IN THE SUPREME COURT OF TEXAS

NO. 05-0882

PERRY HOMES, A JOINT VENTURE, HOME OWNERS MULTIPLE EQUITY, INC., AND WARRANTY UNDERWRITERS INSURANCE COMPANY, PETITIONERS,

v.

ROBERT E. CULL AND S. JANE CULL, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

Argued March 20, 2007

JUSTICE BRISTER delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE O'NEILL, JUSTICE WAINWRIGHT, and JUSTICE MEDINA joined, and in which CHIEF JUSTICE JEFFERSON, JUSTICE GREEN, JUSTICE JOHNSON, and JUSTICE WILLETT joined as to parts I–V.

JUSTICE O'NEILL filed a concurring opinion.

JUSTICE JOHNSON filed an opinion concurring in part and dissenting in part, in which CHIEF JUSTICE JEFFERSON and JUSTICE GREEN joined.

JUSTICE WILLETT filed an opinion concurring in part and dissenting in part.

Since 1846, Texas law has provided that parties to a dispute may choose to arbitrate rather than litigate.[1] But that choice cannot be abused; a party cannot substantially invoke the litigation

[1] *See L. H. Lacy Co. v. City of Lubbock*, 559 S.W.2d 348, 351 (Tex. 1977).

process and then switch to arbitration on the eve of trial.[2] There is a strong presumption against waiver of arbitration,[3] but it is not irrebuttable and was plainly rebutted here. The Plaintiffs vigorously opposed (indeed spurned) arbitration in their pleadings and in open court; then they requested hundreds of items of merits-based information and conducted months of discovery under the rules of court; finally only four days before the trial setting they changed their minds and decided they would prefer to arbitrate after all. Having gotten what they wanted from the litigation process, they could not switch to arbitration at the last minute like this.

The Plaintiffs argue — and we agree — that sending them back to the trial court not only deprives them of a substantial award but also wastes the time and money spent in arbitration. But they knew of this risk when they requested arbitration at the last minute because all of the Defendants objected. Accordingly, we vacate the arbitration award and remand the case to the trial court for a prompt trial.

I. Background

In 1996, Robert and Jane Cull bought a house from Perry Homes for $233,730. They also bought a warranty from Home Owners Multiple Equity, Inc. and Warranty Underwriters Insurance Company. The warranty agreement included a broad arbitration clause providing that all disputes the Culls might have against Perry Homes or the warranty companies were subject to the Federal

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[2] *See Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 348 (5th Cir. 2004); *Com-Tech Assocs. v. Computer Assocs. Int'l, Inc.*, 938 F.2d 1574, 1576-77 (2d Cir. 1991); *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156, 1160 (5th Cir. 1986); *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 764 (Tex. 2006).

[3] *See, e.g.*, *In re Vesta*, 192 S.W.3d at 763; *In re Bruce Terminix Co.*, 988 S.W.2d 702, 704–05 (Tex. 1998); *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 89–90 (Tex. 1996).

Arbitration Act, and would be submitted to the American Arbitration Association (AAA) or another arbitrator agreed upon by the parties.[4]

Over the next several years, the home suffered serious structural and drainage problems. According to the Culls, the Defendants spent more effort shifting blame than repairing the home. When the Culls sued in October 2000, the warranty companies (but not Perry Homes) immediately requested arbitration; the Culls vigorously opposed it, and no one ever pressed for a ruling. At the same time, the Culls' attorneys began seeking extensive discovery from all of the Defendants.

After most of the discovery was completed and the case was set for trial, the Culls changed their minds about litigating. Instead they asked the trial court to compel arbitration under precisely the same clause and conditions to which they had originally objected. The trial judge expressed reservations, saying:

> I really have a problem with people who have competent counsel who wait 14 months and after all this much effort in the courthouse has taken place, to come in and say that they have not waived that arbitration. That arbitration clause was there when the lawsuit was filed.

Nevertheless, the trial court ordered arbitration because the Defendants had not shown any prejudice from litigation conduct:

> [A]ll I have heard from [defense counsel] insofar as what is the prejudice suffered by people you represent is that they have participated in litigation activities that may or

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[4] The warranty provided:

> Any "unresolved dispute" (defined below) that you may have with [Perry Homes or the warranty companies] shall be submitted to binding arbitration governed by the procedures of the Federal Arbitration Act, 9 U.S.C. 1 et seq. . . . The dispute will be submitted to the American Arbitration Association, or such other independent arbitration service as is agreeable to the [warranty administrator] and you . . . .

> may not have been required by the arbitrator. So without anything further, I am going to grant the motion to abate the case for arbitration.

The order was signed December 6, 2001, four days before the case was set for trial. The Defendants filed petitions for mandamus in the court of appeals and this Court, both of which were denied without opinion within a few days.[5]

After a year in arbitration, on December 24, 2002, the arbitrator awarded the Culls $800,000, including restitution of the purchase price of their home ($242,759), mental anguish ($200,000), exemplary damages ($200,000), and attorney's fees ($110,000). The Defendants moved to vacate the award, again arguing (among other things) that the case should never have been sent to arbitration after so much activity in court. The trial court overruled the objection, confirmed the award, and added post-judgment interest duplicating that already in the award; the court of appeals affirmed after deleting the duplicative interest.[6] We granted the Defendants' petition to consider whether the arbitration award should be set aside because the Culls waived their right to arbitration.

II. When Should Orders Compelling Arbitration Be Reviewed?

At the outset, the Culls assert it is too late to review the trial court's order referring this case to arbitration. First, they argue the pre-arbitration mandamus proceedings establish the law of the case and preclude the Defendants from raising the same arguments now. We recently rejected this argument, holding that as mandamus is a discretionary writ, "its denial, without comment on the

[5] Perry Homes sought mandamus in the court of appeals on April 11, 2002, and was denied 7 days later. It refiled in this Court on April 26, and was denied 13 days later.

[6] 173 S.W.3d 565, 568.

merits, cannot deprive another appellate court from considering the matter in a subsequent appeal."[7] Mandamus is only available when a final appeal would be inadequate;[8] if filing for mandamus precluded a final appeal, that requirement would be self-fulfilling. Because the earlier proceedings here were denied without comment on the merits, they do not foreclose our review.

Second, the Culls argue that an order compelling arbitration can only be reviewed *before* arbitration occurs. The Culls address none of the cases in which this Court and the United States Supreme Court have reviewed such orders *after* arbitration.[9] Nor do they address the general rule that parties waive nothing by foregoing interlocutory review and awaiting a final judgment to appeal.[10]

But most important, the Culls do not address section 16 of the Federal Arbitration Act, which expressly prohibits pre-arbitration appeals:

> Except as otherwise provided in section 1292(b) of title 28 [providing for certified questions to federal circuit courts], an appeal may not be taken from an interlocutory order . . . directing arbitration to proceed under section 4 of this title [providing for orders compelling arbitration] . . . .[11]

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[7] *Chambers v. O'Quinn*, 242 S.W.3d 30, 32 (Tex. 2007).

[8] *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004); *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992).

[9] *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89 (2000); *Chambers*, 242 S.W.3d at 31; *see also Gulf Oil Corp. v. Guidry*, 327 S.W.2d 406, 408 (Tex. 1959) (invalidating portion of award regarding nonarbitrable issues); *Fortune v. Killebrew*, 23 S.W. 976, 978 (Tex. 1893) (same).

[10] *Pope v. Stephenson*, 787 S.W.2d 953, 954 (Tex. 1990) ("The decision not to pursue the extraordinary remedy of mandamus does not prejudice or waive a party's right to complain on appeal."); *accord, City of San Benito v. Rio Grande Valley Gas Co.*, 109 S.W.3d 750, 756 (Tex. 2003); *Walker v. Packer*, 827 S.W.2d 833, 842 n.9 (Tex. 1992).

[11] *See* 9 U.S.C. § 16(b)(2); *see also* TEX. CIV. PRAC. & REM. CODE § 171.098 (providing for interlocutory appeal only of orders denying motion to compel arbitration).

This ban on interlocutory appeals of orders compelling arbitration was added by Congress in 1988 to prevent arbitration from bogging down in preliminary appeals.[12] We have held that routine mandamus review of such orders in state court would frustrate this federal law.[13]

The Culls assert that post-arbitration review is unavailable because an arbitration award can be vacated only for statutory grounds like corruption, fraud, or evident partiality.[14] But reviewing the trial court's initial referral to arbitration is not the same as reviewing the arbitrator's final award; as the United States Supreme Court has held, courts conduct ordinary review of the former and deferential review only of the latter.[15]

We agree that post-arbitration review of referral may create (as the Culls allege) a "huge waste of the parties' resources." But if review is available before arbitration, parties may also waste resources appealing every referral when a quick arbitration might settle the matter. Frequent pre-arbitration review would inevitably frustrate Congress's intent "to move the parties to an arbitrable

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[12] *See* David D. Siegel, *Appeals from Arbitrability Determinations*, Practice Commentary to 9 U.S.C. § 16 ("The mission of § 16 is to assure that if the district court does determine that arbitration is called for, the court system's interference with the arbitral process will terminate then and there, leaving the arbitration free to go forward. To accomplish this, § 16 provides in general that there may be no appeal from the pro-arbitration determination until after the arbitration has gone forward to a final award."); *see also* CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3914.17 (2d ed. 1992).

[13] *In re Palacios*, 221 S.W.3d 564, 565 (Tex. 2006). Courts may review an order compelling arbitration if the order also dismisses the underlying litigation so it is final rather than interlocutory. *See Green Tree Fin. Corp.-Ala.*, 531 U.S. at 87 n.2; *Childers v. Advanced Found. Repair, L.P.*, 193 S.W.3d 897, 898 (Tex. 2006). As we noted in *Palacios,* the Fifth Circuit has indicated it may review a district court's decision to stay rather than dismiss if a petitioner shows "clearly and indisputably that the district court did not have the discretion to stay the proceedings pending arbitration." *Id.* (citing *Apache Bohai Corp., LDC v. Texaco China, B.V.*, 330 F.3d 307, 310-11 (5th Cir. 2003)).

[14] *See* 9 U.S.C. § 10(a).

[15] *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 947–48 (1995). The Court noted that a different rule would apply if the parties clearly and unmistakably indicated in the arbitration contract that the arbitrator should decide arbitrability, *id.*, but there is no such indication in this contract.

dispute out of court and into arbitration as quickly and easily as possible."[16] We recognize the potential for waste, but that is a risk a party must take if it moves for arbitration after substantially invoking the litigation process.

III. Do Courts or Arbitrators Decide Waiver?

The Culls also assert that waiver of arbitration by litigation conduct is an issue to be decided by arbitrators rather than courts. To the contrary, this Court and the federal courts have held it is a question of law for the court.[17] Rather than referring such claims to arbitrators, we have decided them ourselves at least eight times,[18] as does every federal circuit court.[19]

The Culls argue this was all changed in 2002 by *Howsam v. Dean Witter Reynolds*, in which the United States Supreme Court said the "presumption is that the arbitrator should decide

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[16] Preston v. Ferrer, ___ U.S. ___, ___ (2008) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983)).

[17] *In re Serv. Corp. Int'l*, 85 S.W.3d 171, 174 (Tex. 2002); *In re Bruce Terminix Co.*, 988 S.W.2d 702, 703–04 (Tex. 1998); *accord*, *In re Citigroup, Inc.*, 376 F.3d 23, 26 (1st Cir. 2004); *Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, 310 F.3d 102, 104 (2d Cir. 2002); *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1316 n.18 (11th Cir. 2002); *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156, 1159 (5th Cir. 1986).

[18] *See In re Bank One, N.A.*, 216 S.W.3d 825, 827 (Tex. 2007) (finding no waiver under FAA); *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 783 (Tex. 2006) (same); *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 764 (Tex. 2006) (same); *In re Serv. Corp. Int'l*, 85 S.W.3d at 174 (same); *In re Bruce Terminix Co.*, 988 S.W.2d at 704–05 (same); *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 574 (Tex. 1999) (same); *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 89–90 (Tex. 1996) (same); *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 899 (Tex. 1995).

[19] *See, e.g.*, *Creative Solutions Group, Inc. v. Pentzer Corp.*, 252 F.3d 28, 32–34 (1st Cir. 2001); *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 456 (2d Cir. 1995); *Wood v. Prudential Ins. Co. of Am.*, 207 F.3d 674, 680 (3d Cir. 2000); *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 96 (4th Cir. 1996); *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 329 (5th Cir. 1999); *Germany v. River Terminal Ry. Co.*, 477 F.2d 546, 547 (6th Cir. 1973); *Ernst & Young LLP v. Baker O'Neal Holdings, Inc.*, 304 F.3d 753, 758 (7th Cir. 2002); *Ritzel Commc'ns v. Mid-American Cellular*, 989 F.2d 966, 969–71 (8th Cir. 1993); *Martin Marietta Aluminum, Inc. v. Gen. Elec. Co.*, 586 F.2d 143, 146 (9th Cir. 1978); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1489–90 (10th Cir. 1994); *Ivax Corp.*, 286 F.3d at 1316; *Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 777–78 (D.C. Cir. 1987).

'allegation[s] of waiver, delay, or a like defense to arbitrability.'"[20] For several reasons, we disagree that this single sentence changed the federal arbitration landscape.

First, "waiver" and "delay" are broad terms used in many different contexts. *Howsam* involved the National Association of Securities Dealers' six-year limitations period for arbitration claims, not waiver by litigation conduct; indeed, it does not appear the United States Supreme Court has ever addressed the latter kind of waiver. Although the federal courts do not defer to arbitrators when waiver is a question of litigation conduct, they consistently do so when waiver concerns limitations periods or waiver of particular claims or defenses.[21] As *Howsam* involved the latter rather than the former,[22] its reference to waiver must be read in that context.

Second, the *Howsam* court specifically stated that "parties to an arbitration contract would normally expect a forum-based decisionmaker to decide forum-specific procedural gateway matters."[23] Thus, the NASD's six-year limitations rule in that case was a gateway matter for the

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[20] 537 U.S. 79, 84 (2002) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

[21] *See, e.g.*, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447 (2003) (holding whether arbitration could proceed by class action was question for arbitrator); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964) (holding question whether steps of grievance procedure prerequisite to arbitration had been completed was for arbitrator); *Sleeper Farms v. Agway, Inc.*, 506 F.3d 98, 104 (1st Cir. 2007) (noting question whether breach of contract voided arbitration clause would normally be for arbitrator); *United Steelworkers of Am. v. Saint Gobain Ceramics & Plastics, Inc.*, 505 F.3d 417, 422 (6th Cir. 2007) (holding question of timely demand for arbitration was for arbitrator); *Ansari v. Qwest Commc'ns Corp.*, 414 F.3d 1214, 1220–21 (10th Cir. 2005) (holding question whether plaintiffs waived forum selection clause by filing suit elsewhere was for arbitrator); *Pro Tech Indus., Inc. v. URS Corp.*, 377 F.3d 868, 871–72 (8th Cir. 2004) (holding questions of timely demand and waiver by failing to initiate arbitration were for arbitrator); *Glass v. Kidder Peabody & Co.,* 114 F.3d 446, 457 (4th Cir. 1997) (holding question of timely demand for arbitration was for arbitrator); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 231–32 (3d Cir. 1997) (holding question of waiver of substantive state law rights was for arbitrator).

[22] *See Howsam*, 537 U.S. at 81–82.

[23] *Id.* at 86.

NASD arbitrator because "the NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it."[24] By contrast, when waiver turns on conduct in court, the court is obviously in a better position to decide whether it amounts to waiver.[25] "Contracting parties would expect the court to decide whether one party's conduct before the court waived the right to arbitrate."[26]

Third, as the *Howsam* Court itself stated, parties generally intend arbitrators to decide matters that "grow out of the dispute and bear on its final disposition," while they intend courts to decide gateway matters regarding "whether the parties have submitted a particular dispute to arbitration."[27] Waiver of a substantive claim or delay beyond a limitations deadline could affect final disposition, but waiver by litigation conduct affects only the gateway matter of where the case is tried.[28]

Finally, arbitrators generally must decide defenses that apply to the whole contract, while courts decide defenses relating solely to the arbitration clause.[29] Thus, for example, arbitrators must decide if an entire contract was fraudulently induced, while courts must decide if an arbitration

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[24] *Id*. at 85.

[25] *Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am.*, 97 F. App'x 462, 464 (5th Cir. 2004).

[26] *Id.*

[27] *Howsam,* 537 U.S. at 83–84 (internal quotations omitted); *see also Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451–52 (2003).

[28] *See Marie v. Allied Home Mortgage Corp*., 402 F.3d 1, 13 (1st Cir. 2005).

[29] *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) ("We reaffirm today that . . . a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.").

clause was.[30] As waiver by litigation conduct goes solely to the arbitration clause rather than the whole contract, consistency suggests it is an issue for the courts.

Every federal circuit court that has addressed this issue since *Howsam* has continued to hold that substantial invocation of the litigation process is a question for the court rather than the arbitrator — including the First,[31] Third,[32] Fifth,[33] and Eighth Circuits.[34] Legal commentators appear to agree.[35] So do we.

IV. When Is the Litigation Process Substantially Invoked?

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[30] *In re Merrill Lynch Trust Co. FSB*, 235 S.W.3d 185, 190 (Tex. 2007) (holding claim that contract was illusory went to contract as a whole and thus was for arbitrators); *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 756 (Tex. 2001) ("The de los Santoses assert the defenses of unconscionability, duress, fraudulent inducement, and revocation. We again note that these defenses must specifically relate to the Arbitration Addendum itself, not the contract as a whole, if they are to defeat arbitration."); *see also In re Kaplan Higher Educ. Corp.*, 235 S.W.3d 206, 210 (Tex. 2007) (holding claim of "unclean hands" that went to contract as a whole rather than arbitration clause was question for arbitrators).

[31] *In Re Tyco Int'l Ltd. Sec. Litig.*, 422 F.3d 41, 45–47 (1st Cir. 2005); *Marie*, 402 F.3d at 13–14; *In re Citigroup, Inc.*, 376 F.3d 23, 27–29 (1st Cir. 2004); *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 12-14 (1st Cir. 2003); *Restoration Pres. Masonry, Inc. v. Grove Eur. Ltd.*, 325 F.3d 54, 61–63 (1st Cir. 2003).

[32] *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 217–21 (3d Cir. 2007).

[33] *Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 344–47 (5th Cir. 2004); *Tristar Fin. Ins. Agency, Inc. v. Equicredit Corp. of Am.*, 97 F. App'x 462, 464 (5th Cir. 2004).

[34] *Lewallen v. Green Tree Servicing, L.L.C.*, 487 F.3d 1085, 1090–94 (8th Cir. 2007); *Kelly v. Golden*, 352 F.3d 344, 349–50 (8th Cir. 2003). The Eighth Circuit did refer to *Howsam* in one case as requiring waiver to be referred to arbitrators, but that case involved an allegation of waiver by previous arbitration, not litigation. *See Nat'l Am. Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462, 463–66 (8th Cir. 2003).

[35] *See* David LeFevre, Note, *Whose Finding is it Anyway?: The Division of Labor Between Courts and Arbitrators with Respect to Waiver*, 2006 J. DISP. RESOL. 305, 316–17 (2006); Stephen K. Huber, *The Arbitration Jurisprudence of the Fifth Circuit, Round II*, 37 TEX. TECH L. REV. 531, 542 (2005).

We have said on many occasions that a party waives an arbitration clause by substantially invoking the judicial process to the other party's detriment or prejudice.[36] Due to the strong presumption against waiver of arbitration, this hurdle is a high one.[37] To date, we have never found such a waiver, holding in a series of cases that parties did not waive arbitration by:

- filing suit;[38]
- moving to dismiss a claim for lack of standing;[39]
- moving to set aside a default judgment and requesting a new trial;[40]
- opposing a trial setting and seeking to move the litigation to federal court;[41]
- moving to strike an intervention and opposing discovery;[42]
- sending 18 interrogatories and 19 requests for production;[43]

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[36] *In re Bank One, N.A.*, 216 S.W.3d 825, 827 (Tex. 2007); *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 783 (Tex. 2006); *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 763 (Tex. 2006); *In re Serv. Corp. Int'l*, 85 S.W.3d 171, 174 (Tex. 2002); *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 574 (Tex. 1999); *In re Bruce Terminix Co.*, 988 S.W.2d 702, 704 (Tex. 1998); *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 89 (Tex. 1996); *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 898–99 (Tex. 1995).

[37] *In re Bank One, N.A.*, 216 S.W.3d at 827; *In re D. Wilson Constr. Co.*, 196 S.W.3d at 783; *In re Vesta Ins. Group, Inc.*, 192 S.W.3d at 763; *In re Serv. Corp. Int'l*, 85 S.W.3d at 174; *In re Bruce Terminix Co.*, 988 S.W.2d at 704; *EZ Pawn Corp.*, 934 S.W.2d at 89.

[38] *In re D. Wilson Constr. Co.*, 196 S.W.3d at 783.

[39] *In re Vesta Ins. Group, Inc.*, 192 S.W.3d at 764.

[40] *In re Bank One, N.A.*, 216 S.W.3d at 827.

[41] *In re Serv. Corp. Int'l*, 85 S.W.3d at 174–75.

[42] *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 898–99 (Tex. 1995).

[43] *In re Bruce Terminix Co.*, 988 S.W.2d at 704.

- requesting an initial round of discovery, noticing (but not taking) a single deposition, and agreeing to a trial resetting;[44] or
- seeking initial discovery, taking four depositions, and moving for dismissal based on standing.[45]

These cases well illustrate the kind of conduct that falls short. But because none amounted to a waiver, they are less instructive about what conduct suffices. We have stated that "allowing a party to conduct full discovery, file motions going to the merits, and seek arbitration only on the eve of trial" would be sufficient.[46] But what if (as in this case) only two out of these three are met? And how much is "full discovery"?

We begin by looking to the standards imposed by the federal courts. They decide questions of waiver by applying a totality-of-the-circumstances test on a case-by-case basis.[47] In doing so, they consider a wide variety of factors including:

- whether the movant was plaintiff (who chose to file in court) or defendant (who merely responded);[48]

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[44] *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 90 (Tex. 1996).

[45] *In re Vesta Ins. Group, Inc.*, 192 S.W.3d at 763 (holding requests for disclosure, four depositions, and request for production did not waive arbitration absent proof regarding extent of requests and whether they addressed merits or arbitrability).

[46] *Id.* at 764.

[47] *In re Tyco Int'l Ltd. Sec. Litig.*, 422 F.3d 41, 46 (1st Cir. 2005) ("[E]ach case is to be judged on its particular facts."); *Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 346 (5th Cir. 2004) ("Ultimately, however, the question of what constitutes a waiver of the right of arbitration depends on the facts of each case."); *accord*, *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1315 (11th Cir. 2002); *Grumhaus v. Comerica Sec., Inc.*, 223 F.3d 648, 650 (7th Cir. 2000); *Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987); *Tenneco Resins, Inc. v. Davy Int'l, AG*, 770 F.2d 416, 420 (5th Cir. 1985).

[48] *Grumhaus*, 223 F.3d at 650; *see also Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995).

- how long the movant delayed before seeking arbitration;[49]
- whether the movant knew of the arbitration clause all along;[50]
- how much pretrial activity related to the merits rather than arbitrability or jurisdiction;[51]
- how much time and expense has been incurred in litigation;[52]
- whether the movant sought or opposed arbitration earlier in the case;[53]
- whether the movant filed affirmative claims or dispositive motions;[54]
- what discovery would be unavailable in arbitration;[55]
- whether activity in court would be duplicated in arbitration;[56] and
- when the case was to be tried.[57]

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[49] *PAICO*, 383 F.3d at 346; *In re Citigroup, Inc.*, 376 F.3d 23, 26 (1st Cir. 2004); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1489 (10th Cir. 1994); *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 926 (3d Cir. 1992).

[50] *Brown v. Dillard's, Inc.*, 430 F.3d 1004, 1012 (9th Cir. 2005); *Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.*, 380 F.3d 200, 206 (4th Cir. 2004).

[51] *PAICO*, 383 F.3d at 346; *Kelly v. Golden*, 352 F.3d 344, 349 (8th Cir. 2003); *Hoxworth*, 980 F.2d at 926; *Gilmore v. Shearson/American Express Inc.*, 811 F.2d 108, 112 (2d Cir. 1987); *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1150–51 (5th Cir. 1985).

[52] *PAICO*, 383 F.3d at 346; *Patten Grading*, 380 F.3d at 205; *In re Citigroup*, 376 F.3d at 26; *Metz*, 39 F.3d at 1489; *Hoxworth*, 980 F.2d at 927.

[53] *Hoxworth*, 980 F.2d at 927; *Com-Tech Assocs. v. Computer Assocs. Int'l, Inc.*, 938 F.2d 1574, 1577 (2d Cir. 1991); *E.C. Ernst, Inc. v. Manhattan Constr. Co.*, 551 F.2d 1026, 1040–41 (5th Cir. 1977); *Blake Constr. Co. v. U.S. for Use and Benefit of Lichter*, 252 F.2d 658, 662 (5th Cir. 1958).

[54] *In re Citigroup*, 376 F.3d at 26; *Metz*, 39 F.3d at 1489.

[55] *In re Citigroup*, 376 F.3d at 26; *Kelly*, 352 F.3d at 349; *Metz*, 39 F.3d at 1489.

[56] *Kelly*, 352 F.3d at 349; *Metz*, 39 F.3d at 1489.

[57] *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 25 (2d Cir. 1995); *Peterson v. Shearson/American Express, Inc.*, 849 F.2d 464, 468 (10th Cir. 1988) (finding waiver as movant waited until five weeks before trial date to move to compel).

Of course, all these factors are rarely presented in a single case. Federal courts have found waiver based on a few, or even a single one.[58]

We agree waiver must be decided on a case-by-case basis, and that courts should look to the totality of the circumstances. Like the federal courts, this Court has considered factors such as:

- when the movant knew of the arbitration clause;[59]
- how much discovery has been conducted;[60]
- who initiated it;[61]
- whether it related to the merits rather than arbitrability or standing;[62]
- how much of it would be useful in arbitration;[63] and
- whether the movant sought judgment on the merits.[64]

Thus, we disagree with the court of appeals that waiver is ruled out in this case solely because the Culls "did not ask the court to make any judicial decisions on the merits of their case."[65] While

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[58] *See, e.g.*, *Restoration Preserv. Masonry, Inc. v. Grove Eur. Ltd.*, 325 F.3d 54, 62 (1st Cir. 2003) (finding three-year delay alone sufficient to establish waiver); *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc*., 50 F.3d 388, 391 (7th Cir. 1995) (finding removal to federal court alone sufficient to establish waiver).

[59] *See EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 88–89 (Tex. 1996) (finding no waiver as defendant did not discover existence of arbitration agreement for almost a year).

[60] *In re Vesta Ins. Group, Inc*., 192 S.W.3d 759, 763 (Tex. 2006).

[61] *Id*.

[62] *Id.*

[63] *Id*.; *In re Bruce Terminix Co.*, 988 S.W.2d 702, 704 (Tex. 1998).

[64] *In re Bruce Terminix Co.*, 988 S.W.2d at 704.

[65] 173 S.W.3d at 570.

this is surely a factor,[66] it is not the only one. Waiver involves substantial invocation of the judicial *process*, not just judgment on the merits.

We also disagree with the Defendants that different standards should apply to plaintiffs and defendants. As parties may begin arbitration without a court order, it is certainly relevant that a plaintiff chose to file suit instead. But Texas procedure also contemplates that parties may file suit in order to compel arbitration.[67] Thus, while the movant's status is a factor to consider, it does not alone justify a finding of waiver or change the basic nature of the totality-of-the-circumstances test.[68]

We recognize, as we have noted before, "the difficulty of uniformly applying a test based on nothing more than the totality of the circumstances."[69] But there appears to be no better test for "substantial invocation."[70] As the United States Supreme Court has said about minimum contacts, tests based on "reasonableness" are never susceptible to mechanical application — "few answers will be written in black and white[;] [t]he greys are dominant and even among them the shades are

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[66] *See In re Bruce Terminix Co.*, 988 S.W.2d at 704.

[67] *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 171.021(a) ("A court shall order the parties to arbitrate on application of a party showing: (1) an agreement to arbitrate; and (2) the opposing party's refusal to arbitrate.").

[68] *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 783 (Tex. 2006); *accord*, *United Computer Sys., Inc. v. AT&T Corp.*, 298 F.3d 756, 764 (9th Cir. 2002).

[69] *See R.R. St. & Co. v. Pilgrim Enters., Inc.*, 166 S.W.3d 232, 242–43 (Tex. 2005) (quotation marks omitted) (applying totality-of-the-circumstances test in determining whether party "otherwise arranged" to dispose of hazardous waste).

[70] *See Burton-Dixie Corp. v. Timothy McCarthy Constr. Co.*, 436 F.2d 405, 407–08 (5th Cir. 1971) ("There is no set rule, however, as to what constitutes a waiver or abandonment of the arbitration agreement. The question depends upon the facts of each case and usually must be determined by the trier of facts."); Joel E. Smith, Annotation, *Defendant's Participation in Action as Waiver of Right to Arbitration of Dispute Involved Therein*, 98 A.L.R. 3d 767, 771 (1980) ("In those cases involving the issue of whether the defendant's participation in an action constitutes a waiver of the right to arbitrate the dispute involved therein, no general rules are readily apparent for determining waiver other than the general adherence by the courts to the principle that waiver is to be determined from the particular facts and circumstances of each case . . . .").

innumerable."[71] How much litigation conduct will be "substantial" depends very much on the context; three or four depositions may be all the discovery needed in one case,[72] but purely preliminary in another.[73]

Moreover, this test is quite similar to one we have long recognized and recently applied to arbitration — estoppel. Estoppel is a defensive theory barring parties from asserting a claim or defense when their representations have induced "action or forbearance of a definite and substantial character" and "injustice can be avoided only by enforcement."[74] In arbitration cases, we have held a nonparty who enjoys substantial direct benefits from a contract may be estopped from denying an arbitration clause in the same contract.[75] By the same token, a party who enjoys substantial direct benefits by gaining an advantage in the pretrial litigation process should be barred from turning around and seeking arbitration with the spoils.

The answer to most questions regarding arbitration "flow inexorably from the fact that arbitration is simply a matter of contract between the parties."[76] Like any other contract right,

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[71] *Kulko v. Superior Court of Cal.*, 436 U.S. 84, 92 (1978) (quoting *Estin v. Estin*, 334 U.S. 541, 545 (1948)).

[72] *See, e.g.*, TEX. R. CIV. P. 190.2(c)(2) (limiting parties in Level 1 cases to six hours of depositions).

[73] *See, e.g.*, *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 763 (Tex. 2006) (holding four depositions did not waive arbitration as record did not show whether they were limited or extensive or whether they addressed merits or merely arbitrability).

[74] *Trammell Crow Co. No. 60 v. Harkinson*, 944 S.W.2d 631, 636 (Tex. 1997); *see English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983); "*Moore" Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 936–37 (Tex. 1972); *Wheeler v. White*, 398 S.W.2d 93, 96 (Tex. 1965); RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

[75] *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 133–35 (Tex. 2005); *accord*, *Meyer v. WMCO-GP, LLC*, 211 S.W.3d 302, 305 (Tex. 2006).

[76] *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

arbitration can be waived if the parties agree instead to resolve a dispute in court. Such waiver can be implied from a party's conduct, although that conduct must be unequivocal.[77] And in close cases, the "strong presumption against waiver" should govern.[78]

V. Is a Showing of Prejudice Required?

Although convinced that the Culls had substantially invoked the litigation process, the trial court compelled arbitration because the Defendants did not prove an arbitrator would not have allowed the same discovery. "Even substantially invoking the judicial process does not waive a party's arbitration rights unless the opposing party proves that it suffered prejudice as a result."[79] On at least eight occasions, we have said prejudice is a necessary requirement of waiver by litigation conduct.[80]

The Defendants ask us to reconsider this requirement. They point out that Texas law does not require a showing of prejudice for waiver, but only an intentional relinquishment of a known right.[81] Waiver "is essentially unilateral in its character" and "no act of the party in whose favor it

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[77] *See Van Indep. Sch. Dist. v. McCarty*, 165 S.W.3d 351, 353 (Tex. 2005); *First Valley Bank of Los Fresnos v. Martin*, 144 S.W.3d 466, 471 (Tex. 2004); *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003); *Equitable Life Assurance Soc'y of U.S. v. Ellis*, 152 S.W. 625, 628 (Tex. 1913).

[78] *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 783 (Tex. 2006); *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 89 (Tex. 1996).

[79] *In re Bruce Terminix Co.*, 988 S.W.2d 702, 704 (Tex. 1998).

[80] *In re Bank One, N.A.*, 216 S.W.3d 825, 827 (Tex. 2007); *In re D. Wilson Constr. Co.*, 196 S.W.3d at 783; *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 763 (Tex. 2006); *In re Serv. Corp. Int'l*, 85 S.W.3d 171, 174 (Tex. 2002); *In re Bruce Terminix Co.*, 988 S.W.2d at 704; *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 574 (Tex. 1999); *EZ Pawn Corp.*, 934 S.W.2d at 89; *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 898–99 (Tex. 1995).

[81] *See In re Gen. Elec. Capital Corp.*, 203 S.W.3d 314, 316 (Tex. 2006); *Sun Exploration & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987); *Bocanegra v. Aetna Life Ins. Co.*, 605 S.W.2d 848, 851 (Tex. 1980); *Mass. Bonding & Ins. Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396, 401 (Tex. 1967); *Texas & P. Ry. Co. v. Wood*, 199

is made is necessary to complete it."[82] Thus, they argue we cannot impose a waiver rule for arbitration contracts that does not apply to all others.[83]

We decline the Defendants' invitation based on both federal and state law. The Defendants say the federal courts are split on the issue, but the split is not very wide. Of the twelve regional circuit courts, ten require a showing of prejudice,[84] and the other two treat it as a factor to consider.[85] We have noted before the importance of keeping federal and state arbitration law consistent.[86]

S.W.2d 652, 656 (Tex. 1947); *Kennedy v. Bender*, 135 S.W. 524, 526 (Tex. 1911); *see also Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc*., 50 F.3d 388, 390 (7th Cir. 1995) (citing authorities showing that contract law generally holds waiver effective without proof of detrimental reliance).

[82] *Mass. Bonding & Ins. Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396, 401 (Tex. 1967).

[83] *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686–87 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

[84] *In re Citigroup, Inc*., 376 F.3d 23, 26 (1st Cir. 2004) ("We have emphasized that, to succeed on a claim of waiver, plaintiffs must show prejudice."); *Thyssen, Inc. v. Calypso Shipping Corp., S.A*., 310 F.3d 102, 105 (2d Cir. 2002); *Hoxworth v. Blinder, Robinson & Co.,* 980 F.2d 912, 925 (3d Cir. 1992) ("[P]rejudice is the touchstone for determining whether the right to arbitrate has been waived . . . ."); *Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc*., 380 F.3d 200, 206 (4th Cir. 2004) ("[T]he dispositive question is whether the party objecting to arbitration has suffered actual prejudice.") (internal quotations and italics omitted); *Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 346 (5th Cir. 2004) ("In addition to the invocation of the judicial process, there must be prejudice to the party opposing arbitration before we will find that the right to arbitrate has been waived."); *O.J. Distrib., Inc. v. Hornell Brewing Co.*, 340 F.3d 345, 356 (6th Cir. 2003); *Kelly v. Golden*, 352 F.3d 344, 349 (8th Cir. 2003) ("The actions must result in prejudice to the other party for waiver to have occurred."); *Brown v. Dillard's, Inc*., 430 F.3d 1004, 1012 (9th Cir. 2005); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 39 F.3d 1482, 1490 (10th Cir. 1994); *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1316 (11th Cir. 2002) ("[W]e look to see whether, by [invoking the litigation process], that party has in some way prejudiced the other party.") (internal quotations omitted).

[85] *St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 590–91 (7th Cir. 1992); *Nat'l Found. for Cancer Research v. A. G. Edwards & Sons, Inc*., 821 F.2d 772, 777 (D.C. Cir. 1987) (holding "a court may consider prejudice to the objecting party as a relevant factor among the circumstances that the court examines in deciding whether the moving party has taken action inconsistent with the agreement to arbitrate").

[86] *In re Weekley Homes, L.P.*, 180 S.W.3d 127, 130–31 (Tex. 2005); *In re Kellogg Brown & Root, Inc*., 166 S.W.3d 732, 738–39 (Tex. 2005); *see also Howsam v. Dean Witter Reynolds,* Inc., 537 U.S. 79, 87 (2002) (Thomas, J., concurring) (suggesting Supreme Court sometimes looks to federal law and sometimes law chosen by parties); *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 267 n.6 (5th Cir. 2004) (noting that whether state or federal law of arbitrability applies "is often an uncertain question").

Under Texas law, waiver may not include a prejudice requirement, but estoppel does. In cases of waiver by litigation conduct, the precise question is not so much when waiver occurs as when a party can no longer take it back. As noted above, Texas estoppel law does not allow a party to withdraw a representation once the other party takes "action or forbearance of a definite and substantial character."[87] Using precisely the same terms, the Restatement does not allow a party to withdraw an option contract when the offeree has taken substantial action based upon it.[88] In these contexts, prejudice is an element of the normal contract rules.

Thus, we agree with the courts below that waiver of arbitration requires a showing of prejudice.

VI. Was Arbitration Waived Here?

A. Did the Culls Waive Arbitration?

It remains only to apply these rules to this case.

Unquestionably, the Culls substantially invoked the litigation process, as their conduct here far exceeds anything we have reviewed before. Before arbitration was ordered, the Culls did not deny taking ten depositions, and the court's file (of which the trial judge took judicial notice) included:

- their initial objection to arbitration covering 79 pages;

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[87] *Trammell Crow Co. No. 60 v. Harkinson*, 944 S.W.2d 631, 636 (Tex. 1997); *see English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983); "*Moore" Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 936 (Tex. 1972); *Wheeler v. White*, 398 S.W.2d 93, 96 (Tex. 1965); RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

[88] RESTATEMENT (SECOND) OF CONTRACTS § 87(2) (1981) ("An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.").

- the Defendants' responses to requests for disclosure;

- the Culls' five motions to compel, attached to which were 76 requests for production of documents regarding complaints, inspections, repairs, and settlements relating to eight other homes in the same subdivision;

- Perry Homes' two motions for protective orders regarding six designees noticed for deposition by the Culls on nine issues (including purchase and preparation of the lot, design and construction of the foundation, sale of this home and others in the subdivision, and attempts to deal with the Culls' and other foundation complaints), with an attachment requesting 67 categories of documents (including all photos, videos, correspondence, insurance policies, plans, soil tests, permits, subcontractors, contracts for sale, and repairs relating to the house or the suit, all complaints about any house in the subdivision, and Perry Homes' articles of incorporation, by-laws, minutes, and financials); and

- the Culls' notices of depositions for three of the Defendants' experts with 24 categories of documents requested from each (including all documents relating to this case, all their articles, publications, or speeches given in their fields of expertise, all courses or seminars they had attended, all persons they had studied under, and all reference books or treatises in their libraries).

There is simply no question on this record that the Culls conducted extensive discovery about every aspect of the merits.[89]

But under the totality-of-the-circumstances test, discovery is not the only measure of waiver. Here, when the warranty defendants initially moved to compel arbitration, the Culls filed a 79-page response opposing it, asserting that the AAA "is incompetent, is biased, and fails to provide fair and appropriate arbitration panels." They complained of the AAA's fees, and asserted that as a result the "purported arbitration clause is unconscionable and unenforceable, and this Court's enforcement of such would be nothing short of ridiculous and absurd." This, plus their prayer asking the trial

[89] Because we limit our review to the record before the trial judge, we do not consider the Defendants' additional seven volumes of discovery exhibits filed after the arbitration award.

court to deny the motion to compel arbitration "in its entirety," belies the court of appeals' conclusion that "the Culls merely opposed the use of the AAA" rather than arbitration itself.[90] In some federal courts, the Culls' objection alone could suffice to waive arbitration.[91]

The Culls also moved for arbitration very late in the trial process. It is true that Perry Homes moved to continue the trial setting when the Culls sought arbitration, requesting about ten weeks to finish deposing experts. Because the trial court ordered arbitration, no one knows whether the case would have gone to trial (including the unnamed court clerk cited by the dissent). But in view of the written discovery and depositions already completed, the record is nevertheless clear that most of the discovery in the case had already been completed before the Culls requested arbitration. The rule that one cannot wait until "the eve of trial" to request arbitration is not limited to the evening before trial; it is a rule of proportion that is implicated here.[92]

Then 14 months after filing suit and shortly before the December 2001 trial setting, the Culls changed their minds and requested arbitration. They justified their change of heart on the basis that they wanted to avoid the delays of an appeal. But their change unquestionably delayed adjudication of the merits; instead of a trial beginning in a few days or weeks, the plenary arbitration hearing did

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[90] 173 S.W.3d 565, 570; *see also Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89 (2000) (holding that unconscionable arbitration fee would render clause unenforceable).

[91] *See In Re Tyco Int'l Ltd. Sec. Litig*., 422 F.3d 41, 46 (1st Cir. 2005) (holding defendant's objections to arbitration before criminal trial waived his right to arbitration); *Gilmore v. Shearson/American Exp. Inc*., 811 F.2d 108, 112 (2d Cir. 1987) (holding party's withdrawal of its prior motion to compel arbitration constituted express waiver of that right).

[92] *See In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 764 (Tex. 2006) (citing *Com-Tech Assocs. v. Computer Assocs. Int'l, Inc*., 938 F.2d 1574, 1576-77 (2d Cir. 1991), in which arbitration was waived by request that did not come until 18 months after filing and 4 months before trial).

not begin until late September of 2002 — almost ten months after the Culls abandoned their trial setting. Moreover, to the extent arbitration reduces delay, it does so by severely limiting *both* pretrial discovery *and* post-trial review. Having enjoyed the benefits of extensive discovery for 14 months, the Culls could not decide only then that they were in a hurry.

It is also unquestionably true that this conduct prejudiced the Defendants. "Prejudice" has many meanings, but in the context of waiver under the FAA it relates to inherent unfairness — that is, a party's attempt to have it both ways by switching between litigation and arbitration to its own advantage:

> [F]or purposes of a waiver of an arbitration agreement[,] prejudice refers to the inherent unfairness in terms of delay, expense, or damage to a party's legal position that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue.[93]

Thus, "a party should not be allowed purposefully and unjustifiably to manipulate the exercise of its arbitral rights simply to gain an unfair tactical advantage over the opposing party."[94]

Here, the record before the trial court showed that the Culls objected to arbitration initially, and then insisted on it after the Defendants acquiesced in litigation. They got extensive discovery under one set of rules and then sought to arbitrate the case under another. They delayed disposition

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[93] *Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 346 (5th Cir. 2004) (punctuation omitted); *accord, In re Tyco*, 422 F.3d at 46 n.5 ("[A] party should not be allowed purposefully and unjustifiably to manipulate the exercise of its arbitral rights simply to gain an unfair tactical advantage over the opposing party."); *In re Citigroup, Inc.*, 376 F.3d 23, 28 (1st Cir. 2004); *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 327 (5th Cir. 1999); *PPG Indus., Inc. v. Webster Auto Parts, Inc.*, 128 F.3d 103, 107 (2d Cir. 1997); *Doctor's Assocs. v. Distajo*, 107 F.3d 126, 134 (2d Cir. 1997) ("[P]rejudice as defined by our cases refers to the inherent unfairness-in terms of delay, expense, or damage to a party's legal position-that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue.").

[94] *In re Tyco*, 422 F.3d at 46 n.5.

by switching to arbitration when trial was imminent and arbitration was not. They got the court to order discovery for them and then limited their opponents' rights to appellate review. Such manipulation of litigation for one party's advantage and another's detriment is precisely the kind of inherent unfairness that constitutes prejudice under federal and state law.

B. A Response to the Dissents

Although we have repeatedly said arbitration agreements can be waived, today's dissents would effectively hold they cannot. That would favor arbitration too much; because most agreements can be waived by the parties' conduct,[95] arbitration contracts should not be *more* enforceable than other contracts. That is not what Congress intended when it enacted the FAA.[96] Indeed, one dissent cannot even bring itself to say the Culls substantially invoked the litigation process. If the litigation conduct here is not enough, it is hard to imagine what would be.

The dissents make several mistakes in their analyses. First, they misconstrue the standard of review. Every abuse-of-discretion review is not identical because "a trial judge's discretion may be applied to scores of situations and in many different ways."[97] Reviewing a declaratory judgment fee award (where trial judges have broad discretion)[98] is not the same as reviewing admission of

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[95] *See, e.g.*, *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 643 (Tex. 1996) (holding companies waived contractual right to approve assignments by treating assignee as full partner); *Ford v. State Farm Mut. Auto. Ins. Co.*, 550 S.W.2d 663, 666 (Tex. 1977) (holding insurer waived contractual right to consent to settlement by denying liability under policy).

[96] *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) ("[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so.").

[97] W. Wendell Hall, *Standards of Review in Texas*, 38 ST. MARY'S L.J. 43, 67 (2006).

[98] TEX. CIV. PRAC. & REM. CODE § 37.009 ("In any proceeding under this chapter, the court *may* award costs and reasonable and necessary attorney's fees as are equitable and just." (emphasis added)).

hearsay (where trial judges follow detailed rules),[99] even though an abuse-of-discretion standard applies to both.[100] Moreover, a totality-of-the-circumstances test presumes a multitude of potential factors and a balancing of evidence on either side; if appellate courts must affirm every time there is some factor that was not negated or some evidence on either side, then no ruling based on the totality-of-the-circumstances could ever be reversed. That standard of review would be the same as no review at all. By applying such a standard, both dissents would allow trial judges to send any case to arbitration no matter what has occurred in court.

Under a proper abuse-of-discretion review, waiver is a question of law for the court,[101] and we do not defer to the trial court on questions of law.[102] We do defer to a trial court's factual findings if they are supported by evidence,[103] but there was no factual dispute here regarding whether the Culls initially opposed arbitration, whether they conducted extensive merits discovery, or

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[99] *See* TEX. R. EVID. 801–806.

[100] *See Nat'l Liab. and Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 529 (Tex. 2000) (hearsay)*; Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998) (declaratory fee award).

[101] *In re Serv. Corp. Int'l*, 85 S.W.3d 171, 174 (Tex. 2002); *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 574 (Tex. 1999); *In re Bruce Terminix Co.*, 988 S.W.2d 702, 703–04 (Tex. 1998).

[102] *Brainard v. State*, 12 S.W.3d 6, 30 (Tex. 1999) (holding that in abuse-of-discretion standard "we defer to the trial court's factual determinations if they are supported by the evidence and review its legal determinations de novo"); *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) ("A trial court has no 'discretion' in determining what the law is or applying the law to the facts. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion . . . ."); *see* Hall, *supra* note 97, at 284 ("When the trial court's findings involve [mixed] questions of law and fact, the appellate court reviews the trial court's decision for an abuse of discretion. In applying the standard, the reviewing court defers to the trial court's factual determinations if supported by the evidence and reviews its legal determinations de novo."); *cf. Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476, 484 (5th Cir. 2002) ("This court reviews de novo a district court's dismissal of a claim that a party waived its right to arbitrate."); *accord*, *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1316 (11th Cir. 2002); *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 326 (5th Cir. 1999).

[103] *Brainard,* 12 S.W.3d at 30; *Walker*, 827 S.W.2d at 840; *see* Hall, *supra* note 97, at 284; *cf. Gulf Guar.*, 304 F.3d at 484; *accord*, *Ivax Corp.*, 286 F.3d at 1316; *Subway Equip.*, 169 F.3d at 326.

whether they sought arbitration late in the litigation process. This leaves only the conclusion whether such conduct constitutes prejudice, a legal question we cannot simply abandon to the trial court.[104]

Second, the dissents define prejudice in a way that makes it impossible to prove. While recognizing that "waiver" has a special definition in the arbitration context, the dissents overlook that "prejudice" does too. Instead of the inherent-unfairness standard used by the federal courts,[105] they impose what appears to be an irretrievable-loss standard. One dissent would go so far as to hold that no amount of discovery, no matter how extensive, can show prejudice if the fees incurred might be compensated in the final arbitration award, *even if erroneously*.[106] No one could ever show prejudice under this standard, because even if a contract allowed no reimbursement of discovery costs (as in this case),[107] it is always hypothetically possible that a rogue arbitrator might reimburse costs regardless. The same dissent would find no prejudice from extensive discovery without proof

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[104] *See Reliance Nat'l Indem. Co. v. Advance'd Temps., Inc*., 227 S.W.3d 46, 50 (Tex. 2007) ("What might otherwise be a question of fact becomes one of law when the fact is not in dispute or is conclusively established."); Hall, *supra* note 97, at 284 ("[A] trial court abuses its discretion [if the court] . . . fails to properly apply the law to the undisputed facts . . . .").

[105] *See supra* Part VI.A.

[106] ___ S.W.3d at ___ ("But even if the Court is right and the reimbursement clause does not allow for recovery of all Defendants' litigation attorney's fees, an arbitration award would not be subject to being vacated if an arbitrator interpreted it to allow recovery of all the fees.").

[107] The parties contract limited reimbursement to costs incurred in "seeking dismissal" of litigation, not costs incurred in preparing it for trial:

> Inasmuch as this Agreement provides for mandatory arbitration of disputes, if any party commences litigation in violation of this Agreement, such party shall reimburse the other parties to the litigation for their costs and expenses including attorney's fees *incurred in seeking dismissal of such litigation*.

(emphasis added).

that an arbitrator would have prohibited it. That again is impossible; arbitrators have almost unbridled discretion regarding discovery, so no one can predict what they might do in advance. Presuming (as the dissents do) that broad discovery is generally available in arbitration simply ignores one of its most distinctive features.[108]

Third, both dissents quibble with the Defendants' proof of prejudice because it was insufficiently detailed.[109] This confuses proof of the *fact* of prejudice with proof of its *extent*; the Defendants had to show substantial invocation that prejudiced them, not precisely how much it all was. Referral to arbitration should be decided summarily with the evidence limited to disputed facts;[110] as the Culls did not dispute that the parties had conducted more than a dozen depositions and other extensive discovery on the merits, requiring proof of each one would have merely made the referral hearing longer and more expensive. The pre-arbitration record proved that discovery was extensive; the evidence demanded by the dissents would have merely showed how much it cost.

Finally, the dissents' focus on discovery ignores all the other circumstances that the totality-of-the-circumstances test requires us to consider. Because we must consider all the circumstances,

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[108] *See Preston v. Ferrer*, ___ U.S. ___, ___ (2008) ("A prime objective of an agreement to arbitrate is to achieve streamlined proceedings and expeditious results."); *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995) (noting that "the discovery provisions of the Federal Rules of Civil Procedure are more generous than those of the American Arbitration Association"); *cf. Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156, 1160 (5th Cir. 1986) (finding prejudice due to discovery as "discovery —whether meaningful or otherwise—is not available in arbitration"); *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 498 (5th Cir. 1986) ("A party to arbitration does not have a right to the pre-trial discovery procedures that are used in a case at law."); *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 943 (1961) (noting expense of discovery as inconsistent with desire to arbitrate).

[109] The court of appeals affirmed on this basis. 173 S.W.3d at 570 ("Appellants did not provide any evidence of the work done, time spent, or costs incurred that would not have been done or incurred in anticipation of an arbitration hearing.").

[110] TEX. CIV. PRAC. & REM. CODE § 171.021(b); *see Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269 (Tex. 1992).

the amount of discovery needed to show prejudice will vary depending on what the other circumstances are. As the Fifth Circuit has held, prejudice should be easier to show against a party that initially opposed arbitration than against one who sought it from the start:

> While the mere failure to assert the right to demand arbitration does not alone translate into a waiver of that right, such failure does bear on the question of prejudice, and may, along with other considerations, require a court to conclude that waiver has occurred. The failure to demand arbitration affects the burden placed upon the party opposing waiver. When a timely demand for arbitration was made, the burden of proving waiver falls even more heavily on the shoulders of the party seeking to prove waiver. A demand for arbitration puts a party on notice that arbitration may be forthcoming, and therefore, affords that party the opportunity to avoid compromising its position with respect to arbitrable and nonarbitrable claims. In contrast, where a party fails to demand arbitration . . . and in the meantime engages in pretrial activity inconsistent with an intent to arbitrate, the party later opposing a motion to compel arbitration may more easily show that its position has been compromised, i.e., prejudiced.[111]

It is these other circumstances that make this case different from *In re Vesta.*[112] The parties seeking arbitration in *Vesta* had not opposed arbitration from the outset and then invoked it after getting all the discovery they wanted.[113] Nor was the *Vesta* case close to trial, as was the case here. The parties in *Vesta* had taken four depositions (rather than 15); they had also exchanged standard requests for disclosure and one request for production, but only one of those documents was in the record so there was no evidence whether this limited discovery related to the merits (as the extensive

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[111] *Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 346 (5th Cir. 2004) (internal citations and punctuation omitted).

[112] *In re Vesta Ins. Group, Inc*., 192 S.W.3d 759 (Tex. 2006).

[113] Two of the numerous defendants in *Vesta* initially objected to the remaining defendants' motion to compel arbitration, but withdrew that objection before the hearing on the motion.

discovery here clearly did).[114] And while the party opposing arbitration in *Vesta* allegedly incurred more than $200,000 in expenses, most of that was incurred in *getting* discovery rather than *providing* it;[115] a party who *requests* lots of discovery is not prejudiced by getting it and taking it to arbitration in the same way that a party who *produces* lots of discovery outside the stricter discovery limits in arbitration.[116]

Applying the proper standard of review and the proper definition of prejudice, we disagree with the dissents that the Defendants have failed to show prejudice here.

C. Did the Warranty Companies Waive Arbitration?

Finally, the Culls argue the warranty companies cannot object to arbitration for two reasons.

First, the warranty companies originally requested arbitration (which the Culls opposed), so it could be argued that it is unfair to hold the Culls to their original position without holding the warranty companies to theirs. Of course, we cannot hold both parties to their original positions as those positions were contradictory. More important, while the parties' original demands are relevant factors, the test is the totality of the circumstances. Looking to all the circumstances, it is quite clear from the parties' extensive co-participation in months of discovery that everyone waived their right to arbitration — whether they asserted that right early (as did the warranty companies) or late (as did the Culls).

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[114] *Id*. at 763.

[115] *Id*.

[116] The defendants in *Vesta* had stipulated that all discovery obtained so far could be used in arbitration.

Second, the Culls argue that the only objection to the trial court's order compelling arbitration was filed by Perry Homes, not the warranty companies. It is true that only Perry Homes' attorneys signed the motion, but in that motion and at the hearing held on it they represented that they were authorized to do so on behalf of all the Defendants. If the Culls wanted to question their authority to speak for the warranty companies, they should have done so by sworn motion.[117]

* * *

Accordingly, we reverse the court of appeals' judgment, vacate the arbitration award, and remand this case to the trial court for a prompt trial.

Scott Brister
Justice

OPINION DELIVERED: May 2, 2008

[117] *See* TEX. R. CIV. P. 12.