

When is it appropriate to assert an arbitration provision after a lawsuit has been filed? Well, not twenty-one months into the litigation and three days before the scheduled trial. Doing so may result in a waiver of the right to arbitrate. However, there are ways to preserve the right even if the case involves some non-arbitrable claims.

In *Cole v. Jersey City Medical Center* (approved for publication), decided by the New Jersey Supreme Court on August 14, 2013, the plaintiff is a certified registered nurse anesthetist who was employed by a company that contracted her services to a hospital. The hospital revoked her privileges to work there for cause, and the nurse's employer terminated her employment in accordance with their employment agreement. The nurse initiated an action against the hospital, and the hospital brought the nurse's employer into the lawsuit. The nurse ultimately asserted direct claims against her employer.

The employer participated in lengthy discovery including the deposition of the plaintiff for six days, filed dispositive motions that resulted in the dismissal of certain claims against the employer, and exchanged witness and exhibits lists in anticipation of trial that included a list of motions. The list of motions did not include a motion to compel arbitration. One week later and three days before the scheduled trial, however, the employer filed a motion to compel arbitration, claiming that it waited until after the plaintiff's claims against the hospital had been resolved.

The Supreme Court decided the employer waived its right to arbitration, establishing a fact-sensitive, totality of the circumstances standard that evaluates the following factors:

1. The party's delay in making the request to arbitrate;
2. The filing of motions, especially motions disposing of claims, and their outcomes;
3. Whether the delay in requesting arbitration was part of the party's litigation strategy;
4. The extent of discovery conducted before the request to arbitrate was made;
5. Whether the party raised the issue of arbitration in its answer or affirmative defenses or provided other notification of its intent to pursue arbitration;
6. The proximity between the trial date and the date of the party's request to arbitrate; and
7. The prejudice that will result to the other party, if any.

Although no one factor is dispositive on the issue, the Court determined that an agreement to arbitrate is waived if the issue of arbitration is only asserted in the party's answer without making any further efforts to preserve it as an affirmative defense.

In this case, the Court decided that the employer's action before invoking the arbitration clause "reflected a commitment to try the case" and the employer intended to rely on the dispositive motions decided in its favor that dismissed some of the plaintiff's claims. The Court also noted that invoking an arbitration clause on the eve of trial has a detrimental effect on the litigation process and would have delayed the resolution of the case, which was imminent at the time the employer raised the arbitration clause.

The Court discussed ways to preserve the right to arbitrate and avoid a waiver when a lawsuit involves some non-arbitrable claims: assert the right to arbitrate in the answer as an affirmative defense; move to compel arbitration in a timely manner; move to stay the judicial proceeding; and notify the other party to the arbitration agreement that its litigation conduct should not be perceived as a waiver of its right to arbitrate the dispute.