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Supreme Court Rules on the Requirements for a Waiver of the Right to Arbitrate

Minding Your Business Blog on **July 7, 2022**

The United States Supreme Court recently resolved a circuit split regarding when a party has waived its contractual right to arbitrate by participating in litigation prior to seeking to arbitrate a dispute. In *Morgan v. Sundance, Inc.*, the Court held that the party seeking to resist arbitration does not need to show that it has been prejudiced by the other party's delay in seeking to compel arbitration. Notably, and in holding that "the Eighth Circuit erred in conditioning a waiver of the right to arbitrate on a showing of prejudice," the Supreme Court decided against the use of "custom-made rules, to tilt the playing field in favor of (or against) arbitration."

When she took a job working as an hourly employee at a Taco Bell franchise owned by Sundance, Plaintiff Robyn Morgan signed an agreement to arbitrate employment disputes. She later, however, filed a nationwide collective action suit for Sundance's alleged violations of the Fair Labor Standards Act. Sundance did not seek to compel arbitration when Morgan initiated the case. Rather, it was only after *Lamps Plus v. Varela* was decided by the Supreme Court — eight months after the litigation had been initiated and after Sundance defended against the lawsuit, including by filing a motion to dismiss, and then unsuccessfully attempting to mediate — that Sundance sought to stay the litigation and compel arbitration under Sections 3 and 4 of the Federal Arbitration Act. In considering whether Sundance had waived its right to arbitration by engaging in litigation, both the District Court and the Eighth Circuit applied Eighth Circuit precedent, under which a party waives its right to arbitrate if a party knew of the right to arbitrate, acted inconsistently with the right to arbitrate, and its action prejudiced the other party. While the District Court found that Morgan had been prejudiced, denying Sundance the opportunity to arbitrate, the Eighth Circuit reversed, holding that Morgan had not in fact been prejudiced, despite having litigated the case for eight months.

The Eighth Circuit, as well as the First, Second, Third, Fourth, Fifth, Sixth, Ninth and Eleventh Circuits all required a showing of prejudice, but the Seventh and D.C. Circuits have held that prejudice is not part of the analysis. In a unanimous decision written by Justice Elena Kagan, the Supreme Court resolved the circuit split, holding that a showing of prejudice is not required because general federal waiver law does not require a determination of prejudice, and "a court must hold a party to its arbitration contract just as the court would to any other kind." It may not, Justice Kagan wrote, "devise novel rules to favor arbitration over litigation."

The Supreme Court clarified that courts are not to create arbitration-specific procedural rules, the federal policy being "about treating arbitration contracts like all others, not about fostering arbitration."

While the Supreme Court's decision did not clarify how far a litigant can proceed before losing its right to arbitrate, it notably removed the requirement that the opposing party have been prejudiced by the delay in seeking arbitration, thereby limiting flexibility for parties who might not initially decide to compel arbitration. Parties must now carefully examine their contractual rights with respect to arbitration at the outset of a case and ensure that they do not delay seeking to compel arbitration if that is their preferred forum.

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