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# SCOTUS Resolves Circuit Split: A Showing of Prejudice Not Required to "Waive" Right to Arbitration

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As noted in our colleagues' blog post, on May 23, in a unanimous opinion, the U.S. Supreme Court held that employers who do not act promptly to invoke an arbitration clause may be held to waive arbitration. In so holding, the Court resolved a circuit court split over whether a party arguing waiver had to demonstrate prejudice. The Court held that prejudice was not a requirement. The Court's holding departs from its generally pro-arbitration holdings over the last 15 years.

The opinion is instructive in both employment law and arbitration law. The Court held that federal courts may not make up new procedural rules for interpreting arbitration agreements based on the Federal Arbitration Act (FAA)'s policy favoring arbitration. The Court rejected the Eighth Circuit's requirement that a showing of prejudice was needed to waive a right to arbitration, explaining that because the usual waiver rules do not include a prejudice requirement, a federal court cannot create one in the arbitration context. Employers that may have relied on prior caselaw and thus elected to sit back and first roll the litigation dice now act at their peril in so doing.

**Background**

Sections 3 and 4 of the FAA allow a defendant to file a motion to stay litigation and compel arbitration if a dispute is governed by an arbitration provision, but the plaintiff files suit in state or federal court. A question that can arise in this context is when must the defendant file its motion? Most circuit courts have analyzed this question by determining whether the defendant has waived his/her right to arbitration. The circuit courts, however, have split on the issue of whether waiver, in the arbitration context, requires the moving party to prove there has been no prejudice to the nonmoving party. The Eight Circuit, along with the First, Second, Third, Fourth, Fifth, Sixth, Ninth, and Eleventh circuits, invoked the "strong federal policy favoring arbitration" when requiring prejudice. The Seventh and D.C. circuits did not require prejudice.

**Procedural History and Facts**

The *Morgan* case involved an employment dispute brought by Robyn Morgan, an hourly employee at Taco Bell, against Taco Bell's parent company, Sundance, Inc., alleging Taco Bell violated the Fair Labor Standards Act, which requires employers to pay overtime wages to employees who work more than 40 hours a week by intentionally manipulating how hours were recorded to avoid exceeding 40 hours in a given week. Morgan's employment contract included an arbitration clause; however, Morgan filed suit against Sundance in the Northern District of Iowa. Sundance did not immediately move to stay the litigation and compel arbitration; instead, over the course of eight months, it filed a motion to dismiss, answered Morgan's complaint, and participated in mediation.

After mediation failed, Sundance then filed its motion to stay the litigation and compel arbitration. In response, Morgan argued Sundance had waived its right to arbitration.

The Northern District of Iowa held Sundance had waived its right to arbitration, but the Eighth Circuit disagreed, finding Morgan was not prejudiced by Sundance's actions.

**SCOTUS Rejects the Eighth Circuit's Prejudice Test**

The issue presented to the Supreme Court was whether federal courts could create "arbitration-specific" rules, including rules concerning waiver, based on the FAA's "policy favoring arbitration," as upheld by *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The Supreme Court held federal courts cannot.

The Supreme Court's decision addressed both the prejudice requirement specifically, and the rationale behind it more generally. Regarding the prejudice requirement, the Supreme Court explained that outside of the arbitration context, prejudice is not typically considered when determining whether a party has waived its right or not. More generally, the Supreme Court made clear that arbitration contracts are not entitled to more deference than any other contract. In other words, the federal policy favoring arbitration, as enshrined in *Moses Cone*, was intended to combat the judicial history of refusing to enforce arbitration agreements and was only intended to "make arbitration agreements as enforceable as other contracts, but not more so." Therefore, as the Supreme Court explained, federal courts are not to use this policy as carte blanche to create "special, arbitration-preferring procedural rules."

The *Morgan* decision rejected the Eighth Circuit's additional requirement of providing prejudice when tasked with determining whether a party waived its right to arbitration, and more generally held that federal courts cannot fashion arbitration-specific rules under the guise of upholding the "federal policy favoring arbitration" as set forth in *Moses Cone* and its progeny.

**What Does This Mean for Employers Who Wish to Compel Arbitration?**

If you believe that your employee's dispute with your company is governed by an arbitration agreement, you should consult with your company's attorney. From a prudent employer's perspective, the takeaway from this decision is clear: Avoid delay when compelling arbitration when faced with a lawsuit. As this case demonstrates, a prudent employer will file a motion to stay litigation and compel arbitration immediately rather than engaging in costly litigation that may work against your company's interests and may constitute waiver. Courts will no longer judge your delay based on any prejudice to the opposing party; instead, the inquiry will focus on whether you knowingly waived a right by acting inconsistently with that right.

More broadly, the *Morgan* decision should not be read as a dramatic shift in the Court's recent pro-arbitration jurisprudence. The Roberts Court has repeatedly made clear that arbitration agreements must be enforced as written, and that lower courts cannot assist parties in avoiding the consequences of those agreements. *Morgan* serves to stem the tide, however, as a reminder that courts equally should not assist parties in compelling arbitration to the point that special contract rules are created.

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