Filed 1/12/15 Arrow Recylcing Solutions v. Applied Underwriters CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ARROW RECYCLING SOLUTIONS, INC., et al., Plaintiffs and Respondents, v. APPLIED UNDERWRITERS, INC., et al., Defendants and Appellants.	B245379 (Los Angeles County Super. Ct. No. BC484846) ORDER MODIFYING OPINION [CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on January 8, 2015, be modified as follows:

On page 19, second sentence, change "Applied, AUCRAC, and CIC" to "Respondents" so the sentence reads:

"Respondents are entitled to recover their costs on appeal."

[This modification changes the judgment.]

Filed 1/8/15 Arrow Recycling Solutions v. Applied Underwriters CA2/3 (unmodified version)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ARROW RECYCLING SOLUTIONS, INC., et al., Plaintiffs and Respondents, v. APPLIED UNDERWRITERS, INC., et al., Defendants and Appellants.	B245379 (Los Angeles County Super. Ct. No. BC484846)

APPEAL from an order of the Superior Court of Los Angeles County, Deirdre H. Hill, Judge. Affirmed.

Barger & Wolen, Spencer Y. Kook and James C. Castle for Defendants and Appellants.

Bremer, Whyte, Brown & O'Meara, John H. Toohey, Jeremy A. Johnson, Holly A. Bartuska; Jeffrey A. Simmons and Everett L. Skillman for Plaintiffs and Respondents.

Applied Underwriters, Inc. (Applied), Applied Underwriters Captive Risk Assurance Company, Inc. (AUCRAC), and California Insurance Company (CIC) appeal the denial of their motion to compel the arbitration of a complaint by Arrow Recycling Solutions, Inc., and Arrow Environmental Solutions, Inc. (collectively Arrow). Applied, AUCRAC, and CIC contend arbitration agreements in two documents are binding and enforceable and there was no valid basis for the trial court's refusal to order arbitration. We conclude that the moving defendants failed to establish the existence of an agreement to arbitrate in one of the documents, and the court properly refused to order arbitration based on the third party litigation exception to the general rule requiring the enforcement of an agreement to arbitrate. We therefore affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Parties*

Arrow is a metal recycler. Doug Kunnel is president of both Arrow entities. CIC is an insurer and offers workers' compensation insurance as part of a profit sharing program together with Applied, as program manager, and AUCRAC, a reinsurer. Patriot Risk and Insurance Services, Inc. (Patriot), is an insurance broker.

2. *Arrow's Complaint*

Arrow filed a complaint against Applied, AUCRAC, CIC, and Patriot in May 2012. Arrow alleges that its workers' compensation insurance coverage was due to expire on April 1, 2011. Arrow provided payroll information to Patriot for the purpose of obtaining a proposal for a replacement policy. On March 31, 2011, Patriot provided information on the workers' compensation insurance and profit sharing program offered by Applied, AUCRAC, and CIC, including a Producer's Quote Transmittal. The Producer's Quote Transmittal stated under "Billing Terms" that based on the payroll information provided the estimated "annual pay-in amount" was $232,094.

Patriot also provided a document entitled Request to Bind Coverages & Services (Request to Bind). The Request to Bind stated that Arrow was requesting that Applied, through its affiliates or subsidiaries (defined in the Request to Bind collectively as

"Applied"), issue a workers' compensation insurance policy "pursuant to the Workers' Compensation Program Proposal & Rate Quotation (the 'Proposal')" and "subject to Applicant [Arrow] executing the following agreements (collectively the 'Agreements'): (1) Reinsurance Participation Agreement; and where available, (2) Premium Finance Agreement." The Request to Bind included an arbitration provision stating:

"Applicant [Arrow] understands that Applied engages in alternative dispute resolution of conflicts. Applicant further agrees that any claims, disputes and or controversies between the parties involving the Proposal or any part thereof (including but not limited to the Agreements and Policies) shall be resolved by alternative dispute resolution and submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act in conformity with the Arbitration Act of the State of Nebraska. Arbitration shall be in accordance with JAMS by a single arbitrator with the arbitration held in Omaha, Nebraska. Each party shall pay one-half of the cost of the arbitration, and the arbitrator is not authorized to award consequential or punitive damages."

The words "Initial Here" appeared under a box next to the arbitration provision. That box was empty and contained no initials in the copy of the Request to Bind attached to the complaint.

Arrow alleges that it executed the Request to Bind on March 31, 2011, and later received a workers' compensation insurance policy effective April 1, 2011, and a document entitled Reinsurance Participation Agreement (RPA). A copy of the RPA executed by Arrow and AUCRAC is attached to the complaint.

The RPA set forth a profit sharing plan involving reinsurance and stated that the parties to the agreement were AUCRAC and Arrow. Paragraph 4 of the RPA stated:

"This Agreement and any Schedules hereto may not be modified, amended or supplemented in any manner except in writing signed by the parties hereto and represents the entire understanding and agreement between the parties with respect to the subject matter hereof and supersedes all prior negotiations, proposals, letters of intent, correspondence and understandings relating to the subject matter hereof. . . . "

Paragraph 13 of the RPA included an arbitration provision stating:

"(A) It is the express intention of the parties to resolve any disputes arising under this Agreement without resort to litigation in order to protect the confidentiality of their relationship and their respective businesses and affairs. Any dispute or controversy that is not resolved informally pursuant to sub-paragraph (B) of Paragraph 13 arising out of or related to this Agreement shall be fully determined in the British Virgin Islands under the provisions of the American Arbitration Association.

"(B) All disputes between the parties relating in any way to (1) the execution and delivery, construction or enforceability of this Agreement, (2) the management or operations of the Company, or (3) any other breach or claimed breach of this Agreement or the transactions contemplated herein shall be settled amicably by good faith discussion among all of the parties hereto, and, failing such amicable settlement, finally determined exclusively by binding arbitration in accordance with the procedures provided herein. . . . "

[¶] . . . [¶]

"(I) All arbitration proceedings shall be conducted in the English language in accordance with the rules of the American Arbitration Association and shall take place in Tortola, British Virgin Islands or at some other location agreed to by the parties."

[¶] . . . [¶]

"(K) This arbitration clause shall survive the termination of this Agreement and be deemed to be an obligation of the parties which is independent of, and without regard to, the validity of this Agreement."

Paragraph 16 of the RPA included a choice-of-law provision stating:

"This Agreement shall be exclusively governed by and construed in accordance with the laws of Nebraska and any matter concerning this Agreement that is not subject to the dispute resolution provisions of Paragraph 13 hereof shall be resolved exclusively by the courts of Nebraska without reference to its conflict of laws."

Arrow alleges that despite a "very good claims history," the actual pay-in amount billed for the first year was approximately $490,000, which exceeded the estimated

annual pay-in amount of $232,094. Arrow alleges that the reason for this discrepancy was that the Billing Terms "contained mathematical falsehoods" involving the misclassification of payroll amounts from higher premium classifications to lower premium classifications. Arrow alleges that it would not have purchased the workers' compensation insurance if it had known of this inaccuracy.

Arrow alleges counts for (1) breach of the implied covenant of good faith and fair dealing; (2) breach of contract; (3) fraud; (4) negligent misrepresentation; (5) fraudulent inducement; (6) rescission; (7) conversion; (8) accounting; (9) unfair business practices; (10) declaratory relief; and (11) professional negligence. Arrow alleges the first 10 counts against Applied, AUCRAC, and CIC, and alleges count 11 against Patriot only.

3. *Motion to Compel Arbitration*

Applied, AUCRAC, and CIC filed a motion in July 2012 to compel arbitration and stay the trial court proceedings. They argued that all of the counts alleged against them were within the scope of the arbitration agreement in the RPA. Alternatively, they argued that any claims not covered by the arbitration agreement in the RPA were within the scope of the arbitration agreement in the Request to Bind. They also argued that Patriot had agreed to participate in any court–ordered arbitration and that the fact that Patriot was not a party to the arbitration agreements did not preclude arbitration. They argued that arbitration was required under the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.) and the California Arbitration Act (CAA) (§ 1280 et seq.). They did not invoke the law of Nebraska.

Arrow argued in opposition to the motion to compel arbitration that it could not be compelled to arbitrate because (1) AUCRAC and CIC were transacting insurance business without a required certificate of authority from the California Department of Insurance, so the policy and the entire scheme were illegal, and the arbitration provisions were unenforceable: (2) the arbitration provisions in the RPA and the Request to Bind were conflicting and unconscionable; (3) the moving parties failed to show an adequate prior demand for arbitration; (4) Patriot was not a party to any

arbitration agreement and therefore could not be compelled to arbitrate; and (5) Arrow did not initial the arbitration provision in the Request to Bind and therefore did not agree to such arbitration provision. Arrow cited California law and did not invoke the law of Nebraska. Arrow also filed a request for judicial notice and evidentiary objections.

Applied, AUCRAC, and CIC argued in reply that the reinsurance arrangement and the profit sharing program were legal, and that the arbitration provisions in the RPA and the Request to Bind were enforceable and not unconscionable. They argued regarding Patriot as a nonparty to the arbitration agreements: "To the extent the Court determines that the claim asserted against Patriot cannot be compelled to arbitration, the Court should stay this action as the issues underlying the claim against Patriot can and will likely be litigated and resolved within the context of the arbitration. Because factual and legal issues relating to the claim against Patriot will likely be addressed in arbitration, there is good cause for staying this action pending resolution of the arbitration."

Applied, AUCRAC, and CIC filed a declaration by T. J. Koch, Applied's Director of Customer Service, stating that Applied had received from Arrow two signed and initialed copies of the Request to Bind. The documents attached to the Koch declaration each bore the signature of Doug Kunnel and initials in the box next to the arbitration provision. The defendants also filed a supplemental declaration by Kook stating that they demanded arbitration in a letter dated July 17, 2012, and attached a copy of the letter. The letter demanded arbitration under the arbitration provision in the RPA and alternatively under the arbitration provision in the Request to Bind. The defendants also filed a request for judicial notice.

Arrow filed objections to evidence submitted with the reply and filed declarations by Doug Kunnel and his wife Patti Kunnel stating that the Request to Bind that he signed and she sent by e-mail to Patriot was signed by Doug Kunnel, but was not initialed in the box next to the arbitration provision. They both declared that the initials

and the word "none" in handwriting appearing in another provision in the versions of the Request to Bind attached to the Koch declaration were not authentic.

4. *Tentative Ruling, Hearing, and Denial of Motion to Compel Arbitration*

The trial court filed a tentative ruling before the hearing on the motion to compel arbitration stating (1) that the demand for arbitration was insufficient because it failed to specify the place for arbitration, when the RPA specified the British Virgin Islands and the Request to Bind specified Nebraska; (2) regarding the disputed initials on the Request to Bind, "The evidence is inconclusive and weighs in favor of plaintiffs that no agreement exists"; (3) regarding the RPA, that the defendants disputed the legality of the workers' compensation insurance program, and, "This issue is at the crux of the case, whether the Program is legal. [¶] The Court does not find an agreement to arbitrate in the RPA";[1] (4) that the arbitration provisions were broadly worded and encompassed the claims in this action; (5) regarding procedural unconscionability, "There is no surprise. [¶] There are elements of adhesion and oppression, although slight"; (6) regarding substantive unconscionability, "Requiring plaintiffs to arbitrate in the British Virgin Islands is substantively unconscionable. The costs of arbitrating in a foreign territory would constitute a large portion of the amount in controversy"; and (7) regarding Patriot as a nonparty to the arbitration agreements, "Here, although Patriot is agreeable to participating in any court-ordered arbitration, there is no special relationship between the [moving parties] and Patriot. Patriot was Arrow's broker. Patriot cannot be compelled to arbitrate against Arrow. Patriot is being sued for professional negligence, separate from the other defendants."

The tentative ruling did not expressly state whether the arbitration provisions were unenforceable due to unconscionability. It concluded, "The motion is denied."

At the hearing on the motion to compel arbitration, counsel for the moving defendants requested a continuance to allow discovery concerning whether the

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[1] The trial court acknowledged at the hearing that this statement in its tentative ruling was intended to refer to the Request to Bind.

arbitration provision in the Request to Bind was initialed by Arrow or on its behalf. Counsel for those defendants also argued that if the trial court ordered an arbitration of the claims against the defendants other than Patriot, "a lot of the factual issues and maybe the legal issues relating to Patriot would be resolved in the arbitration, and, therefore, at least it seems like it would be a good idea to stay this case in the interim while the arbitration is resolved."

The trial court heard oral argument and took the matter under submission. No party requested a statement of decision (see Code Civ. Proc., § 1291).[2] The court filed a minute order on the date of the hearing, October 30, 2012, stating only, "The motion is denied." The court did not rule on the evidentiary objections.

5. *Appeal*

Applied, AUCRAC, and CIC timely appealed the order denying their motion to compel arbitration.

CONTENTIONS

Applied, AUCRAC, and CIC challenge the reasons stated in the tentative ruling for tentatively denying the motion to compel arbitration, while acknowledging that the basis for the trial court's final ruling is unknown. They contend in their appellants' opening brief (1) the failure to specify the place of arbitration in their demand for arbitration cannot justify the denial of their motion to compel arbitration; (2) the evidence suggests that Patriot, as Arrow's agent, initialed the arbitration provision in the Request to Bind, and Arrow failed to show otherwise, so Arrow is bound by that provision; (3) the denial of their request for discovery relating to the initials appearing on the Request to Bind was an abuse of discretion. (4) the profit sharing program is not illegal, so the arbitration provision in the RPA is not unenforceable as a result of such purported illegality; (5) the arbitration agreements are not unconscionable, and any unconscionable provisions should be severed rather than invalidate the entire arbitration

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[2] All statutory references are to the Code of Civil Procedure unless stated otherwise.

agreement; and (6) the trial court erred by refusing to compel arbitration based on the third party litigation exception rather than ordering arbitration and staying this litigation under section 1281.2.

We requested supplement briefing on certain questions, including whether the third party litigation exception (§ 1281.2, subd. (c)) applies. In response to our request, Applied, AUCRAC, and CIC contend (1) the FAA (9 U.S.C. § 1 et seq.) preempts the application of the third party litigation exception; and (2) even if there is no preemption, the third party litigation exception is inapplicable because there is no possibility of conflicting rulings on a common factual or legal issue.

DISCUSSION

1. *Implied Findings*

An order denying a motion to compel arbitration is appealable. (§ 1294.) A statement of decision is required if timely requested when an appealable order is made under the CAA. (§ 1291; *Metis Development LLC v. Bohacek* (2011) 200 Cal.App.4th 679, 689.) A statement of decision explains the factual and legal basis for the court's ruling. (§ 632.)

No party requested a statement of decision in this case. A tentative ruling is nonbinding and is not a substitute for a statement of decision.[3] (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 268-269.) Absent a statement of decision, we must presume that the trial court resolved all of the principal controverted issues in favor of the prevailing party as necessary to support the appealed order. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134; see §§ 632, 634.)

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[3] Rule 3.1590(c) of the California Rules of Court states that a court may direct that its tentative decision will become the statement of decision in certain circumstances. The trial court here did not do so.

2. *Applied, AUCRAC, and CIC Have Shown No Error in the Implied Finding That Arrow Never Agreed to the Arbitration Provision in the Request to Bind*

a. *Substantial Evidence Supports the Implied Finding*

The parties disputed whether Arrow's president, Doug Kunnel, initialed the arbitration provision in the Request to Bind. Absent a statement of decision, we presume that the trial court found that he did not initial the provision and that there was no arbitration agreement in the Request to Bind. Applied, AUCRAC, and CIC challenge this implied finding.

A party moving to compel arbitration bears the burden of proving by a preponderance of evidence the existence of an arbitration agreement. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.) The trial court sits as the trier of fact for purposes of ruling on the motion. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.) We review the court's factual findings under the substantial evidence standard. (*Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 60.)

Substantial evidence is evidence that a rational trier of fact could find to be reasonable, credible and of solid value. We view the evidence in the light most favorable to the judgment or appealed order and accept as true all evidence tending to support the trial court's ruling, including all facts that reasonably can be deduced from the evidence. We must affirm the judgment or order if an examination of the entire record viewed in this light discloses substantial evidence to support the ruling. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429; *Mealy v. B-Mobile, Inc.* (2011) 195 Cal.App.4th 1218, 1223.)

Doug Kunnel stated in his declaration that the box next to the arbitration provision in the Request to Bind that he signed was left blank and did not contain his initials. He also declared that the word "none" in handwriting appearing in another provision in the versions of the Request to Bind attached to the Koch declaration was not present in the document that he signed. He declared that the initials and the word

"none" were not of his hand and were added to the document without his knowledge or consent. Patti Kunnel declared that she sent the signed Request to Bind to Patriot and that neither the initials nor the word "none" was present on the document that she provided.

Applied, AUCRAC, and CIC argue that Arrow failed to negate the possibility that Patriot as Arrow's agent initialed the Request to Bind. But the defendants as the parties moving to compel arbitration had the burden of producing evidence sufficient to establish the existence of an arbitration agreement in the Request to Bind, such as evidence that Patriot initialed the Request to Bind as Arrow's agent. The defendants failed to present such evidence. We conclude that the declarations of Doug Kunnel and Patti Kunnel constitute substantial evidence supporting the implied finding that Arrow never agreed to the arbitration provision in the Request to Bind and that, therefore, there was no such arbitration agreement.

b. *The Trial Court Properly Denied a Continuance*

Applied, AUCRAC, and CIC cite no authority in support of their argument that they were entitled to a continuance of the hearing on their motion to compel arbitration for the purpose of conducting discovery concerning the initials. We review the denial of their request for a continuance for abuse of discretion. (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.)

"An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice. [Citations.] This standard of review affords considerable deference to the trial court provided that the court acted in accordance with the governing rules of law. We presume that the court properly applied the law and acted within its discretion unless the appellant affirmatively shows otherwise. [Citations.]" (*Mejia v. City of Los Angeles* (2007) 156 Cal.App.4th 151, 158 (*Mejia*).)

Applied, AUCRAC, and CIC in their motion to compel arbitration referred to the Request to Bind attached to the complaint, which had no initials in the box next to the arbitration provision. They submitted initialed versions of the Request to Bind for the

first time with their reply. In our view, the trial court reasonably concluded that having neglected to address the missing initials in their motion, the moving defendants failed to show good cause to continue the hearing. We conclude that the defendants have shown no abuse of discretion in this regard.

3. *Third Party Litigation Exception*

A party to an arbitration agreement can be compelled to arbitrate a dispute that is within the scope of the arbitration agreement.[4] Section 1281.2 states that on a petition filed by a party to a written arbitration agreement, a court must order a party to the agreement to arbitrate a controversy if it finds that an agreement to arbitrate the controversy exists, unless any of three specified exceptions applies. The CAA "reflects a 'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.' [Citation.]" (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 380.)

Section 1281.2, subdivision (c) states that a court need not order arbitration if it determines that "[1] [a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, [2] arising out of the same transaction or series of related transactions and [3] there is a possibility of conflicting rulings on a common issue of law or fact." We will refer to this as the third party litigation exception. If a court determines that the third party litigation exception applies, it may refuse to enforce the arbitration agreement and instead order intervention

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[4] The arbitration provision in the Request to Bind stated that any dispute must be resolved "by binding arbitration under the Federal Arbitration Act in conformity with the Arbitration Act of the State of Nebraska." A choice-of-law provision in the RPA stated, "This Agreement shall be exclusively governed by and construed in accordance with the laws of Nebraska . . . . " Yet the parties did not assert Nebraska law in the trial court, relying instead on California law and, to a limited extent, the FAA. The parties also fail to invoke Nebraska law on appeal. We conclude that by failing to assert the choice-of-law provisions in the trial court and on appeal, the parties have forfeited any reliance on Nebraska law for purposes of this appeal. (*Segal v. Silberstein* (2007) 156 Cal.App.4th 627, 632; *Pelletier v. Alameda Yacht Harbor* (1986) 188 Cal.App.3d 1551, 1554, fn. 1.)

or joinder of all parties to the dispute in a single action, among other options. (§ 1281.2, final par.)

The final paragraph of section 1281.2 states:

"If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding."

Thus, under the CAA a court finding that the third party litigation exception applies may refuse to order arbitration and instead join all parties to the dispute in a single action, or order arbitration and stay either the arbitration or the litigation, in order to avoid conflicting rulings on a common issue of fact or law. As used in section 1281.2, subdivision (c), the term "third party" means a person who is neither bound by nor entitled to enforce the arbitration agreement. (*Thomas v. Westlake* (2012) 204 Cal.App.4th 605, 612; *Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399, 1407.)

The third party litigation exception was at issue in the trial court. Arrow argued in opposition to the motion to compel arbitration that the motion should be denied because Patriot was not a party to any arbitration agreement and therefore could not be compelled to arbitrate. Absent a statement of decision, we presume that the court found that each of the requirements for application of the third party litigation exception was present and that the exception applied, and elected to refuse to compel arbitration rather than order arbitration and stay either the arbitration or this litigation.

4. *The FAA Does Not Preempt the Application of the Third Party Litigation Exception*

a. *Applied, AUCRAC, and CIC Forfeited the Preemption Argument by Failing to Assert it Earlier*

Applied, AUCRAC, and CIC did not argue in their appellants' opening brief that the FAA preempts the application of the third party litigation exception. They argued that California has a strong public policy favoring the arbitration of disputes and that section 2 of the FAA (9 U.S.C. § 2) "also provides guidance as it reflects an equally strong federal public policy favoring arbitration." But they did not argue in their opening brief that the FAA preempted the application of the CAA in any manner.

Applied, AUCRAC, and CIC argued in their opening brief that the trial court erred by refusing to compel arbitration based on the third party litigation exception rather than ordering arbitration and staying this litigation under section 1281.2. We requested supplemental briefing on the question whether the third party litigation exception applies. Applied, AUCRAC, and CIC argue in their supplemental brief that the third party litigation exception is inapplicable because there is no possibility of conflicting rulings on a common legal or factual issue. They also argue for the first time in their supplemental brief that the FAA preempts the application of the third party litigation exception. We conclude that the defendants forfeited the preemption argument by failing to assert it in their opening brief. (*Padilla v. Rodas* (2008) 160 Cal.App.4th 742, 753, fn. 2.) We nonetheless will address the merits of the preemption argument.

b. *There Is No Preemption*

The United States Supreme Court in *Volt Info. Sciences v. Leland Stanford JR. U.* (1988) 489 U.S. 468 [109 S.Ct. 1248] (*Volt*) held that the application of the third party litigation exception of section 1281.2, subdivision (c) to stay the arbitration of a contract dispute involving interstate commerce, and therefore covered by the FAA, did not undermine the goals and policies of the FAA and therefore was not preempted. (*Volt*, *supra*, at pp. 477-478.) The contract in *Volt* included a choice-of-law provision

designating the law of the situs state, which was California. The United States Supreme Court assumed the correctness of the ruling by the California Court of Appeal that the choice of California law included California's arbitration rules and specifically section 1281.2, subdivision (c). (*Volt, supra,* at p. 474.)

Volt stated that section 2 of the FAA requires courts to enforce arbitration agreements and does not prevent courts from enforcing agreements to arbitrate under rules different from those set forth in the FAA. (*Volt, supra*, 489 U.S. at p. 474.) *Volt* stated, "[W]e think the California arbitration rules which the parties have incorporated into their contract generally foster the federal policy favoring arbitration. As indicated, the FAA itself contains no provision designed to deal with the special practical problems that arise in multiparty contractual disputes when some or all of the contracts at issue include agreements to arbitrate. California has taken the lead in fashioning a legislative response to this problem, by giving courts authority to consolidate or stay arbitration proceedings in these situations in order to minimize the potential for contradictory judgments. See Calif. Civ. Proc. Code Ann. § 1281.2(c)." (*Id.* at p. 476, fn. 5.)

The California Supreme Court in *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376 (*Cronus*) similarly held that the FAA did not preempt the application of the third party litigation exception in that case. (*Cronus, supra*, at p. 380.) The arbitration agreements in *Cronus* included a California choice-of-law provision but also stated that the choice of law did not preclude the application of the FAA, if applicable. (*Cronus, supra,* at p. 381.) *Cronus* concluded that section 1281.2, subdivision (c) did not conflict with the FAA's procedural provisions because the FAA's procedural provisions applied only in federal court. (*Cronus, supra*, at pp. 388-390.) *Cronus* also concluded that section 1281.2, subdivision (c) did not contravene the FAA's substantive policy favoring arbitration. (*Cronus, supra,* at pp. 391-392, citing *Volt, supra,* 489 U.S. at p. 476 & fn. 5.) *Cronus* therefore concluded that the arbitration agreements did not preclude the application of section 1281.2, subdivision (c) because the California statute did not conflict with the FAA or

undermine the FAA's substantive policy favoring arbitration. (*Cronus, supra,* at p. 394.) *Cronus* stated further, "Our opinion does not preclude parties to an arbitration agreement to expressly designate that any arbitration proceeding should move forward under the FAA's procedural provisions rather than under state procedural law." (*Ibid.*)

Thus, the third party litigation exception of section 1281.2, subdivision (c) does not conflict with the procedural or substantive provisions of the FAA and is not preempted by the FAA.[5] We therefore reject the contention that the FAA preempts the application of the third party litigation exception in this case.

5. *The Third Party Litigation Exception Applies*

Applied, AUCRAC, and CIC expressly concede that the first two requirements for application of the third party litigation exception are satisfied because (1) Patriot is a defendant in this action and is not a party to any arbitration agreement, and (2) the claims subject to arbitration and the claim against Patriot arise from the same transaction or series of related transactions. The defendants argue, however, that there is no possibility of conflicting rulings because the 10 counts alleged against them are separate and distinct from, and share no common issues with, the single professional negligence count alleged against Patriot. This contradicts the defendants' argument in the trial court.

Applied, AUCRAC, and CIC argued in the trial court that the claims against them shared common issues with the claim against Patriot. They argued in their reply in support of their motion to compel arbitration that even if Patriot could not be compelled to arbitrate, an arbitration of the claims against Applied, AUCRAC, and CIC would

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[5] The third party litigation exception is inapplicable if the contracting parties expressly elected to proceed under the procedural provisions of the FAA rather than the CAA. (*Cronus, supra,* 35 Cal.4th at p. 394; *Valencia v. Smyth* (2010) 185 Cal.App.4th 153, 174, 177.) The defendants appear to assert this argument with respect to the Request to Bind, which, unlike the RPA, provided for arbitration "under the Federal Arbitration Act." We need not decide the effect of this language because our conclusion that substantial evidence supports the implied finding that Arrow never agreed to the arbitration provision in the Request to Bind (discussed *ante*) renders the issue moot.

likely resolve "the issues underlying the claim against Patriot." They argued further that "[b]ecause factual and legal issues relating to the claim against Patriot will likely be addressed in arbitration, there is good cause for staying this action pending resolution of the arbitration." They argued at the hearing that if the court ordered an arbitration of the claims against them, "a lot of the factual issues and maybe the legal issues relating to Patriot would be resolved in the arbitration, and, therefore, at least it seems it would be a good idea to stay this case in the interim while the arbitration is resolved." Thus, in arguing that the court should order arbitration and stay this litigation rather than refuse to order arbitration, Applied, AUCRAC, and CIC acknowledged that the claims against them share common legal and factual issues with the claim against Patriot. Such an acknowledgment effectively concedes the existence of a possibility of conflicting rulings on a common issue of law or fact.

The doctrine of invited error prevents a party from asserting an alleged error as grounds for reversal when the party through its own conduct induced the commission of the alleged error. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403; *County of Los Angeles v. Southern Cal. Edison Co.* (2003) 112 Cal.App.4th 1108, 1118.) The doctrine is based on the principle of estoppel. (*Norgart*, *supra*, at p. 403.) The purpose of the doctrine is to prevent a party from misleading the court and then profiting on appeal from doing so. (*Ibid.*)

We conclude that by arguing in the trial court that the claims against them shared common issues with the claim against Patriot, the moving defendants invited any error in the court's finding of a possibility of conflicting rulings if the same issue were decided both in this litigation and in arbitration. Accordingly, Applied, AUCRAC, and CIC have shown no error in the trial court's implied finding that the third party litigation exception applies.

6. *The Trial Court Properly Refused to Compel Arbitration Based on the Third Party Litigation Exception*

Applied, AUCRAC, and CIC also contend the trial court, having found that the third party litigation exception applied, abused its discretion by refusing to order

arbitration rather than ordering arbitration of the claims against them and staying this litigation.

The standard of review of an order denying a petition to compel arbitration depends on the particular issue decided. (*Laswell v. AG Seal Beach, LLC*, *supra*, 189 Cal.App.4th at p. 1406.) If the trial court finds that the third party litigation exception applies, its selection of one of the alternatives under the final paragraph of section 1281.2 is a discretionary decision and is reviewed for abuse of discretion. (*Lindemann v. Hume* (2012) 204 Cal.App.4th 556, 567-568.)

Applied, AUCRAC, and CIC argue that the gravamen of this action concerns Arrow's dispute with them, the 10 counts alleged against them are all within the scope of the arbitration agreements, and the presence of a single count against Patriot for professional negligence should not prevent the arbitration of the counts against them. But section 1281.2 does not state that a trial court has no discretion to refuse to order arbitration in a case in which most of the claims are arbitrable. Applied, AUCRAC, and CIC have failed to persuade us that the trial court's discretion under the statute should be so limited.

The trial court's reasons for refusing to order arbitration rather than ordering arbitration and staying either the arbitration or this litigation are unknown because no party requested a statement of decision, and the order ruling on the motion to compel arbitration states only "The motion is denied." We cannot presume that the court's decision was based on a legally impermissible reason or that the court abused its discretion in a manner not shown by the record. Instead, we must presume that the court properly applied the law and acted within its discretion unless an appellant affirmatively shows otherwise. (*Mejia*, *supra*, 156 Cal.App.4th at p. 158.)

We conclude that Applied, AUCRAC, and CIC have shown no abuse of discretion in the trial court's refusal to order arbitration based on the third party litigation exception. In light of our conclusion, we need not decide whether the court properly denied the motion to compel arbitration for another reason.

DISPOSITION

The order denying the motion to compel arbitration is affirmed. Applied, AUCRAC, and CIC are entitled to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

WE CONCUR:

EDMON, P. J.

KITCHING, J.