

Invoke It Early and Often: New Jersey Supreme Court Establishes Arbitration Waiver Standards

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An employer that delays invoking its rights under an arbitration clause runs the risk of waiving those rights. The New Jersey Supreme Court, in *Cole v. Jersey City Medical Center* (A-6-12) (070542), has held an employer waived its contractual right to arbitration where the company failed to raise arbitration as an affirmative defense in its answer, engaged in 21 months of discovery, filed a motion for summary judgment, made no mention of the arbitration clause in its pretrial disclosures, and moved to compel arbitration for the first time only three days before the trial date. The August 14, 2013, decision likely would lead to early disclosure of arbitration agreements and, where appropriate, early motion practice.

The plaintiff, Karen Cole, was a certified nurse anesthetist who had a contract with Liberty Anesthesia Associates, which had a contract with Jersey City Medical Center. She filed suit against the hospital where she performed services on behalf of her employer. The hospital, in turn, filed a third-party claim against its vendor. The plaintiff eventually amended the complaint to name her employer as a direct defendant. Although the plaintiff's contract with her employer contained an arbitration provision, the employer never asserted the arbitration clause as a defense in the answer. The parties completed discovery over the course of 21 months. The parties had deposed the plaintiff over six days, but she was never questioned about the arbitration provision.

At the conclusion of discovery, the defendants filed motions for summary judgment. Prior to a decision, the hospital reached a settlement with the plaintiff and the case proceeded only with Liberty Anesthesia as defendant. Thereafter, the trial court granted the employer's summary judgment, in part, and set a trial date as to the remaining claims. The parties served pretrial disclosures in accordance with the Court Rules; however, the employer's disclosures failed to mention arbitration. Finally, three days before the scheduled trial date, the employer filed a motion to compel arbitration. The trial court granted the motion and appeals ensued.

The New Jersey Supreme Court held that the employer waived its contractual right to arbitration, noting, in particular, that the employer never raised the defense in pleadings, filed a motion for summary judgment (i.e., submitted the dispute for disposition by the court), and waited until the eve of trial to assert the defense. The Court explained that questions of waiver must focus on the totality of the circumstances in each case. It held the following factors should be analyzed in deciding the issue of waiver:

1. The delay in making the arbitration request;
2. The filing of any motions, particularly dispositive motions, and their outcomes;
3. Whether the delay in seeking arbitration was part of the party's litigation strategy;
4. The extent of discovery conducted;
5. Whether the party raised the arbitration issue in its pleadings, particularly as an affirmative defense, or provided other notification of its intent to seek arbitration;
6. The proximity of the date on which the party sought arbitration to the date of trial; and
7. The resulting prejudice suffered by the other party, if any.

As a result of *Cole*, employers should invoke their contractual rights to arbitration early and often in

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the litigation process to protect their rights. Failure to do so may result in a waiver of those rights and subject the employer to litigation in the trial court.

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