Commercial Litigation: Can Arbitration Clauses Be Impliedly Waived?

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How do you impliedly waive an arbitration clause? It has seemed to be very difficult, if not impossible, to do. This, of course, is consistent with the strong federal and state policies favoring arbitration. But we now have a Texas Supreme Court case demonstrating how an arbitration clause can be impliedly waived. *See Perry Homes v. Cull*, 258 S.W.3d 580 (Tex. 2008).

The facts of *Perry Homes* are compelling. Plaintiffs purchased from Perry Homes a home and a homeowner's warranty. The warranty provided that all disputes with Perry Homes or the warranty companies were to be arbitrated. A dispute arose over structural and drainage problems with the house, so the plaintiffs sued. The warranty companies immediately requested arbitration. Plaintiffs vigorously opposed arbitration, and no party pressed the issue. Four days before trial, however, the plaintiffs changed their minds and moved to compel arbitration. The trial court found that there was no evidence that defendants were prejudiced by the late filing, reluctantly granted the motion to compel, and sent the case to arbitration. The warranty companies and Perry Homes filed petition for writs of mandamus to prevent the case from going to arbitration. Both the court of appeals and Texas Supreme Court, however, denied the petitions without opinions.

The parties then proceeded to arbitration and plaintiffs received a favorable ruling. The trial court and court of appeals both affirmed the award. The warranty companies and Perry Homes, however, appealed to the Texas Supreme Court–the same court that had previously denied their petition for writ of mandamus. In a surprising turn, a divided Court vacated the arbitration award and remanded the case to the trial court. The Court held that the plaintiffs had substantially invoked the litigation process and waived the arbitration clause.

The Court evaluated the totality of circumstances in vacating the arbitration award. It noted that before requesting arbitration, the plaintiffs took at least ten depositions, filed five motions to compel, were subject to two motions for protective orders, and requested extensive and numerous categories of documents. The court also pointed out that the plaintiffs filed a 79-page brief vigorously opposing defendants' original motion to compel arbitration. Then the court noted that only after the plaintiffs had conducted full discovery, which the Court stated would have been limited if the parties had arbitrated from the beginning, they moved to compel arbitration just four days before trial. These facts were enough for the Court to find that the defendants were prejudiced by the plaintiffs' conduct and that the plaintiffs effectively waived their right to have the case arbitrated. The majority opinion is followed by several pages of concurrences and dissents by the various justices. The primary disagreement was over whether the defendants presented sufficient evidence of being prejudiced.

So what has happened since the *Perry Homes* decision? At least two more cases before the Texas Supreme Court have argued for implied waiver, but neither has been successful.

In a case decided the same month as *Perry Homes,* the Court conditionally granted a writ of mandamus overruling the trial court and finding that an arbitration clause had not been waived. *In re Citigroup Global Mkts., Inc.*, 258 S.W. 3d 623 (Tex. 2008) (orig. proceeding) (per curiam). Disgruntled investors sued Citigroup over erroneous investment advice. Citigroup removed the case to federal court and then moved to transfer the case to a federal multidistrict-litigation court. After months of jurisdictional wrangling, the case ended up in state court where Citigroup moved to compel arbitration. The trial court and court of appeals held that Citigroup waived arbitration by statements that it made in the various motions for transfer indicating that it intended to litigate –not arbitrate–the case. Citigroup's statements revolved around the similarity of its case to other transferred cases, the potential savings in consolidated discovery, and the potential convenience of the parties and witnesses. The Court dismissed these statements as merely being an attempt to meet the requirements for transfer to an MDL panel that should not be taken out of context. In fact, the Court interpreted some of the statements as showing an effort to avoid litigation. It ultimately concluded that these statements were not enough to waive arbitration.

Soon after the *Perry Homes* and *Citigroup* decisions, the Court conditionally granted a writ of mandamus holding that the defendant did not waive its right to arbitration. *In re Fleetwood Homes of Tex., L.P.,* 257 S.W.3d 692 (Tex. 2008) (orig. proceeding) (per curium) Gulf Regional Services, Inc. sued Fleetwood Homes of Texas, L.P., for breach of contract. In October 2005, Fleetwood filed an answer demanding arbitration but did not move to compel arbitration until July 2006. Gulf argued that Fleetwood waived arbitration by delaying filing its motion, even though it knew about the arbitration clause at least as early as the answer date. Gulf also cited several e-mails from Fleetwood's counsel that discussed moving the trial setting as evidence of an intent to litigate, not arbitrate. The trial court held that Fleetwood waived arbitration. A divided court of appeals agreed and denied Fleetwood's petition for mandamus relief. The Texas Supreme Court, however, did not agree. The Court noted that nothing in Fleetwood's e-mails expressly waived the arbitration clause, and Gulf did not show that Fleetwood impliedly waived the arbitration. Furthermore, Fleetwood took no depositions, served only one set of written discovery before it moved to compel arbitration, filed no dispositive motions, and did not wait until the eve of trial to file the motion to compel. Given all of these facts, the Court held that Fleetwood did not waive its right to arbitration.

So where are we? These cases demonstrate that it is still very difficult to impliedly waive an arbitration clause, but given the right set of facts, the Court will find that an arbitration clause has been waived. What seems to be clear is that moving to compel arbitration as soon as possible is generally the safest course of action, but all is not lost even if you wait.