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Participation in Litigation as a Waiver of the Contractual Right to Arbitrate: Toward a Unified Theory

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I. INTRODUCTION

During the almost ninety years since passage of the Federal Arbitration Act (FAA),¹ the United States judiciary has stood the old common law hostility toward arbitration on its head. Whereas once arbitration agreements were disfavored and regarded as revocable at will by either party,² the federal judiciary has now taken to heart the maxim that there is a “liberal federal policy favoring arbitration agreements.”³

The embrace of a policy favoring arbitration is particularly evident in decisions of the United States Supreme Court over the last few decades. In 1985, the Supreme Court declared “we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.”⁴ In three recent decisions, the Supreme Court has preferred an expansive reading of the FAA: the Supreme Court has held a party’s claim that the entire contract containing an arbitration clause was illegal and void ab initio should be decided by the contract arbitrator rather than a court;⁵ the arbitration agreement in a collective bargaining agreement between a

1. 9 U.S.C §§ 1–16 (2006).

2. *See, e.g.*, *Memphis Trust Co. v. Brown-Ketchum Iron Works*, 166 F. 398, 402 (6th Cir. 1909); *U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007–08 (S.D.N.Y. 1915); *Meacham v. Jamestown, Franklin & Clearfield R.R. Co.*, 105 N.E. 653, 655 (N.Y. 1914). For an interesting and thoughtful discussion of the history of the common law rule against enforcing agreements to arbitrate, see *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982–84 (2d Cir. 1942). *Kulukundis Shipping* discusses the usual reason given for historical judicial hostility to arbitration, which is reluctance by courts to surrender a part of their jurisdiction. *Id.* *Kulukundis Shipping*, however, also notes that there is some historical support for the proposition that the common law rule against enforcing arbitration agreements was due to the desire of English judges, “at a time when their salaries came largely from fees, to avoid loss of income.” *Id.* at 983.

3. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24 (1983).

4. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626–27 (1985).

5. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

union and an employer may preclude an individual employee from litigating a statutory claim;⁶ and a state statute prohibiting the enforcement of arbitration agreements that do not allow for class actions is preempted by the FAA.⁷ These cases illustrate a strong trend in the Supreme Court toward an expansive reading of the FAA and a vigorous enforcement of agreements to arbitrate.

Despite that trend, however, there are still circumstances under which a party that wishes to litigate a contractual dispute will not be forced to arbitrate. The FAA states that federal courts are to order parties to arbitration only “upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue.”⁸ Consistent with that dictate, it is a fundamental tenet of American arbitration law that “a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”⁹ To determine whether a particular contractual dispute is one that the parties have agreed to arbitrate, the federal judiciary has developed common law rules of arbitrability. Although the law of arbitrability is largely based on the terms of the FAA and has now had almost ninety years to develop, it remains confused and confusing in some aspects. In part, the confusion is attributable to the ad hoc nature of the common law method by which the law of arbitrability developed.¹⁰ It is also partially attributable to the necessarily circular nature of the arbitrability inquiry, which requires a court to decide the issue of whether it should decide an issue.¹¹

One aspect of the law of arbitrability on which the federal courts so far have been unable to agree concerns whether a party that participates in the litigation of a dispute has waived its right to arbitrate that dispute.¹² It sometimes occurs that parties to a contract with a

6. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009).

7. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

8. 9 U.S.C. § 4 (2006).

9. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

10. See George A. Bermann, *The “Gateway” Problem in International Commercial Arbitration*, 37 YALE J. INT’L L. 1, 50 (2012) (“The progression [of American arbitrability law] has admittedly been non-linear and has produced considerable doctrinal complexity.”)

11. *Buckeye Check Cashing, Inc v. Cardegna*, 546 U.S. 440 (2006), provides an example of the type of conundrum created by this type of meta-analysis. In *Buckeye*, the party opposing arbitration argued that the relevant contract was illegal and, therefore, void ab initio. If the issue of whether the contract was illegal was sent to the arbitrator and determined in the affirmative, then the arbitrator would be ruling that the contract that putatively gave him power to decide the matter was void. On the other hand, if a court decided the issue and determined that the contract was not illegal, the court would be deciding that it never should have been given the issue in the first place. *Id.* at 448–49.

12. *Compare, e.g., Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995) (applying “presumptive waiver of the right to arbitrate” by

valid arbitration provision decide to litigate instead of arbitrate. That situation presents no obvious procedural problem so long as both parties agree to waive the right to arbitrate and then litigate their dispute through to conclusion. A problem does arise, however, if at some stage during the litigation process one of the parties changes its mind about its preferred forum and moves to compel arbitration instead. Under what circumstances has a party that wishes to switch from litigation to arbitration waived its contractual right to compel arbitration? For example, may a litigant decide as the jury is being charged at the end of a trial that it would like to invoke the arbitration clause in the contract after all? At the opposite end of the spectrum of possibilities, should the rule be that once a party voluntarily participates in litigation to any extent it has waived its right to compel arbitration of the same dispute? If the best answer is somewhere between those two poles, where is the point of no return, beyond which a party participating in litigation will be held to have waived its right to arbitrate?

This Article proposes answers to the above questions. To do so, the first Part of the Article reviews the current state of the law of arbitrability, which provides the framework within which the issue of waiver by participation in litigation must be analyzed. The second Part of this Article examines the different ways that the United States circuit courts have attempted to deal with the issue of when participation in litigation will be found to constitute a waiver of the right to arbitrate. The most fundamental split in the circuits on that issue concerns whether some prejudice to the party resisting arbitration is a necessary element of such a waiver.¹³ In addition, even among those circuits that require a showing of prejudice, there is disagreement as to what type of showing is required. The third Part of this Article proposes a uniform resolution of the issue of when a party's participation in litigation should be found to constitute a waiver of the contractual right to arbitrate. It is argued that a rule that does not require a showing of prejudice to the party resisting arbitration better effectuates the policies of the FAA. Rather, the goal of fair and efficient dispute resolution in conformity with the parties' agreement is better served by a rule that the contractual right to compel arbitration of a

participation in litigation), *with* *Cargill Ferrous Int'l v. Sea Phoenix MV*, 325 F.3d 695, 700–01 (5th Cir. 2003) (applying “presumption against” waiver of the right to arbitrate by participation in litigation).

13. In *Stok & Associates, P.A. v. Citibank, N.A.*, the Supreme Court granted a petition for a writ of certiorari to decide the issue of whether prejudice was a necessary element of a waiver by litigation. *Stok & Assocs., P.A. v. Citibank, N.A.*, 387 F. App'x 921 (11th Cir. 2010), *cert. granted*, 131 S. Ct. 1556 (2011). The writ was dismissed, however, when the case settled prior to review by the Supreme Court. *Stok & Assocs. v. Citibank, N.A.*, 131 S. Ct. 2955 (2011).

dispute is waived if it is not asserted by the time the defendant answers the complaint.

II. THE LAW OF ARBITRABILITY FRAMEWORK

As the Supreme Court has noted, the word “arbitrability” is used in two different senses—one broad and the other narrow.¹⁴ In the broad sense, “arbitrability” can refer to “any potentially dispositive gateway question” that might prevent a determination on the merits by an arbitrator.¹⁵ For example, one party to a contractual dispute might argue to an arbitrator that the other party’s claim is time-barred. In such a circumstance, the arbitrator might rule on the issue of “arbitrability,” that is, whether the claim is time-barred, before considering the merits of the underlying claim.¹⁶ In the narrow, more technical sense, the word “arbitrability” refers to the question of whether an arbitrator should be considering the gateway question at all or if the gateway question is one that should be decided by a court.¹⁷ Both senses of the word are relevant to the issue of when a party’s participation in litigation will constitute a waiver of the right to arbitrate. The law is currently unsettled both as to who should decide issues of waiver by participation in litigation¹⁸ and as to what standard the decision maker should be apply.¹⁹

A. The FAA

Any discussion of the modern American law of arbitrability must begin with a review of the provisions of the FAA. Prior to enactment of the FAA, the courts of the United States followed the old English common law rule that parties were free to breach an agreement to arbitrate so long as an arbitration award had not been issued yet. The reason that was typically given for this judicial hostility to arbitration agreements was that such agreements were contrary to public policy.²⁰ When the FAA was enacted in 1925, Congress effectively overruled the common law hostility to arbitration agreements and established a new public policy that placed an agreement to arbitrate “upon the same footing as other contracts, where it belongs.”²¹

14. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002).

15. *Id.*

16. See ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 287–89 (Alan Miles Ruben ed., 6th ed. 2003).

17. *Howsam*, 537 U.S. at 83–84.

18. See *infra* notes 95–104 and accompanying text.

19. See *infra* notes 105–89 and accompanying text.

20. See *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982–84 (2d Cir. 1942).

21. H.R. REP. No. 68-96, at 1 (1924).

The FAA's impact is wide reaching. By its terms it applies to "any maritime transaction or a contract evidencing a transaction involving commerce."²² The Supreme Court construed the legislatively unique words "involving commerce" to mean the same thing as "affecting commerce" and held that the FAA was intended to be a full exercise of Congress's constitutional power to regulate interstate commerce.²³ The FAA states that it does not "apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."²⁴ The Supreme Court, however, construed that limiting phrase narrowly. Applying the doctrine of *ejusdem generis*, the Court found that Congress only intended to exclude contracts for employment of workers engaged in transportation.²⁵ In addition, the Supreme Court found that the FAA preempts state law and that state courts cannot invalidate arbitration agreements by applying state statutes.²⁶ The FAA, therefore, with only limited exceptions, applies to almost any arbitration agreement in the United States so long as the underlying transaction affects interstate commerce.²⁷

Section 2 of the FAA provides:

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.²⁸

Section 2 thus explicitly ends the common law rule that agreements to arbitrate are revocable by either party prior to the issuance of an arbitration award. In the same sentence, however, the FAA acknowledges that there will be instances in which arbitration agreements will not be enforceable; such agreements may be held invalid, revocable, and unenforceable on "such grounds as exist at law or in equity for the revocation of any contract."²⁹ That language is the genesis of the oft-

22. 9 U.S.C. § 2 (2006).

23. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273–77 (1995).

24. 9 U.S.C. § 1.

25. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113–21 (2001).

26. *Allied-Bruce Terminix*, 513 U.S. at 272.

27. *See id.* at 281. Because the courts construed the scope of the interstate commerce clause more narrowly prior to *West Coast Hotel Co. v. Parish*, 300 U.S. 379 (1937), the reach of the FAA is considerably greater than what Congress probably envisioned when it passed the statute in 1925. The Supreme Court justified its expansive reading of the scope of the FAA on the ground that it is not "unusual" for the Court to "ask whether the scope of a statute should expand along with the expansion of the Commerce Clause power itself, and to answer the question affirmatively." *Allied-Bruce Terminix*, 513 U.S. at 275.

28. 9 U.S.C. § 2.

29. *Id.*

repeated judicial observation that “the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so.”³⁰

Section 3 of the FAA provides a procedure by which a party to litigation may assert that the matter should be arbitrated instead of litigated. Section 3 is similar to Section 2 in that it requires that agreements to arbitrate be enforced, but in the same sentence, it also acknowledges that not every contractual dispute is arbitrable. Section 3 states:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.³¹

The federal courts are thus required to stay litigation pending arbitration when an issue is “referable to arbitration” but only after “being satisfied that the issue . . . is referable to arbitration under such an agreement.”³² Furthermore, even if the issue is otherwise referable to arbitration, the litigation will not be stayed if the applicant for the stay is “in default in proceeding with such arbitration.”³³

Section 4 of the FAA provides a procedural remedy in federal district court for a complaining party to an arbitration agreement when the other party refuses to participate in arbitration. Pursuant to Section 4, the district court is to hear the parties and order them to proceed to arbitration “upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue.”³⁴

Taken together, sections 2, 3, and 4 of the FAA provide the foundation of the American law of arbitrability. They establish that arbitration agreements are to be enforced by federal courts, unless there are grounds under the law of contracts for revocation of the arbitration

30. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967); see also, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (supporting the proposition that Congress intended to put arbitration agreements on an “equal footing” with other contracts with language from § 2 of the FAA); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293–94 (2002) (“The FAA directs courts to place arbitration agreements on equal footing with other contracts”); *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leeland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (“[The FAA] simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.”).

31. 9 U.S.C. § 3.

32. *Id.*

33. *Id.*

34. *Id.* § 4.

agreement. Federal district courts are to stay litigation and compel arbitration only after being satisfied that the matter in dispute is referable under an agreement to arbitrate. Even if the issue in dispute is referable under a valid agreement to arbitrate, a federal court still might decline to enforce the agreement if the party seeking to avoid litigation is “in default in proceeding with such arbitration.”³⁵ The FAA, therefore, requires the federal courts to perform certain gate-keeper functions when the parties to a contractual dispute disagree whether they should proceed to arbitration.

B. The Scope of the Agreement to Arbitrate

It sometimes occurs that the parties to a dispute agree that there is an agreement to arbitrate but disagree as to whether the particular dispute falls within the scope of that agreement. The landmark case of *United Steelworkers of America v. Warrior & Gulf Navigation Co.*³⁶ is an example of such a disagreement. In *Warrior & Gulf*, an employer and a union had a contract that provided for arbitration of “differences . . . as to the meaning and application of this agreement” or in the event of “any local trouble of any kind.”³⁷ The same contract, however, also provided that “matters which are strictly a function of management” would not be arbitrated.³⁸ When the employer contracted out certain work and laid off some of the employees, the union went to federal district court to compel the employer to go to arbitration. The district court declined to order the parties to arbitration on the ground that the contracting out of work was a function of management not limited by the contract. The court of appeals affirmed.³⁹

On review, the Supreme Court agreed that the question of whether the employer breached its duty to arbitrate was a matter for the courts to determine because “a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”⁴⁰ In making that determination, however, the court’s inquiry

must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it can be said with positive assurance that the

35. *Id.* § 3.

36. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). As is typical in cases involving collective bargaining agreements, *Warrior & Gulf* was analyzed under Section 301 of the Labor Management Relations Act, rather than under the FAA. *Id.* at 577 & n.1. Cases involving the FAA and the Labor Management Relations Act “employ the same rules of arbitrability.” *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 130 S. Ct. 2847, 2857 n.6 (2010).

37. *Warrior & Gulf Navigation Co.*, 363 U.S. at 576.

38. *Id.*

39. *Id.* at 577.

40. *Id.* at 582.

arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.⁴¹

Furthermore, in determining arbitrability “the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions” of the underlying contract.⁴²

Warrior & Gulf sets forth the basic framework for determining challenges to arbitrability based on the scope of the arbitration clause. The issue of whether the parties have agreed to arbitrate a particular dispute is for a court to decide in the first instance. In making that decision, however, the court must resolve “any doubts concerning the scope of arbitrable issues” in favor of arbitration.⁴³ So long as there is a contract with an arbitration clause, “there is a presumption of arbitrability.”⁴⁴

Although, as a general rule, a court is to decide in the first instance whether a particular dispute is within the scope of an agreement to arbitrate, the parties can circumvent that rule by stating in their agreement that all issues of arbitrability are to be determined by the arbitrator. To be effective, such a statement must be clear and unmistakable.⁴⁵ Any ambiguity in an arbitration agreement as to whether a court or an arbitrator should determine the issue of arbitrability will be resolved in favor of the court making the determination.⁴⁶

C. Procedural Arbitrability

A party to an arbitration agreement will sometimes object to the arbitration because the complaining party failed to meet some procedural requirement, such as commencing the arbitration within a certain amount of time. The Supreme Court has determined that such issues of procedural arbitrability are to be treated differently than issues of whether the substance of the dispute falls within the scope of an agreement to arbitrate. While substantive objections concerning the scope of the agreement to arbitrate are to be determined by a court in the first instance,⁴⁷ procedural objections are to be determined by an arbitrator.⁴⁸

The Supreme Court has given two basic reasons for assigning issues of procedural arbitrability to contract arbitrators. First, contract

41. *Id.* at 582–83.

42. *Id.* at 585.

43. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (citing *Warrior & Gulf Navigation Co.*, 363 U.S. at 582–83).

44. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (citing *Warrior & Gulf Navigation Co.*, 363 U.S. at 582–83).

45. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (citing *Warrior & Gulf Navigation Co.*, 363 U.S. at 582–83).

46. *Id.* at 944–45.

47. *See supra* notes 36–46 and accompanying text.

48. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–86 (2002).

arbitrators may be “comparatively more expert” than the courts at applying the procedural requirements of the parties’ contract.⁴⁹ Second, “parties to an arbitration contract would normally expect a forum-based decision maker to decide forum-specific procedural gateway matters.”⁵⁰ As discussed below, both of those considerations are relevant to the issue of whether parties that participate in litigation waive their right to arbitrate.⁵¹

D. Allegations Concerning the Validity of the Entire Contract

A party to a putative arbitration agreement might object that the entire agreement between the parties is void, illegal, or otherwise legally unenforceable. For example, the party resisting arbitration might argue the contract violates state law⁵² or was fraudulently induced.⁵³ Arguably, if the entire contract containing an arbitration agreement is void or revocable, then the agreement to arbitrate is also void or revocable. Such a result would seem to be consistent with Section 2 of the FAA, which provides that agreements to arbitrate are “enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁵⁴

The Supreme Court, however, determined that objections to the enforceability of the entire contract should be addressed to the contract arbitrator, not to a court. In reaching that result, the Court applied the doctrine of severability. Pursuant to that doctrine, as a matter of substantive federal arbitration law, “an arbitration provision is severable from the remainder of the contract.”⁵⁵ Unless the ground for challenging the enforceability of the contract applies specifically to the arbitration provision itself (for example, if it is alleged that the arbitration provision, rather than the entire contract, was fraudulently induced), then the issue of whether the contract is enforceable will be referred to the contract arbitrator in the first instance.⁵⁶

49. *Id.* at 85.

50. *Id.* at 86.

51. See *infra* notes 200–03 and accompanying text.

52. See *Preston v. Ferrer*, 552 US 346 (2008).

53. See *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

54. 9 U.S.C. § 2 (2006).

55. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006).

56. *Id.* at 445–46; see also *Prima Paint*, 388 U.S. at 400–04 (distinguishing between state law claims of fraud in the inducement of the entire contract and claims relating specifically to the arbitration clause of a contract).

E. Allegations Concerning the Formation of the Entire Contract

The issue of whether the underlying contract is unenforceable is different from the issue of whether a contract was ever formed at all. In *Buckeye Check Cashing, Inc. v. Cardenga*, the party resisting arbitration argued that the contract at issue was void ab initio because it violated Florida lending and consumer protection laws.⁵⁷ The Supreme Court applied the doctrine of severability and held the dispute should be referred to the contract arbitrator because the claim of illegality went to the contract as a whole, not to the arbitration provision specifically.⁵⁸ In reaching that conclusion, however, the Court noted “[t]he issue of the contract’s validity is different from the issue [of] whether any agreement between the alleged obligor and obligee was ever concluded.”⁵⁹ The *Buckeye* decision, therefore, does not address arbitrability challenges that allege the obligor never signed the contract, lacked authority, or lacked capacity.⁶⁰ The subsequent decision of *Granite Rock Co. v. International Brotherhood of Teamsters*, however, does address the problem of arbitrability challenges based on contract formation.⁶¹

In *Granite Rock*, the contract between a union and employer expired, and the union went on strike.⁶² The union and employer then negotiated a new contract with a no-strike clause and an arbitration clause. The new contract was putatively ratified by a vote of the union membership. The union, however, contended that the ratification vote was flawed, and the union members did not return to work until a second ratification vote was held more than a month later. The employer sued the union for damages it sustained as a result of the work stoppage that occurred between the first and second votes. The union contended that the issue of whether the contract was validly ratified by the first vote was a question for the contract arbitrator to decide.⁶³ The Supreme Court, however, held that the issue of when the contract was ratified was an issue of formation and, therefore, was not arbitrable.⁶⁴

The *Granite Rock* Court reasoned that the federal policy favoring arbitration of labor disputes “cannot be divorced from the first princi-

57. *Buckeye Check Cashing, Inc.*, 546 U.S. at 443.

58. *Id.* at 442–45.

59. *Id.* at 444 n.1.

60. *Id.*

61. *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 130 S. Ct. 2847 (2010).

62. *Id.* at 2853. Although *Granite Rock* was a labor relations case arising under the Labor Management Relations Act (LMRA), the Court’s decision relies on cases decided under both the LMRA and the FAA because both statutes “employ the same rules of arbitrability.” *Id.* at 2857 n.6.

63. *Id.* at 2853–55.

64. *Id.* at 2860–61.

ple that underscores all of our arbitration decisions: Arbitration is strictly ‘a matter of consent.’⁶⁵ Applying that principle, arbitration should not be ordered unless the court is first satisfied that the formation of the agreement is not an issue. Because the issue of when the contract was validly ratified was a formation issue, it was an issue for the court rather than an arbitrator.⁶⁶ Taken together, *Granite Rock* and *Buckeye Check Cashing* establish a rule that issues of contract validity are for the contract arbitrator to determine, but issues of contract formation are for a court to determine.⁶⁷

F. Waiver of the Right to Arbitrate Generally

It is a well-established principle of contract law that contract rights can be waived.⁶⁸ That principle includes the possibility that a party to a contract might waive the right to arbitrate and instead choose to litigate.⁶⁹ The waiver of the right to arbitrate may be either expressly stated by a party to a contract, or it may be established by “undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary.”⁷⁰

This Article discusses the issue of when participation in litigation will constitute a waiver of the contractual right to arbitrate in Parts III and IV.⁷¹ It is, however, also possible for a party to a contract to waive the right to arbitrate by means other than participation in litigation. For example, a party that had ignored correspondence seeking to arbitrate a claim was not permitted to use arbitration as a defense in subsequent litigation.⁷² Similarly, a party that had disclaimed any obligation to arbitrate was found to have waived the right to later insist on arbitration.⁷³

65. *Id.* at 2857 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leeland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

66. *Id.* at 2860–61.

67. *See* *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 & n.1 (distinguishing the issue of contract validity from the issue of whether contract was ever concluded); *Granite Rock*, 130 S. Ct. at 2855–56 (noting issues concerning contract formation are generally for courts to decide).

68. *See* RESTATEMENT (SECOND) OF CONTRACTS § 84 cmt. a–b (1979); E. ALLAN FARNSWORTH, *CONTRACTS* § 8.5 (3d ed. 2004).

69. *See* 4 AM. JUR. 2D *Alternative Dispute Resolution* § 105 (2007) (“The right to arbitrate given by a contract may be waived.”).

70. *Id.*

71. *See infra* notes 90–256 and accompanying text.

72. *Blake Const. Co. v. United States*, 252 F.2d 658, 662 (5th Cir. 1958).

73. *Baker & Taylor, Inc. v. AlphaCraze.com Corp.*, 602 F.3d 486, 491 (2d Cir. 2010) (per curiam); *see also* *Brown v. Dillard’s Inc.*, 430 F.3d 1004, 1006 (9th Cir. 2005) (denying an employer the contractual right to compel an employee’s participation in arbitration after the employer refused to participate in the employee’s prior attempt to initiate arbitration).

There is broad, but not universal, agreement that waiver by conduct other than litigation is a gateway issue that should be decided by an arbitrator rather than a court.⁷⁴ Courts considering that issue have been significantly influenced by a sentence in the Supreme Court's decision in *Howsam v. Dean Witter Reynolds, Inc.*⁷⁵ In *Howsam*, the Court considered the issue of whether a court or an arbitrator should determine if a party's claim was time-barred pursuant to a procedural rule of the agreed upon arbitral forum requiring that disputes be submitted within six years of the underlying occurrence. As discussed above, the Court ruled that such procedural issues are presumptively for an arbitrator to decide.⁷⁶ After reaching that determination, the *Howsam* Court stated, "So, too, the presumption is that the arbitrator should decide 'allegations of waiver, delay, or a like defense to arbitrability.'"⁷⁷

Despite the above-quoted sentence from *Howsam*, the Sixth Circuit Court of Appeals has held the issue of whether a party's prelitigation conduct constitutes a waiver of the right to arbitrate is an issue for a court to decide. In *JPD, Inc. v. Chronimed Holdings, Inc.*, the plaintiff alleged that the defendant waived its right to arbitration by statements made in correspondence sent to the plaintiff prior to the commencement of the litigation.⁷⁸ The defendant, relying on *Howsam*, argued that the issue of waiver should be referred to the contract arbitrator. The Sixth Circuit, however, ruled that *Howsam's* statement about "waiver, delay or a like defense to arbitrability" must be read in context and was only meant to refer to "defenses arising from non-compliance with *contractual* conditions precedent to arbitration, such as the NASD time limit rule at issue in that case."⁷⁹ Because the waiver alleged in *JPD* was conduct-based rather than "contractually-based," the Sixth Circuit held the question of whether the right to arbitrate had been waived was for a court to decide.⁸⁰

74. See JAY. E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION § 6:38 (3d ed. 2005); Michael P. Scharpf, Note, *Court v. Arbitrator: Who Should Decide Whether Prelitigation Conduct Waives the Right to Compel an Arbitration Agreement?*, 84 ST. JOHN'S L. REV. 363, 364–65 (2010).

75. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).

76. See *supra* notes 48–51 and accompanying text.

77. *Howsam*, 537 U.S. at 84 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24–25 (1983)).

78. *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 393 (6th Cir. 2008).

79. *Id.* at 393–94. In support of its conclusion, the Sixth Circuit cites cases involving waiver of the right to arbitration by participation in litigation. *Id.* As is discussed below, however, there are significant reasons for having a court decide issues of waiver by litigation, which are not applicable to cases involving waiver by other conduct. See *infra* notes 194–207 and accompanying text; see also, Scharpf, note 74, at 382–89 (arguing that waiver by prelitigation conduct should be for arbitrator to decide).

80. *JPD, Inc.*, 539 F.3d at 394.

In light of the Sixth Circuit's decision in *JPD*, the issue of who should decide whether there has been a waiver of the right to arbitrate by conduct other than participation in litigation remains unsettled.⁸¹ It is likely to remain unsettled until the Supreme Court clarifies what it meant by the phrase "waiver, delay, or a like defense of arbitrability" in *Howsam*.⁸² As is discussed below, the courts are similarly struggling with how to apply *Howsam* to cases involving allegations of waiver by participation in litigation.⁸³

G. Conclusions Concerning the Law of Arbitrability

There are two overriding principles that guide the federal courts in determining issues of arbitrability. First, there is a strong federal policy favoring arbitration.⁸⁴ Second, parties will not be forced to arbitrate absent an agreement to do so.⁸⁵ The Supreme Court's recent decision in *Granite Rock* makes it clear that the policy favoring arbitration is not so strong that it can overcome the lack of an agreement to arbitrate.⁸⁶ The two overriding principles, therefore, can be functionally combined into a single guiding policy that the courts should vigorously enforce agreements to arbitrate. That policy is consistent with the FAA, which requires judicial enforcement of arbitration agreements, but only after the court is satisfied that there is an agreement to arbitrate the relevant issue.⁸⁷

In the absence of a comprehensive legislative scheme addressing issues of arbitrability, the federal courts have developed various doctrines, such as substantive arbitrability, procedural arbitrability, severability, and waiver.⁸⁸ All of those doctrines seek to further the policy of vigorous enforcement of agreements to arbitrate so long as there *is* an agreement to arbitrate.⁸⁹ The question of when participation in litigation will constitute a waiver of the right to arbitrate

81. Compare *JPD, Inc.*, 539 F.3d at 394 (holding *Howsam* does not prevent court from determining issue of waiver by inconsistent conduct), with *Mulvaney Mech., Inc. v. Sheet Metal Workers Int'l Ass'n, Local 38*, 351 F.3d 43, 45–46 (2d Cir. 2003) (holding pursuant to *Howsam* that an allegation that party's inconsistent conduct repudiated the agreement should be referred to arbitrator).

82. *Howsam*, 537 U.S. at 84.

83. See *infra* notes 96–104 and accompanying text.

84. See *Howsam*, 537 U.S. at 83.

85. See *United Steel Workers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

86. *Granite Rock Co. v. Int'l. Bhd. of Teamsters*, 130 S. Ct. 2847, 2857 (2010).

87. 9 U.S.C. §§ 2–4 (2006).

88. See *supra* notes 36–83 and accompanying text.

89. See, e.g., *Granite Rock Co.*, 130 S. Ct. at 2857 (policy favoring arbitration "cannot be divorced from" principle of consent); *Howsam*, 537 U.S. at 83 (policy favors arbitration, but parties must have agreed to submit dispute); *Warrior & Gulf Navigation Co.*, 363 U.S. at 582 (policy favors settlement of disputes through arbitration, but the parties must have agreed to arbitrate).

should be addressed within the framework of those doctrines and in conformity with that policy.

III. THE VARIOUS APPROACHES TO WAIVER BY PARTICIPATION IN LITIGATION

Section 3 of the FAA provides that federal courts should grant an application to stay litigation of “any issue referable to arbitration under an agreement in writing for such arbitration” but only if “the applicant for the stay is not in default in proceeding with such arbitration.”⁹⁰ There is general agreement among the circuit courts that the term “default” in Section 3 should, under appropriate circumstances, be read to include waiver of the right to arbitrate by participation in litigation.⁹¹ The circuit courts, however, have taken varying approaches to determining when participation in litigation will constitute a waiver of the right to arbitrate. The most significant split in the circuits in this regard concerns whether the party resisting arbitration must show prejudice in order to establish that the other party waived its right to arbitrate. Nine circuits clearly require a showing of prejudice before such a waiver will be found.⁹² Three circuits do not require a showing of prejudice, and two of those three have created a presumption that a party that participates in litigation waives its right to arbitrate.⁹³ The circuits that require a showing of prejudice vary as to what that showing of prejudice entails.⁹⁴

A. Who Decides Whether a Party Waived Its Right to Arbitrate by Participating in Litigation

Before there can be a determination as to the proper standard for waiver by participation in litigation, there needs to be a determination as to whether the waiver issue itself should be referred to an arbitrator. Arguably, if one party to a litigation moves to stay the litigation and compel arbitration and the other party objects that the contractual right to arbitrate has been waived, the court should refer the case to the contract arbitrator for a determination of the waiver issue. The usual rule, at least as to waiver based on conduct other than litigation, is that the contract arbitrator should decide allegations of waiver.⁹⁵ Additionally, in deciding *Howsam v. Dean Witter Reynolds, Inc.*, the Supreme Court stated “the presumption is that the arbitrator should

90. 9 U.S.C. § 3.

91. See, e.g., *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 217 (3d Cir. 2007); *Marie v. Allied Home Mortgage*, 402 F.3d 1, 14 (1st Cir. 2005); *Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.*, 380 F.3d 200, 204 (4th Cir. 2004).

92. See *infra* notes 105–50 and accompanying text.

93. See *infra* notes 151–85 and accompanying text.

94. See *infra* notes 105–50 and accompanying text.

95. See *supra* notes 74–83 and accompanying text.

decide allegations of waiver, delay, or a like defense to arbitrability.”⁹⁶ A literal reading of that statement would seem to require referral of issues of waiver by participation in litigation to the contract arbitrator in most cases.

Nonetheless, since the *Howsam* decision, the federal courts have generally continued to decide themselves whether there has been a waiver of the right to arbitration by participation in litigation.⁹⁷ Some courts have done so without any discussion.⁹⁸ Others have held that *Howsam*'s reference to waiver should be read as applying only to waiver by failing to comply with a condition precedent of a contract, such as failing to abide by a contractual time limit.⁹⁹ For reasons discussed in Part IV of this Article,¹⁰⁰ that consensus approach is preferable to a broader, more literal reading of *Howsam*'s statement that “the presumption is that the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability.”¹⁰¹

The Eighth Circuit, however, simply relying on *Howsam*, and without any further discussion, held in *National American Insurance Co. v. Transamerica Occidental Life Insurance Co.* that the issue of waiver by participation in litigation should be referred to the arbitrator for determination.¹⁰² To add to the confusion, in a later case the Eighth Circuit decided an issue of waiver by participation in litigation without referring it to the contract arbitrator and without citing *Howsam* or *National American*.¹⁰³ In a still later case in which it decided that an employer had not waived its right to arbitrate by participating in EEOC proceedings, the Eighth Circuit acknowledged its prior decision in *National American Insurance* but did not address whether the waiver issue before it should be referred to an arbitrator because the parties had not raised that possibility.¹⁰⁴

96. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24–25 (1983)).

97. *See JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 393–94 (6th Cir. 2008); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 217 (3d Cir. 2007); *Marie v. Allied Home Mortgage*, 402 F.3d 1, 14 (1st Cir. 2005); *Republic Ins. Co. v. Paico Receivables LLC*, 383 F.3d 341, 346–49 (5th Cir. 2004).

98. *See Marie*, 402 F.3d at 12 (“[T]he First Circuit has continued to decide waiver questions due to litigation-related activities without discussing the impact of *Howsam* . . .”).

99. *See JPD, Inc.*, 539 F.3d at 393–94; *Ehleiter*, 482 F.3d at 217; *Marie*, 402 F.3d at 14; *Tristar Fin. Ins. Agency, Inc. v. Sec. Ins. Co. of Hartford*, 97 F. App'x 462 (5th Cir. 2004).

100. *See infra* notes 194–207 and accompanying text.

101. *Howsam*, 537 U.S. at 83 (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25).

102. *Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462, 466 (8th Cir. 2003).

103. *Lewallen v. Green Tree Servicing, LLC*, 487 F.3d 1085 (8th Cir. 2007).

104. *McNamara v. Yellow Transp., Inc.*, 570 F.3d 950, 958 n.3 (8th Cir. 2009).

It may be that eventually the Eighth Circuit will overrule itself and join the consensus view that, in spite of the Supreme Court's statement in *Howsam*, determinations of waiver by participation in litigation should be made by courts instead of arbitrators. Nevertheless, until the Supreme Court clarifies *Howsam's* statement about "allegations of waiver," the question of who should decide issues of waiver by participation in litigation will remain unsettled.

B. Courts That Require a Showing of Prejudice

The federal courts of appeal all recognize that under some circumstances participation in litigation can constitute a waiver of the right to arbitrate, but they disagree as to what those circumstances are.¹⁰⁵ The basic premise behind finding such a waiver is that litigating a claim is inherently inconsistent with arbitrating a claim.¹⁰⁶ In that respect, waiver of the right to arbitrate is like any other conduct-based waiver of a contractual right.¹⁰⁷ A substantial majority of the circuits, however, will not find a waiver of the right to arbitrate by participation in litigation unless there is a showing of prejudice to the party resisting arbitration.¹⁰⁸ For those circuits that require a showing of prejudice, waiver of an agreement to arbitrate is, at least in this respect, different from waiver of other contracts.¹⁰⁹

Those circuits that require a showing of prejudice before there can be a finding of waiver of the right to arbitrate state they do so because of the strong federal policy favoring arbitration.¹¹⁰ Although they disagree as to just what kind of a showing must be made, they agree that in the context of waiver by litigation, prejudice may consist of delay and expense to the party resisting arbitration.¹¹¹ Prejudice can also

105. See *infra* notes 116–85 and accompanying text.

106. See, e.g., *Nat'l Found. For Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987) ("essential question is whether . . . party has acted inconsistently with the arbitration right"); *Gen. Star Nat'l Ins. Co. v. Administratia Asigurariilor de Stat*, 289 F.3d 434, 438 (6th Cir. 2002) (arbitration agreement waived by completely inconsistent actions); *Ritzel Commc'ns., Inc. v. Mid-American Cellular Tel. Co.*, 989 F.2d 966, 968–69 (8th Cir. 1993) (waiver of right to arbitrate requires that party "acted inconsistently with that right").

107. See generally E. ALLAN FARNSWORTH, *CONTRACTS* § 8.5 (3d ed. 2004) (discussing waiver).

108. See *infra* notes 116–50 and accompanying text.

109. See *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995) ("[I]n ordinary contract law, a waiver normally is effective without proof of consideration or detrimental reliance.").

110. See, e.g., *Lewallen*, 487 F.3d at 1090 (citing strong federal policy in favor of arbitration); *In re Tyco Int'l Ltd. Sec. Litigation*, 422 F.3d 41, 44 (1st Cir. 2005) (citing strong federal policy in favor of arbitration); *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 95 (4th Cir. 1996) (citing strong federal policy in favor of arbitration).

111. See, e.g., *Republic Ins. Co. v. Paico Receivables*, 383 F.3d 341, 346 (5th Cir. 2005) (prejudice may be due to delay and expense); *Thyssen, Inc. v. Calypso Shipping*

consist of some tactical advantage that would be gained by the party seeking to move the case to an arbitral forum.¹¹² For example, changing to an arbitral forum might give a party a second opportunity to argue an issue that it lost on a motion in litigation.¹¹³ Prejudice may also be found if the party seeking to arbitrate first conducted discovery in litigation that would not have been available to it in arbitration.¹¹⁴

As a practical matter, the party arguing in favor of waiver will usually be able to show some level of delay, prejudice, or tactical disadvantage from being forced to litigate and then arbitrate. At a minimum, the two-forum approach to dispute resolution would cause some delay and expense. The issue of how much delay, expense, and tactical disadvantage is necessary in order to satisfy the prejudice requirement is, therefore, an important question. None of the circuits that require prejudice has formulated a precise test for determining when that requirement has been met. On the contrary, circuits that require prejudice often emphasize that there is no “bright line test” for waiver of the right to arbitrate.¹¹⁵

1. Circuits That Impose a “Heavy Burden” to Show Prejudice

The Fourth, Fifth and Ninth Circuits have held that because of the federal policy favoring arbitration, a party seeking to establish waiver by participation in litigation bears a “heavy burden” to prove prejudice.¹¹⁶ The Fifth Circuit defines prejudice as “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.”¹¹⁷ There is, however, “a strong presumption against waiver of arbitration.”¹¹⁸ Thus, in *Cargill Ferrous International v. Sea Phoenix MV*, the Fifth Circuit held there was no waiver where the defendant waited until after a deposition had

Corp., 310 F.3d 102, 105 (2d Cir. 2002) (prejudice may be due to delay and expense); *S & H Contractors, Inc. v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990) (prejudice may be due to delay and expense).

112. *In re Tyco Int’l Ltd. Sec. Litigation*, 422 F.3d at 46.

113. *Thyssen, Inc.*, 310 F.3d at 105.

114. *Kelly v. Golden*, 352 F.3d 344, 349 (8th Cir. 2003).

115. *In re Tyco Int’l Ltd. Sec. Litigation*, 422 F.3d at 46; *see also*, *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 223 (3d Cir. 2007) (no “per se” rule as to necessary length of delay); *Lewallen*, 487 F.3d at 1093 (participation in discovery not “per se prejudicial”).

116. *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 326 (5th Cir. 1999); *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 95 (4th Cir. 1996); *Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990).

117. *Republic Ins. Co. v. Paico Receivables LLC*, 383 F.3d 341, 346 (5th Cir. 2004) (quoting *Doctor’s Assocs. v. Distajo*, 107 F.3d 126, 134 (2d Cir.), *cert. denied*, 522 U.S. 948 (1997)).

118. *Id.* at 344.

been taken to move to compel arbitration.¹¹⁹ The Ninth Circuit has not defined the required prejudice but has held that the party resisting arbitration bears a “heavy burden” of proof as to all elements of waiver, including prejudice.¹²⁰

The Fourth Circuit has held that a waiver arises “when the party seeking arbitration ‘so substantially utilized the litigation machinery that to subsequently permit arbitration would prejudice’” the other party.¹²¹ It is not sufficient that the party seeking to arbitrate filed pleadings in the litigation and caused delay of the arbitration.¹²² Rather, the Fourth Circuit has emphasized “the dispositive question is whether the party objecting to the arbitration has suffered *actual prejudice*.”¹²³ Because of the strong federal policy favoring arbitration, the Fourth Circuit will not infer waiver lightly.¹²⁴

The case of *MicroStrategy, Inc. v. Lauricia*¹²⁵ illustrates just how heavy the burden of proving waiver by participation in litigation is in the Fourth Circuit. In that case, MicroStrategy’s employee, Lauricia, signed a document requiring her to arbitrate any claim arising out of or relating to her employment relationship with MicroStrategy. Lauricia later filed a charge with the EEOC alleging age and sex discrimination by MicroStrategy and filed a complaint with the Department of Labor, alleging violations of the Fair Labor Standards Act. MicroStrategy then sued Lauricia and her attorney in federal district court seeking a declaratory judgment that it had not violated the Fair Labor Standards Act and also seeking damages for the alleged theft and disclosure of confidential information. When that case was dismissed, MicroStrategy sued Lauricia and her attorney in state court. After the EEOC issued Lauricia a right-to-sue letter, MicroStrategy sued Lauricia again in federal court, seeking a declaratory judgment that it was not liable to Lauricia for violating federal employment laws. At that point, having been sued by MicroStrategy three times, Lauricia sued MicroStrategy in federal court. MicroStrategy then moved to dismiss Lauricia’s suit on the ground that she was required to arbitrate.¹²⁶ The district court, after consolidating the federal case brought by MicroStrategy with the case brought by Lauricia, found

119. *Cargill Ferrous Int’l v. Sea Phoenix MV*, 325 F.3d 695, 701 (5th Cir. 2003).

120. *See Britton*, 916 F.2d at 1412.

121. *Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.*, 380 F.3d 200, 204 (4th Cir. 2004) (quoting *Maxum Foundns. Inc. v. Salus Corp.*, 779 F.2d 974, 981 (4th Cir. 1985)).

122. *Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 817 F.2d 250, 252 (4th Cir. 1987).

123. *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 251 (4th Cir. 2001) (quoting *Fraser*, 817 F.2d at 252).

124. *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 95 (4th Cir. 1996).

125. 268 F.3d at 249.

126. *Id.* at 246–47.

that because of its “remarkably aggressive” litigation conduct, MicroStrategy waived its right to arbitrate.¹²⁷ The Fourth Circuit reversed.¹²⁸

During its three court cases, MicroStrategy had deposed Lauricia and engaged in substantial document discovery.¹²⁹ The Fourth Circuit, however, found Lauricia did not carry her “heavy burden” of proving that similar discovery would not have been available in arbitration, and so she had not shown actual prejudice.¹³⁰ The Fourth Circuit acknowledged that the court cases commenced by MicroStrategy “involved the expenditure of substantial sums of money,” particularly because Lauricia had been forced to hire a second attorney until the state court dismissed MicroStrategy’s claim against her first attorney.¹³¹ The Fourth Circuit, however, did not consider those expenses to constitute actual prejudice because they “primarily” related to MicroStrategy’s state law claims against Lauricia rather than Lauricia’s federal claims against MicroStrategy.¹³² The Fourth Circuit even acknowledged that Lauricia made a “strong argument that MicroStrategy undertook its ‘remarkably aggressive’ course of litigation for the sole purpose of wearing her out, both emotionally and financially.”¹³³ Nonetheless, in the Fourth Circuit’s view, Lauricia had not carried her “heavy burden of establishing that she suffered legally significant prejudice from MicroStrategy’s litigation activities.”¹³⁴

The “heavy burden” to show prejudice does not mean that participation in litigation will never be found to constitute a waiver of the right to arbitrate in the Fourth, Fifth, and Ninth Circuits.¹³⁵ It does mean, however, that waiver is more difficult to establish in the Fourth, Fifth, and Ninth Circuits than in the other circuits.¹³⁶ The *MicroStrategy* case indicates that the Fourth Circuit may be the most difficult circuit in which to establish the required prejudice.

127. *Id.* at 247–48 (quoting *Lauricia v. MicroStrategy*, 114 F. Supp. 2d 489, 492 (E.D. Va. 2000)).

128. *Id.* at 254.

129. *Id.*

130. *Id.* at 251.

131. *Id.* at 250–51.

132. *Id.* It is not clear why that distinction should make a difference. MicroStrategy’s claims concerning confidential information were related to the “employment relationship” and would seem to be covered by the scope of the arbitration agreement.

133. *Id.* at 254.

134. *Id.*

135. See *Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 817 F.2d 250 (4th Cir. 1987) (waiver found after years of delay, extensive discovery, and dispositive motions); *Republic Ins. Co. v. Paico Receivables LLC*, 383 F.3d 341, 344–47 (5th Cir. 2004) (waiver found where plaintiff asserted right to arbitrate days before trial scheduled to begin).

136. See *infra* notes 137–85 and accompanying text.

2. *The First Circuit “Modicum of Prejudice” Standard*

For circuits that require a showing of prejudice for waiver of the right to arbitrate by participation in litigation, the First Circuit is at the opposite end of the spectrum from the Fourth Circuit. The First Circuit has explicitly stated that it requires only a “modicum of prejudice” to the party arguing for waiver.¹³⁷ In the First Circuit, if a party to a court case intends to invoke a right to arbitrate, “this must be done early on in the case so resources are not needlessly deployed.”¹³⁸ The party resisting arbitration is still required to show prejudice, but where the other party has delayed its demand for arbitration, “the prejudice showing required is tame at best.”¹³⁹ Thus, in *Rankin v. Allstate Insurance Co.*, the First Circuit relied on the “prejudice inherent in wasted trial preparation when an arbitration demand is made, and effectively granted, after many months of delay and only six weeks before a long-scheduled trial.”¹⁴⁰

3. *Circuits Between a “Modicum” Standard and a “Heavy Burden” Standard*

Most circuits that require some showing of prejudice for a waiver of the right to arbitrate by participation in litigation fall between the “modicum” standard of the First Circuit and the “heavy burden” standard of the Fourth, Fifth, and Ninth Circuits.¹⁴¹ Generally, the circuits that require unqualified prejudice avoid any precise statement as to what constitutes a sufficient showing, and instead list various circumstances that may be considered in assessing prejudice, such as

137. *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 12 (1st Cir. 2003).

138. *Id.* at 14.

139. *Id.*

140. *Id.*

141. See *Lewallen v. Green Tree Servicing, LLC*, 487 F.3d 1085 (8th Cir. 2007); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 217 (3d Cir. 2007); *Gen. Star Nat'l Ins. Co. v. Administratia Asigurarilor de Stat*, 289 F.3d 434, 438 (6th Cir. 2002); *Doctor's Assocs. v. Distajo*, 107 F.3d 126, 134 (2d Cir.), *cert. denied*, 522 U.S. 948 (1997); *S&H Contractors, Inc. v. A.J. Taft Coal Co., Inc.*, 906 F.2d 1507, 1514 (11th Cir. 1990). As has been noted above, it is unclear whether, in light of the Supreme Court's decision in *Howsam*, the Eighth Circuit will decide issues of waiver by participation in litigation, or will simply refer such issues to the arbitrator for decision. See *supra* notes 102–04 and accompanying text. If the Eighth Circuit does still decide issues of waiver by participation in litigation, then the *Lewallen* case sets forth the standard it applies. See *Lewallen*, 487 F.3d at 1090–93.

delay,¹⁴² expense,¹⁴³ attempts to relitigate issues lost in court,¹⁴⁴ and the use of litigation discovery procedures.¹⁴⁵

Highlighting the inexact nature of the prejudice inquiry, the Third Circuit

compiled a nonexclusive list of factors relevant to the prejudice inquiry: “[1] the timeliness or lack thereof of a motion to arbitrate . . . [2] the degree to which the party seeking to compel arbitration [or to stay court proceedings pending arbitration] has contested the merits of its opponent’s claims; [3] whether that party has informed its adversary of the intention to seek arbitration even if it has not yet filed a motion to stay the district court proceedings; [4] the extent of its non-merits motion practice; [5] its assent to the [trial] court’s pretrial orders; and [6] the extent to which both parties have engaged in discovery.”¹⁴⁶

The Third Circuit’s comprehensive list of factors highlights both the strength and the weakness of a prejudice requirement that is somewhere between the Fourth Circuit’s “heavy burden”¹⁴⁷ and the First Circuit’s “modicum.”¹⁴⁸ Applying a multifactor analysis “goes beyond merely counting the factors for or against finding a waiver,”¹⁴⁹ and so allows the court flexibility to make a case-specific just determination. The cost of that flexibility, however, is predictability.¹⁵⁰

C. Courts That Do Not Require a Showing of Prejudice

The Seventh, Tenth, and District of Columbia Circuits do not require a showing of prejudice in order to find a waiver of the right to arbitrate by participation in litigation.¹⁵¹ The Tenth Circuit’s approach is similar to that of the Third Circuit in that both circuits employ a multifactor, case-specific analysis to determine whether a party’s participation in litigation constitutes a waiver of the right to

142. See *Ehleiter*, 482 F.3d at 223 (delay a relevant factor, but no “per se” rules regarding delay).

143. See *S&H Contractors, Inc.*, 906 F.2d at 1514 (court may consider the expense incurred in the litigation process).

144. See *Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, 310 F.3d 102, 105 (2d Cir. 2002).

145. See *Stok & Assocs., P.A. v. Citibank, N.A.*, 387 F. App’x 921, 924 (11th Cir. 2010), *cert. dismissed*, 131 S. Ct. 2955 (2011).

146. *Ehleiter*, 482 F.3d at 222 (quoting *Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912, 926 (3d Cir. 1992)).

147. See *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 249 (4th Cir. 2001).

148. See *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 12 (1st Cir. 2003).

149. *Gray Holdco, Inc. v. Cassady*, 654 F.3d 444, 452 (3d Cir. 2011).

150. See *id.* at 451 (“the answer to the question of whether a party invoking the arbitration clause waived its right to arbitrate is necessarily case specific and thus depends on the circumstances and context of each case”).

151. *Zuckerman Spaeder, LLP v. Auffenberg*, 646 F.3d 919, 922–23 (D.C. Cir. 2011); *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995); *Reid Burton Constr., Inc. v. Carpenters Dist. Council of S. Colo.*, 614 F.2d 698, 702 (10th Cir.), *cert. denied*, 449 U.S. 824 (1980).

arbitrate.¹⁵² The difference between the two approaches is that the Third Circuit uses its multifactor analysis to determine whether the required showing of prejudice has been made;¹⁵³ the Tenth Circuit treats prejudice as one of the factors that it will consider in making a determination.¹⁵⁴

To determine if there has been a waiver of the right to arbitrate, the Tenth Circuit considers:

- (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) "whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and (6) whether the delay "affected, misled, or prejudiced" the opposing party.¹⁵⁵

The Tenth Circuit cautions that its list of factors is not necessarily exhaustive and that the factors are not meant to be applied mechanically. Instead, they "reflect certain principles that should guide courts in determining whether it is appropriate to deem that a party has waived its right to demand arbitration."¹⁵⁶

The Seventh Circuit has explicitly held "[t]o establish a waiver of the contractual right to arbitrate, a party need not show that it would be prejudiced if the stay were granted and arbitration ensued."¹⁵⁷ In *St. Mary's Medical Center of Evansville, Inc. v. Disco Aluminum Products Company, Inc.*,¹⁵⁸ the Seventh Circuit recognized that other circuits hold there can be no waiver of the right to arbitrate "absent prejudice to the non-defaulting party."¹⁵⁹ For the Seventh Circuit, however, "[t]he essential question is whether, based on the circumstances, the alleged defaulting party has acted inconsistently with the right to arbitrate."¹⁶⁰ Prejudice may be a "relevant factor" in assessing the circumstances, but "where it is clear that a party has forgone its right to arbitrate, a court may find waiver even if that decision did not prejudice the non-defaulting party."¹⁶¹

152. See *Hill v. Ricoh Americas Corp.*, 603 F.3d 766, 772–73 (10th Cir. 2010); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 222 (3d Cir. 2007).

153. *Ehleiter*, 482 F.3d at 222.

154. *Hill*, 603 F.3d at 772–73.

155. *Id.*

156. *Id.* at 773.

157. *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995).

158. 969 F.2d 585 (7th Cir. 1992).

159. *Id.* at 590.

160. *Id.* at 588.

161. *Id.* at 590.

In formulating its waiver standard, the *St. Mary's* court asserted that its rejection of a prejudice requirement was not “inconsistent with the ‘strong federal policy’ favoring arbitration.”¹⁶² The court reasoned that the FAA was designed to further “a policy favoring enforcement of contracts, not a preference for arbitration over litigation.”¹⁶³ The issue of whether a party has waived its contractual right to arbitration should, therefore, be decided according to the same standard as is applied to “waiver of any other contract right.”¹⁶⁴ When the parties to a contract with an arbitration provision both choose to litigate a dispute, they have, “in essence, agreed . . . to litigate rather than arbitrate,” and the courts should enforce that agreement.¹⁶⁵

Writing for the Seventh Circuit in *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, Chief Judge Posner described *St. Mary's* as having established that

[i]n determining whether a waiver has occurred, the court is not to place its thumb on the scales; the federal policy favoring arbitration is, at least so far as concerns the interpretation of an arbitration clause, merely a policy of treating such clauses no less hospitably than other contractual provisions. To establish a waiver of the contractual right to arbitrate, a party need not show that it would be prejudiced if the stay were granted and arbitration ensued.¹⁶⁶

Cabinetree then took what it describes as “the next step in the evolution of doctrine,” and held “that an election to proceed before a nonarbitral tribunal for the resolution of a contractual dispute is a presumptive waiver of the right to arbitrate.”¹⁶⁷ That is essentially the opposite approach to waiver by participation in litigation that is applied in the majority of circuits.¹⁶⁸ The Seventh Circuit’s presumption that a party that chooses to litigate has waived its right to arbitrate can be overcome under “abnormal” circumstances, in which case the court should consider any prejudice to the party resisting arbitration, as well as the diligence of the party seeking arbitration.¹⁶⁹

The District of Columbia Circuit has long been of the view that no showing of prejudice is required to establish waiver of the right to ar-

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 591.

166. *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995).

167. *Id.*

168. *See, e.g.*, *Lewallen v. Green Tree Servicing, LLC*, 487 F.3d 1085, 1090 (8th Cir. 2007) (resolve any doubts against finding of waiver); *Cargill Ferrous Int'l v. Sea Phoenix MV*, 325 F.3d 695, 700–01 (5th Cir. 2003) (applying presumption against waiver); *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 95 (4th Cir. 1996) (circumstances giving rise to waiver not to be lightly inferred).

169. *Cabinetree of Wis., Inc.*, 50 F.3d at 391.

bitrate by participation in litigation.¹⁷⁰ Until recently, it was similar to the Tenth Circuit¹⁷¹ in that it considered prejudice to be one of the factors that a court should consider in determining whether there had been a waiver of the right to arbitrate.¹⁷² A showing of prejudice, however, was not essential so long as “under the totality of the circumstances, the defaulting party . . . acted inconsistently with the arbitration right.”¹⁷³ In formulating that standard, the District of Columbia Circuit reasoned that

the “strong federal policy in favor of enforcing arbitration agreements” is based upon the enforcement of contract, rather than a preference for arbitration as an alternative dispute resolution mechanism. . . . Thus, the question of whether there has been waiver in the arbitration agreement context should be analyzed in much the same way as in any other contractual context.¹⁷⁴

The District of Columbia Circuit’s recent decision in *Zuckerman Spaeder, LLP v. Auffenberg*¹⁷⁵ indicates that the court’s thinking on waiver by participation in litigation has now evolved in a manner similar to that of the Seventh Circuit. In *Zuckerman Spaeder*, the District of Columbia Circuit noted that its “totality of the circumstances” approach was “fact-bound,” and that the court had “established few bright-line rules.”¹⁷⁶ The lack of a defined standard had “imposed a cost upon both litigants and the district court.”¹⁷⁷ To address that concern, *Zuckerman Spaeder* sets forth the following standard:

A defendant seeking a stay pending arbitration under Section 3 [of the FAA] 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. See Fed. R. Civ. P. 8(c) (enumerating affirmative defenses defendant must raise in answer or else forfeit). A defendant who delays seeking a stay pending arbitration until after his first available opportunity might still prevail on a later stay motion provided his delay did not prejudice his opponent or the court.¹⁷⁸

The District of Columbia Circuit has thus joined the Seventh Circuit in creating a presumption that a party that chooses to litigate loses its contractual right to arbitrate.¹⁷⁹

170. See *Cabinetree of Wis., Inc.*, 50 F.3d at 390 (stating that the District of Columbia Circuit does not “insist on evidence of prejudice beyond what is inherent”); *Nat’l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 777 (D.C. Cir. 1987) (“waiver may be found absent any showing of prejudice”).

171. See *supra* notes 151–56 and accompanying text.

172. See *Nat’l Found. for Cancer Research*, 821 F.2d at 777.

173. *Id.* at 774.

174. *Id.* (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218–24 (1985)).

175. 646 F.3d 919 (D.C. Cir. 2011).

176. *Id.* at 922.

177. *Id.*

178. *Id.* at 922–23.

179. The *Zuckerman Spaeder* standard only references the right of a “defendant seeking a stay pending arbitration.” *Id.* It is arguable that a different standard should apply to a plaintiff based on the plaintiff’s initiation of the litigation process and a defendant’s limited time to respond to a complaint.

Zuckerman Spaeder broke new ground by opining that to be technically correct as well as clear . . . forfeiture, not waiver, is the appropriate standard for evaluating a late-filed motion under Section 3 of the FAA. Forfeiture is the “failure to make a timely assertion of a right” and, unlike waiver, entails no element of intent.¹⁸⁰

The District of Columbia Circuit is unique in using the term “forfeiture” rather than “waiver” to refer to the loss of the right to arbitrate as a result of participation in litigation. It is a departure from convention that does not seem justified by the court’s observation that waiver entails an element of intent. As Professor Farnsworth states, although “waiver” is often defined as “‘the intentional relinquishment of a known right,’ this is a misleading definition.”¹⁸¹ It is “misleading in that the word ‘known’ must be read as going only to the facts and not to their legal effect. As Williston said, ‘blameworthy ignorance is sufficient.’”¹⁸² The word “waiver,” therefore, adequately describes a situation in which a party knowingly participates in litigation, even though it may not realize the legal effect of such participation on the right to arbitrate.¹⁸³

Overall, a review of the approaches of the three circuits that do not require prejudice shows that they, like the circuits that do require prejudice, do not have a uniform approach to the issue of waiver by participation in litigation. The Tenth Circuit employs a multifactor analysis in which prejudice may be considered and which is not to be mechanically applied.¹⁸⁴ The Seventh and the District of Columbia Circuits apply a presumption of waiver in cases where the parties have participated in litigation.¹⁸⁵

180. *Id.* at 922. One commentator has proposed that neither waiver nor forfeiture is correct in this context and that the courts should analyze the issue as one of discharge. See Paul Bennett IV, Note, “Waiving” Goodbye to Arbitration: A Contractual Approach, 69 WASH. & LEE L. REV. 1609, 1669–75 (2012).

181. E. ALLAN FARNSWORTH, CONTRACTS § 8.5 (3d ed. 2004).

182. *Id.* at § 8.5 n.6 (quoting S. WILLISTON, CONTRACTS § 685 (1st ed. 1920)). *Lewis v. The Keiser Sch.*, No. 11-62176-Civ., 2012 U.S. Dist. LEXIS 147150 (S.D. Fla. Oct. 12, 2012), provides an example of such blameworthy ignorance. In *Lewis*, the defendant employer waited seven months before moving to compel arbitration. The defendant’s proffered excuse for the delay was that it had been unable to find a copy of the arbitration agreement. *Id.* at *2. The court found that the defendant had waived its right to arbitrate and that the defendant “should have known” whether an arbitration agreement existed. *Id.* at *8.

183. See *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 11–12 (1st Cir. 2003) (delay by litigant in seeking arbitration “commonly addressed under the heading ‘waiver,’ here meaning forfeiture rather than intentional relinquishment”); RESTATEMENT (SECOND) OF CONTRACTS, § 84 cmt. b (“The common definition of waiver may lead to the incorrect inference that the promisor must know his legal rights and must intend the legal effect of the promise. . . . [I]t is sufficient if he has reason to know the essential facts.”).

184. *Hill v. Ricoh Americas Corp.*, 603 F.3d 766, 772–73 (10th Cir. 2010).

185. *Zuckerman Spaeder*, 646 F.3d at 922–23; *Cabinetry of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995).

D. Conclusions on the Current State of the Law

The law is unsettled as to when participation in litigation will be found to constitute a waiver of the right to arbitrate. There is broad but not unanimous consensus that the issue of whether there has been a waiver by participation in litigation is for a court rather than an arbitrator to decide.¹⁸⁶ Most circuits will not find such a waiver unless the participation in litigation is shown to have caused prejudice to the party resisting arbitration. Those circuits that require prejudice have different standards for determining how much prejudice is enough.¹⁸⁷ The three circuits that do not require prejudice also have different standards for determining when there has been a waiver, although the Seventh Circuit and District of Columbia Circuit have adopted similar approaches that presume that a party waives its right to arbitrate when it chooses to litigate.¹⁸⁸

The unsettled state of the law of waiver of the contractual right to arbitrate is undesirable. Besides the logical inconsistency of different federal courts interpreting the same federal statute in different ways, the District of Columbia Circuit correctly observed that uncertainty imposes costs on the parties and on the judicial system.¹⁸⁹ Since parties typically include arbitration provisions in their contracts in the hope of reducing costs, a consistent resolution of the waiver issue is desirable.

IV. A PROPOSED RESOLUTION OF THE WAIVER BY PARTICIPATION IN LITIGATION ISSUE

Given the current unsettled state of the law and the conflict among the circuits, there is an obvious need for a single federal rule concerning when a party's participation in arbitration will constitute a waiver of the contractual right to arbitrate. The first issue that must be addressed in fashioning a single federal rule is whether the issue of waiver by participation in litigation is properly one for a court rather than an arbitrator to decide. As is discussed above,¹⁹⁰ there is near unanimity among the circuits that the issue should be decided by a court. As is discussed below,¹⁹¹ there are good reasons for that consensus, and it should be universally accepted.

The more difficult issue in fashioning a uniform federal rule is how to resolve the split in the circuits as to whether the party resisting arbitration should be required to show prejudice before there can be a

186. See *supra* notes 95–104 and accompanying text.

187. See *supra* notes 105–50 and accompanying text.

188. See *supra* notes 151–85 and accompanying text.

189. See *Zuckerman Spaeder, LLP*, 646 F.3d at 922.

190. See *supra* notes 95–104 and accompanying text.

191. See *infra* notes 194–207 and accompanying text.

finding of waiver by participation in litigation. A uniform federal rule addressing that issue should satisfy three criteria. First, the rule should be consistent with the FAA and the policies underlying the FAA. Second, the rule should be consistent with the doctrines of arbitrability established by the Supreme Court in the years since the FAA was enacted.¹⁹² Third, the rule should advance, or at least not hinder, the goal of efficient dispute resolution.¹⁹³ Those criteria are best satisfied by a rule that does not require a showing of prejudice. The policy goals of the FAA and the interests of efficient dispute resolution are better served by a rule that requires parties to choose their forum at the pleading stage of their dispute.

A. Waiver by Participation in Litigation Should Be Determined by a Court, Not an Arbitrator

With the exception of the Eighth Circuit, a general consensus has developed that allegations of waiver by participation in litigation should be determined by the court, not referred to an arbitrator.¹⁹⁴ The Eighth Circuit departed from that view based on the Supreme Court's statement in *Howsam v. Dean Witter Reynolds, Inc.* that "the presumption is that the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability."¹⁹⁵ There are, however, several good reasons for accepting the consensus view that the *Howsam* Court did not intend the word "waiver" to apply to allegations of waiver by participation in litigation.

First, the word "waiver" is a broad term that, in Professor Corbin's words, "covers a multitude of sins."¹⁹⁶ The *Howsam* case concerned the issue of whether a court or an arbitrator should rule on the procedural issue of whether the plaintiff's claim was time-barred pursuant to the six-year limitations period contained in the rules of the agreed upon arbitral forum.¹⁹⁷ As the First, Third, Fifth and Sixth Circuits have held, it seems likely that *Howsam* intended the word "waiver" to refer only to waiver by failing to comply with a condition precedent of a contract, such as commencing a procedure within a certain time period, not to waiver by inconsistent conduct.¹⁹⁸

192. See *supra* notes 36–83 and accompanying text.

193. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) (arbitration agreements desirable for "streamlined proceeding and expeditious results").

194. See *supra* notes 95–104 and accompanying text.

195. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

196. E. ALLAN FARNSWORTH, *CONTRACTS* § 8.5 (3d ed. 2004) (quoting Arthur L. Corbin, *Conditions in the Law of Contract*, 28 *YALE L.J.* 739, 754 (1919)).

197. *Howsam*, 537 U.S. at 83–86.

198. See *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 393–94 (6th Cir. 2008); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 217 (3d Cir. 2007); *Marie v.*

Second, in determining that the arbitrator should decide whether a claim was time-barred under the rules of the arbitration forum, *Howsam* reasoned that “parties to an arbitration contract would normally expect a forum-based decisionmaker to decide forum-specific procedural gateway matters.”¹⁹⁹ Applying that rationale to the issue of waiver by participation in litigation, the parties to a pending litigation would expect the forum-based decision maker, that is, the judge, to decide whether a litigation-based waiver had occurred. The underlying rationale of *Howsam*, fulfilling the expectations of the parties, thus weighs in favor of having the court decide issues of waiver by participation in litigation.

Third, the *Howsam* Court based its decision in part on the judgment that arbitrators may be “comparatively more expert” than the courts at applying the procedural requirements of the parties’ contract.²⁰⁰ For issues of waiver by participation in litigation, the opposite is true. It is the court where the litigation has been proceeding that will have firsthand knowledge of the relevant activity.²⁰¹ To the extent that either a court or an arbitrator has superior expertise in determining whether there has been a waiver by litigation, the court would have the advantage.²⁰²

Fourth, court determination as to whether there has been waiver by participation in litigation is consistent with Section 3 of the FAA, which empowers federal courts to stay litigation pending arbitration provided “the applicant for the stay is not in default in proceeding with such arbitration.”²⁰³ There is general agreement that the word “default” encompasses waiver by participation in litigation.²⁰⁴ Furthermore, an allegation of waiver by participation in litigation does not allege that all rights under the relevant contract have been waived. Rather, the argument goes specifically to the enforceability of the arbitration provision in isolation. Having the issue decided by a court rather than an arbitrator is, therefore, consistent with the arbitrability doctrine of severability.²⁰⁵

Fifth, in cases involving allegations of waiver by participation in litigation, the parties have, at least initially, chosen to involve the judicial system. Switching back and forth between arbitration and liti-

Allied Home Mortgage, 402 F.3d 1, 14 (1st Cir. 2005); Tristar Fin. Ins. Agency, Inc. v. Sec. Ins. Co. of Hartford, 97 F. App’x 462 (5th Cir. 2004).

199. *Howsam*, 537 U.S. at 86.

200. *Id.* at 84.

201. See *Ehleiter*, 482 F.3d at 218; *Marie*, 402 F.3d at 13.

202. *Marie*, 402 F.3d at 13 (“Judges are well-trained to recognize abusive forum shopping.”).

203. 9 U.S.C. § 3 (2006).

204. See, e.g., *Ehleiter*, 482 F.3d at 217; *Marie*, 402 F.3d at 14; *Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.*, 380 F.3d 200, 204 (4th Cir. 2004).

205. See *supra* notes 52–56 and accompanying text.

gation can be an abuse of the judicial system for purposes of bad faith delay or forum shopping.²⁰⁶ Once the judicial process is invoked, the courts should be empowered to control their own processes.²⁰⁷

For these reasons, as well as the great bulk of precedent from the circuit courts, issues of waiver by participation in litigation should be decided by courts, not arbitrators. The problem thus becomes determining what standard the federal courts should apply when making that determination.

B. Waiver by Participation in Litigation Should Not Require a Showing of Prejudice

1. Policy Considerations Under the FAA

The most basic conflict among the circuits on the issue of waiver of the right to arbitration by participation in litigation concerns whether the party resisting arbitration must show prejudice.²⁰⁸ The root cause of that conflict is an inherent disagreement as to whether the primary policy of the FAA is a policy favoring arbitration or a policy favoring enforcement of arbitration agreements on the same basis as other contracts. Courts that require prejudice routinely state that there is a strong policy favoring arbitration and that all doubts concerning arbitrability must be decided in favor of arbitration.²⁰⁹ Because courts are predisposed to refer cases to arbitration whenever possible, they only find waiver of the right to arbitrate in cases where a sense of unfairness overcomes the policy in favor of arbitration.²¹⁰ Because that is a necessarily ad hoc determination, different approaches to finding prejudice have developed.²¹¹

206. See *Hill v. Ricoh Americas Corp.*, 603 F.3d 766, 773 (10th Cir. 2010) (“An important consideration in assessing waiver is whether the party now seeking arbitration is improperly manipulating the judicial process.”).

207. See *Marie*, 402 F.3d at 13; *Ehleiter*, 482 F.3d at 218.

208. See *supra* notes 105–85 and accompanying text.

209. See, e.g., *Lewallen v. Green Tree Servicing, LLC*, 487 F.3d 1085, 1090 (8th Cir. 2007) (because of “strong federal policy in favor of arbitration, any doubts concerning waiver of arbitrability should be resolved in favor of arbitration”); *Cargill Ferrous Int’l v. Sea Phoenix MV*, 325 F.3d 695, 700 (5th Cir. 2003) (presumption against waiver because of strong federal policy in favor of arbitration); *Maxum Found. Inc. v. Salus Corp.*, 779 F.2d 974, 981 (4th Cir. 1985) (default not to be lightly inferred in light of federal policy favoring arbitration).

210. See *Republic Ins. Co. v. Paico Receivables LLC*, 383 F.3d 341, 346 (5th Cir. 2004) (for purpose of finding waiver of right to arbitrate, prejudice refers to “inherent unfairness”); *Doctor’s Assocs. v. Distajo*, 107 F.3d 126, 134 (2d Cir.), *cert. denied*, 522 U.S. 948 (1997) (for purpose of finding waiver of right to arbitrate, prejudice refers to “inherent unfairness”).

211. See *supra* notes 105–50 and accompanying text.

The District of Columbia and Seventh Circuits, on the other hand,²¹² have emphasized that the policy behind the FAA is that agreements to arbitrate should be placed “on the same footing as other contracts.”²¹³ The FAA policy is “based upon the enforcement of contract, rather than a preference for arbitration as an alternative dispute resolution mechanism.”²¹⁴ Therefore, in assessing whether a party to litigation has waived its right to arbitrate,

the court is not to place its thumb on the scales; the federal policy favoring arbitration is, at least so far as concerns the interpretation of an arbitration clause, merely a policy of treating such clauses no less hospitably than other contractual provisions.²¹⁵

Using that policy as a starting point, the conclusion that waiver of the right to arbitrate requires no special finding of prejudice naturally follows because “in ordinary contract law, a waiver normally is effective without proof of consideration or detrimental reliance.”²¹⁶

Compared to the circuits that require a showing of prejudice, the District of Columbia and Seventh Circuits have a sounder approach to the policy considerations relevant to the waiver inquiry. Their approach is consistent with the words of the statute, which require a federal court to stay pending litigation if “the applicant for the stay is not in default in proceeding with such arbitration.”²¹⁷ It is reasonable to conclude that a party that files a complaint or an answer in litigation without mentioning any desire to arbitrate is “in default” under the FAA. Furthermore, the District of Columbia and Seventh Circuit approach is consistent with the legislative history of the FAA, which states:

Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs.²¹⁸

212. As is discussed above, the Tenth Circuit also does not strictly require prejudice but does consider prejudice as one of the factors to be considered when determining whether there has been a waiver of the right to arbitrate. Unlike the Seventh and District of Columbia Circuits, the Tenth Circuit has not adopted a presumption that a party waives its right to arbitrate by participating in litigation. See *supra* notes 151–56 and accompanying text.

213. See *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 590 (7th Cir. 1992); *Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987).

214. *Nat'l Found. for Cancer Research*, 821 F.2d at 774.

215. *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995).

216. *Id.* at 390 (citing E. ALLEN FARNSWORTH, *CONTRACTS* § 8.5 (2d ed. 1990); 3A ARTHUR LINTON CORBIN, *CORBIN ON CONTRACTS* § 753 (1960)).

217. 9 U.S.C. § 3 (2006).

218. H.R. REP. NO. 68-96 (1924), *quoted in Kulukundis Shipping Co., S.A. v. Amtorg Trading Corp.*, 126 F.2d 978 (1942).

The District of Columbia and Seventh Circuit approach to the relevant policy considerations is also consistent with Supreme Court precedent. The Supreme Court has stated that the FAA “embodies the national policy favoring arbitration *and* places arbitration agreements on equal footing with all other contracts.”²¹⁹ Courts do not require a showing of prejudice to establish waiver of other contract rights and so should not require it for arbitration agreements.

In addition, a policy that stresses “enforcement of contract, rather than a preference for arbitration as an alternative dispute resolution mechanism”²²⁰ is not inconsistent with a strong federal policy favoring arbitration.²²¹ A court decision that allows a party that participated in litigation to then compel arbitration moves one case out of the court system, but it encourages future court cases by parties with arbitration agreements who now know they can litigate initially without losing the right to arbitrate later. The Fourth Circuit case of *MicroStrategy, Inc. v. Lauricia*²²² is one example. In this case, MicroStrategy brought two federal cases against Lauricia before being permitted to switch to arbitration.²²³ It seems unlikely that those cases would ever have been initiated if the Fourth Circuit had a rule requiring parties to choose their forum at the time of pleading. The Fourth Circuit rule placing a “heavy burden” on Lauricia to show prejudice was putatively based on a federal policy favoring arbitration, but the result of the rule was more litigation.²²⁴ From a broader perspective than the individual litigant seeking to move a case to arbitration, the prejudice requirement does not encourage parties with an arbitration agreement to proceed expeditiously to arbitration. It encourages them, at least initially, to litigate.

2. *Application of Established Doctrines*

Courts that require a showing of prejudice for waiver of the right to arbitrate sometimes cite the maxim that doubts should be resolved in favor of arbitration.²²⁵ That rule, however, is not correctly applied to

219. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (emphasis added); *see also* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (acknowledging the national policy favoring arbitration and arbitration agreements).

220. *Nat'l Found. for Cancer Research*, 821 F.2d 772, 774 (D.C. Cir. 1987).

221. *See* *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 590 (7th Cir. 1992) (finding waiver without prejudice “not inconsistent with the ‘strong federal policy’ favoring arbitration”).

222. *See supra* notes 125–34 and accompanying text.

223. *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 247–48 (4th Cir. 2001).

224. *Id.* at 249–50.

225. *See, e.g.*, *Lewallen v. Green Tree Servicing, LLC*, 487 F.3d 1085, 1090 (8th Cir. 2007) (“doubts concerning waiver of arbitrability should be resolved in favor of arbitration”); *In re Tyco Int'l Ltd. Sec. Litigation*, 422 F.3d 41, 44 (1st Cir. 2005) (“reasonable doubts as to whether a party has waived the right to arbitrate

issues of waiver by conduct of the parties. Correctly stated, the rule, which has its genesis in the landmark case of *United Steelworkers of America v. Warrior & Gulf Navigation Co.*,²²⁶ is that doubts as to “whether a particular merits-related dispute” is within the scope of the arbitration clause should be resolved in favor of arbitration.²²⁷ It is based on the need to keep courts from becoming “entangled in the construction of the substantive provisions” of the parties’ agreement because construction of the agreement is properly in the province of the contract arbitrator.²²⁸

The Supreme Court’s decision in *Granite Rock Co. v. International Brotherhood of Teamsters*²²⁹ makes clear that the rule that doubts should be resolved in favor of arbitration does not apply to cases concerning contract formation. In *Granite Rock*, the issue of arbitrability hinged on whether the relevant contract had been ratified, and thus formed, by a certain date.²³⁰ In determining that issue, the Court did not resolve any doubts in favor of arbitration. Rather, the Court said the presumption in favor of arbitrability applies “only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand.”²³¹ Because the federal policy favoring arbitration of labor disputes “cannot be divorced from the first principle that . . . [a]rbitration is strictly ‘a matter of consent,’ the courts must independently determine issues of contract formation.”²³²

Whether a party to an agreement has waived its right to arbitrate by virtue of its participation in litigation is more like an issue of contract formation than an issue of whether a particular dispute fits within the scope of an arbitration clause. The waiver issue is completely separate from the merits of the underlying dispute. There is, therefore, no danger of the court becoming entangled in construing the substantive provisions of the contract in order to determine an issue of waiver. In a waiver case, the issue is whether the arbitration clause has ceased to be binding in light of the parties’ conduct. As the Sev-

should be resolved in favor of arbitration”); *Kramer v. Hammond*, 943 F.2d 176, 178 (2d Cir. 1991) (“doubts concerning the scope of arbitration issues should be resolved in favor of arbitration”).

226. See *supra* notes 36–44 and accompanying text.

227. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944–45 (1995); see also *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 130 S. Ct. 2847, 2857 (2010) (the policy is to resolve doubts concerning the scope of arbitral issues in favor of arbitration); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960) (doubts as to whether “the arbitration clause is not susceptible of [sic] an interpretation that covers the asserted dispute . . . should be resolved in favor of coverage”).

228. *Warrior & Gulf Navigation Co.*, 363 U.S. at 585.

229. 130 S. Ct. 2847.

230. *Id.* at 2860.

231. *Id.* at 2858.

232. *Id.* at 2857.

enth Circuit explained, the issue can be viewed as whether, by their conduct, the parties have voluntarily agreed to litigate rather than arbitrate; if they have, then their new agreement to litigate should be no less enforceable than their old agreement to arbitrate.²³³ A rule that resolves doubts in favor of arbitrability is, therefore, inappropriate in the waiver context.

An arbitrability doctrine that should apply in the waiver context is that decisions on arbitrability should be consistent with the contracting parties' expectations.²³⁴ It is, therefore, appropriate to consider what the parties would reasonably have expected concerning waiver of the right to arbitrate at the time they entered a contract with an arbitration provision. Determining such hypothetical expectations necessarily requires the use of normative assumptions. Thus, in *Howsam v. Dean Witter Reynolds, Inc.*, the Supreme Court made the reasonable assumption that "parties to an arbitration agreement would normally expect a forum-based decisionmaker to decide forum-specific procedural gateway matters."²³⁵

In determining what parties might reasonably expect concerning waiver of the right to arbitrate by participation in litigation, it is appropriate to consider Federal Rule of Civil Procedure 8(c), which provides that "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense"²³⁶ Rule 8(c)(1) lists particular affirmative defenses that must be pleaded, including "arbitration and award."²³⁷

The circuits do not agree as to whether the requirement of Rule 8(c) to plead "arbitration and award" applies to a situation in which there is a contractual right to arbitrate the dispute but there has not yet been an arbitration award. In a case in which it found that the defendant had waived its right to arbitrate, the Sixth Circuit stated that "Federal Rule of Civil Procedure 8(c) requires a defendant to plead arbitration as an affirmative defense."²³⁸ The Fourth Circuit has similarly stated that, pursuant to Rule 8(c), "the affirmative defense of arbitration must be raised" in the answer.²³⁹ The Fourth Circuit also found, however, that because failure to plead an affirmative

233. See *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co., Inc.*, 969 F.2d 585, 591 (7th Cir. 1992).

234. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773–74 (2010) ("courts and arbitrators must 'give effect to the contractual rights and expectations of the parties'") (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leeland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

235. 537 U.S. 79, 86 (2002).

236. FED. R. CIV. P. 8(c).

237. *Id.*

238. *Manasher v NECC Telecom*, 310 F. App'x. 804, 806 n.3 (6th Cir. 2009).

239. *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 96 (4th Cir. 1996).

defense may be excused so long as there is no prejudice, the analysis of the waiver issue is unaffected.²⁴⁰ The District of Columbia Circuit cited Rule 8(c) in support of its holding that a defendant “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.”²⁴¹ In contrast to the Fourth, Sixth, and District of Columbia Circuits, the Second Circuit and Tenth Circuit have each held that Rule 8(c) only applies if an arbitrator has issued an award.²⁴²

Regardless of which circuits are correct as to whether the term “arbitration and award” should be read as requiring a defendant to plead arbitration when there has not been an award, Rule 8(c)’s list of affirmative defenses is not “intended to be exhaustive.”²⁴³ The rule’s requirement to state “any avoidance or affirmative defense” is generally read to include any defense that cannot be raised by “a simple denial in the answer.”²⁴⁴ Where there is any doubt as to whether an allegation falls within the scope of Rule 8(c)’s residual clause, prudent counsel would be expected to plead it “in order to avoid waiving an otherwise valid defense.”²⁴⁵ Therefore, even if the term “arbitration and award” in Rule 8(c)(1) is construed not to include the affirmative defense that a dispute should be arbitrated, defendants should still be expected to plead arbitration as an affirmative defense if they do not intend to waive that right.

A waiver rule that requires parties to assert their right to arbitrate by the time the defendant files its answer would be consistent with Rule 8(c) and consistent with what the parties should reasonably expect. A plaintiff that initiates litigation acts inconsistently with an expectation that its claim will be arbitrated. Such a plaintiff has, by serving and filing its complaint, offered to litigate what may have otherwise been an arbitrable dispute. If a defendant answers such a complaint without raising the defense of arbitration, that defendant should, consistent with Rule 8(c), expect that it has waived its right to later claim that the dispute should be arbitrated. By answering the complaint without raising arbitration, the defendant accepts the plaintiff’s offer to litigate what may have otherwise been an arbitrable dispute. If, on the other hand, the defendant does raise arbitration in its answer, then its right to insist on arbitration has been preserved,

240. *Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.*, 380 F.3d 200, 205 n.3 (4th Cir. 2004).

241. *Zuckerman Spaeder, LLP v. Auffenberg*, 646 F.3d 919, 922–23 (D.C. Cir. 2011).

242. *Hill v. Ricoh Americas Corp.*, 603 F.3d 766, 771 (10th Cir. 2010); *Thyssen, Inc. v. Calypso Shipping Corp.*, 310 F.3d 102, 106 (2d Cir. 2002).

243. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1271, at 581 (3d ed. 2004).

244. *Id.* at 585.

245. *Id.*

and the plaintiff has been put on notice that there is no agreement to litigate the dispute.

3. *Efficient Dispute Resolution*

As the Supreme Court recently stated, “[t]he overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”²⁴⁶ Typically, an arbitration clause is included in a contract precisely for the purpose of resolving disputes quickly and efficiently.²⁴⁷ An approach to arbitrability that hinders efficient dispute resolution should be avoided not only because it increases costs and hurts commerce, but also because it frustrates the intent of Congress and the intent of arbitration agreements.

The current state of the law regarding waiver by participation in litigation encourages inefficient dispute resolution. First, the law is unsettled, which by itself imposes costs on the dispute resolution process. The standard for waiver by participation in litigation changes from circuit to circuit, and the circuits that require prejudice assess whether the standard has been met on a case-specific basis.²⁴⁸ Second, the majority of circuits require a showing of prejudice before there can be a finding of waiver by participation in litigation.²⁴⁹ The prejudice requirement encourages a dispute resolution process of litigation *and* arbitration, rather than litigation *or* arbitration.

Attorneys do not make choice of forum decisions lightly.²⁵⁰ Circuits that require a showing of prejudice before there can be a waiver of the right to arbitrate encourage parties to try litigation first, secure in the knowledge that they will have at least some leeway before they have to decide whether they would prefer arbitration after all. For example, it would be entirely rational for a party’s attorneys to decide to switch to arbitration if they did not like the judge assigned to the case or if there was some indication, however subtle, that the case was not going as well as might have been hoped.²⁵¹ This is essentially a

246. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011).

247. *See Preston v. Ferrer*, 552 U.S. 346, 357–58 (2008).

248. *See supra* notes 147–50 and accompanying text. The District of Columbia Circuit, in contrast, clarified its standard in recognition of the fact that a vague standard imposes costs on both litigants and the court system. *See Zuckerman Spaeder, LLP v. Auffmanberg*, 646 F.3d 919, 922 (D.C. Cir. 2011).

249. *See supra* notes 105–50 and accompanying text.

250. *See Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995) (“Parties know how important it is to settle on a forum at the earliest possible opportunity, and the failure of either of them to move promptly for arbitration is powerful evidence that they made their election—against arbitration.”).

251. In *Cabinetree of Wisconsin, Inc.*, the reason that the defendant gave for waiting before moving to stay the litigation was that it wanted “to weigh its options.” *Id.* The Seventh Circuit correctly treated that reason as an abuse of the dispute resolution system. *Id.*

form of forum shopping that allows a party to try out the litigation forum before making a final decision. It is also a form of forum shopping that increases the cost of resolving disputes by adding a litigation stage to what should be an arbitration process.²⁵²

It is possible for a party to participate in litigation before seeking to arbitrate as a result of innocent mistake. For example, in *Patten Grading & Paving, Inc. v. Skanska USA Building, Inc.*, the defendant was a successor in interest that claimed it did not know the terms of the contract until after discovery had started.²⁵³ Under contract law, however, a finding of waiver does not require that the party have actual knowledge of its legal rights. It is sufficient if the waiving party had “reason to know the essential facts.”²⁵⁴ Given that the impact of the delay is the same regardless of the intent²⁵⁵ and given that waiver of the right to arbitrate does not result in the loss of any substantive right, it does not seem unduly onerous to charge the parties to a contractual dispute with constructive knowledge of the terms of the underlying contract.

The District of Columbia and Seventh Circuits have correctly emphasized the importance of choosing a forum “at the earliest possible opportunity in order to economize on the resources, both public and private, consumed in dispute resolution.”²⁵⁶ Courts that allow the parties to litigate until some point in the process at which prejudice is deemed to have occurred encourage the parties to an arbitration agreement to try litigating a dispute before deciding whether to arbitrate. A rule that requires the parties to choose their forum at the pleading stage encourages the efficient resolution of disputes and thus effectuates the purpose of the FAA.

252. *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244 (4th Cir. 2001), offers a particularly egregious example of an increase in costs as a result of the prejudice requirement. In *MicroStrategy*, the Fourth Circuit acknowledged that there was a strong case that the plaintiff undertook its course of litigation for the sole purpose of wearing out the defendant “both emotionally and financially.” *Id.* at 254. Nonetheless, the plaintiff was found to have not waived the right to switch to arbitration because the defendant did not prove prejudice. *Id.*

253. 380 F.3d 200, 205 (4th Cir. 2004).

254. RESTATEMENT (SECOND) OF CONTRACTS § 84 cmts. a–b (1979); see also E. ALLAN FARNSWORTH, CONTRACTS § 8.5 (3d ed. 2004) (stating “blameworthy ignorance” is sufficient for waiver).

255. See *Reid Burton Constr., Inc. v. Carpenters Dist. Council of S. Colo.*, 614 F.2d 698, 702 (10th Cir.), cert. denied, 449 U.S. 824 (1980).

256. *Cabinetree of Wis. Inc.*, 50 F.3d at 91; see also *Zuckerman Spaeder, LLP v. Aufenberg*, 646 F.3d 919, 922–23 (D.C. Cir. 2011) (stating a party has presumptively forfeited its right to arbitration if it fails to “invoke[] the right to arbitrate on the record at the first available opportunity”).

V. CONCLUSION

The law of arbitrability is still developing. On the issue of when participation in litigation will constitute a waiver of the right to arbitrate, the law is particularly unsettled. Although a consensus seems to be forming that such issues are for a court rather than an arbitrator to determine, there is no consensus as to the standard that the courts should apply. The circuits are split as to whether the party alleging waiver needs to show prejudice and, if so, what that showing of prejudice entails. Although it is currently the minority view, a rule that does not require a showing of prejudice better effectuates the policies of the FAA than a rule that does require a showing of prejudice. A rule that requires the parties to elect their forum by the pleading stage is consistent with the law of arbitrability generally, with Federal Rule of Civil Procedure 8(c), and with the goal of efficient dispute resolution.