

The Right To Arbitrate: Use It Or Lose It

On December 1, 2011, an Ohio Court of Appeals concluded that a party lost its right to arbitrate a dispute when that party first attempted to assert that right more than a year after litigation concerning the dispute began. The Ohio Eighth District Court of Appeals' decision in *Ohio Bell Telephone Co. v. Central Transport, Inc.*, 2011-Ohio-6161 emphasizes that a party to a lawsuit desiring enforcement an arbitration clause should raise its right to arbitrate early, often and clearly because failure to do so may result in a waiver of that right.

In the *Ohio Bell* case, a phone company sued a trucking company and an electric company after a truck owned by the trucking company collided with and damaged the phone company's cables attached to utility poles owned by the electric company. The electric company filed a counterclaim against the phone company seeking indemnification pursuant to a Pole Agreement between the phone company and the electric company. The Pole Agreement contained a mandatory arbitration clause requiring arbitration of disagreements arising under the Agreement.

About seven months after the lawsuit was commenced (and apparently after the trucking company settled its claims with the other parties), the electric company filed an amended counterclaim against the phone company seeking a determination from the trial court that the phone company was trespassing on the electric company's utility poles and also seeking an injunction enjoining the phone company from such trespass.

In September 2009, the phone company filed a reply to the electric company's amended counterclaim. The reply contained several affirmative defenses, but did not state that the dispute between the companies was subject to the mandatory arbitration provision contained in the Pole Agreement.

The companies proceeded with discovery and a dispute arose involving the electric company's efforts to depose a phone company representative. Eventually, on October 26, 2010, the electric company filed a motion to compel this deposition. The telephone company opposed the motion and filed its own motion to stay the litigation pending arbitration as required by the terms of the parties' Pole Agreement. The trial court granted the phone company's motion to stay pending arbitration and the electric company appealed the decision.

The Eighth District Court of Appeals noted "Ohio's strong policy in favor of arbitration" but also observed that the right to arbitrate may nevertheless be waived when the party seeking arbitration "has acted inconsistently with the right to arbitrate."

In this case, the Court of Appeals reversed the trial court's decision to stay the case pending arbitration. In reaching its conclusion, the Court of Appeals explained that the phone company acted inconsistently with its right to arbitrate contained in the Pole Agreement because it "sat on its right for over a year and litigated the case in the [trial court], acquiescing to the jurisdiction of the trial court." During that one-year period, the phone company participated in discovery and motion practice. These facts, said the Court of Appeals, indicated that the phone company waived its right to arbitrate.

The lesson to be learned from the *Ohio Bell* case is simple. If a party finds itself involved in a lawsuit concerning a dispute that is subject to a contractual right of arbitration that the party wishes to exercise, then it must assert that right as early, and as often, as possible in the litigation to avoid any argument that the right to arbitration has been waived.