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Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2025

Another look at the *Quach* decision

ARBITRATION, LIKE ANY CONTRACTUAL RIGHT, CAN BE WAIVED

In many workplaces, arbitration agreements have become a mandatory part of the hiring process, thus ensuring that many work-related disputes will never see the inside of a courtroom. If a claim subject to an arbitration agreement has been filed in court, employers typically respond either by obtaining the employee's consent to move the case to arbitration via a stipulation, or filing a motion or petition to compel arbitration.

Sometimes, however, a different process is followed. For strategic or other reasons, an employer might delay making any effort to move the case to arbitration. Such a delay might be for just a short time, but it could also last until well into the litigation process, after parties have already done extensive discovery and trial preparation. When so many months have passed, the employer might finally file a motion or petition to compel arbitration, frustrating the plaintiff's efforts to go to trial. Can the affected employee now use the employer's delay to bypass arbitration?

It stands to reason that a party who failed to timely assert a right provided under contract should not be given the opportunity to retroactively invoke that right. When it comes to arbitration, however, all bets are off. Until recently, an employee seeking to avoid arbitration on the grounds that his or her employer delayed filing a motion to compel arbitration would have faced an uphill battle. Unless that employee suffered prejudice because of the employer's delay, the claim would still be sent to arbitration. What might have been considered a waiver of contractual rights under other circumstances was not a waiver for purposes of arbitration.

Such was the case for Peter Quach, who filed a lawsuit against his former employer, the California Commerce Club (Commerce), alleging wrongful termination, age discrimination, retaliation and harassment. Despite the fact that it took 13 months for the defendant to file a motion to compel arbitration, an appeals court nevertheless granted that motion. (*Quach v. California Commerce Club Inc.* (2022) 78 Cal.App.5th 470.)

But in July 2024, a unanimous California Supreme Court reversed that decision. It found that an intervening U.S. Supreme Court decision clarified the calculus for determining whether a contractual right to arbitrate has been waived. The new decision makes it easier for plaintiffs to get employment disputes to trial and harder for defendants who don't act promptly to lock in arbitration.

Waiver two ways

Contractual waivers, generally

Parties are generally found to have lost their rights under contract when their actions demonstrate an intent to waive those rights. Such waiver might occur because a party seeking to enforce the right intentionally relinquished or abandoned it. The California Supreme Court explained in *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1048 that "'waiver' means the intentional relinquishment or abandonment of a known right."

Intention may be express – based on words – or it may be implied through conduct "so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished." (*Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 598.)

In *Lynch v. California Coastal Com.* (2017) 3 Cal.5th 470, 475, homeowners who objected to certain conditions in the permit for construction of their homes were deemed to have waived their right to challenge those conditions because the house was constructed and they had enjoyed the benefits of the permit. Their actions would have led a reasonable person to believe that they had relinquished their contractual right to object to the permit conditions.

Waiver of arbitration rights

But when the contractual right at issue is the right to demand arbitration of disputes, different rules have applied. At both the federal and state levels, case law had inserted an additional requirement into the mix. To find a waiver in the context of a party seeking to avoid arbitration, courts required a showing of prejudice to the party asserting the waiver because of the delay.

In *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187 (*St. Agnes*), the California Supreme Court upheld the respondent's petition to compel arbitration of certain claims despite its repudiation of the underlying contract. The court observed that "a party who resists arbitration on the ground of waiver bears a heavy burden." Any doubts regarding a waiver allegation "should be resolved in favor of arbitration." (*St. Agnes*, at p. 1195.)

State law, according to the *St. Agnes* decision, should comport with the Federal Arbitration Act (FAA), U.S.C. Title 9, which favored arbitration agreements and required close scrutiny of waiver claims. Neither state nor federal law, the court said, established a single test of the type of conduct that would constitute a waiver of arbitration, but California courts had found an arbitration waiver under certain circumstances. Among these circumstances was when the party seeking to compel arbitration previously took steps inconsistent with an intent to invoke arbitration or when the petitioning party unreasonably delayed seeking arbitration. "Bad faith" or "wilful misconduct" could also justify a refusal to compel arbitration. (*Engalla v. Permanente Med. Grp., Inc.* (1997) 15 Cal.4th 951, 983.)

Finally, a waiver of arbitration might be in order when the delay "'affected, misled, or prejudiced' the opposing party." The presence or absence of prejudice, the state supreme court said, was a "determinative issue under federal law" and thus was also a "critical" issue in California arbitration waiver determinations. (*St. Agnes*, at p. 1195.) In adopting this rule, the Court relied on a series of earlier federal decisions construing the FAA.

The *Quach* case

On to this stage Peter Quach brought

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claims against his former employer. He may not have signed an arbitration agreement when hired by Commerce almost three decades before his termination, but in 2015 he did sign one at his employer's request. Three years later, before Quach filed his lawsuit, the employer reminded him of this fact by presenting him with a copy of the signature page from that arbitration agreement.

But that was it. At a case-management conference, defendant Commerce filed a demand for a jury trial and declined to answer questions about private arbitration. It checked the jury trial box rather than the binding-arbitration box on the form and proposed a plan for completing discovery. It also did not list a motion to compel arbitration in the space provided for listing motions it expected to file before trial, instead indicating that it only intended to file a "dispositive motion." In all relevant ways, the company indicated an intent to proceed to trial. Trial preparation went on – with breaks necessitated by the COVID-19 pandemic – for 13 months. Only at that point did Commerce file a motion to compel arbitration.

The trial court ruled that Commerce had waived its right to compel arbitration by failing to seek arbitration sooner and it denied the motion to compel arbitration, finding that Commerce "knew of its right to compel arbitration." On appeal, however, a divided panel ruled that Quach had not shown prejudice from the delay and that, in keeping with both state and federal law, it had to grant the motion to compel arbitration.

Morgan changes the equation

As Quach's case moved through the appeal process, the U.S. Supreme Court decided *Morgan v. Sundance, Inc.* (2022) 596 US 411. The high court unanimously overturned an Eighth Circuit decision that conditioned a waiver of arbitration rights on a showing of prejudice. Despite the FAA's "policy favoring arbitration," there was no legal requirement for an arbitration-specific waiver standard.

In fact, Justice Kagan wrote, "the text of the FAA makes clear that courts are not to create arbitration-specific procedural rules like the one we address here." Under FAA Section 6, any application under the statute – including an application to stay litigation or compel arbitration – "shall be made and heard in the manner provided by law for the making and hearing of motions."

In effect, the high court determined that arbitration contracts are no different than other contracts when it comes to waiver of rights. Any action that would be deemed a waiver of contractual rights in another context is also a waiver in the arbitration context. A plaintiff such as Peter Quach should thus be able to make a case for waiver without a showing of prejudice.

The California Supreme Court, in reversing the appellate court's decision favoring Commerce, acknowledged that California's waiver rule was based on a line of federal cases that required a showing of prejudice to establish waiver. Absent the federal rule, the court said, there was no basis for California's arbitration-specific waiver requirement. It was therefore immaterial whether Commerce's arbitration agreement was governed by the FAA or its California counterpart, the California Arbitration Act (CAA).

What this means in practice

The arbitration playbook has undergone a rewrite. Plaintiffs – employees, contractors, consumers, and others – who previously had little chance of arguing their claims before juries, may now have a better chance of going to trial. The fact that they have signed mandatory arbitration agreements may no longer be enough to lock them into arbitrating their grievances if the defense has not timely moved to compel arbitration.

The *Quach* decision should motivate defendants to be more diligent about filing to compel arbitration. Without the benefit of arbitration-specific rules, any foot-dragging could now come back to bite them. They must exercise care in responding to plaintiff complaints, or their delay could be considered a waiver.

If the defendant fails to file a motion to compel arbitration and/or takes other actions that belie an intent to pursue arbitration for resolving the dispute, there is a good likelihood that a waiver claim could be asserted and upheld. Courts will look at the totality of the circumstances to determine whether, in fact, a waiver of rights occurred.

Even though prejudice – or bad faith, willful misconduct, or other negative circumstance – is no longer a requirement for establishing waiver, the waiver determination will depend on the facts. A defendant whose motion is filed late, but well before discovery has commenced, should have a better chance of compelling arbitration than one who waits several months before filing. The reasons for a delay in filing may also be relevant to the determination.

For all of these reasons, both plaintiffs and defendants must be mindful of the timing of motions to compel arbitration. Plaintiff's counsel who have made the decision to file a lawsuit in court, despite the existence of an arbitration agreement, should be ready to argue waiver if the defense unreasonably delays filing a motion or petition to compel arbitration.

Defense counsel can no longer rely on arbitration-specific waiver rules to provide cover for a delay in pursuing arbitration. Any delay should be cause for concern, but a lengthy delay – especially when coupled with activity consistent with trial preparation – is likely to mean that a jury will ultimately decide the matter.

JJ Johnston is an employment and class action mediator. He has been mediating employment and class action matters for more than two decades and has more than three decades' experience as an employment attorney representing both plaintiffs and defendants in a wide range of employment cases.