

HOW MUST LITIGANTS ASSERT ARBITRATION RIGHTS?

Simply raising arbitration in a pleading may not avoid waiving contractual arbitration rights.



By [Shaun Blake](#)

As last month's [decision](#) by the Central District of California in the Toyota Hybrid Brake Class Action case demonstrates, simply raising a contractual right to arbitrate as an affirmative defense may not be enough to protect a party's contractual right to compel arbitration.

In its Answer, Toyota raised as an affirmative defense an arbitration clause contained in certain dealer agreements executed by the Class Plaintiffs (purchasers of hybrid vehicles with allegedly defective anti-lock braking systems). Thereafter, in support of its subsequent Motion to Compel Arbitration, Toyota contended that it had preserved the right to compel arbitration as it awaited the United States Supreme Court's decision in [AT&T Mobility LLC v. Concepcion](#), 131 S. Ct. 1740 (2011). Toyota argued that, prior to

Concepcion, any motion to compel arbitration would have been futile because class action waivers were generally unenforceable under California law.

The court disregarded Toyota's argument, noting that *Concepcion* only speaks to the enforceability of class action arbitration waivers in adhesion contracts involving disputes over small sums of money. The Court observed that Toyota had "vigorously" litigated the class action for two years by conducting discovery, filing motions, and seeking a protective order. Finding prejudice to the Class Plaintiffs in the form of considerable resources spent pursuing a litigation strategy in federal court, the Court held that Toyota had waived its right to compel arbitration.

In South Carolina, "There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." *Hyload, Inc. v. Pre-Engineered Prods., Inc.*, 417 S.E.2d 622, 624 (S.C. Ct. App. 1992). Significant litigation conduct can waive a contractual right to arbitrate. *See, e.g. Liberty Builders, Inc. v. Horton*, 521 S.E.2d 749, 753 (S.C. Ct. App. 1999). Therefore, parties and their counsel need to be vigilant regarding these rights and move to compel arbitration at the outset of their cases - or risk the court construing their litigation conduct as waiver.

This article initially appeared on the [SC Business Litigation Blog](#).