SCOTUS Weighs in on Waiver of Right to Arbitrate

By [Janet A. Hendrick]

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On May 23, 2022, the United States Supreme Court resolved a circuit split and held that whether a party that delays seeking arbitration has waived its right to arbitrate pursuant to an arbitration agreement between the parties does not require a showing that the opposing party was prejudiced by the delay. In the case, *Morgan v. Sundance Inc.*, which involved claims for violation of the Fair Labor Standards Act, the parties litigated for 8 months in court and then attempted mediation in an effort to settle the case. After mediation failed, the defendant company filed a motion to compel arbitration, which the trial court denied on the grounds that the company waived its right to arbitrate by waiting to seek arbitration until after it had engaged in litigation in court. On appeal, the Eighth Circuit Court of Appeals applied a three-part waiver test: a party waives its contractual right

to arbitration if (1) it knew of its right, (2) it acted inconsistently with that right, and critical here, (3) it prejudiced the other party by its inconsistent actions. The appellate court held that because there was no showing that the plaintiff was unfairly prejudiced by the defendant's delay, the defendant did not waive its right to arbitrate.

In an opinion delivered by Justice Kagan, the Supreme Court reversed, rejecting the arbitration-specific waiver rule, which requires a showing of prejudice, invoked by the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits based on a decades-old Second Circuit decision. Only the Seventh and DC Circuit Courts of Appeals had rejected such a rule (it appears the Tenth Circuit has not addressed this issue). The Supreme Court held that federal courts may not "make up a new procedural rule based on the FAA's 'policy favoring arbitration,'" such as a procedural rule concerning waiver. SCOTUS sent the case back to the Eighth Circuit to determine, focusing solely on the defendant's conduct, whether the defendant company knowingly relinquished its right to arbitrate by acting inconsistently with that right (or determine whether a different procedural framework, such as forfeiture, is appropriate).

Today's decision, which will apply to any future case in which a party claims that an opposing party that delays seeking arbitration waived its right to arbitrate, will make it harder for a party that waits to seek arbitration to avoid a finding of waiver. The best course for a party seeking to enforce its right to arbitration is to seek arbitration without delay and as early as possible. Rolling the dice by seeing how things play out in court could result in a waiver of the party's right to have the case heard in arbitration.

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Janet A. Hendrick is an experienced employment litigator who tackles each of her client's problems with a tailored, results-oriented approach.

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