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***Security Alarm Financing Enterprises, L.P., v. Amy Fuller, et al., No. 1 CA-CV 16-0255 (2017)***

In a matter of first impression in Arizona, Division One of the Arizona Court of Appeals determined that a movant does **not** waive its right to compel arbitration under the Federal Arbitration Act (“FAA”) by failing to raise arbitration as an affirmative defense in its answer.

Appellants asked the court to enforce arbitration agreements they had signed at the beginning of employment with Security Alarm Financing Enterprises (“Security”). Although Appellants did not raise the arbitration agreements as an affirmative defense in their answer, they had requested arbitration within 29 days of filing their answer. Before trial, Appellants filed a motion to dismiss and compel arbitration. The trial court denied the motion holding Appellants had waived their right to compel arbitration since they had not raised it as an affirmative defense in their answer.

The Division One of the Court of Appeals reversed, holding that under the FAA, a trial court shall, “stay the action . . . until arbitration has been had in accordance with the terms of the agreement providing the applicant for the stay is not in default in proceeding with such arbitration.” The Court of Appeals also found that Appellants had not knowingly waived their right to arbitration by failing to raise it in their answer. Specifically, the Court examined the three elements required for waiver under the FAA, and determined appellants had not waived under these circumstances. The elements are: 1) knowledge of an existing right to compel arbitration; 2) acts inconsistent with the right; and 3) prejudice to the party opposing arbitration.

Although the Appellants did not raise arbitration as a defense, they did make an arbitration demand within a month of filing the answer. Security’s knowledge of the right to arbitration, combined with the short time between the answer and the demand, led the Court to find Security would not be prejudiced by any delay in the arbitration. Based on these reasons, the Court of Appeals reversed and remanded the case back to the trial court holding Appellants did not waive their right to arbitration under the FAA.