



MICHAEL R. DILIBERTO, ESQ.



The Initial Question

If two parties sign an arbitration agreement, but neither party initials a designated line to indicate their agreement to waive a jury trial, may arbitration be compelled? The answer is yes, according to *Martinez v. BaronHR, Inc.* (2020) 51 Cal.App.5th 962. BaronHR hired Martinez as a sales manager, and both parties signed an arbitration agreement. Martinez later sued BaronHR in court, alleging employment violations. BaronHR moved to compel arbitration.

The arbitration agreement provides that the parties “mutually agree that they shall resolve by final and binding arbitration any and all claims or controversies.” The paragraph in dispute stated: **“In agreeing to arbitration, both Employer and Employee explicitly waive their respective rights to trial by jury.”** Next to the bolded sentence, in the right-hand margin, “INITIAL:” is written. Beneath that is a short line. Neither BaronHR nor Martinez initialed the “INITIAL” line.

Another paragraph stated: “This is the complete agreement of the parties on the subjects of arbitration of claims and waiver of trial by jury.” The final portion of the agreement contained an “Employee’s Certification of Understanding” paragraph in all capitalized letters, indicating that Martinez’s signature confirmed that he **“HAS NO RIGHT TO PURSUE CLAIMS AGAINST THE COMPANY IN COURT AND BEFORE A JURY, BUT ONLY THROUGH THE ARBITRATION PROCESS.”**

Martinez opposed the motion to compel arbitration with a declaration stating that he did not initial the statement agreeing to waive a jury trial because he did not intend to waive a jury trial. The trial court denied the motion to compel, finding insufficient evidence of mutual assent in light of Martinez’s omitted initials and declaration. The Court of Appeal reversed and remanded.

The trial court found Martinez’s declaration credible, where he stated that he did not want to arbitrate or waive his jury trial right when he signed the agreement. But the trial court erred because it “should not have considered Martinez’s unexpressed intentions as evidence of the lack of mutual assent.” The court noted that unexpressed subjective intentions are irrelevant to the issue of mutuality. Mutual assent is determined by objective criteria, such as the reasonable meaning of the parties’ words and actions. The language of the agreement was an objective expression of the parties’ mutual assent to arbitrate.

The signed agreement was not ambiguous, as “three separate terms of the agreement acknowledge in explicit and unmistakable language the parties’ mutual intent to arbitrate all disputes.” Martinez’s failure to initial the boldface jury waiver paragraph did not create lack of mutual assent. Applying substantive contract law, the court held that Martinez could not avoid his contractual obligations by claiming that he did not intend to do what his words bound him to do. Martinez’s declaration was deemed “insufficient evidence as a matter of law.”