



## Alerts

### Plaintiff Who Could Not Afford to Pay for Arbitration Was Allowed to Pursue Her Malpractice Action in Court

July 27, 2016

*Lawyers for the Profession®*

*Tillman adv. Rheingold Firm*, No. 13-56624, 2016 BL 190432 (9th Cir. June 15, 2016)

#### Brief Summary

A former client who had agreed to arbitrate disputes with her lawyers, but ultimately could not afford to pay the fees of arbitration, was allowed to proceed with her action in federal court after the arbitration was terminated for nonpayment. The Federal Arbitration Act (FAA) requires federal courts to stay an action subject to a valid arbitration agreement until the arbitration process has been completed. When the arbitration is terminated without an award or judgment based on one party's inability to pay the arbitration fees, the agreement has been satisfied and the stay should be lifted to allow the action to proceed in court.

It was important to the decision that the litigant was determined to be unable to pay the fees, rather than unwilling to do so. It was also important that the defaulting party was not the party seeking a stay of the federal court proceedings.

#### Complete Summary

Following her husband's death in a trucking accident, Renee Tillman (Tillman) retained the Rheingold law firm (Rheingold) and local counsel to file a wrongful death lawsuit on her behalf. Tillman won the lawsuit and was awarded \$8 million, later reduced on appeal. The decedent's son from a prior marriage then sued Tillman and the attorneys for failing to include him in the wrongful death action.

Tillman cross-complained against her attorneys for malpractice for failing to include the son in the wrongful death action and for failing to advise her of the rights of the decedent's other heirs. Rheingold moved to stay the action and compel arbitration in accordance with the firm's retainer agreement. The case was stayed and ordered to arbitration.

Arbitration proceeded with the American Arbitration Association (AAA) for a period of time. During arbitration, Tillman objected to several rulings as unnecessarily increasing the cost of the proceedings, particularly the "case-

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within-a-case" form of adjudication. Tillman made efforts to pay her share of the arbitration expense. She borrowed money to pay AAA fees and her counsel had agreed to pay certain costs, but ultimately she ran out of funds and could not pay an \$18,562 deposit required by AAA to proceed. The law firm declined to voluntarily cover the deposit. Tillman sought interim relief under AAA rules, requesting that the firm be ordered to pay the fees going forward. The arbitrator refused to decide the motion for interim relief until the deposits had been paid, and when the deadline for payment of the deposits had passed, terminated the arbitration for nonpayment.

Rheingold moved the district court to lift the stay and dismiss Tillman's complaint under Fed. R. Civ. P. 41(b), asserting that Tillman's failure to pay the AAA deposits violated the court's order compelling arbitration. Tillman argued that she fully participated in the arbitration and had done everything within her power to proceed. Tillman presented evidence regarding how the money from the wrongful death lawsuit had been exhausted. After considering this evidence the district court found that Tillman was indeed unable to pay for her share of the arbitration and denied the Rule 41(b) motion to dismiss.

However, the district court did dismiss Tillman's complaint based on its determination that the FAA deprived the district court of authority to hear claims that were subject to the arbitration agreement, and that because the AAA's rules required Tillman and the firm to equally bear the costs of arbitration and allowed the arbitrator to suspend the proceedings, dismissal by the court was required.

The issue before the court of appeal was how a federal court is to proceed where one party runs out of funds to pay its share of the arbitration and the arbitrator terminates the proceedings without entering an award or otherwise resolving the case.

The FAA requires courts to stay court proceedings on issues subject to arbitration "until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3. The arbitration agreement between Tillman and the firm incorporated the AAA rules. Those rules required the parties to equally bear the costs of arbitration absent another agreement, and allowed the arbitrator to terminate proceedings for nonpayment, and to do so without issuance of an award.

The district court and the appellate court primarily relied on *Lifescan, Inc. v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004), in which the parties submitted their dispute to AAA arbitration. Shortly before final arbitration proceedings, Premier advised that it was not able to pay its share of the arbitrators' costs. When Lifescan declined to pay Premier's share, the AAA suspended the proceedings. Lifescan then petitioned the district court to compel arbitration. On appeal, the court determined that compelling arbitration would be inappropriate, concluding that the arbitration had proceeded pursuant to the parties' agreement.

Tillman's arbitration had also "been had" in accordance with the arbitration agreement. The agreement incorporated the AAA rules which provided for setting of fees, payment by the parties, suspension for nonpayment and termination without issuance of an award. As these rules were followed, the arbitration process had been completed. Thus, the court concluded, the district court properly lifted the stay as there was no longer a basis for it.

The district court did not abuse its discretion in refusing to dismiss under Rule 41(b). It reviewed the evidence regarding Tillman's inability to pay and concluded that she lacked the resources to pay the arbitration deposit. As Tillman was willing but unable to pay for arbitration, any "failure to comply" with the court's order to arbitrate was not culpable and did not merit the harsh penalty of dismissal under Rule 41(b).

However, the appellate court disagreed with the district court's conclusion that it lacked jurisdiction and was required to dismiss the action based on the holding of *Lifescan*. The FAA requires a district court to stay court proceedings on issues subject to arbitration until the arbitration has been had, to compel arbitration if a party fails, neglects or refuses to arbitrate, and to enforce a valid arbitration award. Neither the statute nor case law requires dismissal when an arbitration is terminated without award for a party's inability to pay.

The court noted that its ruling allowing Tillman's case against Rheingold to proceed despite the existence of an arbitration agreement between the two does not run afoul of the "liberal federal policy favoring arbitration" reflected in the FAA. The court stated, "Our decision that Tillman's case may proceed does not mean that parties may refuse to arbitrate by choosing not to pay for arbitration." When a party refuses to pay for arbitration despite having the ability to do so, the



district court has the ability to compel arbitration and dismiss the action for failure to comply with its order to arbitrate. Here, the district court specifically found that Tillman was unable to pay for her share of arbitration. As the arbitration was terminated without reaching the merits, the only way Tillman's case could be adjudicated was to proceed in district court.

The court also noted that the outcome would likely be different if Tillman were the one seeking a stay of court proceedings, as that would interfere with the firm's rights to have the matter heard.

### **Significance of Opinion**

The court's opinion clarifies that the FAA does not require dismissal of a claim previously submitted to arbitration but terminated before the merits were reached or any award issued. If the parties cooperate with the arbitration rules they agreed to and the arbitration has concluded without an award, the case may continue to be adjudicated in court.

For more information, please contact [Linda L. Streeter](#) or your regular [Hinshaw attorney](#).

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