

Court v. Arbitrator: Who Should Decide Whether Prelitigation Conduct Waves the Right To Compel an Arbitration Agreement?

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COURT V. ARBITRATOR: WHO SHOULD DECIDE WHETHER PRELITIGATION CONDUCT WAIVES THE RIGHT TO COMPEL AN ARBITRATION AGREEMENT?

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INTRODUCTION

Traditionally, “federal appellate and district courts have primarily decided the equitable defense of waiver [of arbitration] themselves, rather than delegating the question to arbitrators.”¹ The courts’ self-imposed responsibility for deciding waiver remained primarily unquestioned² until the recent Supreme Court decision *Howsam v. Dean Witter Reynolds, Inc.*³ In the wake of *Howsam*, circuits have split over whether *Howsam* should be interpreted as (1) giving questions of waiver of arbitration by litigation conduct and prelitigation conduct to arbitrators, or (2) favoring the traditional rule that courts should decide issues of waiver of arbitration by litigation conduct and prelitigation conduct.⁴

Waiver is a term that is sometimes used quite loosely to incorporate many different circumstances in which a party “loses” the right to compel arbitration. To ensure clarity and for the purpose of this Note, waiver shall be construed in a more narrow and precise way to mean the “intentional relinquishment

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¹ David LeFevre, *Whose Finding Is It Anyway?: The Division of Labor Between Courts and Arbitrators with Respect to Waiver*, 2006 J. DISP. RESOL. 305, 307 (2006).

² *Id.* Deciding waiver regarding arbitration was held to be the responsibility of the court either “because the power to do so was assumed, or because no party questioned it.” *Id.*

³ 537 U.S. 79 (2002).

⁴ See LeFevre, *supra* note 1, at 311–12; see also Lori Turner, Recent Development, *Marie v. Allied Home Mortgage Corp.*, 21 OHIO ST. J. ON DISP. RESOL. 539, 540 (2006).

of a known right.”⁵ It is this “intentional” aspect of waiver that sets it apart from terms such as laches,⁶ forfeiture,⁷ or contractual default,⁸ in that waiver represents not just “losing” the right to arbitrate but, in fact, voluntarily giving up and renouncing that right.⁹

A party can intentionally waive its right to compel arbitration through litigation conduct and prelitigation conduct.¹⁰ In both contexts, conduct may be considered a waiver if it “might be reasonably construed as showing that [parties] do not intend to avail themselves of such [arbitration].”¹¹ Waiver by litigation conduct focuses on a party’s degree of participation in the litigation process, specifically in regards to motions, discovery, and evidence.¹² Waiver by prelitigation conduct encompasses conduct that takes place before, and that is outside the realm of, litigation activity. An example of such prelitigation conduct could be a statement made or a letter sent by the party who is seeking to compel arbitration that is “inconsistent with the notion that [it has] treated the arbitration provision as in effect.”¹³

Circuit courts are split as to whether courts or arbitrators should decide questions of waiver by litigation conduct and prelitigation conduct.¹⁴ Circuit courts holding that waiver is a question for arbitrators have done so in regards to both waiver by litigation conduct and waiver by prelitigation conduct. Conversely, circuits holding that waiver is a question for the

⁵ 4 AM. JUR. 2D *Alternative Dispute Resolution* § 105 (2009). Black’s Law Dictionary defines waiver as “[t]he voluntary relinquishment or abandonment—expressed or implied—of a legal right or advantage.” BLACK’S LAW DICTIONARY 768 (3d pocket ed. 2006).

⁶ See *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 217 (2005) (characterizing laches as “a doctrine focused on one side’s inaction and the other’s legitimate reliance,” which “may bar long-dormant claims for equitable relief”).

⁷ “[F]orfeiture is the failure to make the timely assertion of a right.” *United States v. Olano*, 507 U.S. 725, 733 (1993).

⁸ See BLACK’S LAW DICTIONARY 188 (3d pocket ed. 2006) (defining “default” as “[t]he omission or failure to perform a legal or contractual duty”).

⁹ See *Olano*, 507 U.S. at 733 (noting that waiver depends on a party’s “choice”).

¹⁰ See *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 217 (3d Cir. 2007) (waiver by litigation conduct); *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 3 (1st Cir. 2005) (waiver by litigation conduct).

¹¹ 4 AM. JUR. 2D *Alternative Dispute Resolution* § 105 (2009).

¹² See *Ehleiter*, 482 F.3d at 222.

¹³ 4 AM. JUR. 2D *Alternative Dispute Resolution* § 105.

¹⁴ See discussion *infra* Part III.

court to decide have done so only in the context of litigation conduct. Recently, however, in *JPD, Inc. v. Chronimed Holdings, Inc.*, the Sixth Circuit held that prelitigation conduct is a question for the court to decide and not the arbitrator.¹⁵

This Note disagrees with *Chronimed*'s holding that waiver by prelitigation conduct is a question for the court to decide. In arriving at this conclusion, this Note argues that the persuasive reasoning used by courts in favor of deciding waiver by litigation conduct does not apply to waiver by prelitigation conduct because of the unique differences between the two types of conduct. Moreover, as a matter of public policy, questions of waiver by prelitigation conduct are best left to the arbitrator, while questions of waiver by litigation conduct are best left to the court.

While acknowledging that Supreme Court clarification will ultimately be needed to resolve the confusion created by the *Howsam* decision, this Note concludes by recommending that waiver by prelitigation conduct be decided by the arbitrator. Part I of this Note provides the historical relationship between courts and the arbitration process prior to *Howsam*. Part II discusses the *Howsam* decision. Part III examines the circuit court split over waiver that has developed as a result of *Howsam*. Part IV analyzes the Sixth Circuit's decision in *Chronimed* and finds that the court incorrectly held that waiver by prelitigation conduct was for the court to decide. It further explains why waiver by prelitigation conduct is best left to the arbitrator to decide.

I. THE FORCED RELATIONSHIP BETWEEN COURTS AND ARBITRATION

A. *Long and Hostile History up Until the Federal Arbitration Act of 1925*

The history of arbitration in the United States is as old as the country itself.¹⁶ Even during the colonial period, before the American Revolution, "certain trade groups used arbitration to

¹⁵ 539 F.3d 388, 394 (6th Cir. 2008); see *infra* Parts III–IV (*Mulvaney* and *Chronimed* cases provide concrete examples of prelitigation conduct).

¹⁶ Peter J. Smith IV, *Investors Win: Howsam v. Dean Witter Reynolds, Inc. Makes Entering Arbitration Quicker, Easier, and Less Expensive*, 4 PEPP. DISP. RESOL. L.J. 127, 128–29 (2003).

resolve disputes among their members.”¹⁷ Throughout the eighteenth and nineteenth centuries, arbitration continued to grow as an alternative means of resolving disputes.¹⁸ “Despite the growth of arbitration, [however,] it remained in tension with the courts.”¹⁹

Initially, courts “believed arbitration agreements were subject to the ‘revocability doctrine’, i.e., an agreement to arbitrate was revocable by either party until an award was given.”²⁰ Therefore, while most courts would enforce awards that were rendered in arbitration, they refused to grant specific performance to a party seeking enforcement of an agreement to arbitrate.²¹ In fact, the Supreme Court in *Insurance Co. v. Morse*²² justified this refusal to recognize arbitration agreements by holding that “agreements in advance to oust the courts of jurisdiction conferred by law are illegal and void.”²³

To alleviate the tension between judicial resolution and the arbitration process, Congress enacted the Federal Arbitration Act (“FAA”) in 1925.²⁴ “The FAA was intended to overcome the jealousy of the . . . courts for their own jurisdiction.”²⁵ Realizing how strongly courts guarded against dilution of their jurisdiction, Congress passed the FAA “simply [so] that such agreements for arbitration [would] be enforced”²⁶ and respected by courts “on the same footing as other agreements.”²⁷ Section 2 of the FAA clearly states this purpose; it provides “an agreement in writing to submit to arbitration an existing controversy arising out of such

¹⁷ *Id.* at 129. “In 1768, the New York Chamber of Commerce created a system to ‘settle business disputes according to trade practice rather than legal principles.’” LINDA R. SINGER, *SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES AND THE LEGAL SYSTEM* 5 (2d ed. 1994)).

¹⁸ See Smith, *supra* note 16, at 129. “By 1927, the American Arbitration Association’s Year Book on Commercial Arbitration in the United States listed over one thousand trade associations that employed a system of arbitration for dispute resolution.” *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² 87 U.S. 445 (1874).

²³ See Smith, *supra* note 16, at 130 (quoting *Morse*, 87 U.S. at 451).

²⁴ *Id.*

²⁵ *Id.* (internal quotations omitted).

²⁶ *Id.* at 130–31 (internal quotations omitted).

²⁷ *Id.* at 131.

a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”²⁸

While section 2 of the FAA certainly legitimized the arbitration process, the legislation left open many unresolved questions as to the exact role courts should play when issues and disputes over arbitration arise, such as with waiver. This uncertainty derives from section 3 of the FAA, which addresses the courts’ role in enforcing agreements to arbitrate. Section 3 provides:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, *providing the applicant for the stay is not in default in proceeding with such arbitration.*²⁹

Section 3 clearly provides that courts are to enforce agreements to arbitrate when the issue is referable to arbitration under the agreement at hand.³⁰ The last part of section 3, however, provides an exception: A court will not enforce such arbitration if the court finds that the party moving for arbitration is in “default” in proceeding with such arbitration.³¹ Thus, if the court finds that the issue it is presented with is not referable to arbitration or the party seeking the stay of trial is in “default”—such as when a party has waived its right to arbitration—the court will not refer the matter to arbitration.³² The court also, under section 4 of the FAA, cannot compel arbitration if the party moving to compel it has waived the right to arbitrate.³³

While the FAA bridged the divide that existed between courts and arbitration and set out roles for courts in helping to enforce arbitration, it still left much discretion in the hands of the courts, which historically were protective of their own

²⁸ *Id.* (quoting 9 U.S.C. § 2 (2006)).

²⁹ 9 U.S.C. § 3 (emphasis added).

³⁰ *Id.*

³¹ *Id.*

³² 6 C.J.S. *Arbitration* § 57 (2009).

³³ *See* 9 U.S.C. § 4 (2006).

jurisdiction.³⁴ In the decades after the FAA was enacted, the Supreme Court tried to provide guidance to courts regarding how to best interpret their new role under the FAA. The most significant decision came in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*³⁵

B. Moses's Attempt To Refocus Courts on the FAA and To Support Arbitration

In *Moses*, the Supreme Court attempted to refocus and put into context Congress's intent in enacting the FAA, which was to promote the enforcement of arbitration agreements. In *Moses*, Moses H. Cone Memorial Hospital (the "Hospital") and Mercury Construction Corporation ("Mercury") entered into a contract to construct additions to the Hospital building.³⁶ The contract contained an arbitration clause providing 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"³⁷ After the completion of construction, Mercury claimed that it incurred additional costs such as "extended overhead [and] increase[s] in construction costs due to delay or inaction by the Hospital."³⁸ After some discussion, the Hospital refused to pay its claim and filed for a declaratory judgment in state court, seeking a declaration, among other things, that there was no right to arbitrate.³⁹ In its complaint, the Hospital alleged that Mercury "had lost any right to arbitration under the contract due to waiver, laches, estoppel, and failure to make a timely demand for arbitration."⁴⁰ Mercury filed an action in district court, seeking an order compelling arbitration under section 4 of the FAA.⁴¹ The district court stayed the action,⁴² but

³⁴ See Smith, *supra* note 16, at 130.

³⁵ 460 U.S. 1 (1983).

³⁶ *Id.* at 4.

³⁷ *Id.* at 5 (internal quotations omitted).

³⁸ *Id.* at 6.

³⁹ *Id.* at 6-7.

⁴⁰ *Id.* at 7. "The basic issue presented in Mercury's federal suit was the arbitrability of the dispute between Mercury and the Hospital." *Id.* at 24.

⁴¹ *Id.* at 7. While section 3 pertains to a party requesting a stay of the suit, section 4 serves the same purpose in regard to enforcing arbitration—except that it is in the context of a party petitioning the court for an affirmative order to arbitrate without a suit already in hand. Section 4 states:

the Court of Appeals for the Fourth Circuit reversed the stay and directed the district court to enter a section 4 order to arbitrate.⁴³ The court held that the dispute was “arbitrable under the Arbitration Act and the terms of the parties’ arbitration agreement.”⁴⁴

The Supreme Court affirmed the court of appeals’ decision.⁴⁵ In doing so, the Court focused on “Congress’s clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.”⁴⁶ The Court found that the district court’s stay of arbitration “frustrated the statutory policy of rapid and unobstructed enforcement of arbitration agreements.”⁴⁷ Most importantly, the Court acknowledged in *Moses* that the FAA “requires a liberal reading of arbitration agreements”⁴⁸ and that “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.”⁴⁹ Specifically, the Court held that the FAA “establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”⁵⁰ This holding—along with the specific language of “waiver, delay, or a like

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4 (2006).

⁴² Imre S. Szalai, *The New ADR: Aggregate Dispute Resolution and Green Tree Financial Corp. v. Bazzle*, 41 CAL. W. L. REV. 1, 84 (2004) (“[T]he federal court stayed the action pending resolution of the Hospital’s declaratory judgment action in state court.”).

⁴³ *Id.*

⁴⁴ *Moses*, 460 U.S. at 29 (citing *In re Mercury Const. Corp.*, 656 F.2d 933, 946 (4th Cir. 1981)).

⁴⁵ *Id.*

⁴⁶ *Id.* at 22.

⁴⁷ *Id.* at 23.

⁴⁸ *Id.* at 22 n.27.

⁴⁹ *Id.* at 24.

⁵⁰ *Id.* at 24–25.

defense"—was later used by the *Howsam* Court and led to the circuit court split over waiver that is analyzed in this Note.⁵¹

II. *HOWSAM* DECISION: FOCUSING ON PARTY EXPECTATIONS

In *Howsam v. Dean Witter Reynolds, Inc.*, Karen Howsam alleged that her financial advisor, Dean Witter, misrepresented the virtues of a partnership that the firm had recommended she purchase.⁵² This controversy fell within the terms of the broad arbitration agreement that the parties had signed.⁵³ The arbitration agreement provided that Howsam could choose the arbitration forum; she chose the National Association of Securities Dealers ("NASD").⁵⁴ NASD rules provided that "no dispute 'shall be eligible for submission . . . where six (6) years have elapsed from the occurrence or event giving rise to the . . . dispute.'"⁵⁵ Dean Witter filed suit in court, asking "the court to declare that the dispute was 'ineligible for arbitration' because it was more than six years old."⁵⁶ Additionally, Dean Witter sought an injunction that would "prohibit Howsam from proceeding in arbitration."⁵⁷ The district court dismissed the action "on the ground that the NASD arbitrator, not the court, should interpret and apply the NASD rule."⁵⁸ The Court of Appeals for the Tenth Circuit reversed, finding that the "application of the NASD rule presented a question of the underlying dispute's 'arbitrability'; and the presumption is that a court, not an arbitrator, will ordinarily decide an 'arbitrability' question."⁵⁹

The Supreme Court granted certiorari to resolve the issue of "whether a court or an arbitrator primarily should interpret and apply this particular NASD rule."⁶⁰ The Court reversed the judgment of the Tenth Circuit, holding that the NASD rule was

⁵¹ See LeFevre, *supra* note 1, at 310–11. "The federal circuits later diverged from their fairly consistent waiver analysis, particularly in their attempts to interpret the Supreme Court's discussion of arbitrability in *Howsam* . . ." *Id.*

⁵² 537 U.S. 79, 81 (2002).

⁵³ *Id.*

⁵⁴ *Id.* at 82 (quoting NASD Code of Arbitration Procedure § 10304).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*; see, e.g., *First Options of Chi. Inc. v. Kaplan*, 514 U.S. 938, 947 (1995).

⁶⁰ *Howsam*, 537 U.S. at 82–83.

for an arbitrator to interpret and apply.⁶¹ In its opinion, the Supreme Court established a framework for courts to use in determining which gateway questions such as waiver were for the courts to decide and which were reserved for arbitrators.⁶² The Court understood that “[l]inguistically speaking, one might call any potentially dispositive gateway question a ‘question of arbitrability,’ for its answer will determine whether the underlying controversy will proceed to arbitration on the merits.”⁶³ The Court, however, found that not all gateway disputes are “questions of arbitrability,” which a court should decide and that the phrase itself “has a far more limited scope.”⁶⁴

In reviewing its own case law, the Court found the phrase “question of arbitrability”

applicable in the kind of narrow circumstances where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.⁶⁵

Thus, focusing on party expectations, the Court distinguished between questions of arbitrability for a court to decide and those gateway questions more appropriately left to the arbitrator. The Court defined questions of arbitrability as questions pertaining to the existence of a binding arbitration agreement and questions as to whether an issue is within the scope of an existing agreement.⁶⁶ Conversely, gateway questions that were not

⁶¹ *Id.* at 86.

⁶² *Id.* at 83–86.

⁶³ *Id.* at 83.

⁶⁴ *Id.*

⁶⁵ *Id.* 83–84.

⁶⁶ See Szalai, *supra* note 42, at 82; see also *Howsam*, 537 U.S. at 84. The *Howsam* Court looked to prior Supreme Court decisions in formulating its view: *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943–46 (1995) (holding that a court should decide whether parties who do not sign an arbitration agreement are bound by the contract); *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 651–52 (1986) (holding that a court should decide whether a labor-management layoff issue is governed by the arbitration clause of a collective bargaining agreement); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964) (holding that a court should decide whether an arbitration agreement continues after a corporate merger and binds the resulting corporation); and *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241–43 (1962) (holding that a court should decide whether a clause authorizing arbitration for “grievances” covers claims for damages for breach of a no-strike

"questions of arbitrability," and thus were not to be decided by courts, related to "general circumstance[s] where parties would likely expect that an arbitrator would decide the gateway matter."⁶⁷ Specifically, "'procedural questions which grow out of the dispute and bear on its final disposition' are presumptively *not* for the judge, but for an arbitrator, to decide"⁶⁸ Thus, the Court divided gateway questions into two broad categories: (1) substantive questions, which are the "questions of arbitrability" for judges to decide—such as the existence and scope of an arbitration agreement; and (2) procedural questions, which are for arbitrators to decide.⁶⁹

In reaching its decision, the Court looked to the Revised Uniform Arbitration Act of 2000 ("RUAA"), which provided that "an arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled."⁷⁰ The Court quoted comment 2 of the RUAA, which mandated "issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide."⁷¹

Moreover, in seeking to clarify which gateway questions were for courts and which were for arbitrators to decide, the Court focused on the expectations parties have when accepting an arbitration agreement. As such, the Court held that an issue regarding NASD's time-limit rule would be expected to fall within the type of procedural question that an arbitrator would decide.⁷² Furthermore, the Court concluded that an NASD arbitrator would be better at interpreting and applying the agency's own rule than a court.⁷³ The Court noted that "for the law to assume an expectation that aligns (1) decisionmaker with (2) comparative expertise will help better to secure a fair and expeditious resolution of the underlying controversy—a goal of

agreement), *overruled by* *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). *Howsam*, 537 U.S. at 84.

⁶⁷ *Howsam*, 537 U.S. at 84.

⁶⁸ *Id.* (quoting *John Wiley*, 376 U.S. at 557) (holding that an arbitrator should decide whether the first two steps of a grievance procedure were completed where these steps are prerequisites to arbitration) (internal quotations omitted).

⁶⁹ See *LeFevre*, *supra* note 1, at 311.

⁷⁰ *Howsam*, 537 U.S. at 84–85 (quoting UNIF. ARBITRATION ACT § 6(c) cmt. 2 (2000)).

⁷¹ *Id.* at 85 (quoting UNIF. ARBITRATION ACT § 6 cmt. 2).

⁷² *Id.*

⁷³ *Id.*

arbitration systems and judicial systems alike.”⁷⁴ Thus, in determining the likely expectations of parties to a specific arbitration agreement, it may be reasonable to weigh the expertise and efficiency considerations of both the judiciary and arbitration process in light of the particular issue at hand.

While the *Howsam* Court established the two sides of the arbitrability issue and clearly settled that the NASD time-limit rule was for arbitrators to decide, there is still much uncertainty about where waiver fits in as a gateway question. Waiver creates controversy because it is a type of default that can fall on either side of the issue of arbitrability. For example, the substantive category of a “question of arbitrability” that a court would be expected to decide is comprised of questions regarding the existence and scope of an arbitration agreement. The court’s role in determining whether an arbitration agreement exists could be applied to a situation involving waiver since acts of waiver could effectively nullify an arbitration agreement, and therefore, bring into question the agreement’s existence. Conversely, questions of waiver could also fall within the category of a procedural question. While the NASD time-limit rule embodies a specific prerequisite type of question, it is conceivable that waiver—whether by litigation conduct or prelitigation conduct—may actually be of a similar type of procedural nature that one would find an arbitrator most suited to handle. In fact, the *Howsam* Court, in the middle of its explanation of procedural questions, actually mentioned waiver.⁷⁵ The *Howsam* Court, citing *Moses*, proclaimed, “[s]o, too, the presumption is that the arbitrator should decide ‘allegation[s] of waiver, delay, or a like defense to arbitrability.’ ”⁷⁶

It is reasonable to argue, however, that the word “waiver” in *Howsam* was not meant to encompass the voluntary renunciation of the right to arbitrate by litigation and prelitigation conduct since the word itself is often broadly used to symbolize many types of procedural defaults in which a party loses the right to compel arbitration. Therefore, until the Supreme Court clarifies what it meant by “waiver,” specifically, whether the term includes waiver by litigation and prelitigation conduct and on

⁷⁴ *Id.*

⁷⁵ *Id.* at 84–85.

⁷⁶ *Id.* at 84 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 25 (1983)).

which side of the issue of arbitrability waiver falls, waiver will continue to float in a grey area between court and arbitrator.

III. CIRCUIT COURT SPLIT ON WAIVER

Some circuit courts have held that issues of waiver by litigation and prelitigation conduct after *Howsam* must be decided by an arbitrator. Other circuits, however, have held that the traditional rule that waiver is for a court to decide is still intact and even supported by the *Howsam* decision.⁷⁷ These circuits, until recently, have limited this holding to waiver by litigation conduct. In *JPD, Inc. v. Chronimed Holdings, Inc.*, however, the Sixth Circuit held that waiver by prelitigation conduct is also for the court to decide.⁷⁸

A. *Circuit Courts That Find Waiver by Litigation Conduct and Prelitigation Conduct To Be a Question for Arbitrators To Decide*

The circuit courts that hold that waiver is a question for an arbitrator simply quote and rely on the language in *Howsam*, discussed above. As a result of *Howsam* incorporating *Moses's* pro-arbitration language regarding "waiver, delay, or a like defense" into the category of procedural arbitrability, these circuit courts find the issue clearly for an arbitrator. These courts have reversed the traditional notion that waiver is a question for courts to decide.⁷⁹

The Eighth Circuit, in *National American Insurance Co. v. Transamerica Occidental Life Insurance Co.*,⁸⁰ summarily dismissed petitioner's argument 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."⁸¹ In its reasoning for dismissing the issue, the Eighth Circuit simply cited *Howsam* for the proposition that "the presumption is that the arbitrator should decide 'allegations of

⁷⁷ See generally LeFevre, *supra* note 1.

⁷⁸ 539 F.3d 388, 393–94 (6th Cir. 2008).

⁷⁹ See LeFevre, *supra* note 1, at 311.

⁸⁰ 328 F.3d 462 (8th Cir. 2003).

⁸¹ LeFevre, *supra* note 1, at 312.

waiver, delay, or a like defense to arbitrability.’”⁸² Thus, the Eighth Circuit held that an issue of waiver by litigation conduct was for an arbitrator to decide.

Likewise, the Second Circuit, in *Mulvaney Mechanical, Inc. v. Sheet Metal Workers International Ass’n, Local 38*, came to the same conclusion regarding waiver by prelitigation conduct.⁸³ In *Mulvaney*, a dispute arose between Mulvaney Mechanical, Inc. (“Mulvaney”) and Sheet Metal Workers International Association, Local 38 (the “Union”), over a collective bargaining agreement (the “CBA”).⁸⁴ The two parties were trying to negotiate a renewal of the CBA, which was set to expire on June 30, 1997.⁸⁵ They could not, however, reach an agreement.⁸⁶ Therefore, on June 25, 1997, the Union instructed its members to strike.⁸⁷

During the summer and fall, the parties again tried but were unsuccessful in negotiating a new contract.⁸⁸ Therefore, in November, the Union sought arbitration in order to reach a new agreement.⁸⁹ The CBA contained an arbitration provision, providing that “any controversy or dispute arising out of the failure of the parties to negotiate a renewal of [the CBA] shall” go to arbitration.⁹⁰ The CBA, however, also contained a no-strike provision establishing that the parties would “not engage in a strike or lockout until the . . . arbitration process had run its course.”⁹¹ In light of this provision and the Union’s conduct, the employer made two arguments:

- (1) the agreement had been terminated by the employees’ strike in violation of both the collective bargaining agreement and the National Labor Relations Act’s notice requirements; and (2) the strike, coupled with the union’s subsequent pronouncements

⁸² *Transamerica*, 328 F.3d at 466 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (internal citations and quotations omitted)).

⁸³ 351 F.3d 43, 46 (2d Cir. 2003).

⁸⁴ *Id.* at 44.

⁸⁵ *Mulvaney Mech., Inc. v. Sheet Metal Workers Int’l Ass’n, Local 38*, No. 3:98CV1750 RNC, 2000 WL 852430, at *1 (D. Conn. Mar. 31, 2000), *vacated*, 288 F.3d 491 (2d Cir. 2002), *vacated*, 538 U.S. 918 (2003).

⁸⁶ *Id.* at *1–2.

⁸⁷ *Id.* at *1.

⁸⁸ *Id.* at *2.

⁸⁹ *Id.*

⁹⁰ *Id.* at *1 n.2.

⁹¹ *Id.* at *1.

that the agreement had been terminated, constituted a repudiation of the agreement, giving Mulvaney the right to rescind it.⁹²

Addressing the first claim—whether the agreement had been terminated by the strike—the Second Circuit held that the claim was “akin to the question of whether a binding agreement to arbitrate exist[ed] at all, and thus [fell] in the category of ‘questions of arbitrability’ presumptively reserved for the courts.”⁹³ Conversely, the Second Circuit held that the second claim—whether the strike, coupled with repudiation of the CBA, constituted a waiver of arbitration—was for the arbitrator to decide.⁹⁴ The court reasoned that the relevant issue was not whether the CBA still existed. Rather, the issue concerned whether the existing contract had become voidable, allowing Mulvaney to rescind the CBA, and thus the arbitration provision as well.⁹⁵ Since “the language of the arbitration clause encompasses the union’s strike and the consequences thereof,” the court reasoned that this issue of repudiation would clearly be for the arbitrator to decide.⁹⁶ Moreover, the court concluded that the alleged repudiation of the CBA by the Union’s prelitigation conduct—the strike and renouncement of the CBA—was an issue that “most closely resemble[d] the defenses to arbitrability such as waiver, estoppel, or delay that the Supreme Court listed as questions properly decided by arbitrators.”⁹⁷

B. Circuit Courts That Find Waiver by Litigation Conduct To Be a Question for Courts To Decide

In interpreting *Howsam*, the Eighth and Second Circuits found that waiver by both litigation and prelitigation conduct is a question for the arbitrator. Other circuits “either have not directly addressed [*Howsam*], continuing to apply their traditional waiver rules,”⁹⁸ or “have distinguished [*Howsam*],

⁹² *Mulvaney Mech., Inc. v. Sheet Metal Workers Int’l Ass’n, Local 38*, 351 F.3d 43, 45 (2d Cir. 2003).

⁹³ *Id.* at 46.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *See Khan v. Parsons Global Serv., Ltd.*, 521 F.3d 421, 425, 428. (D.C. Cir. 2008) (holding, without mentioning *Howsam*, that “the question of waiver is one of

again maintaining the status quo⁹⁹ as to the question of waiver by litigation conduct. Specifically, three circuit courts—the First, Third, and Fifth—have addressed *Howsam*’s impact on waiver by litigation conduct and have found that this type of waiver question is for courts to decide.

The Fifth Circuit, in *Tristar Financial Insurance Agency, Inc. v. Equicredit Corp. of America*,¹⁰⁰ held that it was for the court to decide the issue of waiver by litigation conduct.¹⁰¹ Focusing on party expectations, *Tristar* quoted *Howsam* for the proposition that “[q]uestions of arbitrability are for the court ‘where contracting parties would likely have *expected* a court to have decided the gateway matter.’”¹⁰² In this case, the court held that “[c]ontracting parties would *expect* the court to decide whether one party’s conduct before the court waived the right to arbitrate.”¹⁰³ The *Tristar* Court reasoned that “waiver in this case depends on the conduct of the parties before the district court i.e., waiver by litigation conduct], and the court, not the arbitrator, is in the best position to decide whether the conduct amounts to a waiver under applicable law.”¹⁰⁴ Thus, the court concluded that the party seeking arbitration did not waive its right to arbitrate by “threatening litigation, filing motions in the district court action, conducting discovery, and waiting eight months to file its motion to compel arbitration.”¹⁰⁵

Similar to *Tristar*, the First Circuit, in *Marie v. Allied Home Mortgage Corp.*,¹⁰⁶ concentrated on party expectations when it addressed whether the court or arbitrator should decide (1) the issue of waiver of arbitration by failure to timely compel

law” and that “filing a motion for summary judgment based on matters outside of the pleadings is inconsistent with preserving the right to compel arbitration” (quoting Nat’l Found. for Cancer Research v. A.G. Edwards & Sons, Inc., 821 F.2d 772, 774 (D.C. Cir. 1987)).

⁹⁹ LeFevre, *supra* note 1, at 311.

¹⁰⁰ 97 F. App’x 462 (5th Cir. 2004).

¹⁰¹ *Id.* at 464.

¹⁰² *Id.* (emphasis added) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)).

¹⁰³ *Id.* (emphasis added).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ 402 F.3d 1 (1st Cir. 2005).

arbitration and (2) the issue of waiver by litigation conduct.¹⁰⁷ The First Circuit held that the arbitrator should decide the first issue and that the court should decide the second issue.¹⁰⁸

The First Circuit held that the issue of whether the party seeking to compel arbitration was untimely in its demand to arbitrate—because it failed to abide by the contractual time limit that was specified in the contract—is to be decided by the arbitrator.¹⁰⁹ Citing *Howsam*, the court found that this “sort of procedural prerequisite . . . is presumed to be for the arbitrator.”¹¹⁰ Moreover, the court reasoned, the arbitrator in this case might be “expected to have comparative expertise in determining the meaning of these sorts of contractual limitations.”¹¹¹ The court relied on *Howsam*’s holding that procedural gateway questions are for a court to decide, focusing on the expectation reasoning that the *Howsam* Court used in formulating that rule.¹¹²

As to the second issue—whether the party seeking to compel arbitration had “waived its right to arbitration by not filing for arbitration during and after the [Equal Employment Opportunity Commission] proceeding”¹¹³—the First Circuit held that waiver by litigation conduct is an issue for courts to decide.¹¹⁴ The court, using *Howsam*’s expectation argument, held that the Supreme Court in *Howsam* “did not intend to disturb the traditional rule that waiver by conduct, at least where due to litigation-related activity, is presumptively an issue for the court.”¹¹⁵ It reasoned that its own long history and the “overwhelming weight of pre-*Howsam* authority, which held that waiver due to litigation conduct was generally for the court and not for the arbitrator,” created an expectation that the court would decide the issue of waiver by litigation conduct.¹¹⁶

¹⁰⁷ *Id.* at 3.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 11.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* Employee initiated a complaint with the Equal Employment Opportunity Commission (“EEOC”) against her employer over a Title VII claim; however her employer did not seek arbitration during or after the EEOC proceeding was finished. *Id.* at 3, 11.

¹¹⁴ *Id.* at 3.

¹¹⁵ *Id.* at 14.

¹¹⁶ *Id.* at 11–12.

Moreover, adding statutory support for its conclusion, the court held that the term “default” in section 3 of the FAA,¹¹⁷ “has generally been viewed by courts as including . . . ‘waiver,’”¹¹⁸ thereby making the issue one for the courts to decide. Additionally, the court noted that the RUAA, which *Howsam* had quoted from, provides that “[w]aiver is one area where courts, rather than arbitrators, often make the decision as to enforceability of an arbitration clause.”¹¹⁹

Furthermore, the First Circuit “articulated three policy reasons why *Howsam* . . . [did] not upset the traditional rule that courts decide waiver by conduct in litigation.”¹²⁰ First, “a court has inherent power to control its docket and to prevent abuse in its proceedings (i.e., forum shopping).”¹²¹ Second, looking at the comparative expertise considerations stressed in *Howsam*, “[j]udges are well-trained to recognize [this] abusive forum shopping.”¹²² Also, “[a] party’s conduct in litigation ‘heavily implicates judicial proceedings’ rather than arbitral proceedings . . . and is not likely to engage the court in the merits of the dispute.”¹²³ Lastly, as discussed in *Moses*, a key purpose of the FAA is to permit speedy resolution of disputes.¹²⁴ Therefore, a court, not an arbitrator, should decide waiver based on litigation conduct because it would be “exceptionally inefficient”¹²⁵ to send such an issue to the arbitrator and have the arbitrator find “that the defendant had waived its right to arbitrate.”¹²⁶ Consequently, “the case would inevitably end up back before the . . . court with the plaintiff again pressing his claims.”¹²⁷

Finally, the First Circuit cited *Tristar*, in which the court held that a court should decide waiver by litigation conduct.¹²⁸ The court acknowledged that, unlike in *Tristar*, the litigation

¹¹⁷ See *supra* note 29 and accompanying text.

¹¹⁸ *Marie*, 402 F.3d at 13.

¹¹⁹ *Id.* (quoting UNIF. ARBITRATION ACT § 6, cmt. 5 (2000)).

¹²⁰ LeFevre, *supra* note 1, at 313.

¹²¹ *Id.* at 313; see also *Marie*, 402 F.3d at 13.

¹²² *Marie*, 402 F.3d at 13; see also LeFevre, *supra* note 1, at 313.

¹²³ LeFevre, *supra* note 1, at 313–14 (quoting *Marie*, 402 F.3d at 13) (internal quotations omitted).

¹²⁴ *Marie*, 402 F.3d at 14.

¹²⁵ *Id.* at 13.

¹²⁶ *Id.*

¹²⁷ *Id.* at 13–14.

¹²⁸ See *supra* notes 100–105 and accompanying text.

conduct in this case “is somewhat unusual in that the claim is of litigation activity before the EEOC that is inconsistent with a right to arbitrate, as opposed to activity before a court.”¹²⁹ Nevertheless, the First Circuit found that “[c]ourts are still well suited to determine the sort of forum-shopping and procedural issues that are likely to arise in litigation before the EEOC, and sending the waiver issue to the arbitrator would still be inefficient.”¹³⁰ Thus, the court concluded that waiver by such litigation conduct, even in a different forum, should be decided by the court rather than arbitrator.¹³¹

Similar to the First Circuit, the Third Circuit concluded that waiver by litigation conduct was for the court to decide.¹³² The Third Circuit, in *Ehleiter v. Grapetree Shores, Inc.*,¹³³ “[found] the First Circuit’s thorough analysis convincing”¹³⁴ and “persuasive.”¹³⁵ In *Ehleiter*, Jack Ehleiter, a casino card dealer, sought damages from Grapetree Shores, Inc. (“GSI”)—the owner of the property the casino was located on—for personal injuries from an alleged slip and fall accident while walking down an employee stairway in the casino.¹³⁶ The card dealer had signed an Hourly Employment Agreement with the casino, and “[u]nder the terms of that Agreement, Ehleiter agreed to arbitrate, inter alia, all claims . . . arising from his employment.”¹³⁷ Despite this agreement, however, neither party initially pursued arbitration. Instead, both parties actively engaged in litigation and extensive discovery for approximately four years.¹³⁸ In fact, arbitration was pursued by GSI “only one day before the parties’ joint final pretrial statement and proposed jury instructions were due.”¹³⁹

¹²⁹ *Marie*, 402 F.3d at 14.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 209–10 (3d Cir. 2007).

¹³³ 482 F.3d 207 (3d Cir. 2007).

¹³⁴ *Id.* at 218.

¹³⁵ *Id.* at 217.

¹³⁶ *Id.* at 210.

¹³⁷ *Id.* at 211.

¹³⁸ *Id.* at 210. “Both parties submitted and responded to several sets of interrogatories and requests for production of documents, took numerous depositions, and submitted several expert reports.” *Id.*

¹³⁹ *Id.*

The court held that whether the parties had waived the right to arbitrate—as a result of their participation in litigation—was an issue for the court to decide.¹⁴⁰ Similar to the First Circuit in *Marie*, the Third Circuit referred to its long history of deciding “questions of waiver based on litigation conduct.”¹⁴¹ Moreover, the court agreed with the First Circuit’s arguments regarding the FAA, the RUAA, and its three policy reasons supporting the holding that waiver based on litigation conduct was indeed for a court to decide.¹⁴²

The Third Circuit also added another dimension to the argument in favor of courts deciding waiver by litigation conduct. The Third Circuit proposed that, when properly considered within the context of the entire opinion, “the Supreme Court’s statement in *Howsam* that ‘the presumption is that the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability,’ ”¹⁴³ actually refers to “waiver, delay, or like defenses arising from non-compliance with contractual conditions precedent to arbitration, such as the NASD time limit rule at issue in that case, and not to claims of waiver based on active litigation in court.”¹⁴⁴ Moreover, the court stated that in its view, *Moses* “established only that arbitrability defenses such as waiver should be ‘addressed with a healthy regard for the federal policy favoring arbitration,’ not that these defenses should presumptively be resolved by an arbitrator.”¹⁴⁵ In further support of this assertion, the court cited *Germany v. River Terminal Railway Co.*,¹⁴⁶ which was cited in *Moses*.¹⁴⁷ In *Germany*, the court decided the question of waiver based on litigation conduct itself and did not submit the question to the arbitrator.¹⁴⁸

¹⁴⁰ *Id.* at 209–10.

¹⁴¹ *Id.* at 217.

¹⁴² *See id.* at 217–18.

¹⁴³ *Id.* at 218–19 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 25 (1983) (internal quotations omitted)).

¹⁴⁴ *Id.* at 219. The court does not provide examples of what would constitute procedural waiver, but makes this comment in order to reaffirm that an arbitrator should deal with only questions that refer to the contractual and procedural aspects of the arbitration agreement, which thus would not include waiver, as so defined in this Note, by litigation or prelitigation conduct.

¹⁴⁵ *Id.* at 219 n.10 (quoting *Moses*, 460 U.S. at 24).

¹⁴⁶ 477 F.2d 546 (6th Cir. 1973).

¹⁴⁷ *Ehleiter*, 482 F.3d at 219 n.10.

¹⁴⁸ *Id.*

IV. THE *CHRONIMED* DECISION: WRONG ON THE QUESTION OF
WAIVER BY PRELITIGATION CONDUCT; WAIVER BY PRELITIGATION
CONDUCT BELONGS TO THE ARBITRATOR

As demonstrated, *Tristar*, *Marie*, and *Ehleiter*, taken together, formulate a cohesive argument based on case history, statutory interpretation, and, most importantly, public policy that courts should decide the issue of waiver by litigation conduct. These arguments—used in support of courts determining waiver by litigation conduct—however, do not apply equally to waiver by prelitigation conduct. The arguments of efficiency and party expectations that developed from these three circuit court cases only support a court deciding questions of waiver by litigation conduct. When such arguments are applied to the question of waiver by prelitigation conduct, however, they cut the other way. Public policy arguments—specifically matters of efficiency and party expectations—set forth by the FAA, *Moses*, and *Howsam* support waiver by prelitigation conduct being a question best left to the arbitrator.¹⁴⁹ Thus, the Sixth Circuit in *JPD, Inc. v. Chronimed Holdings, Inc.*¹⁵⁰ misapplied the rationale provided by *Tristar*, *Marie*, and *Ehleiter* and incorrectly held that the issue of waiver by prelitigation conduct is for the courts to decide.¹⁵¹

A. *Facts of Chronimed*

In October 2005, Chronimed Holdings, Inc. (“Chronimed”) purchased Northland Pharmacy, a drugstore, from James P. DiCello.¹⁵² As part of the deal, the parties negotiated an employment agreement under which DiCello would continue to help run the drugstore until the end of 2006.¹⁵³ Furthermore, “[t]o align their interests . . . and as part of arriving at a fair purchase price, Chronimed agreed to pay DiCello an ‘additional purchase price payment’ based on Northland’s 2006 [Earnings Before Interest, Taxes, Depreciation, and Amortization (“EBITDA”)].”¹⁵⁴

¹⁴⁹ See *infra* notes 176–178 and accompanying text.

¹⁵⁰ 539 F.3d 388 (6th Cir. 2008).

¹⁵¹ See *infra* notes 174–175 and accompanying text.

¹⁵² *Chronimed*, 539 F.3d at 389.

¹⁵³ *Id.* at 389–90.

¹⁵⁴ *Id.* at 390. The additional payment, if the EBITDA exceeded \$2.7 million, would equal the excess amount. *Id.*

At the end of 2006, Chronimed notified DiCello that the EBITDA did not reach the agreed-upon level, and therefore, DiCello would not receive an additional payment.¹⁵⁵ DiCello objected to the calculation of the EBITDA, “complaining that Chronimed depressed Northland’s earnings by shortchanging some aspects of the operations and poor decision-making[,]”¹⁵⁶ and, in keeping with the arbitration provision of the parties’ purchase agreement, notified Chronimed in writing.¹⁵⁷ Chronimed responded with a letter on July 6, 2007, that “disputed [DiCello’s] allegations and took the position that his objection failed to contest the company’s EBITDA calculation in sufficient detail. . . . Nonetheless, the company invited DiCello to meet to ‘discuss this matter with a view toward an amicable resolution.’ ”¹⁵⁸ Shortly thereafter, DiCello sued Chronimed in federal court.¹⁵⁹ In response, Chronimed moved to stay the suit and compel arbitration.¹⁶⁰ The district court denied the motion, finding that the issue of waiver was for the court to decide and that Chronimed had waived its right to invoke arbitration when it sent the July 6 response letter.¹⁶¹

On appeal, the Sixth Circuit agreed that the question of waiver by prelitigation conduct was for the court to decide but found that the July 6 response letter did not waive Chronimed’s right to arbitrate.¹⁶² In justifying its jurisdiction, the *Chronimed* Court looked to the Third Circuit’s decision in *Ehleiter* and the

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* The court found that, while this issue perhaps did not specifically entail the calculation of the EBITDA, it did fall within “issues having a bearing on such dispute” and therefore was within the scope of the arbitration provision. *Id.* at 391 (internal quotations omitted).

¹⁵⁷ The Purchase Agreement at § 2.3(b) reads:

If Sellers [DiCello and family’s] Representative disagrees with Buyer [Chronimed’s] calculation of the Company [Northland’s] EBITDA, Sellers’ Representative shall advise the Buyer in writing In the event Buyer and Sellers’ Representative are unable to resolve such dispute within 15 Business Days after delivery of the Objection Notice . . . such dispute shall be submitted to, and all issues having a bearing on such dispute shall be resolved by the Accounting Referee The Accounting Referee’s resolution of such dispute shall be final, conclusive and binding on the parties.

Id. (emphasis added).

¹⁵⁸ *Id.* at 390.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 394.

First Circuit's decision in *Marie*, concluding that the reasoning used in those cases applied equally to the facts in the present case.¹⁶³ The *Chronimed* Court, however, failed to recognize that the *Ehleiter* and *Marie* decisions, addressing issues of waiver by litigation conduct, do not support the court deciding issues of waiver by prelitigation conduct.

B. Chronimed's Reliance on Ehleiter Is Misplaced

The *Chronimed* Court begins its analysis by admitting that, "when read in isolation," the *Howsam* Court states that waiver is for an arbitrator to decide.¹⁶⁴ They dismiss, however, this isolated reading using the same reasoning in *Ehleiter*; namely that, when taken within the context of the whole decision, the *Howsam* Court was only referring to types of waiver that arose from "non-compliance with contractual conditions precedent to arbitration, such as the NASD time limit rule."¹⁶⁵ Applying this more narrow reading of *Howsam*, the *Chronimed* Court held that the July 6 response letter was not a "contractual condition[] precedent to arbitration."¹⁶⁶ Therefore, it was not the type of waiver for an arbitrator to decide.

The *Chronimed* Court, however, failed to consider that waiver by prelitigation conduct has both substantive and procedural elements. Thus, waiver by prelitigation conduct could easily fit in either of the two categories from *Howsam*: (1) substantive questions for a court; and (2) procedural questions for an arbitrator. The mere fact that prelitigation conduct is different from contractual conditions—such as the NASD time-limit rule—does not mean that it then must be placed in the substantive category for courts to decide. *Chronimed's* reasoning does not advance any public policy argument as to why waiver by prelitigation conduct should be for the court to decide.

¹⁶³ *Id.* at 394 n.1.

¹⁶⁴ *Id.* at 393.

¹⁶⁵ *Id.* at 393–94 (quoting *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 219 (3d Cir. 2007)) (italics omitted).

¹⁶⁶ *Id.* at 394 (quoting *Ehleiter*, 482 F.3d at 219) (italics omitted).

C. *Chronimed's Reliance on Marie Is Misplaced*

The *Marie* Court made clear that the question before it pertained only to waiver by litigation conduct.¹⁶⁷ The court stated, “[w]e do not here discuss the proper presumptive division of labor as between courts and arbitrators for non-litigation-related waiver claims or for other doctrines that are sometimes (erroneously) referred to as waiver, such as laches.”¹⁶⁸ The *Marie* Court’s entire argument was specifically structured around the fact that the conduct it was addressing was “litigation” conduct.¹⁶⁹ The litigation aspect of the conduct in *Marie* provided the entire basis for the court to justify why the question of waiver by litigation conduct should be for the court to decide. *Chronimed* failed to recognize the difference between litigation conduct and prelitigation conduct, and therefore, the court incorrectly used the reasoning in *Marie* to validate its decision on prelitigation waiver.

Additionally, the *Chronimed* Court misapplied the three policy reasons provided by the *Marie* Court in support of giving the question of waiver by litigation conduct to the court to prelitigation conduct. The first two policy reasons proffered by *Marie* relate to forum shopping and a court’s inherent right to protect itself from such abuses, as well as the court’s own expertise in identifying abuses of the court system.¹⁷⁰ First, *Marie* acknowledged a court’s power and right to control its own docket and to prevent abuse in its proceedings, such as forum shopping. Prelitigation conduct, such as the July 6 response letter, however, is conduct that takes place before litigation and

¹⁶⁷ The *Marie* Court does not refer to the conduct before them as “prelitigation” conduct, as suggested in note 1 of *Chronimed*. *Id.* at 394 n.1; see *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 14 (1st Cir. 2005). *Chronimed* attempts to label it as prelitigation conduct because the conduct in *Marie* was not litigation conduct before the *Marie* court, but was litigation conduct before the EEOC. However, it is still litigation conduct regardless of whether it was in front of its own court or another.

¹⁶⁸ *Marie*, 402 F.3d at 14 n.9.

¹⁶⁹ *Id.* at 14. When the *Marie* court discussed the meaning of “default” under section 3 of the FAA as incorporating waiver, it noted that one of the cases it derived this from actually held that “only waiver *due to the pursuit of legal remedy* inconsistent with arbitration is a ‘default’ under 9 U.S.C. § 3.” *Id.* at 13 (citing *County of Middlesex v. Gevyn Constr. Corp.*, 450 F.2d 53 (1st Cir. 1971)) (emphasis added).

¹⁷⁰ See *supra* notes 120–127 and accompanying text.

is outside the realm of a court room. Therefore, this reasoning cannot be used to support giving the question of waiver by prelitigation conduct to the court.

Secondly, *Marie* compared the expertise of the courts and arbitrators, finding that “[j]udges are well-trained to recognize abusive forum shopping.”¹⁷¹ Prelitigation conduct, however, does not involve abusive forum shopping, and therefore, cannot be used to support taking the question of waiver by prelitigation conduct from the arbitrator. When dealing with waiver by prelitigation conduct, however, the issue does not call upon the court’s expertise nor does it involve the court’s inherent right of protection from abuse because the conduct at issue takes place outside of the courtroom and litigation process. Therefore, when the question refers to waiver by prelitigation conduct, the court has no advantage over an arbitrator in answering this particular waiver question.

Thirdly, *Marie* found that it was inefficient for a court to send a question of waiver to an arbitrator. “A waiver defense is raised by one party to a lawsuit in response to another party’s motion to compel arbitration or stay judicial proceedings”¹⁷² Agreeing with *Marie*, the *Chronimed* Court found that it would be inefficient to send a question, which is presently in front of the court, to the arbitrator “because just deciding that a party waived arbitration fails to advance the substance of the case—it just gets referred back to the court.”¹⁷³ Moreover, the *Chronimed* Court found that deciding the question of waiver by prelitigation conduct “‘will help better to secure a fair and expeditious resolution of the underlying controversy[,]’” as quoted in *Howsam*.¹⁷⁴

The *Chronimed* Court failed, however, to see that the efficiency argument was specific to litigation conduct. The *Marie* Court wanted courts to decide the question of waiver by litigation conduct because of the expertise of the judges in dealing with conduct pertaining to litigation and the court system. In fact, the quote in *Howsam* regarding “fair and expeditious resolution” is not so much an argument about what is more efficient, but is

¹⁷¹ *Marie*, 402 F.3d at 13.

¹⁷² *Id.*

¹⁷³ *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 394 (6th Cir. 2008).

¹⁷⁴ *Id.* at 392 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002)).

discussed in the context of matching the decision maker with comparative expertise.¹⁷⁵ Thus, while courts have expertise in dealing with forum shopping and other abuses of the court, these issues are not implicated in prelitigation conduct. If deciding whether an arbitrator or court should hear the issue were solely about efficiency and minimizing the different forums an arbitration issue had to travel between, then *Howsam* would simply have left all such questions of default to the court. Instead, the *Howsam* Court explained that some questions were better suited for the arbitrator—even if there existed the chance it would be sent back to the court.

Moreover, efficiency can be advanced when dealing with questions of waiver by prelitigation conduct by giving such questions to the arbitrator. As noted in *Moses*, the FAA requires that “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.”¹⁷⁶ Specifically, *Moses* held that the FAA “establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”¹⁷⁷ While *Ehleiter* correctly noted that *Moses* did not specifically say that waiver should be decided by an arbitrator, it is clear from *Moses* that the FAA strongly emphasizes efficiency in handling disputes related to arbitration and, in light of such policy, establishes that issues of waiver should be resolved in favor of arbitration.¹⁷⁸ Thus, under FAA policy, prelitigation conduct is certainly less likely to waive arbitration, and therefore, efficiency dictates that such an issue be sent to the arbitrator to decide—rather than to the court, where, after all, a ruling against waiver would only route the case to the arbitrators to begin arbitration proceedings. Therefore, with the scale tipping in support of promoting arbitration and without other types of expertise considerations, it would be more efficient and more consistent with party expectations to have questions of waiver by prelitigation conduct answered by the arbitrator.

¹⁷⁵ *Howsam*, 537 U.S. at 85.

¹⁷⁶ *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983).

¹⁷⁷ *Id.* at 24–25.

¹⁷⁸ See *supra* notes 45–50 and accompanying text.

Although the First Circuit in *Marie* laid out three strong policy reasons—abuses of court proceedings, comparative expertise, and speedy resolution of disputes¹⁷⁹—as to why the question of waiver by litigation conduct should be for a court to decide, these policy reasons do not support the same conclusion when applied to the question of waiver by prelitigation conduct. The first two policy reasons, given by the *Marie* Court, simply do not apply to prelitigation conduct at all because they are specifically geared to litigation conduct. The last policy reason, which focuses on efficiency, is broad enough to apply not only to waiver by litigation conduct, but also to waiver by prelitigation conduct; however, the efficiency argument has the opposite result in the waiver by prelitigation conduct context. The most efficient means by which to handle a dispute involving waiver by prelitigation conduct is for the arbitrator to decide the issue.

D. Turning to Public Policy for Guidance

In light of the public policy favoring efficiency and resolution in conformity with party expectations, courts should decide questions of waiver by litigation conduct, whereas arbitrators should decide questions of waiver by prelitigation conduct. In situations involving waiver by litigation conduct, it is more efficient for a court to handle such issues because such conduct occurs within the courtroom and under the watchful eye of the court. Moreover, party expectations are more likely to be honored when courts address waiver by litigation conduct because the court is in the best position to understand such conduct and realize abuses of its own system.

In contrast, the concerns of efficiency and party expectations favor arbitrators deciding questions of waiver by prelitigation conduct. Unlike litigation conduct, prelitigation conduct occurs outside the courtroom and thus is not the type of conduct that a court already has an invested stake in or an inherent expertise in handling. Additionally, prelitigation conduct often functions as a means of delay and is insufficient to constitute waiver. Thus, it would be more efficient to direct such issues to arbitrators in the first instance, rather than wasting time, money, and effort volleying the issue between the court system and arbitration. Moreover, since parties who agree to an arbitration provision and

¹⁷⁹ See *supra* notes 120–28 and accompanying text.

never enter the court system would most likely expect such issues to be resolved by arbitration, it is more in keeping with party expectations to allow the arbitrator to decide issues of waiver by prelitigation conduct.

CONCLUSION

The history of arbitration—including pivotal moments such as the FAA, *Moses*, the RUAA, and the *Howsam* decision—illustrates that the overall arch in the relationship between courts and the arbitration process continues to bend towards support for arbitration. Courts, however, as evidenced by the circuit court split, are still struggling to construe their own roles in the arbitration process. While *Howsam* helped define more succinctly the roles of courts when certain questions of arbitration are at stake and established the substantive and procedural categories in which these questions fall, waiver exists in a grey area because it has both substantive and procedural elements.

The Supreme Court will eventually be needed to resolve the existing circuit court split. Until that time comes, however, the circuit courts should look to public policy and hold that for efficiency reasons the question of waiver by prelitigation conduct best belongs with the arbitrator. Thus, as the First, Third, and Fifth Circuits held, while waiver by litigation conduct is a question for the court, prelitigation conduct—despite the Sixth Circuit's ruling in *Chronimed*—is different from litigation conduct and, for efficiency reasons, is a question best left to the arbitrator.

