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Avoiding Waiver of a Right to Arbitrate After Morgan v. Sundance

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Before the U.S. Supreme Court's decision in *Morgan v. Sundance, Inc.*, 142 S.Ct. 1708 (2022), most of the federal circuits, including the Fourth Circuit, required a showing of prejudice to establish waiver of the right to compel arbitration under a contract. *See e.g.*, *Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 817 F.2d 250, 252 (4th Cir. 1987). *Morgan* rejected any requirement of prejudice, holding that the analysis of waiver of an arbitration right is identical to the analysis of waiver of other contract rights. After *Morgan*, the party asserting waiver of a right to arbitrate must show only: (1) knowledge of an existing right to compel arbitration; and (2) acts inconsistent with that right.

The Fourth Circuit has not set out a concrete test for waiver, holding that the issue turns on the facts of each case, but two recent EDVA decisions provide guidance on the actions sufficient to establish waiver after *Morgan*.

First, in *Szy Holding, LLC v. Rico Garcia*, No. 1:20CV01475, 2023 U.S. Dist. LEXIS 37227 (March 6, 2023), the defendants initially filed a motion to dismiss for failure to state a claim under Rule 12(b)(6), arguing, among other things, that a contractual arbitration clause required dismissal of the suit. After the court denied that motion, the defendants filed a motion to reconsider and a motion in the alternative to compel arbitration. In response, the plaintiffs did not dispute that the arbitration clause did not apply. Rather, they argued only that defendants had been delinquent in moving to compel arbitration.

Judge Nachmanoff denied the motion to reconsider and then denied the motion to compel arbitration, holding that the defendants waived their right to compel arbitration. The court relied on two factors: first, the defendants waited several months from the time they were named as defendants before moving to compel arbitration. Second, the defendants waited until after they had received an unfavorable decision on the merits of their Rule 12(b)(6) motion before filing their motion to compel arbitration.

An earlier post-*Morgan* decision from Judge Alston illustrates the proper way to preserve a right to compel contractual arbitration in an EDVA case. In *Ghouri v. AmSher Collection Servs.*, No. 1:22CV00503 (E.D.Va. Oct. 19, 2022), the defendants removed the case from state court and asserted the contractual arbitration provision as affirmative defenses in their answer. Two months after removal, defendants moved to compel arbitration. Judge Alston noted that the filing of an answer is not necessarily inconsistent with an intent to pursue arbitration. Since the defendants had invoked the arbitration clause in their answer to the original complaint and took no other action that would suggest waiver, he rejected plaintiff's argument that defendants had waived their right to arbitration.

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SZY Holding and *Ghouri* suggest several steps a defendant should take to avoid waiver now that *Morgan* has eliminated a requirement of showing prejudice to the non-moving party:

- First, invoke the arbitration clause in any pleading filed before a motion to compel arbitration;
- Second, move to compel arbitration as soon as possible – an EDVA court may view a delay as short as a few months as too long;
- Most importantly, include a motion to compel arbitration in any Rule 12 motion. While other grounds can also be asserted, failure to seek arbitration in an initial Rule 12 motion will likely result in a finding of waiver.

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