

## **Waiving or Forfeiting the Right to Arbitrate - Recent Cases Tackle Issue**



Hon. Abe Gafni

Increasingly, mandatory arbitration provisions are included in commercial agreements. After disputes arise, however, parties often claim that their adversary is no longer entitled to demand arbitration because of either forfeiture by reason of a failure to timely assert or waiver through intentional relinquishment or abandonment of this contractual right. In the arbitration context, the courts generally lump the two together under the rubric of "waiver."

Cases considering whether arbitration has been waived reflect how careful a party must be in seeking to preserve this right. Examples of this outcome are reflected in two recent federal cases.

Thus, the U.S. Court of Appeals for the Seventh Circuit decided that a debt collector had waived arbitration through "gratuitous delay" in *Smith v. GC Services Limited Partnership*, No. 18-1361, Oct. 22, 2018.

*Smith* involved a debt collection matter in which the debtor brought a class action against the collector alleging violations of the Fair Debt Collection Practices Act. The collector filed a motion to dismiss in August 2016 based, inter alia, upon the failure to state a claim. No mention was made of the arbitration agreement. Following the filing of an amended complaint, a second motion to dismiss was filed which again made no reference to the arbitration agreement. A discovery conference scheduled by a magistrate in February 2017 was held in March. After the conference, the collector for the first time demanded arbitration by letter which was refused by the debtor. In April 2017, the collector filed an answer and new matter to the amended complaint, but again did not mention the arbitration agreement.

In June 2017 the court denied the motion to dismiss. It was only in August 2017, 13 months after the commencement of the suit, that the collector formally moved to compel arbitration.

The Seventh Circuit noted that here there was no claim of an express waiver of the right to arbitrate; rather, the issue was whether there was a forfeiture of that right because "considering the totality of circumstances, a party acted inconsistently with the right to arbitrate."

The appellate court stated that there are many factors that "are relevant to this analysis, but diligence or lack thereof is particularly important" ... "Did 'the party seeking arbitration ... do all it could reasonably be expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration?'" To be included in this consideration is "whether the allegedly defaulting party participated in litigation, substantially delayed its request for arbitration or participated in discovery." [READ MORE..](#)

To schedule a mediation or arbitration with [Judge Gafni](#) or any of our [neutrals](#), please email [mcarney@adroitptions.com](mailto:mcarney@adroitptions.com) or click below:

[Submit a Case](#)



View our profile on [LinkedIn](#)

[ADDRESS](#) | [EMAIL](#) | [PHONE](#) | [WEBSITE](#)

ADR Options, Inc., Two Commerce Square, Suite 1100,  
2001 Market Street, Philadelphia, PA 19103-7044

[SafeUnsubscribe™](#) {recipient's email}

[Forward this email](#) | [Update Profile](#) | [About our service provider](#)

Sent by [mcarney@adroitptions.com](mailto:mcarney@adroitptions.com) in collaboration with

**Constant Contact**

Try it free today