No Harm, No Foul: Court Rules Prejudice Not Required to Establish Waiver of a Right to Arbitrate

May 24, 2022

In a unanimous Opinion issued Monday, May 23, the United States Supreme Court resolved a circuit split and held that waiver of a right to arbitrate does **not** require a showing of prejudice to the opposing party.

In *Morgan v. Sundance*, Justice Kagan, writing for the unanimous court, noted that while the Federal Arbitration Act (FAA) embodies a "policy favoring arbitration," the FAA does not authorize courts to create arbitration-specific procedural rules to advance this policy. This is important because historically, the concept of waiver never included a prejudice factor. Conversely, in the arbitration context, courts over the years had included prejudice as an element that must be met in order to establish waiver of a right to arbitrate. Ultimately, Justice Kagan found, "[i]f an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it. The federal policy is about treating arbitration contracts like all others, not about fostering arbitration."

As Justice Kagan noted:

> *"Outside the arbitration context, a federal court assessing waiver does not generally ask about prejudice. Waiver, we have said, is the intentional relinquishment or abandonment of a known right. To decide whether a waiver has occurred, the court focuses on the actions of the person who held the right; the court seldom considers the effects of those actions on the opposing party. That analysis applies to the waiver of a contractual right, as of any other."*

So how will this impact waiver arguments in the arbitration context moving forward? For starters, *Morgan* will return the focus to the conduct of the entity who allegedly waived its right to arbitrate in the first place. This makes it more important than ever to timely and properly assert a right to arbitrate a claim or dispute and avoid the temptation of changing litigation tactics mid-stream. In other words, given the renewed focus courts will place on the conduct of the party seeking to compel arbitration, litigants should seek to compel arbitration at the outset of a case, or as close in time as possible to the commencement of an action. Along those same lines, it is possible, and perhaps even likely, that *Morgan* will result in more findings of a waiver of a right to arbitrate. This is because the prejudice factor historically had been hard to meet. In light of this possibility, it is very important to raise a right to arbitrate as soon as practical to avoid any claim of waiver.

Finally, “anti-waiver” provisions embodied in arbitration agreements may take on renewed significance post-*Morgan*. Arbitration agreements are contracts and, like any other contract, courts and arbitrators will interpret the language of an arbitration agreement as written. To that end, parties often structure their arbitration agreements to include anti-waiver language. Under such provisions, parties to an arbitration agreement agree that the undertaking of certain acts (e.g. repossessing collateral or filing of a collection suit) does not operate as a waiver of a right to arbitrate subsequently-filed lawsuits or claims. Litigants will most likely need to rely on such language much more often in light of *Morgan*. Moreover, if an entity’s standard arbitration agreement does not include an anti-waiver provision, now may be the time to update the agreement to include one.

Related people

Jim Sandy