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BLOG

Should the Ninth Circuit’s Waiver Test Be More Closely Scrutinized?

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Key Takeaway

Hill v. Xerox Business Services, LLC shows how the Ninth Circuit’s waiver test, revised after a 2022 SCOTUS case, could force defendants in potentially arbitrable cases to instead become further involved in class action litigation.

In February 2023, the Ninth Circuit Court of Appeals held in a 2–1 decision that Xerox waived “its right to compel arbitration … against unnamed”[1] class members in *Hill v. Xerox Business Services, LLC*. In reaching its holding, the *Hill* majority stated that after the Supreme Court’s ruling in *Morgan v. Sundance*, the Ninth Circuit’s “test for waiver of the right to compel arbitration consists of two elements: (1) knowledge of an existing right to compel arbitration; and (2) intentional acts inconsistent with that existing right.”[2] Applying this test, the majority determined that Xerox’s conduct in litigating with Plaintiff Hill, who had not signed the arbitration agreement—including Xerox engaging in discovery regarding unnamed class members, and moving for summary judgment—waived Xerox’s ability to compel arbitration, as certain unnamed class members who had executed arbitration agreements. Notably, the issue of whether this set of unnamed class members could be part of the class, due to the arbitration agreements, was first raised in the context of class notice.

In his dissent, Ninth Circuit Judge Lawrence VanDyke argued emphatically that Xerox’s actions did not waive its right to compel arbitration, since Xerox’s acts were incorrectly considered intentional acts inconsistent with the right to arbitrate.[3] Judge VanDyke pointed to the fact that “XBS limited its precertification litigation to issues related to Ms. Hill and her attempt to certify a class. Time and again … XBS restricted its … discovery … to issues related to Ms. Hill’s personal claims and her proposed class’s alleged inadequacies under Rule 23.”[4] Judge VanDyke also disagreed with the majority’s contention that latent acts could meet the second part of the waiver test.[5]

Also, the dissent admonished the majority opinion for inconsistency in defining “active litigation.” The dissent alluded to *Van Ness* and *Martin*, cases where more extensive “active litigation” occurred than that which transpired in *Hill* before the defendant was viewed as waiving the right to arbitrate.[6]

The dissent also argued that the majority opinion erred because it was overly speculative in how it linked XBS's precertification litigation with actions that could affect the future claims of unnamed class members.[7] The dissent foresaw that based on the majority's reasoning, "a defendant can target a hypothetical future class member—at least for waiver purposes—even when[,] as a legal matter[,] its litigation activity is directed only at a named plaintiff[,] with whom it has no arbitration agreement."[8]

Overall, the result in *Hill* illustrates that defendants should immediately examine whether any putative class members may be subject to an arbitration agreement, even if the named plaintiff is not. Otherwise, *Hill* demonstrates that a different standard applies for determining a defendant's waiver of the right to arbitrate within the Ninth Circuit, as to unnamed class members, which could become a headache for class action defendants searching for ways to minimize the costs of class action litigation. However, Judge VanDyke's dissent indicates that support for this revised waiver standard is not unanimous within the Ninth Circuit.

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[1] *Hill v. Xerox Bus. Servs., LLC*, 59 F.4th 457, 489 (9th Cir. 2023).

[2] *Id*. at 468.

[3] *Id*. at 492.

[4] *Id*. at 487.

[5] *Id*. at 472.

[6] *Id*. at 488–89.

[7] *Id*. at 488.

[8] *Id*.

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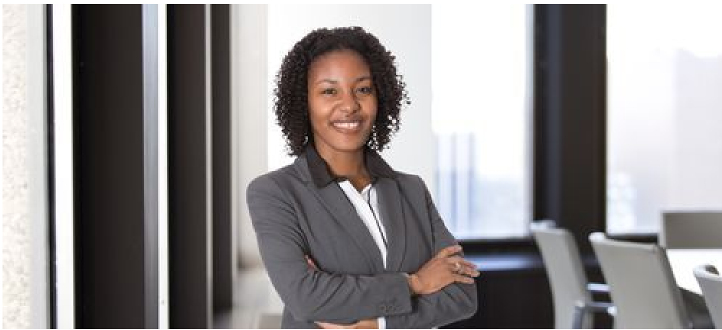

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