

## Employer's Delay Results In Waiver Of Arbitration

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In sports, a team could be penalized if there is a delay in game. In law, a company could lose its right to compel arbitration if it delays in exercising its arbitration rights. This is exactly what happened in a recent 8<sup>th</sup> Circuit Court of Appeals decision, [Messina v. North Central Distributing, Inc. d/b/a Yosemite Home Decor](#). In *Messina*, the former vice president, Richard Messina, signed a two-year employment agreement with North Central Distributing, Inc., d/b/a Yosemite Home Decor (Yosemite) as well as a stand-alone arbitration agreement prior to commencement of employment. Messina worked for the company for only six months and was involuntarily terminated in January 2013. On July 1, 2014, Messina sued Yosemite for breach of contract and wrongful termination in state court in Minnesota. Within a matter of days after commencement of the action, Yosemite removed the case to the U.S. District Court, District of Minnesota. The parties then filed a Rule 26(f) report in November 2014 and agreed that they would be ready for trial in August 2015. In November 2014, Yosemite moved to transfer venue to the Eastern District of California, where the company was headquartered, and that motion eventually was denied after being fully briefed and argued. In December 2014, the parties attended a Rule 16 scheduling conference. Despite all of the motions and conferences from July 2014 through January 2015, Yosemite never disclosed an arbitration agreement existed. In mid-February 2015, Yosemite, through counsel, disclosed the arbitration agreement and asked Messina to stipulate to arbitration, which he refused. In March 2015 – more than eight months after commencement of the action – Yosemite moved to compel arbitration. The district court rejected Yosemite's motion and found that the company waived its right to arbitration because it knew of the existing right to arbitrate, acted inconsistently with that right and its actions prejudiced Messina. The 8<sup>th</sup> Circuit Court of Appeals agreed. In siding with the district court, the 8<sup>th</sup> Circuit stated that a party waives its right to arbitrate if it (1) knew of an existing right to arbitrate; (2) acted inconsistently with that right; and (3) prejudiced the other party. Here, the court of appeals determined Yosemite knew of its existing right to arbitrate because the company possessed the arbitration agreement. Next, the 8<sup>th</sup> Circuit found Yosemite acted inconsistently with its right to arbitrate because it "substantially invoke[d] the litigation machinery" by removing the case to federal court, filing an answer, participating in a pretrial hearing, filing a scheduling report with recommended trial and discovery dates and filing a motion to transfer venue. Additionally, it was found that Yosemite failed to "do all it could reasonably have been expected to do" to raise its right at the earliest feasible time. For example, Yosemite never mentioned the arbitration agreement in its answer, which included 24 affirmative defenses, in the joint Rule 26(f) report, or in any of the motions prior to its motion to compel arbitration. Instead, Yosemite sought an August 2015 trial date and subsequently argued that litigation should take place in California because it would create a hardship to litigate in Minnesota. Based on this, the 8<sup>th</sup> Circuit found Yosemite acted in a manner that evidenced a "preference for litigation...." Finally, the court of appeals concurred that Yosemite's actions caused Messina prejudice because he "spent

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considerable time and money obtaining new counsel, partaking in pretrial hearings and responding to the transfer motion.” In reviewing everything that Messina was forced to undertake based on Yosemite’s litigation tactics, the 8<sup>th</sup> Circuit found that compelling arbitration would likely cause Messina to duplicate his efforts and this would result in a prejudice against him.