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## Asleep at the Wheel:

## Arbitration Delayed is Arbitration Denied

By: **Jed L. Marcus**

A New Jersey employer learned an important lesson the hard way when the Appellate Division held that it waived its right to compel arbitration in accordance with an employment agreement's mandatory arbitration clause because the defense was not raised until three days before a definitive trial date and after twenty months of discovery. Accordingly, the employer waived its right to arbitration as a forum to adjudicate plaintiff's claim as a matter of litigation strategy. *Cole v. Jersey City Medical Center*, A-4914-09 (App. Div. Mar. 29, 2012). *Cole* is only the latest in a line of cases in which a New Jersey employer learned the hard way that an arbitration clause isn't worth the paper it was written on because it failed to demand arbitration until all discovery in the underlying lawsuit was completed and dispositive motions were filed. *Grella v. Prebon Yamane (USA), Inc.*, Docket No. L-79-05, 2007 WL 4302083 (App. Div., Dec. 11, 2007).

We've been a huge proponent of arbitration as a cost-effective way for resolving employment disputes. Courts have never been friendlier to arbitration, but even as New Jersey recognizes an employer's right to arbitrate employment disputes, *see e.g., Martindale v. Sandvik, Inc.*, 173 N.J. 76, 84-85 (2002), the enforceability of arbitration agreements is not limitless. New Jersey courts have held that "active and prolonged litigation of such disputes in the trial court will require a finding of the waiver of the right to compel arbitration." *Wein v. Morris*, 388 N.J. Super. 640, 649-50 (App. Div. 2006). As one New Jersey court put it, "the courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration." *Shevlin v. Prudential Commercial Ins. Co.*, 256 N.J. Super. 691, 700-01 (Law Div. 1991).

The lesson for employers is simple: the right to remove a case from court to arbitration is not limitless; it can be waived if the employer does not seek arbitration in a timely manner. If you've got an arbitration agreement, you can't have it all ways. Either litigate or move the case to arbitration. Sit on your hands, and you've waived your rights. ■

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