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One Bite of the Apple

Let's say you are a party to a contract with an arbitration clause. Perhaps you are an attorney, and the retainer agreement with your client provides for arbitration in the event of a dispute. Or you are an employer, and the agreement with your employees provides that disputes shall be determined in arbitration, and not in court. A dispute arises, and instead of initiating arbitration, the client or the employee files a lawsuit in court. Has the client or employee breached the contract by filing a complaint in court, instead of filing a claim in arbitration? The answer is no, according to *Sargon Enterprises, Inc. v. Browne George Ross LLP* (2017) 15 Cal.App.5th 749.

Sargon filed a legal malpractice claim in the superior court against the law firm BGR, even though it had signed a retainer agreement with BGR that contained an arbitration clause. BGR counterclaimed against Sargon for breach of contract for filing in court. The parties were ordered to arbitration. The arbitrator found that Sargon breached the retainer agreement and the implied covenant of good faith and fair dealing by filing a malpractice action in the superior court, "in contravention of the clea[r] contractual clause mandating arbitration for '[a]ny and all disputes, claims or proceedings between [Sargon] and BGR'"

The arbitrator awarded BGR \$200,000 in damages. Sargon appealed, and argued that the arbitrator's award violated Sargon's constitutional and statutory right to petition the courts under Code of Civil Procedure section 1281.12. Under section 1281.12, if an arbitration agreement has a deadline for a party to initiate arbitration, filing a civil action within that period of time "tolls" the applicable limitations period, "from the date the civil action is commenced until 30 days after a final determination by the court that the party is required to arbitrate the controversy."

The Court of Appeal reversed, noting that section 1281.12 "separately provides that a party may challenge the enforceability of an arbitration agreement in court without forfeiting the right to arbitrate should the challenge to the arbitration agreement be unsuccessful." "According to its legislative history, [section 1281.12] prevents 'parties from being either forced to abide by arbitration agreements of dubious validity instead of seeking court evaluation, initiating costly and duplicative proceedings, or being unfairly deprived of any forum for resolution of the dispute. Supporters observe that there are many legitimate reasons why a party might file a lawsuit in court, rather than demanding or pursuing arbitration.'" (*Id.* at p. 767.)

The takeaway: Code of Civil Procedure section 1281.12 ensures that a party who timely brings an action in superior court, but then was barred from litigating the action in that forum because of an arbitration agreement, does not forfeit his or her right to arbitrate the case because of the time necessary to resolve whether arbitration may be compelled. A contract to arbitrate does not preclude a party to the contract from initially resorting to the courts.