“Testing the Water before Taking the Swim” – How Participating in Litigation May Constitute Waiver of the Right to Arbitration

Aug 27, 2012

Categories:
Publications

There are plenty of reasons that parties include arbitration clauses in their contracts. But, there may also be good reasons to choose not to invoke those clauses, at least in the short term, even when one party has filed a complaint. For example, if a defendant believes the claims are baseless, it may choose to file a motion to dismiss on the merits, rather than invoke the additional time and expense of arbitration at that early stage or, a defendant may prefer arbitration to litigation, but would rather delay while engaging in settlement discussions. A party contemplating delaying invocation of an arbitration clause should be well aware of the attendant risks.

Johnson Associates

Courts have held that parties may waive their right to arbitration by participating in litigation. Different state and federal courts have formulated varying tests to determine whether a party’s conduct constitutes waiver. The 6th Circuit recently clarified its position in *Johnson Associates Corp. v. HL Operating Corp.*, 680 F.3d 713, 717 (6th Cir. 2012). *Johnson Associates* involved a dispute between luggage maker Hartmann and two of its manufacturers. The manufacturers filed suit in December 2009 for breach of the Sourcing Agreement between the parties. The Sourcing Agreement included an arbitration clause, as well as a blanket “no waiver” clause.

Hartmann filed an answer and counterclaim, and in April 2010 the parties engaged in a series of settlement discussions, including a judicial settlement conference. In July, with settlement discussions at a standstill, the parties began issuing interrogatories, requests for production of documents, requests for admissions, and deposition notices.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

Three days before the first discovery deadline, Hartmann asserted its right to arbitration in a communication to the plaintiffs. When the plaintiffs failed to respond, Hartmann filed a motion to compel arbitration pursuant to the arbitration clause in the Sourcing Agreement. The plaintiffs nonetheless complied with the discovery deadline, turning over 1,151 documents and a hard drive. Likewise, Hartmann responded to the plaintiff's discovery requests while its motion to compel arbitration was pending but asserted that its responses were not to be deemed a waiver of its right to arbitrate.

The district court denied Hartmann's motion, holding that Hartmann had waived its right to arbitration by participating in the litigation for nearly a year, including filing an answer and counterclaim, engaging in a settlement conference, and serving and responding to discovery requests.

On appeal, Hartmann argued that the blanket no waiver clause in the Sourcing Agreement applied to prevent waiver, regardless of Hartmann's level of participation in the litigation. The Sixth Circuit panel quickly disposed of that argument, holding that "'[T]he presence of [a] 'no waiver' clause does not alter the ordinary analysis undertaken to determine if a party has waived its right to arbitration.'" *Johnson Associates*, 680 F.3d at 717 (*quoting S & R Co. of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80, 86 (2d Cir. 1998), cert. denied, 528 U.S. 1058, 120 S.Ct. 629 (1999)).

The Court then moved to the primary argument asserted by the plaintiffs, that Hartmann had waived its right to arbitration by actively participating in litigation without asserting that right. The Court began by explaining that "because of the strong presumption in favor of arbitration, waiver of the right to arbitration is not to be lightly inferred." *Id.* (*quoting Glazer v. Lehman Bros., Inc.*, 394 F.3d 444, 450 (6th Cir. 2005). The Court then set forth the test for whether a party has waived its right to arbitrate a dispute: "[A] party may waive an agreement to arbitrate by engaging in two courses of conduct: (1) taking actions that are completely inconsistent with any reliance on an arbitration agreement; and (2) 'delaying its assertion to such an extent that the opposing party incurs actual prejudice.' " *Id.* (*quoting Hurley v. Deutsche Bank Trust Co. Ams.*, 610 F.3d 334, 338 (6th Cir. 2010).

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

The Court held that Hartmann failed the "completely inconsistent" test. The key facts were that Hartmann filed an answer and counterclaim, without asserting its right to arbitration as an affirmative defense, then engaged in settlement discussions and discovery, again without asserting its right to arbitration. More than 8 months passed before Hartmann raised the issue to either the plaintiffs or the District Court.

The Court then moved to the second element of the test for waiver – whether Hartmann's delay actually prejudiced the plaintiffs. Prejudice can come in many forms, including one party gaining a strategic advantage through discovery, causing unnecessary delay or expense, or attempting to relitigate an issue by invoking arbitration. In this case, the Court focused on unnecessary delay and expense, pointing to the 1,151 pages of discovery produced by the plaintiffs and the numerous related scheduling motions.

On both elements of the test for waiver, the Court took a "totality of the circumstances" approach in analyzing Hartmann's conduct. No single action or inaction – failing to invoke the arbitration clause as an affirmative defense, engaging in discovery, or delaying resolution of the dispute – appeared to be the tipping point. But taken together, they were more than sufficient to constitute waiver.

On the facts, *Johnson Associates* does not appear to have been a close call. While it may serve as an example of what not to do, it leaves several unanswered questions. For example, does Federal Rule of Civil Procedure 8(c) (or corresponding state rules) require defendants to plead arbitration as an affirmative defense? Is a finding of actual prejudice required to render a waiver irrevocable? And can a defendant file a motion to dismiss without waiving its right to compel arbitration?

Pleading Arbitration as an Affirmative Defense

In *Robinson v. Food Service of Belton*, 415 F.Supp.2d 1221 (D. Kan. 2005), the United States District Court for the District of Kansas held that an employer had waived its right to arbitration of several FLSA claims brought by employees. Similar to *Johnson Associates*, the defendant waited 10 months after the suit was filed to raise the

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

arbitration issue. However, the defendant did assert the arbitration clause as an affirmative defense. But the Court was not moved by this fact because "[w]hile plaintiffs may have been made aware of defendants' *right* to arbitrate, they were not notified of defendants' *intent* to arbitrate until the [motion to compel arbitration] was filed." *Id.* at 1226 (emphasis in original). The employer was deemed to have waived its right to compel arbitration.

In *Robert J. Denley Co., Inc. v. Neal Smith Const. Co., Inc.*, 2007 WL 1153121 (Tenn. Ct. App. 2007), the Tennessee Court of Appeals found that the defendants had not waived their right to arbitration, despite failing to invoke an arbitration clause as an affirmative defense, and waiting more than 7 months to file their motion to compel arbitration. The Court held that filing an answer was not "so inconsistent with the right to arbitrate as to demonstrate an abandonment of that right," and that the plaintiff was not prejudiced by the delay in filing the motion to compel arbitration. Notably, the plaintiff had served the defendants with discovery requests, but the defendants had not responded.

While courts in some states have held that failure to plead arbitration as an affirmative defense constitutes waiver as a matter of law, *see, e.g., In re Estate of Cortez*, 226 Ariz. 207 (Ariz. Ct. App. 2010), *Robinson* and *Denley* show that whether arbitration is pled as an affirmative defense may not be determinative. Courts are more likely to focus instead on the conduct of the party after an answer is filed.

Whether a Showing of Prejudice is Required

There is a split among the circuit courts as to whether the party asserting waiver must show prejudice. The Court of Appeals for the District of Columbia has held that a showing of prejudice is not required to establish waiver, though it is a relevant factor. *Khan v. Parsons Global Services, Ltd.*, 521 F.3d 421 (D.C. Cir. 2008) (defendant waived right to compel arbitration by filing motion for summary judgment based on matters outside the pleadings). Similarly, the 7th Circuit has held that "a party need not show that it would be prejudiced if the stay were granted and arbitration ensued." *Cabinetree of Wisconsin v. Kraftmaid Cabinetry, Inc.*, 50

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

F.3d 388, 390 (7th Cir. 1995) (presumption of waiver where party invokes judicial process).

A majority of the circuit courts do require a showing of prejudice, in addition to actions inconsistent with an intent to arbitrate. Most have held that prejudice results when parties "litigate substantial issues on the merits or when compelling arbitration would require a duplication of efforts." *See Hooper v. Advance America, Cash Advance Centers of Missouri, Inc.*, 589 F.3d 917, 923 (8th Cir. 2009) (*quoting Kelly v. Golden*, 352 F.3d 344 (8th Cir. 2003)). The 6th Circuit appears to agree with this majority position. *See Crossville Medical Oncology, P.C. v. Glenwood Systems, LLC*, 310 Fed. Appx. 858 (6th Cir. 2009). However, the test recently enunciated in *Johnson Associates* arguably presents the "completely inconsistent" and prejudice prongs as an either-or proposition. 680 F.3d at 717.

The Supreme Court recently granted a petition for a writ of certiorari, presumably to resolve this split, but the case settled prior to oral argument. *See Stok & Assocs., P.A. v. Citibank, N.A.*, ___U.S. ___, 131 S.Ct. 1556 (2011). However, even absent clarification, all circuits appear to take into account the prejudice to litigation of enforcing an agreement to arbitrate after an action is pending, despite refusing to acknowledge prejudice as a standalone element for waiver.

Whether Filing a Motion to Dismiss Affects a Defendant's Right to Compel Arbitration

Depending on the grounds on which a party seeks dismissal, a motion to dismiss will not necessarily constitute a waiver of the right to compel arbitration. Some courts have held unequivocally that "it is well-established that a party does not waive its right to arbitrate merely by filing a motion to dismiss." *Sharif v. Wellness Int'l Network, Ltd.*, 376 F.3d 720, 726 (7th Cir. 2004). Others have refused to find waiver where the motion to dismiss was on jurisdictional grounds, *Dumont v. Saskatchewan Government Ins.*, 258 F.3d 880 (8th Cir. 2001), or where the claims were truly frivolous, *Khan*, 521 F.3d at 427. However, where a party seeks a

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

dismissal on the merits of the claims, a court is likely to find waiver of the right to arbitration to prevent that party from playing "heads I win, tails you lose" by attempting to relitigate the issue in arbitration. *Hooper*, 589 F.3d at 922.

Conclusion

Courts generally take a "totality of the circumstances," fact-dependent approach to determining whether a party has waived its right to arbitration by participating in litigation. And some courts emphasize certain factors more than others. This makes it difficult to come up with hard and fast rules to guide future litigants. However, the cases make clear that, while parties may be granted some leeway in determining whether and when to invoke an arbitration clause, courts are skeptical of parties' motives and careful to prevent them from sitting on the right to arbitration to gain unfair advantage. Courts will generally focus on the period of time between the filing of the complaint and the motion to compel, how much discovery has taken place and the volume of motion practice, whether the merits of the dispute have been litigated, and how much of the litigation activity will have to be duplicated in arbitration. Judicial settlement conferences and motions to dismiss on non-merits grounds are probably permissible. Significant discovery activity, or a motion for summary judgment, on the other hand, may forfeit a party's right to seek arbitration. Litigants are well-advised to provide notice to the Court and opposing parties of their intent to arbitrate and to avoid utilizing the judicial forum to engage on the merits of the dispute.

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons