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# Whose Finding Is It Anyway: The Division of Labor between Courts and Arbitrators with Respect to Waiver

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# Whose Finding is it Anyway?: The Division of Labor Between Courts and Arbitrators with Respect to Waiver

*Marie v. Allied Home Mortgage Corp.*[1]

## I. INTRODUCTION

Given the emphasis with which the Supreme Court has made clear its policy favoring arbitration, it is not surprising that some courts may have reacted by divesting themselves of a "gateway issue" long decided by courts. Traditionally, courts have determined whether a party has acted inconsistently with its right to arbitration, thereby waiving it, but a few courts found that the question is properly before an arbitrator. Recently, the First Circuit Court of Appeals in *Marie v. Allied Home Mortgage Corporation*[2] established a framework through which the federal circuits may begin to close the potential split of authority regarding waiver of the right to arbitration. This framework distinguishes between waiver by litigation conduct and waiver by delay or other contractual limitation, maintaining the former for judicial review, and delegating the latter to arbitrators. While it is likely that *Marie* will become the rule, an alternative may exist in a separate set of equitable defenses, avoiding the confusion that comes from distinguishing between different forms of waiver.

## II. FACTS AND HOLDING

Plaintiff-Appellee Martha M. Marie (Marie) filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) on April 23, 2003, alleging sexual discrimination by her employer, Defendant-Appellant Allied Home Mortgage Corporation (Allied), and her supervisor, Joseph Thompson (Thompson),[3] in violation of Title VII of the Civil Rights Act of 1964.[4] Allied responded to the charge on May 22, 2003, after which the EEOC conducted an investigation.[5] On July 18, 2003, the EEOC issued a "right to sue"[6] letter to

1. 402 F.3d 1 (1st Cir. 2005).

2. *Id.*

3. The EEOC dismissal letter indicates that Marie and her supervisor, Joseph Thompson, lived together and represented themselves as domestic partners. *Id.* at 5.

4. 42 U.S.C. §§ 2000e to 2000e-17 (2000); *Marie*, 402 F.3d at 4-5. Marie, a loan processor for Allied, specifically alleged that Thompson physically and verbally abused her in an effort to divert her loan origination commission to himself, forced her to engage in an illegal "autodialing" scheme, and made her pay for office supplies out of her own pocket. *Id.* at 4. Marie alleged that Allied had knowledge of these incidents and failed to act. *Id.*

5. *Marie*, 402 F.3d at 5.

6. Actions for discrimination in employment under Title VII must first be investigated by the EEOC. 42 U.S.C. § 2000e-5(b). After the EEOC determines, either by finding "no cause" or treating the issue as unsuccessful conciliation with the employer, that it will not proceed itself, the Commission will issue the complainant a letter detailing that person's rights, including the right to file suit. *See*

Marie, dismissing her EEOC claims.[7] Marie then filed suit in Massachusetts state court alleging the same violations of Title VII, and Allied removed the case to the United States District Court for the District of Massachusetts.[8] In district court, Allied defended by moving to compel arbitration, pursuant to the terms of Marie's employment contract requiring that all disputes be submitted to arbitration.[9] The district court denied the motion, and Allied subsequently filed its notice of interlocutory appeal, which was taken up in the instant case.[10]

The district court advanced two reasons for denying Allied's motion to compel arbitration.[11] First, the district court interpreted a time limitation provision in Marie's employment contract to mean that Allied had failed to timely initiate arbitration.[12] The court reasoned that, pursuant to the terms of the contract, arbitration "must be initiated within sixty days of the . . . occurrence about which the party initiating the arbitration is complaining."[13] Because Allied sought arbitration more than sixty days after the EEOC concluded its proceedings,[14] Allied's motion to compel arbitration was untimely under the terms of Marie's employment agreement.[15] Second, the district court held that Allied had "waived" its right to arbitrate the claims largely because of this delay.[16]

On appeal, Allied argued that the district court erred in making any determination or finding whatsoever with respect to the contractual time limitation or waiver.[17] Rather, Allied argued, both questions should have been left to an arbi-

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David Sherwin, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1585 (2005); 42 U.S.C. § 2000e-5(b).

7. *Marie*, 402 F.3d at 5. The EEOC dismissed Marie's charges, noting that her relationship with Thompson was consensual rather than unwelcome, that Thompson's actions were motivated by his personal relationship with Marie, not by her gender, and that Marie failed to utilize Allied's sexual harassment policy. *Id.*

8. *Id.*

9. *Id.* The relevant portion of the employment contract entered into by Marie and Allied states:

> Employer and Employee agree to submit to final and binding arbitration any and all disputes, claims (whether in tort, contract, statutory, or otherwise), and disagreements concerning the interpretation or application of this Agreement and Employee's employment by Employer including the arbitrability of any such controversy or claim . . . . Arbitration under this section must be initiated within sixty days of the action, inaction or occurrence about which the party initiating the arbitration is complaining.

*Id.* at 4.

10. *Id.* Allied did not appeal from this order specifically, but rather appealed from the denial of a subsequent motion to reconsider based on FED. R. CIV. P. 59(e), filed on January 26, 2004. *Id.* Because Allied did not file its notice of appeal until March 12, 2004, that is, more than 30 days after the denial of the motion to compel arbitration, the First Circuit Court of Appeals first addressed the jurisdictional question raised and ultimately resolved it in favor of Allied. *Id.* at 6, 9.

11. *Id.* at 6.

12. *Id.* at 11.

13. *Id.*

14. The EEOC issued a "Dismissal and Notice of Rights" on July 18, 2003, whereas Allied did not seek arbitration until December 23, 2003, over five months later. *See id.*, at 5.

15. *Id.* The district court proffered this reason in its original order denying Allied's motion to compel arbitration. *Id.* In that order, the district court stated: "It being undisputed that the initiation of arbitration proceedings occurred ... more than sixty days after the conclusion of [the] charge proceedings before the [EEOC], the demand for arbitration is untimely under Article V of plaintiff's employment agreement." *Id.* at 5.

16. *Id.* This reason for denying Allied's motion to compel arbitration was contained in the court's order denying Allied's motion to reconsider the prior denial. *Id.* at 6.

17. *Id.* at 11.

trator.[18] While conceding that the general rule is that issues of procedural arbitrability are presumptively for an arbitrator to decide and issues of substantive arbitrability are for courts,[19] Marie argued that waiver remains an issue for a court to determine, because courts have more expertise in judicial procedures.[20] Allied argued, alternatively, that if the appellate court found the issue of waiver to be presumptively for a court, that presumption was overcome in this case by the terms of the arbitration agreement, which provided that any disputes concerning general arbitrability issues should be submitted to an arbitrator.[21]

The First Circuit Court of Appeals reversed the decision of the district court and remanded the case for arbitration.[22] The court held that, because a contractual time limitation is a procedural question presumptively for the arbitrator, and because there was no evidence to rebut the presumption, the issue must be resolved by an arbitrator.[23] With respect to waiver though, the court found that courts possess more expertise in judicial procedures, and it would be inefficient for an arbitrator to decide the issue of waiver by conduct in litigation.[24] Thus, the court held that such questions are properly before a judge.[25] On the merits, the court held that failing to initiate arbitration during the pendency of EEOC proceedings does not constitute waiver of a contractual right to arbitrate.[26]

## III. LEGAL BACKGROUND

Prior to two decisions of the United States Supreme Court, federal appellate and district courts have primarily decided the equitable defense of waiver themselves, rather than delegating the question to arbitrators.[27] Whether because the power to do so was assumed, or because no party questioned it,[28] the division of labor in this respect between courts and arbitrators was not questioned until the Supreme Court's decisions in *Howsam v. Dean Witter Reynolds, Inc.*[29] and *Green Tree Financial Corp. v. Bazzle*.[30] Following these decisions, a few courts moved

18. *See id.* at 14-15.

19. *See id.* at 10 n.7 (citing Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002)). *Howsam* identified such procedural issues as "time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate. *Howsam*, 537 U.S. at 85 (citing RUAA § 6, comment 2). These issues are for arbitrators, while only two questions, termed questions of substantive arbitrability, are for courts: whether the parties are bound to an arbitration agreement, and whether the agreement covers a particular dispute. *See id.* at 83-84.

20. *See Marie*, 402 F.3d at 14-15.

21. *Id.* at 14.

22. *Id.* at 17.

23. *Id.* at 11.

24. *Id.* at 15.

25. *Id.*

26. *Id.* at 16.

27. *See generally* Philip Aidikoff, *Arbitration: Can it be Waived?*, *in* SECURITIES ARBITRATION 2002: TAKING CONTROL OF THE PROCESS, at 531 (PLI Corp. L. & Practice, Course Handbook Series No. 1326, 2002) [hereinafter Aidikoff].

28. *See Marie*, 402 F.3d at 12. The court raises the possibility that the recent stream of First Circuit cases that continuing to adhere to the traditional waiver rule, discussed *infra*, have done so because no party raised the issue of *Howsam*'s impact on the traditional rule. *Id.*

29. 537 U.S. 79 (2002).

30. 539 U.S. 444 (2003). *See generally* Aidikoff, *supra* note 27. The impact of the *Howsam* and *Green Tree* decisions is discussed below.

away from applying traditional rules of waiver, and instead reserved the issue for an arbitrator.[31]

### A. *Tests of Waiver Prior to* Howsam *and* Green Tree

Nearly every federal circuit court has adjudicated questions of waiver by litigation conduct, irrespective of whence that power came or whether they had that power in the first place.[32] Generally, courts utilize a three-part test for determining if the particular facts suggest waiver of the right to arbitrate: (1) knowledge of an existing right to arbitrate, (2) acts inconsistent with that right, and (3) resulting prejudice to the opposing party.[33] Where courts differ is in the application of prongs two and three, that is, how much prejudice or how many inconsistent acts are required to constitute waiver.[34] As a result, the general rule varies slightly from circuit to circuit.[35]

Some circuits focus more on the prejudice element, requiring the party defending a motion to compel arbitration to show the movant has "substantially invoke[d] the judicial process to the prejudice or detriment of the other party."[36] In *S&H Contractors, Inc. v. A.J. Taft Coal Company*,[37] for instance, the Eleventh Circuit found that Taft was prejudiced where S&H, the party who sought to compel arbitration, waited eight months, filed two motions, and took five depositions before invoking the contractual right to arbitrate the dispute.[38] Consequently, the court found S&H had waived its right to arbitration.[39] Central to the court's reasoning was the great expense Taft incurred as result of S&H's litigation conduct.[40] Applying a similar test, and again noting the expense incurred, the Second Circuit in *Com-tec Associates v. Computer Associates Int'l, Inc.*,[41] found that a party to litigation had waived the right to arbitrate the dispute after "extensively deposing" its party opponents and engaging in eighteen months of "protracted litigation."[42]

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31. *See* PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER & O'CONNOR ON CONSTRUCTION LAW § 20:105 (Supp. Aug. 2005) (identifying the same two divergent cases as in *Marie*: Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co., 328 F.3d 462 (8th Cir. 2003), and Belleview Drug Co. v. Advance PCS, 333 F. Supp.2d 318 (E.D. Pa. 2004)).

32. For a catalogue of federal and state cases involving waiver of arbitration, see Joel E. Smith, Annotation, *Defendant's Participation in Action as Waiver of Right to Arbitration of Dispute Involved Therein*, 98 A.L.R.3d 767 (1980 & Supp. 2005). The source of a court's power to hear questions of waiver by litigation conduct is key to understanding the distinction that the *Marie* court made between the two types of waiver, and is discussed more fully below.

33. Aidikoff, *supra* note 27, at 533.

34. *Id.*

35. *See* Aidikoff, *supra* note 27.

36. Stone v. E.F. Hutton & Co., 898 F.2d 1542, 1543 (11th Cir. 1990) (citing Miller Brewing Co. v. Fort Worth Distributing Co., 781 F.2d 494, 497 (5th Cir. 1986)).

37. 906 F.2d 1507 (11th Cir. 1990).

38. *Id.* at 1514.

39. *Id.*

40. *Id.*

41. 938 F.2d 1574 (2d Cir. 1991).

42. *Id.* at 1576-77. The court in *Com-Tec* phrased the waiver test as follows: "Mere delay in seeking arbitration, absent prejudice to the opposing party does not constitute waiver . . . However, 'litigation of substantial issues going to the merits may constitute a waiver of arbitration.'" *Id.* at 1576 (internal citations omitted).

Other circuits focus their waiver inquiry on the acts of the movant that are inconsistent with the right to arbitrate, and are less concerned with actual prejudice.[43] In *Ritzel Communications, Inc. v. Mid-American Cellular Telephone Company*,[44] the Eighth Circuit found that the party seeking arbitration engaged in "substantial, active invocation of the litigation process" by filing a motion to dismiss a cross-claim or, in the alternative, to sever the claims for a separate trial.[45] The court found these acts constituted a choice to proceed in a judicial forum, and therefore also constitute an abandonment of the arbitral forum.[46] Rather than discussing the subjective impact of such litigation conduct upon the non-moving party, the court analyzed the objective act of foregoing a known right, stating simply that the prejudice in the *Ritzel* case was "obvious and substantial."[47]

The Court of Appeals for the District of Columbia uses an approach similar to that of the Eighth Circuit, and in *Nat'l Foundation for Cancer Research v. A.G. Edwards & Sons, Inc.*,[48] found that arbitration was waived where the moving party filed an answer with multiple affirmative defenses, participated in discovery, and moved for summary judgment.[49] Concentrating on the objective acts of the movant, "[t]he essential question [in the D.C. Circuit] is whether ... the defaulting party has acted inconsistently with the arbitration right."[50] The Seventh Circuit went even further and expressly abandoned the need for any showing of prejudice.[51] In order to defend a motion to compel arbitration, Seventh Circuit courts require only that the moving party has demonstrated an election to proceed in a judicial forum in order to presume that arbitration was waived.[52]

Throughout each of these cases, and indeed across all circuits prior to *Howsam* and *Green Tree*, there run two important themes. First, in each case in which the court determined that the party seeking to compel arbitration had waived that right, it was litigation activity that provided the impetus for the court's decision.[53] The mere passage of time was never enough.[54] Second, each of these courts framed their power to make the waiver determination in terms of abuse of the legal system.[55] The abuse generally takes two forms: the creation of undue expense, or forum shopping. For instance, in *Com-Tec*, the forbidden acts of the movant were called "maneuvers" that caused delay and created undue expense.[56] Even in the Seventh Circuit, where the prejudice requirement was eliminated, the

43. *See* Aidikoff, *supra* note 27, at 548-51. These decisions still include an element of "prejudice," but the emphasis is on the "inconsistent act."

44. 989 F.2d 966 (8th Cir. 1993).

45. *Id.* at 969.

46. *See id.* at 970-71.

47. *Id.* The Eighth Circuit had maintained a "prejudice" requirement, and in at least one case has found "inconsistent acts," but not "prejudice." *See* Stifel, Nicolaus & Co. v. Freeman, 924 F.2d 157, 159 (8th Cir. 1991).

48. 821 F.2d 772 (D.C. Cir. 1987).

49. *Id.* at 774-75.

50. *Id.*

51. Aidikoff, *supra* note 27, at 552-53.

52. Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 390 (7th Cir. 1995) (finding waiver where movant removed the case to federal court before invoking the right to arbitration).

53. *See* Aidikoff, *supra* note 27 at 533-53; *see also* Smith, *supra* note 32.

54. *See, e.g.*, Stifel, Nicolaus & Co. v. Freeman, 924 F.2d 157, 159 (8th Cir. 1991) ("Delay in seeking to compel arbitration does not itself constitute waiver.").

55. *See generally* Bruner & O'Connor, *supra* note 31.

56. Com-tec Assocs. v. Computer Assocs. Int'l, Inc., 938 F.2d 1574, 1576-77 (2d Cir. 1991).

moving party's conduct was described as "not a choice between remedies...but the selection of the forum,"[57] indicating that the waiver defense operates to prevent the abusive practice of forum shopping.

While in most circuits the source of a court's power to review waiver went largely unchallenged, the Second Circuit in *Doctor's Associates, Inc. v. Distajo*[58] brought attention to the jurisdictional oddity.[59] In a stunning display of the Socratic method, however, the court asked only questions and failed to provide a satisfactory answer.[60] In *Distajo*, the court noted the peculiarity of courts ruling on waiver issues given the fairly clear terms of the Federal Arbitration Act (FAA).[61] The FAA created a substantive body of federal law which declared arbitration clauses "valid, irrevocable, and enforceable . . . ."[62] The Supreme Court, interpreting the FAA, stressed that it reflects a strong federal policy favoring arbitration agreements.[63] Section 3 of the FAA permits a party to move the court for a stay of proceedings so that the cause may be referred to arbitration, "providing the applicant for the stay *is not in default* in proceeding with such arbitration."[64] Section 4, which commands federal district courts to compel arbitration, contains no such provision allowing the court to examine the moving party's conduct,[65] but courts have routinely made such determinations in section 4 proceedings.[66]

The *Distajo* court commented on the discrepancy by making this observation: "It would appear that the waiver defense has slowly been transformed from a statutorily mandated inquiry in section 3 cases . . . into a broader equitable defense in section 4 cases."[67] Waiver as an equitable defense to a motion to compel under section 3, however, was limited solely to litigation activity under the reasoning of *Distajo*.[68] The court identified a distinction made in the Second Circuit whereby waiver defenses based upon mere delay are reserved for arbitrators, but waiver by conduct in a judicial tribunal is heard by the court.[69] Again, without reaching a conclusion as to why courts have the power to make that determination, the court remanded the case to the district court to adjudicate the waiver defense.[70]

### B. *The Analysis of* Howsam *and* Green Tree

The federal circuits later diverged from their fairly consistent waiver analysis, particularly in their attempts to interpret the Supreme Court's discussion of arbi-

57. *Cabinetree of Wis., Inc.*, 50 F.3d at 390.
58. 66 F.3d 438 (2d Cir. 1995).
59. *See id.* at 453-57.
60. *See id.* at 455-56.
61. *Id.*; Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2000).
62. 9 U.S.C. § 2.
63. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).
64. 9 U.S.C. § 3 (emphasis added).
65. *Id.* at § 4.
66. *See* Aidikoff, *supra* note 27, at 536-53; *see also* Smith, *supra* note 32.
67. *Distajo*, 66 F.3d at 456.
68. *Id.* at 456-57.
69. *Distajo*, 66 F.3d at 456 (citing Prudential Lines, Inc. v. Exxon Corp., 704 F.2d 59, 67 (2d Cir. 1983)).
70. *Id.* at 457. For further review of various forms of the waiver defense rule in the federal circuits, *see* Matthew Forsythe, *The Treatment Arbitration Waivers Under Federal Law*, DISP. RESOL. J. MAY 2000, at 8.

trability in *Howsam v. Dean Witter Reynolds, Inc.*[71] and *Green Tree Financial Corp. v. Bazzle*.[72] *Howsam* held that the question of a six-year time limitation for arbitration that was contained in the arbitration agreement was a question for an arbitrator.[73] In its opinion, the Supreme Court first reiterated that arbitration is a matter of contract, and courts should therefore generally leave any questions relating to arbitration to arbitrators.[74] The narrow exception to this rule is "questions of arbitrability," which are those issues that parties would likely expect a court to have decided the condition precedent.[75] The presumption, then, is that arbitrators should decide "procedural" questions like allegations of waiver, delay, or a like defense to arbitrability, and courts should decide "substantive" issues such as fraud, in the creation of the arbitration clause.[76] The Supreme Court relied on the comments to the Revised Uniform Arbitration Act (RUAA) which state that prerequisites such as time limitations are for arbitrators to decide.[77]

The question in *Green Tree* was whether the arbitration agreement at issue contemplated class-wide arbitration.[78] The underlying issue, then, was which adjudicator should make that determination.[79] The Supreme Court, noting the narrow interpretation of "arbitrability" in *Howsam*, held that the question was for the arbitrator.[80] In determining which forum the parties likely expected to hear the class-arbitration question, the Court examined the relative expertise of courts versus arbitrators.[81] The kind of proceeding the parties agreed to, the Court found, concerned neither the validity of the arbitration clause, nor the clause's applicability to a particular dispute, nor did it implicate *judicial* procedures.[82] Instead, because arbitrators are well-equipped to deal with contract interpretation and *arbitration* procedures, the Court reasoned, the issue of class arbitration should go to the arbitrator.[83]

### *C. The Subsequent Split of Authority*

In the wake of *Howsam* and *Green Tree*, several courts have reversed their positions with respect to waiver by litigation conduct, and have given all questions of waiver to arbitrators.[84] Other federal courts, though, either have not directly addressed these two cases, continuing to apply their traditional waiver rules, or have distinguished them, again maintaining the status quo.[85] In *Nat'l Am. Ins. Co.*

71. 537 U.S. 79 (2002).
72. 539 U.S. 444 (2003).
73. *Howsam*, 537 U.S. at 85.
74. *Id.* at 83.
75. *Id.* at 84. The Court notes that the "question of arbitrability," also called "substantive arbitrability," has been applied to situations such as whether the parties have a valid arbitration agreement at all, or whether the agreement encompasses a certain kind of claim. *Id.*
76. *Id.* at 84-85.
77. *Id.*
78. *Green Tree*, 539 U.S. at 447.
79. *Id.*
80. *Id.* at 453.
81. *Id.* at 452-53.
82. *Id.* at 452.
83. *Id.* at 453.
84. *See* BRUNER & O'CONNOR, *supra* note 31.
85. *Id.* As discussed in subsection A, above, the status quo is slightly different in each Circuit.

*v. Transamerica Occidental Life Ins. Co.*,[86] the petitioner argued before the Eighth Circuit that, because respondent chose to litigate in state court other disputes involving the same contracts, respondent thereby waived its right to arbitrate the instant dispute.[87] The Eighth Circuit summarily dismissed this argument with little discussion, but cited *Howsam* for the proposition that "the presumption is that the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability."[88] In *Belleview Drug Co. v. Advance PCS*,[89] the Eastern District of Pennsylvania similarly found that, in light of *Howsam*, waiver is presumptively for an arbitrator to decide, even in cases where, as in *Marie*, waiver is implicated by litigation activity such as a contentious motion to dismiss.[90] Neither court examined the policy reasons behind *Howsam*, nor did they address the likely expectations of the parties as the *Howsam* court did.[91]

The Fifth Circuit, on the other hand, came to the opposite conclusion in *Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am.*[92] The court first stated its version of the rule from *Howsam* that courts, rather than arbitrators, should decide questions of arbitrability "where contracting parties would likely have expected a court to have decided the gateway matter."[93] Given that courts are in the better position to decide whether litigation conduct constitutes a waiver, the court reasoned, parties would expect a court to make such a determination.[94] Consistent with the Fifth Circuit rule prior to *Howsam*, the court found that where the only evidence of waiver was delay in compelling arbitration and participation in limited discovery, arbitration should be compelled.[95]

These three cases represent a potential split in authority between those circuits that send all questions of waiver to arbitrators, and those that will reach the merits of such a defense. While the full impact of these cases on waiver is yet unknown, the First Circuit recently made a good case for judicial adjudication.

## IV. INSTANT DECISION

In *Marie v. Allied Home Mortgage Co.*,[96] the First Circuit Court of Appeals examined the role of courts in two areas. Briefly analyzing a contractual time limitation on when a party could seek arbitration, the court first held that the district court erred in interpreting the complained-of contract provision.[97] The court

86. 328 F.3d 462 (8th Cir. 2003).
87. *Id.* at 466.
88. *Id.* (citing *Howsam*, 537 U.S. 79) (internal citations and quotations omitted).
89. 333 F. Supp.2d 318 (E.D. Pa. 2004).
90. *Id.* at 324-25 (citing *Howsam*, 537 U.S. at 84). Interestingly enough, after the court found that waiver is presumptively for an arbitrator to decide, the district court noted that Third Circuit opinions since *Howsam* continued to address the merits of a waiver defense. *Id.* (citing Palcko v. Airborne Express, Inc., 372 F.3d 588, 596-97 (3d Cir. 2004)). The district court then resolved the instant waiver issue on the merits, finding no waiver. *Id.*
91. *See Nat'l Am. Ins. Co.*, 328 F.3d at 466; *Belleview Drug Co.*, 333 F. Supp.2d at 324-25.
92. 97 Fed. Appx. 462, 464 (5th Cir. 2003) (citing *Howsam*, 537 U.S. at 83).
93. *Id.* (quoting *Howsam*, 537 U.S. at 83).
94. *Id.*
95. *Id.* at 463-64 (citing Price v. Drexel Burnham Lambert, Inc., 791 F.2d 1156, 1158 (5th Cir. 1986)).
96. 402 F.3d 1 (1st Cir. 2005).
97. *Id.* at 11.

reasoned it was likely that an arbitrator would be expected to have the expertise required to determine the meaning of such contract terms, especially given the "background norms in this employment area."[98] Deciding this type of procedural provision, the *Marie* court wrote, "would entangle the court in issues that may go properly to the merits of the dispute," thereby depriving the parties of their bargain to arbitrate.[99] A time limitation, be it contractual as in the instant case, or arbitrator-imposed as in *Howsam*,[100] is precisely the type of procedural prerequisite that is presumed to be decided by the arbitrator.[101]

More significantly, the court next examined the role of courts in adjudicating allegations of waiver of a known right to arbitration in defense of a motion to stay the instant proceedings and compel arbitration.[102] Noting that the First Circuit had long been deciding claims of waiver by conduct in litigation,[103] the court began its analysis of waiver with the FAA.[104] Under the language of section 3 of the FAA, a stay of proceedings requires the court to address the waiver issue.[105] Admitting that section 4 contains no such language, the court nonetheless found no reason to interpret the sections differently, relying on the analysis of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*,[106] where the Supreme Court found that Congress intended the narrow analysis of section 4 be applied to section 3, and *Doctor's Assocs., Inc. v. Distajo*,[107] where the Second Circuit postulated that waiver developed as an equitable defense to a motion under section 4.[108] Implicitly, the court reasoned that the "not in default" determination of section 3 is contemplated by section 4.[109]

The First Circuit then articulated three policy reasons why *Howsam* and *Green Tree* do not upset the traditional rule that courts decide waiver by conduct in litigation. First, the *Marie* court posits, a court has inherent power to control its docket and to prevent abuse in its proceedings (i.e. forum shopping).[110] Where litigation activity has occurred before a particular federal court, that court is the most appropriate forum in which to decide the waiver issue.[111]

Second, the *Marie* court found, courts have comparatively more expertise in recognizing such abuses, and in controlling for them.[112] A party's conduct in

98. *Id.*
99. *Id.* (citing John Wiley & Sons, Inc., v. Livingston, 376 U.S. 543, 557 (1967)).
100. *Howsam*, 537 U.S. at 84-85.
101. *Marie*, 402 F.3d at 11 (citing *Howsam*, 537 U.S. at 84-85).
102. *Id.* at 11-12.
103. *Id.*
104. *Id.* at 12-13; 9 U.S.C. §§ 1-16.
105. *Marie*, 402 F.3d at 12-13 (citing 9 U.S.C. § 3).
106. 388 U.S. 395 (1967).
107. 66 F.3d 438 (2d Cir. 1995).
108. *Marie*, 402 F.3d at 13 (citing *Prima Paint*, 388 U.S. at 403-04; *Distajo*, 66 F.3d at 456-57). The *Marie* court argued that the "default" inquiry of § 3 should be read into § 4, thus enlarging the realm of possible inquiries into which a court may delve. *Id. Prima Paint*, however, did the reverse—the Court read the narrow terms of § 4 into § 3, *reducing* the power of federal courts. *Prima Paint*, 388 U.S. at 403-04.
109. *Marie*, 402 F.3d at 13 (citing 9 U.S.C. §§ 3, 4). The court's discussion in this respect is largely *dictum*, as Allied did not move the court to compel arbitration under § 4, but to stay Marie's lawsuit under § 3, which does contain the "default" inquiry.
110. *Id.*
111. *See id.*
112. *Id.* (citing *Howsam*, 537 U.S. at 85; *Green Tree*, 539 U.S. at 452-53).

litigation "heavily implicates 'judicial proceedings'" rather than arbitral proceedings, a factor stressed in *Green Tree*, and is not likely to engage the court in the merits of the dispute.[113] Presumably, the implication of these first two arguments is that, as a matter of contract interpretation, parties are more likely to expect a court, rather than an arbitrator, to decide waiver by conduct in litigation.[114]

Third, the court reasoned that, to the extent *Howsam* and *Green Tree* seek to avoid delay and promote speedy resolution of disputes, efficiency concerns demand that a court determine waiver by conduct in litigation.[115] Normally, the court said, "gateway issues" like limitations periods will bar both arbitration and litigation of a dispute.[116] But where the issue is waiver due to litigation activity, by its nature the possibility of litigation remains, and referring the question to an arbitrator would be an additional, unnecessary step.[117] The *Marie* court thus held that *Howsam* and *Green Tree* left undisturbed the presumption that waiver by conduct in litigation lies properly before a court, contrary to the holdings in other circuits.[118] [119]

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113. *Id.* (citing *Green Tree*, 539 U.S. at 452-53).

114. *See id.*; *see also Howsam*, 537 U.S. at 83; *Green Tree*, 539 U.S. at 452.

115. *Marie*, 402 F.3d at 13-14.

116. *Id.* at 14. Litigation would be barred by the contractual obligation to arbitrate, and full arbitration would be barred by whatever procedural condition precedent the arbitrator found was not fulfilled (like the contractual time limitation in this case). In other words, if an arbitrator decided in favor of a laches-type defense, further arbitration would be barred, as well as any litigation of the same issue under the principles of *res judicata*.

117. *Marie*, 402 F.3d at 13-14.

118. *Id.* at 14. Allied argued that this presumption was overcome by the following contract language: "Employer and employee agree to submit to final and binding arbitration any and all disputes, claims ... and disagreements concerning the interpretation or application of this Agreement ... including the arbitrability of any such controversy or claim ...." *Id.* at 14-15. Given that "'clear and unmistakable evidence'" is required to overcome the presumption, the appellate court found that this very general language did not shift the question of waiver to the arbitrator. *Id.* at 15.

119. On the merits, the court determined that Allied had not, in fact, waived its contractual right to arbitrate by participating in the EEOC investigation or by failing to initiate arbitration during the pendency of those proceedings, relying heavily on EEOC v. Waffle House, Inc., 534 U.S. 279 (2002). *Marie*, 402 F.3d at 15-17.

In *Waffle House*, the Supreme Court reconciled the FAA with the authority granted to the EEOC in Title VII. *See Waffle House*, 534 U.S. at 279-80. In that case, the EEOC brought a public enforcement action against Waffle House for alleged violations of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 - 12181 (1994), on behalf of a former Waffle House employee seeking both injunctive and make-whole relief. *Id.* After extensively dealing with the legislative histories of both the FAA and the EEOC's authority, the Court found that under the clear terms of Title VII, an employee has no independent cause of action once the EEOC decides to file on its own. *Id.* at 285-89, 291. A public enforcement action is not merely a derivative suit of the employee's, and so the employee cannot bind the EEOC by signing an arbitration action. *Id.* at 297-98.

The *Marie* court extended this analysis and found that an employer would be unable to stop either EEOC investigations or proceedings by invoking an arbitration agreement because the EEOC is not a party to an agreement to arbitrate between employer and employee. *Marie*, 402 F.3d at 15-16 (citing *Waffle House*, 534 U.S. at 297-98). It would be a waste of resources, the court concluded, for courts to require an employer to preemptively begin a duplicative arbitration proceeding when the results of EEOC involvement may well end the dispute. *Id.* at 16. For example, the EEOC investigation may lead the complaining party to realize the lack of merit in his or her claim and to abandon it. *Id.* In *Marie,* because no waiver was found, and because the issue of contractual time limitation must have been reserved for the arbitrator, the court remanded the case to the district court for an order compelling arbitration. *Id.* at 17.

*Marie* begins to answer a question largely ignored prior to, and in many cases even after, the decisions of *Howsam* and *Green Tree*. In articulating three policy reasons why courts are better suited to decide waiver,[120] the court makes a strong case for judicial adjudication of waiver by conduct in litigation in a manner that satisfies the concerns of the Supreme Court.

## V. COMMENT

To some, extensive treatment of whether courts or arbitrators hear issues of waiver may seem superfluous. After all, as the *Marie* court notes, federal courts have long been the arbiters of waiver resulting from litigation conduct.[121] Accordingly, several circuits have continued to apply the traditional rule without even mentioning *Green Tree* or *Howsam*.[122] What *Marie* stands for, then, is a rebuttal to those courts, like the Eighth Circuit and Eastern District of Pennsylvania identified by *Marie*, who may rely too heavily on Supreme Court dicta where waiver is only mentioned in passing.[123]

In the vast majority of cases decided subsequent to *Green Tree*, courts that left waiver questions for arbitrators rested their holdings on facts in which the party seeking arbitration had not invoked the "litigation machinery," but had only delayed in compelling arbitration.[124] The holdings in these cases would be unchanged by the analysis of *Marie*. Failure to seek arbitration within a contractual time limitation, for instance, is a question presumed to be for the arbitrator, just as the *Marie* court found.[125] Even in cases where a party asserts waiver by delay, absent an agreed-upon time limitation, courts applying the traditional rule upheld by *Marie* would still reject the defense, and proceed in compelling arbitration.[126] In arbitration, the complaining party would be free to again assert waiver by delay before the arbitrator.[127]

Only in two cases, *Nat'l Am. Ins. Co.*[128] and *Belleview Drug Co.*,[129] did a court find that, despite litigation conduct, the issue of waiver was still for an arbi-

120. The policy concerns in *Marie* can be reduced to three: the inherent powers of courts, relative expertise, and efficiency. *See Marie*, 402 F.3d at 11-14.

121. *See id.* at 11-12; *see also* Matthew Forsythe, *The Treatment Arbitration Waivers Under Federal Law*, DISP. RESOL. J., May 2000, at 8, 18.

122. *See, e.g.*, Alejandro v. L.S. Holding Co., 130 Fed. Appx. 544 (3d Cir. 2005); Batory v. Sears, Roebuck & Co. 124 Fed. Appx. 530 (9th Cir. 2005); Glazer v. Lehman Bros., Inc., 394 F.3d 444 (6th Cir. 2005). In fact, some circuits consider the issue too obvious to publish as precedent, as evidenced by their cases being published in the Federal Appendix, as opposed to the Federal Reporter.

123. *See* ADRWorld.com, *First Circuit Deepens Split Over Arbitration Waivers*, March 21, 2005, http://www.adrworld.com/sp.asp?id=38148 [hereinafter, ADRWorld.com].

124. *See* Smith v. Dean Witter Reynolds, Inc., 2004 WL 1859623 (6th Cir. 2004); Pro Tech Indus., Inc. v. URS Corp., 377 F.3d 868 (8th Cir. 2004); Mulvaney Mechanical, Inc. v. Sheet Metal Workers Int'l Ass'n, 351 F.3d 43 (2d Cir. 2003).

125. *Marie*, 402 F.3d at 11.

126. *See* Restoration Preservation Masonry, Inc. v. Grove Europe Ltd., 325 F.3d 54, 61 (1st Cir. 2003) (requiring prejudice beyond mere delay); Gulf Guaranty Life Ins. Co. v. Conn. General Life Ins. Co., 304 F.3d 476, 484 (5th Cir. 2002) (requiring inconsistent acts beyond mere delay).

127. Assuming that the arbitrator does not employ a collateral estoppel-type principle, nothing this author is aware of bars a party from asserting the same argument in arbitration that it argued in front of a judge before being compelled to arbitration.

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

129. Belleview Drug Co. v. Advance PCS, 333 F. Supp. 2d 318 (E.D.Pa 2004).

trator. The courts in those cases examined *Howsam* no further than to include in their holdings the oft-quoted line that "the presumption is that the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability."[130] The issue in *Howsam* was a contractual time limitation and had little to do with the party's use of a judicial forum.[131] Thus, mere inclusion of waiver in the Supreme Court's exemplar list of issues presumed to be for an arbitrator was not necessary to the holding in *Howsam*, and should not be determinative.

Instead of relying on dicta as the *Nat'l Am. Ins. Co.* and *Belleview* courts seem to have done, the *Marie* court addressed the policy reasons behind the Supreme Court's decisions, and applied those policies to a substantially different form of waiver than was taken up in *Howsam*. That is, the *Marie* court looked at litigation conduct as opposed to mere delay. As a matter of contract interpretation, and in light of the likely intent of the parties, the court says, courts should decide whether a party has waived its right to arbitration.[132] The sound reasoning of *Marie* will likely serve as an analytical roadmap for other circuits presented with similar issues of waiver, and will help resolve the differences in approach caused by cases like *Nat'l Am. Ins. Co.* and *Belleview*.[133]

Rather than making a distinction between two types of waiver and using the same term for both, perhaps the "split" in authority could better be resolved by abandoning the "waiver" terminology altogether. Instead, one could apply the existing principles of two separate equitable defenses closely related to their "waiver" counterparts, yet dissimilar enough from each other that courts would avoid the temptation to send both defenses to arbitration. The distinction between types of waiver defenses recognized in *Marie* is already encompassed in two existing equitable defenses: laches and judicial estoppel.

Where one party defends a motion to compel arbitration either on the grounds that the contractual time limitation in which to bring the claim has lapsed, or on the grounds of simple delay absent such an agreement, the appropriate defense would be laches.[134] Consistent with the decisions of the Supreme Court, this defense is for an arbitrator.[135] It heavily implicates issues of procedural arbitrability, and is most like the case in *Howsam*. Furthermore, the parties are likely to expect a laches variety defense to be made in front of an arbitrator, given the relative expertise an arbitrator would have in controlling her own processes.

A party would argue judicial estoppel, on the other hand, where a court has relied on an apparent choice of the moving party to proceed not with arbitration, but with litigation. Judicial estoppel is designed to protect the integrity of the judicial process, and "generally prevents a party from prevailing in one phase of a case on an argument, and then relying on a contradictory argument to prevail on another phase."[136] Courts applying the principle of judicial estoppel usually re-

130. *Nat'l Am. Ins. Co.*, 328 F.3d at 466 (citing *Howsam*, 537 U.S. at 84); *Belleview Drug Co.*, 333 F. Supp. 2d at 324 (citing *Howsam*, 537 U.S. at 84).

131. *Howsam*, 537 U.S. at 79.

132. *See Marie*, 402 F.3d at 12-15.

133. *See* ADRWorld.com, *supra* note 123.

134. Laches is an equitable defense that one's party opponent has unreasonably delayed in pursuing a right or claim; this is also referred to as "sleeping on one's rights." BLACK'S LAW DICTIONARY 891 (8th ed. 2004). The focus of a laches defense is the passage of time, rather than inconsistent conduct.

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

136. New Hampshire v. Maine, 532 U.S. 742, 749 (2001) (internal citations and quotations omitted).

quire the existence of a number of factors: whether a party's later position is clearly inconsistent from the first; whether the prior position was successful, risking the perception that the court was at some time "misled;" and whether the party asserting the inconsistent position will derive an unfair advantage or impose an unfair detriment to the opposing party if not estopped.[137]

Waiver in the form of judicial estoppel would be limited to the holding in *Marie*; a court would only determine waiver of the judicial estoppel variety where the complained-of conduct (or argument) occurred in litigation. By its terms, judicial estoppel is limited to litigation conduct, as it is the court that must appear to have been misled. By proceeding first with litigation and then asking a court to compel arbitration, the prior position is clearly inconsistent. The "success" inquiry for judicial estoppel is the same as the inconsistent act requirement of the traditional waiver rule. The extent to which a party invokes the "litigation machinery" is the extent to which the prior position, litigation, is successful. The "unfair advantage" inquiry bears striking resemblance to the prejudice requirement of the traditional waiver rule, and correlates with both forms of prejudice that courts may find in waiver situations: forum-shopping with unfair advantage, and undue expense with unfair detriment to the opposing party. The court would then be "judicially estopped" from enforcing the arbitration provision.[138]

By utilizing a different body of equitable remedies, courts would be less apt to confuse the general language in *Howsam* with the specific application of a substantially different concept than was dealt with in that case.[139] Hopefully, the sound reasoning in *Marie* will be a strong influence for resolving the differences among the federal circuits. But where a federal court refuses to hear waiver allegations that it believes are presumptively for an arbitrator, a party should argue judicial estoppel instead. A court would have a hard time sending the parties to an arbitrator for judicial estoppel.

## VI. CONCLUSION

The Supreme Court twice emphasized the narrowness of the realm of possible inquiries into which the federal courts may engage before sending a case to arbitration. Although it was once quite common for courts to hear defenses of waiver when a party sought to compel arbitration, several courts reversed their positions and deemed all questions of waiver appropriate only for an arbitrator. The First Circuit in *Marie v. Allied Home Mortgage Corp.* provided an analytical framework that came to the opposite conclusion, but more closely followed the concerns of the Supreme Court: expectations of the parties, and relative expertise of courts versus arbitrators. Given the depth of the First Circuit's reasoning, it is likely that *Marie* will be the rule that future circuits presented with the issue will

137. *Id.* at 750.

138. Not so coincidentally, judicial estoppel in this context comports with the FAA as well. To the extent that judicial estoppel may be used to refuse enforcement of any contract term, § 2 of the FAA renders arbitration provisions enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2000).

139. *Howsam* dealt with a contractual time limitation and included waiver in its list of issues presumptively for an arbitrator. *See Howsam*, 537 U.S. 79. As the *Marie* court showed, litigation conduct is entirely different from arbitration conduct. *See Marie*, 402 F.3d at 1.

follow. This author suggests, though, that an alternative framework exists in laches and judicial estoppel. Arguing these defenses, instead, avoids the potentially confusing distinction that must currently be made between two types of waiver, and conforms to more palatable equitable principles.

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