

News & Developments

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Sixth Circuit Determines Defendant Did Not Waive Its Right to Arbitrate

In *Shy v. Navistar International Corp.*, 781 F.3d 820 (6th Cir. 2015), the Sixth Circuit upheld the district court's ruling that the parties' dispute was subject to an arbitration clause contained in a settlement agreement and consent decree related to the defendant's obligations to its retired employees, but reversed the district court's finding that the defendant waived its right to arbitrate the dispute.

Under the settlement and consent decree, the defendant was required to make certain payments to a Supplemental Benefit Trust, which was managed by a Supplemental Benefit Committee (SBC). *Id.* at 822. An appendix to the agreement and decree outlined the method for the calculation and enforcement of the defendant's obligation regarding the payments. This appendix also contained an arbitration clause which required that disputes over the "information or calculation[s]" provided by the defendant be referred to arbitration. *Id.* at 823.

Following this settlement agreement, SBC requested additional information from the defendant and disputed certain calculations, namely that the defendant had misclassified certain Medicare subsidies in its calculations. *Id.* The defendant provided some additional information and declined to pursue dispute resolution over the disputed calculations, arguing reclassifying the subsidies would not affect its overall obligations. SBC then formally requested arbitration over the disputed calculations, to which the defendant did not directly respond. *Id.* at 824. After some back and forth, SBC ultimately filed a motion to intervene in the litigation, as well as a motion to enforce the settlement agreement. *Id.* The defendant responded to these motions. However, after the district court granted SBC's motion for leave to amend its complaint, the defendant moved to dismiss the amended complaint on the ground that the issues were subject to arbitration. *Id.* The district court found that the claims fell under the scope of the arbitration clause, but that the defendant had waived its right to arbitrate based on the defendant's behavior prior to and during the litigation. *Id.*

In upholding the district court's ruling that the claims were subject to arbitration, the Sixth Circuit stated that the "strong federal policy in favor of arbitration resolves any doubts as to the parties' intentions in favor of arbitration." *Id.* at 827. In reversing the district court's determination that the defendant waived its right to arbitrate, the Sixth Circuit noted that a party "waives arbitration if it acts in a manner completely inconsistent with any reliance on an arbitration agreement or delays asserting arbitration to such an extent that the opposing party incur[red] actual prejudice." *Id.* at 827–28 (internal citations and quotations omitted). The Sixth Circuit determined that neither inconsistency nor actual prejudice were present in this case. For example, the Sixth Circuit interpreted the defendant's silence in response to SBC's formal notice of dispute not as a waiver, but rather as "the typical posturing that may occur where one party is attempting to stare down the other party in the hope that the other party will simply give up." *Id.* at 829 (internal citations and quotations omitted).

In addition, the Sixth Circuit found that the defendant's "pre-litigation behavior did not delay proceedings in a way that actually prejudiced the SBC" and that the defendant was not the sole reason for any delay, as SBC could have sought a court order compelling arbitration after the defendant initially refused to arbitrate. *Id.* The Sixth Circuit also found that waiver could not be inferred from the defendant's delay in seeking arbitration once SBC commenced litigation, as the Sixth Circuit found that the defendant raised arbitration as a defense in its second substantive submission. *Id.* at 829.

The dissent, however, had harsh words for the defendant, stating that it would have found that the defendant waived its right to arbitrate "by engaging in an unmistakable campaign of avoidance and delay," including sitting quietly on its right to arbitrate until it received an adverse ruling from the district court. *Id.* at 831. The dissent also stated that the defendant's conduct caused actual prejudice to SBC because SBC incurred litigation costs prior to the defendant claiming the dispute should be arbitrated and that the defendant did not raise the issue of arbitration until its fourth substantive submission—not its second one. *Id.* at 837. Not only did the dissent argue that the defendant waived the right to arbitrate, the dissent disagreed that the dispute was even within the scope of the arbitration clause. *Id.*

Following the decision in *Shy*, it will be interesting to see what sort of conduct is required for the Sixth Circuit to find that

waiver of an arbitration clause occurred.

Keywords: litigation, ADR, alternative dispute resolution, arbitration, scope of arbitration clause, waiver

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