

A Lil' Too Late—U.S. Court of Appeals for the Sixth Circuit Refuses to Compel Arbitration After Company Litigates Case for 7 Months

March 28, 2024

When has a party waived its contractual right to arbitrate? Until recently, most federal Courts of Appeal—including the Sixth Circuit—held that a party who participates in litigation (e.g., by serving and responding to discovery, conducting depositions, and so on) has not waived its right to arbitrate unless there was prejudice to the opposing side. The prejudice requirement was inferred from the Federal Arbitration Act's policy favoring arbitration. But in 2022, the U.S. Supreme Court eliminated the arbitration-specific requirement to show prejudice, holding the right to arbitrate can be waived like any other contractual right. Whether a party waived the right to arbitrate, reasoned the Supreme Court, depends on whether there is an "intentional relinquishment or abandonment" of the contractual right. *Morgan v. Sundance, Inc.*, 596 U.S. 411, 417 (2022).

On March 27, 2024, the Sixth Circuit U.S. Court of Appeals, following *Morgan*, in a published decision affirmed a district court's denial of a motion to compel arbitration filed by the employer. ***Schwebke v. United Wholesale Mortgage***. The Employer participated extensively in discovery for seven months—including producing tens of thousands of pages of documents, taking and defending depositions, and issuing third-party subpoenas—without ever mentioning arbitration (not even in its affirmative defenses). Discovery was nearly complete when the Employer finally decided to compel arbitration. The Court of Appeals explained that after *Morgan*, proof of prejudice was unnecessary; the Employer's "conduct was completely inconsistent with reliance on its arbitration" and thereby "implicitly waived" its right to arbitration.

It remains prudent for employers seeking to avoid similar pitfalls and ensure timely arbitration to assert proactively their right to arbitrate at the outset of legal proceedings or as soon as practicable thereafter. By promptly demanding arbitration and moving to dismiss the litigation or to compel arbitration, an employer can establish a clear intent to enforce its contractual right, thereby avoiding any potential claims of waiver based on conduct during litigation.

Should you have any questions, please call your Miller Canfield attorney or one of the authors of this alert.