

U.S. Supreme Court Rejects Prejudice Element for a Claim of Waiver

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Is the right to compel arbitration waived only when the plaintiff can show prejudice from the defendant's inconsistent actions and delay? In *Morgan v. Sundance, Inc.*, No. 21-328 (2022), the Supreme Court found that the Federal Arbitration Act ("FAA") does not permit courts to create tests to favor arbitration over litigation, and that a showing of prejudice is not required for a claim of waiver.

In *Morgan*, the defendant, a Taco Bell franchisee, moved to compel arbitration eight months after the plaintiff, an employee alleging a nationwide collective action for violations of wage and hour laws, brought suit. The defendant sought to compel arbitration, but not before filing a motion to dismiss the lawsuit, filing an answer and asserting affirmative defenses that did not mention the arbitration agreement, and mediating the case. Eight months into the litigation, the defendant changed course and moved to compel arbitration of the plaintiff's individual claims.

In opposition, the plaintiff argued that, even if there was a valid agreement to arbitrate, the defendant had waited too long, and thus waived its right to do so. The Eighth Circuit rejected the plaintiff's argument because she failed to show that she suffered any harm by the defendant's delay in bringing the motion to compel arbitration.

Overturning the Court of Appeal's decision, a unanimous Supreme Court noted that "[t]he prejudice requirement... is not a feature of federal waiver law generally," and while the FAA prevents courts from undermining arbitration agreements, it also does not permit courts to "invent special, arbitration-preferring procedural rules" to favor arbitration. On remand, the Court directed the Court of Appeal to review whether the defendant knowingly relinquished its right to arbitrate by "acting inconsistently with that right," without the need to show harm.

Morgan highlights the importance of considering early on whether to move to compel arbitration in litigation, and the downsides of taking action that might be inconsistent with the right to compel.

If you have any questions about the laws discussed in this article, please contact **Peter Walrod** at pwalrod@vedderprice.com, **Sheryl L. Skibbe** at sskibbe@vedderprice.com, or any other Vedder Price attorney with whom you have worked.

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