The Non-Subscriber Case Law Update

A Bi-Monthly Publication Dedicated to Detailing Recent Cases Pertaining to Non-Subscription Issues.

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Recent Arbitration Cases

Below are two cases which pertain to waiver of a party's right to arbitration. This is an issue that interests every litigant as there are times when a party will want to explore whether arbitration is the best forum for their dispute. The longer a claim can be left in litigation, the longer a litigant has to explore whether arbitration or court is the better forum.

The Texas Supreme Court addressed the issue of waiver in Perry Homes v. Cull, 51 Tex. Sup Ct. J. 819 (Tex. 2008). This case involved a homeowner's suit arising from a defective home. At the outset, the Defendant sought to compel arbitration which the Plaintiff successfully resisted. The Plaintiff then engaged in extensive discovery over several years. Just prior to trial, the Plaintiff sought to compel arbitration which was granted. The Defendant did not like the arbitrator's award and appealed. One of the issues raised by the Defendant was waiver of the right to arbitration by the Plaintiff. The Texas Supreme Court enumerated the following factors in determining the issue of waiver of a party's right to arbitration: (1) when the movant knew of the arbitration agreement; (2) how much discovery has been conducted; (3) who initiated the discovery; (4) whether the discovery related to arbitrability of standing; (5) how much of the discovery would be useful in arbitration; and (5) whether the movant sought judgment on the merits. Texas law also requires that in order to show waiver the party resisting arbitration show that they have been prejudiced by the movant's delay or actions in court. Of note, the Defendant attempted to convince the court that a showing of prejudice was not required. The Texas Supreme Court declined and instead concluded that the Defendant had been prejudiced by the Plaintiff waiting until the eve of trial to compel arbitration after conducting extensive litigation in court.

In re Bison Bldg Materials, Inc., 2008 WL 2548568 (Tex. App. – Houston [1st Dist], 2008) applies some of the Perry Homes factors in a non-subscription setting. This case pertains to an arbitration agreement contained within a summary plan description. The employee acknowledged receipt of the summary plan description containing the arbitration agreement. She was later hurt at work. While at the hospital after the accident, the employer had the employee sign a post injury litigation waiver as required for eligibility under the ERISA employee injury plan. The employee later filed suit. The suit was filed in February 2006. The employer only subpoenaed medical records and exchanged written discovery with the Plaintiff. The parties agreed to a scheduling order which set trial for October 2006. In July 2006, the employer filed a motion for summary judgment based upon the post-injury waiver. The trial court denied the motion for summary judgment. The employer filed a motion to compel arbitration in September 2006. The parties entered an agreed motion for continuance of the October 2006 trial setting. The court denied the motion to compel on January 4, 2007 and the employee's deposition was taken by the employer on January 5, 2007. The employer filed an appeal with the Houston Court of Appeals after the deposition seeking to reverse the trial court's denial of the motion to compel arbitration. In response to the employee's contention that the employer waived arbitration by substantially invoking the litigation process, the court found that the employer had not waive its right to arbitration by its actions in court. The court found that since the lawsuit was filed in February 2006 and the motion to compel was filed in September 2006, that the short period of time did not show they had waived arbitration. The court also dispelled the employee's argument that the motion for summary judgment waived the employer's right to arbitration because the motion did not "go to the merits" of the employee's claims only sought to avoid litigating them based upon the pre-injury waiver. Finally, the employee argued that the employer had substantially invoked the litigation process through participation in discovery. The appeals court dismissed this argument by noting the employer did not conduct a single deposition until after the court denied its motion to compel arbitration and had merely conducted written discovery and sought to obtain the employee's medical records.

Comment:
What seems to be clear is obtaining medical records and engaging in simple written discovery will not lead to waiver. If there is a basis for summary judgment, it must be a basis that does not address the merits of the employee's case. The passage of time also factors into whether waiver of the right to arbitrate has occurred. For instance, if two years pass and there is written discovery and medical records obtained, there may be a better chance of waiver than if a motion to compel arbitration is filed after only six months and medical records were obtained. There seem to be some gray areas where an argument could be made that engaging in early discovery, that could be obtained through the arbitration agreement, and then moving to compel arbitration after only a short time, may not constitute waiver. However, the safe approach will always be to move for arbitration at the outset of the case without engaging in any discovery. That being said, the cases do appear to allow an employer to obtain medical records before moving for arbitration.

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