

RESOLUTION 11-01-2003

DIGEST

Contracts: Tolling of Statute of Limitations by Arbitration Request

Amends Code of Civil Procedure section 337 to extend the statute of limitations where notice is given of intent to arbitrate or mediate pursuant to the contract terms.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

None known.

Reasons:

This resolution amends Code of Civil Procedure section 337 to extend the statute of limitations where notice is given of intent to arbitrate or mediate pursuant to the contract terms. This resolution should be disapproved because the proposed extension of time is unnecessary in the case of a valid arbitration clause, and inapplicable in the case of an invalid or unenforceable one.

A claimant does not waive the right to arbitrate by filing a civil action, even in cases in which the claimant is seeking to record and enforce a lien. (See Code Civ. Proc., § 1281.5.) Thus, if a claimant is in danger of having a statute of limitations lapse, he or she need only file a complaint and then file a petition to arbitrate under section 1281.2.

A claimant does encounter a problem if he or she pursues the arbitration claim alone, and then finds out that the arbitration clause is invalid or the claim is not arbitrable. The proposed resolution, however, makes the existence of a valid, enforceable arbitration clause a precondition to any extension of the statute of limitations. Accordingly, this problem would not be solved by the proposed resolution.

Finally, although there seems to be no case law directly holding that an attempt at arbitration tolls the statute of limitations on a legal action over the same claim, the concept of equitable tolling would seem to apply (see generally, *Elkins v. Derby* (1974) 12 Cal.3d 410) and would solve the problem posed by the proponent.

SECTION/COMMITTEE REPORT

THE STATE BAR'S COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION

Recommendation: **DISAPPROVE**

Reason:

The State Bar's Committee on Alternative Dispute Resolution ("ADR Committee") has reviewed Resolution 11-01-03 and opposes the resolution on two grounds. First, the ADR Committee believes the resolution does not serve any apparent need that is not already addressed by statute. Second, the ADR Committee believes the resolution, as currently drafted, would invite additional litigation concerning, among other things, compliance with the proposed statute and timely commencement of an action.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 337 to read as follows:

1 §337

2 Within four years: 1. An action upon any contract, obligation or liability founded upon an
3 instrument in writing, except as provided in Section 336a of this code; provided, that the time within
4 which any action for a money judgment for the balance due upon an obligation for the payment of
5 which a deed of trust or mortgage with power of sale upon real property or any interest therein was
6 given as security, following the exercise of the power of sale in such deed of trust or mortgage, may
7 be brought shall not extend beyond three months after the time of sale under such deed of trust or
8 mortgage.

9 2. An action to recover (1) upon a book account whether consisting of one or more entries;
10 (2) upon an account stated based upon an account in writing, but the acknowledgment of the account
11 stated need not be in writing; (3) a balance due upon a mutual, open and current account, the items of
12 which are in writing; provided, however, that where an account stated is based upon an account of
13 one item, the time shall begin to run from the date of said item, and where an account stated is based
14 upon an account of more than one item, the time shall begin to run from the date of the last item.

15 3. An action based upon the rescission of a contract in writing. The time begins to run from
16 the date upon which the facts that entitle the aggrieved party to rescind occurred. Where the ground
17 for rescission is fraud or mistake, the time does not begin to run until the discovery by the aggrieved
18 party of the facts constituting the fraud or mistake. Where the ground for rescission is
19 misrepresentation under Section 359 of the Insurance Code, the time does not begin to run until the
20 representation becomes false.

21 4. When the writing subject to this section contains a valid, enforceable clause or provision
22 for mediation or arbitration, and a party bound by such clause or provision gives written notice of
23 intention to mediate or arbitrate, or both, and if the notice is served within 120 days of the expiration
24 of the applicable statute of limitations, the time for commencement of a legal action upon the writing
25 shall be extended 120 days from the service of the notice. No particular form of notice is required,
26 but it shall notify the defendant of the legal basis of the claim and the type of loss sustained. The
27 notice may be served in the manner prescribed in Chapter 5 (commencing with Section 1010) of title
28 14 of Part 2.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

Existing Law: Makes no provision for tolling of the statute of limitations when arbitration or mediation is sought as a remedy to enforce a written agreement near the expiration of the limitations period.

This Resolution: Modifies the statute of limitations to provide that it is tolled for 120 days if notice of intention to mediate or arbitrate, or both, is given within 120 days of expiration of the limitations period.

The Problem: When a party to a written agreement first sees a lawyer near the expiration of the statute of limitations, the party may have no choice but to file his suit to prevent expiration of the statute, even though the party is bound by the arbitration or mediation clause in the agreement and prefers to arbitrate or mediate rather than litigate. This proposed resolution would extend the statute of limitations for up to 120 days while the parties pursue their arbitration or mediation remedy, allowing them to abide by the agreement and still preserve their right to litigate.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

AUTHOR AND/OR PERMANENT CONTACT: Steven S. Brand, Attorney at Law, 601 University Avenue, Suite 255, Sacramento, CA 95825; voice (916) 923-0830, e-mail sbrandgolf@aol.com

RESPONSIBLE FLOOR DELEGATE: Steven S. Brand

COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

This resolution allows a party to extend the four year statute of limitations for a period of up to 120 days by simply giving notice of intent to arbitrate or mediate. It would increase uncertainty as to the application of the statute of limitations by permitting the statute to be extended without an independently verifiable event such as the filing of an action or proceeding. It may increase litigation by adding uncertainty to the statutory scheme, and serves no useful purpose other than to allow a procrastinator additional time to assert a claim under a contract.