Waiving Goodbye to Arbitration: Factoring Prejudice When a Party Delays Assertion of Its Contractual Right to Arbitrate: Elliot v. KB Home N.C., Inc.

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Waiving Goodbye to Arbitration: Factoring Prejudice When a Party Delays Assertion of its Contractual Right to Arbitrate

_Elliott v. KB Home N.C., Inc._¹

I. INTRODUCTION

Annually millions of homeowners invest in HardiPlank, a cement fiber lap siding made to look like wood or masonry, to protect the exterior of their newly purchased homes from severe weather conditions.² In North Carolina however, hundreds of new homeowners were left without an important installation component of HardiPlank—weatherproof material.³ Joining together, three plaintiffs and other similarly situated individuals filed a class action lawsuit against KB Home, the installers of HardiPlank, in 2008.⁴ Over the next three years, the plaintiffs spent approximately $100,000 to participate in four pretrial hearings, to take or defend twenty depositions all over the country, and to engage in comprehensive discovery in preparation for their day in court.⁵ On April 12, 2012, three and a half years after plaintiffs first filed the case, KB Home filed a motion to compel arbitration, asserting that the mandatory arbitration clauses in its New Home Purchase and Warranty Agreements’ required arbitration of the Plaintiffs’ claims.⁶ After years of preparation for the class action, Plaintiffs were unable to continue their lawsuit seeking compensation for the negligent installation of HardiPlank.⁷

This note addresses the lawsuit described above, _Elliott v. KB Home N.C., Inc._, concerning whether KB Home waived its contractual right to arbitration by waiting three years to assert that right, which ultimately prejudiced a class of plaintiffs pursuing litigation against it.⁸ After examining how North Carolina courts decide whether to compel arbitration, this note will analyze the four-factor test North Carolina courts use to determine whether a party has sat on its right to arbitrate for too long, subjecting itself to waiver of arbitration. Finally, this note contends that North Carolina’s four-factor test, as opposed to a bright-line rule, is the superior method for protecting against prejudice and for upholding the policy favoring arbitration.

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2. See _infra_ note 10 and accompanying text.
4. _Id._
5. _Id._ at *7.
6. _Id._ at *1.
7. _Id._
II. FACTS AND HOLDING

On December 5, 2008, Mark Elliott, Tor and Michelle Gabrielson, and Michihiro and Yoko Kashima (hereinafter “Plaintiffs”) filed a putative class action against KB Home Raleigh-Durham, Inc. (“KB Home”) and KB Home North Carolina, Inc. (“KB Home NC”) on their behalf and on the behalf of other similarly situated plaintiffs.9 Plaintiffs filed the class action for claims arising out of the negligent installation of cement fiber lap siding,10 which KB Home had agreed to install under its New Home Purchase Agreement (“Purchase Agreement”) and its New Home Limited Warranty Agreement (“Warranty Agreement”).11 Plaintiffs alleged that the siding, known as “HardiPlank,”12 KB Home installed did not contain necessary weather-proof materials underneath its surface.13 Plaintiffs further alleged that KB Home’s failure to install the weather-proof materials violated local building codes as well as the manufacturer’s guidelines and standards.14 KB Home and KB Home NC responded by filing a motion to dismiss the complaint, which the court granted only for KB Home NC, on July 17, 2009.15

In January of 2010, KB Home filed a third-party complaint against Third-Party Defendant, Stock Building Supply, LLC (“Stock”) for indemnity, breach of contract, and negligence in relation to the Plaintiffs’ suit.16 The third-party complaint filed against Stock elevated the case under North Carolina law to an exceptional and complex business case.17 Plaintiffs then moved for class certification in March of 2011.18 In opposition to the Plaintiffs motion for class certification and nearly three years after the Plaintiffs had filed the case, on May 9, 2011 KB Home asserted its contractual right to arbitration under the Purchase and Warranty agreements in a brief to the court.19 Despite KB Home’s invocation of the arbitra-

10. Id. at *1. Specifically, the plaintiff class alleged breach of contract, breach of express warranties, breach of implied warranties, negligence, negligence per se, unfair and deceptive trade practices, and negligent misrepresentation. Id.
11. Cement fiber lap siding is a popular siding used on the exterior of 15% of new homes. The siding is able to withstand severe weather and its aesthetically pleasing because of its look of wood or masonry. See Sal Vaglica, All About Fiber-Cement Siding, THIS OLD HOUSE.COM, http://www.thisoldhouse.com/toh/photos/0,20569027,00.html.
12. The decision lists the siding as “HardiPlank” but the product website lists the siding as “Hardieplank.” Hardieplank is a cement fiber lab siding that is used on 5.5 million homes. See Fiber Cement Lap Siding, James Hardie (2013), http://www.jameshardie.com/homeowner/products_siding_hardieplank/lapSiding.py.
16. Id.
17. Id. The third-party complaint filed by KB Home elevated the case under North Carolina law to “an exceptional and complex business case” under Rules 2.1 and 2.2 of the General Rules of Practice for the Superior and District Courts. Id. Other issues in this case pertaining to Stock are not addressed in this note.
19. KB Home opposed the class certification on the grounds that class issues did not predominate over individual issues, the named plaintiffs did not represent the class, and that arbitration was a super-
tion provision, in February of 2012 the court certified the class, which included all North Carolina homeowners who had contracted with KB Home to install a weather-resistance barrier underneath the HardiPlank siding. KB Home filed an interlocutory appeal of the class certification order, a motion to stay pending arbitration, and a motion to stay against the unnamed plaintiffs in the event that the court decertified the class. KB Home filed its motion to stay pending arbitration based on its belief that Plaintiffs' claims were subject to arbitration under the Purchase and Warranty agreements entered into between the parties.

On August 28, 2012, the North Carolina Court of Appeals took up KB Home’s interlocutory appeal of the class certification order, while the Superior Court of North Carolina continued the case as filed by the Plaintiffs. The court of appeals dismissed KB Home’s appeal and remanded the case for trial, leaving the North Carolina Superior Court to rule on KB Home’s motion to stay pending arbitration. The ruling on the motion to stay depended upon whether the court found a valid arbitration clause to exist in the Purchase or Warranty agreements.

KB Home argued that Plaintiffs’ claims should be resolved by arbitration, as expressly stated in the Purchase and Warranty agreements between KB Home and Plaintiffs, and that trial should be delayed until the parties first arbitrated the disputes. KB Home also stated that it had properly asserted its right to arbitration.

rator method to resolving the disputes. KB Home Raleigh-Durham Inc.'s Brief in Opposition to Plaintiffs' Motion for Class Certification, Elliott v. KB Home, Inc. No. 08 CVS 21190, 2012 WL 5385181 (N.C. Super. May 9, 2011), 2012 WL 7464649.


21. Id. KB Home appealed the class certification order to the North Carolina Court of Appeals and filed a motion to stay pending appeal. Id. The Court of Appeals denied the motion to stay pending appeal. Id.

22. Id.

23. Elliott, 2012 WL 5385181, at *1. In order to protect the unnamed class members’ legal rights if the appellate court decertified the class, a portion of the unnamed class, comprised of sixty-nine members, filed a Motion to Intervene. Id.; see supra note 14. The intervention, if granted, would have allowed the unnamed plaintiffs to have their claims heard individually and in the alternative to the class action, but within the statute of repose. Id. Because the North Carolina Court of Appeals later dismissed KB Home’s appeal of the class certification, the unnamed class members filed a motion to voluntarily dismiss the motion to intervene without prejudice. Id. The court granted the motion. Id. at *10.


25. Id.

26. The North Carolina Superior Court is a trial court. This particular action was filed in Wake County, North Carolina. Wake County is one county in North Carolina that further subdivides its trial courts into particular areas of the law. This action is in the Business Court. For more information, see Courts in Wake County, THE NORTH CAROLINA COURT SYSTEM, http://www.nccourts.org/County/Wake/Courts/Default.asp.

27. Two motions to stay were filed by KB Home for 1) the named plaintiffs and 2) the unnamed plaintiffs of the class action filed against KB Home. Elliott, 2012 WL 5385181, at *1. The second motion to stay was only filed in the event the court decertified the class. The first motion to stay also applied to the third-party defendant, Stock. Stock argued against KB Home’s motion to stay based on its belief that no valid contract existed between the parties, and therefore no valid arbitration agreement existed. Stock contended that there was no valid arbitration agreement because the subsequent indemnity agreement KB Home entered into with Stock did not contain a mandatory arbitration clause. The court adopted Stock’s argument and held that no mandatory arbitration agreement existed between Stock and KB Home. Id. at *8-10.

28. Id. at *2.

29. Id. KB Home also argued in its Memorandum of Law in Support Thereof of the Motion to Stay that the plaintiffs must proceed to arbitration with KB Home because 1) the arbitration agreement falls
Plaintiffs counter-argued that a valid arbitration agreement did not exist, and in the alternative, that KB Home had waived its right to proceed to arbitration. Specifically, Plaintiffs claimed that if a controlling arbitration agreement existed, the Warranty Agreement’s arbitration clause governed the proceedings because Plaintiffs’ claims related to repairs needed after purchase of KB Home’s installation services, thus falling under the Warranty Agreement and not the Purchase Agreement. Plaintiffs further asserted that even if the Warranty Agreement’s arbitration clause applied, KB Home had waived its right to arbitration by waiting three years to assert the right, by engaging in discovery not available in arbitration, by stipulating to the court’s jurisdiction over the matter, and by failing to assert arbitration in the Joint Case Management Report filed with the court in September of 2010. KB Home responded to the Plaintiffs’ waiver argument by stating that the company could not compel arbitration until the court had certified the class.

The Superior Court of North Carolina, Business Court Division held that even though a valid arbitration agreement existed in both of the Purchase and Warranty agreements the parties entered into, KB Home “sat on its right to arbitrate for too long” and therefore waived its arbitration rights under the contracts permanently. The court further held that the arbitration rights were waived because Plaintiffs had become prejudiced by preparing for and expecting litigation of the claims.

III. LEGAL BACKGROUND

Courts have long held that arbitration agreements are enforceable, given that the parties have already agreed to arbitrate disputes or claims arising out of such an agreement. Congress enacted the FAA to put arbitration agreements on equal footing with other types of contracts and to ensure that these agreements would be

under the Federal Arbitration Act and therefore the claims are arbitrable and 2) parties entered into an arbitration agreement that incorporated the standard “dispute resolution procedures of the American Arbitration Association,” thereby agreeing to let the arbitrator determine whether the claims are subject to arbitration under the agreement. Defendant KB Home Raleigh-Durham Inc.’s Reply Brief in Support of its Motion to Stay and Compel Arbitration as to Proposed Plaintiffs-in-Intervention, Elliott v. KB Home, Inc. No. 08 CVS 21190, 2012 WL 4766944 (Sept. 25, 2012).

31. Id. at *3.
32. Id. at *3 n.7.
35. The Superior Court of North Carolina, Business Court Division is a trial court. See THE NORTH CAROLINA COURT SYSTEM, supra note 26.
37. Id.
upheld against the widely held judicial hostility toward arbitration at the time.\textsuperscript{39} The courts’ reluctance to apply the FAA to state cases, and certain types of claims, ended in the 1980s when the U.S. Supreme Court handed down a series of cases giving force to the FAA.\textsuperscript{40} Following the strong national policy in favor of upholding arbitration agreements, North Carolina enacted the Revised Uniform Arbitration Act (“NCURAAA”), which is similar to the FAA.\textsuperscript{41}

North Carolina courts maintain a policy in favor of using arbitration to settle disputes, including disputes as to whether a claim is actually subject to arbitration, by resolving these issues in favor of arbitration.\textsuperscript{42} In North Carolina,\textsuperscript{43} courts apply a two-part test to determine whether a party will be compelled to arbitrate.\textsuperscript{44} The two parts are: 1) whether a valid arbitration agreement exists and, if so, 2) whether the particular dispute is within the agreement’s substantive scope.\textsuperscript{45} This section will address this test, including the burden of proof necessary to establish a dispute’s arbitrability.\textsuperscript{46} This section will also address the waiver defense, which parties opposing arbitration may raise in response to an opponent’s motion to compel arbitration. Finally, this section will discuss the four-factor test that North Carolina courts use to determine whether a party has been prejudiced by an opponent’s untimely motion to compel arbitration, an a finding that weighs in favor of waiver.

\textit{A. Existence of a Valid Arbitration Agreement}

Whether a dispute is subject to arbitration has typically been an issue of law for the courts to decide.\textsuperscript{47} In order for a court to compel arbitration of a claim or dispute, the claim or dispute must satisfy a two-part test.\textsuperscript{48} This test, discussed by

\textsuperscript{39} AT&T Mobility, 131 S. Ct. at 1745; Southland Corp., 465 U.S. at 10.

\textsuperscript{40} See supra note 38 and accompanying text.

\textsuperscript{41} N.C. GEN. STAT. § 1-569.1 et seq. (2004).


\textsuperscript{43} The NCURAAA is nearly identical to the FAA, and North Carolina courts have adopted similar interpretations. See Sloan Fin. Grp., Inc. v. Beckett, 583 S.E.2d 325, 330 (N.C. Ct. App. 2003) (noting that “North Carolina’s stance on arbitration is very close, if not identical, to the federal stance.”)

\textsuperscript{44} Ragan v. Wheat First Sec., Inc., 531 S.E.2d 874, 876 (N.C. Ct. App. 2000).

\textsuperscript{45} In re W.W. Jarvis & Sons, 671 S.E.2d 534, 536 (N.C. Ct. App. 2009). See also Ragan, 531 S.E.2d at 876 (noting that a trial court’s determination to compel arbitration requires considering 1) “whether a valid arbitration agreement exists and,” if so 2) “whether the particular dispute is within the agreement’s substantive scope.”

\textsuperscript{46} “Arbitrability” is a term of art used to refer to whether a dispute is subject to arbitration. Whether a dispute is arbitrable may depend on national law establishing a court’s jurisdiction over a particular dispute and laws or rules relating to arbitration itself. See Stavros Brekoulakis, \textit{Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori, in ARBITRABILITY: INT’L & COMP. PERSP.} (Loukas A. Mistelis & Stavros L. Brekoulakis, eds., 2009).

\textsuperscript{47} Revels v. Miss Am. Org., 599 S.E.2d 54, 59 (N.C. Ct. App. 2004). This case pertains to a lawsuit filed by a former Miss North Carolina against the national pageant organization. \textit{Id.} This case is not to be confused with the case cited infra note 57, which is a lawsuit filed by the same former Miss North Carolina but against the state pageant organization. On the federal level, the issue of whether a dispute is subject to arbitration is resolved by a court. See First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944-45 (1995).

\textsuperscript{48} In re W.W. Jarvis & Sons, 671 S.E.2d at 802.
the U.S. Supreme Court in *AT&T Techs. v. Communications Workers of America*\(^49\) and adopted in North Carolina by *Ragan v. Wheat First Securities, Inc.*,\(^50\) requires determining (1) whether a valid arbitration agreement exists and, if so, (2) whether the particular dispute is within the agreement’s substantive scope.\(^51\) The burden of proof for each part falls on the party seeking to compel arbitration of the claim or dispute.\(^52\) Under the first part, the party must prove the existence of a valid arbitration agreement.\(^53\) Under the second part, the party must show that the language in the arbitration clause is sufficiently broad in scope to include the claim or dispute the party seeks to arbitrate.\(^54\)

Principles of contract law apply in determining whether one part of the test, the existence of a valid arbitration agreement, is satisfied.\(^55\) In *Revels v. Miss North Carolina Pageant Organization*, the North Carolina Court of Appeals\(^56\) stated the principles of contract law that are used in this analysis throughout the state.\(^57\) In *Revels*, Rebekah Revels\(^58\) entered into an agreement with the state pageant organization after she won the title of Miss North Carolina.\(^59\) The state pageant organization and Miss Revels contractually agreed that she must not “d[o] any act or engage in any activity which could be characterized as dishonest, immoral, immodest, indecent, or in bad taste, during her reign.”\(^60\) The contract also provided that if anything agreed to in the contract turned out to be untrue, the contract would cease to exist and Miss Revels would no longer hold the title of Miss North Carolina.\(^61\) The contract included an arbitration clause for “any controversy or claim arising out of or relating to this contract.”\(^62\)

When nude photographs of Miss Revels were brought to the attention of the state pageant organization, the organization forced Miss Revels to resign as Miss North Carolina.\(^63\) As a result, she alleged breach of contract and sought specific

\(^{49}\) 475 U.S. 643 (1986).

\(^{50}\) *Ragan*, 531 S.E.2d at 876.

\(^{51}\) *In re W.W. Jarvis & Sons*, 671 S.E.2d at 802; see also *Ragan*, 138 531 S.E.2d 874 at 876 (noting that a trial court’s determination to compel arbitration requires considering “1) the validity of the contract to arbitrate and 2) whether the subject matter of the arbitration agreement covers the matter in dispute.”).


\(^{55}\) *In re W.W. Jarvis & Sons*, 671 S.E.2d at 534, 536.


\(^{59}\) *Revels*, 627 S.E.2d at 282.

\(^{60}\) Id.

\(^{61}\) Id.

\(^{62}\) Id. The contract also stated that the arbitration clause would not interfere with the rights of the state pageant organization to obtain injunctive relief on a breach or the threat of a breach of the contract. Id.

\(^{63}\) Id.
performance of the contract promising her the title of Miss North Carolina. 64 Pursuant to the contract, the state pageant organization sought to compel arbitration, which the trial court granted. 65 On appeal, Miss Revels only challenged the first part of the test, namely, whether or a valid arbitration agreement existed. 66 The court found that Miss Revels did in fact have a valid agreement with the state pageant organization, and thus the first part of the test was satisfied. 67 The court noted the requirements for a valid contract under state law, providing that a valid contract is one in which there is mutual assent that shows a “meeting of the minds” for each and every term in the contract, including arbitration clauses. 68 The court also stated that if a party challenges the principle of assent, the court must decipher the “intention of the parties” by examining the instrument the parties agreed to execute. 69 In applying these principles of contract interpretation to the arbitration clause in the Revels case, the court found that since Miss Revels had signed the contract and initialed next to the arbitration clause, Miss Revels had assented to the terms of the agreement. 70

Another contract interpretation principle, applicable in determining whether a valid arbitration agreement exists, is that the “plain and unambiguous language” must be upheld when construing a contract. 71 In Johnston County v. R.N. Rouse & Co., 72 Johnston County entered into a construction contract that included an arbitration agreement 73 and a consent to jurisdiction clause 74 with R.N. Rouse & Co. 75 When R.N. Rouse & Co. disputed the amount that the county owed it for the construction project, R.N. Rouse & Co. filed a request for arbitration with the Ameri--

64. Revels, 627 S.E.2d at 282.
65. Id. The appellate court reviews the trial court’s ruling on the motion to compel arbitration de novo. Id. at 283.
66. Id. at 283. The parties did go to arbitration before Miss Revels appealed. The arbiter dismissed the case after Miss Revels refused to comply with the arbiter’s order to produce the photos for discovery purposes. Id. at 282. Miss Revels attempted to appeal this decision but the court found that the arbiter’s decision to make the photos discoverable was part of the arbiter’s “broad discretion.” Id. at 284.
67. Id. at 283.
68. Id.
69. Id. See also Gould Morris Elec. Co. v. Atl. Fire Ins. Co., 50 S.E.2d 295, 297 (N.C. 1948) (explaining that contracts should be “construed and enforced according to their terms.”).
70. Revels, 627 S.E.2d at 283. The court also contrasted Miss Revels’ case with that of Scioliino v. TD Waterhouse Investor Servs., Inc., 149 N.C. App. 642, 645–46, 562 S.E.2d 64, 66, disc. review denied, 356 N.C. 167, 568 S.E.2d 611 (2002) and Routh v. Snap-On Tools Corp., 423 S.E.2d 791 (N.C. Ct. App. 1992). Revels, 627 S.E.2d at 283. In Scioliino, plaintiffs signed an agreement to be bound by terms of a customer agreement that the plaintiffs never read. Id. The agreement to be bound was not signed or initialed by the plaintiffs. Id. In Miss Revels’ case, she had signed and initialed the contract, manifesting her objective assent to the agreement. Id.
72. Id.
73. The arbitration agreement stated: “[a]l l claims, disputes and other matters in question between the Contractor and the Owner arising out of, or relating to, the Contract Documents or the breach thereof . . . shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise.” Id. at 31.
74. The consent to jurisdiction clause stated: “[b]y executing a contract for the Project the Contractor agrees to submit itself to the jurisdiction of the courts of the State of North Carolina for all matters arising or to arise hereunder, including but not limited to performance of said contract and payment of all licenses and taxes of whatever nature applicable thereto.” Id. at 31-32.
75. Id. at 31.
can Arbitration Association while the county filed a motion to stay the arbitration in the superior court. 76 Though the appellate court held that the consent to jurisdiction clause conflicted with the arbitration clause, the North Carolina Supreme Court reversed the appellate decision. 77 The court reasoned that the consent to jurisdiction clause merely waived any party’s objection to personal jurisdiction in a North Carolina court, while the arbitration clause governed the resolution of claims arising out of the agreement. 78 The court found that the appellate court had incorrectly read the consent to jurisdiction clause as a forum selection clause, 79 and by doing so, had rewritten the contract with a term not previously intended by the parties. 80 In adopting the “plain and unambiguous meaning” of the contract, the North Carolina Supreme Court held that the parties were in fact subject to arbitration. 81

B. Scope of the Arbitration Agreement

Part two of the test used in determining whether to compel arbitration requires examining the arbitration clause and deciding if the claim or dispute at issue is within the scope of the agreement. 82 In making this determination, courts must consider the nature of the dispute and the language used to define the scope of the arbitration agreement. 83

In Sloan Financial Group v. Beckett, the Sloan Financial Group hired Justin Beckett to oversee the group’s investments in Africa. 84 Mr. Beckett developed a separate investment fund for the company but Sloan Financial later discovered that he stole significant amounts of money from that fund. 85 Sloan Financial Group and other subsidiaries sued Mr. Beckett for fraud, breach of fiduciary duty, embezzlement, conversion, and breach of contract. 86 Mr. Beckett sought a motion to compel arbitration for all claims under Sloan Financial Group’s partnership agreement, 87 which mandated arbitration for employees who breached the agree-

76. Id. at 32.
77. Id. at 34.
78. Id. at 35.
79. Forum selection clauses typically choose the law and the forum to hear disputes arising out of the contract. Id. at 33. Consent to jurisdiction clauses list the court that has the jurisdiction or power to hear the case. Id.
80. Id. at 34.
81. Id.
82. See In re W.W. Jarvis & Sons, 671 S.E.2d 534, 536 (N.C. Ct. App. 2009). See also Ragan v. Wheat First Sec., Inc., 531 S.E.2d 874, 876 (N.C. Ct. App. 2000) (noting that a trial court’s determination to compel arbitration requires considering 1) “whether a valid arbitration agreement exists and,” if so 2) “whether the particular dispute is within the agreement’s substantive scope.”).
84. Id. at 326.
85. Id. at 328.
86. Id. In addition to suing Mr. Beckett, the subsidiaries sued Justin Beckett’s wife, three named employees, and unnamed employees. Id.
87. The arbitration agreement stated:
(a) To the fullest extent permitted by law, any dispute, controversy or claim arising out of or relating to this Agreement or to the Company’s affairs or the rights or interests of the Members including, but not limited to, the validity, interpretation, performance, breach or termination of this Agreement, whether arising during the Company term or at or after its termination or during or after the liquidation of the Company, shall be settled by arbitration in
ment. The trial court denied his motion to compel arbitration on all but one claim alleged against Mr. Beckett. The court compelled arbitration of the breach of contract claim, because the scope of the arbitration agreement only included the breach of contract claim.

On appeal, the North Carolina Court of Appeals reviewed the trial court’s decision not to compel arbitration based on part two of the test for determining whether a party is compelled to arbitrate, the scope of the arbitration agreement. The appellate court held that the lawsuit was not subject to arbitration, and that the trial court did not abuse its discretion by denying the Beckett’s motion to compel arbitration, because the contested issues were not within the scope of the arbitration agreement. Specifically, the court noted that the scope of an arbitration is defined by the clear terms of the agreement. The court also stated that determining if an issue falls within an arbitration clause requires examining the relationship between the claim at issue and the content of the arbitration clause; the claim must have a strong connection to the clause’s scope. The court ultimately determined that Mr. Beckett sought to arbitrate all of the claims against him, most of which were not connected to the subsidiary’s narrow arbitration clause, which applied only to issues “arising out of the agreement” and relating to “internal claims” of the operating of the fund. The court concluded that a strong relationship did not exist between the arbitration clause, which applied to internal claims, and the claims against Mr. Beckett, which included more than simple internal disagreements, and therefore, the claims did not fall within the scope of the arbitration agreement.

In determining a dispute’s arbitrability under part two, North Carolina courts resolve doubts in favor of arbitration, provided that the issue could fall within the plain meaning of the arbitration clause’s scope. Courts will not find a claim to be arbitrable if the court must re-write the agreement to encompass the issue. The issue in Raspet v. Buck involved whether an “oral buy-out agreement” entered into

New York City by three neutral arbitrators in accordance with the rules then obtaining of the American Arbitration Association.

Id. 88.Id. at 328, 479.
89. Sloan Fin. Group, Inc., 583 S.E.2d at 329. The arbitration clause in the contract stated: SECTION 10.1. Arbitration; Waiver of Partition/Action for Accounting; (a) To the fullest extent permitted by law, any dispute, controversy or claim arising out of or relating to this Agreement or to the Company’s affairs or the rights or interests of the Members including, but not limited to, the validity, interpretation, performance, breach or termination of this Agreement, whether arising during the Company term or at or after its termination or during or after the liquidation of the Company, shall be settled by arbitration in New York City by three neutral arbitrators in accordance with the rules then obtaining of the American Arbitration Association.

Id. 90. Review of the trial court’s decision not to compel arbitration is de novo. Id. at 330.
91. Id.
92. Id. at 334.
93. Id. at 329.
94. Id. at 330-31.
95. Sloan Fin. Group, Inc., 583 S.E.2d at 332-33.
96. Id. at 333.
98. Id. at 679.
during the creation of a partnership was subject to arbitration. Mr. Buck alleged that the "oral buy-out agreement" required Ms. Raspet to give Mr. Buck "buy-out' money" from the joint management of the partnership's clients. The contract provided that to fall within the arbitration clause, all matters, including the "oral buy-out agreement," must be "concerning, directly or indirectly, the affairs, conduct, operation and management of the LLC."  

The Raspet court found that the partnership never came into operation and therefore the "oral buy-out agreement" did not concern the "operation and management of the LLC." The court recognized that under North Carolina law, the claim and the scope of the arbitration clause must have a strong relationship for the parties to proceed to arbitration, and that ambiguities about whether an issue is arbitrable should be resolved in favor of arbitration, but only where a doubt exists. In Raspet, the court had no doubt about whether the issue was arbitrable; the issue was clearly not within the scope of the arbitration clause.

C. Waiver of Arbitration

If a court determines that a claim or dispute meets both parts of the test for determining whether to compel arbitration, the issue will be subject to arbitration. A party, however, may intentionally or unintentionally waive its right to arbitration, even if a claim is found to be arbitrable. Under North Carolina law, a party that does not act in conformity with its right to arbitration waives the right to arbitrate, especially where the party opposing arbitration has been prejudiced by the nonconforming behavior. The North Carolina Supreme Court considers four factors to consider in determining whether a party is prejudiced by the opposing party's failure to timely assert his or her right to arbitration.

In Servomation Corporation v. Hickory Construction Co., the North Carolina Supreme Court found that the party seeking arbitration had not waived its right to

99. Id. at 677. The trial court held that a valid arbitration agreement did not exist, and therefore the claims were not subject to arbitration. Id.
100. Id. Ms. Raspett and Mr. Buck formed the partnership entitled "Plan First" to handle financial services clients jointly. The two were also employees of Select Capital Corporation, and Ms. Raspett was Mr. Buck's supervisor. When Select Capital Corporation fired Mr. Buck, they told him to transfer his Select Capital Corporation clients to another broker. Ms. Raspett was told by Select Capital Corporation to cease all business operations with Mr. Buck, so Mr. Buck and Ms. Raspett signed Articles of Dissolution for "Plan First" after his name had been removed from jointly held client accounts. Mr. Buck then asserted the "oral buy-out agreement." Id.
101. Id. at 678-79.
102. Id.
103. Raspet, 554 S.E.2d at 678.
104. Id.
105. Id. at 678-79. Specifically, the arbitration clause stated: "[T]he Members hereby agree to submit to arbitration any and all matters in dispute and in controversy between them and concerning, directly or indirectly, the affairs, conduct, operation and management of the LLC, to the end that all such disputes and controversies be resolved, determined and adjudged by the arbitrators." Id. at 678.
arbitration because the party opposing arbitration had not been prejudiced. The court identified the following factors to be considered when determining if a delayed motion to compel arbitration will prejudice a party:

(1) the party is forced to bear the expense of a long trial;

(2) the party loses helpful evidence;

(3) the party took steps in litigation to its detriment or expended significant amounts of money on the litigation; or

(4) If the party seeking to compel arbitration has made use of judicial discovery procedures not available in arbitration.

The plaintiff, Servomation Corporation, filed a suit against Hickory Construction Company for negligent installation of a warehouse roof. Hickory Construction answered by asserting several affirmative defenses, including that Servomation failed to arbitrate the dispute as agreed to under the installation contract. Hickory Construction also moved for summary judgment, one year later, on the ground that the claim was subject to arbitration, which both the trial and appellate courts denied on the basis of waiver. The North Carolina Supreme Court reversed, holding that Hickory Construction’s right to arbitrate had not been waived because there had not been a “long trial” to spend money on, evidence had not been lost, and Hickory Construction had not utilized any discovery regularly unavailable in an arbitration proceeding.

Servomation argued that a substantial amount of money had been expended on interrogatories and on providing a defense for Hickory Construction’s motion for summary judgment, which had been filed one year after Servomation initiated the action. The Court found that the money expended on interrogatories would have been spent anyway in arbitration. The Court noted that no evidence in the record showed that providing a defense to the motion for summary

110. Id. at 855.
111. Id. at 854.
112. Id. at 853.
113. Id. Article Seven of the contract that Servomation and Hickory Construction entered into states that “[a]ll claims, disputes and other matters in question arising out of, or relating to, this Contract or the breach thereof shall be decided by arbitration...unless the parties mutually agree otherwise.” Servomation Corp. v. Hickory Constr. Co., 318 S.E.2d 904, 906 (N.C. Ct. App. 1984).
114. Id. at 853-54. In moving for Summary Judgment, Hickory Construction also asserted that the statute of limitations time-barred the claim. Id. Hickory Construction also moved for, in the alternative, a motion to stay to compel arbitration. Id. at 854. The trial court denied the motions and the North Carolina Court of Appeals affirmed. Id. Hickory Construction petitioned the North Carolina Supreme Court for discretionary review. Id. In reviewing the case, the Court remanded it back to the Court of Appeals. Id. The Court of Appeals determined that Hickory Construction had waived its right to arbitration. Id. Hickory appealed again to the North Carolina Supreme Court. Id.
115. Servomation Corp., 342 S.E.2d at 854.
116. Id. Hickory Construction had submitted sixty-one interrogatories to Servomation. Servomation answered the interrogatories prior to Hickory Construction filing a motion to stay. See Servomation Corp., 318 S.E.2d at 906.
117. Servomation Corp., 342 S.E.2d at 855.
118. Id. at 854-55.
judgment required substantial cost. The Court held that Servomation was not been prejudiced when Hickory Construction asserted its right to arbitrate, in its answer and its invocation of arbitration one year later.

In Herbert v. Marcaccio, the North Carolina Court of Appeals expanded upon the third factor pronounced in Servomation Corporation v. Hickory Construction Co. In finding prejudice, the Court of Appeals relied on the principle that if one party has incurred significant costs in pursuit of a lawsuit, another party that could have, but did not timely move for arbitration, waives its right to arbitrate. The plaintiff, Herbert, was the executor of the estate of Ms. Shirley Sykes. Ms. Sykes had been injured in a motor vehicle accident with the defendants, John Douglas and Kaye Harrison Marcaccio, but died before resolution of her case. In 2007, Ms. Sykes filed a claim against the Marcaccios for the personal injuries she suffered as a result of the accident. The Marcaccios began to prepare for trial by sending interrogatories to Ms. Sykes, who refused to answer. On November 30, 2009, nearly two years later and facing sanctions for failing to respond to discovery, Ms. Sykes filed a motion to stay pending arbitration. The trial court denied the order and Ms. Sykes appealed.

The North Carolina Court of appeals affirmed, finding that Ms. Sykes had waived her right to arbitration. The court noted that arbitration, like any other contractual right, may be waived and that the party opposing arbitration may be prejudiced if the right is not timely asserted. The court also pointed out that the party opposing arbitration may be prejudiced if it had incurred significant expenses that would have been avoided if the advocate of arbitration had timely moved to compel arbitration. The court concluded that the defendants’ insurance company incurred significant costs in preparation for litigation and were therefore prejudiced by Ms. Sykes’ delay in asserting her right to arbitrate.

119. Id. at 855.
120. Id. Hickory Construction’s answer and invocation of the right to arbitrate were included in its motion for summary judgment. The court also stated that had either party moved for an early hearing on the defendant’s motion to stay, the issue would have been resolved at the hearing. Id.
122. Id. at 535-36 (citing Servomation Corp., 342 S.E.2d 853).
123. Id. at 537.
124. Id. at 533-34. Nanette Herbert filed a motion to intervene in the action and a motion for a hearing on the competence of Ms. Sykes, requesting that Herbert be appointed as Ms. Sykes’ guardian. Id. at 534. Herbert alleged “that there [was] a genuine, material, and substantial question of whether [Ms. Sykes] was competent” when she initiated the action against the Marcaccios. Id. The motions were granted, but Ms. Sykes died two months later. Id.
125. Id. at 533.
126. Herbert, 713 S.E.2d at 533-34.
127. Ms. Sykes’ first attorney was her son. He later withdrew. Nanette Herbert took over after it was believed that Ms. Sykes was incompetent when she entered into the action against the Marcaccios. Id.
128. Id. at 534-535. The trial court denied the motion to compel arbitration because Ms. Sykes proceeded with litigation by using discovery that was not available in arbitration. Id. at 534. By waiting to compel two years later, the Marcaccios had spent significant amounts of money in pursuance of the lawsuit. Id. These circumstances, according to the trial court, amounted to the Marcaccios being prejudiced. Id.
129. Id. at 537.
130. Id. at 535 (citing Douglas v. McVicker, 564 S.E.2d 622, 623 (N.C. Ct. App. 2002)).
131. Id. at 536 (citing Culberson v. REO Props. Corp., 670 S.E.2d 316, 320 (N.C. Ct. App. 2009)).
132. Id. at 535-36.
IV. INSTANT DECISION

The decision in *Elliott v. K.B. Home NC, Inc.* relied on the reasoning of North Carolina courts, as discussed above, to determine whether a motion to compel arbitration was necessary in this complex business case. The *Elliott* court first had to determine whether a valid arbitration agreement existed and whether the claims alleged against KB Home were within the scope of the arbitration agreement.\(^{133}\) The court also had to address whether the waiver defense, asserted by Plaintiffs, applied to KB Home’s contractual right to arbitration.\(^{134}\) After analyzing the case under the two-part test and assessing the waiver defense, the court held that KB Home had a contractual right to arbitration but had “sat on its right to arbitrate for too long,” therefore waiving its right to arbitrate the Plaintiffs’ claims under the contracts.\(^{135}\) The court reasoned that KB Home had waived its right to compel arbitration when it failed to assert its right to arbitrate for three years after the Plaintiffs filed their claims against it, all the while pursuing litigation against KB Homes, and incurring the attendant expenses.\(^{136}\)

The court began its analysis of whether to compel arbitration by noting its adoption of the strong federal policy favoring arbitration and by recognizing the general enforceability of arbitration agreements in the state.\(^{137}\) The court also noted that KB Home, as the party seeking arbitration, had the burden of proof in satisfying the two-part test to compel arbitration.\(^{138}\) To meet this burden, KB Home argued that a valid arbitration agreement existed in each of the plaintiff’s signed Purchase Agreements and signed Warranty Agreements.\(^{139}\) Plaintiffs responded by claiming that only the Warranty Agreement applied and that this agreement’s arbitration clause was not mandatory.\(^{140}\)

To resolve whether a valid, mandatory arbitration agreement existed, the *Elliott* court examined the agreements according to principles of contract interpretation, as outlined in *Revels v. Miss North Carolina Pageant Organization, Inc.* and *Johnston County v. R.N. Rouse & Company.*\(^{141}\) The court concluded that the “plain and unambiguous” language of the Purchase Agreement showed that the parties intended to resolve their disputes through arbitration.\(^{142}\) Specifically, section 35 of the Purchase Agreement signed by Plaintiffs stated that “[i]n the event of any dispute related to the [home] or this Agreement…then this Agreement shall be subject to arbitration under the [FAA].”\(^{143}\) In finding that a valid arbitration


\(^{134}\) Id. at *6-8.

\(^{135}\) Id. at *8.

\(^{136}\) Id.

\(^{137}\) Id. at *2 n.4.

\(^{138}\) Id. at *2; see also *In re W.W. Jarvis & Sons*, 671 S.E.2d 534, 536 (N.C. Ct. App. 2009).

\(^{139}\) *Elliott*, 2012 WL 5385181, at *2.

\(^{140}\) Id. at *3. Plaintiffs argued that the Purchase Agreement did not apply to this dispute because the purchase of HardiPlank had already occurred. *Id.*

\(^{141}\) Id. The court pointed out that the contract must show mutual assent or a willingness to be bound by the terms of the agreement. The court also pointed out that it would look at the “plain and unambiguous language” of the arbitration agreement to determine its validity. *See discussion supra* Part IIIA.

\(^{142}\) *Elliott*, 2012 WL 5385181, at *3.

\(^{143}\) Id. Section 35 of the Purchase Agreement also stated that mediation would occur first. *Id.* If mediation did not resolve the dispute, then the parties would enter into arbitration. *Id.* “Mediation and
agreement existed in the Purchase Agreement, the court noted that Plaintiffs did not argue against the existence of an arbitration clause in the Purchase Agreement.144

Next, the court considered the Plaintiffs’ assertion that arbitration under the Warranty Agreement was not mandatory, but voluntary.145 Plaintiffs asserted that section E.2(G) of the Warranty Agreement allowed for arbitration as one option in resolving the dispute because the clause stated “shall not be required to proceed to Arbitration.”146 In examining the “plain and unambiguous” language of the contract as a whole, the court found that Plaintiffs were required to proceed to arbitration before pursuing litigation.147 The court rejected Plaintiffs’ reasoning that arbitration was not mandatory, noting that the Plaintiffs were merely examining one sentence of one paragraph in the agreement.148 The Warranty Agreement, the court explained, first mandated that the parties resolve any dispute with a negotiation conference.149 Section E.3 of the Warranty Agreement stated that if the initial negotiation conference did not resolve the dispute, parties seeking to resolve the issue in another forum must next use arbitration.150 The court explained that Section E.2(G), which the Plaintiffs relied on for their contention that arbitration was not mandatory under the agreement, actually provided that parties were not required to arbitrate their dispute if they were able to successfully resolve it during the initial negotiation conference.151 If Plaintiffs sought to resolve the dispute beyond the initial negotiation conference, then the parties had to use arbitration; it was only optional that the Plaintiffs continue to resolve the dispute.152 Based on the court’s reading of the agreements, it concluded that a valid, mandatory arbitration agreement existed between Plaintiffs and KB Home in both the Purchase and Warranty Agreements.153

Next, the court turned to the second part of the test for determining whether to compel arbitration; whether the issues in dispute were within the scope of that agreement.154 The court noted that under *Raspet v. Buck*, ambiguities about

Arbitration of future disputes that may arise between the parties. In the event of any dispute related to the [home] or this Agreement, the parties shall first mediate their dispute...and if mediation does not settle the dispute, then this Agreement shall be subject to arbitration under the [FAA]." *Id.*

144. *Id.*
145. *Id.*
146. *Id.* at *4*. Section E of the Warranty Agreement sets out an informal negotiation process to resolve disputes that must be completed first. *Id.* As part of the negotiation, parties must “participate in a conference.” *Id.* Plaintiffs argued that one excerpt from section E precluded mandatory arbitration. *Id.* That section states:

If, after such Conference..., the entire Dispute has not been resolved, the [Plaintiffs] may, but shall not be required to, proceed to Arbitration as described in Subsection 3, below. If, as a result the Conference, certain issues in the dispute have been resolved, the parties shall jointly state in writing the issues that have been resolved and the issues which remain unresolved and will require Arbitration. Although Arbitration is the next formal and required step in the dispute resolution procedure, the parties may continue to negotiate informally to resolve the dispute....

*Id.*
147. *Id.* at *3.*
149. *Id.* at *4.*
150. *Id.*
151. *Id.*
152. *Id.* at *4-5.*
153. *Id.* at *5.*
whether an issue is arbitrable must be construed in favor of arbitration, but also that the clear terms of the agreement governed whether the issue was subject to arbitration. The court analyzed Sections 35.1 and 35.3 of the Purchase Agreement, which required arbitration of "all claims, demands, disputes, controversies, and differences that may arise between the parties." The court found that under the broad, inclusive language of the Purchase Agreement’s arbitration clause, all of Plaintiffs’ claims were subject to arbitration. Section 35.3 of the Purchase Agreement did, however, exempt warranty claims from arbitration.

The court reasoned that even if the Purchase Agreement exempted a claim from arbitration, the Warranty Agreement’s arbitration clause would cover the claim because the Warranty Agreement’s arbitration clause applied to “any dispute” under the agreement. Because all potential claims fell under the scope of either the Warranty or Purchase Agreement’s arbitration clause, all of the Plaintiffs’ claims were arbitrable. Although it found that arbitration should be compelled under the two-part test, the court still had to determine whether KB Home had waived its right to compel arbitration.

The Elliott court recognized that a party may waive its right to arbitration by sitting on its rights for too long, and by prejudicing the party opposing arbitration. The court used the four factors announced by the North Carolina Supreme Court, in Servovation Corp. v. Hickory Construction Co., to determine whether KB Home’s delayed motion to compel arbitration would prejudice the Plaintiffs. The court also cited the Herbert v. Marcaccio decision, where the North Carolina Court of Appeals found that prejudice existed for parties that had incurred expenses that could have been avoided, had the party seeking arbitration timely asserted its right. In support of a finding of prejudice, Plaintiffs argued that significant amounts of money had been expended toward litigation, KB Home

155. Id.
156. Section 35.1 of the Purchase Agreement states:
   [A]ll claims, demands, disputes, controversies and differences that may arise between the parties to this Agreement...of whatever nature or kind, including, without limitation, disputes: (A) as to events, representations, or omissions, which predate this Agreement; (B) arising out of this Agreement; and/or (C) relative to the construction contemplated by this Agreement arising prior to the Closing shall be submitted to binding arbitration....

Id.

157. Section 35.3 of the Purchase Agreement states:
   [T]his section shall not apply to any repairs or warranty claims with respect to the [h]ome arising after the construction is completed and the Closing has occurred hereunder and shall expressly NOT control over the dispute resolution provisions in the Warranty Agreement for such repairs or warranty claims....[A]ny such repairs or warranty claims shall be governed by the Warranty Agreement coverage disputes provisions of the Warranty Agreement....

Id.

158. Id. at *5.
160. Id. at *5.
161. Id. at *5-6.
162. Id. at *6.
163. Id.
164. Id. at *6, *8.
166. Id. at *7.
engaged in discovery not available in arbitration, and more than three years of pre-trial litigation had already occurred by the time that KB Home asserted its right to arbitration, on April 12, 2012.  

The court in Elliott was persuaded that Plaintiffs had incurred significant costs in preparation for litigation, over $100,000, but found that Plaintiffs had not endured a long trial or the loss of important evidence. The court did, however, find that the expenses incurred by Plaintiffs could have been avoided had KB Home asserted its right to arbitrate three years earlier, in 2008, when Plaintiffs had first filed their action. Stating only in a footnote of its opinion, the court commented that it was not required of KB Home and not determinative of finding prejudice that KB Home assert its right to arbitration in its Answer to the Petition or in its responses to Plaintiffs' discovery. The court, instead, found that due to KB Home's delay in seeking arbitration, the Plaintiffs had spent money unnecessarily on: four pre-trial hearings, twenty depositions taken across the country, and securing expert witnesses. The court concluded that KB Home had acted inconsistently with its right to arbitration by not timely asserting the right, and that the Plaintiffs were prejudiced under the factors announced in Servomation. Therefore, the court denied KB Home's motion to stay pending arbitration for sitting "on its rights to arbitrate for too long." This conclusion, according to the court, made it unnecessary to determine which arbitration agreement—the Warranty or Purchase Agreement—governed the Plaintiffs' claims.

167. Id. Plaintiffs argued that KB Home did not assert its right to arbitration under April 12, 2012, when KB filed its motion to stay; however, KB Home first asserted its right in its brief opposing class certification on May 9, 2011. See supra note 19.
168. Id. at *7. The court noted that the $100,000 spent by Plaintiffs accounted for preparing and attending negotiations, depositions, motions, hearings, and hiring expert witness. Id. at *11 n.30.
169. Id. at *6.
170. Id. at *7. The Plaintiffs first filed the action on December 5, 2008. Id. at *1. In a footnote of its opinion, the court commented that KB Home was not required to assert its right to arbitration in its Answer to the Petition or in its responses to Plaintiffs' discovery, and that its failure to do so was not relevant to the prejudice analysis. Id. at *11 n.28.
172. Plaintiffs spent money on the following four pre-trial hearings: KB Home's Motion to Dismiss, Plaintiffs' Motion to Compel Discovery of KB Home, Plaintiffs' Motion for Class Certification, and KB Home's Motion to Stay Pending Appeal. Id. at *11 n.31.
173. Id. at *7.
174. Id.
175. Id. at *8. The court also denied the motion to stay against the unnamed class members, granting the motion to dismiss the Motion to Intervene filed by the unnamed class members, denied the Motion to Intervene filed by the unnamed class members, and did not award Plaintiffs requested attorney's fees. The court denied the motion to stay against unnamed class members even though KB Home argued that it could not have asserted its right to arbitration until class certification on February 27, 2012. The court did not adopt KB Home's argument, finding that compelling arbitration to the unnamed class members would prejudice the named plaintiffs, rendering the class action meaningless. The court also pointed to the fact that KB Home knew the named plaintiffs were seeking a class action. Id. at *6-8.
176. Id. at *11 n.24.
V. COMMENT

North Carolina courts have long upheld the federal policy favoring arbitration. 177 Following federal law, North Carolina adopted its own version of the FAA to ensure that arbitration agreements are enforced according to their terms. 178 Yet, in recognizing a waiver of this contractual right to arbitration, one must consider whether the waiver defense is contrary to the aforementioned policy favoring arbitration. This section considers whether a "factor test" or a bright-line rule is the method of determining whether a party has waived its contractual right to arbitration that is more consistent with the policy favoring arbitration. Ultimately, this note argues that the North Carolina four-factor test, though at times unpredictable, allows courts to properly consider each waiver claim on a case-by-case basis. A case-by-case analysis, unlike a bright-line rule, would not automatically bar arbitration, simply because the party seeking to compel it has filed a responsive pleading. Finally, a factor test allows for more disputes to be resolved by arbitration, supporting the policy favoring arbitration.

A. Bright Line Rule Establishing Waiver After A Defined Period of Time

The policy favoring arbitration originated with the federal courts, beginning in the 1980s. 179 States, following the growing national policy in support of arbitration, began to adopt similar provisions and legal interpretations to uphold arbitration agreements. 180 Federal circuit courts generally take either one of two approaches in determining whether a party has waived the right to arbitration. 181 Most federal circuit courts will find waiver if, after examining a series of factors, the court determines that the party opposing arbitration has suffered prejudice. 182 A minority of federal circuit courts have adopted a bright-line rule that sets a time


179. See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468 (1989) (noting that "due regard must be given to the federal policy favoring arbitration"); see also 6 C.J.S. Arbitration § 3.

180. 6 C.J.S. Arbitration § 3.

181. This issue would not be contested had the parties in Stok & Associates, P.A. v. Citibank, N.A. not settled their dispute. Previously, the United States Supreme Court granted certiorari to hear the case. The issue would have been whether the FAA requires that a party must show prejudice after the party seeking arbitration waived its right to arbitration by participating in litigation. The issue would have resolved the circuit split discussed in this comment. Stok & Associates, P.A. v. Citibank, N.A., 58 So.3d 366, 367-68 (Fla. Dist. Ct. App. 2011); Stok & Associates, P.A., v. Citibank, N.A., 131 S.Ct. 2955 (2011) (mem.) (dismissing writ of certiorari).

182. See Coca-Cola Bottling Co. of N.Y., Inc. v. Soft Drink & Brewery Workers Union Local 812 Int'l Broth. of Teamsters, 242 F.3d 52, 57 (2d Cir. 2001) (noting that "[t]he waiver determination necessarily depends upon the facts of the particular case and is not susceptible to bright line rules"); see also Hooper v. Advance Am., Cash Advance Ctrs. of Mo., Inc., 589 F.3d 917, 920 (8th Cir. 2009) (holding that a three factor test is applied in determining whether a party has waived the right to arbitration: the party knew of the right, acted inconsistently, and the party became prejudiced).

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after which a party can no longer compel arbitration, usually when the party seeking arbitration has filed a responsive pleading.\textsuperscript{183}

Most parties enter into arbitration agreements for their predictability, efficiency, and to avoid the costs of litigation.\textsuperscript{184} Factor-tests eliminate these benefits. Adopting a factor-test to determine whether a party has waived its right to arbitration eliminates the predictability of that the bargained-for forum, as the plaintiff can seek this analysis in any forum. Factor-tests also allow the court to use its discretion in determining whether the totality of the circumstances calls for a waiver of a party’s contractual right to arbitration, or whether parties must proceed to arbitration.\textsuperscript{185} Because each case possesses a unique set of circumstances, factor-tests make it difficult for parties to clearly ascertain whether or not their conduct, or that of their opponent, would constitute a waiver of their right to compel arbitration. Conversely, a bright-line rule that establishes a point at which waiver will be presumed \textsuperscript{186} would allow parties to better predict whether a delayed motion to compel arbitration would result in the waiver of the right. Additionally, a bright-line rule would keep parties from investing in pre-trial litigation, only to later be compelled to arbitrate. The bright-line rule forces parties not to sit on their right to arbitrate by signaling that asserting the right as early as possible is the only way to keep it.

A bright-line rule, though providing predictability, is not the superior method for determining waiver because it may unnecessarily take away a party’s contractual right to arbitrate. Anthony DeToro disagrees with a bright-line rule that treats the filing of responsive pleadings, or the initiation of a lawsuit, as a waiver of the right to arbitrate.\textsuperscript{187} DeToro supports his argument by noting that the commencement of litigation is not always inconsistent with the party’s right to arbitration.\textsuperscript{188} Several types of lawsuits, such as injunctions or writs of attachment, are unavailable in arbitration, and therefore, do not conflict with a party’s contractual right to pursue arbitration of the dispute.\textsuperscript{189} DeToro contends that under a bright-line rule, a party seeking an injunction on one issue and arbitration on another would be barred from asserting arbitration once the party filed a suit for injunction.\textsuperscript{190} Adopting a rigid bright-line test would effectively reduce parties’ contractually

\textsuperscript{183} See Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 390 (7th Cir. 1995) (holding “that an election to proceed before a nonarbitral tribunal for the resolution of a contractual dispute is a presumptive waiver of the right to arbitrate”); see also Zuckerman Spadaer, LLP v. Auffenberg, 646 F.3d 919, 922 (D.C. Cir. 2011) (holding that a defendant “who has not invoked the right to arbitrate on the record at the first available opportunity, typically in filing his first responsive pleading or motion to dismiss, has presumptively forfeited that right”).

\textsuperscript{184} See generally Lawrence W. Newman, Agreements to Arbitrate and the Predictability of Procedures, 113 PENN ST. L. REV. 1323 (2009).

\textsuperscript{185} See Ivax Corp. v. B. Braun of Am., Inc., 286 F.3d 1309, 1315-16 (11th Cir. 2002) (holding that a party has waived its right to arbitration if the party, “under the totality of the circumstances,” has acted inconsistently with its right to arbitration and by doing so has prejudiced the other party) (citations omitted).

\textsuperscript{186} The period of time will usually be after a responsive pleading has been filed. See Elliott v. KB Home N. C., Inc., No. 08 CVS 21190, 2012 WL 5385181, at *4 (N.C. Super. Ct. Nov. 2, 2012).


\textsuperscript{188} Id.

\textsuperscript{189} Id. DeToro advocates for a factor test that takes into account the delay in seeking arbitration and the prejudice the delay caused the opposing party. Id. at 625-26.

\textsuperscript{190} Id. at 625.
agreed upon right to arbitrate, and would not be in keeping with the national policy in favor of arbitration.\footnote{191}

Although DeToro’s reasoning is correct, an easy solution to his argument would be to extend the bright-line rule past the period of filing a responsive pleading. Courts could draw the line after a discovery schedule had been set, after two years had lapsed since the first pleading had been filed\footnote{192} or, following Texas’ lead, when a party has substantially invoked the judicial process.\footnote{193} The problem, however, with any bright-line rule is that if the line is drawn too early, as DeToro notes, the parties’ contractually bargained-for decision to arbitrate is taken away unnecessarily. In such situations, the party seeking to compel arbitration may not have actually acted inconsistently with its right to arbitrate, and the party opposing arbitration may not be harmed by the delay. If the line is drawn too late in the pre-trial process, arbitration is not taken away unnecessarily, but the party who initiated the litigation may suffer extensive loss, including the money spent pursuing the claim in court. A bright-line rule drawn later in the pre-trial process also unfairly awards a party who sat on its right to arbitrate and attempted to use discovery procedures not available in arbitration to develop evidence and testimony to be used later in arbitration.\footnote{194}

Despite a factor-test’s potential for unpredictable outcomes, the factor-test is superior to a bright-line rule is both overly narrow and overly broad. A factor-test can be used to most accurately determine when a waiver has actually occurred, by considering both the prejudice to the party opposing arbitration, and whether the delay is so insignificant that compelling arbitration would be harmless.

\textit{B. Factor-Test Establishing Waiver Based on Prejudice}

The North Carolina four-factor test, though at times unpredictable, allows courts to properly consider each potential waiver on a case-by-case basis and does not create a rigid statute of limitations for compelling arbitration. North Carolina, following in the footsteps the Fourth Circuit,\footnote{195} has adopted a set of factors to consider when determining whether a party has been prejudiced by the delay in the assertion of another party’s right to arbitrate.\footnote{196} The factor test is based upon a showing of prejudice against the party opposing arbitration, but takes into account other circumstances that a court following a bright-line rule would fail to consider.\footnote{197} These circumstances, discussed \textit{supra}, include: whether a party has taken

\footnotesize{191. \textit{Id.} at 618-620.}
\footnotesize{192. See Carcich v. Rederi A/B Nordie, 389 F.2d 692 (2d Cir. 1968) (holding that a delay in seeking arbitration for almost two years after pre-trial proceedings was not enough to find waiver of arbitration).}
\footnotesize{193. See In re Citgo Petroleum Corp., 248 S.W.3d 769, 778 (Tex. App. 2008) (stating “[s]ubstantially invoking the judicial process can occur when the proponent of arbitration actively tried, but failed, to achieve a satisfactory result in litigation before turning to arbitration”) (citation omitted).}
\footnotesize{194. For a discussion on the discovery procedures allowed in arbitration, see \textsc{Thomson Reuters, Corporate Counsel’s Guide to ADR Techniques} § 2:20.}
\footnotesize{195. See Microstrategy Inc. v. Lauricia, 268 F.3d 244 (4th Cir. 2001) (holding that “[a] party may waive its right to insist on arbitration if the party ‘so substantially utilize[s] the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay’” and that a delay in seeking arbitration is a factor) (citations omitted).}
\footnotesize{197. \textit{Id.}}
advantage of discovery not available in arbitration, the loss of helpful evidence, the amount of time that has passed, the amount of money spent on litigation, and whether a party has endured a long trial. 198 Indeed, the Second Circuit has recognized that filing discovery past the responsive pleading stage may not prejudice a party and therefore may not waive arbitrable claims. 199 A simple lapse in time, which a bright-line rule might use to determine when a waiver occurs, does necessarily not mean that the outcome of the parties’ dispute has been affected, and does not mean that compelling arbitration will necessarily harm a party’s interests.

Under a bright-line rule, the court would take an all-or-nothing approach that would invalidate arbitration agreements simply after a party has engaged in the beginning stages of litigation. 200 By taking an all-or-nothing approach that bright-line rules require, scholars have argued that courts would invalidate arbitration agreements entirely, which is neither the intention of the FAA nor the intention of the policy in favor of arbitration. 201 A factor test based on a finding of prejudice to the party opposing arbitration is the best way to uphold the policy favoring arbitration without unfairly awarding a party who sits on its right to arbitrate for too long. By using a factor-test, rather than an all-or-nothing rule, to determine whether a party will be prejudiced by a delayed motion to compel arbitration, the Elliott court’s progeny will be able to uphold a greater number of arbitration agreements while also protecting the parties to a dispute.

VI. CONCLUSION

In Elliott, the North Carolina Superior Court found that KB Home’s delay in seeking arbitration caused the Plaintiffs’ prejudice. The court reasoned that KB Home sat on its right to arbitrate for too long, and in doing so, waived it. The court reached this decision after examining several factors. The court could have decided to find waiver because KB Home’s delay in seeking arbitration caused the plaintiffs prejudice, or the court could have established a bright-line rule prohibiting arbitration rights from being asserted after a specified period of time. The court opted for determining waiver by factoring in whether the Plaintiffs had been prejudiced by KB Home’s delay in making its motion to compel arbitration.

The Elliott decision’s multi-factor analysis allowed the court to best uphold a policy favoring arbitration. Although bright-line rules provide more predictability, they may also unnecessarily strip parties’ of their contractual right to arbitration, based merely on the passage of time, or the filing of a reply brief. As the Elliott court noted, the mere passage of time may not have an impact on a party’s claims. By adopting a factor-test for waiver, courts can balance the effects of the passage

198. Id.
199. See also Nesslage v. York Sec., Inc., 823 F.2d 231, 234 (8th Cir. 1987) (concluding that “[p]arties can conduct discovery with respect to non-arbitrable claims without waiving their right to arbitrate arbitrable claims”).
of time with other factors that may reveal whether a party has suffered prejudice as the result of his opponents delay. Ultimately, factoring in prejudice to determine waiver will uphold more arbitration agreements, which best supports the policy favoring arbitration.

KRIStEN SANOCKI