Professional Perspective

Preserving Arbitration Rights After Morgan v. Sundance, Inc.

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The contractual right to compel arbitration is among litigators' most important tools. A well-written arbitration agreement can reduce a company's risks of participating in costly class or consolidated actions, litigating in prejudicial forums, and having confidential information publicly filed.

But arbitration rights can be waived if a company does not diligently pursue arbitration. Under the US Supreme Court's recent decision in *Morgan v. Sundance, Inc.*, companies now risk unintentionally waiving arbitration rights. 142 S. Ct 1708 (2022). In light of the *Morgan* decision, legal counsel and parties should reexamine the legal landscape around waiver of arbitration rights to ensure that this risk is fully accounted for when making strategic litigation decisions.

To that end, this article reviews the changes following *Morgan* and the key considerations around what parties should and should not do to preserve their arbitration rights.

Before Morgan

Before *Morgan*, most circuits required a showing of prejudice against the opposing party to find waiver of an arbitration agreement. The Supreme Court unanimously did away with this requirement in *Morgan*. The court emphasized that arbitration agreements must be treated like other contracts and that requiring a showing of prejudice improperly favors arbitration. Now, the waiver inquiry under federal law rests solely on the actions of the party seeking to compel arbitration. If parties "knowingly relinquish the right to arbitrate by acting inconsistently with that right," they will waive their right to compel arbitration.

Historically, circuits have applied various standards to determine when a party has waived its right to arbitration. While the law still varies between jurisdictions, there are several actions that parties should generally take or avoid to minimize the likelihood of waiver.

Parties generally should:

- Immediately communicate their intent to compel arbitration.
- Promptly move to compel arbitration.
- Raise arbitration as an affirmative defense or defense—depending on the jurisdiction—if answering before moving to compel.

Parties generally should not:

- Consistently and actively litigate.
- Engage in active discovery.

And under certain circumstances, parties should be aware of a heightened risk of waiver when:

- Filing certain types of motions.
- Asserting counterclaims.
- Defending a class action.

Actions to Preserve Arbitration Rights

Immediately communicating the intent to arbitrate is important to preserving arbitration rights. When determining waiver, courts consider "whether [the] 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." *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 222 (3d Cir. 2007). Thus, in motions and any responsive pleading filed before moving to compel, parties should explicitly indicate their intent to compel arbitration imminently and reserve the right to arbitrate.

If a party must file an answer before moving to compel arbitration, that party should raise arbitration as an affirmative defense or defense–depending on the jurisdiction. Including arbitration as an affirmative defense or defense can be a vital protection against waiver. See *Hilti, Inc. v. Oldach*, 392 F.2d 368, 371 (1st Cir. 1968). Courts may view the failure to raise arbitration as a defense as an indication that a party intends to litigate. See, e.g., *Johnson Assocs. Corp. v. HL Operating Corp.*, 680 F.3d 713, 718 (6th Cir. 2012).

Time is another critical factor in determining waiver. It is best practice to move to compel arbitration early in the litigation. Once a lawsuit begins, the likelihood of waiver increases with each day that passes without an attempt to compel arbitration. Because a finding of prejudice is no longer required to find waiver under federal law, it is even more essential to timely move to compel arbitration.

Moreover, "a reservation of rights is not an assertion of rights." *Hooper v. Advance Am., Cash Advance Ctrs. of Mo., Inc.*, 589 F.3d 917, 919 (8th Cir. 2009). Even if parties have communicated their intent to compel arbitration, their actions are not fully consistent with that intent until they move to compel arbitration. See, e.g., *In re Mirant Corp.*, 613 F.3d 584, 591 (5th Cir. 2010).

Actions to Avoid

Generally, parties intending to arbitrate must avoid "consistently and actively" litigating their case. *Hurley v. Deutsche Bank Tr. Co. Americas,* 610 F.3d 334, 339 (6th Cir. 2010). When courts find waiver of the right to arbitration based on activity in litigation, the waiving party has typically taken several actions inconsistent with arbitration.

In *Hurley*, the court found waiver after a party filed several dispositive and non-dispositive motions and engaged in extensive discovery. In another case, the court found waiver after a party "took several actions that were inconsistent with its right to arbitrate," including filing two motions to dismiss and serving initial disclosures. *McCoy v. Walmart, Inc.*, 13 F.4th 702, 704 (8th Cir. 2021).

Parties also risk waiving their right to compel arbitration when they engage in discovery. Courts have consistently held that engaging in discovery is inconsistent with a party seeking to enforce its arbitration rights. Although there have been select instances where courts did not find waiver after a party engaged in discovery, parties should be aware of the waiver risk, which is likely higher now with the removal of the prejudice requirement.

Actions to Approach with Caution

Because prejudice is no longer considered when determining waiver, courts may be less forgiving of extensive participation in the litigation. When a party takes "several actions" or "consistently and actively" litigates, the risk of waiver increases. Although waiver is generally a balancing test, the activities discussed below should be avoided as much as possible.

Motions to Dismiss

Some courts have found that a motion to dismiss can waive arbitration rights, but "[n]ot every motion to dismiss is inconsistent with the right to arbitration." See, e.g., *Hooper*, 589 F.3d at 922. Because motions to dismiss can take many forms, courts "consider the totality of the circumstances" when deciding if a motion to dismiss constitutes waiver.

A motion to dismiss is more likely to result in waiver of arbitration if the defendant seeks a decision on the merits or "immediate and total victory." See, e.g., *McCoy*, 13 F.4th at 704. Waiver may be less likely where dismissal is sought on jurisdictional grounds. See, e.g., *Dumont v. Saskatchewan Gov't Ins. (SGI)*, 258 F.3d 880, 886–87 (8th Cir. 2001). Additionally, some circuits have held that seeking the dismissal of a frivolous claim or using a motion to dismiss to sort out arbitrable and non-arbitrable claims may be consistent with the intent to arbitrate. See, e.g., *Khan v. Parsons Glob. Servs., Ltd.*, 521 F.3d 421, 427 (D.C. Cir. 2008). Because the effects on waiver can be situation and jurisdiction specific, parties should be cautious when moving to dismiss.

Non-Dispositive Motions

In certain situations, non-dispositive motions have been held to waive the right to arbitrate. For example, in finding waiver, the US Court of Appeals for the Eighth Circuit determined that requesting to transfer venue to another judicial district evidenced a "preference for litigation" but this appears to be somewhat of an outlier. *Sitzer v. Nat'l Ass'n of Realtors*, 12 F.4th 853, 856 (8th Cir. 2021). Alternatively, other courts have held that "a motion to transfer venue does not constitute waiver of the right to arbitrate." *Sharif v. Wellness Int'l Network, Ltd.*, 376 F.3d 720, 727 (7th Cir. 2004).

Once again, the jurisdiction and totality of the circumstances may influence whether a non-dispositive motion results in waiver, but it is more likely to result in waiver if done in conjunction with other litigation activities. While it is unclear if a non-dispositive motion on its own suffices to waive arbitration rights, the court's removal of the prejudice requirement in *Morgan* will make it more likely.

Defending Class Actions

Parties must be careful about waiving their arbitration rights when defending class actions. In addition to waiving arbitration rights for named class members, several courts have indicated that the right to compel arbitration as to unnamed class members can be waived depending on how and when arbitration rights are asserted. See, e.g., *In re Cox*, 790 F.3d 1112 (10th Cir. 2015). Thus, parties should be aware that any potential waiver of arbitration rights might have more far-reaching effects in a class action, and risks should be evaluated accordingly.

Motions to Compel Arbitration

If a party seeks to compel arbitration, it should cautiously consider whether to assert counterclaims. In both the US Court of Appeals for the First and Tenth Circuits, "fil[ing] a counterclaim without asking for a stay of the proceedings" weighs in favor of waiver. *Creative Solutions Grp., Inc. v. Pentzer Corp.*, 252 F.3d 28, 32 (1st Cir. 2001). If counterclaims are necessary, they should be filed subject to the right to arbitrate. Other circuits have likewise found that asserting counterclaims may be inconsistent with reliance on a party's right to arbitrate.

Finally, parties cannot rely solely on a "no waiver" clause to protect against waiver of arbitration. Several courts have held that "the presence of [a] 'no waiver' clause does not alter the ordinary analysis undertaken to determine if a party has waived its right to arbitration." *S & R Co. of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80, 86 (2d Cir. 1998). Thus, even in the presence of such a clause, the right to arbitrate can still be waived through engagement in litigation.

Conclusion

The more parties invoke the judicial process through engaging in litigation, the greater the likelihood that they will waive their right to compel arbitration. This risk is heightened by the removal of the prejudice requirement in the Supreme Court's decision in *Morgan v. Sundance*.

To minimize this risk, parties should express their intent to compel arbitration at the commencement of litigation, limit litigation activity that is inconsistent with their right to arbitrate, and promptly move to compel arbitration. However, federal standards around waiver of arbitration vary across jurisdictions, so parties and their legal counsel should always conduct jurisdiction-specific research.

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