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Owner's Participation in Pretrial Litigation Does Not Amount to a Waiver of Arbitration

Kilpatrick Townsend Construction Law Blog

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Proving waiver of a party's contractual right to arbitrate has often been a laborious obligation of the party bearing such burden. Because the law strongly favors arbitration, the burden to prove the defense "is a high one." *Perry Homes v. Cull*, 258 S.W.3d 580, 590 (Tex. 2008), cert. denied, 555 U.S. 1103, 129 S.Ct. 952, 173 L.Ed.2d 116 (2009). So high, in fact, that appellate courts seldom find an implied waiver through litigation conduct. *See, e.g., RSL Funding, LLC v. Pippins*, 499 S.W.3d 423, 430–31 (Tex. 2016); *Richmont Holdings, Inc. v. Superior Recharge Sys., LLC*, 455 S.W.3d 573, 575 & n.1 (Tex. 2014); *see also Perry Homes*, 258 S.W.3d at 590 (in appeal finding waiver, stating court had "never" before found implied waiver through litigation conduct).

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