

# Can You Enforce an Arbitration Clause on the Other Side Just Before Trial?

by Gary S. Young on May 10, 2013

The Supreme Court of New Jersey recently considered how late is “too late” to invoke an arbitration clause in a contract. The court accepted the case after lower courts reached opposing opinions of the issue.

In the recently decided *Cole v. Jersey City Medical Center*, the defendant waited until three days before trial to invoke its right to proceed to arbitration. The arbitration clause at issue was included in an employment agreement with the plaintiff, Karen Cole. The agreement provided, in pertinent part, that, "any claim, controversy or dispute between you and [the employer] . . . arising out of or relating to your employment, the cessation of your employment, or any matter relating to the foregoing . . . shall be submitted to and settled by arbitration . . . ."

Cole was hired by Liberty Anesthesia Associates, LLC (Liberty) to work as a Certified Registered Nurse Anesthetist at the Jersey City Medical Center (Medical Center). After refusing to submit to a drug test, her employment was terminated. Cole filed suit against the Medical Center alleging retaliation in violation of the Conscientious Employee Protection Act, among other claims. She later added Liberty as a defendant, and asserted many of the same claims.

After discovery was completed, Liberty and the Medical Center filed motions for summary judgment. Cole settled with the Medical Center, and the court ultimately dismissed several claims against Liberty. It then set a trial date of March 22, 2010 for the remaining claims.

Three days before trial, Liberty filed a motion to compel arbitration. Cole objected on the basis that Liberty had failed to raise the clause as a required affirmative defense and had willingly participated in the litigation for several years. Liberty explained that it did not raise the arbitration issue earlier because an arbitrator might have reached a different result than a jury if the claims against Liberty proceeded to trial and the nearly identical claims against the Medical Center proceeded in court.

The trial court granted Liberty's motion and dismissed the case but the Appellate Division reversed. The state Supreme Court will now take on the issue of whether Liberty waived its right to arbitration. We will be closely watching this case and will provide a discussion of the decision as soon as it is published.

*If you have any questions about this case or would like to discuss the legal issues involved, please contact me or the Scarinci Hollenbeck attorney with whom you work.*

