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Zachary Kerner
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ZACHARY KERNER

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ABOUT THE AUTHOR: Zachary Kerner will receive his J.D. from New York Law School in May of 2009.

"Heads I win, tails you lose" is not a game employers should be able to play in court. Yet this is essentially what happens when courts permit employers, and defendants in general, the opportunity to participate in litigation and *then* compel arbitration.[1] Not only does a court's acquiescence in such situations discourage diligence and reward indecision, it also ignores the inherent unfairness in giving employers, but not employees, the choice between winning in court and bringing the claim to arbitration—where they are likely to win anyway.[2] It is quite literally a win-win situation for the party moving to compel arbitration ("moving party"), generally the defendant. On the other hand, the party opposing arbitration ("opposing party"), generally the plaintiff, bears the risk of losing in court (thus terminating permanently a cause of action) or, after spending time and money, of being compelled to arbitrate.

In *Jung v. Skadden, Arps, Slate, Meagher & Flom* ("Skadden"), Judge Mukasey of the United States District Court for the Southern District of New York decided whether to grant Skadden's motion to compel arbitration after denying its Rule 12(b)(6) motion to dismiss.[3] Jonathan Jung, the plaintiff and former Skadden employee, objected on the grounds that Skadden had waived its right to enforce the arbitration agreement by filing and awaiting the disposition of its motion to dismiss.[4] The district court disagreed, concluding that Jung had not been sufficiently harmed so as to strip Skadden of its right to compel arbitration.[5] This case comment contends that the waiver test used in *Jung*, and currently followed by the Second Circuit Court of Appeals, effectively gives the moving party a free pass to test the judicial waters with affirmative defenses and motions to dismiss by improperly focusing on the prejudice to the opposing party, rather than on the behavior and intent of the moving party.

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1. In most instances discussed in this case comment, arbitration agreements are mandated as a condition of employment.

2. *See generally* Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 Ohio St. J. on Disp. Resol. 759 (2001) (emphasizing the distinction between "traditional" arbitration, as between merchants, for example, and "modern" arbitration, as between an employer and an employee, for example). "Traditional" arbitration takes place between parties with equal bargaining power that belong to "specialized, self-regulating communities." *Id.* at 760. By contrast, "modern" arbitration is between "repeat players" and "one-shot players." *Id.* Repeat employers win in arbitration over one-shot employees almost 85% of the time. *Id.* at 784 (citing Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 McGeorge L. Rev. 223, 240 (1998)).

   Since the Supreme Court's decision in *Gilmer v. Interstate-Johnson*, 500 U.S. 20 (1991), which held "that an employee could prospectively agree to arbitrate statutory claims," courts have consistently enforced agreements to arbitrate various anti-discrimination statutes, especially Title VII claims. Cole, *supra*, at 765; *see also* Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 Hofstra L. Rev. 83, 100 n.87 (1996) (noting that after *Gilmer* more employers began conditioning employment on agreements to arbitrate).

3. 434 F. Supp. 2d 211 (S.D.N.Y. 2006). In November 2007, former Judge Mukasey replaced Alberto Gonzalez as United States Attorney General. Carl Huse, *Mukasey Wins Vote in Senate, Despite Doubts*, N.Y. Times, Nov. 9, 2007, at A1.

4. *Jung*, 434 F. Supp. 2d at 216; *see also* Fed. R. Civ. P. 12(b)(6).

5. *Jung*, 434 F. Supp. 2d at 216.

Jung began working in Skadden's New York office as a Tax Coordinator in September 1998.[6] As a condition of employment, Jung signed an arbitration agreement ("the Agreement") and agreed to submit all claims to mutually binding arbitration.[7] Jung alleged that, beginning in October 2002, he was subjected to discrimination on the basis of his race and national origin.[8] Jung further alleged that on June 7, 2004, he was discharged in retaliation for complaints he made regarding the discriminatory treatment.[9] Jung filed a formal complaint with the Equal Employment Opportunity Commission ("EEOC"), to which Skadden filed a statement in opposition.[10]

On April 29, 2005, after obtaining a right to sue letter from the EEOC,[11] Jung brought a claim against Skadden in the Southern District of New York.[12] On or about May 16, 2005, Jung agreed to allow Skadden more time to respond to his complaint.[13] On June 10, 2005, the day of the deadline, Skadden moved to dismiss the Title VII and New York City Human Rights claims pursuant to Rule 12(b)(6).[14] In a footnote in a memorandum in support of its motion, Skadden stated that it was not waiving any claims or defenses, including the right to compel arbitration.[15] On October 20, 2005, Judge Mukasey denied Skadden's motion to dismiss and granted Jung leave to file an amended complaint.[16] After the motion was denied, Skadden faxed Jung a copy of the Agreement along with a letter requesting that Jung submit

6. *Id*. at 213.

7. *Id*. The Agreement stated:

> The Firm [Skadden] and I [Jung] mutually consent to the resolution by final and binding arbitration of all claims or controversies, whether or not arising out of my employment (or its termination), that the Firm may have against me or that I may have against the Firm or its partners, employees or agents in their capacity as such, including, but not limited to, . . . claims of discrimination . . . and claims alleging a violation of any federal, state or other governmental law, statute, regulation or ordinance . . . .

Id. (citation omitted).

8. *Id*. at 214. Jung is an Asian-American of Korean descent. *Id*. at 213.

9. *Id*. at 214.

10. *Id*.

11. The EEOC issues a right to sue letter when all administrative procedures have been exhausted and the parties have still not settled the dispute, after which time the aggrieved party has ninety days to bring a civil action. *See* 42 U.S.C. § 2000e-5(f)(1) (2000).

12. *Jung*, 434 F. Supp. 2d at 214. Jung's complaint alleged violations of Title VII of the Civil Rights Act of 1964, as amended, the New York State Human Rights Law, and the New York City Human Rights Law. *Id*. at 213.

13. *Id*. at 214. The parties did not dispute the validity of the Agreement or that Jung's claims were included within its scope. *Id*. at 215. Nevertheless, Skadden did not raise the issue of arbitration at this point. *Id*. at 214.

14. *Id*.

15. *Id*.

16. *Id*. Judge Mukasey granted Jung leave to amend in order to correct an inconsistency between his initial complaint and his answer to Skadden's motion. *Id*. at 216.

his claims to arbitration.[17] Jung rejected this request and Skadden subsequently moved to compel arbitration and stay litigation.[18]

Jung argued that he should not be compelled to arbitrate his claims because Skadden waived its right to arbitrate by not invoking the Agreement until after the district court ruled against its Rule 12(b)(6) motion, almost seven months later.[19] Jung argued that Skadden's conduct caused him substantive prejudice as well as prejudice due to excessive cost and time delay.[20] Additionally, Jung argued that compelling arbitration at this point would encourage "impermissible forum shopping."[21]

The court rejected each of Jung's arguments.[22] First, the court found that Jung did not suffer substantive prejudice because Skadden did not lose its motion to dismiss on the merits, notwithstanding the fact that Rule 12(b)(6) motions go to the merits of a case for res judicata purposes.[23] Moreover, Skadden did not gain a "tactical advantage" in the same way as if, for instance, it had conducted discovery and learned sensitive information otherwise not attainable.[24] Second, the court held that a six-and-a-half month delay from the start of litigation before moving to compel arbitration and the expenses incurred thereby did not constitute "sufficient" prejudice to warrant a waiver of arbitration.[25] Finally, the court dismissed Jung's forum and law shopping argument after reviewing the holding of a Second Circuit case involving a similar argument.[26]

The trial court correctly followed binding precedent from the Second Circuit; however, the reasoning behind this precedent is flawed. Although the courts pay lip

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17. *Id.* at 214

18. *Id.*

19. *Id.* at 216. Jung filed suit on April 29, 2005, and Skadden's motion to dismiss was denied on October 20, 2005. *Id.* at 214.

20. *Id.* at 216–18. "The Second Circuit 'has recognized two types of prejudice: substantive prejudice and prejudice due to excessive cost and time delay.'" *Id.* at 215 (quoting Thyssen, Inc. v. Calypso Shipping Corp., 310 F.3d 102, 105 (2d Cir. 2002)).

21. *Id.* at 216.

22. *Id.* at 216–19. In the Second Circuit, the moving party waives its right to arbitration if it "engages in protracted litigation that results in prejudice to the opposing party." *Id.* at 215 (quoting S & R Co. of Kingston v. Latona Trucking, Inc., 159 F.3d 80, 83 (2d Cir. 1998)). The issue should turn on the facts, and courts generally consider three factors: (1) the length of the delay before arbitration was sought, (2) the extent to which a party avails itself of litigation, and (3) prejudice to the other party. *Jung*, 434 F. Supp. 2d at 215 (quoting *Thyssen*, 310 F.3d at 105).

23. *Id.* at 216 n.4 (citing Teltronics Servs., Inc. v. L.M. Ericsson Telecomm., Inc., 642 F.2d 31, 34 (2d Cir. 1981)).

24. *Id.* at 216–17.

25. *Id.* at 217.

26. *Id.* at 219 (following Sweater Bee by Banff, Ltd. v. Manhattan Industries, Inc., 754 F.2d 457 (2d Cir. 1985)) ("The [*Sweater Bee*] Court stated that even if this forum shopping deprives a plaintiff of 'notice of the defendant's arbitration intentions,' this deprivation is 'not exactly what can be called severe prejudice . . . .'" (quoting *Sweater Bee*, 754 F.2d at 464)).

service to the flexibility of the waiver test, when deciding whether a moving party has waived its right to arbitrate, the courts focus narrowly on prejudice to the opposing party—whether substantive or due to unnecessary delay and expenses.[27] Indeed, from a purely legal (i.e., substantive) standpoint, Jung was no worse off proceeding to arbitration than he would have been had Skadden moved for arbitration immediately after being served with the complaint.[28] However, the Second Circuit's current restatement of the waiver rule is problematic for several reasons. First, the emphasis on prejudice to the opposing party is a vast departure from prior precedent, yet courts have not recognized this jurisprudential shift.[29] To the extent that a court has provided legal support for making prejudice the touchstone of a waiver analysis, its reasoning is not persuasive.[30] Second, the outcome in *Jung* is emblematic of the perverse incentive this rule creates: defendants are encouraged to adopt a wait-and-see strategy while expending judicial time and resources.[31]

The Second Circuit's waiver rule has not always focused so strictly on the prejudice to the opposing party. Early Second Circuit cases applied what this comment terms the "behavior/intent" inquiry. As its name suggests, this approach to a waiver analysis revolved around whether the moving party behaved in a manner inconsistent with the right to arbitrate, such that it manifested an intent to remain in court.[32] That which constituted inconsistent behavior was left for the courts to decide based upon the circumstances of the particular case.[33] For example, in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, the moving party, Devonshire, waited nine months to formally request a stay of litigation, during which time settlements were

27. *Id.* at 215 ("Notwithstanding the complex of factors that a court may consider in determining waiver, '[t]he key to a waiver analysis is prejudice.'" (quoting *Thyssen*, 310 F.3d at 105)). *But see id.* at 215 n.3 (questioning how prejudice can be both "one of a number of factors" and the "*sine qua non*" in a waiver analysis, and then concluding that the latter is the better test: the "other factors . . . affect[] the singular issue of prejudice" (quoting Allied Sanitation, Inc. v. Waste Mgmt. Holdings, Inc., 97 F. Supp. 2d 320, 328 n.7 (E.D.N.Y. 2000))).

28. *Id.* at 217 (suggesting that, to the contrary, the motion to dismiss "alerted Jung to glaring deficiencies in his complaint").

29. *See* discussion *infra* pp. 183–86. *Compare* Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 412 (2d Cir. 1959), *with* Rush v. Oppenheimer, 779 F.2d 885, 887 (2d Cir. 1985).

30. *See* discussion *infra* pp. 185–87.

31. *See* Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 390 (7th Cir. 1995) (denying defendant's motion to compel arbitration due to waiver because the only reason for arbitration at such a late stage was defendant's belief that it would be better off in arbitration than in court); *see* discussion *infra* pp. 188–89.

32. *Robert Lawrence*, 271 F.2d at 412; *see also* Nortuna Shipping Co. v. Isbrandtsen Co., 231 F.2d 528, 529 (2d Cir. 1956) (holding that "invoking or actively assenting to the jurisdiction of a court, being manifestly inconsistent with an assertion of the right to arbitrate the same dispute, constitutes a waiver"); Tsakalotos Navigation Corp. v. Sonaco, Sociedad Internacional de Comercio S.A., 259 F. Supp. 210, 213 (S.D.N.Y. 1966) (concluding there was no waiver where the petitioner had "not acted inconsistently with its right to arbitrate").

33. *See*, *e.g.*, *Sonaco*, 259 F. Supp. at 213 (citation omitted) (rejecting the notion that answering a complaint on the merits is *per se* inconsistent with the right to arbitrate, in favor of looking to the totality of the circumstances).

negotiated and sensitive information was exchanged. However, because Devonshire had demanded arbitration in its initial answer to the complaint, just over one month after it was filed, the opposing party "was apprised of Devonshire's intention to arbitrate."[34] Therefore, the court did not find a waiver.

In addition to deciding waiver on a case-by-case basis, these earlier Second Circuit decisions were guided in their inquiry by contract principles, both in law and equity, as well as by practical considerations.[35] This sentiment was conveyed by Judge Patterson in the early case, *The Belize v. Steamship Owners Operating Co, Inc.*:

> When a party who has agreed to arbitrate any controversy that may arise prefers to take a controversy to the court in the ordinary way, *there comes a time in the course of the litigation when it would be unfair to permit one side to resort to arbitration over the protest of the other.* That time is reached when the defendant files an answer on the merits, joining with the plaintiff in rejecting arbitration and tendering the controversy to the court for trial.[36]

Although subsequent courts have rejected the application of a *per se* rule to the waiver of a right to arbitrate,[37] Judge Patterson's premise is sound: once the matter is before a court, at some point it becomes unfair for one party to force the other to change the forum. As Judge Learned Hand echoed, equitable considerations "prevent a party from playing fast and loose with his adversary."[38] The later the court declares this "time in the course of litigation" to be, the more uncertainty will swirl around the parties' acts and the more judicial resources will be used.

The Second Circuit has inexplicably abandoned the "behavior/intent" inquiry in favor of, what this comment terms, a "demonstrable prejudice" standard.[39] Under this approach, the outcome of the case is oftentimes inconsistent with the twin pillars of fairness and efficiency.[40] Untethered to any justification or stated purpose, the standard for proving prejudice has become so high that courts invariably downplay all but the most egregious effects of a defendant's dilatory conduct.[41] In direct

34. *Devonshire*, 271 F.2d at 412–13.

35. *See* Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 987 n.30 (2d Cir. 1942) (noting in a footnote that the U.S. Arbitration Act does not ask courts to preclude the equitable considerations of contract when deciding whether to stay litigation); Krauss Bros. Lumber v. Louis Bossert & Sons, 62 F.2d 1004, 1006 (2d Cir. 1933) (Hand, J.) (holding that the question of whether a party has forfeited its remedy to enforce an arbitration agreement is one of contract only).

36. 25 F. Supp. 663, 664 (S.D.N.Y. 1938) (Patterson, J.) (emphasis added).

37. *See Sonaco*, 259 F. Supp. at 213.

38. *Krauss*, 62 F.2d at 1007.

39. *See* Rush v. Oppenheimer, 779 F.2d 885, 887 (2d Cir. 1985) ("[W]aiver of the right to compel arbitration due to participation in litigation may be found only when prejudice to the other party is demonstrated.").

40. Ironically, these goals are even more compelling today, as there are more "one-time" employees in arbitration agreements with "repeat" employers, whereas half a century ago arbitration was generally between parties with equal bargaining power. Cole, *supra* note 2, at 760.

41. The case law is filled with examples of courts disregarding the unnecessary delay and expense incurred by the opposing party before concluding that the opposing party did not sufficiently demonstrate

contradiction to the "behavior/intent" inquiry, the current emphasis on prejudice has signaled to lower courts that a defendant's behavior and intent are completely irrelevant.[42]

The origins of the "demonstrable prejudice" standard can be traced back to *Rush v. Oppenheimer & Co.*[43] Many of the leading Second Circuit opinions dealing with waiver have cited *Rush* for the proposition that the moving party must demonstrate sufficient prejudice in order to avoid compulsory arbitration.[44] The *Rush* court reached its conclusion in large part based upon the holding of a then-recent Supreme Court decision, *Dean Witter Reynolds, Inc. v. Byrd*.[45] The application of the *Byrd* holding to the *Rush* decision was misguided, however, for the issue confronted by the *Rush* court was markedly different from that in *Byrd*.

In *Byrd*, the Court had to decide whether a district court may refuse to compel arbitration when an arbitration agreement exists but the dispute includes both non-arbitrable and arbitrable claims. In such cases, consolidating the claims in federal court would better serve judicial economy.[46] However, in a unanimous opinion written by Justice Marshall, the Court answered in the negative, holding that the Federal Arbitration Act mandates that district courts enforce the parties' bargain to arbitrate "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums."[47] Rejecting the plaintiff's argument that the "overriding goal of the Arbitration Act was to promote the expeditious resolution

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prejudice. *E.g.*, *Thyssen*, 310 F.3d at 105–06 (finding no prejudice despite almost two year delay and raising of defenses in an answer); *Sweater Bee*, 754 F.2d at 459–60 (finding no prejudice even though defendant "vigorously litigated" for over two years before invoking arbitration, including filing a 12(b)(6) motion to dismiss the complaint for failure to state a claim for relief, for failure to satisfy the pleading requirements of the Federal Rules of Civil Procedure, for lack of standing, and because the claims were barred by res judicata); *Rush*, 779 F.2d at 887 (finding no waiver despite eight month delay, which included "extensive discovery, bringing a motion to dismiss[,] posing thirteen affirmative defenses[,]" and only raising arbitration after receiving an adverse decision from the trial court); Hubei Provincial Garments Imp. & Exp. (Group) Corp. v. Rugged Active Wear, Inc., No. 97 Civ. 7564, 1998 U.S. Dist. LEXIS 12304, at *7 (S.D.N.Y. Aug. 7, 1998) (finding no prejudice even though defendants waited until "the eleventh hour" to file motion to compel arbitration; plaintiff turned over more than 1,000 documents and responded to defendant's interrogatories; and, according to the plaintiff, defendants obtained a "roadmap" to plaintiff's case).

42. *See*, *e.g.*, *Hubei*, 1998 U.S. Dist. LEXIS 12304, at *11 (finding that by waiting until the last minute to file the motion to compel arbitration, "[d]efendants' conduct indicated an intent to litigate that was inconsistent with the right to compel arbitration"). Nevertheless, the court concluded there was no waiver, because it does not "matter how badly [d]efendants conducted themselves" so long as the plaintiff does not demonstrate "[s]ufficient prejudice." *Id.* at *11–12.

43. 779 F.2d 885, 887 (2d Cir. 1985).

44. *See Thyssen*, 310 F.3d at 105; PPG Indus. v. Webster Auto Parts, 128 F.3d 103, 108 (2d Cir. 1997); Leadertex, Inc. v. Morganton Dyeing & Finishing Corp., 67 F.3d 20, 26 (2d Cir. 1995); Doctor's Assoc. v. Distajo, 66 F.3d 438, 456 (2d Cir. 1995); Kramer v. Hammond, 943 F.2d 176, 179 (2d Cir. 1991); Com-Tech Assoc. v. Computer Assoc. Int'l, Inc., 938 F.2d 1574, 1576 (2d Cir. 1991).

45. 470 U.S. 213 (1985).

46. *Id.* at 217.

47. *Id.*

of claims," the *Byrd* Court reasoned that "[t]he legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate."[48] In deciding whether the primary goal of arbitration was the expeditious resolution of claims or the enforcement of private agreements, the *Byrd* Court was arguably concerned that an outright endorsement of the expeditious resolution rationale could open the door for arguments to compel arbitration even where arbitration was not part of the parties' original agreement.[49]

Rush, however, was not an example of a plaintiff seeking to avoid his agreement to arbitrate an otherwise arbitrable claim on the grounds that it would promote efficiency and judicial economy. Quite differently, the plaintiff in *Rush* objected to the defendants' motion to arbitrate because of the defendants' involvement in the litigation over the course of eight months.[50] In rejecting the plaintiff's contention that he suffered prejudice, the court in *Rush* jumped to the conclusion that it is "beyond question" that the expenses incurred from the defendants' delay were insufficient to constitute waiver, because the Supreme Court "reject[ed] the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims."[51] The *Rush* court's conclusion, however, does not necessarily follow. The Supreme Court did not ignore the harm that results from inefficiency and delay, but rather emphasized that arbitration agreements should be placed "upon the same footing as other contracts," and, as with a contract, a party shall not be compelled to arbitrate a claim to which it had not consented merely because it would be more efficient.[52] It follows then that just as a party to a contract may waive a condition of a contract's terms through its conduct without proof of detrimental reliance, so too should a party to an arbitration agreement waive the right to compel arbitration without proof of prejudice.[53]

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48. *Id.* at 219.

49. *See id.* at 219 (noting that "[t]he Act . . . does not mandate the arbitration of *all* claims, but merely the enforcement . . . of *privately negotiated arbitration agreements*") (emphasis added). The Court continued:

> [P]assage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this principal objective when construing the statute, or *allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation*.

Id. at 220 (internal citation omitted) (emphasis added); *see also* John Hancock Life Ins. Co. v. Wilson, 254 F.3d 48, 55 (2d Cir. 2001) (citing First Options v. Kaplan, 514 U.S. 938, 945 (1995) (reiterating the concerns expressed by the *Byrd* court: "[I]f the general presumption in favor of arbitration were applied to the question of arbitrability, it 'might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide'")).

50. *Rush*, 779 F.2d at 887 (noting that defendants' involvement included "extensive discovery, bringing a motion to dismiss, and posing thirteen affirmative defenses to the amended complaint, all without raising the right to arbitration").

51. *Id.* (quoting *Byrd*, 470 U.S. at 219).

52. *Byrd*, 470 U.S. at 219 (quoting H.R. Rep. No. 96-68, at i (1924)).

53. *See Cabinetree*, 50 F.3d at 390 (citing E. Allan Farnsworth, Contracts § 8.5 (2d ed. 1990); 3A Arthur Linton Corbin, Corbin on Contracts § 753 (1960)).

The *Rush* court emphasized that there is a "dominant federal policy favoring arbitration,"[54] but this policy does not mandate that courts "enforce the bargain" between the parties in every instance.[55] The court misinterpreted the cautious liberalization of arbitration in certain circumstances announced in *Byrd* as a green light to expand the use of arbitration overall. In fact, the *Rush* court went so far as to conclude that judicial economy is not a basis for waiving the right to compel arbitration.[56] The invocation of an ambiguous "federal preference" for arbitration is thus the only support for the "demonstrable prejudice" standard. This approach ignores the increasing inequality in bargaining power between opposing parties in arbitration, and is inconsistent with ordinary contract principles. Taken together, this is reason enough to reexamine the waiver rule. Yet there is another compelling reason to have reservations about the "demonstrable prejudice" standard. The explicit segregation of judicial economy from waiver (as advanced by the court in *Rush*) results in, not surprisingly, more unnecessary litigation.[57]

The shift from the "behavior/intent" inquiry to the "demonstrable prejudice" inquiry provides defendants more leeway when deciding to proceed with a complaint in federal court or to compel arbitration. This extra leeway is not necessarily a good thing. The longer a defendant waits to assert its right to arbitrate, the more expensive and time-consuming it becomes to settle the grievance, and the more misleading the defendant's intentions are to the plaintiff. Rather than sending a clear message that a speedy resolution of complaints is strongly preferred, the "demonstrable prejudice" approach used by the Second Circuit signals to future defendants the amount of unnecessary time and delay that courts allow before the opposing party is sufficiently prejudiced.[58] Confident that they can fall back on the arbitration agreement (which, in an employment relationship, will favor the employer[59]), defendants are essentially permitted to use the courts as not only practice for their arguments at arbitration, but also as a welcome opportunity to get the claim dismissed entirely.[60] If the motion is

54. *Rush*, 779 F.2d at 887.

55. *Byrd*, 470 U.S. at 217.

56. *Kramer*, 943 F.2d at 179 (citing *Rush*, 779 F.2d at 888).

57. Although compelling arbitration even after the time spent in court may resolve a dispute more quickly than remaining in court, discouraging the dilatory behavior in the first place would arguably increase net efficiency.

58. *See*, *e.g.*, Stefan B. Kalina, *The Road Not Taken: Avoiding Waiver of Arbitration Rights*, 15 METRO. CORP. COUNCIL 20, 20 (2007) (providing guidelines for when businesses are approaching "the point of no return" and waiver will be triggered).

59. *See* Cole, *supra* note 2 (noting the frequency with which "repeat" employers win over "one-shot" employees).

60. *See* Mem. of Law in Supp. of Pl's Opp'n to Defs.' Mot. to Compel Arbitration and Stay This Action at 9, Jung v. Skadden, Arps, Slate, Meagher & Flom, 434 F. Supp. 2d 211 (S.D.N.Y. 2006) (No. 05 Civ. 4286) ("Defendants must not be permitted to use the resources of federal court when it suits their purpose only to retreat to an arbitration haven when their motion practice on the merits falls short of its aim.").

granted, the case is over. If the motion is denied, the case goes to arbitration. In other words, "heads I win, tails you lose."[61]

The erstwhile "behavior/intention" approach did not produce such a paradoxical and unfair result when deciding whether arbitration had been waived. By responding to a complaint and filing a motion to dismiss, a party manifests its intention to resolve the dispute through the courts rather than arbitration.[62] There is no reason why defendants, and not plaintiffs, should get to have it both ways, especially considering that the purported advantages of arbitration are its speedy and efficient resolution of claims.[63]

The principles of the "behavior/intent" approach are exemplified in the rebuttable presumption rule adopted in *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*[64] In direct contradistinction from the *Rush* court, the Seventh Circuit framed its analysis of the waiver issue around the notion that the federal policy favoring arbitration is "merely a policy of treating such clauses no less hospitably than other contractual provisions," and that to establish a waiver "a party need not show that it would be prejudiced if the stay were granted and arbitration ensued."[65] In fact, the *Cabinetree* court's analysis included an express admission that compelling arbitration "would have [caused] no demonstrable prejudice" to the opposing party.[66] Yet, because the moving party waited seventeen months before moving to compel arbitration "for reasons unknown and with no shadow of justification . . . it manifested an intention to resolve the dispute through the process of the federal courts."[67] Accordingly, the court denied the motion to compel arbitration, 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."[68] Creating a rebuttable presumption ensures that the delay of the party seeking to compel arbitration was justified. This rule is consistent with treating arbitration agreements as contracts and encourages the party seeking arbitration to proceed with diligence in order to "economize on the resources, both public and private, consumed in dispute

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61. *Cabinetree*, 50 F.3d at 391.

62. *Id*. at 390.

63. Kramer v. Hammond, 943 F.2d 176, 180 (2d Cir. 1991) ("[T]he purpose of arbitration [is] that disputes be resolved with dispatch and with a minimum of expense.").

64. 50 F.3d 388 (7th Cir. 1995) (Posner, C.J.).

65. *Id.* at 390. The other two principles around which the court framed the issue were: "1. Review of finding that a party waived its contractual right to invoke arbitration is for clear error only; it is not plenary. 2. Such a waiver can be implied as well as express." *Id.*

66. *Id.* at 391.

67. *Id.* at 390–91.

68. *Id.* at 390. The underlying issue in *Cabinetree* was a breach of franchise agreement. Although the holding is directed at contractual disputes, the court gives no indication that the analysis would change if the underlying issue were a discrimination claim.

resolution."[69] Significantly, it does not allow a party to delay for no reason other than a desire "to weigh its options."[70]

If courts are genuinely concerned with promoting judicial economy and enforcing arbitration agreements (and there is no reason they should not be), then courts should adopt the rebuttable presumption rule established in *Cabinetree*, or a similar version of it. The waiver rule in the Second Circuit has drifted too far in favor of the moving party. In light of the congressional mandate that contract principles govern, as well as the increasing inequities involved in arbitration, it is surprising that a court would continue to recite the "demonstrable prejudice" standard without giving sufficient justification for it. It is hard to believe that Skadden had a good reason for waiting until its motion to dismiss was denied before seeking to compel arbitration. The least the court can do is ask it to provide one.

69. *Id.* at 391.

70. *Id.* In fact, the court stated:

> That is the worst possible reason for delay. It amounts to saying that [the defendant] wanted to see how the case was going in federal district court before deciding whether it would be better off there or in arbitration. *It wanted to play heads I win, tails you lose*.

Id. (emphasis added).