University of Miami Law Review

Volume 77 | Number 4 Article 4

6-5-2023

Beware of Testing the Waters: Wading Into Litigation Could Cost the Company Its Arbitration Right

Susan L. Shin
Weil, Gotshal & Manges LLP

Pravin R. Patel
Weil, Gotshal & Manges LLP

Nicole Comparato
Weil, Gotshal & Manges LLP

Katheryn Maldonado
Weil, Gotshal & Manges LLP

ARTICLES

Beware of Testing the Waters: Wading Into Litigation Could Cost the Company Its Arbitration Right

SUSAN L. SHIN, PRAVIN R. PATEL, NICOLE COMPARATO, & KATHERYN MALDONADO*

The following situation may sound all-too-familiar for general counsel: a former employee files a lawsuit against the company, despite the existence of a binding arbitration clause in the employment contract. Now, the company must make an important decision. Should it engage in the suit, perhaps move to dismiss, or should it immediately move to compel arbitration and get out of court? This Article discusses the Supreme Court's May 23, 2022 unanimous opinion in Morgan v. Sundance*, which involved this very factual scenario, and seemingly could make it easier for courts to find that the moving party has waived its right to arbitration by engaging in litigation because prejudice is no longer part of the equation. Accordingly, the answer to the question*

* Susan L. Shin is a first-chair trial lawyer and partner in Weil, Gotshal & Manges LLP's Complex Commercial Litigation practice group with extensive experience in complex disputes in state and federal courts and arbitration proceedings; Pravin R. Patel is a counsel in Weil's Complex Commercial Litigation practice group with vast experience in nationwide and multi-state putative class actions and multidistrict litigation, along with significant experience in handling complex commercial disputes more generally; Nicole Comparato is a senior associate in Weil's Complex Commercial Litigation practice group with significant experience handling multi-faceted disputes through discovery, jury trial, and final arbitration hearing; Katheryn Maldonado is an associate in Weil's Complex Commercial Litigation practice group with experience in various commercial disputes, including antitrust, trade secret, and class action disputes.

above requires careful analysis of a company's strategic options at the outset of the case. If the company decides that arbitration is the preferred and more favorable path, it likely should invoke that right early to avoid the risk of losing the right to arbitrate altogether.

INTRODUCTION

Morgan v. Sundance resolved a longstanding circuit split and simplified the test that courts apply to determine whether a party has waived its arbitration right.[1] For decades, nine circuits—including the Eleventh Circuit—invoked the "strong federal policy favoring arbitration," holding that a party only waives its arbitration right by engaging in litigation if its conduct prejudices the other side.[2] Only

[1] Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1711 (2022).
[2] *Id* at 1712.

two circuits rejected that rule.[3] The Supreme Court joined those two circuits with its decision in *Sundance*, reversing the Eighth Circuit's application of the waiver test requiring prejudice, and remanding it for the Eighth Circuit to consider whether the party seeking arbitration relinquished its right to arbitrate.[4] The primary justification for the Supreme Court's decision was that an arbitration-specific rule is untenable because—in any other context—a federal court deciding whether a litigant waived a right does not ask if its actions caused harm.[5] The impact of this ruling will have far-reaching implications, and this Article addresses practical and strategic considerations moving forward in light of this pivotal decision.

Part I of this Article begins by describing the facts, context, and legal underpinnings of the *Sundance* decision, interpreting the Court's analysis and the policy reasons underlying its decision.[6] It analyzes how courts have applied the decision since the ruling, revealing there is still some uncertainty regarding its scope.[7] Part II dissects the standard for whether a party has "substantially participated" in litigation, as this may be the main question courts will ask in determining whether the party moving to compel arbitration "acted consistently" with its arbitration right.[8] It also details why parties seeking to enforce their arbitration right should proceed with caution as to the steps they take in a litigation.[9] Part III discusses what, if any, impact the *Sundance* decision will have on contracts containing anti-waiver provisions, and whether such disputes are circumvented by including such a clause.[10] Part IV touches on the procedural differences across jurisdictions for filing of motions to compel arbitration.[11] Finally, the Conclusion offers practical tips for practitioners on how best to respond to these tricky situations.[12]

---

3 *Id.*
4 *Id.* at 1714.
5 *Id.* at 1711.
6 *See* discussion *infra* Part I.
7 *See* discussion *infra* Part I.
8 *See* discussion *infra* Part II.
9 *See* discussion *infra* Part II.
10 *See* discussion *infra* Part III.
11 *See* discussion *infra* Part IV.
12 *See* discussion *infra* Conclusion.

I. THE *SUNDANCE* DECISION AND ITS SCOPE MOVING FORWARD

A. *Factual Circumstances of the* Sundance *Dispute*

The facts underlying the *Sundance* decision form the basis of the hypothetical that began this Article. Robyn Morgan, the petitioner, worked as an hourly employee at one of defendant Sundance's Taco Bell franchises.[13] When she applied for the job, she signed an agreement to "use confidential binding arbitration, instead of going to court" to resolve any employment disputes that may arise.[14] She alleged that at various points during her three years of employment, Sundance failed to pay her for all hours worked, including overtime wages for hours worked over forty per week.[15] Based on those claims, she filed a nationwide collective and class action against Sundance in federal court in the Southern District of Iowa for violations of the Fair Labor Standards Act, alleging Sundance flouted the Act's requirements to pay overtime wages.[16] Rather than moving to compel arbitration, Sundance "initially defended itself as if no arbitration agreement existed."[17]

First, Sundance moved to dismiss the suit on grounds that it was duplicative of another collective action suit and suggested that Morgan join that suit with the other Taco Bell employees or file her suit on an individual basis.[18] Morgan did not take that suggestion and the district court denied Sundance's motion.[19] Second, after the court denied its motion, Sundance answered the complaint and asserted fourteen affirmative defenses that did not include the assertion that the dispute was governed by an arbitration provision.[20] Third, Sundance engaged in a joint mediation with the named plaintiffs repre-

---

[13] *Sundance, Inc.*, 142 S. Ct. at 1711.

[14] *Id.*

[15] Morgan v. Sundance, Inc., No. 4:18-CV-00316-JAJ-HCA, 2019 WL 5089205, at *1 (S.D. Iowa June 28, 2019), *rev'd and remanded*, 992 F.3d 711 (8th Cir. 2021), *vacated and remanded*, 142 S. Ct. at 1708.

[16] *Sundance*, 142 S. Ct. at 1711.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

senting the Taco Bell employees in both collective actions in an attempt to reach a settlement.[21] Leading up to the mediation, there were various communications, including about scheduling and informal discovery between the parties, and Morgan claimed that Sundance still had not mentioned the existence or applicability of an arbitration agreement between the parties.[22] The mediation was unsuccessful as to Morgan's action, but the other collective action settled.[23] Finally, nearly eight months after Morgan filed suit, Sundance moved to stay the litigation and compel arbitration under Sections 3 and 4 of the Federal Arbitration Act ("FAA").[24] Sundance claimed that its decision was triggered by the Supreme Court's decision in *Lamps Plus, Inc. v. Varela*, which provided "significant clarification" regarding "the availability of class arbitration," prompting it to point out that the existing arbitration provision in Morgan's contract was silent on the availability of class arbitration.[25] Sundance, however, did not dispute that the first time Sundance notified Morgan's counsel of an existing arbitration agreement was eight months into the litigation.[26]

B. *Legal Underpinnings of the Various* Sundance *Rulings*

At the district court level, the court determined that the "real fighting issue" was not whether Sundance met the requirements for enforcement of the parties' arbitration agreement, which is where Sundance had focused its briefing, but rather, whether Sundance waived its right to compel arbitration.[27] Morgan argued that Sundance waived its right to arbitrate by waiting eight months to assert its right to compel arbitration, yet engaging in other litigation activities, and that she was prejudiced because of the work and expense of preparing to address class-wide claims and damages.[28] Sundance responded that it did not act inconsistently with its right to compel

---

[21] *Id.*

[22] Morgan v. Sundance, Inc., No. 4:18-CV-00316, 2019 WL 5089205, at *3 (S.D. Iowa June 28, 2019), *rev'd and remanded*, 992 F.3d 711 (8th Cir. 2021), *vacated and remanded*, 142 S. Ct. at 1708.

[23] *Sundance*, 142 S. Ct. at 1711.

[24] *Id.*

[25] *Sundance*, 2019 WL 5089205, at *3.

[26] *See id.*

[27] *Id*.

[28] *Id.*

arbitration and Morgan had not been prejudiced because Sundance's actions were limited and the case had made limited progress.[29] Sundance also emphasized it was Morgan's decision to engage in expensive and time-consuming activities ahead of the mediation.[30]

Applying Eighth Circuit precedent, the district court held that a party waives its contractual right to arbitration if it (1) "knew of the right," (2) "acted inconsistently with that right," and—most pertinent here—(3) "prejudiced the other party by its inconsistent actions."[31] The district court acknowledged Sundance knew of its right and found that Sundance acted inconsistently with its right to arbitrate by, among other things, seeking an extension of time to respond to the Complaint, filing a motion to dismiss, filing an answer, and participating in discussions regarding scheduling issues.[32] The district court also found that the prejudice requirement had been satisfied because "Sundance's delay caused Morgan reasonably to believe that her class-wide claims would proceed to class-wide mediation and, if mediation failed, to 'litigation' in federal court."[33] Accordingly, the district court denied the motion to compel arbitration.[34]

On appeal, in a 2–1 decision, the Eighth Circuit reversed and remanded.[35] While the Eighth Circuit mostly agreed with the district court's findings as to the first and second elements of the waiver test, it found "the district court erred in determining Sundance waived its right to arbitrate because Sundance's conduct, even if inconsistent with its right to arbitration, did not materially prejudice Morgan."[36] The Eighth Circuit explained that four months of Sundance's delay entailed the parties waiting for the disposition of Sundance's motion to dismiss, during which the parties did not conduct

---

[29] *Id.*

[30] *Id.*

[31] *Id.* at *4–6.

[32] *Id.* at *6

[33] *Id.* at *8.

[34] *Id.*

[35] Morgan v. Sundance, Inc., 992 F.3d 711, 715 (8th Cir. 2021), *vacated and remanded*, 142 S. Ct. 1708 (2022).

[36] *Id.* at 714.

discovery, and most of Morgan's work up to that point had not focused on the merits of the case.[37] For those reasons, the Eighth Circuit held Morgan was not prejudiced by Sundance's litigation strategy, and absent the showing of prejudice, "Sundance did not waive its contractual right to invoke arbitration."[38]

Judge Colloton dissented with the Eighth Circuit's opinion.[39] He criticized the panel's holding because the reversal was primarily grounded upon a determination that Morgan was not prejudiced.[40] However, Judge Colloton wrote that "[p]rejudice is a debatable prerequisite," given that "'in ordinary contract law, a waiver is normally effective without proof of consideration or detrimental reliance.'"[41] Indeed, the dissent cites to the two circuits—the Seventh and District of Columbia—as allowing a "finding of waiver of arbitration without a showing of prejudice."[42] In her petition to the Supreme Court for certiorari, Morgan emphasized that the Eighth Circuit joined eight other federal courts in "grafting" the prejudice requirement onto otherwise regular waiver analysis, highlighting the need for the Supreme Court to decide the circuit split once and for all.[43]

C. *The Supreme Court's* Sundance *Holding*

The Supreme Court's "sole" holding was explicitly narrow: a court "may not make up a new procedural rule based on the FAA's 'policy favoring arbitration.'"[44] Because the prejudice requirement applied by the Eighth Circuit (and nine of its sister circuits, including the Eleventh) is not a feature of federal waiver law generally, the

---

[37] *Id.* at 715.

[38] *Id.*

[39] *Id.* (Colloton, J., dissenting).

[40] *Id.* at 716–17 (Colloton, J., dissenting).

[41] *Id.* at 716 (Colloton, J., dissenting) (quoting Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 390 (7th Cir. 1995)).

[42] *Id.* at 716–17 (Colloton, J., dissenting).

[43] Petition for a Writ of Certiorari at i, Morgan v. Sundance, Inc., 142 S. Ct. 1708 (2022).

[44] *Sundance*, 142 S. Ct. at 1714.

Court rejected its inclusion as an additional element in the arbitration context.[45] But the Court did not make an actual determination as to whether Sundance knowingly relinquished the right to arbitrate by acting inconsistently with its right, leaving that to the Eighth Circuit to resolve on remand.[46]

The Supreme Court explained that the FAA's policy favoring arbitration "'is merely an acknowledgment of the FAA'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.'"[47] The key phrase in that statement is "same footing." As the Court reiterated, arbitration agreements should be *as enforceable* as other contracts, not more so, and not less so.[48] Thus, because "the usual federal rule of waiver does not include a prejudice requirement[,]" prejudice should not be a condition to a finding that a party waived its right to stay litigation or compel arbitration under the FAA.[49] The Court held that the Eighth Circuit's waiver test should then be "stripped of its prejudice requirement," meaning that the inquiry would focus on Sundance's conduct.[50] The Supreme Court vacated the Eighth Circuit's judgment and remanded for further proceedings.[51]

On December 15, 2022, before the parties were to submit supplemental briefing on how the Supreme Court's decision impacted their arguments, the parties settled.[52]

---

[45] Peter Cho, *U.S. Supreme Court Eliminates Prejudice Requirement from Waiver of Arbitration Rights Calculus*, A.B.A (June 8, 2022), https://www.americanbar.org/groups/litigation/committees/class-actions/practice/2022/morgan-v-sundance/; *Sundance*, 142 S. Ct. at 1712–13.

[46] *Sundance*, 142 S. Ct. at 1714.

[47] *Id.* at 1713 (quoting Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 302 (2010)).

[48] *Id.; see also* Nat'l Found. for Cancer Rsch. v. A.G. Edwards & Sons, Inc., 821 F.2d 772, 774 (D.C. Cir. 1987) (citing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218–19 (1985)) ("The Supreme Court has made clear" that the FAA's policy "is based upon the enforcement of contract, rather than a preference for arbitration as an alternative dispute resolution mechanism").

[49] *Sundance*, 142 S. Ct. at 1714.

[50] *Id.*

[51] *Id.*

[52] Sealed Settlement Agreement, Morgan v. Sundance, Inc., No. 4:18-CV-00316-JAJ-HCA, 2019 WL 5089205 (S.D. Iowa June 28, 2019).

D. *Applying* Sundance *Moving Forward*

District courts have already begun to grapple with how to apply *Sundance*'s holding, particularly in light of its apparent narrowness, and this challenge for clarity will continue to play out in the courts for months and years to come.[53] Does *Sundance* tell the circuits that they simply strip away the prejudice requirement and apply the rest of their previous arbitration waiver test as-is? Or does *Sundance* tell the circuits to standardize their arbitration waiver test to be identical to waiver for any other contractual right, including the removal of prejudice *and* anything else that is inconsistent with the general test? Courts have answered both ways[54] and only time will tell which interpretation becomes the prevailing view.[55]

One federal court in the Eleventh Circuit, for example, has already opined that "[t]he Supreme Court's opinion is admittedly unclear on its precise scope."[56] In *Soriano*, the court explained that the Supreme Court's instruction on remand for the Eighth Circuit to

---

[53] Deng v. Frequency Elecs., Inc., No. 21-CV-6081, 2022 WL 16923999, at *6 (E.D.N.Y. Nov. 14, 2022); Vollmering v. Assaggio Honolulu, LLC, No. 22-CV-00002, 2022 WL 6246881, at *12 (S.D. Tex. Sept. 17, 2022), *report and recommendation adopted*, No. 22-CV-00002, 2022 WL 6250679 (S.D. Tex. Oct. 6, 2022).

[54] *Compare Deng*, 2022 WL 16923999, at *6 ("The question is – what's left? The ready answer is that if Morgan strips away one out of the three factors, then there are two factors left. . . . Although Judge Woods did not determine whether the stripped-down arbitration standard or the common law standard should apply (finding that neither standard was satisfied), my conclusion based on Morgan is that applying waiver to an arbitration agreement should be the same as applying waiver in the context of any other kind of contract."), *with Vollmering*, 2022 WL 6246881, at *12 ("In the absence of any intervening Fifth Circuit authority dictating otherwise, the Court follows Morgan and concludes that the surviving test for waiver in this circuit is the remainder of Fifth Circuit's prior test: whether the party has substantially invoked the judicial process." (citations omitted)).

[55] *See* Herrera v. Manna 2nd Ave. LLC, No. 1:20-CV-11026-GHW, 2022 WL 2819072, at *8 (S.D.N.Y. July 18, 2022) ("At some point, courts may be forced to interpret whether Morgan instructs courts to adopt general waiver analysis, or instead instructs courts to strip any prejudice requirement from their existing analysis of waivers of the right to arbitration under the FAA. However, although the former seems most consistent with Morgan's reasoning, the Court need not do so today.").

[56] Soriano v. Experian Info. Sols., Inc., No. 2:22-CV-197, 2022 WL 6734860, at *2 (M.D. Fla. Oct. 11, 2022), *objections overruled*, No. 2:22-CV-197, 2022 WL 17551786 (M.D. Fla. Dec. 9, 2022).

"strip" its waiver test "'of its prejudice requirement[,]'" and then to ask whether the defendant "'knowingly relinquish[ed] the right to arbitrate by acting inconsistently with that right'" is conflicting.[57] That is because the "'Eighth Circuit's test for general waivers of contract rights differs from its test for waivers of the right to arbitrate—even when the latter is stripped of its prejudice requirement.'"[58] As further explained in another decision, the Eighth Circuit's general contractual waiver test holds that a waiver requires "intentional relinquishment of a known right," but its previous test for waiver to arbitrate considers whether a party "knowingly relinquished the right by acting inconsistently with that right."[59] While this may be a distinction without a difference resulting in the same outcome, the circuits may still deal with some inconsistency across standards.

The same inconsistency could present itself with the Eleventh Circuit's test. Previously, the Eleventh Circuit used a two-prong test to decide whether there was an arbitration waiver: (1) the party seeking arbitration substantially participates in litigation and (2) the participation results in prejudice to the opposing party.[60] The *Soriano* court explained that "[t]he parties disagree about what is left of the Eleventh Circuit's test following *Morgan*" because Soriano claimed that the Eleventh Circuit does not apply the substantial participation standard for other contractual rights.[61] Another court in the Eleventh Circuit determined that the post-*Sundance* test is whether the party "'substantially invoke[d] the litigation machinery prior to demanding arbitration. . . .'"[62] Accordingly, as the *Soriano* court stated, "[w]hat remains of the Eleventh Circuit's waiver test is best left for another day."[63] This will likely be the case for other circuits moving forward as well.

---

[57] *Id.* (quoting *Sundance*, 142 S. Ct. at 1714).

[58] *Id.* (quoting *Herrera*, 2022 WL 2819072, at *7).

[59] *Herrera*, 2022 WL 2819072, at *6 (citations omitted).

[60] *Soriano*, 2022 WL 6734860, at *2 (quoting In re Checking Acct. Overdraft Litig., 754 F.3d 1290, 1294 (11th Cir. 2014)).

[61] *Id.*

[62] Warrington v. Rocky Patel Premium Cigars, Inc., No. 2:22-CV-77-JES-KCD, 2022 WL 3025937, at *2 (M.D. Fla. Aug. 1, 2022) (quoting Krinsk v. SunTrust Banks, Inc., 654 F.3d 1194, 1201 (11th Cir. 2011)).

[63] *Soriano*, 2022 WL 6734860, at *3.

II. A HEIGHTENED EMPHASIS ON THE MEANING OF "*SUBSTANTIAL* PARTICIPATION" AND INTENT

As explained above, the Supreme Court's decision did not determine whether Sundance had in fact waived its right to arbitrate in the above scenario, nor did it articulate exactly what the arbitration waiver test is moving forward.[64] It only held that adding a prejudice requirement to the waiver equation created an arbitration-specific rule that is inappropriate.[65] The Court therefore left open the issue of the precise formula constituting waiver of the right to arbitrate.[66] Assuming that the test will now place a greater emphasis on the parties' substantial participation and intent, litigants will need to know what conduct crosses the line as too much litigation engagement, and what conduct toes that line. Unfortunately, because prejudice impacted the analysis for many circuits for the last several decades, that answer remains unclear. A closer analysis of the standards the circuits set and followed before *Sundance* helps to determine whether bright line rules can be gleaned from their decisions.

A. *Developing "Substantial Participation" Guidance in the Eleventh Circuit and the Sister Circuits That Previously Applied Prejudice*

1. PRE-*SUNDANCE*: MAJORITY OF CIRCUITS

Pre-*Sundance*, the Eleventh Circuit held that a "[w]aiver occurs when a party seeking arbitration *substantially* participates in litigation to a point inconsistent with an intent to arbitrate and this participation results in prejudice to the opposing party."[67] Because it was a two-prong test, in some cases, courts in the Eleventh Circuit presumed the "substantial participation" prong of the test was met, only

---

64 *See* Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1714 (2022).

65 *Id.*

66 *See id.*

67 Morewitz v. W. of England Ship Owners Mut. Prot. & Indem. Ass'n (Luxembourg), 62 F.3d 1356, 1366 (11th Cir. 1995) (emphasis added) (citations omitted); *see also* Ivax Corp. v. B. Braun of America Inc., 286 F.3d 1309, 1316 (11th Cir. 2002).

to find there was no waiver based on lack of prejudice.[68] For example, in *Fuentes*, the court found that a defendant acted inconsistently with its arbitration right after an eight-month delay in filing a motion to compel arbitration and filing a Rule 11 motion.[69] In addition to filing its Rule 11 motion, defendants had also moved to dismiss plaintiffs' complaint and amended complaints; issued interrogatories, requests for production, and request for admissions; provided responses and objections to plaintiffs' requests for production; and moved to compel on its discovery requests.[70] Notwithstanding the party's heavy participation in the litigation, the court still found there was no waiver because there was no prejudice.[71] Those kinds of decisions are now inconsistent with the Supreme Court's holding in *Sundance.*[72]

At a more granular level, the Eleventh Circuit previously held that participation to a minor extent (such as filing an answer,[73] case management report,[74] or motion to avoid a default judgment[75]) is not

---

[68] *See* Citibank, N.A. v. Stock & Assocs., P.A., 387 F. App'x 921, 924–25 (11th Cir. 2010).

[69] *See* Fuentes v. Sec. Forever LLC, No. 16-20483-CIV, 2017 WL 3207775, at *2 (S.D. Fla. July 28, 2017).

[70] *Id.* at *5.

[71] *Id.* at *6.

[72] *See* Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1712 (2022).

[73] *See, e.g.*, Bennett v. Sys. & Servs. Techs., No. 2:21-cv-770-SPC-NPM, 2022 WL 1470318, at *6–7 (M.D. Fla. May 10, 2022) (holding defendants did not substantially participate in the litigation by complying with early deadlines of Fair Credit Reporting Act).

[74] *See, e.g.*, Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc., No. 6:14-cv-1551-Orl-40GJK, 2015 WL 6869734, at *3 (M.D. Fla. Nov. 9, 2015) (finding plaintiff's indication in the case management report that the matter was not ripe for arbitration did not constitute a waiver, considering that the case management report was a document the court required the parties to file and the document was completed before any ruling on defendant's motion to dismiss); *see also Ivax Corp.*, 286 F.3d at 1319 (finding Braun's participation in the dispute resolution procedure, and request for paperwork to review Ivax's objection did not waive its right to arbitrate).

[75] *See, e.g.*, Blue Cross & Blue Shield of Ga., Inc. v. DL Inv. Holdings, LLC, No. 1:18-cv-01304, 2018 WL 6583882, at *9 (N.D. Ga. Dec. 14, 2018) (finding that defendants didn't waive their right to arbitration "by filing a defensive motion to dismiss and responding to Plaintiffs' offensive motions . . . .").

enough to be *substantial*.[76] On the other hand, certain litigious conduct such as filing motions to dismiss, motions to strike deposition notices, and opposing a motion to amend pleadings, together could constitute a waiver.[77] As the Eleventh Circuit explained, "[a]cting in a manner inconsistent with one's arbitration rights and then changing course mid-journey smacks of outcome-oriented gamesmanship played on the court and the opposing party's dime."[78] In *Davis*, for example, the Eleventh Circuit found that the defendant waived its right to arbitrate after filing multiple motions to dismiss, a motion to strike plaintiffs' deposition notices, and opposing plaintiffs' motions to amend the complaint.[79] In addition to filing the motions, the defendant sought to stay discovery pending the resolution of its motions to dismiss.[80] The district court denied the defendant's motions to dismiss, subsequent appeal, and motion for reconsideration.[81] Only after plaintiffs moved for default judgment against the defendant did it file its motion to compel arbitration.[82] Because the defendant invoked its right to compel arbitration only after it became clear plaintiffs' lawsuits would not be dismissed, the court concluded the defendant acted inconsistently with its right to arbitrate.[83]

In another Eleventh Circuit decision, significant delay also appeared to carry weight in support of waiver.[84] In *Krinsk*, the court found the defendant waived its right to arbitrate after waiting nine months prior to filing its answer and motion to compel arbitration, when it had already engaged in class certification discovery.[85] Similarly, the Eleventh Circuit found waiver where a movant delayed

---

[76] *See* Sherrard v. Macy's Sys. & Tech. Inc., 724 F. App'x 736, 740 (11th Cir. 2018).

[77] *See* Davis v. White, 795 F. App'x 764, 769–70 (11th Cir. 2020).

[78] Gutierrez v. Wells Fargo Bank, NA, 889 F.3d 1230, 1236 (11th Cir. 2018).

[79] *Davis*, 795 F. App'x at 766, 768–69.

[80] *Id.* at 766.

[81] *Id.* at 766–67.

[82] *Id.* at 767.

[83] *Id.* at 768–69.

[84] *See* Krinsk v. SunTrust Banks, Inc., 654 F.3d 1194, 1201, 1204 (11th Cir. 2011).

[85] *See id.* at 1201, 1204 (finding defendant had spent nine months prior to filing its answer and motion to compel arbitration invoking the judicial process in class certification and class discovery, therefore acting inconsistently with its arbitration right).

for eight months before demanding arbitration in *S & H Contractors, Inc.*[86] During that time, the movant deposed five of the nonmovant's employees, while the nonmovant filed both a motion to dismiss and a motion to oppose discovery.[87] On the other hand, delay in initiating the proceeding or the amount of time that has elapsed before seeking to compel arbitration does not, by itself, constitute a waiver of the right to arbitrate; the delay must be coupled with other substantial conduct inconsistent with an intent to arbitrate.[88]

2. POST-*SUNDANCE*: MAJORITY OF CIRCUITS

After *Sundance*, courts in the Eleventh Circuit continue to find that various combinations of certain litigious conduct constitute a waiver of the right.[89] For example, in *Soriano*, the district court held that the moving party's participation in the litigation was sufficiently substantial including "answering the Complaint, amending its answer, participating in discovery, attending mediation, and submitting a case management report requesting a jury trial – all without a single mention of arbitration or moving to compel arbitration."[90] Even though the moving party sought to compel arbitration within six months from the filing of the action, the moving party's failure to assert the affirmative defense in both its answer and

---

[86] *See* S & H Contractors, Inc. v. A.J. Taft Coal Co., 906 F.2d 1507, 1514 (11th Cir. 1990) ("In this case, S&H waited eight months from the time it filed its complaint to the time it demanded arbitration.").

[87] *Id.*

[88] Grigsby & Assocs., Inc. v. M Sec. Inv., 635 F. App'x 728, 733 (11th Cir. 2015) (finding the moving party did not waive its right to arbitrate after waiting more than ten years from the transaction date to move to compel arbitration, even though party had filed "placeholder lawsuits" that were never served or dismissed).

[89] Soriano v. Experian Info. Sols., Inc., 2:22-cv-197-SPC-KCD, 2022 WL 17551786, at *3 (M.D. Fla. Dec. 9, 2022); Warrington v. Rocky Patel Premium Cigars, Inc., No. 22-12575, 2023 WL 1818920, at *3 (11th Cir. Feb. 8, 2023) (finding that defendant initially suing plaintiff in state court, amending his complaint, participating in federal district court's case management proceeding, moving to dismiss, abate, stay, or remand the plaintiff's federal complaint, and filing multiple extensions in federal district court constituted a waiver of his arbitration right).

[90] *Soriano*, 2022 WL 17551786, at *4.

amended answer was dispositive and demonstrated that it "actively and substantially litigated its case."[91]

The Eleventh Circuit's approach to "substantial participation" is consistent with the approach taken by its sister courts.[92] For example, courts in the Third Circuit look to whether the moving party's actions evince an intent to "knowingly relinquish the right to arbitrate by acting inconsistently with that right." [93] The Fifth Circuit has held that, "at the very least" the moving party has to have engaged "in some overt act in court that evinces a desire to resolve the arbitrable dispute through litigation rather than arbitration."[94] As a general matter, in most circuits, a moving party's participation in discovery, absent express reservation of the party's right to arbitrate, and filing of substantive motions on the merits are sufficient to find waiver.[95] On the other hand, the Ninth Circuit has held that a party's conduct does not constitute a waiver if it reflects a "determination to avoid or frustrate the litigation" rather than a strategic decision to actively litigate.[96] Courts in the Ninth Circuit have also found conduct like issuing a single deposition request was not sufficient to

---

[91] *Id.*

[92] *See, e.g.*, S & H Contractors, Inc. v. A.J. Taft Coal Co., 906 F.2d 1507, 1514 (11th Cir. 1990) ("A party has waived its right to arbitrate if 'under the totality of the circumstances, the . . . party has acted inconsistently with the arbitration right'") (quoting Nat'l Found. for Cancer Rsch v. A.G. Edwards & Sons, 821 F.2d 772, 774 (D.C. Cir. 1987))).

[93] Zenon v. Dover Downs, Inc., No. 21-1194-RGA, 2022 WL 2304118, at *2 (D. Del. June 27, 2022) (finding the filing of initial disclosures and answer, which did not mention an arbitration agreement, did not constitute a waiver).

[94] In re Mirant Corp., 613 F.3d 584, 589 (5th Cir. 2010); *see also* Steel Warehouse Co., Inc. v. Abalone Shipping Ltd. of Nicosai, 141 F.3d 234, 238 (5th Cir. 1998) (finding the appellants had to participate in the litigation to protect themselves if the district court chose not to stay the proceedings).

[95] *See, e.g.*, PPG Indus., Inc. v. Webster Auto Parts Inc., 128 F.3d 103, 109 (2d Cir. 1997) (finding engaging in discovery and filing substantive motions constitutes a waiver); Hurley v. Deutsche Bank Trust Co. Ams., 610 F.3d 334, 339 (6th Cir. 2010) (finding waiver although defendants did not respond to the action, because they filed multiple dispositive and non-dispositive motions, including motions to dismiss, summary judgment, change venue, and waited more than two years from the filing of the complaint to compel arbitration).

[96] Britton v. Co-op Banking Grp., 916 F.2d 1405, 1413 (9th Cir. 1990) (holding defendant who resisted discovery requests, pursued a court-appointed attorney, and applied for in forma pauperis status did not act inconsistently with his right to arbitrate). *But see* Van Ness Townhouses v. Mar Indus. Corp., 862 F.2d

constitute a waiver.[97] By the same token, when a demand for arbitration is made shortly after the filing of the complaint, and a motion to compel is served in lieu of an answer, courts in the Second Circuit have also found no waiver.[98]

Still, most circuits have yet to rule on whether a new standard applies to motions to compel arbitration following *Sundance*.[99] As a result, courts like those in the Second Circuit have either: (i) simply used the Circuit's previous test stripped of the prejudice prong,[100] or (ii) analyzed waiver by considering the time elapsed from when litigation was commenced until the request for arbitration, as well as under a traditional contractual waiver analysis.[101]

754, 758–59 (9th Cir. 1988) (concluding defendant acted inconsistently with its known arbitration right when it made an intentional decision to refrain from filing a motion to compel arbitration—because it did not want to sever the arbitrable claims from the nonarbitrable claims—and litigating the arbitrable claims for two years in federal court, including filing a motion to dismiss for failure to state a claim); Martin v. Yasuda, 829 F.3d 1118, 1126 (9th Cir. 2016) (finding defendants acted inconsistently with pursuing arbitration when they spent seventeen months actively litigating their case in federal court, including filing a motion to dismiss "on a key merits issue").

[97] Potts v. Sirius XM Radio Inc., No. CV 21-9755, 2022 WL 17098184, at *3 (C.D. Cal. Oct. 25, 2022).

[98] DeGraziano v. Verizon Commc'ns, Inc., 325 F. Supp. 2d 238, 244 (E.D.N.Y. 2004) (finding defendant did not waive its right to arbitrate because the demand for arbitration was made shortly after the filing of the complaint, and the motion to compel was served in lieu of an answer).

[99] *See, e.g.*, Carollo v. United Cap. Corp., No. 6:16-cv-00013, 2022 WL 9987380, at *3 (N.D.N.Y. Oct. 17, 2022).

[100] *See* De Jesus v. Gregorys Coffee Mgmt., LLC, No. 20-CV-6305 (MKB) (TAM), 2022 WL 3097883, at *7, *7 n.6 (E.D.N.Y. Aug. 4, 2022) (noting the Second Circuit has not ruled on whether a new standard applies to motions to compel arbitration following *Sundance* and applying "the other two elements traditionally used by the Second Circuit").

[101] *See* Herrera v. Manna 2nd Ave. LLC, No. 1:20-cv-11026-GHW, 2022 WL 2819072, at *8 (S.D.N.Y. July 18, 2022).

B. *Standards of the Two Circuits That Excluded Prejudice from the Beginning*

Before *Sundance*, a minority of circuits had declined to consider prejudice as a dispositive factor in their arbitration waiver test.[102] In *Sundance*, the Supreme Court sided with the Seventh and D.C. Circuits that held that a party waives the right to arbitrate if its litigation conduct is inconsistent with its contracted right to arbitrate, regardless of prejudice.[103] Because these circuits never applied the prejudice element—or applied it without weighing it as a dispositive[104] factor—they often had more robust discussion related to the extent of the parties' litigation conduct that informed their decisions on waiver.[105]

For instance, "'the diligence or lack thereof of the party seeking arbitration'" is weighed heavily in the Seventh Circuit's analysis.[106] Moreover, "a party's diligence should be considered alongside: whether the allegedly defaulting party participated in litigation, sub-

---

[102] *See* Morgan v. Sundance, 142 S. Ct. 1708, 1712 (2022) (noting nine circuits have embraced the prejudice factor in the waiver rule while two circuits have rejected it).

[103] *See* Smith v. GC Servs. Ltd. P'ship, 907 F.3d 495, 499 (7th Cir. 2018); Nat'l Found. for Cancer Rsch. v. A.G. Edwards & Sons, Inc., 821 F.2d 772, 774, 777 (D.C. Cir. 1987).

[104] *See, e.g.*, *A.G. Edwards & Sons, Inc.*, 821 F.2d at 777 ("This circuit has never included prejudice as a separate and independent element of the showing necessary to demonstrate waiver of the right to arbitration. We decline to adopt such a rule today. Of course, a court may consider prejudice to the objecting party as a relevant factor among the circumstances that the court examines in deciding whether the moving party has taken action inconsistent with the agreement to arbitrate. But waiver may be found absent a showing of prejudice." (internal citations omitted)).

[105] *See* Royce v. Michael R. Needle P.C., 950 F.3d 939, 950 (7th Cir. 2020) (discussing defendant's failure to compel arbitration for three-and-a-half years as well as his explicit argument that the federal court was the proper forum to resolve the claims); *A.G. Edwards & Sons*, 821 F.2d at 775 (detailing every federal litigation procedural action and event that defendant engaged in before moving to compel arbitration).

[106] *Royce*, 950 F.3d at 950 (quoting Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 391 (7th Cir. 1995)).

stantially delayed its request for arbitration, or participated in discovery."[107] In *Royce v. Michael R. Needle*, for example, the litigating party never moved to compel arbitration, and only invoked its right for the first time on appeal.[108] The court found that a delay of "over three-and-a-half years is alone sufficient to find waiver, particularly where [the party] actively participated in the litigation."[109]

The Seventh Circuit reached a different conclusion in *Colon v. EYM Pizza of Illinois, Inc.*, finding that the defendants did not waive their right to arbitrate even though they waited nearly three years, from the start of the litigation, to move to compel. [110] Not only did the defendants delay in invoking their right to compel arbitration, they filed an answer, opposed a notice requirement pursuant to the Federal Labor Standard Act, and participated in mediation and discovery. [111] However, the defendants' delay was a result of their need to verify the identities of the opt-in plaintiffs who had executed an arbitration agreement.[112] While the court noted that the delay was frustrating, on balance, it held there was no waiver given that defendants did not file any dispositive motions and did not previously include the arbitration opt-in plaintiffs in discovery.[113]

In *Cooper v. Asset Acceptance, LLC*, the Seventh Circuit held that the moving party did not waive its right to arbitrate even after it removed the case to federal court, filed a motion to dismiss, and participated in discovery. [114] The court held that removal to federal court and filing a motion to dismiss "are not sufficient, in the totality of the circumstances . . . for finding waiver, particularly in light of

---

[107] Colon v. Eym Pizza of Ill., Inc., No. 18-cv-05743, 2022 WL 3999703, at *2 (N.D. Ill. Sept. 1, 2022) (citing *Cabinetree of Wis., Inc.*, 50 F.3d at 391).

[108] 950 F.3d at 950. *Compare* Sharif v. Wellness Int'l Network, Ltd., 376 F.3d 720, 726 (7th Cir. 2004) (finding an eighteen-month delay that included filing four motions to dismiss before filing a motion to compel arbitration failed to support waiver), *with* Grumhaus v. Comerica Sec., Inc., 223 F.3d 648, 651 (7th Cir. 2000) (finding a delay of about twelve months constituted waiver where plaintiffs had previously filed a complaint that the court dismissed related to the same claims).

[109] *Royce*, 950 F.3d at 950.

[110] Colon v. EYM Pizza of Ill., Inc., 2022 WL 3999703, at *3.

[111] *Id.* at *3.

[112] *Id.*

[113] *Id.*

[114] Cooper v. Asset Acceptance, LLC, 532 F. App'x 639, 642 (7th Cir. 2013).

the fact that [the moving party] only participated in discovery because the district court declined to stay discovery pending its ruling on the motion to dismiss."[115]

Similarly, the D.C. Circuit "views 'the totality of the circumstances [in deciding whether] the defaulting party has acted inconsistently with the arbitration right . . . . [O]ne example of [such] conduct . . . is active participation in a lawsuit.'"[116] Courts in the D.C. Circuit do not fault parties for seeking to compel arbitration in an answer that also asserts counterclaims and defenses.[117] Nor do they fault a party for removing an action to federal court without engaging in discovery or disputing the merits of a claim.[118]

But, participation in litigation is a highly fact-intensive inquiry and thus, not treated equally by the courts in the circuit.[119] For example, the United States District Court for the District of Columbia concluded that the defendants in *Partridge* waived any right to compel arbitration even though the defendants timely invoked the right to arbitrate in their earliest filings.[120] After filing their motion to compel arbitration and response in opposition to plaintiff's request for summary judgment, the defendants consented to the filing of a settlement agreement in which the parties claimed to have resolved the matter.[121] In the agreement, defendants consented to the United States District Court for the District of Columbia's continued jurisdiction of the matter until plaintiff received payments totaling an

---

115 *Id.*

116 Khan v. Parsons Glob. Servs., Ltd., 521 F.3d 421, 425 (D.C. Cir. 2008) (quoting Nat'l Found. for Cancer Rsch. v. A.G. Edwards & Sons, Inc., 821 F.2d 772, 775 (D.C. Cir. 1987)).

117 *See, e.g.*, Gordon–Maizel Constr. Co., Inc. v. Leroy Prods., Inc., 658 F. Supp. 528, 531 (D.D.C. 1987) (citing Rush v. Oppenheimer & Co., 779 F.2d 885, 889 (2d Cir. 1985)).

118 *See* Martin v. Citibank, Inc., 567 F. Supp. 2d 36, 41 (D.D.C. 2008).

119 *See* Partridge v. Am. Hosp. Mgmt. Co., LLC, 289 F. Supp. 3d 1, 17 (D.D.C. 2017).

120 *Id.* at 18.

121 *Id.*

amount certain.[122] As such, the court was wholly unpersuaded by defendants arguments against waiver.[123]

Similarly in *Khan*, the court reversed a trial court's order to compel arbitration as a result of its finding that the defendant waived its arbitration rights.[124] Although the defendant had not sought discovery, it filed a motion for summary judgment.[125] The court held that the defendant could not salvage its right to seek arbitration upon prevailing on its motion for summary judgment but losing on appeal.[126] The court maintained that "a motion to dismiss may not be inconsistent with the intent to arbitrate, as where a party seeks the dismissal of a frivolous claim." But the court noted that "where . . . a party moves for summary judgment through a motion including or referring to 'matters outside the pleading' . . . that party has made a decision to take advantage of the judicial system and should not be able thereafter to seek compelled arbitration."[127]

Both the D.C. and Seventh Circuits have found that a party's failure to assert its right to arbitrate on the record at the "first available opportunity" supports an inference of disinterest in arbitration.[128] In *Zuckerman*, the D.C. Circuit concluded the right to arbitrate had been forfeited when the defendant sought to compel arbitration eight months after filing his answer.[129] The court stated that "[b]y this opinion we alert the bar in this Circuit that failure to invoke arbitration at the first available opportunity will presumptively extinguish a client's ability later to opt for arbitration."[130] Likewise, in *Cabinetree*, the court found that a movant waived its right to arbitrate after removing the case to federal court, and then waiting six

---

[122] *Id.*; *see also* Zuckerman Spaeder, LLP v. Auffenberg*,* 646 F.3d 919, 922 (D.C. Cir. 2011) ("A defendant seeking a stay pending arbitration under Section 3 who has not invoked the right to arbitrate on the record at the first available opportunity, typically in filing his first responsive pleading or motion to dismiss, has presumptively forfeited that right.").

[123] *See Partridge*, 289 F. Supp. 3d at 18.

[124] Khan v. Parsons Glob. Servs., Ltd., 521 F.3d 421, 423 (D.C. Cir. 2008).

[125] *Id.*

[126] *Id.* at 427.

[127] *Id.*

[128] *E.g.,* Zuckerman Spaeder, LLP v. Auffenberg, 646 F.3d 919, 922 (D.C. Cir. 2011); *see also* Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 391 (7th Cir. 1995).

[129] *Zuckerman*, 646 F. 3d at 924.

[130] *Id.*

months to compel arbitration.[131] On appeal, the Seventh Circuit affirmed the district court's finding that the movant waived its right to arbitrate as it failed to rebut the presumption.[132] The movants' only explanation for the delay was that it needed time to weigh its options.[133] While presumption is discussed and sometimes considered by the courts, decisions from the Seventh and D.C. Circuits suggest that it does not control the analysis.[134]

***

Overall, because of the wide range of decisions across the circuits, there are no clear bright line rules that litigants should follow to avoid waiving their arbitration right. However, some best practice guidance can be gleaned from the various opinions that have addressed the issue.

- A motion to dismiss, answer, or motion practice is not an absolute bar to later arbitrating.[135]
- Courts are likely to focus on the extent to which the parties took steps to preserve its arbitration right.[136] Thus, as a best practice, parties should be diligent to timely assert its right to arbitrate as one of the arguments.

---

131 *See Cabinetree of Wis., Inc.*, 50 F. 3d at 389.

132 *Id.* at 391.

133 *Id.*

134 *See, e.g.*, Kawasaki Heavy Indus., Ltd. v. Bombardier Recreational Prods., Inc., 660 F.3d 988, 995–96 (7th Cir. 2011) (finding the moving party did not trigger the presumption of waiver because it did not file a claim or motion, but merely responded to a motion to reopen litigation and even though the moving party waited two years to request arbitration, at every turn it mentioned its desire to arbitrate).

135 *See* Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1711, 1714 (2022) (remanding decision to lower court to decide whether defendant waived arbitration where defendant filled a motion to dismiss and an answer).

136 *See, e.g*, Kawasaki, 660 F.3d at 996.

- Reaching outside the pleadings to support a motion could indicate a party's interest in litigating a case to its finality in that forum.[137]
- Similarly, while a removal petition alone might not result in a waiver, parties should be careful before filing a notice of removal.[138]
- Whether or not a party has engaged in discovery is a factor most courts consider when determining whether a party acted with the intent to waive its right to arbitrate.[139] Therefore, parties should avoid engaging in discovery before moving to compel arbitration, unless the discovery is defensive.

III. IMPACT OF ANTI-WAIVER PROVISIONS

In addition to the following best practices for engaging in litigation conduct, including anti-waiver clauses in agreements could provide an additional level of defense to a finding that a party intended to litigate to finality. However, the "general view is that a party to a written contract can waive a provision of that contract by conduct despite the existence of a so-called anti-waiver or failure to enforce clause in the contract."[140] Moreover, *Sundance* did not address anti-

---

[137] *See, e.g.*, Khan v. Parsons Glob. Servs., Ltd., 521 F.3d 421, 427 (D.C. Cir. 2008) ("But where . . . a party moves for summary judgment through a motion including or referring to matters outside the pleading . . . that party has made a decision to take advantage of the judicial system and should not be able thereafter to seek compelled arbitration.").

[138] *See* Cooper v. Asset Acceptance, LLC, 532 F. App'x 639, 643 (7th Cir. 2013) (holding removal to federal court and filing a motion to dismiss "are not sufficient, in the totality of the circumstances . . . for finding waiver").

[139] *See, e.g.*, PPG Indus., Inc. v. Webster Auto Parts Inc., 128 F.3d 103, 109 (2d Cir. 1997) (finding engaging in discovery and filing substantive motions constitutes a waiver).

[140] 13 WILLISTON ON CONTRACTS § 39:36 (4th ed. 2022), Westlaw (database updated May 2022).

waiver clauses, as there was no such clause in the Sundance agreement.[141] Yet there is reason to believe that parties may utilize *Sundance*'s rhetoric against "arbitration exceptionalism"[142] to push back on these kinds of clauses in future contracts.

While there have been only a few cases addressing anti-waiver clauses since *Sundance*, several state courts have considered the impact of the decision on such clauses.[143] In *Bridgecrest Acceptance Corporation v. Donaldson*, Bridgecrest sought a deficiency judgment against consumers who defaulted on car payments.[144] After the consumers filed counterclaims, Bridgecrest moved to dismiss or stay the counterclaims and to compel them to arbitration pursuant to an arbitration agreement between the parties.[145] That agreement contained an anti-waiver provision stating that if either party elected to litigate a claim in court, either party may still elect to arbitrate any other claim (including a new claim in the same lawsuit).[146] The consumers opposed the motion to compel arbitration, arguing that *Sundance* supported waiver of the right to compel arbitration because the party seeking arbitration had already filed a deficiency claim in circuit court.[147] But the court found that *Sundance* does not prohibit or invalidate anti-waiver provisions.[148] Instead, the court held that the parties had included a valid anti-waiver provision in their agreements, which it did not find to be unconscionable, in exchange for mutual consideration.[149] While *Bridgecrest* dealt with a different factual scenario than *Sundance*, the *Bridgecrest* court found that nothing in *Sundance* changes the validity or applicability of an anti-waiver clause.[150]

---

141 *See generally* Morgan v. Sundance, Inc., 142 S. Ct. 1708 (2022).

142 Karla Gilbride*, In* Morgan v. Sundance*, the Supreme Court Strikes a Blow Against Arbitration Exceptionalism*, 26 J. CONSUMER & COM. L. 15, 16–17 (2022).

143 *See, e.g.*, Bridgecrest Acceptance Corp. v. Donaldson, 648 S.W.3d 745, 758 n.12 (Mo. 2022), *modified* (Aug. 30, 2022).

144 *Id.* at 749.

145 *Id.*

146 *Id.* at 750.

147 *Id.* at 758 n.12.

148 *Id.*

149 *Id.*

150 *Id.*

On the other hand, a different state court in the wake of *Sundance* has argued that inclusion of an anti-waiver provision in an arbitration agreement "does not automatically preclude a finding of waiver following a party's substantial participation in litigation to a point inconsistent with an intent to arbitrate."[151] After all, the court stated, "if an anti-waiver provision constituted an unassailable shield under this judicially-created doctrine, contracting parties hypothetically could use anti-waiver provisions to delay a request for arbitration until jury deliberations had commenced following a trial on the merits of an arbitrable claim . . . offend[ing] established principles of fairness . . . ."[152] Indeed, as another court articulated pre-*Sundance*, the existence of an anti-waiver provision "should be considered as one factor in the larger waiver analysis" but an "anti-waiver clause itself can be waived."[153]

On balance, it is difficult to predict the weight a court will apply to the existence of an anti-waiver clause. It certainly cannot hurt, but litigants cannot expect to lean on it if their conduct otherwise indicates an intent to litigate or to forego the arbitration right.

IV. EMPLOYING THE PROPER PROCEDURAL VEHICLE FOR A MOTION TO COMPEL ARBITRATION

This Article has focused on waiving the right to arbitrate, but in certain jurisdictions, an additional procedural wrinkle presents itself. If defendants do not pay careful attention to precedent in their jurisdiction, seeking to enforce their right to arbitrate could prevent them from raising other Rule 12 defenses if they fail to follow the correct procedure.

Federal courts in the Second, Sixth, Eighth, Ninth, and Eleventh Circuits permit litigants to file motions to compel arbitration as motions to dismiss for lack of subject matter jurisdiction under Rule

---

[151] Lopez v. GMT Auto Sales, Inc., 656 S.W.3d 315, 327 (Mo. Ct. App. Dec. 6, 2022).

[152] *Id.*

[153] Gen. Elec. Cap. Corp. v. Bio-Mass Tech, Inc., 136 So. 3d 698, 703 (Fla. 2d Dist. Ct. App. 2014).

12(b)(1).[154] Pursuant to Rule 12, a challenge to subject matter jurisdiction is appropriate at any stage, so defendants in these jurisdictions may raise a motion to compel arbitration via 12(b)(1) without fear of impacting their other defenses.[155]

The same procedural safety net is not available for litigants in the Fourth and Seventh Circuits. These circuits have adopted a different approach, finding that motions to compel arbitration are properly brought pursuant to Rule 12(b)(3) for improper venue.[156] These circuits reason that because arbitration clauses are a type of forum selection clause and therefore concern venue, motions to compel arbitration should be brought under the venue provision of Rule 12.[157] However, as most litigators know, pursuant to Rule 12, a party waives *any* defense listed in Rule 12 (b)(2)–(5) by omitting it from an initial motion to dismiss.[158] That means that if a defendant chooses to move to compel arbitration via a Rule 12(b)(3) motion to dismiss, but does *not* raise other defenses typically subject to a Rule 12 motion in (b)(2)–(5), those defenses will be waived. Vice versa, if a defendant decides to pursue other (b)(2)–(5) defenses in its motion to dismiss, but leaves out compelling arbitration under (b)(3), that is automatically waived.[159] Accordingly, a defendant in the Fourth or Seventh Circuits would need to assert both the motion to

---

[154] *See, e.g.*, Geographic Expeditions, Inc. v. Estate of Lhotka, 599 F.3d. 1102, 1106–07 (9th Cir. 2010); U.S. ex rel. Lighting & Power Servs., Inc. v. Inferface Constr. Corp., 553 F.3d 1150, 1152 (8th Cir. 2009); Harris v. United States, 841 F.2d 1097, 1099 (Fed. Cir. 1988); Multiband Corp. v. Block, No. 11–15006, 2012 WL 1843261, at *5 (E.D. Mich. May 21, 2012); Orange Cnty. Choppers, Inc. v. Goen Techs. Corp., 374 F. Supp. 2d 372, 373 (S.D.N.Y. 2005); *See* MRI Scan Ctr., L.L.C. v. Nat'l Imaging Assocs., Inc., No. 13-cv-60051, 2013 WL 1899689, at *2 (S.D. Fla. May 7, 2013) (expressly stating that courts generally treat motions to compel arbitration as motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1)).

[155] *See* Fed. R. Civ. P. 12(h)(3).

[156] *See, e.g.*, Sucampo Pharms., Inc. v. Astellas Pharma, Inc., 471 F.3d 544, 550 (4th Cir.2006).

[157] Gratsy v. Colo. Technical Univ., 599 Fed. App'x 596, 597 (7th Cir. 2015); Aggarao v. MOL Ship Mgmt. Co., Ltd., 675 F.3d 355, 365 n.9 (4th Cir.2012).

[158] *See* Fed. R. Civ. P. 12(h)(1).

[159] Fed. R. Civ. P 12(h)(1).

compel arbitration under (b)(3) and its defenses under (b)(2)–(5) to preserve them all.[160]

In sum, it is critical for a defendant to carefully consider the law in its jurisdiction so it does not inadvertently waive the right to arbitrate by litigating—*or* waive its right to file a substantive motion to dismiss by filing a motion to compel arbitration.

CONCLUSION AND PRACTICE RECOMMENDATIONS

As demonstrated in this Article, the extent to which a party can dip into litigation without forfeiting an arbitration right remains murky. For that reason, parties should be cautious about the steps taken to litigate in court should they want to retain their right to arbitration.

For those wanting to maintain their arbitration right, below are a few practical recommendations to keep in mind:

- Upon receiving a litigation demand letter or other correspondence, immediately notify opposing counsel of an existing arbitration agreement and its applicability;
- If a lawsuit is filed without any notice or demand, utilize the procedures of Section 3 and 4 of the Federal Arbitration Act to immediately stay the litigation and move to compel arbitration if the opposing party refuses to honor the arbitration clause;
- In any case management report, Rule 26(f) report, or other filing at the beginning of a case, clearly state the existence of the arbitration right and quote the language of the provision from the contract;
- If there is a need to file a motion to dismiss, one of the bases for dismissal should be the existence of a valid arbitration right;

---

[160] *Id.* As another reference point, the Third Circuit, standing on its own, explicitly rejects the practice of bringing motions to compel arbitration under 12(b)(3), and instead requires that motions to compel arbitration should be made under Rule 12(b)(6) (failure to state a claim).

- If there is a need to file a motion to dismiss, the defendant should also determine whether the case sits in a jurisdiction where a motion to compel arbitration is considered a 12(b)(3) basis for dismissal, and if so, should be sure to raise any other waivable defenses within the initial motion to dismiss;
- If there is a need to file an answer to the complaint, include the existence of a valid arbitration agreement as an affirmative defense (with priority);
- In all conversations with opposing counsel or the court, counsel should articulate that there is a valid arbitration agreement and that the case is subject to arbitration; and
- A party seeking to enforce an arbitration right should not file its own litigation or proactively litigate (via depositions or other discovery).

Overall, these kinds of decisions require a balancing act of various considerations. There may be competing (and/or complementary) legal and business aspects in play, so it is advisable to align the legal and business sides of a company to determine the most prudent path forward. Sometimes there may be a strong business reason to favor arbitration over litigation, or vice versa. Perhaps, for example, counsel wants to use arbitration as a bargaining chip for negotiating a settlement up front before litigation has advanced. In another scenario, the company may need to consider whether enforcing arbitration against one person or entity could have adverse consequences to enforcing arbitration over another. It is highly fact-dependent and important to consider all potential outcomes. If losing the right to arbitrate is an unacceptable outcome, the party should act early and carefully in responding to unexpected litigation. As one author has put it, litigants "will no longer be able to use the liberal federal policy as an all-powerful tiebreaker, or a mechanism for throwing out existing contract rules and creating new ones specific to the arbitration context."[161] All practitioners must act accordingly and cautiously in taking these lessons forward.

---

[161] Gilbride, *supra* note 142, at 17.