
# Appellate Review

## *Garcia v. Pexco* — Defendant may enforce arbitration agreement when plaintiff alleges a defendant acted as an agent of a party to an arbitration agreement

By Jeffrey I. Ehrlich

**Arbitration; non-signatories' ability to compel arbitration; estoppel; agency:** *Garcia v. Pexco, LLC* (2017) 11 Cal.App.5th 782, 217 Cal.Rptr.3d 793 (Fourth Dist., Div. 3.)

Garcia was hired by Real Time Staffing as an hourly employee, and was then assigned to work for Pexco. Garcia's employment agreement with Real Time included an arbitration clause. Pexco was not a signatory to that agreement. Garcia sued Real Time and Pexco for wage-and-hour claims. Both Real Time and Pexco moved to compel arbitration. The trial court granted the petition. Affirmed.

The general rule is that one must be a party to an arbitration agreement to be bound by it or invoke it. But the rule has exceptions for equitable estoppel and agency. Under the equitable estoppel exception, a non-signatory defendant may invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claim when the causes of action against the nonsignatory are intimately founded in and intertwined with the underlying contract obligations. The doctrine applies where the claims are based on the same facts and are inherently inseparable from the arbitrable claims against signatory defendant. That exception applied here.

The agency exception is another exception to the general rule that only a party to an arbitration agreement may enforce it. The exception applies, and a defendant may enforce the arbitration agreement, when a plaintiff alleges a defendant acted as an agent of a party to an arbitration agreement. Here, the operative complaint alleged that Real Time and Pexco were acting as agents of one another and that every cause of action alleged identical claims against "All Defendants" without any distinction. Pexco could therefore invoke the exception to compel arbitration.

**Vicarious liability; admission of liability will not avoid punitive damages:** *CRST, Inc. v. Superior Court* (2017) __ Cal.App.5th __ (Second Dist., Div. 4.)

In *Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 126 Cal.Rptr.3d 443, the Supreme Court held that an employer's concession that it was vicariously liable for its employee's tort rendered evidence of the employer's negligent hiring or retention of the employee irrelevant and required the exclusion of that evidence. In *CRST*, the employer sought to rely on *Diaz* to exclude evidence of its tortious conduct in hiring/retaining/supervising its employee, so as to avoid the plaintiff's punitive-damage claim against it. The Court of Appeal held that CRST's admission of vicarious liability for its employee's tort did not preclude a punitive-damage claim against it. The punitive-damage allegations in the complaint did not constitute a separate cause of action, but attached to the claim against the employer for vicarious liability. "Thus, when an employer such as CRST admits vicarious liability, neither the complaint's allegations of employer misconduct relating to the recovery of punitive damages nor the evidence supporting those allegations are superfluous."

**Appellate procedure; appealable and non-appealable orders; motions for reconsideration; Code Civ. Proc., § 1008:** *Chango Coffee, Inc. v. Applied Underwriters, Inc.* (2017) __ Cal.App.5th __ (Second Dist., Div. 3.)

Chango filed a lawsuit against Applied for breach of contract, conversion, and fraud. Applied filed a petition to compel arbitration, which was denied. An order denying a petition to compel arbitration is appealable, but Applied did not file an appeal. Seven months after the denial, Applied filed a renewed motion to compel arbitration under section 1008, relying on new evidence obtained in a deposition. The court denied the renewed motion, finding that the new deposition testimony did not alter the court's legal analysis in the prior order. Applied then appealed from the denial of the renewed motion. Appeal dismissed.

Prior cases have held that the denial of a motion for reconsideration filed under section 1008, subd. (a) or (b) is not an appealable order. The Legislature's amendment to section 1008 in 2011, to add subdivision (g) did not alter this rule. The new provision states, "An order denying a motion for reconsideration made pursuant to subdivision (a) is not separately appealable. However, if the order that was the subject of a motion for reconsideration is appealable, the denial of the motion for reconsideration is reviewable as part of an appeal from that order." Applied argued that because the new provision did not specifically state that a motion under section 1008, subd. (b) was non-appealable, the cases holding that the denial of a


motion made under section 1008, subd. (b) had been abrogated. The court rejected this argument. The Legislature's failure to address the appealability of orders denying renewed motions under section 1008, subdivision (b) suggests the Legislature intended the appellate authority that previously held that no appeal would lie from the denial of a reconsideration motion under section 1008, subd. (b) was an indication that the Legislature intended that the prior authority would continue to control.

**Expert witness; *Daubert*; exclusion of opinions:** *Wendell v. GlaxoSmithKline LLC* (9th Cir., 2017) __ F.3d __. Decedent's parents filed products-liability action against drug manufacturer, alleging that drug used to treat son's inflammatory bowel disease caused their son to develop a fatal cancer. In opposing summary judgment, the plaintiffs relied on the declarations from two experts for causation. The trial court excluded their opinions under *Daubert* as insufficiently reliable. Reversed.

Scientific evidence is reliable if the principles and methodology used by an expert are grounded in the methods of science. The focus of the district court's analysis must be solely on principles and methodology, not on the conclusions that they generate. The court's task is to analyze not what the experts say, but what basis they have for saying it.

To assist courts with determining whether expert testimony is sufficiently reliable to admit, the Supreme Court has listed several non-exclusive factors that judges can consider. These include: whether the theory or technique employed by the expert is generally accepted in the scientific community; whether it's been subjected to peer review and publication; whether it can be and has been tested; and whether the known or potential rate of error is acceptable." Courts also consider whether experts are testifying about matters growing naturally out of their own independent research, or if they have developed their opinions expressly for purposes of testifying. These factors are illustrative, and they are not all applicable in each case. The inquiry is supposed to be "flexible," and applied with a liberal thrust favoring admission."

The district court concluded that the plaintiff's experts' testimony did not meet the *Daubert* standard of reliability, focusing principally on the fact that experts developed their opinions specifically for litigation, and had never


conducted independent research on the relationship between the defendant's drugs and the development of the fatal cancer. The court also noted that both experts conceded that although their opinions were based on a reasonable degree of medical certainty, they "would not satisfy the standards required for publication in peer-reviewed medical journals." It concluded that the lack of independent research combined with the doctors' reluctance to publish, "casts doubt on the reliability of their methodologies under Rule 702." The district court also determined that the lack of animal or epidemiological studies showing a causal link between the cancer and the drugs undermined the experts' methodology.

Finally, the district court found that the studies the experts cited did not purport to show that the specific combination of drugs prescribed to the plaintiffs' son actually causes the cancer he developed.

In reversing, the Ninth Circuit found that the question was close, but that the district court erred by excluding the experts' testimony. The district court looked too narrowly at each individual consideration, without taking into account the broader picture of the experts' overall methodology. It improperly ignored the experts' experience, reliance on a variety of literature and studies, and review of the decedent's medical records and history, as well as the fundamental importance of differential diagnosis by experienced doctors treating troubled patients. The district court also overemphasized the facts that (1) the experts did not develop their opinions based on independent research and (2) the experts did not cite epidemiological studies. "We hold that all together, these mistakes warrant reversal."


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