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Preface

Each volume of Thomson Reuters' Causes of Action Second (COA 2d) contains articles discussing causes of action of current interest to practicing lawyers. Each article leads the practitioner through the steps necessary to determine whether particular facts give rise to a cause of action. The article analyzes the elements of the cause of action and then explains how these elements can be proved. COA 2d also guides the attorney in getting the case into court, and points out how to pursue the case through trial and to a successful conclusion. Each article is organized so that a practitioner can quickly turn to an appropriate section for information on a particular question of substantive or procedural law.

COA Action Guide. The COA Action Guide begins each COA 2d article. It presents the critical points the attorney must be familiar with in order to successfully bring a particular action in state or federal court. The COA Action Guide is a concise overview of the cause of action with cross-references to sections in the article where specific points are discussed in detail.

Article Index. Preceding the text of each COA 2d article is an alphabetical, descriptive-word Index. The Index is based on key words or phrases appearing in the article. Together with the Table of Contents, the Index makes for easy access to points discussed in the article.

Research References. Each COA 2d article contains a list of research references referring the attorney to valuable sources for additional research. Leading law reviews and major works by leading authorities are included.

Table of Cases. A Table of Cases, arranged by jurisdiction, is included in each COA 2d article.

Substantive Law Overview. Each COA 2d article includes a Substantive Law Overview describing the elements of the prima facie case, defenses to the action, persons who may bring the action, and persons against whom the action may be brought. This overview presents the relevant substantive law from a practical point of view. It provides the attorney with guidance as to what is likely to be successful under a given set of circumstances.

Practice and Procedure. A Practice and Procedure division is included in each COA 2d article. It covers such procedural matters as jurisdiction, venue, limitations, pleadings, remedies, and recovery. All procedural points discussed are focused on the distinct requirements of the cause of action that is the subject of the article.

Practice Tips. Appearing frequently throughout each COA 2d article are special Practice Tips. They provide the attorney with

specific practical guidance or advice that is directly related to the particular cause of action discussed in the article. Practice Tips are distinctively set off from the text so they are easily recognizable.

Authority Features. In some articles dealing with topics with extensive case law, an Authority feature is included in some sections as appropriate as a device for collecting numerous cases supporting legal propositions discussed in the article. Cases are arranged by jurisdiction to make it easy to find cases of interest. Authority features are set off from the text to make them easily identifiable.

Practice Checklists. As appropriate, each COA 2d article includes Practice Checklists intended to assist the attorney in gathering and evaluating information in the preparation of the action. Information Checklists for the plaintiff and the defendant identify information to obtain from the client to begin to prepare the case. Discovery Checklists for the plaintiff and the defendant include pertinent deposition questions and interrogatories, as well as requests for admissions and production of documents.

Primary Law. When a cause of action has its basis in a federal statute or a uniform state law, the text of the statute is reprinted in the Appendix to the COA 2d article. When an action is based on a type of statute that may vary from state to state, statutory references are provided.

Sample Case. The Appendix to each COA 2d article includes the text of a recent judicial opinion, usually from an appellate court, that illustrates application of basic principles of the cause of action that is the subject of the article to an interesting set of facts.

Sample Pleadings. Each COA 2d article includes a sample complaint that can be used or adapted for use by an attorney bringing the type of action that is the subject of the article.

Summary of Contents

CAUSES OF ACTION INVOLVING ARBITRABLE DISPUTES*

*James L. Buchwalter, J.D.***

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ARTICLE OUTLINE

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*This article supersedes Causes of Action Involving Arbitrable Disputes, 32 Causes of Action 2d 385.

**Mr. Buchwalter, the author of the two-volume treatise Bankruptcy Code Manual 2025 ed. (Thomson Reuters), contributes chapters and articles on various topics to several Thomson Reuters legal publications, including, for example, Corpus Juris Secundum, several state-law encyclopedias, American Law Reports, Causes of Action 2d, American Jurisprudence Proof of Facts, and American Jurisprudence Trials. Mr. Buchwalter served as a judicial law clerk to Bankruptcy Judge John J. Hargrove, Southern District of California. As a law student, he interned as a judicial law clerk to federal district judge Charles S. Haight, Jr., Southern District of New York, and earlier interned with the staff attorney in the Office of Pro Se Litigation in that district, where he assisted in reviewing prisoners' civil rights suits. Mr. Buchwalter holds a J.D. from Hofstra University School of Law, where he served as a staff member of the "International Property Investment Journal." He received a B.S. in Mathematics from Stony Brook University and an M.A. in Philosophy from the City University of New York Graduate Center, with an emphasis in the philosophy of law. Mr. Buchwalter taught courses in business law and in philosophy for many years as an adjunct faculty member at New York Institute of Technology. He is admitted to practice law in New York State.

COA ACTION GUIDE

PRIMA FACIE CASE

- The three fundamental elements that must be considered when determining whether a dispute is required to proceed to arbitration are whether:
  (1) a valid written agreement to arbitrate exists [§ 4];
  (2) an arbitrable issue exists [§§ 4, 5]; and
  (3) the right to arbitration was not waived [§ 4].

DEFENSES

- A defense to an allegation that a dispute is required to proceed to arbitration may be established by:
  (1) rebutting the elements of the prima facie case [§§ 4, 5]; or
  (2) demonstrating that the proponent of arbitration waived its right to arbitrate, either completely or with regard to a particular issue in dispute [§§ 6 to 22].
- The opponent of arbitration may also be required to demonstrate prejudice [§§ 23, 24].

PARTIES

- The adverse parties contesting whether a dispute is required to proceed to arbitration are the proponent of arbitration and the party opposing arbitration [§ 25].

PRACTICE AND PROCEDURE

- A party contending that a dispute is required to proceed to

Construction Dispute Resolution Arbitration and Beyond, 100 Am. Jur. Trials 45
Causes of Action Involving Arbitrable Disputes, 32 Causes of Action 2d 385

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Agostini, Canna, Lincoln, Arbitration Waiver in the Wake of Morgan v. Sundance, 43 Franchise L.J. 205 (2024)

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I. INTRODUCTION

§ 1 Scope

This article presents a plaintiff's practice guide for navigating disputes involving questions of arbitrability. It supersedes Causes of Action Involving Arbitrable Disputes, 32 Causes of Action 2d 385. The article explores how arbitrable matters can migrate from the arbitrator to the judge, and, sometimes, back to the arbitrator because of the explicit or implicit waiver of arbitration by a party to the arbitration agreement. The article does not address waiving substantive issues in arbitration by the failure to raise such issues; nor does it deal with waiver of claims on appeal by failure to raise them, or not raising them in a timely fashion in the tribunal below, or by failure to object in the tribunal below.

This article first addresses the prima facie for enforcing arbitration, including the question of which claims are subject to arbitration (§§ 4, 5), and then, under the subdivision on defenses, the issue of waiver is discussed in detail, including the effect of statutory and other express waivers (§ 6), negotiating a settlement of the arbitration dispute (§ 7), and acting inconsistently with arbitration (§ 8). In particular, the article addresses the consequence of resorting to administrative or other non-arbitral proceedings (§ 9), including

bankruptcy remedies (§ 10), failing to demand arbitration (§ 11), and making an untimely demand for arbitration (§ 12), such as, for example, waiting until the eve of trial (§ 13).

Arbitration is commonly waived by substantially participating in litigation (§ 14), with courts asking whether, and to what extent, the litigant has invoked the "machinery" of litigation (§ 15) and whether the arbitration proponent showed a preference for litigation over arbitration (§ 16). Other actions that may affect a finding of waiver included filing papers that do not address the merits of the dispute (§ 17), removing the case from state to federal court (§ 18), voluntarily dismissing the suit (§ 19), engaging in pretrial discovery (§ 20), seeking summary judgment (§ 21), and failing to promptly appeal a denial of arbitration (§ 22). The elimination of the prejudice requirement to find a waiver in cases governed by the Federal Arbitration Act (FAA) is discussed, as is the role of prejudice in cases governed by state law (§§ 23, 24).

Matters of parties (§ 25) and procedure (§ 26) are addressed next, with specific focus on statutory bars to arbitration (§ 27), the petition to compel arbitration (§ 28), submitting issue of arbitrability to the arbitrator (§ 29), the petition to stay arbitration (§ 30), arbitrating under protest (§ 31), the implications of arbitration for jury trial (§ 32), and appellate review in the context of arbitration disputes (§ 33). Proof (§ 34), including the burden of proof (§ 35), on arbitrability and waiver are addressed, as well as the remedies of compensatory and punitive damages (§§ 36, 37), and the authority of an arbitrator to issue sanctions (§ 38).

A practice checklist is provided that helps identify whether substantial litigation has occurred that may demonstrate a waiver of arbitration (§ 39). Finally, the article includes an appendix of sample or illustrative documents, including a sample federal appellate opinion on waiver (§ 40), a sample form protesting arbitration (§ 41), a sample petition to stay arbitration due to waiver (§ 42), a sample defendants' motion to compel individual arbitration and dismiss the suit with prejudice, as well as a supporting brief (§ 43), and a sample opposition to a motion to compel arbitration (§ 44).

◆ **Note:** Some opinions discussed in this article may be restricted by court rule as to publication and citation in briefs; readers are cautioned to check each case for restrictions. A number of jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments directly bearing upon this subject. These provisions are discussed herein only to the extent and in the form that they are reflected in the court opinions that fall within the scope of this article. The reader is consequently advised to consult the appropriate statutory or regulatory compilations to ascertain the current status of all statutes discussed.

§ 2 Background

Like any other contract right, arbitration can be waived if the

parties agree instead to resolve a dispute in court. Dallas Excavation Systems, Inc. v. Orellana, 697 S.W.3d 702 (Tex. App. Dallas 2024), rule 53.7(f) motion granted, (Oct. 8, 2024). Arbitration is too often thought of as a black or white choice: either a matter is arbitrable (and, thus, fully heard by an arbitrator) or it is a cause of action (to be heard by a judge in court). Sometimes matters that ultimately are arbitrable can be tried in court before a judge or jury. For instance, a legitimate dispute over whether or not a contract to arbitrate exists in a case in which the arbitrator's authority is narrowly defined can be tried to bench or jury. 9 U.S.C.A. § 4 (addressing failure to arbitrate under an agreement; petitions to United States courts having jurisdiction over an order to compel arbitration; notice and service; and the hearing and determination). Beyond the issue of a dispute over the formation of a contract to arbitrate, other arbitrable matters in contract-based disputes may end up being tried in court before a judge, despite an agreement to arbitrate the matter. Indeed, any contractual right—like most statutory and constitutional rights—can be waived, including the right to arbitrate. American Locomotive Co. v. Gyro Process Co., 185 F.2d 316, 19 Lab. Cas. (CCH) ¶ 66056 (6th Cir. 1950); Bielski v. Wolverine Ins. Co., 379 Mich. 280, 150 N.W.2d 788 (1967).

Arbitration is a matter of contract, and, absent an agreement between the parties to arbitrate an issue, the parties cannot be compelled to arbitrate that issue. When addressing the specific issue of whether there is a valid agreement to arbitrate, courts generally should apply ordinary state-law principles that govern the formation of contracts, but in doing so, must give due regard to the federal policy favoring arbitration. PennEnergy Resources, LLC v. MDS Energy Development, LLC, 2024 PA Super 219, 325 A.3d 756 (2024), appeal granted in part, 341 A.3d 55 (Pa. 2025).

An alternate path to dispute resolution presents itself when an existing disputes lends itself to arbitration. In such cases, the parties may contract for arbitration by entering into a submission agreement, which might read: "We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules the following controversy: (describe briefly). We further agree that the above controversy be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of any court having jurisdiction may be entered on the award."

§ 3 Related and alternative actions

Related actions and alternative actions are grounded in the same

facts that give rise to a dispute resolution method—whether it may be arbitration or litigation. There may be a related action cause of action, however, if an arbitrable issue implicates a cross-claim against a third party. When there is no arbitration agreement between a third party and the two contestants in arbitration, then although all parties may agree to join the third party in the arbitration, the third party must be sued in court if any single party objects to a consolidated arbitration.

An alternative action may lie even if one issue, among others in a controversy, may be arbitrable, as when, for example, if the parties have a narrow arbitration clause restricting arbitration to one or another particular issue within a larger controversy. International Broth. of Elec. Workers, Local No. 4, AFL-CIO v. KTVI-TV, Inc., 985 F.2d 415, 142 L.R.R.M. (BNA) 2385, 60 Empl. Prac. Dec. (CCH) ¶ 42000, 124 Lab. Cas. (CCH) ¶ 10527 (8th Cir. 1993). For example, in a property insurance coverage dispute, the amount of damages may be arbitrable while liability disputes are left to the court. Or in a building contract controversy, breach of contract issues may be arbitrable even though personal injury claims are left to a judge or jury.

II. SUBSTANTIVE LAW OVERVIEW

A. PRIMA FACIE CASE

§ 4 Arbitration, generally

Generally, the three fundamental elements that must be considered when determining whether a dispute is required to proceed to arbitration are whether (1) a valid written agreement to arbitrate exists; (2) an arbitrable issue exists; and (3) the right to arbitration was not waived. Jackson v. Shakespeare Foundation, Inc., 108 So. 3d 587 (Fla. 2013). Once it has been determined that an agreement to arbitrate exists and that the dispute falls within the arbitration provision, the trial court must order the parties to proceed with arbitration; in such cases, the court is not free to examine the merits of the controversy. PennEnergy Resources, LLC v. MDS Energy Development, LLC, 2024 PA Super 219, 325 A.3d 756 (2024), appeal granted in part, 341 A.3d 55 (Pa. 2025).

When matters are automatically subject to arbitration, they become arbitrable by reason of a past arbitral contract. Typical of these is a commercial contract that, when drafted, contains a provision often referred to as a "standard arbitration clause" which might read: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association (AAA) under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having

jurisdiction thereof." Given such language, a party who desires to arbitrate may demand arbitration. Under the above language, that demand occurs by filing an arbitration demand with the AAA. However, that same petitioner might wish to repudiate the arbitral contract, which is readily accomplished by filing a cause of action in court over matters that would otherwise be arbitrable under the above contract language. Alternately, if a defendant is sued and wishes to repudiate the arbitral agreement, that is done simply by refusing to name arbitration as an affirmative defense and by then moving full steam ahead in court by engaging the litigation machinery.

◆ **Observation:** In the usual course, once parties agree to submit a present dispute to arbitration, there is generally no waiver of the right to arbitrate; this is because a dispute is at hand and the parties have reached a consensus for an alternate dispute resolution method to conclude the matter. Conversely, a party to an arbitral agreement may have "buyer's remorse" when, after having agreed to arbitration in the past, tactics suggest that litigation is a preferred path.

§ 5 Which claims are subject to arbitration

The purportedly arbitrable dispute must be covered by the parties' arbitration agreement. For example, in a case from the Ninth Circuit, users of an online tax-filing service that allegedly deployed a third-party company's tracking tools on their websites were not equitably estopped under California law from suing the company in federal court, to bring federal and state claims alleging that the tracking tools caused their financial data to be sent to the company without their consent, even if the users entered into a valid and enforceable arbitration agreement with the service. The court explained that the users' claims against the company were statutory, did not rely on the terms of their purported agreement with the service, and were not intimately founded in or intertwined with that agreement. Furthermore, the users did not allege substantially interdependent and concerted misconduct by the company and service founded in or intimately connected with obligations derived from the purported agreement. Smith v. Google, LLC, 722 F. Supp. 3d 990 (N.D. Cal. 2024) (applying California law).

Some arbitration agreements are worded broadly. In a Fifth Circuit case, an arbitration clause in a settlement agreement between a manufacturer of oil and gas pipes and its former president, who had started a competing company, which resolved claims concerning misappropriation of trade secrets, was broad, giving rise to a presumption of arbitrability, as the provision indicated that it covered "any disputes arising from this agreement." Polyflow, L.L.C. v. Specialty RTP, L.L.C., 993 F.3d 295 (5th Cir. 2021). A party that has agreed to arbitrate may not pick and choose to arbitrate only

those issues favorable to them. Such, if plaintiffs have agreed to arbitrate claims arising out of a contract dispute, they may not pursue a lawsuit to vindicate contractual provisions beneficial to them yet avoid an agreement to arbitrate—either by couching their claims as actions unrelated to the contract or by suing a nonsignatory. Ford Motor Warranty Cases, 17 Cal. 5th 1122, 333 Cal. Rptr. 3d 897, 570 P.3d 857 (Cal. 2025).

An arbitration agreement need not mandate the arbitration of all claims between the parties. However, if an agreement singles out certain claims for arbitration, there must be mutuality. Ramirez v. Charter Communications, Inc., 16 Cal. 5th 478, 322 Cal. Rptr. 3d 825, 551 P.3d 520 (Cal. 2024). Thus, an arbitration agreement cannot require one contracting party, but not the other, to arbitrate all claims arising out of the same transaction or occurrence or series of transactions or occurrences; instead, a modicum of bilaterality is required. In particular, given the disadvantages that may exist for plaintiffs arbitrating disputes, it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness based on business realities; if the arbitration system established by the employer is indeed fair, then the employer as well as the employee should be willing to submit claims to arbitration. Ramirez v. Charter Communications, Inc., 16 Cal. 5th 478, 322 Cal. Rptr. 3d 825, 551 P.3d 520 (Cal. 2024).

◆ **Illustration:** In a California case, a lack of mutuality in covered- and excluded-claims clauses in an arbitration agreement between an employer and employee was substantively unconscionable. The court noted several salient facts. First, a wide range of statutory and policy-based claims that would typically be initiated by an employee were directed into arbitration while only a small portion of the claims that would typically be initiated by the employer were similarly directed. Second, claims that were more likely to be brought by the employer—such as those related to intellectual property rights and severance or noncompete agreements, claims for equitable relief related to unfair competition or disclosure of trade secrets or confidential information, and claims for theft or embezzlement—were specifically excluded. And finally, the employer offered no justification for this one-sided treatment. Ramirez v. Charter Communications, Inc., 16 Cal. 5th 478, 322 Cal. Rptr. 3d 825, 551 P.3d 520 (Cal. 2024).

Courts generally presume that so-called "gateway disputes"—concerning whether the parties are bound to arbitrate—are for judicial determination unless the parties to the arbitration agreement clearly and unmistakably provide otherwise. Garden Fresh

Restaurant Corp. v. Superior Court, 231 Cal. App. 4th 678, 180 Cal. Rptr. 3d 89, 23 Wage & Hour Cas. 2d (BNA) 1872 (4th Dist. 2014) (disapproved of on other grounds by, Sandquist v. Lebo Automotive, Inc., 1 Cal. 5th 233, 205 Cal. Rptr. 3d 359, 376 P.3d 506, 129 Fair Empl. Prac. Cas. (BNA) 744, 166 Lab. Cas. (CCH) ¶ 61727 (Cal. 2016)).

B. DEFENSES TO ARBITRATION: WAIVER OF RIGHT TO ARBITRATE

1. In General

§ 6 Statutory and other express waivers

Waiver is the intentional abandonment of a known right, and arbitration—as with other constitutional, statutory, and contractual rights—may be waived by all parties. American Locomotive Co. v. Gyro Process Co., 185 F.2d 316, 19 Lab. Cas. (CCH) ¶ 66056 (6th Cir. 1950). When all or some of the parties covered by a valid arbitration agreement act jointly to repudiate that agreement and choose, instead, to proceed in a judicial forum, then the court must exercise its jurisdiction and proceed to trial. United Steelworkers of America, AFL-CIO v. Mesker Bros. Industries, Inc., 457 F.2d 91, 79 L.R.R.M. (BNA) 2714, 67 Lab. Cas. (CCH) ¶ 12488, 16 Fed. R. Serv. 2d 204 (8th Cir. 1972).

◆ **Observation:** A signatory to a contract that requires arbitration may expressly waive arbitration and, thus, bind that signatory's assignees. Likewise, all signatories to an arbitration agreement may expressly waive their respective right to arbitrate and, in so doing, proceed to litigate or pursue some other contractually stated dispute resolution avenue.

An express waiver may be demonstrated in communications between the parties. One express waiver involved this consciously made statement: "If you want to collect, sue us." This exclamation waived the right to arbitrate since the speaker was authorizing litigation. Sanford Const. Co. v. Rosenblatt, 25 Ohio Misc. 99, 54 Ohio Op. 2d 97, 266 N.E.2d 267 (Mun. Ct. 1970). Another explicit waiver arose from an exchange of correspondence between the parties' attorneys; defendant claimed that the agreement to arbitrate had become academic. It was obvious that this defendant did not intend to arbitrate and had waived any right to arbitrate by repudiating the parties' arbitral agreement. By expressing this conclusion, the defendant abrogated its right to arbitrate. People v. Kitendaugh, 190 Misc. 410, 411, 77 N.Y.S.2d 321, 323 (County Ct. 1947) (the plaintiff amended the complaint to add a cause of action for an issue that previously had been arbitrable).

A state statute might permit a claimant or defendant to unilaterally waive arbitration, permitting a dispute to be judicially resolved.

For example, a Maryland statute allows a written waiver by a patient in a medical malpractice case (with copies served on all parties); under one court interpretation, a written complaint filed in court and served on all other parties was treated as meeting those statutory requirements for a written waiver. Salvagno v. Frew, 388 Md. 605, 881 A.2d 660 (2005).

§ 7 Negotiating settlement of the dispute

One does not necessarily waive arbitration by negotiating the settlement of dispute in a contract containing an arbitration clause or by litigating to some minor extent. Pre-litigation negotiations often involve acts or statements that amount to nothing more than posturing—with one party trying to "stare down" the other party in the hope of a capitulation. Enviro Petroleum, Inc. v. Kondur Petroleum, S.A., 91 F. Supp. 2d 1031 (S.D. Tex. 2000). In one construction dispute, the parties entered into negotiations even though their contract gave them each the right to arbitrate. Although, as a result of these negotiations one party accepted a "final payment," this did not waive the right to later arbitrate. Sears Roebuck & Co. v. Herbert H. Johnson Assoc., Inc., 325 F. Supp. 1338 (D.P.R. 1971).

> ◆ **Practice Tip:** When confronted with a contractual limitations period within which an arbitration demand must be made, or a clause restricting arbitrable claims to those arising within a brief look-back period, a timely demand for arbitration should be made. The parties may then stipulate to stay arbitration to allow for negotiations, mediation, or some alternative form of dispute resolution.

A repudiation of arbitration made during negotiations can foreclose the repudiator from later claiming arbitration. In one case, a chief executive officer (CEO) demanded arbitration against an employee; however, the employee wrote a letter explicitly refusing to ". . . consent to the AAA's administration of this matter [or] . . . to participate in the arbitration filed with the AAA." The employee also failed to propose an arbitrator who might meet the CEO's approval. The CEO took no further steps until, more than six months after the filing, the AAA dismissed the CEO's arbitration demand. The CEO then sued and, for the first time, the defendant-employee raised arbitration as an affirmative defense and moved unsuccessfully to compel the CEO to arbitrate. However, the CEO succeeded in arguing that the employee had waived the right to arbitrate. To bolster that argument, the CEO proved prejudice in that the employer was out its expenses, had to demand arbitration, had to file its district court complaint, and had to successfully defend against two motions to compel arbitration. In Re Tyco Intern. Ltd. Securities Litigation, 422 F.3d 41, 151 Lab. Cas. (CCH) ¶ 60061 (1st Cir. 2005).

§ 8 Acting inconsistently with arbitration, generally

"Waiver" is the intentional relinquishment or abandonment of a known right. Morgan v. Sundance, Inc., 596 U.S. 411, 142 S. Ct. 1708, 212 L. Ed. 2d 753 (2022); In re Pawn America Consumer Data Breach Litigation, 108 F.4th 610 (8th Cir. 2024). The question boils down to whether the party has intentionally relinquished or abandoned a known right. In the analysis of whether a party has waived the right to compel arbitration, focusing on litigation conduct zeroes in on the most relevant conduct without tilting the playing field in favor of or against arbitration. To evaluate whether a party moving to compel arbitration has intentionally or relinquished or abandoned the right to arbitration, a court must determine whether the party (1) knew of its existing right and (2) acted inconsistently with it. The court explained that a showing of prejudice is not required, and that, instead, the focus of waiver is on the actions of the person who held the right, not the effects of those actions on the opposing party. In re Pawn America Consumer Data Breach Litigation, 108 F.4th 610 (8th Cir. 2024).

◆ **Illustration:** In an Eighth Circuit case, a pawnbroker, payday lender, and prepaid-card company knew of their contractual right to arbitrate putative class claims that customers asserted against them arising from a data breach, weighing in favor of a finding that the pawnbroker, lender, and company waived their arbitration right by failing to timely file a motion to compel arbitration. The court explained that as soon as the customers signed the contracts, the pawnbroker, lender, and company were presumed to know the contents of the contracts under the doctrine of constructive knowledge, and the pawnbroker, lender, and company admitted that the topic of arbitration came up during a pretrial conference, months before they moved to compel arbitration. In re Pawn America Consumer Data Breach Litigation, 108 F.4th 610 (8th Cir. 2024).

Some courts hold that a court considering waiver of the right to arbitration should treat the arbitration agreement as it would any other contract, without applying any special rules based on a policy favoring arbitration. Quach v. California Commerce Club, Inc., 16 Cal. 5th 562, 323 Cal. Rptr. 3d 126, 551 P.3d 1123 (Cal. 2024). More generally, there is a presumption against waiver of particular disputes, and a court should compel arbitration of arguably arbitrable issues "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." AT & T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 106 S. Ct. 1415, 89 L. Ed. 2d 648, 121 L.R.R.M. (BNA) 3329, 104 Lab. Cas. (CCH) ¶ 11758 (1986).

§ 9 Resorting to administrative and other non-arbitral proceedings

Waiver can occur if a party—who later proposes arbitration—has been involved in a charge before a federal administrative agency without advising the agency that the subject matter of the dispute may yet be arbitrable. Brennan v. King, 139 F.3d 258, 125 Ed. Law Rep. 303, 73 Empl. Prac. Dec. (CCH) ¶ 45465 (1st Cir. 1998). However, no waiver of arbitration occurs when a contracting party fails to raise its right to arbitrate during a governmental administrative proceeding. Nonetheless, an employer cannot stop a governmental administrative agency from filing a public enforcement action simply by invoking an arbitration agreement between the employer and the relevant employee, E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755, 81, 12 A.D. Cas. (BNA) 1001, 81 Empl. Prac. Dec. (CCH) ¶ 40850 (2002). An employer does not waive its right to arbitrate by failing to inform a governmental administrative agency that the subject matter of an agency investigation, ultimately, is arbitrable and cannot be litigated. Thus, any failure to initiate arbitration while EEOC proceedings, for example, are pending merely reflects a desire to avoid inefficiency and is consistent with a desire to arbitrate. Marie v. Allied Home Mortgage Corp., 402 F.3d 1, 95 Fair Empl. Prac. Cas. (BNA) 737, 85 Empl. Prac. Dec. (CCH) ¶ 41892 (1st Cir. 2005).

A dispute pending before an administrative agency may be resolved at the agency level and without the need for further dispute resolution. Thus, a party to such a proceeding need not make a wasteful decision to engage in arbitration which may be duplicative when no one knows whether or not a dispute will be resolved before the administrative agency. Thus, an administrative agency respondent need not make a "pre-suit demand for arbitration." Brown v. ITT Consumer Financial Corp., 211 F.3d 1217, 82 Fair Empl. Prac. Cas. (BNA) 1388, 78 Empl. Prac. Dec. (CCH) ¶ 40023 (11th Cir. 2000).

◆ **Illustration:** In a First Circuit case, there was no pre-litigation waiver of arbitration involving an academic grievance first aired before governmental agencies. A professor had pursued employment discrimination charges before state and federal discrimination agencies, even though the professor was entitled to arbitrate the same claims. While before the administrative agencies, neither party demanded arbitration. Once these administrative remedies were exhausted, the professor sued the university, which successfully compelled arbitration. The university did not waive arbitration by its silence regarding that remedy when the matters were before the administrative agency. Brennan v. King, 139 F.3d 258, 125 Ed. Law Rep. 303, 73 Empl. Prac. Dec. (CCH) ¶ 45465 (1st Cir. 1998).

Outside of the administrative arena and in the criminal courts, a

waiver of the right to arbitrate may occur if criminal charges are pressed in an effort to obtain restitution that is otherwise available in arbitration. Consorcio Rive, S.A. de C.V. v. Briggs of Cancun, Inc., 134 F. Supp. 2d 789 (E.D. La. 2001), aff'd, 82 Fed. Appx. 359 (5th Cir. 2003). This may occur, for example, when a criminal court is asked to determine the amount of restitution to be paid by a criminal defendant with whom there is an arbitral contract. Assuming the restitution is paid, no greater sum could be obtained from an arbitrator.

§ 10 Effect of bankruptcy proceedings

Filing a bankruptcy petition does not waive the arbitration rights of the debtor. For instance, if an arbitration demand is filed, then a subsequent bankruptcy petition would still allow the trustee in bankruptcy to prosecute any action or proceeding on behalf of the estate before the arbitrator. In re Al-Cam Development Corp., 99 B.R. 573, 19 Bankr. Ct. Dec. (CRR) 346, Bankr. L. Rep. (CCH) ¶ 72890 (Bankr. S.D. N.Y. 1989). Congress has demonstrated no intent in either the statutory text or legislative history of the Bankruptcy Code to preclude a debtor in bankruptcy from waiving the right to proceed in an adversary proceeding in bankruptcy court and arbitrate the claim instead. For instance, a debtor in bankruptcy court may arbitrate against a lender to enforce a prepetition rescission of a home equity loan; in one such case, the bankruptcy court was required to enforce the otherwise applicable arbitration contract. In re Mintze, 434 F.3d 222 (3d Cir. 2006).

The nonenforcement of an otherwise applicable arbitration provision turns on the underlying nature of the proceedings. For example, an arbitration clause might be inapplicable if the controversy arose exclusively under the provisions of the Bankruptcy Code and the arbitration would conflict with the purposes of the Code. In re APF Co., 264 B.R. 344 (Bankr. D. Del. 2001). Thus, the fact that a dispute involves a bankruptcy "core proceeding" does not automatically confer on the bankruptcy court discretion to deny arbitration. In re U.S. Lines, Inc., 197 F.3d 631, 35 Bankr. Ct. Dec. (CRR) 187, 2000 A.M.C. 784 (2d Cir. 1999); Matter of National Gypsum Co., 118 F.3d 1056, 31 Bankr. Ct. Dec. (CRR) 237, 38 Collier Bankr. Cas. 2d (MB) 722 (5th Cir. 1997).

The interests of efficient case management may influence the court's decision on whether to permit arbitration of a claim when there is a mix of core and noncore issues. For example, a federal district court has ruled that enforcing an arbitration clause by compelling arbitration of a Chapter 11 debtor-swine farm operator's prepetition claim for wrongful termination of a contract against a customer was not warranted, noting that the debtor's adversary proceeding also raised core claims that would remain before the

bankruptcy court. The court reasoned that bifurcating the adversary proceeding by allowing arbitration of the prepetition claim would defeat the objective of centrality, create potential for inconsistent results, interfere with the court's efficient administration of the estate, impose additional, unnecessary litigation costs on the estate, and divert the attention of the debtor's management from the operations. In re D & B Swine Farms, Inc., 430 B.R. 737 (Bankr. E.D. N.C. 2010).

§ 11 Failing to demand arbitration

Unless the parties contract otherwise, the burden to initiate arbitration rests with the aggrieved party seeking relief; the failure to demand arbitration does not necessarily waive that contractual right. In re Bruce Terminix Co., 988 S.W.2d 702 (Tex. 1998). A defendant preserves its contractual right to arbitrate despite waiting until litigation has been commenced before demanding arbitration and moving to stay the pending arbitration. R.M. Bennett Heirs v. Ontario Iron Co., 426 N.W.2d 921 (Minn. Ct. App. 1988). Nevertheless, a party may waive the right by failing to demand arbitration if, as a result, the opposing party suffers actual prejudice, MicroStrategy, Inc. v. Lauricia, 268 F.3d 244, 86 Fair Empl. Prac. Cas. (BNA) 1349, 81 Empl. Prac. Dec. (CCH) ¶ 40810 (4th Cir. 2001), such as unnecessary delay or expense. Doctor's Associates, Inc. v. Distajo, 107 F.3d 126 (2d Cir. 1997).

> ◆ **Observation:** As a practical matter, the reluctance of a party to demand arbitration may be economically motivated: the party who demands arbitration must pay what could amount to a substantial filing fee to an arbitral institutional. If the respondent refuses to share in the case service fee, the petitioner must pay before the first hearing. Additionally, the failure to demand arbitration could reflect a desire to litigate, or might be an effort to "let that sleeping dog lie" in hopes that the controversy will just go away.

In the situation of a defendant who seeks arbitration, when the plaintiff sues, and the underlying contract provides for arbitration, that plaintiff can be compelled to arbitrate if the defendant expeditiously asserts the parties' arbitration contract; having contractually selected such an arbitral tribunal, the parties would be relegated to it upon the timely insistence by either party. Guerra v. Richard G. Krueger Corp., 4 Misc. 2d 696, 150 N.Y.S.2d 759 (Sup 1956). Thus, a defendant against whom a claim is asserted—and who thus is not seeking relief—has no obligation to initiate arbitration, Walther v. Sovereign Bank, 386 Md. 412, 872 A.2d 735 (2005), and cannot be required to seek arbitration before a lawsuit is served. Board of Ed., Utica School Dist. No. 1 v. Delle Cese, 65 Misc. 2d 473, 318 N.Y.S.2d 46 (Sup 1971). What if it is the plaintiff

who seeks arbitration? Traditionally, a defendant ordinarily may "let a sleeping dog lie" until in danger of being "bitten." It is the aggrieved party, that is, the one who seeks some relief or damages who must initiate arbitration. Even though a defendant expresses a willingness to arbitrate from the onset of a dispute, the responsibility to file the actual demand for arbitration remains with the complaining party. Nordenstrom v. Swedberg, 143 N.W.2d 848 (N.D. 1966).

◆ **Practice Tip:** The course to take when initiating arbitration may differ, depending on whether any arbitral rules have been adopted under which the parties have agreed to proceed. Under one scheme, whichever party wanted to initiate arbitration had to name the first arbitrator—if no one named the first arbitrator, then litigation proceeded. Shanferoke Coal & Supply Corporation of Delaware v. Westchester Service Corporation, 70 F.2d 297 (C.C.A. 2d Cir. 1934), aff'd, 293 U.S. 449, 55 S. Ct. 313, 79 L. Ed. 583, 1935 A.M.C. 1135 (1935).

Under the Federal Arbitration Act (FAA), when a party fails to demand arbitration during pretrial proceedings, and, in the meantime, engages in pretrial activity inconsistent with an intent to arbitrate, the party later opposing a motion to compel arbitration may more easily show that its position has been compromised, that is, prejudiced, but even in cases when the party seeking arbitration has invoked the litigation machinery to some degree. The dispositive question is whether the party objecting to arbitration has suffered actual prejudice. Wheeling Hosp., Inc. v. Health Plan of the Upper Ohio Valley, Inc., 683 F.3d 577 (4th Cir. 2012).

◆ **Practice Tip:** A defendant who is under no obligation to first demand arbitration, and who has waited after being sued before asserting the right to arbitrate, is not duty-bound to notify the AAA of its intent before moving to stay litigation pending arbitration so as to permit arbitration to proceed. Mountain Plains Constructors, Inc. v. Torrez, 785 P.2d 928 (Colo. 1990).

§ 12 Making untimely demand for arbitration

Under some circumstances, the right to compel arbitration of a cause of action involving an arbitrable dispute may be waived by a delay in seeking it. Mere delay, however, does not amount to prejudice that will waive a party's right to arbitrate the dispute. Morvant v. P.F. Chang's China Bistro, Inc., 870 F. Supp. 2d 831 (N.D. Cal. 2012). When a party delays enforcing a contractual arbitration clause and instead participates in litigation, the ultimate question in determining whether the party waived its right to arbitration is whether the party's conduct has reached a point where it was inconsistent with any other intention but to forgo the right to arbitration. Saili v. Parkland Auto Center, Inc., 181 Wash. App. 221, 225, 329 P.3d 915, 917 (Div. 2 2014).

A party may waive the right to arbitrate by an untimely demand even without any intent to forgo the procedure. Hoover v. American Income Life Ins. Co., 206 Cal. App. 4th 1193, 142 Cal. Rptr. 3d 312, 162 Lab. Cas. (CCH) ¶ 61260 (4th Dist. 2012).

◆ **Illustration:** A former client forfeited any right to stay legal malpractice proceedings against his attorneys and compel arbitration of attorney-fee issues pursuant to the Federal Arbitration Act. The former client brought a substantially similar malpractice suit against the same attorneys in the past, during the pendency of which the former client never referenced or requested arbitration, then following voluntary dismissal of the action, the former client filed the case at bar, but yet again not invoking the right to compel arbitration, and only filed a motion to stay the proceedings and compel arbitration 13 months after commencing the first action, by which time litigation activities had already imposed substantial costs on the defendant attorneys and judiciary. Cho v. Mallon & McCool, LLC, 263 F. Supp. 3d 226 (D.D.C. 2017).

Waiver of the right to arbitration does not require a voluntary relinquishment of a known right; to the contrary, a party may be said to have "waived" its right to arbitrate by an untimely demand, even without intending to give up the remedy. Lewis v. Fletcher Jones Motor Cars, Inc., 205 Cal. App. 4th 436, 140 Cal. Rptr. 3d 206 (4th Dist. 2012), as modified, (Apr. 25, 2012) and (overruled on other grounds by, Quach v. California Commerce Club, Inc., 16 Cal. 5th 562, 323 Cal. Rptr. 3d 126, 551 P.3d 1123 (Cal. 2024)).

◆ **Observation:** A waiver of the right to arbitrate, when unintended, is arguably more properly described a forfeiture.

A protracted delay in demanding arbitration may cause prejudice when the litigation machinery has been substantially invoked. There is no set minimum number of days that automatically equates to unreasonable delay. Rather, the trial court must a case-by-case assessment. One court did draw a line in the sand, however, when the defendants raised the affirmative defense of arbitration after having delayed filing their motion to compel arbitration for over eight months. Noting the absence of extreme and unusual circumstances, the court found as a matter of law that eight months was an unjustified delay in asserting arbitration as an affirmative defense—which could have terminated the litigation—when coupled with active participation in the litigation process. MS Credit Center, Inc. v. Horton, 926 So. 2d 167 (Miss. 2006). An unexplained delay in seeking arbitration, while proceeding with litigation in court without mentioning or seeking to preserve the right to arbitrate, is powerful evidence that the right to arbitrate was relinquished or abandoned, as an element of determining whether a party has waived the right to arbitrate, within the meaning of a waiver exception to a statutory requirement that courts enforce contractual

agreements to arbitrate. Hofer v. Boladian, 111 Cal. App. 5th 1, 332 Cal. Rptr. 3d 506 (2d Dist. 2025).

If a party knows it may benefit from a contract to arbitrate and intends to exercise that right, then that party should demand arbitration without delay. One party's unilateral act is ineffective to waive an opposing party's contractual right to arbitrate, and a party's unilateral act can only operate to waive its own right to arbitrate. AFSCME, Council 4, Local 704 v. Department of Public Health, 272 Conn. 617, 866 A.2d 582, 176 L.R.R.M. (BNA) 2591 (2005). Because the universe of arbitration law is interwoven with fundamental contract principles, waivers comes into play. In that sphere, a litigant waives its right to arbitrate if that party knew of an existing right to arbitrate and acted inconsistently with that right, E. C. Ernst, Inc. v. Manhattan Const. Co. of Texas, 559 F.2d 268 (5th Cir. 1977). The waiver doctrine applies to arbitration on the ground that a court will not permit parties to anticipate a favorable decision, reserving a right to impeach it or set it aside if it happens to be against them, for a cause that was well known to them before or during the trial. C.R. Klewin Northeast, LLC v. City of Bridgeport, 282 Conn. 54, 919 A.2d 1002 (2007).

Timeliness can be governed by a limitations period set forth in a contract, in the parties' adopted arbitration rules, or in a statute of limitations. Just as a timely demand must be made to invoke a forum-selection clause or any other claim of improper venue, Sharpe v. Jefferson Distributing Co., 148 F.3d 676, 77 Fair Empl. Prac. Cas. (BNA) 797, 74 Empl. Prac. Dec. (CCH) ¶ 45545 (7th Cir. 1998) (abrogated on other grounds by, Papa v. Katy Industries, Inc., 166 F.3d 937, 78 Fair Empl. Prac. Cas. (BNA) 1665, 74 Empl. Prac. Dec. (CCH) ¶ 45716 (7th Cir. 1999)), so too a demand must be made for arbitration as early as possible in litigation so the parties can proceed in the proper forum. Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388 (7th Cir. 1995). Thus arbitration can be waived by a petitioner who makes an untimely demand to arbitrate.

Gentry v. Orkin, LLC, 490 S.W.3d 784 (Mo. Ct. App. W.D. 2016).

The best practice is that, when a defendant claims that a dispute captured in a judicial complaint should be arbitrated, then the affirmative defense of arbitration and award should be expressly raised in the defendant's first responsive pleading. Arbitration is not waived if it is raised as an affirmative defense in the answer or first responsive pleading (for example, in a summary judgment motion). When coupled with a demand or motion for arbitration, this shifts the burden of proof onto the plaintiff to prove that the defendant waived its right to arbitrate. Southwest Indus. Import & Export, Inc. v. Wilmod Co., Inc., 524 F.2d 468 (5th Cir. 1975).

◆ **Illustration:** One defendant did waive arbitration by denying

liability, pleading affirmative defenses, impleading two subcontractors, and proceeding to litigate the dispute. Burton-Dixie Corp. v. Timothy McCarthy Const. Co., 436 F.2d 405 (5th Cir. 1971). Another defendant-proponent did not waive arbitration by waiting to raise arbitration as an affirmative defense only when the plaintiff submitted its first request for discovery. American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88 (4th Cir. 1996). Even more dramatically, one court held that a defendant—who later proposed arbitration—preserved the right to arbitration by doing nothing in a litigation that escalated the case. Steel Warehouse Co., Inc. v. Abalone Shipping Ltd. of Nicosai, 141 F.3d 234, 1998 A.M.C. 2054 (5th Cir. 1998).

Although a waiver of arbitration is disfavored and there is a presumption against it, Williams v. Cigna Financial Advisors, Inc., 56 F.3d 656, 19 Employee Benefits Cas. (BNA) 1751, 68 Fair Empl. Prac. Cas. (BNA) 65, 66 Empl. Prac. Dec. (CCH) ¶ 43601 (5th Cir. 1995), arbitration should be raised as an affirmative defense in the first responsive pleading; otherwise, in some state courts, the right to arbitrate is absolutely waived. Campbell v. St. John Hosp., 434 Mich. 608, 455 N.W.2d 695 (1990).

◆ **Practice Tip:** Such an affirmative defense might read: "This dispute is subject, in whole or in part, to the parties' agreement to arbitrate in the attached contract entitled [name] and dated [date]." If a defendant fails or neglects to claim arbitration in the first affirmative defenses, a motion can be made to file amended affirmative defenses so as to add the defense of arbitration. In one case, even the defendant's failure to include an arbitration defense in amended answers (filed after the court denied an initial motion to stay litigation pending arbitration) did not waive arbitration. In re Crysen/Montenay Energy Co., 226 F.3d 160 (2d Cir. 2000).

Once a defendant has demanded arbitration in its answer, the burden of proof shifts to the plaintiff to prove that the defendant waived arbitration. Southwest Indus. Import & Export, Inc. v. Wilmod Co., Inc., 524 F.2d 468, 469 (5th Cir. 1975). For example, in a Fifth Circuit case, the presumption against waiving arbitration was not overcome and arbitration, eventually, was compelled. The defendant had merely defended itself in litigation in the event that the court might not stay the litigation; the defendant did not escalate the case or shower the plaintiff with interrogatories or discovery requests. Steel Warehouse Co., Inc. v. Abalone Shipping Ltd. of Nicosai, 141 F.3d 234, 1998 A.M.C. 2054 (5th Cir. 1998).

The earliest point in litigation when a waiver of the right to arbitrate might begin to take root is upon filing an answer on the merits if the defendant failed to raise arbitration as an affirmative defense. Cavac Compania Anonima Venezolana de Administracion y Comercio v. Board for Validation of German Bonds in the U.S., 189 F. Supp. 205 (S.D. N.Y. 1960).

◆ **Practice Tip:** If the affirmative defense of arbitration is plead and coupled with a successful motion to compel arbitration, the litigation does not terminate but, rather, is stayed pending completion of arbitration and judicial resolution of the arbitral award by, for example, confirming, vacating, modifying, clarifying, or correcting it.

The arbitration option is preserved unless the plaintiff has been prejudiced, other than by the mere passage of time between the plaintiff's filing the action and the defendant's moving to compel arbitration. I. T. A. D. Associates, Inc. v. Podar Bros., 636 F.2d 75 (4th Cir. 1981).

◆ **Practice Tip:** As a practical matter, many judges are reluctant to find substantial prejudice and will order arbitration, so long as the request for arbitration occurs well before trial and not too far into the litigation process.

Defendants should be watchful of a plaintiff who is contractually bound to arbitrate but who prefers a judicial forum, as the plaintiff may ensnare the defendant into waiving arbitration by answering the complaint and failing or neglecting to list arbitration as an affirmative defense and failing to immediately move to compel arbitration. American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88 (4th Cir. 1996).

Other delays have effectively waived arbitration when, after litigation moves along for a while, a party belatedly "discovers" their contractual right to arbitrate and then demands arbitration. In one case, a delay waived arbitration because the plaintiff neither reserved its right to arbitrate in the body of its complaint nor dismissed the action once a scheduling conference date was set. Prudential-Bache Securities, Inc. v. Stevenson, 706 F. Supp. 533, Fed. Sec. L. Rep. (CCH) ¶ 94427 (S.D. Tex. 1989). In another dispute, the demand for arbitration was not made until eight months after the complaint was filed and then not until after discovery had ended, leaving the parties only two months away from a scheduled trial date. The defendant's undue delay waived arbitration and prejudiced the plaintiff, who had spent time in trial preparation, needlessly deploying judicial and party-resources. Rankin v. Allstate Ins. Co., 336 F.3d 8 (1st Cir. 2003).

The equitable doctrine of laches has precluded arbitration when a lawsuit was filed and the demand for arbitration was not made until many months or even years. S & R Co. of Kingston v. Latona Trucking, Inc., 159 F.3d 80 (2d Cir. 1998); General Star Nat. Ins. Co. v. Administratia Asigurarilor de Stat, 289 F.3d 434, 2002 Fed. App. 0164P (6th Cir. 2002); Restoration Preservation Masonry, Inc. v. Grove Europe Ltd., 325 F.3d 54 (1st Cir. 2003).

§ 13 Making untimely demand for arbitration—Waiting until trials or appellate review

As a practical matter, if a party's delayed demand for arbitration were to be upheld, nothing would preclude a litigant having a potential right to arbitrate from testing the judicial waters for as long as desired—even to the brink of trial—and then nullifying all that has transpired by demanding arbitration. Uwaydah v. Van Wert County Hosp., 246 F. Supp. 2d 808 (N.D. Ohio 2002). Waiting until the 11th hour before an impending trial to move to compel arbitration is problematic. For example, in a maritime dispute, a vessel owner waived arbitration by participating in litigation commenced by a charterer and by denying the existence of a valid charter party that had the arbitration clause. The vessel charterer maintained this litigation posture for over a month before filing a motion to compel arbitration, and then did so only one day before start of an expedited trial. This prejudiced the charterer and others in the form of expenses incurred to prepare the case for trial, which would not have been occasioned had the parties instead been preparing for arbitration. Navieros Inter-Americanos, S.A. v. M/V Vasilia Exp., 120 F.3d 304, 1997 A.M.C. 2845, 38 Fed. R. Serv. 3d 440 (1st Cir. 1997).

How close to a trial date is too close in seeking to compel arbitration? Even with a trial date two months off, some courts have refused to compel arbitration. U.S. for Use and Benefit of DMI, Inc. v. Darwin Const. Co., 750 F. Supp. 536 (D.D.C. 1990). In one such controversy, court proceedings had carried on during four years of active litigation. The plaintiff successfully resisted arbitration and claimed prejudice because defendant never raised arbitration as an affirmative defense and the defendant enjoyed the benefit of at least five depositions, all while plaintiff had to endure 13 pretrial conferences. Restoration Preservation Masonry, Inc. v. Grove Europe Ltd., 325 F.3d 54 (1st Cir. 2003).

Certainly, by going to trial on the merits a party waives any right to arbitrate. In a Second Circuit case, a third party waived arbitration—after being impleaded—by failing to move for a stay of litigation. Instead, they cross-claimed, participated in discovery, and proceeded to trial on the merits, and thus waived the right to arbitrate. Demsey & Associates, Inc. v. Steamship Sea Star, 461 F.2d 1009, 1972 A.M.C. 1440 (2d Cir. 1972). Even farther along that same spectrum, a party who litigates a matter and then appeals the decision indisputably waives arbitration. Schussel v. Schussel, 186 Misc. 736, 63 N.Y.S.2d 380, 381 (Sup 1946).

§ 14 Substantially participating in litigation

A party who chooses a judicial forum to resolve a dispute is rebuttably presumed to have waived arbitration. Ernst & Young LLP v.

Baker O'Neal Holdings, Inc., 304 F.3d 753, 40 Bankr. Ct. Dec. (CRR) 76 (7th Cir. 2002). However, a plaintiff-proponent of arbitration does not waive arbitration simply by filing a complaint in court, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Lecopulos, 553 F.2d 842 (2d Cir. 1977); Stifel, Nicolaus & Co. Inc. v. Freeman, 924 F.2d 157, Fed. Sec. L. Rep. (CCH) ¶ 95779 (8th Cir. 1991), so long as they immediately move the court to stay that same litigation and to compel arbitration. U.S. for Use and Benefit of Orleans Elec. Const. Co. v. AMC Mechanical Contractors, Inc., 709 F. Supp. 694 (M.D. La. 1989). For instance, simply filing a lawsuit that is later dismissed for lack of jurisdiction does not waive arbitration. Doers v. Golden Gate Bridge etc. Dist., 23 Cal. 3d 180, 151 Cal. Rptr. 837, 588 P.2d 1261, 100 L.R.R.M. (BNA) 2877 (1979). If a plaintiff who files multiple lawsuits involving arbitrable disputes but makes no mention of arbitration in the pleadings may have waived their right to arbitrate. Yates v. Doctor's Associates, Inc., 193 Ill. App. 3d 431, 140 Ill. Dec. 359, 549 N.E.2d 1010 (5th Dist. 1990).

In a case in which the merits are finally to be decided by arbitration, petitioning a court may suggest to a defendant that the plaintiff has abandoned a contractual right to arbitrate by engaging in acts inconsistent with arbitration. More specifically, waiver occurs if a complaint, counterclaim, or cross-complaint pleads arbitrable matters and seeks a judicial resolution of issues that are susceptible to arbitration. Nevada Gold & Casinos, Inc. v. American Heritage, Inc., 121 Nev. 84, 110 P.3d 481 (2005). Petitioning a court to determine arbitrability under the parties' contract does not waive arbitration and does not abandon or repudiate an arbitral contract. Furthermore, it is clear that arbitration is not abandoned by seeking a declaratory judgment that an issue is not arbitrable, or that an arbitrator lacks jurisdiction over a given question, as such challenges are consistent with arbitration. Dean Witter Reynolds, Inc. v. Fleury, 138 F.3d 1339 (11th Cir. 1998).

By litigating against a defendant with whom there is no arbitration agreement, a plaintiff expresses no intent to waive the right to arbitrate a related claim against a third party with whom there is an arbitral contract, even though that third party is a corporation related to the defendant. In an Eleventh Circuit decision, the plaintiff sued a corporation A (with which the plaintiff had no arbitration agreement); however, the plaintiff did have an arbitration agreement with corporation B. Corporations A and B were related as parent-subsidiary. Thus, the plaintiff did not waive its right to arbitration with corporation B simply by suing corporation A. Ivax Corp. v. B. Braun of America, Inc., 286 F.3d 1309 (11th Cir. 2002).

◆ **Practice Tip:** When a lawsuit must be filed to gain a temporary restraining order or some other emergency or prelimi-

> nary relief, to preserve a later right to arbitrate the merits of the controversy, a plaintiff should add a count in the complaint which might read:
>
> Count I: Arbitration. Plaintiff and Defendant have a contract entitled *[name]* and dated *[date]* to arbitrate the merits of this dispute; Plaintiff is not surrendering and reserves the right to arbitrate the merits of the controversy under the parties' agreement; however, by filing this Complaint, Plaintiff merely seeks interim relief from this Court in aid of arbitration; after this Court has made a determination regarding the relief sought in this Complaint, Plaintiff moves this Court to compel the parties to arbitrate all arbitrable issues.

A defendant may allow significant time to pass and may engage in some preliminaries of litigation without the court's finding a substantial invocation of the judicial process, for purpose of waiver of the right to arbitrate. Garcia v. Fuentes Restaurant Management Services Incorporated, 141 F.4th 671 (5th Cir. 2025). Even when a party seeks temporary or preliminary relief by filing an action, the court may still determine that, under the parties' contract or adopted rules, emergency relief is fully available from the arbitrator and, thus, remand those issues to be resolved by the arbitrator. However, a party may implicitly waive its contractual right to arbitrate by engaging in substantial litigation. Navieros Inter-Americanos, S.A. v. M/V Vasilia Exp., 120 F.3d 304, 1997 A.M.C. 2845, 38 Fed. R. Serv. 3d 440 (1st Cir. 1997); Khan v. Parsons Global Services, Ltd., 480 F. Supp. 2d 327 (D.D.C. 2007), judgment rev'd on other grounds, 521 F.3d 421, 27 I.E.R. Cas. (BNA) 884 (D.C. Cir. 2008). A party waives its right to arbitrate if it: (1) substantially invokes the judicial process, and (2) thereby causes detriment or prejudice to the other party. Al Rushaid v. National Oilwell Varco, Inc., 757 F.3d 416 (5th Cir. 2014). A finding of prejudice is required in order to find that litigation conduct waived the right to arbitrate. Ehleiter v. Grapetree Shores, Inc., 48 V.I. 1034, 482 F.3d 207 (3d Cir. 2007).

A waiver of arbitration on the primary cause of action in the litigation does not necessarily mean that arbitration of a counterclaim is also waived. In an Alabama case, although a lender's assignee substantively invoked the litigation process when pursuing its collection claim as to a borrower's default on cash advances—which meant that the assignee waived its contractual right to have the collection claim submitted to arbitration—the assignee did not waive its contractual right to arbitration of the borrower's counterclaim for injunctive relief and damages for herself and a putative class. The court reasoned that the arbitration provision worked on a claim-by-claim basis, and the counterclaim marked a substantial shift in the litigation. CNU of Alabama, LLC v. Shakeena Cox, 2024 WL 4716159 (Ala. 2024).

Waiver by litigation affects both plaintiffs and defendants who act inconsistently with their right to arbitrate by initiating or defending a court action without contemporaneously demanding arbitration. Morewitz v. West of England Ship Owners Mut. Protection and Indem. Ass'n (Luxembourg), 62 F.3d 1356, 1996 A.M.C. 707 (11th Cir. 1995). Litigating rather than arbitrating does not automatically deprive the court of subject-matter jurisdiction. If there is good reason for a delayed request to arbitrate, then the court can excuse a delayed motion. Gilmore v. Shearson/American Exp. Inc., 811 F.2d 108, R.I.C.O. Bus. Disp. Guide (CCH) ¶ 6534 (2d Cir. 1987). Reversal upon appeal is appropriate if the judge has acted unreasonably. U.S. v. Austin, 54 F.3d 394, 403, 1997-1 Trade Cas. (CCH) ¶ 71670, 42 Fed. R. Evid. Serv. 190 (7th Cir. 1995).

When issues in litigation are separate and distinct from arbitrable controversies, no waiver of arbitration occurs. Denihan v. Denihan, 34 N.Y.2d 307, 357 N.Y.S.2d 454, 313 N.E.2d 759 (1974).

◆ **Illustration:** In a Fourth Circuit case, there was no waiver when an employer filed three separate actions against an employee, given the fact that the employee's own suit involving the same issues was pending. Several factors were important. Specifically, the litigation involved many motions, responses, and other procedural maneuvers; the employer requested arbitration approximately one month after the employee filed the complaint and the time between filing the first action and the arbitration request was less than six months; the bulk of the litigation activity was directed toward state-law claims; and no decision on the merits of the employer's declaratory relief claims was ever made. Finally, the employee was not prejudiced by any discovery obtained by the employer. MicroStrategy, Inc. v. Lauricia, 268 F.3d 244, 86 Fair Empl. Prac. Cas. (BNA) 1349, 81 Empl. Prac. Dec. (CCH) ¶ 40810 (4th Cir. 2001).

§ 15 Substantially participating in litigation—Invoking litigation machinery

A party acts inconsistently with its right to arbitrate, as required for court to find waiver of right to compel arbitration, if it substantially invokes the litigation machinery before asserting its arbitration right. Lackie Drug Store, Inc. v. OptumRx, Inc., 143 F.4th 985 (8th Cir. 2025); Housley v. Autohaus, L.L.C., 711 S.W.3d 554 (Mo. Ct. App. S.D. 2025), transfer denied, (May 27, 2025); A party waives a right to arbitration by substantially invoking the judicial process to the other party's detriment or prejudice. RSL Funding, LLC v. Pippins, 499 S.W.3d 423 (Tex. 2016). Thus, a defendant who uses the tools of litigation, or participates in litigation for an unreasonable period without asserting the right to arbitrate, may lose the right to compel arbitration. Arnav Industries Inc. Profit Sharing Plan and Trust v. 3449-3461 Hamilton Ft, LLC, 237 A.D.3d 786, 233 N.Y.S.3d 74 (2d Dep't 2025).

Factors considered by a court in determining whether a party implicitly waived its right to arbitrate through litigation conduct include whether the allegedly defaulting party participated in litigation, substantially delayed its request for arbitration, or participated in discovery. Al-Nahhas v. 777 Partners LLC, 129 F.4th 418 (7th Cir. 2025).

◆ **Illustration:** The defendant, a vehicle seller and servicer, acted inconsistently with the right to arbitrate under a vehicle protection plan by substantially participating in litigation, and thus the seller/servicer waived arbitration of the buyer's claim for repairs. As drafters of the agreement, the seller/servicer knew of their existing right to arbitrate but made no such request for almost a year, and instead filed motions and pleadings, responded to discovery requests, and agreed to a discovery schedule and jury trial setting without once requesting to either mediate or arbitrate the pending claims. Housley v. Autohaus, L.L.C., 711 S.W.3d 554 (Mo. Ct. App. S.D. 2025), transfer denied, (May 27, 2025).

A party's course of action amounts to waiver when it submits arbitrable issues to a court for decision on the substantive merits of the cause. Smith v. Jones, 2025 IL App (5th) 231136, 483 Ill. Dec. 257, 259 N.E.3d 962 (App. Ct. 5th Dist. 2025).

◆ **Illustration:** In a Nevada case, a party initially demanded arbitration but the court denied the motion to compel arbitration. Rather than take an immediate appeal, the proponent of arbitration then amended its complaint, adding what were otherwise arbitrable claims, and vigorously litigated those claims for 18 months without renewing their motion to compel arbitration. Additionally, the proponent of arbitration also pursued discovery in court, sought a preferential trial setting, and never renewed its motion to compel arbitration until the week before trial and then only after several adverse pretrial rulings. These acts were inconsistent with the right to arbitrate and prejudiced the party resisting arbitration. After substantial issues were litigated on the merits, a subsequent arbitration would have required the parties to replicate their efforts, especially after having disclosed litigation strategies and incurring significant expenses. Nevada Gold & Casinos, Inc. v. American Heritage, Inc., 121 Nev. 84, 110 P.3d 481 (2005).

Defendants who desire to arbitrate should promptly file a motion to stay litigation and compel arbitration. University Nursing Associates, PLLC v. Phillips, 842 So. 2d 1270, 176 Ed. Law Rep. 470, 19 I.E.R. Cas. (BNA) 1680 (Miss. 2003). Nonetheless, answering the complaint does not typically suggest that the party has substantially invoked the judicial process. Garcia v. Fuentes Restaurant Management Services Incorporated, 141 F.4th 671 (5th Cir. 2025); West Alabama Bank and Trust v. Perry County Board of Education, 2025 WL 1479284, at *1 (Ala. Civ. App. 2025). This is true, even if the

defendant also filed a counterclaim. West Alabama Bank and Trust v. Perry County Board of Education, 2025 WL 1479284, at *1 (Ala. Civ. App. 2025). However, a party that avails itself of the judicial process by attempting to win favorable rulings from the judicial system following the filing of a complaint waives the right to proceed through arbitration. PennEnergy Resources, LLC v. MDS Energy Development, LLC, 2024 PA Super 219, 325 A.3d 756 (2024), appeal granted in part, 341 A.3d 55 (Pa. 2025).

> ◆ **Practice Tip:** Litigation may be viewed along a continuum: the more embroiled parties become with pleadings, papers, request for injunctive relief, facilitative mediation, motions, affidavits and briefs, discovery, pretrial conferences and hearings, evaluative mediation, and other steps along the path to a bench or jury trial, the more remote arbitration begins to look in the rear view mirror and the more imminent the trial appears on the horizon. Thus, the more intense the litigation and the longer it lasts before a motion to compel arbitration is filed, the more likely it is that the party who invoked the litigation machinery and abandoned arbitration will have waived arbitration. Of course, the arbitral option remains available if all litigants agree to repair to the arbitral forum before trial begins. Yet, the right to arbitrate is absolutely waived once a matter has been tried on its merits.

The question is: how much litigation is too much before arbitration is deemed waived? In a Mississippi suit, the defendants waived their right to arbitration by waiting more than three years after the complaint was filed before moving to compel arbitration; meanwhile, the defendants actively participated in the lawsuit by petitioning to recuse the trial judge, to transfer venue, to stay discovery, for the extraordinary writ of prohibition and/or mandamus, as well as executing an order setting the case for a jury trial, designating experts, and attending depositions. It was this active participation in litigation that was inconsistent with, and waived the right to, arbitrate. In re Tyco Intern. (US) Inc., 917 So. 2d 773 (Miss. 2005).

Some contracts (often by adopting arbitral rules) contain clauses stipulating that the mere fact that litigation is invoked in conjunction with arbitration does not waive arbitration. For example, a no-waiver clause permits petitions seeking provisional remedies or other emergency relief. Although a no-waiver provision can be read literally, State Farm Mut. Auto. Ins. Co. v. George Hyman Const. Co., 306 Ill. App. 3d 874, 240 Ill. Dec. 62, 715 N.E.2d 749 (4th Dist. 1999), it is not calculated to permit litigation on the merits of otherwise arbitrable claims and, thus, can be narrowly construed as well. S & R Co. of Kingston v. Latona Trucking, Inc., 159 F.3d 80 (2d Cir. 1998); Home Gas Corp. of Massachusetts, Inc. v. Walter's of Hadley, Inc., 403 Mass. 772, 532 N.E.2d 681 (1989). Thus, a no-waiver clause should not be interpreted to allow every judicial intervention. Joba Const. Co., Inc. v. Monroe County Drain Com'r, 150 Mich. App. 173, 388 N.W.2d 251 (1986).

A party may waive or forfeit the right to arbitrate by litigating despite a no-waiver provision in an arbitral contract. The presence of a no-waiver clause does not alter the ordinary analysis used in determining whether a party has waived arbitration. A Fifth Circuit case addressed a no-waiver clause that read: "The institution and maintenance of an action for judicial relief, the pursuit of provisional or ancillary remedies or other remedies provided for in the agreement or related settlement documents shall not be deemed a waiver of a party's right to demand arbitration or to continue arbitration." Despite this no-waiver clause, the court retained its inherent authority to find that a party-litigant had waived its right to arbitration by extensively enlisting the judicial process before asserting the right to arbitrate. The central problem was that the litigant had forced the opposing party to litigate issues in a counterclaim, and then unsuccessfully moved to compel arbitration of those same issues on the eve of trial, after having forced the court and opposing party to expend significant resources in preparation for trial. Republic Ins. Co. v. PAICO Receivables, LLC, 383 F.3d 341 (5th Cir. 2004).

§ 16 Substantially participating in litigation—Intent

A waiver of contractual arbitration rights is an intentional act. Whether explicit or implicit, waiver is evidenced by some overt act or course of action indicating a preference for litigation over arbitration, or an abandonment of arbitration. Intent ordinarily turns on the facts of each case, Questar Homes of Avalon, LLC v. Pillar Const., Inc., 388 Md. 675, 882 A.2d 288 (2005), and is not susceptible to bright line rules. Cotton v. Slone, 4 F.3d 176, Fed. Sec. L. Rep. (CCH) ¶ 97748 (2d Cir. 1993).

Though substantially invoking litigation machinery can waive the right to arbitrate, the act of invoking litigation describes implementing or enforcing judicial processes, not the act of petitioning the court for support or assistance while simultaneously moving forward with arbitration. A party's intent in litigating—as contrasted with the singular act of filing a lawsuit—is determinative. That is, the party alleged to have waived arbitration must engage in some overt act in court evincing a desire to litigate rather than arbitrate the dispute. American Locomotive Co. v. Gyro Process Co., 185 F.2d 316, 19 Lab. Cas. (CCH) ¶ 66056 (6th Cir. 1950). For example, no waiver occurred where a plaintiff sued and immediately entered into settlement negotiations which later collapsed; this plaintiff was permitted to arbitrate claims as to which no judicial relief had been sought. Codman v. Hygrade Food Products Corp. of New York, 295 Mass. 195, 3 N.E.2d 759, 106 A.L.R. 1354 (1936).

The waiver of any constitutional, statutory, or contractual right

should be made knowingly and after being fully informed. A party waiving a substantive right can only do so after an informed consent, or must make a knowing and voluntary waiver (which can be express or implied). In one dispute involving multiple tortfeasors, no waiver was found. The plaintiff litigated antitrust claims against various defendants with whom plaintiff had no agreement to arbitrate, while demanding arbitration against but one additional tortfeasor with whom the plaintiff did have an arbitration contract. The plaintiff did not waive arbitration by filing the unrelated antitrust suit against these other defendants, even though the plaintiff had sought—and was denied—a stay of arbitration pending resolution of antitrust suit. The court concluded that the plaintiff never demonstrated the requisite desire to resolve arbitrable issues through litigation. Texaco Exploration and Production Co. v. AmClyde Engineered Products Co., Inc., 243 F.3d 906, 2001 A.M.C. 1199, 48 Fed. R. Serv. 3d 1258 (5th Cir. 2001).

◆ **Practice Tip:** Although a waiver may be legally explicit, clarity is crucial too. Waiver language should be written in plain English and might read, in part: "Employee agrees that any disputes with the Employer shall be resolved only through arbitration and not through litigation in any state or federal court. By signing this contract, you will not be able to bring a claim in court and, therefore, you are giving up your right to a jury and a court trial." Buraczynski v. Eyring, 919 S.W.2d 314 (Tenn. 1996).

§ 17 Filing papers not going to merits of dispute

Filing suit in court is but one of the factors courts consider in determining whether a party has waived a right to arbitration and, standing alone, is insufficient to show waiver. PAK Foods Houston, LLC v. Garcia, 433 S.W.3d 171 (Tex. App. Houston 14th Dist. 2014). Simply filing a lawsuit or simply conducting discovery before asking for arbitration does not constitute waiver of the right to arbitrate pursuant to an arbitration clause; the issue of whether conduct constitutes waiver depends on the overall evaluation of the applicant's involvement and conduct up to the time of the request for arbitration. Kirk v. Credit Acceptance Corp., 2013 WI App 32, 346 Wis. 2d 635, 829 N.W.2d 522 (Ct. App. 2013).

§ 18 Removing case from state to federal court

For a defendant simply to remove a case from state to federal court does not, ipso facto, waive the right to arbitrate. Although a decision to litigate can waive arbitration, some circumstances may make a case unique, such that the court finds no waiver or permits a previous waiver to be rescinded. One defendant did not waive its arbitration right even though, after removing an action to federal court, the defendant filed a compulsory counterclaim and, after a

motion to stay discovery was denied, engaged in discovery. Williams v. Cigna Financial Advisors, Inc., 56 F.3d 656, 19 Employee Benefits Cas. (BNA) 1751, 68 Fair Empl. Prac. Cas. (BNA) 65, 66 Empl. Prac. Dec. (CCH) ¶ 43601 (5th Cir. 1995).

However, in a Seventh Circuit case, arbitration was waived when the moving party unsuccessfully sought to abandon the litigation in favor of arbitration. When sued in state court, the defendant manifested an intention to resolve the dispute in federal court by removing the action to federal court rather than moving to stay litigation pending arbitration. Then, the problem was exacerbated when the defendant propounded discovery and received over 2000 documents in response. Finally, the defendant waited until five months before trial before demanding arbitration. The court was not satisfied that the moving party had done everything reasonable to make the earliest, feasible determination to arbitrate. Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388 (7th Cir. 1995).

This case may be contrasted with one from the Eleventh Circuit, in which the district court ruled that under the totality of the circumstances, an online retailer never actively participated in a consumer's action alleging violations of the Florida Telephone Solicitation Act or in manner inconsistent with the retailer's asserted right to arbitrate the action, and thus, under the Federal Arbitration Act (FAA) and Florida law, the retailer did not waive its right to arbitration pursuant to an arbitration clause contained in the terms and conditions of the browserwrap agreement. The crucial difference here was that the retailer had timely removed the suit to federal court and moved to compel arbitration within a month, without engaging in any other litigation practice beforehand. Adams v. Lashify, Inc., 689 F. Supp. 3d 1146 (M.D. Fla. 2023).

§ 19 Voluntarily dismissing suit

A lawsuit that is voluntarily dismissed without prejudice by the plaintiff cannot be construed to have waived arbitration. After a voluntary dismissal, a later refiling begins the case anew (as if the first suit had never been filed). Sturm v. Schamens, 99 N.C. App. 207, 392 S.E.2d 432 (1990).

◆ **Illustrations:** In one such dismissal, a plaintiff in a North Carolina case had sued a defendant for damages arising out of a contract which required arbitration. Before the defendant answered the complaint, however, the plaintiff voluntarily dismissed this first lawsuit without prejudice. Later, the plaintiff filed a second lawsuit involving identical issues. In response to that complaint, the defendant successfully moved to dismiss the case and to compel arbitration. The plaintiff unpersuasively argued that because the plaintiff sued the defendant in the first

case (which action was voluntarily dismissed by plaintiff), and, because the defendant was involved as a party to that first lawsuit albeit involuntary, the defendant had waived it's right to arbitrate. Sturm v. Schamens, 99 N.C. App. 207, 392 S.E.2d 432 (1990).

In an Ohio case, the voluntary dismissal of a company's and insurer's prior negligence and breach of contract suit against a roofer, arising from a roof's detachment from a commercial building within months after it was installed, was consistent with the company's principal's desire for speedy resolution of the dispute, as required for the principal to obtain a declaratory judgment requiring the roofer to submit itself to arbitration pursuant to the parties' contract. Although the roofer argued that the principal could not demonstrate a necessity for speedy relief because instead of waiting for the trial court to rule on the motion to stay filed in the prior case, he voluntarily ended that case and filed the instant case, it was doubtful that the company, which filed the prior case, could successfully invoke the arbitration provision in that case because only the principal, and not the company, was a party to the contract. Guerrini v. Chanell Roofing & Home Improvement, LLC, 2024-Ohio-585, 236 N.E.3d 376 (Ohio Ct. App. 8th Dist. Cuyahoga County 2024).

◆ **Practice Tip:** The form of the order in a voluntary dismissal can affect the right to appeal. The general principle is that a party cannot appeal from a judgment to which the parties have consented or stipulated as to substance. If a respondent signs a stipulation that is limited to approving the form of the wording of the order then, above the signature line of respondent's counsel, this phrase should appear: "Stipulated as to form only."

§ 20 Engaging in discovery

Relevant discovery factors in determining whether a party moving to compel arbitration has substantially invoked the judicial process include how much discovery has been conducted and who initiated it, whether the discovery related to the merits rather than arbitrability or standing, and how much of the discovery would be useful in arbitration. Adams v. StaxxRing, Inc., 344 S.W.3d 641 (Tex. App. Dallas 2011).

◆ **Illustrations:** In a Florida case, a construction company would not suffer actual prejudice during subsequent arbitration, if ordered, from the fact that a refrigeration company participated in minimal discovery and answered the construction company's complaint, in which the construction company sought recovery pursuant to a subcontracting agreement for losses sustained when the refrigeration company's conversion project at a wholesale corporation allegedly failed. Thus, the refrigeration company's use of the litigation machinery did not result in a waiver of the subcontracting agreement's arbitration provision under Virginia

law. Performance Air Mechanical, Inc. v. Miller Construction Services, Inc., 299 So. 3d 573 (Fla. 4th DCA 2020) (applying Virginia law).

A nursing home operator did not substantially invoke the judicial process in family members' action alleging wrongful death and survival claims in connection with residents' receipt of allegedly negligent nursing home care, and thus the operator did not waive an arbitration clause that was part of a resident admission agreement. Although the operator served written discovery, responded to written discovery, attended a scheduling conference, and requested a hearing on its motion to compel arbitration, the operator did not file a summary judgment motion or a motion to compel discovery or depose any witnesses. Specialty Select Care Center of San Antonio, L.L.C. v. Owen, 499 S.W.3d 37 (Tex. App. San Antonio 2016).

In a New Jersey case, the extent of discovery conducted, as a factor in determining whether the right to compel arbitration was waived, did not weigh in favor of or against waiver, in a suit by a consumer against alleged owners of the consumer's debt for violations of various consumer protection statutes. The court explained that the owners did not obtain any discovery from the consumer, but they stipulated to the extension of the discovery period, evaded responding to consumer's discovery requests, and moved to compel arbitration two days after the consumer moved to compel discovery responses, and, in doing so, used the court system to their advantage before attempting to shift the case to arbitration. Hopkins v. LVNV Funding LLC, 481 N.J. Super. 49, 330 A.3d 1231 (App. Div. 2025).

§ 21 Seeking summary judgment

A summary judgment motion is brought on the merits of the case and asks the court to rule that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The motion substantially invokes the judicial process. Williams Industries, Inc. v. Earth Development Systems Corp., 110 S.W.3d 131 (Tex. App. Houston 1st Dist. 2003). The court may find no waiver, however, if the merits were not addressed. For example, in an Idaho case, a former employer did not waive its right to arbitration of a former employee's severance pay and wrongful termination claims by filing an answer to the complaint and seeking summary judgment on the former employee's incentive pay claim. The former employer sought arbitration on the arbitrable claims the same day it filed its answer to the complaint, and only sought summary judgment on the one claim arising under the former employee's prior contract, which did not contain an arbitration provision, and the former employer never sought judicial relief on the merits of the claims it believed to be, and were later found, arbitrable. Stiffler v. Hydroblend, Inc., 172 Idaho 630, 535 P.3d 606 (2023) (abrogated on other grounds by,

Litster v. Litster Frost Injury Lawyers PLLC, 174 Idaho 860, 560 P.3d 1007 (2024)).

There is authority that, as a matter of law, filing a motion for summary judgment qualifies as substantial participation in the underlying litigation inconsistent with the intent to arbitrate. Danny's Const. Co., Inc. v. Birdair, Inc., 136 F. Supp. 2d 134 (W.D. N.Y. 2000). On this view, it would be unfair to permit arbitration after a court has dismissed a motion going to the merits, since allowing arbitration would afford the unsuccessful moving party two bites at the proverbial apple. Baker v. Stevens, 2005 UT 32, 114 P.3d 580 (Utah 2005). However, according to some courts, even a decision to file a motion for summary judgment on the merits may not necessarily waive the right to arbitrate. For example, in a Washington State case, a builder's parent companies did not waive arbitration by moving for summary judgment on the basis that they had no connection to the lawsuit in which homeowners and their sued a builder and its parent companies for fraud, negligence, negligent misrepresentation, rescission, and a declaration of the unenforceability of the arbitration clause for unconscionability. The court noted that the parent companies had moved to compel arbitration promptly after the superior court denied their motion for summary judgment. Townsend v. Quadrant Corp., 173 Wash. 2d 451, 268 P.3d 917 (2012).

◆ **Observation:** In seeking a summary judgment, a moving party litigates the very issues which, otherwise, must be arbitrated. A summary judgment motion accedes to the jurisdiction of the court and pursues redress through litigation. A moving party has no reason to seek summary judgment unless intending that the judge, not the arbitrator, dispose of their opponent's claim.

◆ **Practice Tip:** A respondent to a summary judgment motion may unwittingly submit to the court's jurisdiction by answering a summary judgment motion or bringing a counter-motion for summary judgment. To preserve the right to arbitrate, a respondent should indicate in the first sentence of such their responsive pleading words in substance and to the effect: "Respondent is obliged under the Court Rules to answer this Motion for Summary Judgment but, in doing so, preserves its right to arbitrate the merits of this claim and asks this Court not to decide this Motion but, rather, to compel arbitration of this controversy."

§ 22 Failing to promptly appeal denial of arbitration

The failure to promptly appeal a denial of arbitration will, if prejudicial to the opposing party, forfeit the right to arbitration. Denials of arbitration under the Federal Arbitration Act (FAA). 9 U.S.C.A. §§ 4, 16(a)(1)(B), unlike most interlocutory rulings, are immediately appealable. Note that the FAA does not require an immediate appeal, but only permits such an interlocutory appeal.

◆ **Practice Tip:** It could be a risky move to forego the right to pursue an interlocutory appeal if that failure is prejudicial to the opposing party. The inherent prejudice is that, only after a full trial of an otherwise arbitrable matter is completed, an appellate court determines that the whole dispute should have been arbitrated. Such a delay squanders judicial resources and can forfeit the right to arbitration. The lesson is that, when a trial court denies a motion to compel arbitration, the moving party—who has proposed and been refused arbitration—risks waiving a contractual right to arbitrate unless an interlocutory appeal is taken.

Although nothing in the FAA requires an immediate appeal, a majority of the federal circuits have held that the failure to promptly appeal such a denial may, by estoppel, foreclose the demanding party's right to arbitration. Franceschi v. Hospital General San Carlos, Inc., 420 F.3d 1, 23 I.E.R. Cas. (BNA) 592, 151 Lab. Cas. (CCH) ¶ 60053 (1st Cir. 2005), citing 9 U.S.C.A. § 16(a)(1)(B); Cargill Ferrous Intern. v. SEA PHOENIX MV, 325 F.3d 695, 2003 A.M.C. 1027 (5th Cir. 2003); John Morrell & Co. v. United Food and Commercial Workers Intern. Union, AFL-CIO, 37 F.3d 1302, 18 Employee Benefits Cas. (BNA) 2232, 147 L.R.R.M. (BNA) 2540 (8th Cir. 1994); Cotton v. Slone, 4 F.3d 176, Fed. Sec. L. Rep. (CCH) ¶ 97748 (2d Cir. 1993). Some courts, however, have held to the contrary. Clark v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 924 F.2d 550, Fed. Sec. L. Rep. (CCH) ¶ 95778, Fed. Sec. L. Rep. (CCH) ¶ 95796 (4th Cir. 1991); Mountain Plains Constructors, Inc. v. Torrez, 785 P.2d 928 (Colo. 1990).

2. Requirement to Demonstrate Prejudice

§ 23 Prejudice requirement

Prejudice to the party opposing arbitration, in determining whether arbitration has been waived, may be shown (1) when the parties use discovery not available in arbitration, (2) when they litigate substantial issues on the merits, or (3) when compelling arbitration would require a duplication of efforts. Tallman v. Eighth Jud. Dist. Ct., 131 Nev. 713, 359 P.3d 113, 131 Nev. Adv. Op. No. 71 (2015). Both delay and the extent of the moving party's participation in judicial proceedings are material factors in assessing a contention of prejudice. Kennamer v. Ford Motor Credit Co., 153 So. 3d 752 (Ala. 2014). Prejudice refers to the inherent unfairness—in terms of delay, expense, or damage to a party's legal position—that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue. Wiese v. Cach, LLC, 189 Wash. App. 466, 358 P.3d 1213 (Div. 1 2015). Protracted litigation often has the unexpected detriment of the loss of evidence and witnesses due to the passage of time, thereby causing prejudice. Brown v. Dillard's, Inc., 430 F.3d 1004, 23 I.E.R. Cas. (BNA) 1377, 151 Lab. Cas. (CCH) ¶ 60104 (9th Cir. 2005).

In an important break with the traditional view, the U.S. Supreme Court has ruled that prejudice is not a condition of finding that a party, by litigating too long, waived its right to stay litigation or compel arbitration under the Federal Arbitration Act (FAA), which applies to arbitration clauses in contracts involving interstate commerce. Morgan v. Sundance, Inc., 596 U.S. 411, 142 S. Ct. 1708, 212 L. Ed. 2d 753(2022); Dallas Excavation Systems, Inc. v. Orellana, 697 S.W.3d 702 (Tex. App. Dallas 2024), rule 53.7(f) motion granted, (Oct. 8, 2024). To decide whether a waiver has occurred, the court focuses on the actions of the person who held the right and seldom considers the effects of those actions on the opposing party; this analysis applies to the waiver of a contractual right, as of any other. A contractual waiver normally is effective without proof of detrimental reliance. The FAA policy favoring arbitration does not authorize federal courts to invent special, arbitration-preferring procedural rules. The policy of the FAA favoring arbitration is merely an acknowledgment of the Act's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts. Thus, the policy of the FAA is to make arbitration agreements as enforceable as other contracts, but not more so, and a court must hold a party to its arbitration contract just as the court would to any other kind. if an ordinary procedural rule would counsel against enforcement of an arbitration contract, "then so be it." Morgan v. Sundance, Inc., 596 U.S. 411, 142 S. Ct. 1708, 212 L. Ed. 2d 753 (2022).

Note that if the FAA does not apply to the litigation—typically because the parties' contract chose state law instead—then state law will govern whether prejudice must be shown for a waiver of arbitration rights. In such cases, choice-of-law rules may end up front and center. Swanson v. Southwest Airlines Co., Inc., 2023 WL 5509357, at *2 (N.D. Ill. 2023).

◆ **Illustration:** In a case from the Seventh Circuit, the district court explained that the plaintiff was exempt from the FAA because she was a ramp supervisor, and thus the law governing the arbitration clause became state law, not the FAA. Also, the standard for determining whether the defendant employer waived mandatory arbitration possibly changed due to the U.S. Supreme Court's *Morgan* decision. The employer had removed the case under the court's diversity jurisdiction, and the issue in the motion to compel arbitration was a question of state law rather than the FAA. Accordingly, the court was bound to follow the substantive law of the forum state (Illinois) and federal procedural law. If the elements of waiver were procedural, the motion was governed by the rule announced in *Morgan*, under which "a federal court assessing waiver does not generally ask about prejudice" and waiver is simply the intentional relinquishment or abandonment of a known right. However, state law pointed the court in a differ-

ent direction. specifically, Illinois's choice-of-law rules (which the court was bound to follow because it sat in diversity) required it to respect the choice-of-law provision in the parties' employment contract so long as the contract is valid and the law chosen is not contrary to Illinois's fundamental public policy. Here, the contract's choice-of-law clause selected Texas as an alternative to the FAA. Like nine federal courts of appeals prior to *Morgan*, the Texas Supreme Court requires a showing of prejudice before a court can hold that a party waived mandatory arbitration. So, if the elements of waiver are substantive for purposes of the U.S. Supreme Court's *Erie* doctrine, the plaintiff here would be required to show that the defendant employer "substantially invok[ed] the judicial process to [her] detriment or prejudice. Swanson v. Southwest Airlines Co., Inc., 2023 WL 5509357, at *2 (N.D. Ill. 2023).

§ 24 Prejudice from delay in enforcing arbitration right

To show some prejudice from delay in invoking arbitration, as would support waiver of the right to arbitrate, the evidence need only show that the party petitioning for arbitration used the discovery processes of the court to gain information about the other side's case that the petitioning party could not have gained in arbitration. Augusta v. Keehn & Associates, 193 Cal. App. 4th 331, 123 Cal. Rptr. 3d 595 (4th Dist. 2011). There is generally no set rule on how long a litigation-induced delay must go on before a party who resists arbitration has become so prejudiced that arbitration must be deemed waived. However, an extreme delay may satisfy the prejudice standard without an inquiry into the factual circumstances, as when a Georgia state court held as a matter of law, that an eight month delay before seeking arbitration was excessive. MS Credit Center, Inc. v. Horton, 926 So. 2d 167 (Miss. 2006).

C. PARTIES

§ 25 Parties to arbitration

A non-signatory may be bound by, or may acquire rights under, an arbitration agreement applying ordinary state-law principles of agency or contract. However, an assignee's rights are subject to any defense or claim of the obligor that accrues before the obligor receives notification of the assignment, but not to defenses or claims accruing afterwards except as provided by statute. Restatement Second, Contracts § 336. Although a contract generally does not bind a nonparty, E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755, 12 A.D. Cas. (BNA) 1001, 81 Empl. Prac. Dec. (CCH) ¶ 40850 (2002), a signatory to a contract can expressly waive arbitration and that waiver binds assignees of that contract. Thus, nonsignatories to a contract containing an arbitra-

tion clause are bound by the signatory's waiver of the right to arbitrate. Restoration Preservation Masonry, Inc. v. Grove Europe Ltd., 325 F.3d 54 (1st Cir. 2003).

Traditional principles of state law allow a contract to be enforced by or against nonparties to the contract through estoppel. Reid v. Tandym Group, LLC, 697 F. Supp. 3d 62 (S.D. N.Y. 2023). Thus, a non-signatory party that knowingly seeks the benefits of a contract containing an arbitration clause is estopped from avoiding arbitration. Gilman v. Walters, 61 F. Supp. 3d 794 (S.D. Ind. 2014). Under the theory of direct-benefits estoppel, a nonparty to an arbitration agreement may be required to arbitrate if: (1) liability for its claim arises from the contract containing the arbitration provision or (2) it deliberately seeks and obtains substantial benefits from the contract itself. Direct-benefits estoppel does not apply when the benefits alleged are insubstantial or indirect, and the doctrine will not create liability for noncontracting parties that does not otherwise exist. In re Advance Payroll Funding, Ltd., 254 S.W.3d 710 (Tex. App. Dallas 2008).

Conversely, the nonsignatory, rather than seeking to avoid arbitration, may be seeking to compel another party to arbitrate. Applying equitable estoppel so as to permit a nonsignatory to compel arbitration is particularly appropriate if a plaintiff's claimed injuries resulted from concerted actions of both the signatory and nonsignatory. Claims against a nonsignatory to an agreement containing an arbitration clause are "intertwined" with the agreement, so as to permit the nonsignatory to compel arbitration, if the merits of an issue between the parties is bound up with a contract binding one party and containing an arbitration clause. The plaintiff's actual dependence on the underlying contract containing the arbitration clause in making out a claim against the nonsignatory defendant is always the sine qua non of an appropriate situation for applying equitable estoppel so as to permit nonsignatory to compel arbitration. Reid v. Tandym Group, LLC, 697 F. Supp. 3d 62 (S.D. N.Y. 2023).

Although simple but-for causation is not all that is required to satisfy the first prong for determining whether a nonsignatory to an arbitration agreement may estop a signatory from refusing to arbitrate claims—namely, that claims against the nonsignatory are intertwined with the agreement—but-for causation is indicative of common subject matter. The second part of the inquiry looks primarily to the relationship between the nonsignatory seeking to compel arbitration and the signatory in whose shoes the nonsignatory seeks to stand. Specifically, the relationship between the parties must either support the conclusion that the signatory effectively consented to extend its agreement to arbitrate to the nonsignatory, or, otherwise put, made it inequitable for the signatory to refuse to arbitrate on the ground that it had made no agreement with the

nonsignatory. Reid v. Tandym Group, LLC, 697 F. Supp. 3d 62 (S.D. N.Y. 2023).

◆ **Illustrations:** In a case from the Second Circuit, the district court ruled that a nurse practitioner who worked at public hospitals was required to arbitrate claims with the entity that operated the hospitals, as a nonsignatory to the practitioner's services agreement with the staffing agency that contained an arbitration clause, under principles of equitable estoppel. The issue arose in a suit seeking overtime wages under the Fair Labor Standards Act (FLSA) and New York law. The services agreement designated the nurse practitioner as an independent contractor, making her ineligible for overtime premiums, and placed her at the nonsignatory hospital. In light of this arrangement, the court concluded that her claims against the nonsignatory arose out of and were intertwined with the subject matter of her services agreement, and the court noted the practitioner knew from the moment she signed the services agreement that she would work with and be supervised by the nonsignatory in the ordinary course of her daily duties, and thus it would be inequitable for the practitioner to refuse to arbitrate. Reid v. Tandym Group, LLC, 697 F. Supp. 3d 62 (S.D. N.Y. 2023).

However, in a California case, equitable estoppel as a basis for allowing a nonsignatory vehicle manufacturer to enforce an arbitration agreement in a sale contract between purchasers and a dealership did not apply because the purchasers of the new vehicle with an allegedly defective transmission were not relying on the terms of the sale contract to impose liability on the manufacturer. The court noted that the purchasers' complaint did not allege that the manufacturer breached any obligations under the sale contract, and instead, the complaint alleged violations of manufacturer warranties under the California's Lemon Law; the manufacturer warranties that accompanied the sale of the vehicle without regard to the substantive terms of the sale contract were independent of the sale contract; the sale contract disclaimed any warranty on the part of the dealership and the Lemon Law claims were not founded on any term of the dealership sale agreement, but instead sought to recover based upon the manufacturer's statutory obligations. Davis v. Nissan North America, Inc., 100 Cal. App. 5th 825, 319 Cal. Rptr. 3d 517, 113 U.C.C. Rep. Serv. 2d 938 (4th Dist. 2024), review filed, (Apr. 22, 2024) and review granted, see Cal. Rules of Court 8.1105 and 8.1115 (and comment on rule 8.1115(e)(3)), 321 Cal. Rptr. 3d 131, 548 P.3d 597 (Cal. 2024) (applying Cal. Civ. Code §§ 1790 et seq).

III. PRACTICE AND PROCEDURE

A. IN GENERAL

§ 26 Procedural matters, generally

A plaintiff who wants to preserve the right to arbitrate but who,

nonetheless, must seek some preliminary judicial relief should claim, in their very first pleading, the right to arbitrate while also pleading that the action is merely "in aid of arbitration." The plaintiff should also move to compel arbitration. What if it is the defendant who wishes to preserve the right to arbitrate? A defendant should plead arbitration as an affirmative defense and move in the first responsive pleading to compel arbitration, otherwise the right may be deemed waived. U.S. v. Lopez, 2 F.3d 1342, 1355, 85 Ed. Law Rep. 647 (5th Cir. 1993), judgment aff'd on other grounds, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626, 99 Ed. Law Rep. 24 (1995).

When ruling on a motion to compel arbitration, a court must consider whether a valid written agreement to arbitrate exists, whether an arbitrable issue exists, and whether the right to arbitration was waived. Lippman v. Lippman, 20 So. 3d 457 (Fla. 4th DCA 2009). Once the moving party has properly supported their motion to compel arbitration, the burden then shifts to the nonmovant to present evidence tending to show that the arbitration agreement is invalid or inapplicable to the case. Custom Performance, Inc. v. Dawson, 57 So. 3d 90 (Ala. 2010). As in the case of any other summary judgment, a district court considering the making of an agreement to arbitrate, should give to the party denying the agreement the benefit of all reasonable doubts and inferences that may arise. Chambers v. Groome Transp. of Alabama, 41 F. Supp. 3d 1327, 2014 Wage & Hour Cas. 2d (BNA) 166965 (M.D. Ala. 2014).

When a plaintiff in a declaratory judgment action avers that the respondent has waived arbitration, the complaint should contain a separate count articulating this waiver argument. Should the respondent move to dismiss the complaint, then the petitioner must answer defend by at least mentioning the waiver argument and supplying supporting legal analysis or authority. County of McHenry v. Insurance Co. of the West, 438 F.3d 813 (7th Cir. 2006), as amended, (Apr. 11, 2006).

§ 27 Statutory bar to arbitration

Despite the rule that when there is a viable arbitration clause, a court lacks the authority and discretion to refuse arbitration if both parties seek to arbitrate, the party resisting arbitration may be able to establish a legislative intent to preclude a waiver of judicial remedies to enforce the statutory rights at issue. To override the FAA's mandate to enforce arbitration, there must be an express congressional intent to preclude a waiver of judicial remedies for the particular statutory rights. In this context, the party opposing arbitration must demonstrate that Congress intended to preclude the waiver of judicial remedies, leaving the courts as the only forum to resolve a given class of controversy. Congressional intent may be

discerned through either (1) the statute's text, (2) the statute's legislative history, or (3) an inherent conflict between arbitration and the statute's underlying purposes. Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185, Fed. Sec. L. Rep. (CCH) ¶ 93265, R.I.C.O. Bus. Disp. Guide (CCH) ¶ 6642 (1987).

◆ **Observation:** Courts have permitted arbitration and rebuffed challenges that certain disputes are not arbitrable. All varieties of statutory disputes have been found to be arbitrable, including actions involving patents and copyrights. However, there are a few types of controversies that cannot be arbitrated, such as criminal prosecutions, child custody and, in some states, suits to quiet title.

§ 28 Petition to compel arbitration and dismiss or stay action

The Federal Arbitration Act (FAA), 9 U.S.C.A. § 3, generally requires courts to stay lawsuits involving arbitrable issues if a party with the right to arbitration seeks a stay pending arbitration of those issues. On motion of a party to an arbitration agreement the trial court must order arbitration even though the order might result in less efficient, separate proceedings. RSL Funding, LLC v. Pippins, 499 S.W.3d 423 (Tex. 2016). A defendant's motion to dismiss or stay an action and to compel arbitration preserves the right to arbitrate. Creative Solutions Group, Inc. v. Pentzer Corp., 252 F.3d 28 (1st Cir. 2001); Chappel v. Laboratory Corp. of America, 232 F.3d 719, 25 Employee Benefits Cas. (BNA) 2720 (9th Cir. 2000). Under the FAA, in ruling on a motion to compel the arbitration of a given dispute, courts must, in the view of Seifert v. U.S. Home Corp., 750 So. 2d 633 (Fla. 1999), consider three matters:

- whether there is a valid written agreement to arbitrate
- whether an arbitrable issue exists
- whether the right to arbitration was waived

◆ **Observation:** Arbitration is best preserved as an option when a defendant promptly moves to dismiss the complaint or stay litigation and to compel arbitration; a prompt motion to dismiss an action does not prejudice a plaintiff who resists arbitration. Chappel v. Laboratory Corp. of America, 232 F.3d 719, 25 Employee Benefits Cas. (BNA) 2720 (9th Cir. 2000).

A court has no independent duty to sua sponte compel arbitration and, thus, a motion to compel must be initiated by one of the parties. Duferco Steel Inc. v. M/V Kalisti, 121 F.3d 321, 1998 A.M.C. 171 (7th Cir. 1997). One general contractor brought a third-party action against 40 subcontractors and suppliers for indemnity or contribution as to a condominium association's claims against that general contractor for defective design and construction. Of the 40 cross-

defendants, contractual arbitration could be compelled only as to two subcontractors or suppliers who had arbitration agreements with that general contractor and who advanced arguments supporting petitions to compel arbitration. Indeed, arbitration could not be compelled as to subcontractors or suppliers who possessed no contractual right to arbitration, who waived their right to arbitration, or who chose to litigate their claims in lieu of invoking their right to arbitration. Questar Homes of Avalon, LLC v. Pillar Const., Inc., 388 Md. 675, 882 A.2d 288 (2005).

The right to arbitrate may be preserved even though the proponent of arbitration previously filed several unsuccessful motions to dismiss. In a Seventh Circuit case, although no discovery had taken place and there was no trial date, the moving party prevailed in a motion to compel arbitration filed some 18 months after the action was initiated. The respondents, who opposed arbitration, had been placed on notice that arbitration was likely because the moving party had won a motion to compel arbitration in a related class action involving the same parties. Sharif v. Wellness Intern. Network, Ltd., 376 F.3d 720 (7th Cir. 2004) (proponent had filed four earlier motions).

◆ **Practice Tip:** If an order compelling arbitration has been entered, and the parties then wish to dismiss the case but reserve the right to appeal the order compelling arbitration, the form of the dismissal order must unequivocally reserve the right to appeal. This is accomplished by including in the dismissal order the phrase that the case is ". . . dismissed without prejudice to the right of [plaintiff/defendant] to seek an appeal of [issue]." When such language has been omitted, it is not enough that, at one point in the proceedings, the appellant has expressed a desire to appeal. The declaration of intent to appeal must be made concurrently with the motion for dismissal, so as to unequivocally reserve the right to appeal where a case is dismissed. Scanlon v. M.V. SUPER SERVANT 3, 429 F.3d 6, 2005 A.M.C. 2705 (1st Cir. 2005).

§ 29 Submitting arbitrability issue to the arbitrator

Under given circumstances, even though the court would decide arbitrability, a party can waive a judicial decision by submitting the matter to arbitration without reservation; if an arbitrator is undertaking to decide a question of arbitrability that should be judicially concluded, then a party who protests the arbitrator's involvement with arbitrability must make known that it wants to reserve the question of arbitrability for the court. If no such reservation is made, then an unrestricted submission to the arbitration waives the right to litigate that same issue. Cleveland Elec. Illuminating Co. v. Utility Workers Union of America, 440 F.3d 809, 179 L.R.R.M. (BNA) 2211, 152 Lab. Cas. (CCH) ¶ 10633, 2006 Fed. App. 0092P (6th Cir. 2006).

In either state or federal courts, the issue of the arbitration provision's validity is considered by the arbitrator in the first instance, unless the challenge to a contract with an arbitration clause is aimed at the contract's arbitration clause itself. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038, 152 Lab. Cas. (CCH) ¶ 10636, 2006 A.M.C. 512 (2006). However, once waiver becomes an issue, the issue arises of who must resolve the question—the judge or an arbitrator. This question is better understood after delineating whether the waiver issue is procedural or substantive. Matters of procedural arbitrability usually arise before any lawsuit is filed. These involve issues such as whether an arbitration demand is timely made (within limits expressed in the parties' contract), or might involve whether service of a demand for arbitration was sufficient and comported with any contractual or governing rules and provided fair notice, or whether laches, estoppel, or some other argument should forgive an obligation to arbitrate.

The U.S. Supreme Court has ruled that all of items of procedural arbitrability are, in the first instance, for the arbitrator, not for the judge, and that there is a presumption that the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002). This rule includes questions concerning whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met. Diamond Waterproofing Systems, Inc. v. 55 Liberty Owners Corp., 4 N.Y.3d 247, 793 N.Y.S.2d 831, 826 N.E.2d 802 (2005).

Although the Supreme Court's pronouncement on waiver seems clear, the federal circuit courts have divided on whether the judge or arbitrator decides waiver issues, after the U.S. Supreme Court decisions in *Howsam* and *Green Tree Financial Corp.*. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002); Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414, 91 Fair Empl. Prac. Cas. (BNA) 1832, 148 Lab. Cas. (CCH) ¶ 59739 (2003). The Eighth Circuit has held that waiver is presumptively an issue for the arbitrator, and not for the courts, at least when the conduct allegedly constituting waiver is due to litigation in some other court. National American Ins. Co. v. Transamerica Occidental Life Ins. Co., 328 F.3d 462 (8th Cir. 2003). However, the First Circuit reserved for the court the implications of waiver from not demanding arbitration during and after an administrative proceeding, when the same issues that had been brought before the agency are later presented in arbitration. There, a party participated in administrative proceedings before the EEOC and, later, petitioned for arbitration. The First Circuit followed the traditional view that waiver implied by conduct before

an arbitral demand is made is presumptively for the court. This conclusion was premised on the principle that judges are well-trained to recognize abusive forum shopping, not to mention manipulation of the litigation process for strategic advantage. Marie v. Allied Home Mortgage Corp., 402 F.3d 1, 95 Fair Empl. Prac. Cas. (BNA) 737, 85 Empl. Prac. Dec. (CCH) ¶ 41892 (1st Cir. 2005).

Though arguing before an administrative agency may be inconsistent with a right to arbitrate, sending such waiver issues to the arbitrator is seen as inefficient. To illustrate, the following broad arbitration clause, for example, did not preserve for the arbitrator issues of waiver and its first cousin, arbitrability:

> "Employer and employee agree to submit to final and binding arbitration any and all disputes, claims (whether in tort, contract, statutory, or otherwise), and disagreements concerning the interpretation or application of this Agreement[. . .] **including the arbitrability of any such controversy or claim. . .**" [emphasis added]. Marie v. Allied Home Mortgage Corp., 402 F.3d 1, 95 Fair Empl. Prac. Cas. (BNA) 737, 85 Empl. Prac. Dec. (CCH) ¶ 41892 (1st Cir. 2005).

A waiver determination can be shifted to the arbitrator if there is "clear and unmistakable evidence" of the parties' intent to do so in an arbitration agreement. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985, Fed. Sec. L. Rep. (CCH) ¶ 98728 (1995). While this is a high standard, the First Circuit has found that the normal presumptions in favor of arbitration do not apply. Coady v. Ashcraft & Gerel, 223 F.3d 1, 25 Employee Benefits Cas. (BNA) 1425, 16 I.E.R. Cas. (BNA) 1025, 141 Lab. Cas. (CCH) ¶ 59001 (1st Cir. 2000).

§ 30 Petition to stay arbitration

As to any issue that is not arbitrable because there is no contractual obligation to arbitrate it, a court may stay the arbitration. (Though the FAA is silent on this remedy, the availability of injunctive relief is an inherent equitable remedy judicially available.) Even though a respondent may petition to stay arbitration, the failure to seek such judicial relief does not necessarily waive an objection to the arbitration. Azcon Const. Co., Inc. v. Golden Hills Resort, Inc., 498 N.W.2d 630 (S.D. 1993).

> ◆ **Illustration:** The lesson of one Second Circuit case appears to be: if you move to compel arbitration and are refused and ordered to continue with litigation, the motion to compel arbitration might be renewed before trial and could be successful. In this case, a Chapter 11 bankruptcy adversary proceeding, the defendants did not impliedly waive arbitration by failing to immediately appeal the denial of the defendants' timely motion to stay the bankruptcy proceeding pending arbitration, even though the adversary proceeding continued for eight years before the stay

motion was renewed. In re Crysen/Montenay Energy Co., 226 F.3d 160 (2d Cir. 2000).

A trial court may dismiss, rather than stay proceedings pending arbitration if all of the plaintiff's claims are subject to arbitration and no useful purpose would be served by staying proceedings pending arbitration. Little v. Cellco Partnership, 304 F. Supp. 3d 508 (S.D. W. Va. 2018) (customer's action against a telecommunications company for violating federal and state debt collection laws). In one case, however, the federal district court stayed proceedings pending arbitration, rather than dismissing the claims, in a suit by subsidiaries of a supplier of healthcare products against distributors for breach of contract. The court reasoned that the only claims implicating the nonexclusive distribution agreement were arbitrable; resolution of some claims in the arbitration could shed light on the remaining nonarbitrable issues; and to avoid inconsistent judgments, it was in the interest of justice to stay all claims pending arbitration. Johnson & Johnson International v. Puerto Rico Hospital Supply, Inc., 258 F. Supp. 3d 255 (D.P.R. 2017).

§ 31 Arbitrating under protest

A respondent's participation in arbitration does not preclude a later judicial challenge of the arbitrator's authority if the respondent clearly, explicitly, and at each significant juncture objects to arbitration. AGCO Corp. v. Anglin, 216 F.3d 589 (7th Cir. 2000). The protest must be raised at the very first opportunity and included in any answering statement to a demand for arbitration, at the onset of any administrative conference, preliminary hearing, and hearing. By proceeding under protest, a party does not waive their objection to arbitrability, even when forced to designate an arbitrator and even though compelled to submit to arbitration on the merits. Local 719, American Bakery and Confectionery Workers of America, AFL-CIO v. National Biscuit Co., 378 F.2d 918, 65 L.R.R.M. (BNA) 2482, 55 Lab. Cas. (CCH) ¶ 11965, 33 A.L.R.3d 1229 (3d Cir. 1967). Connecticut Union of Tel. Workers, Inc. v. Southern New England Tel. Co., 148 Conn. 192, 169 A.2d 646, 42 Lab. Cas. (CCH) ¶ 50218 (1961).

◆ **Practice Tip:** A protest to arbitration should be made in writing and should be filed with the arbitral administrator with copies to all parties and the arbitrator. It is wise to introduce as an exhibit into the record at the first arbitration hearing the written objection. The protest should be reiterated at significant junctures (i.e., before a hearing on the merits), and the respondent's continued participation in arbitration must clearly be under protest. The objection to arbitration must be clear and preferably stated in writing to all parties, to each arbitrator, and to any institutional administrator as well as to any third party who

would be bound by an award. By arbitrating under protest, a respondent may be able to preserve the defense that a controversy is not arbitrable and, later, seek to vacate an adverse award.

Even when there is no contractual right to arbitrate, a respondent cannot silently permit an arbitration to proceed without protest, lie in wait and, if an adverse the award issues, then claim that the arbitrator lacked jurisdiction or authority to decide the matter. Such behavior equitably estops a respondent from arguing (in a petition to vacate the award) that there was no agreement to arbitrate. In one example, a protest was preserved at arbitration, made again in the federal district court, and repeated once more in the federal circuit court of appeals. Reiterating this protest at each of these critical stages preserved the objection, so that the respondent did not waive the objection. ACEquip Ltd. v. American Engineering Corp., 315 F.3d 151 (2d Cir. 2003).

◆ **Illustration:** Since there is no rule-based method for arbitrating under protest, a prudent respondent who objects to arbitrability should petition the court to stay arbitration; if not, a respondent should consider filing a written protest to arbitration at these critical junctures:

- in the answering statement
- at the preliminary hearing
- at the beginning of the first hearing
- if a hearing is reopened
- in the first responsive pleading in any court action.

There is no requirement that a party who objects to arbitrability must seek a judicial stay of arbitration; indeed, an objection to arbitration can be protected by a timely, written objection. In one construction dispute, Golden Hills Resort and Azcon Construction were parties to a contract for the design and construction of a hotel convention and recreation center. After construction disputes arose, these two parties entered into a settlement agreement, releasing any claims which had accrued and agreeing not to sue or arbitrate against each another concerning the released claims. Disregarding their settlement, Azcon subsequently demanded arbitration seeking damages for Golden's breach of contract. Golden objected to the arbitrator's jurisdiction, claiming that the settlement agreement barred arbitration. In fact, Golden objected several times to arbitrating issues that were foreclosed by the settlement agreement, thus, demonstrating a clear intent not to waive a jurisdictional challenge to arbitrability. The arbitration panel ruled that claims covered by the settlement agreement would not be arbitrated, but deferred determining which claims were arbitrable until the hearing. The matter proceeded to arbitration and an award was rendered in favor of Azcon, ostensibly because the arbitration covered different issues not resolved by the settlement agreement. Although the

award otherwise was confirmed, Azcon unsuccessfully claimed that Golden had waived its objection to arbitration by participation in the proceeding. Not so, as the challenge to arbitral jurisdiction was preserved by Golden's timely objections. Moreover, Golden's participation in arbitration without first seeking a judicial stay was of no consequence. Azcon Const. Co., Inc. v. Golden Hills Resort, Inc., 498 N.W.2d 630 (S.D. 1993).

A party may not submit a claim to arbitration and then challenge the authority of the arbitration panel to act after receiving an unfavorable result. Fortune, Alsweet and Eldridge, Inc. v. Daniel, 724 F.2d 1355, 115 L.R.R.M. (BNA) 2411, 99 Lab. Cas. (CCH) ¶ 10687 (9th Cir. 1983); Shore v. Groom Law Group, 877 A.2d 86, 95 Fair Empl. Prac. Cas. (BNA) 271 (D.C. 2005), as amended, (Mar. 14, 2005).

§ 32 Consequences for jury trial

The right to a jury trial is not automatically available to determine, under the Federal Arbitration Act, whether the parties agreed to arbitrate. The party seeking a jury trial must make an unequivocal denial that an arbitration agreement exists, and must also show sufficient supporting facts. Chorley Enterprises, Inc. v. Dickey's Barbecue Restaurants, Inc., 807 F.3d 553 (4th Cir. 2015). Also, merely raising the affirmative defense of waiver does entitle a defendant to a jury trial. Doctor's Associates, Inc. v. Stuart, 85 F.3d 975 (2d Cir. 1996). If a lawsuit is filed to compel arbitration, but the defendant believes the issues are not arbitrable and, instead, should be litigated, then that defendant must unequivocally deny the existence of any contract to arbitrate and produce some evidence to undermine the existence of the purported arbitration contract. Norwest Financial Mississippi, Inc. v. McDonald, 905 So. 2d 1187 (Miss. 2005).

During the arbitration hearing itself, there is no right to a jury trial. Indeed, by agreeing to arbitrate, any reasonable person would understand that the right to a jury trial is waived. Norwest Financial Mississippi, Inc. v. McDonald, 905 So. 2d 1187 (Miss. 2005); Sydnor v. Conseco Financial Servicing Corp., 252 F.3d 302 (4th Cir. 2001) (the loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate.)

Constitutional rights may be waived. Although many state constitutions preserve a right to a jury trial in most civil disputes, a party may waive the right to have civil disputes adjudicated in a judicial forum, Pierson v. Dean, Witter, Reynolds, Inc., 742 F.2d 334, Fed. Sec. L. Rep. (CCH) ¶ 91615 (7th Cir. 1984), provided the waiver is voluntary, knowing, and intelligently made. D. H. Overmyer Co. Inc., of Ohio v. Frick Co., 405 U.S. 174, 92 S. Ct. 775, 31 L. Ed. 2d 124 (1972).

◆ **Illustration:** It was constitutional to require final and binding arbitration of attorney's fee disputes involving lawyers. Shimko v. Lobe, 103 Ohio St. 3d 59, 2004-Ohio-4202, 813 N.E.2d 669 (2004). In another case, a state law disallowed a jury trial, and mandated arbitration as the sole remedy, for all civil cases involving disputes between manufacturers and their independent sales representatives. GTFM, LLC v. TKN Sales, Inc., 257 F.3d 235 (2d Cir. 2001).

The Seventh Amendment to the U.S. Constitution does not confer the right to a trial, but only the right to have a jury hear the case once it is determined that the litigation should proceed before a court. Indeed, the Seventh Amendment has not been applied to the states through the Fourteenth Amendment. GTFM, LLC v. TKN Sales, Inc., 257 F.3d 235 (2d Cir. 2001). If claims are properly before an arbitral forum under an arbitration agreement, the right to a jury trial is waived. American Heritage Life Ins. Co. v. Orr, 294 F.3d 702 (5th Cir. 2002). By agreeing to arbitrate a statutory claim, a party does not, however, forgo the substantive rights afforded by the statute; it merely submits their resolution to an arbitral rather than a judicial forum. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234, 85 Fair Empl. Prac. Cas. (BNA) 266, 17 I.E.R. Cas. (BNA) 545, 79 Empl. Prac. Dec. (CCH) ¶ 40401, 143 Lab. Cas. (CCH) ¶ 10939 (2001).

When a party contracts to arbitrate, it cannot be said that the state has deprived that party of a jury trial since the party has voluntarily agreed to forego a civil trial. Barackman v. Anderson, 338 Or. 365, 109 P.3d 370 (2005). This voluntary action may be evident from signing documents that incorporate an arbitration clause. For example, in a North Dakota case, compelled arbitration did not violate the jury trial rights of owners of a minority interest in a partnership, who had sued the majority owners, partnership, and limited liability company (LLC). The court found it significant that one minority owner had signed the LLC's operating agreement containing an arbitration clause, and the other minority owner waived the right by pursuing claims under rights granted by the LLC's agreement. Kramlich v. Hale, 2017 ND 204, 901 N.W.2d 72 (N.D. 2017). A litigant may waive the right under the Federal Arbitration Act (FAA) to jury trial on issue of whether the litigant agreed to arbitrate disputes arising from their contract by failing to timely demand jury trial on that issue. Adams v. Citicorp Credit Services, Inc., 93 F. Supp. 3d 441, 2015 Wage & Hour Cas. 2d (BNA) 179592 (M.D. N.C. 2015) (current and former hourly employees sued the employer under the FLSA, alleging a systematic scheme of wage abuses against its hourly paid employees).

The U.S. Supreme Court has upheld a jury trial waiver (in favor of arbitrating) in a suit involving a consumer home improvement loan. There, the pertinent waiver language read:

ARBITRATION—All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract . . . shall be resolved by binding arbitration by one arbitrator selected by us with [your] consent. . . . This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C.A. § 1 . . . THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO COURT ACTION BY US. . . . The parties agree . . . that the arbitrator shall have all powers provided by the law and the contract [as well as] all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief. Bazzle v. Green Tree Financial Corp., 351 S.C. 244, 569 S.E.2d 349 (2002), judgment vacated on other grounds, 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414, 91 Fair Empl. Prac. Cas. (BNA) 1832, 148 Lab. Cas. (CCH) ¶ 59739 (2003).

◆ **Practice Tip:** A waiver of a jury trial in an arbitral contract can be emphasized by making it conspicuous and underlining the terms of the waiver in a separate and distinct arbitration clause, with the parties' signatures directly below the distinct arbitration provision. Walther v. Sovereign Bank, 386 Md. 412, 872 A.2d 735 (2005). Also using capitalized and bold letters articulates the jury trial waiver, McBurney v. The GM Card, 869 A.2d 586 (R.I. 2005), as well as writing any waiver language in plain English. Norwest Financial Mississippi, Inc. v. McDonald, 905 So. 2d 1187 (Miss. 2005).

Waiver of the right to a jury trial (by selecting arbitration over litigation) does not make an arbitration agreement unconscionable, nor does it require a court to evaluate the arbitration contract under a more demanding standard. Sydnor v. Conseco Financial Servicing Corp., 252 F.3d 302 (4th Cir. 2001). However, equitable principles can still void a jury trial waiver if a contract is one of adhesion. For example, in a Montana case, an adhesion contract required arbitration of securities disputes and disaffected a 95-year-old widow who had no bargaining power and a relative lack of sophistication when investing $352,000. The court concluded that the securities broker owed a fiduciary duty to this elderly widow to explain the consequences of an arbitration clause when opening the securities account at the brokerage firm. Kloss v. Edward D. Jones & Co., 2002 MT 129, 310 Mont. 123, 54 P.3d 1 (2002), on reh'g in part, 2002 MT 129A, 57 P.3d 41 (Mont. 2002).

§ 33 Appellate review

The appellate standard for reviewing a lower court determination that arbitration has been waived varies among federal circuit courts

of appeal, which have variously applied "clearly erroneous" and de novo review. Thus, the federal circuits are split on whether the appellate standard of review of a lower court determination that arbitration was waived is under the clearly erroneous standard, Menorah Ins. Co., Ltd. v. INX Reinsurance Corp., 72 F.3d 218 (1st Cir. 1995), or whether the review is de novo. Bianchi v. Roadway Exp., Inc., 441 F.3d 1278, 179 L.R.R.M. (BNA) 2203, 152 Lab. Cas. (CCH) ¶ 10628 (11th Cir. 2006); Leadertex, Inc. v. Morganton Dyeing & Finishing Corp., 67 F.3d 20 (2d Cir. 1995). Regardless of the applicable standard, in order to preserve an issue (other than jurisdiction) for appeal, that issue must be raised in the tribunal below; otherwise, an appeal of that issue is waived. Hess v. Reg-Ellen Machine Tool Corp., 423 F.3d 653, 35 Employee Benefits Cas. (BNA) 2301 (7th Cir. 2005).

◆ **Illustration:** In a Ninth Circuit class action lawsuit alleging violations of California labor laws, the employer did not waive the argument that a delegation clause in an arbitration agreement signed by an employee was enforceable, for purposes of the employer's appeal of an order by the district court denying its motion to compel arbitration. The employer had raised the issue of the delegation clause before the district court with sufficient specificity and vigor, as it was asserted in the motion, and, in a stand-alone section of that motion, the employer had argued that jurisdiction to decide the enforceability of the arbitration agreement rested solely with the arbitrator. Holley-Gallegly v. TA Operating, LLC, 74 F.4th 997 (9th Cir. 2023).

◆ **Observation:** Although as a general rule the appellate court cannot consider matters outside the record on appeal, an appellate court may consider relevant facts outside the record in determining whether appellants have waived their appeal—including an appeal as to whether arbitration has been waived. Nevada Gold & Casinos, Inc. v. American Heritage, Inc., 121 Nev. 84, 110 P.3d 481 (2005).

B. PROOF

§ 34 Proof, generally

As for documentary evidence to support a waiver contention, a sworn affidavit of counsel may be a suitable form of evidence to prove litigation expenses incurred in litigation. For example, a district court has ruled that competent evidence supported a finding that skilled nursing facility owners' 15-month delay in asserting an alleged right to arbitrate prejudiced the administrator of a deceased patient's estate due to expenses incurred in litigation, as would support a conclusion that the owners waived any right to arbitrate in a suit brought by the administrator for medical negligence, administrative or corporate negligence, ordinary negligence, and survival and wrongful death. The administrator's

counsel submitted a sworn affidavit averring that counsel expended approximately $75,000 in litigation and almost half of the money had been spent on preparation and taking depositions, travel, preparations for and travel to court hearings, completion of depositions that would have otherwise been unavailable in arbitration, and hundreds of hours of attorney time. Register v. Wrightsville Health Holdings, LLC, 271 N.C. App. 257, 843 S.E.2d 464 (2020).

A trial court may take judicial notice of the record in determining whether a party's substantial invoking of the judicial process accrued to an opponent's detriment or prejudice, such that it constituted a waiver of an arbitration provision. RSL Funding, LLC v. Pippins, 424 S.W.3d 674 (Tex. App. Houston 14th Dist. 2014), aff'd but criticized, 499 S.W.3d 423 (Tex. 2016).

With an explicit waiver, some courts have applied a knowing-and-voluntary standard, particularly when a statutory employment right is implicated. Prudential Ins. Co. of America v. Lai, 42 F.3d 1299, 66 Fair Empl. Prac. Cas. (BNA) 933, 65 Empl. Prac. Dec. (CCH) ¶ 43365 (9th Cir. 1994). Such a contention (that a waiver of the right to litigate was not made knowingly and voluntarily) could be countered by an evaluation of these factors:

- the clarity of the waiver
- the employee's experience, background, and education
- the time available to consider whether to sign the waiver
- the opportunity to consult with a lawyer and the employer's encouragement or discouragement of consulting with counsel
- any additional consideration exchanged for the waiver, compared with benefits to which the employee was automatically entitled
- the relative bargaining power of the parties.

Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 10 Wage & Hour Cas. 2d (BNA) 609, 150 Lab. Cas. (CCH) ¶ 34961, 2005 Fed. App. 0115P (6th Cir. 2005).

If waiver is alleged to have occurred implicitly by, for instance, a party's substantial invocation of the litigation process, then proof of the intensity of the litigation may derive from affidavit evidence from an attorney, coupled with a print out of the court docket and, perhaps, copies of the court file indicating which arbitrable issues may have been submitted for judicial determination. Proof of substantial invocation of the litigation machinery might include such documentary evidence as a list (better yet, copies) of pleadings and papers exchanged (e.g., motions and briefs), as well as the tangible results of discovery requests (whether in the form of a stack of papers, CD-ROMs or the like): visual evidence is always more compelling. If delay is a cornerstone of the argument that arbitration has been waived, then a time-line drawing may be an excellent demonstrative exhibit.

If the party resisting arbitrate complains of having incurred costs and fees that would not have been incurred in arbitration, or that may have to be duplicated if arbitration were compelled, then a statement of professional services from counsel may be just the ticket. Such a bill might be supplemented with other invoices from litigation preparation activities that have been outsourced—for example, copying services, investigators, process server fees, and similar expenses. A spreadsheet of such costs and fees is an excellent tool to summarize a collection of invoices. A good witness to present this data is the chief financial officer of the law firm that generated the bills; alternatively, the client's CFO may make a good witness but must be able to explain the need and necessity of certain expenses, which may be a challenge for the uninitiated nonlawyer.

In the unusual instances when a state statute could affect waiver issues (for example, in California or Utah), then the elements of that statute should be defined and proofs directed at each pertinent element. The applicable California statute, Cal. Civ. Code § 1668, addresses contracts that are unlawful due to policy of law: The provision, headed "Contracts contrary to policy of law" provides that: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." This statute has been judicially interpreted to prohibit enforcement of class proceeding waivers. Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003).

◆ **Observation:** The element to be proven under this statute are rather sparse. One must enter as evidence the purportedly offending contract. Then a party to that contract should be called as a witness and testimony must be elicited that the offending agreement has as its "object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." This statutory language offers a fairly broad target, limited only by the resisting party's creativity.

§ 35 Burden of proof

The party seeking to enforce an arbitration agreement bears the substantial burden of showing that the agreement exists and that its terms bind the other party. 9 U.S.C.A. §§ 1 et seq.; see Peters v. Amazon Services LLC, 2 F. Supp. 3d 1165 (W.D. Wash. 2013), aff'd, 669 Fed. Appx. 487 (9th Cir. 2016); Nelson v. Dual Diagnosis Treatment Center, Inc., 77 Cal. App. 5th 643, 292 Cal. Rptr. 3d 740 (4th Dist. 2022). The party seeking arbitration bears the burden of proving the existence of a valid arbitration agreement by a preponder-

ance of the evidence, and the party opposing arbitration bears the burden of proving any defense, such as unconscionability, by a preponderance of the evidence. Mendoza v. Trans Valley Transport, 75 Cal. App. 5th 748, 290 Cal. Rptr. 3d 702 (6th Dist. 2022).

If the party moving to compel arbitration shows the existence of a binding agreement to arbitrate, the burden shifts to the non-moving party to prove that the claims at issue are unsuitable for arbitration. Carney v. JNJ Exp., Inc., 10 F. Supp. 3d 848 (W.D. Tenn. 2014). Chelsea Morgan Securities, Inc. v. Rappaport, 3 F. Supp. 3d 791 (C.D. Cal. 2014); Ramirez v. Charter Communications, Inc., 75 Cal. App. 5th 365, 290 Cal. Rptr. 3d 429 (2d Dist. 2022), review granted, see Cal. Rules of Court 8.1105 and 8.1115 (and comment on rule 8.1115(e)(3)), 293 Cal. Rptr. 3d 813, 510 P.3d 404 (Cal. 2022) and rev'd on other grounds and remanded, 16 Cal. 5th 478, 322 Cal. Rptr. 3d 825, 551 P.3d 520 (Cal. 2024). The party seeking to compel arbitration does not meet its burden of proving the existence of an arbitration agreement when it does not present any evidence that the purported principal's conduct caused the agent or the third party to believe that the agent had the authority to bind the principal. Rogers v. Roseville SH, LLC, 75 Cal. App. 5th 1065, 290 Cal. Rptr. 3d 760 (3d Dist. 2022).

C. REMEDIES

§ 36 Damages

Damages for breach of an agreement to arbitrate is a fascinating topic, virtually unexplored in legal literature. Some interesting ground-breaking thinking along parallel lines has been undertaken as to forum selection clauses, Tan, Damages for Breach of Forum Selection Clauses, Principled Remedies and Control of International Civil Litigation, 40 Tex. Int'l L.J. 4, but there is a dearth of reported cases suggesting that damages may be awarded when a party disregards an arbitration clause and, instead, sues. When this occurs and a defendant affirmatively defends a lawsuit by claiming the right to arbitrate, the courts routinely assess the claim and, if valid, compel arbitration without any mention of damages.

Damages for breach of contract owed by a contracting party who repudiates the obligation to arbitrate by filing a lawsuit should be awarded if unnecessary attorney's fees and costs are incurred in court that would not have been incurred had the plaintiff, instead of suing, made an immediate demand for arbitration. In a case meriting damages, a plaintiff would sue while a defendant would immediately move to compel arbitration as the first responsive pleading. If arbitration is ordered, then the measure of damages equals the cost of litigation plus any consequential damages.

Assuming such damages are awardable, the next question is, who determines the sum? When there is a broad arbitration clause

providing for the submission of any and all claims arising in and out of a contract to arbitration, the answer is simple and the arbitrator can decide that issue are part and parcel of the arbitration. However, when the contractual arbitration clause narrows the arbitrator's authority to something less than the entire scope of the controversy, then a prudent defendant in litigation who immediately moves to compel arbitration should file a counterclaim seeming damages for breach of contract by the plaintiff's having filed suit. The likely outcome would be for the court to either determine those damages or, after assessing the breadth of the arbitration clause, to compel the issue of damages to arbitration.

§ 37 Punitive damages demand

The FAA preempts state laws that prohibit arbitrators from awarding punitive damages. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76, Blue Sky L. Rep. (CCH) ¶ 74017, Fed. Sec. L. Rep. (CCH) ¶ 98,619 (1995). If contracting parties include claims for which punitive damages may be awarded within the scope of their arbitrable issues, then the FAA ensures enforcement of their agreement, even if a rule of state law would otherwise have excluded such a claim from arbitration. However, some state statutes require a stepped approach before a demand may be made for punitive damages. For example, in Rhode Island a request for punitive damages requires a preliminary hearing at the trial court level before a plaintiff may make a pretrial inquiry into a defendant's private financial information. There, a plaintiff must make a prima facie showing at an evidentiary hearing that a viable claim exists to possibly award punitive damages before discovery can be undertaken of defendant's financial situation. Castellucci v. Battista, 847 A.2d 243 (R.I. 2004).

An evidentiary hearing may not be necessary in every case. There may be factual situations—as revealed through by affidavits in which a plaintiff can clearly demonstrate the viability of a punitive damage claim, thus obviating the need for a time-consuming evidentiary hearing. One such dispute, in a Rhode Island case, although the plaintiff's request for punitive damages normally would mandate a preliminary hearing in court, the parties had contracted to arbitrate. The mere request for punitive damages—with its attendant judicial hearing—did not waive the right to arbitrate. Instead, the court stayed the civil action pending an arbitral award. This stay of litigation and order compelling arbitration necessarily sent this entire dispute—punitive damages and all—to the arbitrator. This case emphasizes the fact that an arbitration contract merely shifts a dispute from one forum (judicial) to another (arbitration), thus relegating to the arbitrator to whatever role the judge may have fulfilled. McBurney v. The GM Card, 869 A.2d 586 (R.I. 2005).

§ 38 Sanctions

The authority of an arbitrator arises primarily from contract, while those of courts arise from the judiciary's constitutional role, statutory authority, and historical practice. A state's statutes and rules of civil procedure may fail to confer on arbitrators the authority to sanction a party's attorney. In a Colorado case, any benefits received by an attorney, who was the sole attorney for a client in the client's arbitration against the client's former law firm, for his representation of the client in arbitration were too indirect to estop the attorney from disclaiming the arbitrator's authority to impose sanctions against the attorney personally under the client's arbitration obligation. The court explained that the attorney did not knowingly exploit the fee agreement between the client and former law firm, which was the basis for the arbitration, by claiming direct benefits from, enjoying rights under, or seeking to enforce other provisions of it for his own benefit. Herrera v. Santangelo Law Offices, P.C., 2022 COA 93, 520 P.3d 698 (Colo. App. 2022).

IV. PRACTICE CHECKLISTS

§ 39 Checklist for assessing waiver: substantial litigation

The greater number of variables (below) which apply to a case at hand, the more likely it is that arbitration has been waived.

A proponent of arbitration engages in substantial pretrial by:

- substantially invoking the litigation process
- exchanging pleadings
- amending its complaint or counterclaim to submit arbitrable claims to the court
- filing substantive motions
- fully participating in and taking advantage of judicial discovery

  Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc., 252 F.3d 218, 2001 A.M.C. 1939 (2d Cir. 2001)
- seeking a preferential trial setting or venue
- waiting a substantial number of months before making a demand for, or moving to compel, arbitration and then only doing so right before the scheduled trial date
- negotiating a full settlement of a dispute

  Sears Roebuck & Co. v. Herbert H. Johnson Assoc., Inc., 325 F. Supp. 1338 (D.P.R. 1971)

Counsel should ascertain the governing law on whether a showing of prejudice is required to show waiver.

- It is clear that prejudice is not required if the parties' are operating under a Federal Arbitration Act (FAA). This was clarified in 2022 by the U.S. Supreme Court's decision in

Morgan v. Sundance, Inc., 596 U.S. 411, 142 S. Ct. 1708, 212 L. Ed. 2d 753 (2022). See discussion in § 23.

- If the FAA does not apply to the litigation—typically because the parties' contract chose state law instead—then state law will govern whether prejudice must be shown for a waiver of arbitration rights. In such cases, counsel may not to carefully examine choice-of-law rules.

A party resisting arbitration may be prejudiced by an opponent's invocation of the litigation process if the resisting party has:

- disclosed certain dispute resolution strategies.
- incurred significant expense, fees, costs. Coca-Cola Bottling Co. of New York, Inc. v. Soft Drink and Brewery Workers Union Local 812 Intern. Broth. of Teamsters, 242 F.3d 52, 171 L.R.R.M. (BNA) 2390, 142 Lab. Cas. (CCH) ¶ 10927 (2d Cir. 2001); Nevada Gold & Casinos, Inc. v. American Heritage, Inc., 121 Nev. 84, 110 P.3d 481 (2005).
- duplicated efforts in litigation that would have to be repeated in arbitration.

V. APPENDIX

§ 40 Sample case: Federal appellate opinion on waiver

COA Synopsis: In an Eighth Circuit case, customers brought a putative class actions against a pawnbroker, payday lender, and prepaid-card company arising from an alleged data breach. After filing a motion to dismiss for lack of standing and failure to state a claim, and after discovery was stayed, the defendants moved to compel arbitration. The district court denied the motion, finding that the defendants waived arbitration. The court of appeals affirmed, ruling that the pawnbroker, payday lender, and prepaid-card company knew of their contractual right to arbitrate putative class claims that customers asserted against them arising from the alleged data breach, weighing in favor of a finding they waived their arbitration right by failing to timely file motion to compel arbitration. The court explained that as soon as the customers signed the contracts, the pawnbroker, lender, and company had constructive knowledge of the contracts, and they admitted that the subject of arbitration arose during a pretrial conference that occurred months before they moved to compel arbitration. In re Pawn America Consumer Data Breach Litigation, 108 F.4th 610 (8th Cir. 2024).

108 F.4th 610
United States Court of Appeals, Eighth Circuit.
IN RE: PAWN AMERICA CONSUMER DATA BREACH LITIGATION

Melissa Thomas, on behalf of herself individually and on behalf of all others similarly situated; Randell Huff; Megan Murillo; Monique Derr; Paola Manzo Plaintiffs - Appellees
v.
Pawn America, Minnesota, LLC; Payday America, Inc.; PAL Card Minnesota, LLC Defendants - Appellants
Submitted: December 14, 2023
Filed: July 11, 2024

Synopsis

Background: Customers brought putative class actions against pawnbroker, payday lender, and prepaid-card company arising from alleged data breach. After filing motion to dismiss for lack of standing and failure to state a claim, and after discovery was stayed, defendants moved to compel arbitration. The United States District Court for the District of Minnesota, Patrick J. Schiltz, Chief Judge, 672 F.Supp.3d 691, denied motion, finding defendants waived arbitration. Defendants appealed.

Holdings: The Court of Appeals, Stras, Circuit Judge, held that:

defendants knew of their contractual arbitration right, and

defendants' litigation conduct waived arbitration right.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Compel Arbitration.

Appeal from United States District Court for the District of Minnesota

Attorneys and Law Firms

Counsel who presented argument on behalf of the appellants and appeared on the brief was Thomas W. Hayde, Jr., of Saint Louis, MO. The following attorney(s) appeared on the appellant brief; Douglas R. Boettge, of Minneapolis, MN., Seong Hong, of Saint Louis, MO., Shawn Tuma, of Plano, TX.

Counsel who presented argument on behalf of the appellees and appeared on the brief was Anne T. Regan, of Edina, MN. The following attorney(s) appeared on the appellee brief; Jeffrey D. Bores, of Minneapolis, MN., Nathan D. Prosser, of Edina, MN., Christopher Paul Renz, of Minneapolis, MN., Bryan L. Bleichner, of Minneapolis, MN., Lindsey LaBelle Larson, of Edina, MN., Terence R. Coates, of Cincinnati, OH., Joseph M. Lyon, of Cincinnati, OH., Gary M. Klinger, of Chicago, IL.

Before ERICKSON, MELLOY, and STRAS, Circuit Judges.

Opinion

STRAS, Circuit Judge.

This case is about what it takes to waive a contractual right to arbitration. Here, three companies spent months litigating in federal court before moving to compel arbitration. The district court[1] concluded that, by then, they had waived the right by "*substantially* invoking the litigation machinery." *Donelson v. Ameriprise Fin. Servs., Inc.*, 999 F.3d 1080, 1087 (8th Cir. 2021) (emphasis added). We reach the same conclusion.

I.

Sometime in September 2021, cybercriminals targeted a chain of pawnshops, a payday lender, and a prepaid-card company. During the attack, they uncovered customers' personal information, including full names, addresses, birth dates, and social-security numbers. Several weeks later, the companies alerted customers about the data breach, which prompted the filing of three nationwide class-action lawsuits in the District of Minnesota.

After agreeing to consolidate the cases, the companies moved to dismiss. They claimed that the customers lacked standing, *see* Fed. R. Civ. P. 12(b)(1), and that the complaint did not state a claim, *see id.* 12(b)(6). Nothing about arbitration. *See* 9 U.S.C. § 3.

Nor did they raise it over the next couple of months. Instead, the companies fully briefed the issues raised in their motion to dismiss, prepared a joint discovery plan, and requested a pretrial conference.

There is disagreement about what happened next. The companies insist that they orally requested a stay of discovery during the pretrial conference and promised to file a motion to compel arbitration. The customers, on the other hand, deny that the companies gave notice of their intent to arbitrate. Unfortunately, there is no recording or transcript of the proceedings, which the magistrate judge conducted by teleconference.

The only other clues about what happened came from the magistrate judge's docket entry and the order staying discovery. The former summarized what happened, and the latter expanded on it by discussing "the significant issues raised as to [the customers'] standing." Delaying discovery was the answer, at least until the district court had a chance to decide whether to grant the motion to dismiss. Still no mention of arbitration.

Several weeks later, the district court held a hearing on the motion to dismiss. Despite allegedly promising at the pretrial conference that a motion to compel "would be forthcoming," the companies had yet to file one. Arbitration did not come up during the hour-long hearing, not even once.

Two more months passed before the companies finally gave formal

[1]The Honorable Patrick J. Schiltz, Chief Judge, United States District Court for the District of Minnesota.

notice of their intent to arbitrate. The customers protested, so they rushed to file a motion before the parties entered mediation. They acknowledged that "timeliness may be an issue," because the customers thought the companies "ha[d] waived the[ir] right."

Following a hearing on the motion, the district court agreed. In the court's view, the companies "ha[d] no credible explanation for why, if [they] had determined [at the pretrial conference] that [they were] going to compel arbitration, [they] sat on [their] hands . . . only to decide [three months later] that it was urgent that [they] act to protect [the] right to arbitrate. That ma[de] no sense." We must decide whether their conduct during the delay amounted to waiver. *See* 9 U.S.C. § 16(a)(1)(A) (allowing an appeal to "be taken from . . . an order . . . refusing a stay").

II.

We have previously addressed what it takes to waive arbitration. *See, e.g.*, *McCoy v. Walmart, Inc.*, 13 F.4th 702, 703–04 (8th Cir. 2021); *Sitzer v. Nat'l Ass'n of Realtors*, 12 F.4th 853, 856–57 (8th Cir. 2021); *Hooper v. Advance Am., Cash Advance Ctrs. of Mo., Inc.*, 589 F.3d 917, 920–24 (8th Cir. 2009); *Kelly v. Golden*, 352 F.3d 344, 349–50 (8th Cir. 2003). This time is different, however, because of the Supreme Court's recent decision in *Morgan v. Sundance, Inc.*, 596 U.S. 411, 142 S.Ct. 1708, 212 L.Ed.2d 753 (2022). Our initial task is to determine its impact, if any, on our existing three-part test, which asks whether the party seeking arbitration (1) knew of the right; (2) acted inconsistently with it; and (3) "prejudice[d] the other party [with its] inconsistent acts." *McCoy*, 13 F.4th at 704 (second alteration in original) (citation omitted).

Morgan makes clear that we can no longer consider prejudice. The focus of waiver, after all, is on "the actions of the person who held the right," not "the effects of those actions on the opposing party." *Morgan*, 596 U.S. at 417, 142 S.Ct. 1708; *see Breadeaux's Pisa, LLC v. Beckman Bros. Ltd.*, 83 F.4th 1113, 1117 (8th Cir. 2023). Given that focus, the question boils down to whether a party has "intentional[ly] relinquish[ed] or abandon[ed] . . . a known right." *Morgan*, 596 U.S. at 417, 142 S.Ct. 1708 (quoting *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)).

"Stripped of its prejudice requirement," the remainder of our existing test answers that question. *Id.* at 419, 142 S.Ct. 1708 (noting that our "current waiver inquiry" otherwise properly "focus[es] on" the right-holder's conduct). So there is no reason to strip our test down to the studs and start over.

Nor does framing our test this way violate the Supreme Court's prohibition on "arbitration-specific procedural rules." *Morgan*, 596 U.S. at 419, 142 S.Ct. 1708. Although *Morgan* requires us to

"treat[ ] arbitration contracts like all others," it does not prevent us from translating garden-variety waiver principles into specific litigation contexts. *Id.* at 418, 142 S.Ct. 1708; *see, e.g.*, *Bd. of Regents of the Univ. of Wis. Sys. v. Phx. Int'l Software, Inc.*, 653 F.3d 448, 458 (7th Cir. 2011) (listing the kinds of litigation conduct that "waive . . . sovereign immunity"); *Phx. Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 39 (D.C. Cir. 2000) (noting that "consciously deciding to participate in . . . litigation may constitute an implied waiver of [foreign sovereign] immunity"); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199 (8th Cir. 1990) (explaining that objections to personal jurisdiction "may be waived[ ] . . . by not asserting them in a timely manner"). Focusing on litigation conduct zeroes in on the most relevant conduct without "tilt[ing] the playing field in favor of (or against) arbitration." *Morgan*, 596 U.S. at 419, 142 S.Ct. 1708.

To the extent the companies argue that state rather than federal waiver principles apply, they failed to make that argument before the district court. *See St. Paul Fire & Marine Ins. Co. v. Compaq Comput. Corp.*, 539 F.3d 809, 824 (8th Cir. 2008). In fact, if anything, they suggested otherwise during the motion-to-compel hearing, when counsel argued that the customers had not "met the[ir] burden of waiver under the *federal* jurisprudence." (Emphasis added). It is too late to change their position now. *See N. Bottling Co. v. Pepsico, Inc.*, 5 F.4th 917, 922–23 (8th Cir. 2021); *see also Cont'l Res., Inc. v. Fisher*, 102 F.4th 918, 930 (8th Cir. 2024) (describing the invited-error doctrine).

In sum, our pre-*Morgan* three-part test now has two parts, but otherwise remains the same. To evaluate whether a party has "intentional[ly] relinquish[ed] or abandon[ed]" the right to arbitration, *Morgan*, 596 U.S. at 417, 142 S.Ct. 1708 (citation omitted), courts must determine whether it (1) knew of its "existing right" and (2) acted "inconsistently with" it, *McCoy*, 13 F.4th at 704 (citation omitted). *See Schwebke v. United Wholesale Mortg. LLC*, 96 F.4th 971, 974 (6th Cir. 2024) (applying the rest of the court's "pre-*Morgan* caselaw"); *Hill v. Xerox Bus. Servs., LLC*, 59 F.4th 457, 460 (9th Cir. 2023) (explaining how *Morgan* "removed prejudice . . . as an element of waiver in the context of arbitration" but "the body of caselaw . . . applying the[ ] [other] two elements remain[ed] good law"). And one way to act inconsistently with it is to "substantially invok[e] the litigation machinery rather than promptly seek[ ] arbitration." *McCoy*, 13 F.4th at 703 (citation omitted).

III.

That is exactly what the companies did. *See id.* at 704 ("Our review is de novo, but we examine any underlying factual findings for clear error."). They all but admit to having knowledge of their contractual right to arbitrate long before they formally raised it.

Their position, after all, is that it came up during the pretrial conference. Yet it is undisputed they took no further action until months later, after the hearing on the motion to dismiss.

The district court, for its part, thought the companies knew even earlier: as soon as customers signed the contracts they drafted. From that point on, under the doctrine of constructive knowledge, they are presumed to know what was in them.[2] Claiming ignorance of a contract's contents is rarely a recipe for success. *See Parler v. KFC Corp.*, 529 F. Supp. 2d 1009, 1014 (D. Minn. 2008); *see also Messina v. N. Cent. Distrib., Inc.*, 821 F.3d 1047, 1050 (8th Cir. 2016) (holding that a party "knew of its existing right to arbitration because it possessed the arbitration agreement"). It is even more of an uphill battle when the party claiming ignorance is the one who drafted it. *See Erdman Co. v. Phx. Land & Acquisition, LLC*, 650 F.3d 1115, 1118 (8th Cir. 2011) (reasoning that the right-holding party's knowledge was "obvious from the fact that [it], a sophisticated party . . ., drafted the [c]ontract containing detailed . . . arbitration provisions, and is presumed to know its contents"); *Se. Stud & Components, Inc. v. Am. Eagle Design Build Studios, LLC*, 588 F.3d 963, 968 (8th Cir. 2009) (similar).

In any event, when the companies learned of their arbitration right is less important than what they did afterward. In the three months following the pretrial conference, they participated in an hour-long motion-to-dismiss hearing, stipulated to a discovery plan, and scheduled a mediation, which "are hardly the actions of [litigants] trying to move promptly for arbitration." *Sitzer*, 12 F.4th at 857 (citation omitted). By any measure, their actions "substantially invoke[d] the litigation machinery." *Donelson*, 999 F.3d at 1087 (citation omitted).

Consider the proceedings surrounding the motion to dismiss. Although the companies "focused on more than just the merits" by raising standing, they also sought "immediate and total victory" by arguing that the complaint failed to state a claim. *McCoy*, 13 F.4th at 704 (citation omitted). Only after they had a chance to preview the district court's thinking did they begin to push for arbitration, with mediation only a week away. Just in time to use the threat of arbitration as a powerful bargaining chip. *See Sitzer*, 12 F.4th at 856 ("If there was a possibility that the case would end in federal court, [the companies were] uninterested in switching to arbitration."); *see also Hooper*, 589 F.3d at 922 (calling this sort of gamesmanship "the worst possible reason for failing to move for

[2]Setting aside the practical difficulties that would accompany an actual-knowledge requirement, it is rarely (if ever) a condition of waiver. One example is when a party fails to raise an argument in an opening brief. In those circumstances, there has been a waiver regardless of what the party knew at the time. *See United States v. Greene*, 513 F.3d 904, 906–07 (8th Cir. 2008).

arbitration sooner" (citation omitted)).

We recognize that the chaos caused by the ransomware attack may have made the circumstances more difficult. But even if it took the companies "considerable time and effort" to locate the contracts, they have yet to explain why they "sat on [their] hands" for several months afterward. *See McCoy*, 13 F.4th at 705 (citation omitted) (requiring parties "to do all [they] could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration"). "Having followed this course, [they] must now live with the consequences." *Sitzer*, 12 F.4th at 857.

IV.

We accordingly affirm the district court's order.

§ 41 Sample form: Protesting arbitration

In an arbitration governed by the AAA rules, the following form might be used to preserve a protest to arbitration for later judicial appeal.

American Arbitration Association
In the Arbitration Between
[Name], Petitioner
and
[Name], Respondent Arbitrator

Case No. *[number]*

Protest by *[respondent/counter-petitioner]* to Arbitration

No court order has issued compelling this arbitration and the below-signed party objects to and protests the exercise of jurisdiction by the Arbitrator(s) who have no authority to decide this dispute because:

(a) the parties have no contract to arbitrate;

(b) the parties have a contract to arbitrate entitled *[contract name]* and dated *[date]*, however, disputes concerning *[describe]* are not arbitrable because *[reason(s)]*;

(c) selection of the arbitrator(s) was not accomplished according to the parties' *[contract/adopted rules/stipulation]*;

(d) the parties agreed that arbitration hearings would be held at *[place]* and not where they are schedule to occur; and

(e) *[state other reason(s)]*.

The below-signed party requests that this protest be deemed continuing in nature (so that it will not have to be reiterated at

every possible juncture). Accordingly, the below-signed party will continue to participate in this arbitration under protest and reserves its right to move to vacate, modify, correct, or clarify any award, in whole or in part, if Petitioner seeks to confirm such award.

Dated: *[ ]*.

Respondent/Counter-Respondent

§ 42 Sample petition to stay arbitration due to waiver

U.S. District Court
District of *[ ]*
Division of *[ ]*
[Name], Petitioner
vs.
[Name], Respondent
Case No. *[number]*
Hon. *[name]*
U.S. District Judge

Petition to Stay Arbitration Due to Waiver

This Petition to Stay Arbitration seeks an order staying certain arbitration proceedings for the reasons stated below.

Prior Action(s)

1. As to prior, pending or heretofore dismissed civil actions arising out of the same transaction or occurrence alleged in this Petition,

☐ there are none in this or any other state or federal, domestic or foreign court.

☐ said action(s) include(s) *[recite case numbers and judges assigned]*.

Jurisdiction and Venue

2. This Court has original jurisdiction over this action or proceeding, to grant relief under the Federal Arbitration Act § 5 and because:

☐ this case presents a federal question, namely *[recite constitutional provision, treaty, or other controlling federal law]*.

☐ there is complete diversity of citizenship among all of the Plaintiffs and all of the Defendants and the amount in controversy exceeds the present minimum requirement of $75,000.00.

3. Venue is proper in this Court because this is the federal District.

☐ where a suit or proceeding is pending involving issues that are allegedly arbitrable (9 U.S.C.A. § 3), entitled *[caption]*, case number *[number]*, assigned to Judge *[name]*.

☐ and Division which embraces *[city, state]* which is the place designated in the parties' written Agreement as the locale within the United States for all arbitration hearings and proceedings.

☐ which, save for the arbitration agreement, would have jurisdiction under Title 28 over an action or proceeding with respect to this controversy between the parties.

☐ where the *[arbitrator / majority of arbitrators]* are sitting (9 U.S.C.A. § 7).

☐ the award would otherwise be made (9 U.S.C.A. § 9).

Arbitration Demand

4. Petitioner has involuntarily been made a respondent in an arbitration proceeding pending before *[arbitral institution]* in *[city, state]*, being case number *[specify]*, assigned to arbitrator(s) *[name]* and attached is a copy of the Arbitration Demand.

Arbitration Agreement

5. While the contract to arbitrate is otherwise valid, Respondent has waived the right to arbitrate under that contract as a result of:

☐ invoking the litigation process in an action entitled *[case name]*, which is case number *[number]* and was filed on *[date]* and is pending in *[court name]* in *[city, state]* by:

☐ exchanging pleadings.

☐ amending its complaint or counterclaim to submit arbitrable claims to the Court.

☐ filing substantive motions including *[name motions]*.

☐ fully participating in and taking advantage of judicial discovery.

☐ seeking a preferential trial setting or venue.

☐ waiting *[number]* months before making a demand for, or moving to compel, arbitration and then only doing so just preceding the scheduled trial date of *[date]*.

☐ having negotiated a full settlement of dispute.

6. Petitioner has been harmed by Respondent's invocation of the litigation process because Petitioner:

☐ had to disclose certain dispute resolution strategies such as *[specify]*.

☐ incurred significant expense, fees, costs namely *[specify]*.

☐ duplicated efforts in litigation that would have to be repeated in arbitration.

Relief Requested

7. In evaluating this Petition, the Court is asked to enter a declaratory judgment determining that Respondent has waived the right to arbitrate the issues embraced in the Arbitration Demand and to enjoin Respondent from participating in this arbitration.

Dated: *[ ]*

[Attorney for petitioner]
Supporting Brief
Statement of Issues Presented

Whether Respondent has waived the right under the Arbitration Agreement to arbitrate the issues embraced by the Arbitration Demand?

Controlling Authority

The following is the controlling or most appropriate authority for the relief sought, namely the Federal Arbitration Act, including 9 U.S.C.A. § 2, which reads:

Validity, irrevocability, and enforcement of agreements to arbitrate. A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Basis for Motion

This Petition is based upon any pleadings and affidavits filed with this Petition or on file.

Statement of Facts

[State relevant facts.]

Legal Argument

Upon Petitioner's showing that the agreement to arbitrate is valid, unrevoked, and enforceable, this Court may stay the arbitration proceedings if Respondent has waived the right to arbitrate, either explicitly or implicitly. In this regard, the Court shall summarily determine the issues.

Relief Requested

Petitioner prays for this Court to proceed summarily to determine that the Arbitration Agreement is valid, unrevoked and enforceable but, however, that Respondent has waived the right to arbitrate, either explicitly or implicitly, and, therefore, to stay the arbitration proceedings.

Dated: *[ ]*

[Attorney for petitioner]

Appendix

(A) Purported Arbitration Agreement
(B) Arbitration Demand

§ 43 Sample defendants' motion to compel individual arbitration and dismiss with prejudice; brief in support

[Based, in part, on Dayana GARCIA, Plaintiff, v. FUENTES RESTAURANT MANAGEMENT SERVICES, INC. d/b/a Gloria's Restaurant; Gloria's Restaurant Las Colinas LLC d/b/a Gloria's Restaurant; Nancy Fuentes Fairview Inc. d/b/a Gloria's Restaurant; and Jose Fuentes, Defendants., 2023 WL 11871989 (N.D. Tex. 2023)]

United States District Court, *[district]*, *[division]*.

[First name] [last name], Plaintiff,

v.

[Corporate defendant], INC. d/b/a *[restaurant]*; *[restaurant location1]*, LLC d/b/a *[restaurant]*; *[restaurant location2]*, LLC d/b/a *[restaurant]*; and *[corporate owner]*, Inc. d/b/a *[restaurant]*, Defendants.

No. XXXXX.

[Date].

Defendants' Motion to Compel Individual Arbitration and Dismiss with Prejudice and Brief in Support

[Attorney name], *[state bar no. xxx]*, *[address]*, *[email address]*, Telephone: *[ ]*, Facsimile *[ ]*, for defendants.

INTRODUCTION

Named Plaintiff *[name]* broadly agreed to arbitrate claims against

Defendants *[corporate defendant]*, Inc., *[restaurant location1]*, LLC, *[restaurant location2]*, LLC, and *[corporate owner]*, Inc. (collectively, "Defendants") arising out of her employment. In breach of that agreement, she filed this putative collective action alleging Defendants violated the Fair Labor Standards Act ("FLSA") by failing to pay her minimum wage and unlawfully keeping tips pursuant to an invalid tip pool arrangement. Pursuant to Sections 3 and 4 of the Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 3, 4, Defendants move to compel *[plaintiff]*'s claims to individual arbitration and to dismiss this action in its entirety.

FACTUAL BACKGROUND

A. *[Plaintiff]*'s Employment.

Defendants are all affiliated with a family-owned, *[multiple]*-location, *[ethnic]*-themed restaurant chain. Restaurant Management, Inc. ("Management") helps operate the restaurants. App. *[ ]* Each restaurant is also operated by a separate corporate entity, and the ownership of each such entity varies. App. *[ ]*. The entity that operates the restaurant located at *[address]* "*[location 1]*" is Defendant *[restaurant location 1]*, Inc. App. *[ ]*. The entity that operates the restaurant located at *[address]* "*[location 2]*" is Defendant *[restaurant location 2]*, LLC. App. *[ ]*.

It is undisputed that Plaintiff *[name]* worked as a server at *[location 1]* and *[location 2]* at varying points from the *[season of year]* until approximately *[month, year]*. Compl., Doc. *[ ]*, Page *[ ]*, par. *[ ]*. *[Plaintiff]* began her employment as a server at *[location 2]* in *[month, year]*. App. *[ ]*. As a new employee, *[plaintiff]* received a Mutual Agreement to Arbitrate ("Arbitration Agreement") and a blank Receipt of SPD and Mutual Agreement to Arbitrate Acknowledgment ("Acknowledgment"). App. *[ ]*, App. *[ ]*. A copy of the Acknowledgment signed by *[plaintiff]*, dated *[ ]*, appears in the record at App. *[ ]*.

B. The Parties Entered Into a Mutually Binding Arbitration Agreement.

By her signature, *[plaintiff]* acknowledged "a mandatory company policy requiring that certain claims or disputes . . . must be submitted to an arbitrator, rather than a judge and jury in court." App. *[ ]*. The Arbitration Agreement provides that by starting employment or continuing to work, employees agree to resolve "Covered Claims" in arbitration. App. *[ ]*. The Arbitration Agreement is mutual, i.e., employees agree to arbitrate any claims they may have against "Company," and "Company" likewise agrees to arbitrate any claims against employees. App. *[ ]*.

"Company" is defined broadly to include certain entities identified

on Schedule A—including Fuentes Management—as well as "all employees, officers, directors, agents, franchisors, franchisees, successors, representatives, predecessors, affiliated or related entities or companies of the entity(ies) and/or person(s) listed in Schedule *[ ]*." App. *[ ]* (emphasis added); see also App. *[ ]* (Schedule *[ ]*).

The scope of the Arbitration Agreement is likewise broad, covering: all claims that Company or Claimant may have which arise from: Any injury suffered by Claimant while in the Course and Scope of Claimant's employment with Company, including but not limited to, claims for negligence, gross negligence, and all claims for personal injuries, physical impairment, disfigurement, pain and suffering, mental anguish, wrongful death, survival actions, loss of consortium and/or services, medical and hospital expenses, of drugs and medical appliances, emotional distress, exemplary or punitive damages, and any other loss, detriment or claim of whatever kind or character. App. *[ ]* (emphasis added).

Finally, and significantly, the Arbitration Agreement contains a delegation clause, which provides that: "Any question as to the arbitrability of any particular claim shall be arbitrated pursuant to the procedures set forth in this Agreement." App. *[ ]*.

Notwithstanding her Arbitration Agreement, on *[date]*, *[Plaintiff]* filed this putative collective action in federal court. Doc. *[ ]*.

ARGUMENTS AND AUTHORITIES

A. *[Plaintiff]*'s Claims are Subject to Mandatory Arbitration.

1. Standard of Review.

By its terms, the Arbitration Agreement is governed by the Federal Arbitration Act (FAA). App. *[ ]*. The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *[case citation]* (emphasis in original); see also 9 U.S.C.A. § 4. Thus, the FAA "establishes a 'liberal policy favoring arbitration' and a 'strong federal policy in favor of enforcing arbitration agreements." ' *[case citation]*. And, under the FAA, parties are free to delegate questions to an arbitrator, including questions regarding the validity and scope of the arbitration provision itself. *[case citation]*.

Generally, "[a] court makes two determinations when deciding a motion to enforce an arbitration agreement." *[case citation]*. First, whether the parties entered into a valid agreement to arbitrate, and second, whether the parties' dispute falls within the scope of that arbitration agreement. Id. If, however, the party seeking to

enforce arbitration argues there is a delegation clause, the analysis changes. Id. "[T]he court performs the first step—'an analysis of contract formation'—'[b]ut the only question, after finding that there is in fact a valid agreement, is whether the purported delegation clause is in fact a delegation clause.'" Id. (internal citations omitted); see also *[case citation]* (explaining that when there is a delegation clause, the only issue is whether there is any agreement to arbitrate any set of claims).

2. There's a Valid Agreement to Arbitrate.

"Arbitration agreements between employers and their employees are broadly enforceable in *[state]*." *[case citation]*. Under *[state]* law, "[t]he elements of a valid contract are: (1) an offer; (2) an acceptance; (3) a meeting of the minds; (4) each party's consent to the terms; and (5) execution and delivery of the contract with the intent that it be mutual and binding." *[case citation]* Furthermore, consideration is a fundamental element of any valid contract." *[case citation]*.

An at-will employee who signs an acknowledgment of an arbitration agreement and continues working for an employer with knowledge of the arbitration program accepts the terms of the arbitration agreement as a matter of law. *[case citation]*. This is just what *[plaintiff]* did here. Her signature on the Acknowledgment, App. *[ ]*, indicates she had notice of the Arbitration Agreement. And *[plaintiff]* continued to work as a server with knowledge of the Arbitration Agreement. App. *[ ]*.

The Arbitration Agreement itself memorializes the offer (to resolve claims in binding arbitration pursuant to the Agreement). App. *[ ]*. Under the terms of the Arbitration Agreement, *[plaintiff]*'s employment as a server constitutes acceptance of the agreement. See App. *[ ]* ("If Claimant receives notice prior to commencing work at Company, Claimant's commencement of work at Company shall constitute acceptance . . . . For any other Claimant, Claimant's continuation of work at Company after three days have passed from the date Claimant receives notice of this Agreement shall constitute acceptance of the terms and conditions of the Agreement.") Both parties thus consented to the Arbitration Agreement. Further, the Arbitration Agreement's essential terms are also sufficiently clear to establish a meeting of the minds. *[case citation]* (a meeting of the minds "describes the mutual understanding and assent to the agreement regarding the subject matter and the essential terms of the contract.").

Finally, there was ample consideration supporting the parties' Arbitration Agreement. Specifically, in exchange for *[plaintiff]*'s promise to submit and resolve claims through arbitration, Defendants similarly promised to submit and resolve claims through

arbitration. App. *[ ]*. This return promise to submit disputes to arbitration, as well as *[plaintiff]*'s continued employment, each independently constitutes consideration sufficient to support the parties' agreement. See, *[case citation]*, which recognizes that consideration supporting an agreement may take the form of mutual promises to submit a dispute to arbitration. (applying *[state]* law); *[case citation]* ("It is not uncommon in certain contexts for the law not to require any additional consideration beyond employment to create rights enforceable in contract. Arbitration is one example."); *[case citation]* (applying *[state]* law and holding that offer of at-will employment is valid consideration to support an arbitration agreement). Thus, the Arbitration Agreement is a valid contract under *[state]* law.

3. There's an Enforceable Delegation Clause

The Arbitration Agreement also contains a clear and unequivocal, enforceable delegation clause. App. *[ ]* (the arbitrability of any particular claim must be arbitrated under the procedures set forth in the agreement). See, e.g., *[case citation]* (identifying as a delegation clause language that stated, "*[a]*ny question as to the arbitrability of any particular claim shall be arbitrated pursuant to the procedures set forth in this Agreement"). Accordingly, it is the arbitrator—not the court—that should decide whether Plaintiffs' claims are arbitrable. *[case citation]*.

4. Arbitration Must Be On An Individual Basis

The FAA requires courts to enforce arbitration agreements according to their terms. 9 U.S.C.A. § 4; AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742, 161 Lab. Cas. (CCH) ¶ 10368 (2011). And when, as here, there is no agreement to arbitrate claims on a class or collective basis, the parties have agreed to individual arbitration only. See, e.g., Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662, 130 S. Ct. 1758, 176 L. Ed. 2d 605, 93 Empl. Prac. Dec. (CCH) ¶ 43878, 2010-1 Trade Cas. (CCH) ¶ 76982, 2010 A.M.C. 913 (2010); Lamps Plus, Inc. v. Varela, 587 U.S. 176, 139 S. Ct. 1407, 203 L. Ed. 2d 636, 2019 I.E.R. Cas. (BNA) 378178, 103 Empl. Prac. Dec. (CCH) ¶ 46261 (2019) (explaining that "[n]either silence nor ambiguity provides a sufficient basis for concluding" that the parties agreed to arbitrate on a class or collective basis). Thus, Defendants ask that the Court compel *[plaintiff]* to arbitrate her claims individually.

B. The Court Should Dismiss the Action with Prejudice.

In the Fifth Circuit, "dismissal is appropriate 'when all of the issues raised in the district court must be submitted to arbitration." ' *[case citation]* (explaining that if all claims asserted in a case are

subject to arbitration, dismissal is the proper remedy, not a stay pending arbitration). Since all the issues raised in this action must be compelled to individually arbitrate, the Court should dismiss the action. See *[case citation]* (the court compelled arbitration and dismissed the suit with prejudice.

CONCLUSION AND PRAYER

For the foregoing reasons, Defendants ask the Court to enter an order: (1) compelling Plaintiff *[name]* to individual arbitration; (2) dismissing the opt-in Plaintiffs' claims; (3) dismissing the case in its entirety with prejudice; and (4) awarding Defendants any further relief to which they may be entitled.

Respectfully submitted,
/s/ *[Attorney signature]*
[Attorney name]
[State bar no. xxx]
[Email address]
[Law firm name], LLP
[Address]
Telephone: *[ ]*
Facsimile: *[ ]*
ATTORNEY FOR DEFENDANTS

§ 44 Sample opposition to motion to compel arbitration

[Based, in part, on Teresa ARMSTRONG, individually and on behalf of all others similarly situated, Plaintiff, v. MICHAELS STORES, INC., and Does 1-100, inclusive, Defendants., 2018 WL 8667890 (N.D. Cal. 2018)]

United States District Court, *[district]*.
[First name, last name], individually and on behalf of all others similarly situated,
Plaintiff,
v.
[Defendant], INC., and Does 1-100, inclusive, Defendants.

XXXXX.

[Date].

Plaintiff *[name]*'s Opposition to Motion to Compel Arbitration

[Attorney name] (Bar No. XXXXX), *[email address]*, *[law firm*

name], *[firm address]*, Telephone *[ ]*, Facsimile *[ ]*, for plaintiff *[name]*.

Honorable *[judge name]*.

Assigned For All Purposes To The Honorable *[judge name]*, Courtroom *[ ]*

Date: *[ ]*

Time: 2:30pm

Courtroom: *[ ]*

I. INTRODUCTION

Ten months into this litigation, after removing to federal court, conducting discovery, and actively participating in litigation, defendant *[defendant]* moves to compel arbitration. As recent *[ ]* Circuit precedent makes clear *[defendant]* has waived the right to compel arbitration. Through its active participation in the litigation *[defendant]* has acted inconsistently with any right to arbitrate. *[Defendant]* has also prejudiced Plaintiff by making full use of discovery procedures available in federal court.

In addition to waiver, the arbitration provision at issue contains a requirement applicable to both parties that arbitration must be demanded "as soon as possible" after the events giving rise to the arbitration. By waiting 10 months *[defendant]* obviously has breached this provision, and under *[state]* law this is a separate reason why the motion to compel arbitration should be denied.

[Defendant] addresses these issues not by explaining its delay but by arguing that the arbitrator and not this Court should decide the issue of waiver. The *[ ]* Circuit has clearly held that whether the defendant has waived the right to compel arbitration is a gateway issue that must be decided by the Court. While *[defendant]* also argues that the arbitration provision delegates the issue of waiver to the arbitrator, the language *[defendant]* cites to falls far short of the clear and unmistakable language that is required for an effective delegation clause.

[Defendant] may argue in reply that it could not have compelled individual arbitration earlier because of *[ ]* Circuit case law (now overturned by the U.S. Supreme Court) prohibiting class action waivers in arbitration agreements under the National Labor Relations Act. That *[ ]* Circuit case law was applicable only because *[defendant]* chose to remove to federal court, the *[state]* Supreme Court had held that there was no such prohibition in the NLRA. And even under the *[ ]* Circuit case law, class action waivers which the employee can opt out of are enforceable. The arbitration provi-

sion which *[defendant]* relies on has such an opt out provision. Therefore, there is no justification for *[defendant]* to have delayed in compelling arbitration which is both a waiver under case law and a breach of the contractual requirement that arbitration be sought as soon as possible. The motion should be denied.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Complaint in this case was filed on *[date]*. ECF No. *[ ]*. On *[date]*, *[Defendant]* filed an Answer which listed arbitration as an affirmative defense. ECF No. *[ ]*. However, the Answer did not plead that Plaintiff had entered into an arbitration agreement stating instead that: "The Complaint, and each purported cause of action contained therein, is barred to the extent Plaintiff, and any purported class members she seeks to represent, agreed to submit their claims against Defendant to binding arbitration." Id. at *[ ]*.

On *[date]*, *[defendant]* removed the case to federal court. ECF No. *[ ]*. On *[date] [defendant]* filed an Answer to the First Amended Complaint. ECF No. *[ ]*. That asserted arbitration as an affirmative defense but again not pleading that Plaintiff had entered into an arbitration agreement but instead "to the extent Plaintiff, and any purported class members she seeks to represent agreed to submit their claims against Defendant to binding arbitration." Id. at *[ ]*.

[Defendant] filed a Joint Case Management Statement on *[date]*, proposing dates including for class certification. ECF No. *[ ]* The pleading notes that *[defendant]* may file a motion to compel arbitration. In that pleading *[defendant]* also stated that in a section on discovery entitled Defendant's Position that: "discovery will focus on class certification issues and the merits of Plaintiff's individual claims." Id. at *[ ]*.

Plaintiff served written discovery on *[date]* including Requests for Production, Interrogatories and Requests for Admission. *[Plaintiff's attorney]* Decl. Exhs. *[ ]*. *[Defendant]* responded on *[date]*, *[plaintiff's attorney]* Decls. Exh. *[ ]*. *[Defendant]* served written discovery including Interrogatories on *[date]* and Requests for Production on *[date]*. *[Plaintiff's attorney]* Decl. Exhs. *[ ]* and *[ ]*. Plaintiff served written responses to the Interrogatories on *[date]*and served written responses to the Requests for Production and produced documents on *[date]*. *[Plaintiff's attorney]* Decl. Exhs. *[ ]*. *[Defendant]* noticed the deposition of Plaintiff on *[date]*. *[Plaintiff's attorney]* Decl. Exh. *[ ]* Plaintiff agreed to appear on *[date]* but *[defendant]* took the deposition off calendar due to a scheduling conflict. *[Plaintiff's attorney]* Decl. Exh. *[ ]*.

III. ARGUMENT

A. The issue of waiver should be decided by this Court.

[Defendant] argues that the issue of waiver should be decided by the arbitrator not this Court. *[Defendant]* argues that the U.S. Supreme Court held in Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) that waiver is a question for the arbitrator. *[Defendant]* also argues that the arbitration provision has a delegation clause that requires that whether it waived the right to compel arbitration should be decided by the arbitrator.

As to the first argument, it is refuted by another case that *[defendant]* cites, Cox v. Ocean View Hotel Corp., 533 F.3d 1114, 103 Fair Empl. Prac. Cas. (BNA) 1560, 91 Empl. Prac. Dec. (CCH) ¶ 43272 (9th Cir. 2008), which explained that the reasoning of the Supreme Court in *Howsam* is simply inapplicable to resolving the first gateway issue: whether the parties are bound by the arbitration clause. As discussed above, in *Cox* the litigant did not concede being bound by the arbitration clause, instead contending that *Ocean View* revoked the clause through its own breach or waiver of the right to arbitrate.

The *[ ]* Circuit has more recently explained the holding of *Howsam* as follows:

In *Howsam v. Dean Witter Reynolds, Inc.*, the Supreme Court distinguished between two categories of gateway issues on motions to compel arbitration, each of which has a different presumption as to whether a court or arbitrator should decide. (Citation). The first category of gateway issues is a question of arbitrability . . . These disputes are for judicial determination unless the parties clearly and unmistakably provide otherwise. . . . In contrast the second category—"procedural" issues is presumptively not for the judge but for an arbitrator to decide. (Citation). In *Howsam*, for example, the Court held that the question as to whether a party met the arbitral forum's statute of limitations for filing a case was a procedural question that the parties would have expected the arbitrator to decide . . . ." Martin v. Yasuda, 829 F.3d 1118, 26 Wage & Hour Cas. 2d (BNA) 1240 (9th Cir. 2016).

In *Martin*, the *[ ]* Circuit specifically addressed the issue of waiver, stating that the question whether a party waived its right to arbitrate on the basis of its litigation conduct "is a question of arbitrability and is in the first category of gateway issues. . . . Accordingly under *Howsam*, the question before us is presumptively for a court and not an arbitrator to decide. . . . Every circuit that has addressed this issue—whether a district court or an arbitrator should decide if a party waived its right to arbitrate through litigation conducted before the district court—has reached the same conclusion." Id. Therefore, it is clear that ordinarily the issue of waiver is one for the district court, not one for the arbitrator.

However, gateway issues of arbitrability can be delegated to the

arbitrator but only where the arbitration agreement has language that the parties clearly and unmistakably intended to do so. *[case citation]*. Whether the parties clearly and unmistakably intended to delegate issue of arbitrability "should be viewed from the perspective of the particular parties to the specific contract at issue. What might be clear to sophisticated counterparties is not necessarily clear to less sophisticated parties or consumers." *[case citation]*.

In arguing that the arbitration provision herein delegates the issue of waiver to the arbitrator *[defendant]* points to language stating that: "Unless otherwise stated in this Agreement, the Arbitrator and not any federal, state, or local court or agency, will have exclusive authority to resolve disputes relating to the interpretation, applicability, enforceability, or formation of this agreement including, but not limited to, any claim that all or any part if this Agreement is void or voidable and pertaining to any waiver." Decl. Exh. *[ ]* at *[ ]*.

This is not a clear and unmistakable delegation for the arbitrator to decide waiver. In the context of an arbitration agreement waiver can refer to several different things. After all an arbitration agreement is a waiver of right, including the right to a jury trial and in this arbitration agreement a waiver of the right to class proceedings. The agreement expressly refers to a Class Action Waiver. Exhibit *[ ]*. at *[ ]*. A layperson certainly would not understand the term "waiver" in this context as referring to a situation where the employee files suit in court and the employer delays seeking arbitration. Further confusion and ambiguity is caused by the use of the conjunctive word "and" in the provision: "any claim that all or any part of this Agreement is void or voidable and pertaining to any waiver." An attorney familiar with arbitration agreements would probably judge that the drafter meant "or" rather than "and" here, but the literal meaning is that the clause applies to disputes that both involve a claim that the Agreement is void or voidable and which also pertain to "any waiver." Therefore, this Court should decide the issue of waiver.

B. Under the *[ ]* Circuit's *Martin* decision, it is clear that *[defendant]* has waived the right to compel arbitration.

The decision of the *[ ]* Circuit in *Martin* is dispositive on the issue of whether *[defendant]* has now waived the right to compel arbitration. As *Martin* explains: "A party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." Id. at *[ ]*.

In *Martin*, knowledge of an existing right to compel arbitration was not at issue. Id. Plaintiff believes that Defendant may argue

that it lacked the right to compel individual arbitration until *[date]* when the U.S. Supreme Court reversed the decision of the *[ ]* Circuit in Morris v. Ernst & Young, LLP, 834 F.3d 975, 26 Wage & Hour Cas. 2d (BNA) 1460, 167 Lab. Cas. (CCH) ¶ 10936 (9th Cir. 2016), rev'd, 584 U.S. 497, 138 S. Ct. 1612, 200 L. Ed. 2d 889, 211 L.R.R.M. (BNA) 3061, 27 Wage & Hour Cas. 2d (BNA) 1197, 168 Lab. Cas. (CCH) ¶ 11091 (2018) and vacated, 894 F.3d 1093 (9th Cir. 2018), which had held that class action waivers in employment agreements are prohibited by the National Labor Relations Act.

However, any inability to compel individual arbitration was a result of *[defendant]*' tactical decision to remove this case to federal court. This case was filed in the *[trial court]* of *[state]*, County of *[county]* on *[date]*. Of course, in state court, where there is no U.S. Supreme Court decision on point, the decisions of the *[state]* Supreme Court are binding. See *[case citation]*. In *[case citation]* the *[state]* Supreme Court held that the National Labor Relations Act does not prohibit class action waivers. Therefore, had *[defendant]* simply allowed the case to stay in state court *[defendant]* could have compelled individual arbitration.

Further, even under the holding of *[case citation]*, *[defendant]* likely could have compelled individual arbitration. In *Morris*, the *[ ]* Circuit reaffirmed its earlier holding in *[case citation]*, which had held that a class action waiver that the employee can opt out of does not violate the National Labor Relations Act. *Morris*, supra at *[ ]*. The arbitration provision at issue herein contains such an opt out. Decl. Exh *[ ]* (averring that employees have the right to opt out of the class action waiver). As such any argument by *[defendant]* that it could not earlier have compelled individual arbitration is unavailing.

Martin demonstrates that the other two elements of waiver, acts inconsistent with the right to compel arbitration and prejudice are present here as well. As to acts inconsistent with the right to compel arbitration under *Martin*: "This element is satisfied when a party chooses to delay his right to compel arbitration by actively litigating his case to take advantage of being in federal court." *Martin*, supra at *[ ]*. Further, "[a] statement by a party that it has a right to compel arbitration in pleadings or motions is not enough to defeat a claim of waiver." Id.

In *Martin*, supra at *[ ]*, the complaint was filed on *[date]*. The defendant employer was served on *[date]*. This was followed by litigation activity including a stipulation to extend the time to file a motion for class certification, a motion to dismiss, the filing of a Rule Joint 26(f) report, initial disclosures, written discovery propounded by plaintiff on defendant, a stipulated protective order, and a deposition of the defendant's Chief Financial Officer. Id. at *[ ]*, On *[date]* defendant filed an Answer to the Second Amended

Complaint which asserted arbitration as an affirmative defense. Id. at *[ ]*. On *[date]*, which the *[ ]* Circuit describes as *[many]* months after the start of the case, the defendant moved to compel arbitration. Id.

The *[ ]* Circuit concluded that the defendants had engaged in conduct inconsistent with their right to arbitrate. Crucially, they had spent 17 months litigating the case, which included devoting considerable time and effort to a joint stipulation structuring the litigation; filing a motion to dismiss on a key merits issue; entering into a protective order; answering discovery; and preparing for and conducting a deposition. The defendants in *Martin* did not even note their right to arbitration until almost a year into the litigation, and did not move to enforce that right until well after that time. Indeed, 14 months into the litigation they told the district judge and opposing counsel that they were likely better off in federal court. The court in *Martin* agreed with the district court that the totality of those actions satisfies that element. Id. at *[ ]*.

As shown in the procedural history set forth above, *[defendant]* actively litigated this case as did the defendant in *Martin* waited for more than a year to move to compel arbitration. *[Defendant]* will no doubt point to differences such as the fact that there was a deposition in *Martin* and the fact that *[defendant]* first mentioned arbitration earlier than the *Martin* defendant did. But there are other differences that make *[defendant]*' conduct more indicative of waiver than in *Martin*. *[Defendant]* removed the case to federal court. This is a "presumptive waiver" of the right to arbitrate. *[case citation]*. *[Defendant]* did not just respond to written discovery it propounded its own written discovery. And *[defendant]* noticed the deposition of Plaintiff (who cleared her schedule to appear). Indeed, *[defendant]* affirmatively stated its intention to use the processes of the federal court to obtain discovery before potentially seeking to arbitrate. ECF No. *[ ]* at *[ ]*: "*[Defendant]* anticipates filing a motion to compel arbitration and a motion for summary judgment after conducting discovery." But *[defendant]* does not have the right to use litigation to obtain discovery it wants and only then compel arbitration. As another district judge in this district has said: "The courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration." *[case citation]* Therefore, this Court should find that the element of conduct inconsistent with the right to arbitrate is met.

As to the element of prejudice, in *Martin*, the *[ ]* Circuit explained as follows:

To prove prejudice, plaintiffs must show more than self-inflicted wounds that they incurred as a direct result of suing in federal court contrary to the provisions of an arbitration agreement. . . .

Such would include costs incurred in preparing the complaint, serving notice or engaging in limited litigation regarding issues directly related to the complaint's filing, such as jurisdiction or venue. In contrast, in order to establish prejudice, the plaintiffs must show that, as a result of the defendants having delayed arbitration, they incurred costs that they otherwise would not have incurred, that they would be forced to relitigate an issue on the merits on which they would have already prevailed in court, or that defendants have received an advantage from litigating in federal court that they would not have received in arbitration. . . . *[a]* plaintiff can show prejudice if the opposing party has gained information about the other side's cases that could not have been gained in arbitration."

Here, *[defendant]* plainly used this federal court litigation to obtain information which would not have been available in arbitration. Interrogatory No. 1 asks whether Plaintiff has ever filed for bankruptcy. Plaintiff responded in a verified response that she had not. *[Plaintiff's attorney]* Decl. Exh *[ ]*. Interrogatory No. *[ ]* asks Plaintiff to identify her employers prior to *[defendant]*. Plaintiff answered this in a verified response. Id. Interrogatory No. *[ ]* asks Plaintiff to explain the basis for her vacation pay claim. Plaintiff answered this in a verified response. Id. *[Defendant]* also propounded requests for production, and Plaintiff responded and produced documents. *[Plaintiff's attorney]* Decl Exhs. *[ ]* and *[ ]*. These documents included *[many]* pages of Plaintiff's handwritten notes regarding her employment with and claims against *[defendant]*. *[Plaintiff's Attorney]* Decl. Exh. *[ ]*. Plaintiff will be unfairly prejudiced if *[defendant]* is permitted to use federal discovery rules to obtain this information but then can compel arbitration.

C. *[Defendant]* has also breached the arbitration agreement and therefore forfeited the right to compel arbitration.

In addition to waiver, the arbitration provision herein contains a specific requirement that arbitration be sought within the applicable statute of limitations and "as soon as possible" after the events giving rise to the claim: "Both parties must make a demand before the deadline (statute of limitations) for the claim has passed. The parties should make their Request as soon as possible after the event, or events in dispute, so that arbitration may take place quickly." Decl. Exh. *[ ]* at *[ ]*.

[Defendant], in waiting for more than 10 months after this lawsuit was filed, has certainly not complied with its obligation to seek arbitration "as soon as possible." This breach of a contractual deadline to seek arbitration renders the arbitration provision unenforceable by *[defendant]* under California law.

For example, in *[case citation]*, the parties entered into an agree-

ment to arbitrate a pending dispute and provided that: "in no event shall such a demand *[for arbitration]* be filed later than *[date]*." The plaintiff failed to seek arbitration by the contractual deadline. In that case, the *[state]* Supreme Court held that when a contractual deadline to arbitrate is not followed, the right to arbitrate is lost regardless of the parties' state of mind or any prejudice: "Plaintiffs assert that a determination of waiver requires an evaluation of (1) the state of mind of the party alleged to have waived arbitration, and (2) the extent of prejudice to the other party. We disagree as we shall discuss below." Id. at *[ ]*. The *[state]* Supreme Court went on to explain: "When, as here, the parties have agreed that a demand for arbitration must be made within a certain time, that demand is a condition precedent that must be performed before the contractual duty to submit the dispute to arbitration arises. . . . A contrary conclusion would undermine the law of contracts by vesting in one contracting party the power to unilaterally convert the other contracting party's obligation into an independent unconditional obligation notwithstanding the terms of the agreement." Id. at *[ ]*.

Plaintiff anticipates that *[defendant]* may argue that this rule is inapplicable here because the arbitration agreement does not have a specific deadline to submit a demand for arbitration by but instead requires that it be done "as soon as possible." But in Platt Pacific, the California Supreme Court cited approvingly to the decision of the court of appeal in *[case citation]*, which found breach when the demand was not filed as contractually required "within a reasonable time after cause arose." Therefore, this rule applies equally to a provision requiring that arbitration be demanded "as soon as possible." In any event, *[defendant]* drafted the arbitration agreement and any uncertainty caused by the lack of a specific deadline should be held against *[defendant]* not Plaintiff. And this is not a close case as to whether *[defendant]* demanded arbitration "as soon as possible."

Since the contract expressly requires that arbitration must be demanded as soon as possible, and *[defendant]* certainly could have demanded arbitration when it was served with the Complaint rather than waiting for 10 months, the motion should be denied.

V. CONCLUSION

The motion to compel arbitration should be denied.

Dated: *[ ]*

[Law firm name]
[Attorney name]
Attorneys for Plaintiff *[name]*

CAUSE OF ACTION AGAINST SELLER OR MANUFACTURER OF VEHICLE FOR MISREPRESENTING EMISSIONS

by John J. Dvorske, J.D., M.A.[*]

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ARTICLE OUTLINE

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[*]John Dvorske is an independent legal researcher and writer. He is a graduate of the University of Kansas School of Law and was on the editorial board of the Kansas Journal of Law and Public Policy for its first two years. He also worked as an editor at West Publishing for six years. He lives with his family in Lawrence, Kansas. He can be contacted at j.dvorske@gmail.com.

CAUSE OF ACTION BY INMATE UNDER RELIGIOUS FREEDOM RESTORATION ACT OF 1993, 42 U.S.C.A. §§ 2000BB ET SEQ., OR RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000 (RLUIPA), 42 U.S.C.A. §§ 2000CC-1 ET SEQ., FOR INTERFERENCE WITH EXERCISE OF RELIGION

Cecily Fuhr, J.D.[*]

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ARTICLE OUTLINE

I. INTRODUCTION

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[*]Cecily Fuhr is a member of the New York bar, specializing in employment law and civil litigation. A former attorney editor at Thomson Reuters, Ms. Fuhr has published a number of legal articles and guides for practitioners, most recently including Cause of Action for Interference with Prospective Business Advantage, 110 Causes of Action 2d 263; Cause of Action Challenging Enforcement of Noncompetition Covenant in Employment Contract, 109 Causes of Action 2d 245; Cause of Action by Airline Employee for Violation of State or Federal Wage and Hour Laws, 106 Causes of Action 2d 119; Proof of Establishment of Public Easement by Prescription, 208 Am. Jur. Proof of Facts 3d 371; Proof of Suitability of Work—Unemployment Compensation, 203 Am. Jur. Proof of Facts 3d 75; Proof of Standing under Americans with Disabilities Act, 42 U.S.C.A. §§ 12181 et seq., in Nonemployment Architectural Barrier Litigation, 201 Am. Jur. Proof of Facts 3d 265; Litigation of Crime-Fraud Exception to Attorney-Client Privilege, 180 Am. Jur. Trials 467; and Litigation of Criminal Prosecutions for Treason, Insurrection, and Seditious Conspiracy, 179 Am. Jur. Trials 435. She received a B.A. with honors from Oberlin College and a J.D. with high honors from the University of Washington School of Law.

II. SUBSTANTIVE LAW OVERVIEW

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COA ACTION GUIDE

PRIMA FACIE CASE

- To establish a prima facie case in an action by an inmate for violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA) or the Religious Freedom Restoration Act (RFRA), the plaintiff must prove that:
  (1) the plaintiff was engaged or wished to engage in religious activity [§ 5]; and
  (2) the defendant's policies or actions have substantially burdened that activity [§ 6].

DEFENSES

- A defense against an inmate's RLUIPA or RFRA claim may be established by proof that:
  (1) the governmental entity's actions were the least restrictive means of furthering a compelling governmental interest [§§ 13, 14]; or
  (2) the plaintiff failed to exhaust available administrative remedies [§ 18].

PERSONS ENTITLED TO BRING ACTION

- An action under RLUIPA or RFRA may be brought by an affected individual, or by an association or organization representing affected individuals. RLUIPA actions may also be brought by the United States acting via the Department of Justice [§ 15].
- In cases where the complained-of policy or action affects the religious exercise of a significant number of persons, the action may be brought on a class basis [§§ 16, 33].

V. APPENDIX

COA ACTION GUIDE

PRIMA FACIE PETITION

- The petitioner seeking to expunge a juvenile record must show that the statutory requirements for juvenile expungement are complied with [§§ 4, 5];
- This may include:
  (1) whether the juvenile has received a governmental pardon [§ 6];
  (2) whether the legislative policy provides for expungement of juvenile records [§ 7];
  (3) whether the statute allows expungement of juvenile records when juvenile fines and costs remain unpaid [§ 8];
  (4) whether the statute allows for multiple adjudications of delinquency or applies to specific juvenile proceedings [§ 9];
  (5) whether the statute allows the expungement of juvenile deoxyribonucleic acid (DNA) [§ 10];
  (6) whether there is a change of circumstances sufficient to overcome the doctrine of res judicata [§ 11];
  (7) such statutory factors as the petitioner's date of birth, the petitioner's date of arrest; the statute or statutes and offense or offenses for which petitioner was arrested and of which petitioner was convicted, the original indictment, summons, or complaint number, the petitioner's date of conviction or date of disposition of the matter if no conviction resulted, and the court's disposition of the matter and the punishment imposed [§ 12];
  (8) whether the juvenile conduct would have constituted a crime if committed by an adult [§§ 13, 14]; would have constituted a disorderly or petty disorderly persons offense if committed by an adult [§§ 13, 15]; would have constituted an ordinance violation if committed by an adult [§§ 13, 16]; or was for a drug offense [§§ 13, 18];
  (9) the amount of time elapsed since the juvenile conduct or adjudication and whether the juvenile