Updates

The U.S. Supreme Court, in a May 23 decision, ruled that the federal policy favoring arbitration does not authorize federal courts to impose a prejudice requirement when evaluating whether a party has waived its right to arbitration by litigating in court. In a unanimous decision resolving a circuit split on this question, the Court in *Morgan v. Sundance, Inc.* concluded that the federal policy "is about treating arbitration contracts like all others, not about fostering arbitration." The Court therefore remanded with instructions that waiver must be assessed based on general contractual principles.

This decision significantly alters the waiver analysis under federal arbitration law as it was understood in most federal circuits. And while its ultimate impact is unclear, parties to arbitration agreements should understand that, where a waiver analysis applies, their ongoing participation in litigation of an arbitrable dispute is now more likely to be found a waiver of the right to arbitrate, as courts must assess waiver without regard to whether

there is any prejudice to the other party.

Enforcing Arbitration Agreements Before *Morgan*

Federal waiver law generally does not include a prejudice requirement, but courts read it into the arbitration context based on the federal policy favoring arbitration. Specifically, most federal circuits applied a version of the test used by the U.S. Court of Appeals for the Eighth Circuit and rejected in *Morgan*, in which "a party waives its contractual right to arbitration if it knew of the right; 'acted inconsistently with that right'; and—critical here—'prejudiced the other party by its inconsistent actions.'"[1] "The Eighth Circuit's arbitration-specific rule derive[d] from a decades-old Second Circuit decision, which in turn grounded the rule in the FAA's policy" favoring arbitration.[2]

***Morgan*'s Background**

Morgan stemmed from a national collective action lawsuit brought by an employee, Morgan, against Sundance, Inc. (Sundance), alleging violations of the Fair Labor Standards Act. Sundance, at first, defended the suit in federal court "as if no arbitration agreement existed." It moved to dismiss the suit in light of an earlier-filed collective action lawsuit brought by other employees, suggesting that Morgan either join that suit or refile her claim on an individual basis; it answered the complaint and asserted 14 affirmative defenses (none of which mentioned the arbitration agreement); and it mediated the dispute. Then, eight months into the litigation—and after the collective action suit alleging similar claims, brought by other employees, had settled—Sundance moved to stay Morgan's suit and compel arbitration under Sections 3 and 4 of the Federal Arbitration Act (FAA). Morgan opposed, arguing that Sundance waived its right to compel arbitration by litigating in court for so long.

Both the federal district and circuit court applied the Eighth Circuit's prejudice test in adjudicating the motion. The district court concluded that Sundance's delay had prejudiced Morgan, but the court of appeals disagreed, because formal discovery had not begun and no matters "going to the merits" had been contested by the parties. In dissent, one Eighth Circuit judge noted that prejudice is not needed to show waiver outside the arbitration context. The Supreme Court granted certiorari to resolve a circuit split on the question.

SCOTUS Reverses Based on General Contractual Principles

The Supreme Court reversed. In a 9-0 opinion, the Court concluded that, notwithstanding the FAA, an arbitration agreement is no different than any other contract and therefore is not subject to "bespoke" waiver requirements. The Court explained that a federal court "assessing waiver does not generally ask about prejudice." Rather, in assessing whether a party intentionally relinquished or abandoned a known right, courts focus "on the actions of the person who held the right" and only rarely evaluate any effects on the counterparty.

The Court found nothing in the FAA policy favoring arbitration that authorized "federal courts to invent special, arbitration-preferring procedural rules." Instead, the Court clarified, the "policy … is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts."[3] In other words, the Court explained, the FAA policy requires courts to treat arbitration contracts "like all others," but it is not "about fostering arbitration." The Court remanded, explaining that a waiver inquiry must focus on Sundance's conduct and determine whether it "knowingly relinquished a right to arbitrate by acting inconsistently with that right."

The Court also left open the possibility that a waiver analysis would not apply at all, noting that the court of appeals may determine whether "a different procedural framework (such as forfeiture) is appropriate."

Post-*Morgan*: Waiver May Be Easier to Show

The Court's elimination of a prejudice requirement in determining waiver makes it more likely that a court applying a waiver analysis will find that a party waived its right to pursue arbitration through lengthy participation in litigation in a manner that is inconsistent with enforcing the right to arbitrate. Jurisdiction-specific waiver law should inform this analysis.

At the same time, the Supreme Court left open the possibility that waiver is not the appropriate analysis to apply in this instance. If the issue is assessed under forfeiture, estoppel, laches, or some other rule, prejudice to the opposing party (or other considerations) may still be part of the analysis.

Until these issues are resolved, parties should consider acting early and decisively to enforce arbitration agreements, particularly in the face of competing litigation.

Endnotes

[1] *Morgan*, Slip Op. at 3 (citing *Erdman Co. v. Phoenix Land & Acquisition, LLC*, 650 F. 3d 1115, 1117 (8th Cir. 2011).

[2] *Id.* at 5 (citing *Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 (CA2 1968); *Erdman*, 650 F. 3d at 1120, n.4).

[3] *Id*. (citing *Granite Rock Co. v. Teamsters*, 561 U. S. 287, 302 (2010).

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