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NOTES

WAIVER OF A CONTRACTUAL ARBITRATION AGREEMENT BY CAUSING PREJUDICE TO THE OPPONENT: SHOULD FEDERAL COURTS ADOPT A BRIGHT-LINE TEST?

Kramer v. Hammond

I. INTRODUCTION

Due to the high costs of litigation and the backlog on court dockets, parties to a contract are beginning to rely more and more on contractual provisions requiring arbitration for future disputes. In the past, courts were reluctant to enforce these provisions, but now the federal courts enforce a strong presumption in favor of such provisions. Because of this strong federal policy, waiver of the contractual agreements is not easily inferred. To overcome this presumption federal courts have developed tests to determine when waiver of contractual agreements to arbitrate occurs. These tests focus on whether the opposing party has been prejudiced by delay in asserting a contractual right to arbitration. However, the question remains—what exactly amounts to prejudice?

1. 943 F.2d 176 (2d Cir. 1991).
3. Note, Contractual Agreements to Arbitrate, supra note 2, at 1515; see also DeToro, supra note 2, at 617.
6. See Note, Contractual Agreements to Arbitrate, supra note 2, at 1527.
7. Id.; see also infra text accompanying notes 60-139.
II. FACTS AND HOLDING

In 1984, Gaines W. Hammond entered into an agreement with a group of California inventors to license the group's medical invention. The agreement, allegedly drafted by Alan S. Kramer, an attorney for the group of inventors, stated that Hammond and the inventors would form a corporation named Hammond Technologies, Inc. Hammond was to raise capital and to contribute his expertise to the project. The agreement provided Hammond with an option to license the invention if he could obtain the necessary capital by October 22, 1984. It also included an arbitration clause which bound the parties to arbitrate "any dispute arising between the Parties in which this Agreement or its interpretation is in issue or alleging any breach thereof." Hammond's option expired when he was unable to raise the necessary financing within the option period. The parties then entered into a new subscription agreement, "under which the California inventors became active participants in the management of the corporation." This subsequent agreement dissatisfied Hammond because it reduced both his responsibilities and his ownership rights in the corporation. In July of 1985, Hammond "ceased active participation" in the corporation.

In March of 1986, Hammond filed a lawsuit in a South Carolina state court, alleging "that Kramer and others entered into a conspiracy and an agreement to fool, cheat and manipulate him in order to greatly dilute and/or take

8. Kramer, 943 F.2d at 177. The invention, called a lithotripter, "was designed to break up kidney stones with sound waves, thereby eliminating the need for surgery." Id.
9. Id.
10. Id.
11. Id. When he was unable to find a purchaser by this date, Hammond exercised a right, provided by the agreement, to extend this deadline to November 8, 1984. Id. at 177-78; Hammond v. Butler, Means, Evins & Brown, 388 S.E.2d 796, 797 (S.C. 1990), cert. denied, 111 S. Ct. 373 (1990).
13. Id. At the time the option expired, Hammond was close to reaching an agreement with Michael Reese Hospital in Chicago. Hammond, 388 S.E.2d at 797. The hospital had required that Hammond provide a letter of credit, which he secured from a doctor in Mobile, Alabama. Id. at 797. The California inventors, however, required certain modifications in this letter of credit, and Hammond was not able to finalize these negotiations before his option expired. Id. at 797.
15. Id. Under the original agreement, Hammond was to control 70,000 of the corporation's 100,000 total shares. Hammond, 388 S.E.2d at 797. The second subscription agreement allocated only 10,000 shares to Hammond. Id. at 797. In addition, under the second agreement, the name of the corporation was changed to Medstone International, Inc., and Kramer was named as the president; Hammond became one of the vice-presidents. Id. at 797.
16. Hammond, 388 S.E.2d at 797.
17. Kramer, 943 F.2d at 178.
away his rights in the corporation."18 In September of 1987, Hammond filed a lawsuit with identical allegations in the Supreme Court of New York.19 Kramer moved to dismiss the allegations against him for lack of personal jurisdiction in South Carolina.20 After the court denied his motion, Kramer appealed to the South Carolina Supreme Court, which affirmed the lower court’s ruling.21 Kramer then petitioned the United States Supreme Court for a writ of certiorari, but the Court denied this motion in October 1990.22 Kramer finally filed an answer in the South Carolina state court action more than four years after Hammond had filed the lawsuit.23 In his answer, Kramer finally raised the arbitration clause as an affirmative defense.24 Meanwhile, in New York, Kramer served a notice to depose Hammond and filed an answer to the New York complaint.25 In his answer, Kramer asserted six affirmative defenses and four counterclaims, but he did not raise the arbitration clause.26 Kramer then moved for summary judgment.27 The New York Supreme Court stayed all proceedings pending the outcome of the South Carolina action.28 Kramer appealed the stay order, but the appellate division of the supreme court affirmed the decision in February 1989.29 Kramer’s motion for leave to appeal to the New York Court of Appeals was dismissed in June 1989.30 After exhausting all of his appeals regarding personal jurisdiction over him in South Carolina, Kramer petitioned a district court in New York to enforce the arbitration clause and to compel arbitration.31 In a handwritten, one-sentence endorsement, the district court "granted this motion on January 22, 1991, stating that there was an insufficient showing of waiver to rebut the policy favoring

18. Id. In particular, Hammond claimed that Kramer and members of the law firm representing Hammond conspired to prevent him from acquiring a controlling share of the stock in the corporation. Hammond, 388 S.E.2d at 797.

19. Kramer, 943 F.2d at 178. The reason Hammond filed the same action in New York, presumably, was to avoid statute of limitations problems in the event that the South Carolina courts found that there was no personal jurisdiction over Kramer in South Carolina. Id. Because Kramer was a resident of New York and practiced law in New York City, Hammond, 388 S.E.2d at 797, New York courts undoubtedly had jurisdiction over him.


21. Id.; see Hammond, 300 S.C. 458, 388 S.E.2d 796.


23. See Kramer, 943 F.2d at 178.

24. Id.

25. Id.

26. Id.

27. Id.

28. Id.


31. Kramer, 943 F.2d at 178.
arbitration." Hammond filed a notice of appeal and also moved for relief from the judgment under Rule 60(b) of the Federal Rules of Civil Procedure. The district court, ruling that it lacked jurisdiction, denied this motion and Hammond appealed to the Second Circuit Court of Appeals. 

In his appeal to the Second Circuit, Hammond claimed that the arbitration clause from the first agreement had been abrogated and therefore Kramer had waived his right to enforce the arbitration clause. The court of appeals reversed the district court’s decision and remanded the case to the district court with an order to compel arbitration. The Second Circuit held that Kramer had waived his contractual right to arbitration "by engaging in extensive pre-trial litigation for over four years."

III. LEGAL BACKGROUND

The question of whether a party has waived his or her contractual right to arbitrate involves the consideration of two competing and conflicting policies. The first is the "strong federal policy favoring arbitration for dispute resolution." The second consideration is the prejudice incurred by the opposing party when one party is allowed to proceed with his or her case first through the litigation process and then through the arbitration process.

In Moses H. Cone Memorial Hospital v. Mercury Construction Corp., the United States Supreme Court supported the approach that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." The Court based this finding on the federal Arbitration Act and stated that the Act establishes that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."
Two years later, the Court added that this strong federal policy favoring arbitration, as expressed in the Arbitration Act, requires that courts "rigorously enforce agreements to arbitrate." Courts should conduct examinations of questions of waiver in light of this strong federal policy favoring enforcement of arbitration agreements, and waiver "is not to be lightly inferred." In short, the federal policy suggests that any doubts regarding waiver of an arbitration agreement should be decided in favor of enforcing the agreement. A party has a "heavy burden" to provide enough evidence to rebut this presumption in favor of arbitration agreements.

Despite this strong federal presumption in favor of enforcing arbitration agreements, these agreements may, of course, be waived. However, courts may find a waiver through a party’s participation in litigation only when the other party can demonstrate that prejudice resulted. There is no firm rule as to what amounts to a waiver of one’s contractual right to arbitrate, and the question should be resolved on a case-by-case basis. The determination of waiver is ordinarily made by the trier of fact, and when the trier of fact is the judge, he or she is entitled to a degree of discretion.

A court may find a waiver of an arbitration clause when one party engages in "litigation of substantial issues going to the merits." Traditionally, courts emphasize whether a party’s pretrial litigation activities touch upon the merits of

45. Carcich, 389 F.2d at 696.
46. Stiefel, Nicolaus & Co. Inc. v. Freeman, 924 F.2d 157, 158 (8th Cir. 1991); National Found. for Cancer Research v. A.G. Edwards & Sons, 821 F.2d 772, 774 (D.C. Cir. 1990); Fleck v. E.F. Hutton Group, Inc., 891 F.2d 1047, 1050 (2d Cir. 1989); Fisher v. A.G. Becker Paribas Inc., 791 F.2d 691, 694 (9th Cir. 1986) ("Waiver of a contractual right to arbitration is not favored.").
47. Britton v. Co-Op Banking Group, 916 F.2d 1405, 1412 (9th Cir. 1990); Tenneco Resins, Inc. v. Davy Int’l, 770 F.2d 416, 420 (5th Cir. 1985); Sweater Bee, 754 F.2d at 466; Ohio-Sealy, 712 F.2d at 273; Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023, 1025 (11th Cir. 1982).
49. Miller Brewing Co. v. Fort Worth Distrib. Co., 781 F.2d 494, 497 (5th Cir. 1986); Rush, 779 F.2d at 887; Carcich, 389 F.2d at 696.
50. Valero Ref., Inc. v. M/T Lauberhorn, 813 F.2d 60, 65 (5th Cir. 1987); Ohio-Sealy, 712 F.2d at 273; 17A C.J.S. Contracts § 515(11) (1963).
51. Valero, 813 F.2d at 65; 17A C.J.S. Contracts, supra note 51, at § 515(11).
52. Jones Motor Co. v. Chauffeurs, Teamsters and Helpers Local Union No. 633, 671 F.2d 38, 44 (1st Cir. 1982), cert. denied, 459 U.S. 943 (1982); see also Sweater Bee, 754 F.2d at 466. In Sweater Bee, the Second Circuit stated: "We have little doubt that a district judge can recognize the tactics of delay or harassment that operate to prejudice the opposing party and to cause him expense, thereby justifying a finding of waiver." Id. In addition, the standard of review for factual findings made by the judge concerning waiver is the clearly erroneous standard. Rush, 779 F.2d at 887.
53. Sweater Bee, 754 F.2d at 461. Demsey & Associates, Inc. v. Steamship Sea Star is a good example of this kind of prejudice. 461 F.2d 1009. In Demsey, the court found that the parties had already been involved in a full trial on the merits. Id. at 1018.
the case.\textsuperscript{55} Certainly, when a party receives a judicial decision on the merits he or she will be deemed to have waived any arbitration clause that was not raised.\textsuperscript{56}

Courts allow some participation in a lawsuit without finding waiver of an arbitration clause.\textsuperscript{57} Different circuits have formulated different tests to determine when a party has forfeited his or her right to compel arbitration,\textsuperscript{58} but all of the tests tend to concentrate on the amount of prejudice incurred by the opposing party. Prejudice, however, "is an ill-defined concept that has not been applied in a consistent manner."\textsuperscript{59}

A. The Eighth and Ninth Circuits' Tests

In the Eighth and Ninth Circuits, a party seeking to prove that the other party waived an arbitration clause must show (1) that the other party knew of the right to compel arbitration, (2) that the other party acted inconsistently with that right, and (3) that prejudice resulted from the inconsistent acts.\textsuperscript{60} Under this test, a party acts inconsistently with the right to compel arbitration if he or she initiates litigation and participates in discovery on claims which would be subject to arbitration.\textsuperscript{61} However, courts hold that pretrial acts such as avoiding discovery and making motions to stay district court proceedings are not inconsistent with a party's right to arbitrate.\textsuperscript{62} A party can also "conduct discovery with respect to non-arbitrable claims without waiving their right to arbitrate."\textsuperscript{63}

The question of whether inconsistent acts are prejudicial to an opponent is determined on a case-by-case basis.\textsuperscript{64} Prejudice may result, for example, when evidence is lost, when the opposing party is forced to duplicate certain efforts, when a party uses discovery methods unavailable in arbitration, or when a party instigates litigation of substantial issues going to the merits.\textsuperscript{65} However, in \textit{Stifel, Nicolaus & Co. v. Freeman},\textsuperscript{66} the Eighth Circuit decided that there was no

\textsuperscript{55} See Chatham Shipping Co. v. Fertex S.S. Corp., 352 F.2d 291, 293 (2d Cir. 1965). In this case, Judge Friendly stated that the earliest stage at which waiver may be found "is when the other party files an answer on the merits." \textit{Id.}

\textsuperscript{56} See \textit{Demsey}, 461 F.2d at 1018. The court decided that, where a party had already gone to trial on the merits, "it would be a gross miscarriage of justice now to require a retrial by arbitration of any of these issues." \textit{Id.; see also} Craig Shipping Co. v. Midland Overseas Shipping Corp., 259 F. Supp. 929, 931 (S.D.N.Y. 1966) ("any attempt to go to the merits and to retain still the right to arbitration is clearly impermissible").

\textsuperscript{57} \textit{Demsey}, 461 F.2d at 1017.

\textsuperscript{58} See \textit{DeToro}, supra note 2, at 620.

\textsuperscript{59} \textit{Id.} at 621.

\textsuperscript{60} \textit{Stifel, Nicolaus}, 924 F.2d at 158; \textit{Fisher}, 791 F.2d at 694.

\textsuperscript{61} \textit{Stifel, Nicolaus}, 924 F.2d at 158.

\textsuperscript{62} \textit{Brioton}, 916 F.2d at 1413.

\textsuperscript{63} Nesslage v. York Sec., Inc., 823 F.2d 231, 234 (8th Cir. 1987); see also \textit{Price v. Drexel Burnham Lambert}, Inc., 791 F.2d 1156, 1159 (5th Cir. 1986).

\textsuperscript{64} \textit{Stifel, Nicolaus}, 924 F.2d at 159.

\textsuperscript{65} \textit{Id.} (citations omitted).

\textsuperscript{66} 924 F.2d 157.
prejudice where a party waited only three months before moving for arbitration and where, during this time, the party engaged in limited discovery and made a counterclaim.\textsuperscript{57} In \textit{Lake Communications, Inc. v. ICC Corp.},\textsuperscript{58} the Ninth Circuit did not find a waiver where ICC waited a year before moving to compel arbitration and where ICC initiated "limited discovery."\textsuperscript{69} The court reached this decision based on the fact that Lake Communications could not show that it had suffered prejudice.\textsuperscript{70}

The Ninth Circuit suggested that a party cannot show prejudice when the other party asserts its right to arbitration in the normal course of pleading.\textsuperscript{71} For example, in \textit{Martin Marietta Aluminum, Inc. v. General Electric Co.},\textsuperscript{72} the court held that G.E. had not waived an arbitration clause where G.E. pleaded the arbitration clause as an affirmative defense, despite the fact that the parties had engaged in "lengthy negotiations . . . prior to suit."\textsuperscript{73} The Eighth Circuit also established that waiver should not be found "in cases in which any delay in making a motion to compel arbitration is based on unfavorable or uncertain law."\textsuperscript{74} In \textit{Nesslage v. York Securities, Inc.},\textsuperscript{75} the court found a delay of almost two years not to be prejudicial because the motion to compel arbitration was filed soon after a Supreme Court decision changed the law.\textsuperscript{76}

\textbf{B. The First and Tenth Circuits' Tests}

The First and Tenth Circuits have set forth a more elaborate, six-factor test.\textsuperscript{77} The factors are as follows: (1) whether a party has acted inconsistent with the right to arbitrate; (2) whether the parties are "well into preparation" for litigation before the arbitration clause was raised; (3) whether the parties are near the trial date or whether there has been a long period of delay before invoking the

\begin{itemize}
    \item 67. \textit{Id.} at 158-59.
    \item 68. 738 F.2d 1473 (9th Cir. 1984).
    \item 69. \textit{Id.} at 1477.
    \item 70. \textit{Id.}
    \item 71. See Rhone-Poulenc Specialites Chimiques v. SCM Corp., 769 F.2d 1569, 1573 (Fed. Cir. 1985); ATSA of California, Inc. v. Continental Ins. Co., 702 F.2d 172, 175 (9th Cir. 1983), \textit{amended on other grounds}, 754 F.2d 1394 (9th Cir. 1985); Martin Marietta Aluminum, Inc. v. General Electric Co., 586 F.2d 143, 146 (9th Cir. 1978).
    \item 72. 586 F.2d 143.
    \item 73. \textit{Id.} at 146.
    \item 74. Ackerberg v. Johnson, 892 F.2d 1328, 1332 (8th Cir. 1989).
    \item 75. 823 F.2d 231.
    \item 76. \textit{Id.} at 234 (the Supreme Court case which changed the law was \textit{Dean Witter Reynolds, Inc. v. Byrd}, 470 U.S. 213); see also Ackerberg, 892 F.2d at 1332-33; Benoay v. Prudential-Bache Sec., Inc., 805 F.2d 1437, 1440 (11th Cir. 1986); Phillips v. Merrill Lynch, Pierce, Fenner & Smith, 795 F.2d 1393, 1396 n.9 (8th Cir. 1986), \textit{cert. denied}, 482 U.S. 931 (1987); Fisher, 791 F.2d at 697; Fogarty v. Piper, 781 F.2d 662, 663 (8th Cir. 1986). The Eighth Circuit stated that it could not find waiver of a right to arbitrate before the right existed under the law. Ackerberg, 892 F.2d at 1333.
    \item 77. Peterson v. Shearson/American Express, Inc., 849 F.2d 464, 467-68 (10th Cir. 1988); \textit{Jones Motor Co.}, 671 F.2d at 44.
\end{itemize}
clause; (4) whether the party seeking arbitration has filed pleadings without requesting a stay of the proceedings; (5) whether the party seeking arbitration has engaged in discovery methods not available in arbitration or has engaged in other "important intervening steps;" (6) whether the delay has prejudiced or otherwise affected the opponent.\textsuperscript{78}

After announcing this test, the First Circuit retreated from it by failing to characterize these criteria as the definitive test for determining waiver of an arbitration agreement.\textsuperscript{79} Instead, in \textit{Page v. Moseley, Hallgarten Estabrook & Weeden, Inc.}\textsuperscript{80} the court emphasized that the plaintiff must show not only delay but also that the delay caused prejudice.\textsuperscript{81} However, a federal district court in the First Circuit has stated that the six-factor test and the \textit{Page} court's approach are not inconsistent.\textsuperscript{82} Instead, these two approaches "compliment each other" and form a "combined standard."\textsuperscript{83}

The two approaches, taken together, show that there should be "extensive analysis . . . before ruling on the motion to compel arbitration" and illustrate the importance of prejudice to the opponent by specifically commanding the court to look at this factor.\textsuperscript{84} As a result, "the two standards essentially aim at the same concept . . . By using both, the two standards act as a check on each other and require a court to look closely at the individual facts of each case."\textsuperscript{85} The district court also suggested that the six factors essentially represent a system "to establish prejudice to the other party."\textsuperscript{86}

Under the six-factor test, a party is held to have waived an arbitration clause after engaging in "considerable discovery," moving for summary judgment, and waiting until after the district court decided the summary judgment motion before attempting to compel arbitration.\textsuperscript{87} The First Circuit also held that a party waives an arbitration agreement after he or she enters into a stipulation designed to

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80. 806 F.2d 291.

81. Id. at 294.


83. Id.

84. Id.

85. Id. at 884-85.

86. Id.

87. \textit{Jones Motor Co.}, 671 F.2d at 44.
\end{flushleft}
accelerate a trial on the merits because such a stipulation is "entirely inconsistent" with the right to arbitrate.88

C. The Second Circuit's Test

The Second Circuit focuses directly on the prejudice factor and "waiver of the right to compel arbitration due to participation in litigation may be found only when prejudice to the other party is demonstrated."89 The Second Circuit stated that one of the ideas behind the presumption in federal courts is to avoid the expense and delay of litigation.90 In Com-Tech Associates v. Computer Associates International,91 the court held that one party's "protracted litigation" devices, such as participating fully in discovery, making motions relating to the merits, and delaying their motion to compel arbitration until late in the process, undercut the federal policy and did in fact result in a waiver.92

In Rush v. Oppenheimer & Co.,93 the Second Circuit concluded that the defendant's activities, taken either individually or collectively, did not justify the district court's finding of a waiver.94 In Rush, the defendant waited eight months before moving to compel arbitration.95 The defendant participated in rather extensive discovery, moved to dismiss, and answered the complaint without raising the arbitration clause as an affirmative defense.96 The court first noted that it was "beyond question" that the eight-month delay was "insufficient by itself to constitute a waiver of the right to arbitrate" because there must be a showing of prejudice.97 The Rush court then discussed the motion to dismiss, and rapidly concluded that a motion to dismiss alone is not enough to waive an arbitration agreement.98 Because the plaintiff could not establish any prejudice resulting from defendant's actions, the court could not justify a finding of waiver.99

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88. Caribbean Ins. Servs., Inc. v. American Bankers Life Assurance Co., 715 F.2d 17, 19-20 (1st Cir. 1983). In this case, the defendant answered without raising the arbitration clause as a defense. Id. at 18. Three months later, the defendant agreed to the stipulation, which also did not contain any mention of the arbitration clause. Id. About three weeks later, the defendant finally moved to compel arbitration. Id. at 18-19.
89. Rush, 779 F.2d at 887.
91. 938 F.2d 1574.
92. Id. at 1576-77.
93. 779 F.2d 885.
94. Id. at 889.
95. Id. at 887.
96. Id.
97. Id. The court emphasized that the delay before invoking the arbitration clause may have been caused by the district court's reinstatement of the issue of punitive damages. Id. at 888. The court concluded that the expense and delay fell "well short" of a waiver. Id.
98. Id. at 888 (citing Sweater Bee, 754 F.2d at 463).
99. Id. at 889.
D. Other Circuits' Tests

The remaining circuits have not specifically listed the factors which enter into the consideration of a question of waiver. However, these courts tend to focus on whether a party caused prejudice or delay and whether a party acted inconsistently with the right to arbitrate.100

For example, the Seventh Circuit stated that while there is no rigid rule as to what amounts to a waiver, the "crucial question" is whether the party seeking arbitration has acted inconsistently with its contractual right to arbitration; prejudice to the opposing party is then considered as a "relevant circumstance."101 The Seventh Circuit also stated that delay may be sufficient to constitute waiver where that delay "causes actual prejudice" to the opposing party.102 The Seventh Circuit has, however, resisted "the application of some inflexible rule" to determine waiver and has instead indicated that "[a]ll of the circumstances, of which prejudice should be one, must be considered in the context of the particular case."103

In Ohio-Sealy Mattress Manufacturing Co. v. Kaplan,104 the Seventh Circuit found that the plaintiff waived an arbitration agreement because it caused prejudice to the defendant by first delaying before finally asserting the arbitration clause.105 In this case, the plaintiff offered the defendant the option of litigation or arbitration, and the defendant chose to litigate.106 The parties then conducted "extensive pretrial activities."107 The court found that the defendant "was justified in concluding that [the plaintiff] had decided to waive arbitration" because the plaintiff had not asserted its right to arbitrate and because it participated in the pretrial activities.108 The court added that the plaintiff "cannot have it both ways" and that it must live with the consequences of its acquiescence to the defendant's choice to litigate.109

Other circuits focus on whether the party seeking to compel arbitration acted inconsistently with the arbitration right110 and thereby caused prejudice to the other party.111 The Eleventh Circuit stated that "length of delay in demanding arbitration and the expense incurred by that party from participating in the

100. See infra notes 101-39 and accompanying text.
102. Ohio-Sealy, 712 F.2d at 273.
103. Midwest Window Sys., Inc. v. Amcor Indus., 630 F.2d 535, 537 (7th Cir. 1980).
104. 712 F.2d 270.
105. Id. at 273.
106. Id.
107. Id.
108. Id.
109. Id.
110. See, e.g., S&H Contractors, 906 F.2d at 1514; National Found. for Cancer Research, 821 F.2d at 774.
111. S&H Contractors, 906 F.2d at 1514.
litigation process" are factors in the determination of prejudice.\textsuperscript{112} In \textit{S & H Contractors, Inc. v. A.J. Taft Coal Co.},\textsuperscript{113} the Eleventh Circuit concluded that "Taft was prejudiced by S & H's delay in demanding arbitration and by its invocation of the litigation process."\textsuperscript{114} Therefore the court found that S & H had waived its right to arbitrate when it waited eight months after filing its complaint before it demanded arbitration.\textsuperscript{115} During these eight months, Taft filed two motions, and S & H deposed five Taft employees.\textsuperscript{116}

The District of Columbia Circuit "has never included prejudice as a separate and independent element of the showing necessary to demonstrate waiver of the right to arbitration."\textsuperscript{117} The circuit states that a court may of course "consider prejudice to the objecting party as a relevant factor among the circumstances that the court examines in deciding whether the moving party has taken action inconsistent with the agreement to arbitrate."\textsuperscript{118} In \textit{National Foundation for Cancer Research v. A.G. Edwards & Sons, Inc.},\textsuperscript{119} the District of Columbia Circuit held that A.G. Edwards waived its right to arbitration because of its "delay in seeking arbitration, its extensive involvement in pretrial discovery, its invocation of summary judgment procedures, and the resulting prejudice to the opposing party."\textsuperscript{120} In this case, the court emphasized A.G. Edwards' summary judgment motion and stated that this motion represented a "conscious decision to exploit the benefits of pretrial discovery . . . that were fully available to it only in the judicial forum."\textsuperscript{121} The election to submit the arbitrable claims to a court was "wholly inconsistent with an intent to arbitrate and constituted an abandonment of the right to seek arbitration."\textsuperscript{122}

The Sixth Circuit, in \textit{Worldsource Coil Coating, Inc. v. McGraw Construction Co.},\textsuperscript{123} took a step toward formulating a test with definitive factors.\textsuperscript{124} The court stated:

Prejudice in this context means that a party was forced to bear the expense of a lengthy trial, that helpful evidence was lost because of the delay in proceeding to arbitration, or that the party seeking arbitration

\begin{footnotes}
112. \textit{Id.}
113. 906 F.2d 1507.
114. \textit{Id.} at 1514.
115. \textit{Id.}
116. \textit{Id.}
118. \textit{Id.}
119. 821 F.2d 772.
120. \textit{Id.} at 778.
121. \textit{Id.} at 775-76.
122. \textit{Id.} at 776.
123. 946 F.2d 473 (6th Cir. 1991).
124. See \textit{id.} at 482.
\end{footnotes}
used litigation to obtain discovery rights not otherwise available. Although this list is not exclusive, it is demonstrative of actions deemed to be prejudicial to a party asserting waiver.\textsuperscript{125}

The \textit{Worldsource Coil} court went on to clarify that prejudice is only a significant factor in determining waiver.\textsuperscript{126}

The Fifth Circuit focuses on whether the party seeking arbitration has "substantially invoke[d] the judicial process to the detriment or prejudice of the other party."\textsuperscript{127} In addition, the circuit emphasizes that the determinative factor is the prejudice suffered by the party opposing arbitration, not the party seeking arbitration.\textsuperscript{128} Mere delay in moving to compel arbitration is insufficient to constitute prejudice,\textsuperscript{129} but the delay and the extent of involvement in judicial proceedings are "material factors in assessing a plea of prejudice."\textsuperscript{130} The Fifth Circuit also stated that "[s]ubstantially invoking the litigation machinery qualifies as the kind of prejudice . . . that is the essence of waiver."\textsuperscript{131}

In \textit{Tenneco Resins, Inc. v. Davy International},\textsuperscript{132} the Fifth Circuit found no waiver of the right to arbitrate where the defendant, in its answer, sought to have the action dismissed because the dispute was covered by the arbitration clause, even though the defendant then waited eight months to move for a stay pending arbitration.\textsuperscript{133} The \textit{Tenneco} court explained that "when only a minimal amount of discovery has been conducted, which may also be useful for the purpose of arbitration, the court should not ordinarily infer waiver based upon prejudice to the party opposing the motion to stay litigation."\textsuperscript{134}

The Third Circuit stated that its focus is not on the inconsistency of a party's actions but rather on the presence or absence of prejudice.\textsuperscript{135} Under this approach, in \textit{Gavlik Construction Co. v. H.F. Campbell Co.},\textsuperscript{136} the circuit court held that there was no waiver where the defendant took "minimal procedural actions"\textsuperscript{137} such as removing the case to federal court, moving for consolidation,

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\textsuperscript{125} \textit{Id.} (citations omitted).
\textsuperscript{126} \textit{Id.}
\textsuperscript{127} \textit{Walker v. J.C. Bradford & Co.}, 938 F.2d 575, 577 (5th Cir. 1991) (quoting \textit{Miller Brewing Co.}, 781 F.2d at 497).
\textsuperscript{128} \textit{Price}, 791 F.2d at 1162.
\textsuperscript{129} \textit{Frye v. Paine, Webber, Jackson & Curtis, Inc.}, 877 F.2d 396, 399 (5th Cir. 1989), \textit{cert. denied}, 494 U.S. 1016 (1990); see, e.g., \textit{Com-Tech}, 938 F.2d at 1576; \textit{Morrie & Shirlee Mages Found.}, 916 F.2d at 405; \textit{Carcich}, 389 F.2d at 696.
\textsuperscript{130} \textit{Frye}, 877 F.2d at 399.
\textsuperscript{132} 770 F.2d 416.
\textsuperscript{133} \textit{Id.} at 420.
\textsuperscript{134} \textit{Id.} at 421.
\textsuperscript{136} 526 F.2d 777.
\textsuperscript{137} \textit{Id.} at 784.
\end{flushleft}
and filing a third party complaint.\textsuperscript{138} In this case, the defendant did not even answer the complaint before moving to compel arbitration, and the court was unable to find any prejudice to the plaintiff.\textsuperscript{139}

IV. THE INSTANT DECISION

The Kramer court began its analysis by first discussing the judicial policy favoring arbitration.\textsuperscript{140} Quoting language from the United States Supreme Court, the court recognized that "any doubts concerning the scope of arbitration issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."\textsuperscript{141} The court then stated that, based on its decision several years earlier in Rush v. Oppenheimer & Co., this strong presumption in favor of arbitration suggests that a waiver of an arbitration agreement "is not to be lightly inferred."\textsuperscript{142} Adding that a party does waive an arbitration agreement when he or she engages in "protracted litigation," the court stated that "protracted litigation" occurs when one party's litigation actions result in prejudice to the opposing party.\textsuperscript{143} The issue that remained for the court to decide was what actions are prejudicial.\textsuperscript{144}

The court defined two categories of prejudice that can occur.\textsuperscript{145} The first category is "substantive," which includes instances where a party attempts to compel arbitration only after the party has first received a court decision on a motion which goes to the merits of the claim.\textsuperscript{146} The court stated that this essentially amounts to relitigation of the same issue.\textsuperscript{147}

The second category of prejudice, according to the court, includes situations where the party seeking to enforce an arbitration agreement has waited to claim his or her contractual right to arbitration until the other party has incurred "unnecessary delay or expense."\textsuperscript{148} The court explained that because there is no bright line test to determine this second type of prejudice, it is to be "determined contextually."\textsuperscript{149} The court listed several ways to determine the prejudice contextually, including "examining the extent of the delay, the degree of litigation

\textsuperscript{138} Id. at 783-84.
\textsuperscript{139} Id. at 784.
\textsuperscript{140} Kramer, 943 F.2d at 178-79.
\textsuperscript{141} Id. (quoting Moses H. Cone, 460 U.S. at 24-25).
\textsuperscript{142} Id. at 179 (quoting Rush, 779 F.2d at 887). Judge George C. Pratt, who wrote the Kramer v. Hammond decision, also authored the Rush decision. Id. at 177; see Rush, 779 F.2d at 885.
\textsuperscript{143} Kramer, 943 F.2d at 179 (quoting Com-Tech, 938 F.2d at 1576).
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id. An example of a bright-line test may include a particular dollar amount or a definite period of time.
that has preceded the invocation of arbitration, the resulting burdens and expenses, and the other surrounding circumstances." The court then proceeded to examine Kramer's actions in order to determine whether he had caused prejudice to Hammond and should therefore be deemed to have waived the arbitration agreement.151

The court noted that Kramer waited four years before he asserted the agreement's arbitration clause as a defense.152 The court described Kramer's actions as "extensive pretrial litigation apparently designed to wear down his opponent."153 The court summarized that, before claiming the arbitration clause as a bar, "Kramer had litigated issues to the highest state courts of New York and South Carolina, and had petitioned the United States Supreme Court for a writ of certiorari."154 The court recounted Kramer's pretrial litigation activities in South Carolina, but suggested that it was more significant that Kramer had filed an answer in New York which did not raise the arbitration clause as a defense.155 The court concluded that Kramer waived the arbitration clause "[b]y engaging in such aggressive, protracted litigation for over a four-year period."156

The court stated that to allow Kramer to invoke the arbitration clause after four years of extensive pretrial litigation would violate the very purposes of speed and efficiency which support the strong policy in favor of enforcing arbitration agreements.157 The court explained that it was not basing its finding of a waiver on judicial economy, but rather it was relying on the unfair prejudice to Hammond by Kramer's "numerous appeals in which he had little likelihood of success."158 The court then claimed that Kramer's fight against personal jurisdiction in South Carolina "might not alone have established waiver of arbitration."159 However, "the extensive litigation in New York, where jurisdiction was not in doubt, substantially augmented the total delay and expense and focused on the merits of the dispute, thereby establishing waiver."160

The court restated Kramer's position as being that the only prejudice which can support a finding of a waiver of an arbitration clause is substantive prejudice.161 Kramer based this argument on his interpretation of Rush v. Oppenheimer & Co., which he claimed clearly stated that evidence of delay and

150. Id. By stating these items that should be examined, the Kramer court may be taking a quiet step toward a list of factors used in other circuits. See supra notes 60-63, 77-78 and accompanying text; see also infra note 218 and accompanying text.
151. Kramer, 943 F.2d at 179.
152. Id.
153. Id.
154. Id.
155. Id.
156. Id.
157. Id.
158. Id.
159. Id.
160. Id.
161. Id. at 180.
expense alone are not sufficient to support a finding of waiver.162 The court, however, rejected this argument by stating that the Rush decision "clearly implied that the prejudice required for waiver is not limited to substantive prejudice, but may also be 'prejudice in terms of either expense or delay.'"163

The court then distinguished its decisions in Rush and in Sweater Bee By Banff, Ltd. v. Manhattan Industries, Inc.164 In both these cases, the Second Circuit denied that parties had waived arbitration agreements.165 The Kramer court distinguished both cases on the grounds that they involved situations where not all of the issues involved were arbitrable.166 In addition, the court emphasized that Rush involved "only an eight-month delay before arbitration was invoked."167 The court concluded that in both Rush and Sweater Bee "there were sound, nonprejudicial reasons to justify the delays and the additional expense incurred when the parties did not immediately invoke arbitration;" the court added that "[n]o such reasons exist in this case."168

The Kramer court supported its decision with a discussion of Com-Tech Associates v. Computer Associates International.169 In Com-Tech, the Second Circuit held that a party waived an arbitration agreement "by engaging in pretrial discovery and making a summary judgment motion in the eighteen months between the time the party answered the complaint and raised its claim of arbitration."170 Also in Com-Tech, all the issues were arbitrable.171 The Com-Tech court found a waiver based on the expense of both participating in "extensive depositions" and defending summary judgment motions.172

The strong presumption in favor of enforcing arbitration agreements, the court stated, was not designed to protect parties like Kramer, who exhaust pretrial maneuvers and then retreat to invoking the arbitration clause.173 Even if Kramer's pretrial maneuvers were void of bad faith, his actions "had the inevitable effect of causing Hammond to expend substantial time and money."174 The court reiterated its previous position in Com-Tech by holding that parties should not be allowed to invoke arbitration clauses at a late date after they have deliberately taken action to participate in costly and extended litigation.175 To

162. Id. at 179-80.
163. Id. at 180 (quoting Rush, 779 F.2d at 888).
164. 754 F.2d 457.
165. Rush, 779 F.2d at 890; Sweater Bee, 754 F.2d at 466.
166. Kramer, 943 F.2d at 180.
167. Id.
168. Id.
169. See id.
170. Id. (citing Com-Tech, 938 F.2d at 1576-77).
171. Id.
172. Id. (quoting Com-Tech, 938 F.2d at 1577-78).
173. Id.
174. Id.
175. Id.
allow this would undercut the purpose of arbitration, which is to promote the efficient and inexpensive resolution of disputes.\textsuperscript{176}

V. COMMENT

The amount of time that passes and the expenses incurred by the opposing party before a party moves to enforce his or her contractual right to arbitration are factors in determining whether the opposing party has suffered prejudice.\textsuperscript{177} But should they be more than just factors? Should courts establish a bright-line test defining a certain time limit or dollar amount after which one, as a matter of law, waives a contractual right to arbitration?

The Kramer court states that the strong presumption in federal courts in favor of enforcing arbitration agreements promotes speed and efficiency in the resolution of disputes.\textsuperscript{178} The court also declares that arbitration ensures "that disputes [will] be resolved with dispatch and with a minimum of expense."\textsuperscript{179} In stating this purpose, the Kramer court departs significantly from its earlier decision in Rush v. Oppenheimer & Co., a case upon which it relied for the legal framework in the area of waiver.\textsuperscript{180} In Rush, the Second Circuit "reemphasize[d] that neither efficiency nor judicial economy is the primary goal behind the arbitration act."\textsuperscript{181} The Kramer court disregards this portion of the Rush opinion and instead asserts that efficiency is the purpose behind arbitration.\textsuperscript{182}

In Kramer, the Second Circuit states that no bright-line test exists to determine when prejudicial delay constitutes waiver.\textsuperscript{183} As other circuits recognize "[t]here is no set rule as to what constitutes a waiver or abandonment of the arbitration agreement; the question depends upon the facts of each case and usually calls for a finding by the trier of facts."\textsuperscript{184} Courts also differ on the appropriate standard to apply in determining whether waiver has occurred.\textsuperscript{185} One writer has noted that the courts' inability to formulate a workable test for waiver is "[p]articularly vexing" when a party participates in litigation activities

\textsuperscript{176} Id.; Com-Tech, 938 F.2d at 1578.
\textsuperscript{177} See supra notes 65, 80-81, 89, 100-103, 112, 118, 125-28 and accompanying text.
\textsuperscript{178} Kramer, 943 F.2d at 179.
\textsuperscript{179} Id. at 180 (quoting Com-Tech, 938 F.2d at 1578).
\textsuperscript{180} See Kramer, 943 F.2d at 179-80.
\textsuperscript{181} Rush, 779 F.2d at 891.
\textsuperscript{182} Kramer, 943 F.2d at 179; see supra text accompanying notes 175-76. This inconsistency is even more interesting in light of the fact that Judge Pratt wrote both the Rush and Kramer opinions. See supra note 142.
\textsuperscript{183} Kramer, 943 F.2d at 179.
\textsuperscript{184} Reid Burton Constr., 614 F.2d at 702 (citing Burton-Dixie Corp. v. Timothy McCarthy Constr. Co., 436 F.2d 405, 408 (5th Cir. 1971)); see also Fasig-Tipton Kentucky, Inc. v. Michaelson, No. 91-1667 (4th Cir. Feb. 10, 1992) (WESTLAW cite 1992 WL 21368) ("No bright line defines when a party has been sufficiently prejudiced by a delay to invoke waiver"); Adams v. Merrill Lynch Pierce Fenner & Smith, 888 F.2d 696, 701 (10th Cir. 1989); Price, 791 F.2d at 1159.
\textsuperscript{185} DeToro, supra note 2, at 616.
before moving to compel arbitration.\textsuperscript{186} The writer further stated that "[t]he variety of tests courts currently apply actually encourage litigation, thereby increasing delay and the expense of arbitration, contrary to the well-established policy objectives" behind arbitration.\textsuperscript{187} The reason the various tests encourage litigation is because parties "are unable to predict the outcome of the law's application to their particular case."\textsuperscript{188} The writer explained that "[t]he various tests applied by . . . federal courts are incapable of being applied consistently because none of the factors considered, such as delay, failure to assert the right to arbitrate, filing suit, participation in discovery, or failure to move to compel arbitration are dispositive of the issue."\textsuperscript{189}

If courts did employ a bright-line test, it would seem as though such a test would further the speed and efficiency of resolving disputes. If there were firm deadlines and dollar limits, parties would no longer have doubts over whether they had waived an arbitration agreement. Such a bright-line test would apparently remove judicial discretion and keep a number of cases out of court. However, there are some very good reasons for not employing a set rule and for continuing to determine prejudice according to the facts of each case.

\textbf{A. A Bright-Line Test Focusing on Costs Incurred by the Opposing Party}

One possible test would deem that a party waives an arbitration clause once the opponent spends a particular amount of money defending against the party's litigation activities. Under this approach, once a party spends a certain amount of money, as a matter of law, he or she suffers prejudice. However, this test would actually frustrate the purpose of efficiency behind the federal presumption in favor or arbitration agreements. In fact, it would generate some very difficult problems for courts.

The problem with this test is that in many cases it is difficult to determine with any precision how much a party has spent defending against his or her opponent's pretrial activities. This may result in causation problems as well. For example, in some situations it may be difficult for the opponent to prove that certain legal expenses were caused by the party's actions. In addition, this rule would cause courts many headaches in trying to determine whether the costs incurred were related to an issue that is arbitrable.\textsuperscript{190} The rule would also permit entry into the very dangerous area of whether certain legal fees were

\textsuperscript{186} Id.
\textsuperscript{187} Id. See also Kramer, 943 F.2d at 179 (discussing the policy objectives behind arbitration).
\textsuperscript{188} DeToro, supra note 2, at 623.
\textsuperscript{189} Id.
\textsuperscript{190} This would be a particular problem because costs incurred as a result of an issue that is \textit{not} arbitrable would presumably not be included in the bright-line prejudice figure.
reasonable, a question which may require information otherwise privileged between the attorney and client.\textsuperscript{191}

The rule would provide the opponent with an incentive to falsify the amount he or she spent. The rule would also encourage an opposing party to spend money quickly and foolishly in an attempt to reach the bright-line prejudice figure before a party moves to compel arbitration.\textsuperscript{192} Interestingly, this rule may actually give the opponent the choice of forum, depending upon what amount he or she reports as legal fees incurred in defending against the first party's litigation activities and upon how quickly he or she spends money defending against the claim.

In short, a bright-line test for waiver after incurring a certain amount of legal expenses would violate the very policies behind arbitration—speed and efficiency.\textsuperscript{193} Courts would be swamped with speculative evidence having little relevance to whether a party has actually suffered prejudice and would often be faced with decisions regarding collateral matters.

B. A Bright-Line Test Focusing on the Period of Time That Has Passed Since the Petition Was Filed

The other possible bright-line test is to rule that waiver occurs, as a matter of law, when a specific period of time passes after the pleading is filed. However, this approach also presents some difficult problems. The period of time, by itself, has little conclusive effect as to whether a party has suffered prejudice; one must also consider the events that occur during the time period.\textsuperscript{194} As a result, this test would place an arbitrary deadline on waiver—a deadline that may have little or no bearing on whether the opposing party has actually suffered prejudice.

A possible solution to this problem is to set a long deadline, such as 18 months or two years, to ensure that some prejudice actually occurs. However, this "solution" creates difficulties because it may lead to a finding that a party who only waits a year to invoke the clause but who puts his opponent to "extensive pre-trial litigation"\textsuperscript{195} activities could not possibly be found to have waived the clause. A bright-line test establishing a deadline does not provide the courts with the flexibility required to make decisions on prejudice and waiver. Such a

\textsuperscript{191} Information on legal fees may intrude on the attorney-client privilege, particularly if disclosing the information would violate a fundamental communication between the attorney and client. See \textit{In re Witnesses Before the Special March 1980 Grand Jury}, 729 F.2d 489, 492 (7th Cir. 1984). But see \textit{Federal Sav. & Loan Ins. Corp. v. Ferm}, 909 F.2d 372, 374 (9th Cir. 1990) ("Fee information is generally not privileged.").

\textsuperscript{192} A corollary to this thought is that the bright-line rule would be against the policy of efficiency because opposing parties would often waste money in legal fees just to reach the set dollar amount.

\textsuperscript{193} In fact, this writer has been unable to find any court or any writer advocating a bright-line test focusing on the amount of money spent by the opponent.

\textsuperscript{194} See supra notes 68-70, 80-81, 97, 100, 129-30 and accompanying text.

\textsuperscript{195} \textit{Kramer}, 943 F.2d at 178.
deadline ties the hands of judges because in cases where prejudice has clearly occurred, they have no means to find a waiver.

One critic of the case-by-case approach to determining prejudice has suggested establishing a bright-line test based solely on the acts of either the plaintiff filing a petition or the defendant answering the petition.\textsuperscript{196} According to the critic, the uncertainty of the case-by-case approach causes an increase in litigation because it is unclear when a party has actually suffered prejudice.\textsuperscript{197} Therefore, the critic concludes that the case-by-case approach is against the policies of speed and efficiency which support the enforcement of arbitration agreements.\textsuperscript{198}

The critic claims that his proposed standard would increase efficiency\textsuperscript{199} and would discourage litigation.\textsuperscript{200} However, its major effect may be to force many cases which could be resolved in arbitration to proceed to trial once pleadings are filed.\textsuperscript{201} This approach would remove the flexibility found in the "prejudice" test by taking away the discretion vested in the judge.\textsuperscript{202} The approach would also defeat the Supreme Court's notion that courts should "rigorously enforce agreements to arbitrate," consistent with the strong federal policy favoring arbitration.\textsuperscript{203} Claiming that parties waive contractual arbitration clauses as soon as they initiate litigation activities clearly is against the requirement that courts "rigorously enforce agreements to arbitrate."\textsuperscript{204} and against the federal policy favoring arbitration.

Another possibility is to create a rebuttable presumption that after an lapse of a certain period of time, a party is presumed to have waived his or her right to arbitrate. One writer has suggested that courts apply two rebuttable presumptions.\textsuperscript{205} First, "[a] plaintiff who knowingly files a lawsuit over an issue covered by an arbitration agreement should be deemed to have waived his right to compel arbitration."\textsuperscript{206} Second, "[a] defendant who responds to a lawsuit without simultaneously moving to compel arbitration should be deemed to have waived his right to compel arbitration."\textsuperscript{207} The writer adds that these

\textsuperscript{196} Note, Contractual Agreements to Arbitrate, supra note 2, at 1543-46.
\textsuperscript{197} Id. at 1534.
\textsuperscript{198} Id. at 1533. The critic also cites the fact that a party can follow two inconsistent remedies at the same time as another problem with the case-by-case approach. Id. at 1542.
\textsuperscript{199} Id. at 1551.
\textsuperscript{200} Id. at 1552.
\textsuperscript{201} The critic efficiently dismisses use of this argument by claiming that the number of cases will, overall, be decreased by his more certain standard of waiver. Id. at 1551-52 n.261.
\textsuperscript{202} In fact, the critic's position seems to favor the elimination of the "prejudice" standard altogether, a stance which this writer is not willing to take. See id. at 1550-51.
\textsuperscript{203} Byrd, 470 U.S. at 221; see also Moses H. Cone, 460 U.S. at 24.
\textsuperscript{204} Byrd, 470 U.S. at 221.
\textsuperscript{205} DeToro, supra note 2, at 624 (DeToro's article deals primarily with waiver in investor-broker cases, but his analysis is applicable to a general discussion of waiver).
\textsuperscript{206} Id.
\textsuperscript{207} Id.
presumptions could be rebutted "in appropriate cases." A court should consider certain "relevant factors" when it determines whether a party has rebutted a prima facie showing of waiver. The writer states that these factors are (1) whether a party has acted inconsistently with the right to arbitrate, (2) whether the party seeking arbitration has unreasonably delayed and has thereby caused prejudice to his or her opponent, and (3) whether the party seeking arbitration has acted in bad faith.

This presumption, however, would not improve on the case-by-case approach to determining waiver. The writer claims that his proposed presumption would "add more certainty" to the area and that it would therefore better serve the policy goals which support arbitration. In terms of serving the purpose of judicial economy, the presumption does not improve the situation. The evidence currently used to determine waiver would still be used under the presumption; the only difference is that the evidence would be used to rebut a presumption.

C. An Intermediate Test

The problem with bright-line tests in the area of waiver is that they either ignore or limit the various factors that enter into the consideration of whether a party has been prejudiced. Therefore, the best approach is to form a list of factors for courts to examine. Such a test, like those followed by the First, Eighth, Ninth, and Tenth Circuits, provides a guideline for decisions concerning waiver while retaining the flexibility of judicial discretion in finding waiver. As such, these tests represent something of an intermediate step between the inflexible

208. Id.
209. Id.
210. Id. at 624-25.
211. Id. at 625-26.
212. Id. at 626-27.
213. Id. at 624.
214. To see how similar the evidence would be, compare the components of the three "relevant factors" in the rebuttable presumption, see id. at 624-27, with the various factors that the federal courts presently consider. See supra notes 60-139.
215. The absolute bright-line tests, discussed previously, ignore the factors that constitute prejudice to the opponent. The bright-line test proposed in Contractual Agreements to Arbitrate Disputes: Waiver of the Right to Compel Arbitration may be viewed as a one-factor test; the proposed test there focuses on the factor of whether a party has acted inconsistently with his right to arbitrate and ignores the other factors considered by the Eighth and Ninth Circuits. Note, Contractual Agreements to Arbitrate, supra note 2, at 1544; see supra notes 60-63 and accompanying text.

The factors considered by the Eighth and Ninth Circuits are as follows: (1) whether the party knew of his or her right to compel arbitration; (2) whether the party acted inconsistently with the right to arbitrate; and (3) whether prejudice resulted to the opponent. Stifel, Nicolaus, 924 F.2d at 158; Fisher, 791 F.2d at 694; see supra notes 60-63 and accompanying text. The author of the law review article essentially assumes the first factor to exist, eliminates the third factor, and focuses only on the second factor. Note, Contractual Agreements to Arbitrate, supra note 2, at 1549.
216. See supra text accompanying notes 60-63 and 77-78.
bright-line test and the amorphous way that many circuits treat the question of whether prejudice has resulted.\textsuperscript{217}

The Kramer court does make a quiet step in this direction by listing certain factors that enter into its contextual determination of waiver.\textsuperscript{218} The court stated that judges should examine "the extent of the delay, the degree of litigation that has preceded the invocation of arbitration, the resulting burdens and expenses, and the other surrounding circumstances."\textsuperscript{219} This listing seems to represent a step toward the formation of a set of factors, such as the tests used in other circuits,\textsuperscript{220} and as such it may be seen as a compromise between an absolute bright-line test and pure case-by-case analysis.

Under this system, courts still focus on the question of what constitutes prejudice,\textsuperscript{221} and judges still evaluate on a case-by-case basis.\textsuperscript{222} However, this system does have some virtues that may further the policy of efficiency behind arbitration. For one thing, such a listing gives the parties a clear idea of what issues the court considers to be important. Parties may then focus their arguments on these factors and may choose to abandon a shotgun approach in arguing waiver. Such a listing would allow parties to formulate their arguments for or against waiver based on the factors that a court has delineated as being determinative on the issue. In addition, a test listing factors may limit the judicial discretion involved, since judges will focus on whether certain factors have been met. It seems that such a factor-test would streamline the discussion of waiver of an arbitration agreement in a case and would act to preserve judicial resources—particularly time.

\section*{VI. Conclusion}

While the question of waiver of an arbitration agreement is inherently in conflict with the policy of efficiency,\textsuperscript{223} a factor-test seems to be the best way to limit the judicial resources that are used in resolving these issues. By using certain factors, the courts give the parties some insight into what issues the courts consider to be important, and the courts also form a general framework within which to operate. In addition, the courts

\begin{itemize}
\item \textsuperscript{217} See supra text accompanying notes 89-139. It is, however, difficult to form a list of factors that will be completely determinative in all cases. See Note, \textit{Contractual Agreements to Arbitrate}, supra note 2, at 1535. This writer does not claim that the factor-test is a perfect solution, but merely that the factor-test represents the best approach; in fact, this writer believes that there is no way to "solve" the problem of determining when a party has waived an arbitration agreement.
\item \textsuperscript{218} Kramer, 943 F.2d at 179; see also supra note 150.
\item \textsuperscript{219} Kramer, 943 F.2d at 179.
\item \textsuperscript{220} See supra text accompanying notes 60-63 and 77-78.
\item \textsuperscript{221} See supra notes 65, 80-81, 89, 100-103, 112, 118, 126, 127-28, 131&135 and accompanying text.
\item \textsuperscript{222} See supra note 51 and accompanying text.
\item \textsuperscript{223} This is evidenced by the fact that parties who include arbitration agreements to avoid courts frequently end up in appellate courts to resolve whether the agreement has been waived.
\end{itemize}
retain the flexibility to exercise some discretion and to arrive at a fair result based on the individual facts of a case.

Bright-line tests, on the other hand, are clearly not the solution. These tests would focus on the time that has passed or the amount of money that has been spent. These two issues, however, may shed very little light on whether it would be unfair due to prejudice suffered, to allow a party to claim a right to arbitrate. In addition, bright-line tests would lead to many collateral issues, such as the exact amount of money spent or the reasonableness of certain amounts paid. Because these bright-line tests could easily be abused, they would not further the purposes of speed and efficiency behind arbitration.

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