The Arbitration Newsletter

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas, to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]
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Loss of the Right to Arbitrate Clarified
(Morgan v. Sundance, Inc.)[2]

The federal "policy favoring arbitration" no longer protects the dilatory movant to compel arbitration. The U.S. Supreme Court in Morgan v. Sundance has now removed the requirement of harm or prejudice to the non-moving party before the dilatory movant is found to have waived it's right to compel arbitration. The waiver of the right to arbitrate has been stripped of its special protection against waiver of the right to arbitrate based on the federal "policy favoring arbitration."[3] The federal "rule of waiver specific to the arbitration context" that required harm or prejudice to the non-moving party is no longer authorized by the FAA.[4]

The waiver of arbitration requiring harm or prejudice to the non-movant in Morgan presented SCOTUS with "whether the FAA authorizes federal courts to create such an arbitration-specific procedural rule." SCOTUS said, "We hold it does not."[5] Morgan, a Taco-Bell franchise employee, filed a "nationwide collective action" Fair Labor Standards Act claim in a federal district court. Sundance, the employer, ignored the existing arbitration agreement and, filed a motion to dismiss Morgan's collective action claim. The district court denied the employer's motion to dismiss, and the employer filed an answer. Eight months later the employer moved to stay the litigation and compel arbitration under FAA sections 3 (stay) and 4 (compel arbitration).[6] Morgan opposed the employer's motion based on the employer's waiver of right to arbitrate "by litigating for so long."[7]

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[1] Nothing in The Arbitration Newsletter is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of *The Arbitration Newsletter* is to inform generally. The application of the comments in *The Arbitration Newsletter* to specific questions and cases should be discussed with the reader's independent legal counsel.
[2] Morgan v. Sundance, Inc., 142 S. Ct. 1708 (2022).
[3] *Id.* at 1711.
[4] *Id.* at 1714 ("Our sole holding today is that [the 8th Circuit] may not make up a new procedural rule based on the FAA's 'policy favoring arbitration'.").
[5] *Id.*
[6] 9 U.S.C. §§3 and 4.
[7] *Id.*

The federal district court applied the 8th Circuit's waiver test (finding prejudice to the employee) but the 8th Circuit reversed and sent the lawsuit to arbitration.[8] SCOTUS granted certiorari based on the split of federal circuits on whether waiver of right to arbitrate required harm or prejudice to the non-moving party.[9]

The Court unanimously held that the FAA's policy favoring arbitration "does not authorize federal courts to invent[10] special, arbitration-preferring procedural rules" to protect a dilatory moving party from potential loss of an existing contractual right to arbitrate.[11]

OBSERVATIONS

1. Justice Kagan, for the unanimous Court, was careful to make it clear that this case answered one and only one issue.[12]

2. The parties disagreed about (i) "the role state law might play" in resolving "the loss of a contractual right to arbitrate; and (ii) does the "inquiry" involve "rules of waiver, forfeiture, estoppel, laches, or procedural timeless."[13]

3. The Court also observed based on its assumption "without deciding" that the "Courts of Appeals, including the Eighth Circuit, have generally resolved cases like this one as a matter of federal law, using the terminology of waiver."[14]

4. The FAA does not authorize federal courts to "invent,"[15] "bespoke,"[16] "devise,"[17] "foster,"[18] "prefer,"[19] "create,"[20] "custom-make,"[21] "tilt,"[22] or "make up,"[23] an arbitration-specific procedural rule of waiver that is based on "an overriding federal policy favoring arbitration."[24]

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[8] *Id.* at 1712 ("The panel majority reasoned that the parties had not yet begun formal discovery or contested any matters 'going to the merits'.").
[9] *Id.* at 1712, fns. 1 (9 Circuits required harm or prejudice for waiver) and 2 (2 Circuits did not – 7th and D.C.).
[10] *See supra* "Observations," ¶4.
[11] *Id.* at 1713.
[12] *Id.* at 1711, 1712 – 13 ("[T]he Eighth Circuit was wrong to condition a waiver of the right to arbitrate on a showing of prejudice."), and 1714 (federal courts cannot "make up a new procedural rule based on the FAA's 'policy favoring arbitration'.").
[13] *Id.* at 1712 ("We do not address those issues.").
[14] *Id.*
[15] *Id.* at 1713.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.* at 1714.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* at 1713 (*citing* 3rd, 4th, and 9th Circuits).

5. Federal courts applying 9 U.S.C. §2 to the determination of whether an arbitration agreement exists (i.e., the validity of the agreement) is limited to contract formation principles applicable to all purported contracts.[25]

6. FAA Section 2 savings clause makes an agreement to arbitrate subject to all the defenses applicable to all contracts.

7. The Court assumes in Morgan, without deciding, that under the FAA the validity of an arbitration agreement is a question of law and "a matter of federal law."[26]

8. Justice Kagan's opinion for the unanimous Court explains in detail what the "federal policy favoring arbitration" means:

    a. "Th[e] policy," we have explained, "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."[27]

    b. "Or in another formulation: The policy is to make 'arbitration agreements as enforceable as other contracts, but not more so'."[28]

    c. "The federal policy is about treating arbitration contracts like all others, not about fostering arbitration."[29]

    d. "[A] court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation."[30]

    e. The FAA policy "is based upon the enforcement of contract, rather than a preference for arbitration as an alternative dispute resolution mechanism."[31]

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[25] *Id.* at 1713 ("The federal policy is about treating arbitration contracts like all others, not about fostering arbitration.").
[26] *Id.* at 1712.
[27] *Id.* at 1713 (*citing Granite Rock* Co. v. *Teamsters*, 561 U. S. 287, 302, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010) (internal quotation marks omitted).
[28] *Id.* (*citing Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395, 404, n. 12, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)).
[29] *Id.* at 1713-14 (*citing Prima Paint*, 388 U. S. 395, 404, n. 12).
[30] *Id. at 1713* (*citing Dean Witter Reynolds Inc.* v. *Byrd*, 470 U. S. 213, 218-221, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985)).
[31] *Id.* at 1713-14 (*citing National Foundation for Cancer Research* v. *A. G. Edwards* & Sons, *Inc.*, 821 F. 2d 772, 774, 261 U.S. App. D.C. 284 (CADC 1987)).