Right to Arbitration Not Necessarily Waived by Delay

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An employer did not waive its right to arbitration by litigating a wage and hour lawsuit for years, because the employee was not prejudiced by the delay, the 9th U.S. Circuit Court of Appeals concluded.

David Ho, Sarah Fernandez and Michelle Richards each filed a class action lawsuit against their employer, Ernst & Young LLP, claiming violations of California wage and hour laws. After six years of litigation, the cases were consolidated in 2011 and Richards became the lead plaintiff. At that point, Ernst & Young moved to put the litigation on hold and compel arbitration of the employees' claims according to binding arbitration clauses in their employment agreements.

The plaintiffs argued that Ernst & Young had waived its right to arbitration by litigating the matters for years. The firm, however, contended that it had not sought to compel arbitration earlier because it would have been futile, as California did not permit arbitration of class actions, in accordance with the 2007 decision in *Gentry v. Superior Court.* This changed in 2011, when the U.S. Supreme Court issued its decision in *AT&T Mobility LLC v. Concepcion,* in which the court held that the Federal Arbitration Act (FAA) trumped state law and did, in fact, allow agreements requiring the arbitration of class actions to be enforced.

The district court rejected Ernst & Young's futility argument, noting that the *Gentry* case had been decided after more than a year of litigation in Ho's case; previously, California law did not clearly prohibit the arbitration of class actions. In addition, the district court said the agreements had a choice-of-law clause, providing that New York law—not California law—would apply; thus, *Gentry* should not even have been factored into the matter. Because Ernst & Young could have moved to compel arbitration in the cases brought by Ho and Fernandez but had chosen not to do so for years, the district court found that the firm had waived its right to arbitration as to all the named plaintiffs, including Richards.

Ernst & Young appealed the district court's ruling as it applied to Richards. The 9th Circuit reversed the ruling, observing that, "Waiver of a contractual right to arbitration is not favored." Although the employer may have known of its right to arbitration at a much earlier point and may have engaged in acts inconsistent with that right by not requesting arbitration sooner, the 9th Circuit found that Richards had not been prejudiced by the delay. The litigation so far did not affect any of Richards' claims in a substantive way, and the extensive discovery that had been undertaken would have occurred in arbitration, as well. In addition, the 9th Circuit noted, the litigation expenses Richards incurred were "self-inflicted," as she chose to bring a lawsuit in court even though she was aware that her employment agreement required arbitration. Such "self-inflicted" expenses could not be blamed on Ernst & Young, the court said.

The 9th Circuit also rejected Richards' argument that the arbitration provision was unenforceable under the National Labor Relations Board's 2012 decision in *D.R. Horton,* in which the board found that the National Labor Relations Act, which protects employees' rights to collective action about the terms and conditions of employment, did not permit a waiver of the right to bring a class action lawsuit. The 9th Circuit determined that the board's decision conflicted with the Supreme Court's "explicit pronouncements … concerning the policies undergirding the Federal Arbitration Act" and that Congress certainly had not specified that the National Labor Relations Act should override the FAA.

The 9th Circuit held that Ernst & Young could compel arbitration of Richards' claims, although it had already litigated the various related cases for years.

Richards v. Ernst & Young LLP, 9th Cir., No. 11-17530 (Aug. 21, 2013).

Professional Pointer: If an arbitration agreement exists, employers should seek to compel arbitration as soon as possible, even if there is some doubt as to whether the agreement is enforceable under state law.

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