4th Civil Nos. G031410, G031684

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PROSPECT MEDICAL GROUP, INC.,

Plaintiff, Respondent and Cross-Appellant,

vs.

ST. JUDE HOSPITAL, INC., and

Defendant and Appellant,

PACIFICARE OF CALIFORNIA,

Defendant and Cross-Respondent.

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Appeal from the Orange County Superior Court
Honorable David R. Chaffee, Judge
Case No. 815670

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# CROSS-RESPONDENT'S BRIEF OF DEFENDANT PACIFICARE OF CALIFORNIA

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## TABLE OF CONTENTS


| | | Page |
|---|---|---|
| INTRODUCTION | | 1 |
| STATEMENT OF FACTS AND PROCEDURAL HISTORY | | 2 |
| A. | Prospect And St. Jude Agree To Participate In A "Risk Pool" Funded By PacifiCare, But Administered Solely By St. Jude | 2 |
| B. | Prospect Compels Arbitration Of Its Claim That St. Jude Breached Its Obligation To Pay Risk Pool Funds | 3 |
| C. | The Arbitrator Concludes That St. Jude Bore Sole Responsibility For The Failure To Pay Prospect Its Share Of Risk Pool Funds | 4 |
| 1. | Phase I: The arbitrator dismisses PacifiCare | 5 |
| 2. | Phase II: The arbitrator finds in favor of Prospect and against St. Jude | 7 |
| D. | Prospect Petitions The Court To Confirm The Arbitration Awards | 9 |
| ARGUMENT | | 9 |
| I. | PROSPECT LOST THE ABILITY TO CONTEST THE AWARD BY FAILING TO MOVE TO VACATE IT OR OPPOSING CONFIRMATION OF IT IN THE TRIAL COURT | 9 |
| II. | REGARDLESS OF WHETHER THE COURT REVERSES THE JUDGMENT IN FAVOR OF PROSPECT, THE JUDGMENT IN FAVOR OF PACIFICARE IS PROPER AND SHOULD NOT BE DISTURBED | 11 |
| A. | Reversal As To St. Jude Does Not Automatically Require Reversal As To PacifiCare | 12 |

## TABLE OF CONTENTS

(continued) Page


B. The Judgment In Favor Of PacifiCare Is Not Subject To Reversal On The Merits 16

1. The arbitrator's factual findings—including his conclusion that St. Jude was solely responsible for making payments to Prospect—are not subject to judicial review 17

2. Prospect waived any right to claim that the contract required PacifiCare to make risk pool payments to it 20

3. The arbitrator's conclusion that St. Jude, rather than PacifiCare, had total responsibility to make risk pool payments is well-supported 21

CONCLUSION 23

CERTIFICATE OF COMPLIANCE 24

## TABLE OF AUTHORITIES

Page

### Cases


*Advanced Micro Devices, Inc. v. Intel Corp.*
(1994) 9 Cal.4th 362 — 18, 19

*American Enterprise v. Van Winkle*
(1952) 39 Cal.2d 210 — 12, 14

*Bonshire v. Thompson*
(1997) 52 Cal.App.4th 803 — 18

*Crowley v. Katleman*
(1994) 8 Cal.4th 666 — 13

*Delaney v. Dahl*
(2002) 99 Cal.App.4th 647 — 19

*Estate of Sanderson*
(1960) 183 Cal.App.2d 740 — 13

*Evans Products Co. v. Millmen's Union N. 550*
(1984) 159 Cal.App.3d 815 — 19

*Gonzalez v. R. J. Novick Constr. Co.*
(1978) 20 Cal.3d 798 — 12

*Gudelj v. Gudelj*
(1953) 41 Cal.2d 202 — 13

*Kelly v. Sparling Water Co.*
(1959) 52 Cal.2d 628 — 13

*Knass v. Blue Cross of California*
(1991) 228 Cal.App.3d 390 — 10

*Konig v. Fair Employment & Housing Com.*
(2002) 28 Cal.4th 743 — 18

## TABLE OF AUTHORITIES

(continued)


| | Page |
|---|---|
| *Louise Gardens of Encino Homeowners' Assn., Inc. v. Truck Ins. Exchange, Inc.* (2000) 82 Cal.App.4th 648 | 10, 11 |
| *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1 | 18, 19 |
| *Moshonov v. Walsh* (2000) 22 Cal.4th 771 | 18, 19 |
| *Pacific Gas & Electric Co. v. Superior Court* (1993) 15 Cal.App.4th 576 | 18 |
| *Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809 | 16 |
| *Weil v. Superior Court* (1950) 97 Cal.App.2d 373 | 13 |


### Statutes


| | |
|---|---|
| Code of Civil Procedure | |
| section 1288 | 10 |
| section 1717 | 8 |

## INTRODUCTION

St. Jude, Prospect and PacifiCare entered into a series of contracts creating a "risk pool" program, pursuant to which St. Jude was obligated to pay funds to Prospect. St. Jude failed to make such payments and Prospect won an arbitration award against it.

In his arbitration award, the arbitrator concluded that although PacifiCare had a contractual relationship with Prospect, it had no responsibility for making payments to it. Accordingly, the arbitrator dismissed PacifiCare.

Now, St. Jude has appealed the judgment entered "in favor of Prospect." Prospect, in turn, has cross-appealed the judgment dismissing PacifiCare. This cross-appeal is untenable for four separate reasons:

(1) Prospect's failure to oppose confirmation or to seek vacation of the arbitration award in the trial court precludes *all* judicial review of the award. Put simply, Prospect lost the ability to contest the award by failing to move to vacate it or opposing confirmation in the trial court.

(2) The arbitrator's factual findings—including the arbitrator's conclusion that St. Jude bore sole responsibility for paying Prospect—are not open to review.

(3) Through its conduct, Prospect waived any right to claim that the contract required PacifiCare to make risk pool payments to it.

(4) In any event, the arbitrator's conclusion that St. Jude, rather than PacifiCare, had total responsibility to make Prospect's risk pool payments is well-supported.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

### A. Prospect And St. Jude Agree To Participate In A "Risk Pool" Funded By PacifiCare, But Administered Solely By St. Jude.

Prospect (an independent physician association), PacifiCare (a health plan) and St. Jude (a hospital) entered into a series of contracts creating a "risk pool" program that was supposed to operate as follows:

- PacifiCare would fund the risk pools by making monthly payments to St. Jude. (CT 906; Augment 32.)
- St. Jude would administer the risk pool funds and be entitled to deduct certain hospital expenses from them. (CT 906; Augment 32);

- If, at the end of any year, funds remained in the risk pool, St. Jude would pay to Prospect a sum equal to fifty percent of the surplus. (CT 906; Augment 32; *see also* RB 7; CT 1883.)
- St. Jude would assume total responsibility for calculating and paying all amounts owed to Prospect. (CT 959-960; see also CT 1008-1010 [Stipulation]; Augment 33.)

### B. Prospect Compels Arbitration Of Its Claim That St. Jude Breached Its Obligation To Pay Risk Pool Funds.

Although PacifiCare met its obligation to fund the risk pools, St. Jude failed to pay Prospect its share.[1/] (Supp. CT 337; see also CT 1009.) Instead, according to Prospect, St. Jude substantially understated the amount it owed and failed to provide adequate accountings of the risk pools. (CT 907-908; see also RB 8.)

After attempts to resolve the dispute with St. Jude failed, Prospect successfully moved to compel arbitration against both St. Jude and PacifiCare. (CT 472.)

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[1/] Although St. Jude argued at the arbitration that the risk pool contained insufficient funds to pay Prospect (CT 970, 978, 981), the arbitrator found no basis for St. Jude's contention. (Supp. CT 337.) Instead, the arbitrator concluded that "PacifiCare paid to St. Jude the monies from which Prospect's share of the surplus should have been paid. St. Jude has held, and continues to hold, those funds through the present." (Supp. CT 337.) Neither St. Jude nor Prospect has appealed this finding.

### C. The Arbitrator Concludes That St. Jude Bore Sole Responsibility For The Failure To Pay Prospect Its Share Of Risk Pool Funds.

Prior to the arbitration hearing, St. Jude executed a stipulation making it clear (1) that PacifiCare had delegated its risk pool payment obligations to St. Jude, and (2) that PacifiCare would not be obligated pay for St. Jude's failure to pay Prospect. To this end, the stipulation provided as follows:

- "PacifiCare delegated to St. Jude the duty of administering the Hospital Control Program [the risk pool] . . . and the duty of paying to Prospect its share of the budget surplus." (CT 1008-1009, ¶ 2.)
- St. Jude agreed to "administer[]" the Hospital Control Program, and "St. Jude is responsible for funding the Hospital Control Program." (CT 1008-1009, ¶¶ 4, 6.)
- "[I]f at the arbitration hearing, the arbitrator finds for Prospect . . . and directs an award to Prospect from either St. Jude or PacifiCare, St. Jude agrees to be responsible for payment of any such award." (CT 1009-1010, ¶ 6.)[2/]

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[2/] See also CT 1009-1010, ¶ 4 ["In the event an award is made in favor of Prospect . . . , St. Jude agrees that it is responsible for satisfying such award"]; ¶ 7 [St. Jude agrees that any monies owed to Prospect . . . stemming from the Hospital Control Program is to be completely satisfied by St. Jude"].

At the arbitration, Prospect contended that St. Jude and PacifiCare were jointly and severally liable for paying Prospect's risk pool payments. (CT 957.) St. Jude counterclaimed, alleging that Prospect had breached the "exclusive provider" provisions in the contracts between Prospect and PacifiCare. (CT 979-980.) St. Jude also alleged that the 1998 and 1999 risk pools were in deficit, and that Prospect owed it money for those periods.[3/] (CT 978.) Both Prospect and St. Jude sought recovery of attorneys' fees in connection with the arbitration. (CT 964, 980-982.) PacifiCare disputed that it had any liability. (CT 375.)

After twenty-six days of hearings, the arbitrator issued his arbitration decision in two phases.

### 1. Phase I: The arbitrator dismisses PacifiCare.

In his Phase I decision, the arbitrator addressed Prospect's claims against PacifiCare and St. Jude. (CT 902.) The arbitrator dismissed the claim against PacifiCare because "Prospect's inclusion of PacifiCare as a respondent in this action contradicts the intention of the parties at the time the contract was made." (Augment 28, 42, 45.) The arbitrator based this decision on voluminous testimony and documentary evidence showing that the parties never intended PacifiCare to shoulder any obligation to pay

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[3/] The arbitrator found to the contrary (see Supp. CT 337) and St. Jude appears to have abandoned this claim on appeal.

Prospect.[4/] (See, e.g., Augment 42 ["All parties understood that according to the Agreements reached between the parties, St. Jude was to administer the pools, and the actions and course of dealings by the parties reflect this mutual understanding"].) The arbitrator expressly rejected Prospect's arguments to the contrary. (See Augment 45 ["the conduct of all parties from the initial formation of the contract until the time this lawsuit was filed shows an understanding that PacifiCare was never meant to assume any financial risk or obligation under the shared risk pools"].)

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[4/] See, e.g., Augment 43 ["As the overwhelming amount of testimony during the arbitration proved, PacifiCare at no time assumed any administrative or financial responsibility associated with the hospital risk pools at issue in this dispute. All parties, including Prospect's own employees, understood that St. Jude maintained the responsibility of administering the pools, and any monies owed would have to come from them"]; Augment 44 ["All of the witnesses in this case who had knowledge of the terms of the contracts, including Prospect's employees, agree that PacifiCare was never to bear any monetary risk in relation to the shared risk pools"]; Augment 45 ["The evidence presented at this hearing clearly shows that for the entire length of the contract, PacifiCare never undertook any administrative duties or financial responsibility. The intention of the parties to this agreement has been clear from the very beginning. Additionally, the pattern of conduct since that time is consistent with the notion that not even Prospect expected PacifiCare to administer the risk pools. Most notably, the testimony of Stewart Kahn, the Secretary of Prospect Medical Group, confirmed that there was never any expectation that PacifiCare would owe money out of their own revenue to resolve a dispute between St. Jude and Prospect"]; Augment 47-48 [The intention of the parties at the time of contract formation, and the conduct of the parties in the years since the agreement has been in effect establishes that Prospect never expected that PacifiCare would bear any financial risk under the risk pools. PacifiCare's Post-Arbitration Brief highlights the testimony from numerous witnesses which illustrates the intention of the parties"]; Augment 42 ["PacifiCare at no time carried any financial or administrative responsibility related to the risk pools at issue in this dispute"].

In addition, the arbitrator held that Prospect, through its conduct, had waived "any right to claim the enforcement of any provision in the contract that would contradict the course of dealing between the parties, and their actions in the years since contract formation." (Augment 42; see also Augment 49.)

### 2. Phase II: The arbitrator finds in favor of Prospect and against St. Jude.

Six months after issuing his Phase I decision, the arbitrator turned to St. Jude's counterclaims against Prospect. After holding Phase II hearings, the arbitrator issued a "Final Decision And Award," addressing St. Jude's and Prospect's claims against each other. In that award, the arbitrator reiterated his conclusions from the Phase I hearing, including the following:

- St. Jude had sole responsibility for making all risk pool payments to Prospect. (See Augment 33 ["St. Jude is liable on the contracts between Prospect and PacifiCare because PacifiCare delegated to St. Jude its contractual duties to administer the risk pools and pay to Prospect its share of the risk pool surplus"].)
- While PacifiCare had funded the risk pools, St. Jude had failed to pay Prospect its share of the funds. (Augment 33 ["PacifiCare paid to St. Jude the monies from which

Prospect's share of the surplus should have been paid. St. Jude has held, and continues to hold, those fund through the present"].)

- In particular, St. Jude had breached its obligations (1) by failing to timely provide Prospect with an accounting for the 1997, 1998 and 1999 risk pools and (2) by failing to pay Prospect its share of risk pool surplus for those years. (Augment 33-34.)
- Thus, St. Jude owed Prospect the unpaid share of the surpluses for the 1997-1999 risk pools plus pre-judgment interest at 10% per annum. (Augment 34-35.)

On St. Jude's counterclaim, the arbitrator found that Prospect had breached the exclusive provider agreement because PacifiCare members were treated at facilities other than St. Jude. (Augment 35.)

Finally, the arbitrator found that Prospect was the "prevailing party" pursuant to Civil Code § 1717, with respect "to the entire arbitration of the claims between Prospect and St. Jude" and that, Prospect therefore was entitled to recover its reasonable attorneys' fees and costs. (Augment 38.)

### D. Prospect Petitions The Court To Confirm The Arbitration Awards.

After the arbitrator rendered his decisions, Prospect petitioned the trial court to confirm the arbitrator's final award and to enter judgment in conformity with it. (CT 870-874.) Prospect did not move to vacate the award as to PacifiCare's dismissal. (*Ibid.*)

The trial court subsequently confirmed both of the arbitrator's decisions (Supp. CT 375-377; Augment 55; CT 2047), and St. Jude appealed "the judgment entered in favor of Prospect Medical Group." (Supp. CT 389.) Prospect filed a protective cross-appeal of the judgment dismissing PacifiCare. (Supp. CT 413.)

## ARGUMENT

### I.

### PROSPECT LOST THE ABILITY TO CONTEST THE AWARD BY FAILING TO MOVE TO VACATE IT OR OPPOSING CONFIRMATION OF IT IN THE TRIAL COURT.

As a threshold matter, Prospect may not cross-appeal the trial court's order confirming the arbitration award in favor of PacifiCare because Prospect failed to move to vacate or oppose confirmation of that award

below. (See CT 870-874, 931.) Quite to the contrary, Prospect actually petitioned the trial court *to confirm* the arbitrator's final arbitration award. (CT 870-873; see pp. 9, *supra.*)

"The arbitration statute is clear. A party to an arbitration proceeding must challenge an award under [CCP] section 1288[5/] by a petition to vacate or correct the award within 100 days of service of the award. An appeal of the judgment confirming the award *may not* be used to circumvent the prescribed time allowed to petition for vacation or correction of an award." (*Knass v. Blue Cross of California* (1991) 228 Cal.App.3d 390, 395-396, emphasis added; see also *Louise Gardens of Encino Homeowners' Assn., Inc. v. Truck Ins. Exchange, Inc.* (2000) 82 Cal.App.4th 648, 659-660 ["A party who fails to timely file a petition to vacate under section 1286 may not thereafter attack that award by other means on grounds which would have supported an order to vacate"; held, "We agree with the reasoning in *Knass* and hold that the Association cannot avoid the consequences of its failure to file a timely petition to vacate by appealing from the post confirmation judgment"].)

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[5/] Code of Civil Procedure section 1288 provides as follows: "A petition to confirm an award shall be served and filed not later than four years after the date of service of a signed copy of the award on the petitioner. A petition to vacate an award or to correct an award shall be served and filed not later than 100 days after the date of the service of a signed copy of the award on the petitioner."

Put simply, the 100-day time limit is jurisdictional; failure to timely seek vacation of the arbitration award in the trial court precludes *all* judicial review of the award. (*Louise Gardens of Encino, supra,* 82 Cal.App.4th at p. 659.) Thus, Prospect lost the ability to contest the award as to PacifiCare by failing to move to vacate it or opposing confirmation in the trial court. This alone defeats Prospect's cross-appeal.

## II.

## REGARDLESS OF WHETHER THE COURT REVERSES THE JUDGMENT IN FAVOR OF PROSPECT, THE JUDGMENT IN FAVOR OF PACIFICARE IS PROPER AND SHOULD NOT BE DISTURBED.

In its protective cross-appeal, Prospect asserts that if the Court reverses the judgment against St. Jude, the Court necessarily must reverse the judgment dismissing PacifiCare. (RB 52-53.) This is false for two separate reasons.

*First*, the judgment dismissing PacifiCare is severable from the judgment against St. Jude. Accordingly, reversal as to St. Jude does not automatically necessitate reversal as to PacifiCare.

*Second*, the arbitrator's factual determination that the parties intended St. Jude (rather than PacifiCare) to shoulder all risk pool payment obligations must be afforded substantial deference and, in any event, is

supported by voluminous evidence. Accordingly, there is no reason to disturb the judgment dismissing PacifiCare.

### A. Reversal As To St. Jude Does Not Automatically Require Reversal As To PacifiCare.

Prospect argues that the judgment dismissing PacifiCare is part of a nonseverable judgment, and thus, any reversal as to St. Jude is necessarily a reversal as to PacifiCare. (RB 53.) Prospect is wrong.

Although a purported partial appeal from a nonseverable judgment will be treated as an appeal from the entire judgment, this exception is not applicable here. (See *Gonzalez v. R. J. Novick Constr. Co.* (1978) 20 Cal.3d 798, 805.) This is because the judgment dismissing PacifiCare *is not* inextricably tied to the judgment concluding that St. Jude breached its obligations to Prospect.

Indeed, the nonseverable judgment exception states that if the determination of the issues involved in the portion of the judgment appealed from will *necessarily* be affected by the remaining portions of the judgment, the reviewing court will consider and act upon the entire judgment. (*American Enterprise v. Van Winkle* (1952) 39 Cal.2d 210, 217 ["The test of whether a portion of a judgment appealed from is so interwoven with its other provisions as to preclude an independent examination of the part challenged by the appellant is whether the matters

or issues embraced therein are the same as, or interdependent upon, the matter or issues which have not been attacked"]; *Kelly v. Sparling Water Co.* (1959) 52 Cal.2d 628, 634 [same]; *Gudelj v. Gudelj* (1953) 41 Cal.2d 202, 214-215 [same]; see also *Crowley v. Katleman* (1994) 8 Cal.4th 666, 685 [an appeal is severable if "the issues raised in the appeal can be resolved without regard to the issues determined by the portion of the judgment that was not appealed"].)

Examples of nonseverable judgments include the following:

- An award of attorneys' fees is purely derivative of the judgment, because a reversal of the judgment would nullify the award of fees. (See *Weil v. Superior Court* (1950) 97 Cal.App.2d 373, 375, 377 [where wife was awarded a divorce and an order requiring her ex-husband to pay attorneys' fees, appeal from judgment prevented enforcement of fee award].)
- Where one beneficiary of a will appeals a judgment denying probate of the will, the judgment denying probate is not final as to the non-appealing beneficiaries because the will affects *all* beneficiaries. (*Estate of Sanderson* (1960) 183 Cal.App.2d 740, 742 ["The judgment admitting the will to probate or denying the probate is binding upon all persons interested in the will"].)

- The portions of a judgment declaring the rights of the parties to a given property are inseparable from the issue as to whether there was a taking of the property in an eminent domain proceeding. (*American Enterprise, Inc., supra,* 39 Cal.2d at p. 217 ["if there was no taking of the property within the meaning of the lease, or if American Enterprise cannot enforce the lessor's rights under the lease, then it is not entitled either to the realty or to enforce a sale of the personalty. These issues permeate both portions of the judgment"].)

Here, in decisive contrast, the issues presented in the portion of the judgment challenged by St. Jude—i.e., whether St. Jude breached its obligations to Prospect—are unaffected by PacifiCare's dismissal. This is because the two separate judgments address the duties owed by *two separate parties*.

Unlike the examples of nonseverable judgments cited above, the two parts of the judgment are not dependent upon or derivative of each other. Accordingly, St. Jude's appeal of the judgment in favor of Prospect does not automatically require the Court to reopen the judgment in favor of PacifiCare.

Further, Prospect argues that reversal on *any* grounds as to St. Jude requires reversal of PacifiCare's dismissal. But Prospect's argument is overly broad. Indeed, St. Jude has urged numerous independent grounds for reversing the trial court's decision to affirm the arbitration awards. These reasons include the following: (1) The arbitrator exceeded his powers by making errors of law; (2) The arbitrator exceeded his powers by awarding Prospect its costs; (3) Prospect's prior breach of the exclusivity agreement excused St. Jude's later failure to make risk pool payments; (4) The arbitration agreement was unenforceable because it contained an illegal provision permitting judicial review of the arbitrator's legal reasoning; and (5) St. Jude was not a party to the contract between Prospect and PacifiCare, so it could not be liable for failing to make risk pool payments. (AOB 40-48.) Only the last of these grounds is even arguably relevant to the cross appeal, and even acceptance of that argument does not *compel* reversal as to PacifiCare. Quite simply, reversal of the judgment as to Prospect does not automatically require reversal of the judgment in favor of PacifiCare.

### B. The Judgment In Favor Of PacifiCare Is Not Subject To Reversal On The Merits.

As a threshold matter, Prospect has failed to make any substantive attack on the judgment dismissing PacifiCare. Rather, Prospect argues only that "[i]f this Court for any reason allows St. Jude to avoid liability on Prospect's claim, both fairness and the law demand that Prospect be permitted to pursue its claim against PacifiCare." (RB 54-55.) Indeed, instead of challenging the arbitrator's rationale, Prospect reiterates the arbitrator's "straightforward" reasons for deciding that "St. Jude, and not PacifiCare, was the party liable to Prospect." (RB 55.)

Prospect's failure to challenge the merits of the arbitrator's decision to dismiss PacifiCare waives the issue and amounts to a concession that other than automatic reversal, there is no conceivable ground for reversing the judgment dismissing PacifiCare. (See *Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809, 1823 [where party "failed to make [an] argument in his opening brief, the contention is waived"].) And, as noted above, reversal of the judgment as to Prospect does not automatically require reversal of the judgment in favor of PacifiCare.

In any event, there no substantive ground for reversing the PacifiCare judgment. This is so for two reasons:

*First*, settled law dictates that the arbitrator's factual findings, legal conclusions and contract interpretations are not subject to judicial review; and

*Second*, even if the arbitrator's conclusion as to PacifiCare was reviewable on the merits, there is no factual basis for reversing the arbitrator's decision that the parties always intended that St. Jude would shoulder all risk pool payment responsibilities.

### 1. The arbitrator's factual findings—including his conclusion that St. Jude was solely responsible for making payments to Prospect—are not subject to judicial review.

After hearing days of testimony and examining volumes of documentary evidence, the arbitrator concluded that "PacifiCare at no time carried any financial or administrative responsibility related to the risk pools at issue in this dispute." (Augment 42; see also p. 6 fn.4, *supra.*) Rather, he found that "[a]ll parties understood that according to the Agreements reached between the parties, St. Jude was to administer the pools, and the actions and course of dealings by the parties reflect this mutual understanding." (Augment 42.)

These factual findings and contract interpretations "are final and not subject to judicial review." (*Pacific Gas & Electric Co. v. Superior Court* (1993) 15 Cal.App.4th 576, 607 ["the factual findings of the arbitrators, mistaken or not, are final and not subject to judicial review"].) Numerous California Supreme Court cases so hold.[6/]

Indeed, "courts may not review for sufficiency the evidence supporting an arbitrator's award." (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 367, fn. 1.) To the contrary, a reviewing court must "take the arbitrator's findings as correct without examining a record of the arbitration hearings themselves." (*Ibid.*)

The only exception is where an arbitrator oversteps his authority by deciding an issue that the parties did not submit to arbitration. (See *Moshonov v. Walsh* (2000) 22 Cal.4th 771, 773 [where the recovery or nonrecovery of fees was one of the contested issues of law and fact submitted to the arbitrator for decision, the arbitrator's decision was final

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[6/] See *Konig v. Fair Employment & Housing Com.* (2002) 28 Cal.4th 743, 754 ["Courts generally may not correct arbitration awards, which are both binding and final, even if an award is based on an arbitrator's factual or legal error"]; *Advanced Micro Devices, Inc. v. Intel Corp.*, *supra*, 9 Cal.4th at p. 377, fn. 10 ["an award generally may not be vacated or corrected, under California law, for errors of fact or law"]; *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11 ["it is the general rule that, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law'"]; see also *Bonshire v. Thompson* (1997) 52 Cal.App.4th 803, 809 [same].

and could not be judicially reviewed for error].) That exception is plainly inapplicable to the present case.

Moreover, where, as here, the issue before the Court involves contract interpretation, the governing rule requires the reviewing court to defer to the arbitrator's construction of the parties' agreement. Again, numerous cases so hold.[7/]

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[7/] See, e.g., *Moshonov, supra,* 22 Cal.4th at p. 779 [so long as a "disputed issue of contractual interpretation . . . was committed to final adjudication by the arbitrator, rather than the courts," the reviewing court will decline to consider the issue's merits and, instead, will treat the arbitrator's contract interpretation as "final and binding"; held, where the recovery or nonrecovery of fees was one of the contested issues of law and fact submitted to the arbitrator for decision, the arbitrator's decision was final and could not be judicially reviewed for error]; *Evans Products Co. v. Millmen's Union N. 550* (1984) 159 Cal.App.3d 815, 819 ["Where the decision [of an arbitrator] involves contractual interpretation, we must defer as to any decision which draws its essence from the Agreement. (Citations.) Therefore if on its face, the award represents a plausible interpretation of the contract, judicial inquiry ceases and the award must be enforced. (Citations.) This remains so even if the basis for the decision is ambiguous, . . . and notwithstanding the erroneousness of any factual findings or legal conclusions, absent a manifest disregard of the law"]; *Delaney v. Dahl* (2002) 99 Cal.App.4th 647, 650 ["The arbitrator, in considering whether to award attorney fees against Delaney, interpreted the parties' contract and considered evidence presented at the arbitration hearing. The arbitrator decided attorney fees should be awarded against Delaney. Following *Moncharsh v. Heily & Blase* 3 Cal.4th 1 and *Advanced Micro Devices, Inc. v. Intel Corp.* 9 Cal.4th 362, the trial court properly deferred to the arbitrator's decision"]; *id.* at pp. 655-656 ["While Delaney tries to style the arbitrator's decision as one exceeding the limits of the powers conferred by the retainer agreements, he is really just arguing the arbitrator wrongly interpreted the written contract on the issue of liability for fees incurred during the arbitration itself. This contractual interpretation is precisely the type of decision by an arbitrator to which courts must grant deference"].

Thus, Prospect cannot challenge the arbitrator's conclusions that the parties delegated all payment obligations to St. Jude, and that PacifiCare had no liability for St. Jude's failure to meet those obligations.

### 2. Prospect waived any right to claim that the contract required PacifiCare to make risk pool payments to it.

Prospect's cross-appeal also founders because Prospect has waived any right to claim that PacifiCare had an obligation to make risk pool payments. In particular, Prospect notes that it sued PacifiCare solely because "Prospect's contracts are with PacifiCare." (RB 55.) But, the arbitrator found that by its conduct, Prospect had waived the right to assert that PacifiCare had a contractual obligation to make risk pool payments. (Supp. CT 353 ["the facts presented in this case establish that PacifiCare was always viewed as a third party by Prospect"].) This waiver finding, like the arbitrator's other factual findings, must be treated with deference. See pp. 18-19, *supra*.

### 3. The arbitrator's conclusion that St. Jude, rather than PacifiCare, had total responsibility to make risk pool payments is well-supported.

Even assuming arguendo that the arbitrator's conclusions are subject to review, the arbitrator's dismissal of PacifiCare passes muster.

Prospect argues that if the Court reverses as to St. Jude, it should revisit the arbitrator's decision dismissing PacifiCare. (RB 54-55.) But even Prospect concedes that the arbitrator had a sound basis for his conclusion that "St. Jude, and not PacifiCare, was the party liable to Prospect," including the fact that "St. Jude never contested the fact that it, rather than PacifiCare, was the responsible party" and "St. Jude stipulated that it, not PacifiCare, would pay the award to Prospect resulting from the Arbitration." (RB 55.)

In addition, the arbitrator noted that Prospect's own Secretary confirmed that there was never any expectation that PacifiCare would owe money out of its own revenue to resolve a dispute between St. Jude and Prospect. (Augment 45.) Moreover, the arbitrator noted that the "pattern of conduct" since the parties executed the contracts "is consistent with the notion that not even Prospect expected PacifiCare to administer the risk pools." (Augment 45; see also p. 6 fn.4, *supra.*) The arbitrator also cited the "testimony from numerous witnesses" which illustrated the intention of

the parties that PacifiCare would not bear any financial risk under the risk pools. (Augment 48.)

Neither Prospect nor St. Jude contests the veracity of the arbitrator's recitation of the facts, including his summary of the evidence, his description of the parties' course of dealings or their intention to place all payment obligations on St. Jude. Instead, Prospect seeks to pin liability on PacifiCare solely because "Prospect's contracts are with PacifiCare." (RB 55.) But even Prospect acknowledges the frivolous nature of this argument. (RB 55 ["Incredibly, St. Jude now contradicts the position which it took in the Arbitration proceeding, arguing that it should not be held liable for the risk pool award merely because its contract was with PacifiCare rather than Prospect. Because this directly contradicts the position taken by St. Jude in the arbitration, St. Jude's argument is frivolous to the point of being sanctionable. Nonetheless, it is because St. Jude contradicted its prior position that Prospect has filed this protective cross-appeal"].)

Prospect and St. Jude have repeatedly acknowledged that St. Jude was solely responsible for administering the risk pool. Thus, the arbitrator's decision to dismiss PacifiCare is well-founded and should not be disturbed.

## CONCLUSION

For all of the foregoing reasons, Prospect's cross-appeal has no merit and the Court should affirm the judgment dismissing PacifiCare.

DATED: October 21, 2003

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(c)(1) of the California Rules of Court, I certify that the attached **Cross-Respondent's Brief of Defendant PacificCare of California** is proportionately spaced and has a typeface of 13 points or more. Excluding the caption page, tables of contents and authorities, signature block and this certificate, it contains 4,726 words.

DATED: October 21, 2003

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