparties will be required to submit any objections to the arbitrator before attempting judicial review. This means the third party ignoring the subpoena has that dispute submitted to the arbitrator—who can render sanctions for noncompliance. In fact, the Code details that arbitrators have the power to enforce the obligations of discovery by imposing the *same sanctions and penalties*

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as a court could impose—short of the "power to order the arrest or imprisonment of a person." Cal. Code Civ. P. §§ 1283.05, 1283.1.

When (and if) The Arbitrator Intervenes

But of course, it couldn't be as simple as incorporating a Code section to ensure an easy review mechanism. It depends on which party seeks review. Per *Berglund*, if the party seeks judicial review of a discovery order, only limited review is available. *Berglund*, *supra*, at 534-36. This comes with one caveat. The *Berglund* court held that while the dispute must first be submitted to the arbitrator for resolution, the nonparty is entitled to full judicial review of the order. *Id*. The latter makes sense, since nonparties to arbitration are not bound by an arbitrator's decision because his or her authority is derived from the parties' consent—and nonparties have not consented to arbitration. *Id*. at 538. All of these "review" provisions come with the important asterisk that this particular review provision under *Berglund* might not even apply to non-personal injury or wrongful death cases.

There is one silver lining. It's important to remember that the arbitrator does have jurisdiction over nonparties for a limited purpose: appearance at the actual arbitration hearing, as well as production of evidence. Cal. Code Civ. P. § 1282.6 ("Subpoenas shall be served and enforced" in compliance with §§ 1985-1997). But parties looking to avoid these discovery issues altogether may want to assess whether pre-hearing discovery is even necessary, or whether they could rely on a third party's testimony at the hearing only. This is because the same "third party" risks apply; third parties can still challenge subpoena, and the procedure for an arbitrator or court to compel a nonparty's attendance at arbitration is not specified under section 1282.6. When a court action is pending (*e.g.*, the action in which the court compelled arbitration), a motion to compel attendance of the witness is a safe bet. If there is no action pending, a party might have to turn to another miscellaneous action.

Implications for Contract Drafting

Practitioners looking to avoid nonparty discovery roadblocks at the outset need to advise clients at the point of contract formation. Depending on the type of contract and most likely risk profile for litigation, it probably makes sense to incorporate Cal. Code Civ. P. § 1283.05. At least one California case suggests that simply incorporating section 1283.05 is enough to evidence intent on the parties' part to be bound by that section (and thus its provisions on nonparty discovery) during the arbitration. *Stone & Webster, Inc. v. Baker Process, Inc.*, 210 F. Supp. 2d 1177, 1188 (S.D. Cal. 2002). When making this decision, it's critical for the party to understand that incorporating section 1283.05 into an arbitration discovery agreement is the equivalent of agreeing to the full range of discovery provided in the Discovery Act, with the exception that the arbitrator must still pre-approve depositions for discovery. Cal. Code Civ. P. § 1283.05(e). This could be a double-edged sword; if counsel chooses to provide for more discovery, the level of procedural protection makes the proceedings more like litigation. The parties might instead want a clause that specifically states the parties agree to operate *without* formal discovery. At least one option that courts have upheld is to place specific limitations on discovery in the arbitration clause—such as limiting depositions to one per side, plus expert depositions—but allow the arbitrator to expand discovery upon a showing of need. *See Dotson v. Amgen, Inc.*, 181 Cal. App. 4th 975 (2010).

Another consideration is that institutional rules differ. When putting together contracts or clauses, drafters should read the JAMS or American Arbitration Association ("AAA") rules before incorporating them. However, those with national clients may be using uniform arbitration agreements across multiple states. One solution is to advise clients to use California-specific arbitration agreements for any business in California, or any deals that will ultimately be carried out in the state. While it presents an upfront cost for national clients, it would save time and money at arbitration if the party anticipates needing broader discovery (and a means to enforce it). At minimum, companies utilizing cross-state arbitration forms should express a clear intent to allow or disallow third-party discovery.

Putting Things Into Perspective

These discovery issues matter because cases are steadily going to arbitration instead of civil court. To put national caseloads into perspective, the United Stated District Courts reported that there were 25,067 private contract disputes filed in all the federal courts in the United States in the year ending June 30, 2018. *Statistical Table for the Federal Judiciary*, Table C-3. Three years ago, the American Arbitration Association reported that parties filed 8,360 new business-to-business arbitrations, including commercial cases,

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construction, and executive employment disputes. *See American Arbitration Association B2B Dispute Resolution Impact Report 2015 Key Statistics*, *accessed at* https://www.arbitrationnation.com/wp-content/uploads/sites/469/2016/06/ AAA186_2015_B2B_Case_Statistics.pdf.

The claims and counterclaims made in those arbitrations totaled over $16 billion. To top it off, 56% of the arbitrations filed three years ago (in 2015) were resolved prior to award.

Such statistics show the obvious: on a national scale there were—and are—a significant percentage of business disputes being resolved in arbitration, potentially getting all the way to an award at a much higher rate than in court litigation. The trend doesn't show signs of changing. Although state-by-state data is not available, there is really no reason to believe California is any different.

Overall, there is considerable time and expense involved in navigating third-party discovery in arbitration. And, given the unknowns of such discovery, practitioners should consider heading off both at the outset of contract formation. Limited discovery in arbitration can be an advantage in certain cases, but in others it can cripple a party and increase the possibility of surprise at the arbitration hearing.

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