

ALLEGING AND PROVING THE REQUIREMENT FOR ARBITRATION

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This was a relatively strange case. Although it dealt with surgeons, the legal questions would be the same if it dealt with contractors. The case dealt with orthopedic surgeons, breach of contract, and fraud. It had to do with new products.

The plaintiffs attached an agreement between the parties to the complaint. The agreement contained an arbitration clause which provided that “any dispute under this agreement shall be settled by arbitration.... unless the parties agree otherwise.” It also contained a method of selecting the arbitrators.

The defendants tried to compel arbitration, the trial court agreed. The appellate court disagreed. The court stated that while it may initially appear that defendants had alleged the existence of an agreement to arbitrate, a closer reading of the petition reveals that it had not. The defendants alleged only that **plaintiffs agreed to the existence of “alleged agreements”** to arbitrate. Defendants did not themselves affirmatively allege the existence of such an agreement. Further, the evidence offered by defendants to prove the existence of a written agreement to arbitrate consisted solely of counsels (the attorney for defendant), attaching a copy of the plaintiffs agreement. In short, the defendants did not allege, or attempt to prove, that **defendants contended an agreement to arbitrate existed – only that plaintiffs alleged the existence of an agreement.**

The court stated that the reason for the defendant’s evasive pleading became clear in their memorandum of points and authorities. There they “contested the existence or validity” of any written agreements with plaintiffs. However, the defendants had not seen any evidence of identical agreements with the other three plaintiffs. Thus, defendants contested the validity for existence of the agreement at arbitration and trial or hearing.

Although the trial court allowed the defendants petition to compel arbitration, the appellate court issued a writ directing the court to set aside and vacate its order granting that decision and to enter a new order denying the petition because it failed to comply with *Code of Civil Procedure* section 1281.2.

A petition to compel arbitration must affirmatively allege the existence of a written agreement to arbitrate. This is from section 1281.2. Here, the defendants did not affirmatively allege the existence of a written agreement to arbitrate. They did the opposite. They contested the existence or validity of any such agreements with plaintiffs.

The defendants argued that they need not **allege** the existence of a written agreement to arbitrate because the plaintiffs admitted the existence of the agreement in their complaint. This misses the point. A contracting party, like the plaintiffs, is free to voluntarily relinquish its contractual right to arbitrate until such time as other parties to the contract, such as the defendants, decide not to give up that right and seek to enforce the contractual arbitration provision. The defendants cannot rely on the allegations in the complaint itself, to meet their pleading burden. They must allege and prove that there was a written arbitration agreement. This they did not do.

Attorney Sam Abdulaziz of Abdulaziz, Grossbart & Rudman has been practicing construction law for over 30 years. He has written a book called “California Construction Law” which is updated annually. He represents numerous construction trade associations and contractors. He appears at Contractors State License Board meetings and has argued a number of cases before the appellate courts, including the California Supreme Court dealing with the “Pay-If-Paid Clause.” Abdulaziz, Grossbart & Rudman provides this information as a service to its friends & clients. The documents are of a general nature and are intended to highlight areas of the subject matter and should not be used as a substitute for specific legal advice. This document does not create an attorney-client relationship, or protect any confidential information until a written agreement is signed. You should seek the aid and advice of a competent attorney, accountant and/or other professional instead of relying on the presentation and/or documents. Sam Abdulaziz can be reached at Abdulaziz, Grossbart & Rudman, P.O. Box 15458, North Hollywood, CA 91615-5458; (818) 760-2000, Facsimile (818) 760-3908; or by E-Mail at info@agrlaw.net. On the Internet, visit our Website at www.agrlaw.net

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Darryl S. Brodke v. Alphatec Spine, Inc.

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