



# Sixth Circuit Affirms District Court's Finding of Waiver of Right to Enforce Arbitration

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In *Hurley v. Deutsche Bank Trust Co. Americas* [1], the plaintiff, an active member of the military service, executed a mortgage on his personal residence as security for a loan he received from the defendants.

The mortgage documents contained an arbitration clause, pursuant to which the plaintiff agreed to resolve all disputes, claims or controversies arising from the loan by binding arbitration instead of by court action.

While the plaintiff was away on active duty, he fell behind in his mortgage payments. After the defendants foreclosed on his home, the plaintiff filed a lawsuit alleging violations of the Servicemembers' Civil Relief Act [2] and state law claims of infliction of emotional distress, fraud, and conversion. During the course of the lawsuit, the defendants filed several dispositive motions and a motion for change of venue, attended a Rule 16 scheduling conference and a settlement conference, and filed numerous other motions and documents in defense of the plaintiff's claims. In the end, after 26 months of litigation, the district court issued a decision in favor of the plaintiff. Afterwards, the defendants filed a motion to compel arbitration pursuant to the arbitration clause in the mortgage documents, which the district court denied, holding that the defendants had waived their right to enforce the arbitration clause by sleeping on their arbitration rights for 26 months while the plaintiff incurred litigation costs and expenses.

On appeal, the Sixth Circuit affirmed the district court's denial of the motion to compel arbitration. As a general rule, the right of arbitration may be waived (1) if the party seeking to assert arbitration takes actions that are completely inconsistent with any reliance on an arbitration agreement, or (2) if that party delays its assertion to such an extent that the opposing party incurs actual prejudice. In this case, the Sixth Circuit found that both factors

indicating waiver were present.

Regarding the first factor, the Court found that over the course of more than two years between the time the action was filed and when the defendants moved to compel arbitration, the defendants had consistently and actively litigated the action in court. Specifically, the Court found that the defendants not only responded to actions taken by the plaintiff, but they also filed multiple dispositive and non-dispositive motions of their own, including motions to dismiss, motions for summary judgment, and a motion to change venue. Moreover, the defendants did not attempt to compel arbitration until *after* the district court entered an unfavorable decision.

With respect to the second factor, the Court found that the defendants had delayed asserting their right to arbitrate to such an extent that they had actually prejudiced the plaintiff. Indeed, for more than two years before the defendants sought to compel arbitration, the plaintiff incurred the costs of active litigation in two federal courts by virtue of employing four attorneys, undergoing extensive discovery, arguing four summary judgment motions, and being subjected to a change in venue at the defendants' request. Therefore, the decision of the district court was affirmed.

[1] No. 09-1964 (6th Cir. July 1, 2010).

[2] 50 U.S.C. § 501.

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