Oct 2026 | Articles Blog: The Westchester Litigator

Prejudice No More: Second Circuit Clarifies Post-Morgan Test for Waiver of the Right to Arbitrate

In 2022, the Supreme Court upended decades of precedent on the waiver of arbitration rights. For more than 60 years, the Second Circuit (and the vast majority of its sister courts) had focused on "proof of prejudice" to the opposing party as the key factor for waiving arbitration rights. In *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022), the Supreme Court abrogated that rule, holding instead that waiver turned on whether the party "knowingly relinquish[ed] the right to arbitrate by acting inconsistently with that right." In the years following *Morgan*, Second Circuit district courts applied the Supreme Court's ruling in different ways, making it difficult for litigants to predict outcomes in any given case. The Second Circuit recently addressed that problem in *Doyle v. UBS Financial Services, Inc.*, 144 F.4th 122 (2d Cir. 2025), which illustrates how carefully a party must act early in litigation to avoid waiving a contractual right to arbitration.

The Case: *Doyle v. UBS Financial Services, Inc.*, 144 F.4th 122 (2d Cir. 2025)

The plaintiffs, trustees of a charitable foundation, sued UBS Financial Services, a UBS financial advisor and an attorney trustee of the foundation, alleging that the defendants breached their fiduciary duties in managing the foundation's investment accounts. The brokerage agreement establishing the relationship with UBS contained an arbitration clause.

Rather than invoke the clause at the outset, the UBS defendants chose to join in the attorney trustee's motion to dismiss the case under the *Colorado River* abstention doctrine and for failure to state a claim. Nowhere in their papers did the UBS defendants mention the right to arbitrate. After the motion was denied, the parties stipulated to an extension of time for the UBS defendants to respond to the complaint. Again, the stipulation did not mention arbitration. Shortly thereafter, the UBS defendants moved to compel arbitration under the brokerage agreement. The district court denied the motion, finding that factual questions about the validity of the arbitration agreement needed to be resolved at trial. UBS appealed.

On appeal, the Second Circuit affirmed the denial of arbitration, but on the alternative grounds that UBS had waived its right to arbitrate. In doing so, the Second Circuit clarified that, post-Morgan, the inquiry is both simpler and less forgiving: did the party seeking arbitration knowingly relinquish that right by acting inconsistently with it? The Second Circuit concluded that for the UBS defendants, the answer was "yes."

In reaching its decision, the court focused on the UBS defendants' decision to join in their co-defendant's motion to dismiss and then stipulate to an extension of time to respond to the complaint, both without reserving rights or even mentioning the arbitration provision. While litigators could certainly envision far more active conduct inconsistent with arbitration, the court

emphasized that "[a]rbitration is not a fallback position . . . [or] a second bite at the apple. Rather, a party with an arbitration claim faces a binary choice between litigation and arbitration and cannot pursue one to its conclusion before falling back on the other."

The Takeaway

The Second Circuit has now confirmed that post-Morgan, a party's own litigation conduct, not a showing of prejudice to its opponent, dictates whether an arbitration right survives. Practitioners representing a party with a right to arbitrate should keep a few lessons in mind.

- Decide early whether to arbitrate or litigate and commit to it. A party cannot test the waters in court and retreat to arbitration if the litigation does not go as hoped.
- Do not assume creative labels will prevent waivers. Characterizing a submission as a "response" or a mere "joinder" will not insulate a party from waiver if the substance of that filing asks the court to resolve the case on the merits.
- If you must take even minimal action in the litigation before moving to compel arbitration, reserve your rights!! Even a simple extension of time should still explicitly state the party's intent to preserve its arbitration right. But do not assume crafty legalese will save you from waiver. Rely on how a filing is labeled.