

## Otherwise Valid Arbitration Clause

### Waived; Arbitration Properly Denied

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June Newirth and others filed a class action complaint against Aegis Senior Communities in California state court alleging fraudulent activities violating multiple California statutes. Aegis removed the case to federal court and filed a motion to compel arbitration as well as a motion to dismiss. Instead of pursuing those motions, the parties entered a stipulation which, in part, called for Aegis to withdraw its motion to compel arbitration and its motion to dismiss. When an amended complaint was filed, Aegis filed a second motion to dismiss, but did not mention arbitration or again seek to compel arbitration. However, after having participated in discovery and other activities (including mediation) for roughly one year, the district court denied the second motion to dismiss. Only then did Aegis file a renewed motion to compel arbitration. The district court denied that motion finding that Aegis had waived its right to arbitrate, a ruling the Ninth Circuit affirmed.

The Ninth Circuit reiterated the strong public policy in favor of arbitration under the Federal Arbitration Act (FAA). In addition, it noted that waivers of “a contractual right to arbitration [are] not favored” and noted that any party arguing for a waiver of arbitration “bears a heavy burden of proof.”

The Supreme Court has ruled that a waiver under federal law is an “intentional relinquishment or abandonment of a known right.” In the Ninth Circuit, a party seeking to prove a waiver has to demonstrate: “(1) knowledge of an existing right to compel arbitration; (2) intentional acts inconsistent with that existing right; and (3) prejudice to the person opposing arbitration from such inconsistent acts.”

Because Aegis had twice sought to compel arbitration, it was obvious that it knew it had that right. For that reason, the case turned on whether it had engaged in intentional, inconsistent acts and whether Newirth had been prejudiced. Under the Ninth Circuit case *Martin v. Yasuda*, 829 F.3d 1118 (9th Cir. 2016), the court looks at the totality of a party’s actions in determining whether a party had engaged in inconsistent acts. The court noted that a party acts “inconsistently with exercising the right to arbitrate when it (1) makes an intentional decision not to move to compel arbitration and (2) actively litigates the merits of a case for a prolonged period of time in order to take advantage of being in court.” Seeking a decision on the merits on a key issue is “an intentional and strategic decision to take advantage of the judicial forum.”

Even though Aegis had initially and promptly filed a motion to compel arbitration, it very soon thereafter “intentionally withdrew the motion and proceeded to take advantage of the federal forum by filing a motion to dismiss Newirth’s arbitrable claims, with prejudice, for failure to state a claim.” Only after Aegis received an adverse ruling on its motion to dismiss did it refile its motion to compel arbitration, a motion withdrawn a year before.

The Ninth Circuit was not persuaded by Aegis’s multiple arguments contending that it had not intentionally waived its right to arbitrate. Furthermore, the Ninth Circuit found that Newirth was prejudiced by Aegis’s conduct. Although she was not prejudiced by having to participate in discovery and scheduling conferences, the court found that she was “prejudiced ... by the costs incurred in defending against Aegis’s motion to dismiss her complaint on the merits. Aegis attempted to take advantage of the judicial forum to prevail on the merits of Newirth’s arbitrable claims, and did not file a motion to compel arbitration until after receiving an adverse ruling. If the court had granted the motion to compel arbitration, Newirth would have been forced ‘to relitigate a key legal issue [on the merits] on which the district court ha[d] ruled in [her] favor.’” The Ninth Circuit found she had met her heavy burden and affirmed the order denying the renewed motion to compel arbitration.

*Newirth* helps class litigators know when otherwise enforceable arbitration clauses will be waived. *Newirth* represents the law in the Ninth Circuit, and it is persuasive authority all across the country.

Case Citation: *Newirth v. Aegis Senior Communities, LLC*, 931 F.3d 935 (9th Cir. 2019)