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Morgan v. Sundance: Prejudice Not Required To Waive Arbitration Rights

In *Morgan v. Sundance*, the Supreme Court unanimously concluded this week that waiving arbitration rights does not require a showing that the party seeking to have their case heard in federal court would be prejudiced by proceeding with arbitration. The opinion eliminated an over-50-year-old rule followed by nine courts of appeals.

Litigants who intend to invoke an arbitration clause should file an early motion to stay litigation and/or to compel arbitration—or risk forfeiting their right to arbitrate.

BACKGROUND

Plaintiff Robyn Morgan was an employee of defendant Sundance, Inc. for three months. When she began her job, she signed an employment application with an arbitration clause—agreeing to "use confidential binding arbitration, instead of going to court, for any claims that arise" between her and Sundance.

Claims then arose. Morgan filed a collective action in federal court against Sundance. Sundance moved to dismiss, but the motion never mentioned arbitration. After Sundance lost its motion, it filed an answer that once again never mentioned arbitration. After attempts to settle the dispute through mediation failed, Sundance filed a motion to compel arbitration.

The district court denied Sundance's attempt to compel arbitration on the basis that it had waived its arbitration rights. The Eighth Circuit reversed. It held that for a waiver of an arbitration clause, a plaintiff must demonstrate she would suffer prejudice by submitting to arbitration, which it concluded Morgan did not demonstrate.

THE DECISION

In 1968, the Second Circuit concluded that "mere delay" in seeking a stay of litigation due to an arbitration right "without some resultant prejudice" to the opposing party "cannot carry the day" of showing a waiver of that right to arbitrate.[1] Eight other courts of appeals followed suit, including the First, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits.[2] This approach was based on the principle—often stated by the Supreme Court—the Federal Arbitration Act ("FAA") represents a "liberal federal policy favoring arbitration."[3] Only the Seventh and D.C. Circuits bucked the trend.

Justice Kagan issued a narrow seven-page ruling for the Court eliminating the prejudice requirement. It sidestepped a number of ancillary questions raised by the parties, including not just "the role state law might play" but also "whether to understand that inquiry as involving rules of waiver, forfeiture, estoppel, laches, or procedural timeliness."[4] All were concerns the justices expressed at argument, which we previously covered. The Court did not even conclude that "waiver" was the proper analytical framework—simply "assum[ing] without deciding" that it was.[5]

In eliminating the prejudice requirement, the Court reasoned that "the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules."[6] Rather, those statements were "merely an acknowledgment of the FAA's commitment . . . to place such agreements upon the same footing as other contracts."[7] The Court stated that the FAA serves "as a bar on using custom-made rules to tilt the playing field" *either* "in favor of" or "against" arbitration.[8]

Outside this arbitration context, a waiver in litigation is the "the intentional relinquishment or abandonment of a known right" which "focuses on the actions of the person who held the right" and "seldom considers the effects of those actions on the opposing party."[9] The Court concluded it was wrong for the lower courts to create a "bespoke rule of waiver for arbitration" by requiring prejudice which is a requirement "found nowhere else."[10]

The Court ultimately reached a very narrowing holding: "Our sole holding today is that [the Eighth Circuit] may not make up a new procedural rule based on the FAA's "policy favoring arbitration."[11] The Court remanded to the Eighth Circuit to resolve the question of whether the defendant waived its right to arbitrate. But it also left the door open for the lower court to "determine that a different procedural framework (such as forfeiture) is appropriate."[12]

IMPLICATIONS

Morgan presented the question of how far a litigant can proceed in federal court before losing its right to arbitrate. The Supreme Court's narrow opinion, while achieving unanimity, did not provide a clear answer to that issue. It did not even decide if "waiver" is the proper framework to begin with.

But by eliminating the prejudice requirement, the Court removed a safety net that for over fifty years saved parties who—for whatever reason—did not move to stay litigation or compel arbitration early in a federal court proceeding. With that safety net removed, defendants should not delay invoking their arbitration rights.

[1] *Carcich v. Rederi A/B Nordie*, 389 F. 2d 692, 696 (2d Cir. 1968)
[2] *See Morgan* (slip op.) at 4 n.1.
[3] *See, e.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)
[4] *Morgan* (slip op.) at 4
[5] *Id.*
[6] *Id.* at 6.
[7] *Id.*
[8] *Id.* at 7
[9] *Id.*
[10] *Id.* at 5
[11] *Id.* at 7
[12] *Id.*