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First Circuit affirms denial of motion to compel arbitration, holding that credit card company waived its right to arbitrate by refusing to pay filing fees in prior arbitration

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Takeaway: The First Circuit recently affirmed the denial of a motion to stay litigation and compel arbitration, holding that a credit card company waived its right to arbitrate when it deliberately refused to pay arbitration filing fees despite repeated warnings that the cases would be administratively closed. *5-Star Gen. Store v. Am. Express Co.*, --- F.4th ----, 2026 WL 2425580 (1st Cir. Aug. 19, 2026). The Court of Appeals held that the district court had authority to decide the waiver question because the company's nonpayment constituted "litigation-related activity" under *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 13 (1st Cir. 2005), and the company's conduct was "inconsistent with an intent to arbitrate." *5-Star Gen. Store*, 2026 WL 2425580, at *4. The *5-Star General Store* decision demonstrates that a party's refusal to pay arbitration filing fees, even in the context of a dispute over the correct fee amount, can constitute a "default" and therefore a waiver of the right to arbitrate under the Federal Arbitration Act.

In *5-Star General Store*, the plaintiffs (a group of thousands of small merchants led by a Rhode Island-based general store) filed over 5,000 demands for arbitration against American Express Company ("Amex") before the American Arbitration Association, challenging Amex's "swipe-fee" policies. The plaintiffs alleged that Amex's swipe fee charges of approximately three percent or more levied on merchants each time a customer pays by credit card pose a substantial expense to small merchants and that Amex's "non-discrimination provisions" prohibited the plaintiffs from incentivizing shoppers to use less expensive payment cards. *Id.* at *1.

An AAA administrator determined that a $3,500 filing fee applied to each case, with the plaintiffs responsible for $350 per demand and Amex responsible for the remaining $3,150 per demand. *Id.* The plaintiffs paid their share; Amex refused to pay; and after months of exchanges and repeated warnings that the cases would be closed, the AAA administrator administratively closed the cases for nonpayment in February 2024. *Id.* at *1-2.

The plaintiffs then filed a class action in the District of Rhode Island, alleging that Amex's conduct constituted a default and waiver of its right to compel arbitration under the FAA, 9 U.S.C. § 3. *Id.* at *2. Amex filed a motion to stay and to compel arbitration under the FAA, and the district court denied Amex's motion, finding that Amex had defaulted under Section 3 of the FAA and had waived its right to compel arbitration. *Id.*

On appeal, the First Circuit first addressed whether the district court had authority to decide whether Amex waived its right to compel arbitration. *Id.* at *2-3. Under *Marie*, courts have the power to decide waiver issues "at least" when they involve "litigation-related activity." 402 F.3d at 13. The Court of Appeals held that Amex's repeated failure to pay filing fees was the type of litigation-related activity contemplated by *Marie*. *5-Star Gen. Store*, 2026 WL 2425580, at *3. The court also noted that sending the waiver issue back to the AAA would be "inefficient and likely unworkable" given that no arbitrator was ever appointed and the AAA had already closed the cases following Amex's nonpayment. *Id.*

Turning to the merits of the waiver question, the First Circuit applied the Supreme Court's standard from *Morgan v. Sundance, Inc.*, 596 U.S. 411, 417 (2022), which defines waiver as "the intentional relinquishment or abandonment of a known right." 2026 WL 2425580, at *4. The court found that AAA warned Amex multiple times over the course of months that its cases would be administratively closed without payment, and that Amex did not argue that it failed to understand those consequences. Because Amex's refusal to pay the filing fees resulted in the "foreseeable (and forewarned) outcome of closure of those arbitrations," the First Circuit concluded that Amex's conduct was "inconsistent with an intent to arbitrate" and that Amex therefore waived its right to compel arbitration. *Id.* The court also rejected Amex's unclean hands defense, finding no evidence that the plaintiffs engaged in misconduct directly related to the merits of the controversy; to the contrary, the plaintiffs participated in dialogue with Amex and the AAA administrator about fees owed and timely paid the fees that the administrator determined were owed. *Id.* at *5.