

## Have I Waived My Right to Arbitration? The Bullet Point: Volume 3, Issue 12

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The Bullet Point is a biweekly update of recent, unique, and impactful cases in Ohio state and federal courts in the area of commercial litigation.

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### Class Action Settlement

*Jane Doe v. Déjà Vu Consulting, Inc.*, 6th Cir. No. 19a0113 (June 3, 2019).

This appeal centered on the district court's decision to affirm a settlement award in a class action. The plaintiff class consisted of a group of exotic dancers who claimed that the defendant violated the Fair Labor Standards Act and state wage and hour laws. Eventually a settlement was reached and the district court approved the settlement over the objections of a handful of class members. Those class members appealed, arguing that the settlement was fundamentally unfair and procedurally improper. The Sixth Circuit Court of Appeals rejected these arguments and affirmed the district court's decision.

**The Bullet Point:** In *International Union, UAW, et al. v. General Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007) (UAW), the Sixth Circuit developed a seven part test to determine whether a class action settlement is "fair, reasonable, and adequate." Those factors include: (1) the "risk of fraud or collusion," (2) the "complexity, expense and likely duration of the litigation," (3) the "amount of discovery engaged in by the parties," (4) the "likelihood of success on the merits," (5) the "opinions of class counsel and class representatives," (6) the "reaction of absent class members," and (7) the "public interest." Of the UAW factors, "[t]he most important of the factors to be considered in reviewing a settlement is the probability of success on the merits." This ordinarily requires a balancing act between competing interests; whether the claims that unnamed class members are giving up are worth the benefits they may receive in the settlement.

### Waiving the Right to Compel Arbitration

*Aljaberi v. Neurocare Center, Inc.*, 5th Dist. Stark No. 2018CA00154, 2019-Ohio-2181.

This appeal focused on the trial court's decision to deny a motion to compel arbitration. The parties were involved in an employment relationship and plaintiff ultimately sued, raising various claims contesting the terms of that agreement. The case then proceeded through discovery, including written discovery and various depositions, along with numerous pre-trials to handle discovery issues. These disputes also resulted in at least one appeal. After that appeal was resolved, motion practice occurred, ultimately resulting in the dismissal of all but one claim. The defendant then moved to compel arbitration of that claim which was denied by the trial court. Defendant appealed and on appeal the Fifth Appellate District affirmed, finding that defendant had waived its right to arbitrate the claims.

**The Bullet Point:** While Ohio law favors arbitration, the right to arbitrate a claim can be waived. In determining whether grounds for waiver exists, the court may consider such factors as: (1) whether the party seeking arbitration invoked the court's jurisdiction by filing a complaint or claim without first requesting a stay; (2) the delay, if any, by the party seeking arbitration to request a stay; (3) the extent to which the party seeking arbitration has participated in the litigation, including a determination of the status of discovery, dispositive motions, and the trial date; and (4) whether prior inconsistent acts by the party seeking arbitration would prejudice the non-moving party. *Id.* "Waiver attaches where there is active participation in a lawsuit evincing an acquiescence to proceeding in a judicial forum."

### Validity of a Real Estate Agreement

*Kertes Ents., L.L.C. v. Sanders*, 8th Dist. Cuyahoga No. 107770, 2019-Ohio-2237.

This was an appeal of the trial court's decision to grant summary judgment in favor of the defendants on a declaratory judgment claim declaring a contract for purchase of real estate void. The parties had entered into a purchase agreement for purchase of real property. The agreement broke down and a lawsuit was filed raising claims for breach of contract and declaratory judgment. The defendant filed various counterclaims, including for declaratory judgment seeking a declaration that the contract was void. Ultimately, the court granted summary judgment on the defendant's claim that the contract was void and plaintiff appealed.

On appeal, the Eighth District Court of Appeals affirmed in part and reversed in part. Specifically, it found that the contract was not void simply because the property was not owned by the defendant at the time the contract was entered into.

**The Bullet Point:** "An agreement for the sale of real estate is binding even though the offeror may not own the property at the execution of the agreement. The key element is whether at the time for consummation of the contract the seller is in a position to carry out the contract." In other words, a contract will not be considered void simply because the offeror does not actually have title to the property at the time of sale, assuming he or she can carry out the contract at the time of consummation.

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