MILLER CANFIELD

Supreme Court Rejects Prejudice Requirement for Waiver of Arbitration Agreement

May 26, 2022

In *Morgan v. Sundance, Inc.*, decided May 23, a unanimous Supreme Court addressed the standard for determining whether a party has waived its right to arbitrate a controversy by first engaging in litigation. Overruling decisions in nine circuits, the Court held that waiver can occur whether or not the adverse party has suffered prejudice. The Court explained, but left standing, its previous opinions holding the Federal Arbitration Act (FAA) adopts a "policy favoring arbitration." The Court's analysis presages issues for future litigation under the FAA.

The facts in *Morgan* were egregious. Morgan, an hourly employee of Sundance, a Taco Bell franchisee, filed a nationwide collective action alleging that Sundance violated federal law requiring overtime payment. Although Morgan's employment agreement contained an arbitration clause, Sundance litigated the case for more than seven months. After its motion to dismiss and mediation were both unsuccessful, Sundance reversed course and filed a motion asking the court to stay the case and compel arbitration under the FAA. Morgan opposed the motion, arguing that Sundance had waived its right to arbitrate by engaging in litigation for so long. The district court agreed with Morgan, but the Eighth Circuit reversed, holding Sundance's tardiness had not caused Morgan prejudice.

The Supreme Court reversed, noting that there is no similar prejudice requirement for waiver of other contractual rights. The Court recognized that its previous opinions have repeatedly held that the FAA adopts a federal "policy favoring arbitration." It explained, however, that policy "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and place such agreements on the same footing as other contracts. . . . Accordingly, a court must hold a party to its arbitration contract just as the court would any other kind. But a court may not devise novel rules to favor arbitration over litigation."[1] The Court resolved a split among the circuits, observing that nine circuits, including the Sixth, had required prejudice for waiver of an agreement to arbitrate, while two—including the Seventh—had rejected the requirement.[2]

The immediate takeaway from *Morgan v. Sundance* is unsurprising: To avoid waiver, an agreement to arbitrate should be enforced without delay. The eventual impact of the case, however, may be broader. The *Morgan* Court does not identify any other "novel rules . . . favor[ing] arbitration" that are in jeopardy. But the Court itself has said that in construing an agreement to arbitrate, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration."[3] Does *Morgan* signal that in the future, the Court will construe agreements to arbitrate by applying normal state-law rules of contractual interpretation, without a thumb on the scale from the FAA? Perhaps, as the Court stated: "The federal policy is about treating arbitration contracts like all others, not about fostering arbitration."[4] This issue will no doubt continue to percolate in the courts.

Should you have any questions regarding *Morgan v. Sundance* or other issues related to alternative dispute resolution, please contact your Miller Canfield attorney or the authors of this alert.

[1] Slip op. at 6 (internal quotation marks omitted), quoting *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 302 (2010).

[2] See Slip Op. at 4 & nn. 1, 2, collecting cases. In *O.J. Distributing, Inc. v. Hornell Brewing, Inc.*, 340 F.3d 345, 355-56 (6th Cir. 2003), the Sixth Circuit held that prejudice was required, but readily found prejudice on facts analogous to those in *Morgan v. Sundance*. In *St. Mary's Medical Center of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 590

(7th Cir. 1987), the Seventh Circuit rejected the requirement of prejudice.

[3] *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475–76 (1989) (citing *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983)).

[4] Slip Op. at 6.