



Business Law Section of the State Bar of California

## ADR Committee

### Case Law E-Bulletin

**Michael Patrick Carbone**  
**Co-Chair**

1 Market Steuart Twr #1600  
San Francisco, CA 94105  
415-357-1622  
FAX 415-357-1633  
[mcarbone@sbcglobal.net](mailto:mcarbone@sbcglobal.net)

**Susan C. Keenberg**  
**Co-Chair**

Attorney/Mediator  
5819 Bedford Ave.,  
Los Angeles, CA 90056  
310-258-0247  
FAX 310-258-9438  
[Susan@SusanKeenberg.com](mailto:Susan@SusanKeenberg.com)

Eric van Ginkel  
Vice Chair  
Arbitrator & Mediator  
11693 San Vicente Blvd. #908  
Los Angeles, CA 90049  
310-836-1919  
FAX 310-815-0255  
[eric@ericvanginkel.com](mailto:eric@ericvanginkel.com)

*Daniel L. Berglund v. Arthroscopic & Laser Surgery Center of San Diego, LP*,  
06 C.D.O.S 4231 (May 22, 2006)

<http://www.courtinfo.ca.gov/opinions/documents/D045218A.PDF>

In *Daniel L. Berglund v. Arthroscopic & Laser Surgery Center of San Diego, LP*, the Fourth Appellate District (Division One) has ruled that a person who has been subpoenaed by order of an arbitrator but who is not a party to the arbitration agreement in question, is entitled to full review by the competent trial court of the arbitrator's discovery order.

In the underlying procedure, Berglund had brought an action against certain medical providers alleging battery and breach of fiduciary duty. All defendants except Arthroscopic & Laser Surgery Center of San Diego ("ALSC") successfully moved to compel arbitration. Because it was not a party to the arbitration agreement, the action against ALSC remained in court. The court subsequently denied plaintiff's motion to compel document production from ALSC. Shortly thereafter, the trial court approved a settlement between plaintiff and ALSC which also discharged ALSC from liability for claims by the other defendants.

In the subsequent arbitration against the other defendants, Berglund, pursuant to CCP §1282.6, served a subpoena for the production of documents on ALSC. The subpoena sought some of the same documents previously sought in the trial court proceeding and some additional documents. After hearing a motion to compel, the arbitrator concluded he was not bound by the trial court's ruling on this issue years earlier and ordered ALSC to produce documents for his in camera review. ALSC then brought a motion for a protective order in the superior court.

The superior court ruled it did not have jurisdiction to review the arbitrator's discovery order, and that the arbitrator had the authority to compel production of evidence. ALSC appealed.

CCP § 1283.1(a) provides that all provisions of § 1283.05 shall be deemed incorporated into every agreement to arbitrate claims arising out of injury or death of a person caused by the wrongful act or neglect of another. Pursuant to CCP § 1283.05(a) and (b), the arbitrator's authority relating to the procedure and enforcement of depositions and discovery is similar to that of a

trial court (with the exception of powers relating to arrest or imprisonment).

The appellate court held that in a case involving personal injury or death, pursuant to CCP § 1283.05(a), the claimant had a right to serve a deposition subpoena for production of documents even on a non-party to the arbitration agreement. The court also ruled that ALSC was required to bring its motion for a protective order before the arbitrator because the arbitrator had the authority to determine the merits of the motion. CCP § 1283.05(b). But the appeals court still had to determine the type of judicial review a non-party is entitled to when an arbitrator orders document production.

The court reversed the trial court on the jurisdictional issue as it related to its power to review the arbitrator's order. It held that the trial court retained "vestigial" jurisdiction over the arbitration, that this included the power to review the arbitrator's denial of a motion for a protective order filed by a non-party to the arbitration agreement, and that such review was not limited to the deferential standard set forth in *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1 (which would apply to a party to the arbitration agreement).

The court explained that parties to an arbitration agreement knowingly accepted the limited judicial review of an arbitrator's decisions and the risk that an arbitrator might make a mistake. As between parties to the arbitration agreement, *Moncharsh's* explanation of the attendant risks and the broad deference given to an arbitrator's award apply equally to an arbitrator's discovery rulings.

The court contrasted public policy enforcing arbitration by those who agreed to arbitration with the substantial rights of a non-party to an arbitration agreement to pursue claims in a judicial forum. The court reasoned that interpreting §1283.05(c) to extend limited judicial review to non-parties would be a radical departure from the principles that make arbitral decisions final as a means of protecting the expectations of the parties and which impose the severe limitations of arbitration only on parties to arbitration agreements. In the absence of an express and unambiguous provision in the statute, the court reasoned, it is difficult to conclude the Legislature intended to deny non-parties full judicial review of an arbitrator's discovery orders.

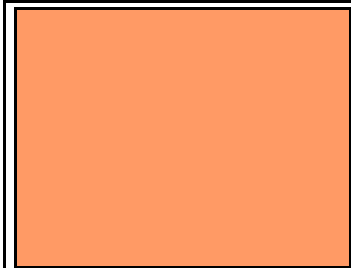
"Thus," the court concluded, "where, as here, an arbitrator has made a discovery determination under section 1283.05, a nonparty may seek judicial review of that order in the trial court without the review limitations expressed in *Moncharsh*; the nonparty's request for relief from the arbitrator's discovery order is subject to plenary judicial review."

*Steven M. Sherman and Eric van Ginkel*

Law Offices of Steven M. Sherman  
220 Montgomery Street, Suite 1500  
San Francisco, CA 94104  
Tel: 415/403-1660  
Fax: 415/397-1577  
[steven.sherman@yahoo.com](mailto:steven.sherman@yahoo.com)

Eric van Ginkel, LL.M.  
11693 San Vicente Blvd., #908  
Los Angeles, CA 90049  
Tel: 310/836-1919  
Fax: 310/815-0255  
[eric@ericvanginkel.com](mailto:eric@ericvanginkel.com)

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