

Justices Question How Delay Didn't Waive Arbitration Rights

By **Max Kutner**

Law360 (March 21, 2022, 4:47 PM EDT) -- The U.S. Supreme Court on Monday seemed skeptical of a Taco Bell franchisee's argument that it didn't forfeit its right to send an overtime case to arbitration by first litigating for months, as multiple justices questioned how a delay didn't amount to a waiver.

During **oral arguments in a case** regarding whether some federal circuit courts give special treatment to arbitration clauses over other contract provisions, Robyn Morgan argued that the Eighth Circuit should assess under Iowa law whether Sundance Inc. waived its arbitration rights, instead of considering whether the delay prejudiced Morgan.



The U.S. Supreme Court justices on Monday questioned whether a company forfeited its right to compel arbitration in an overtime case even though it did not seek to do so for months. (AP Photo/J. Scott Applewhite)

But Sundance argued that the Federal Arbitration Act doesn't require a party to seek arbitration so quickly and that the company did not give up its right to seek to enforce an arbitration agreement.

Echoing an earlier sentiment by Justice Elena Kagan, Justice Sonia Sotomayor told counsel for Sundance, "The question becomes, did you know that you had the right to arbitration? And here you knew. Nevertheless, you didn't move for arbitration in the answer as a defense."

Sundance had instead filed a motion to transfer the case, and when the court denied that motion, the

company went into settlement talks and materials were produced, Justice Sotomayor said.

"There was a delay in the speedy adjudication of the case because you didn't move to begin with to go to arbitration, so that's delay," Justice Sotomayor said. "You were taking a calculated risk by staying in litigation. Why isn't that a waiver under Section 6 [of the Federal Arbitration Act]? Why isn't that a waiver under any normal definition?"

The justice added, "It prejudiced the other side, it hurt them at least financially, it hurt them in delay and you intentionally sat on your rights waiting to see if you could derive from anything."

Paul Clement of Kirkland & Ellis LLP, counsel for Sundance, responded that the franchisee had acted within its rights, and that there was a difference between filing motions that go to the merits and those that don't.

"I really would draw the line at discovery," Clement told the court.

Some justices also seemed to push back against Morgan's argument that Sundance forfeited its right to send the case to arbitration by litigating for months and that the Eighth Circuit was wrong to hold otherwise based on whether the delay caused prejudice.

Under Iowa contract law, the federal circuit panel instead should have ruled based on a waiver inquiry, not a prejudice inquiry, Karla Gilbride of Public Justice PC argued on behalf of Morgan.

"How do we get from federal law to state law?" Justice Sotomayor said.

Gilbride responded that the question of waiver rights falls under state law because it's a generally applicable contract defense.

Justice Stephen Breyer said, "I might think they had good reason for delaying."

The justices **had agreed in November** to review a March 2021 Eighth Circuit **panel majority ruling** that Sundance did not forfeit its right to compel arbitration even though it did not seek to do so for months.

Morgan, a former Sundance employee, had sued Sundance in Iowa federal court in 2018. She alleged that the company violated the Fair Labor Standards Act by failing to pay for overtime. The company recorded her time across multiple weeks to keep the weekly hours below 40, she claimed.

In 2019, after a failed mediation, Sundance sought to send the case to arbitration, but the court denied the bid, finding that the company waived its right to arbitrate by litigating first. The company appealed, and the Eighth Circuit majority reversed the lower court ruling.

For the Taco Bell franchisee to have waived its arbitration rights, Morgan would have needed to show she was unfairly prejudiced, the panel majority held. But there was no prejudice because the parties spent that time arguing about whether the court could hear the case, not litigating the merits, the majority said.

In her August 2021 petition, Morgan argued that the Eighth Circuit and eight other federal circuit courts had adopted an arbitration procedure that went against the U.S. Supreme Court's 2011 precedent from [AT&T Mobility LLC v. Concepcion](#).

In *Concepcion*, the justices had said courts should evaluate arbitration agreements "on an equal footing with other contracts," and weighing prejudice is not part of the analysis of other contract cases, Morgan said in the petition.

On Monday, Morgan's counsel argued that Sundance gave up its arbitration rights by first seeking to dismiss the case and filing an answer that didn't allude to arbitration.

"Those actions should have been sufficient for a finding of waiver, and the same actions placed Sundance in default within the meaning of Section 3" of the Federal Arbitration Act, Gilbride said. "Prejudice has no part to play in either of these inquiries, and the Eighth Circuit was wrong to require it."

But Clement argued on Monday, "Nothing in the FAA or state law supports petitioner's proposed rule that a motion to stay litigation in favor of agreed upon arbitration must be filed as expeditiously as possible or

lost forever."

Instead, the Federal Arbitration Act says courts should compel arbitration unless the party seeking it is in default, and state laws say a party has to show prejudice before a contractual right is lost, Clement said.

The American Association for Justice, formerly known as the Association of Trial Lawyers of America, and **attorneys general** from 19 states and the District of Columbia **filed amicus briefs** supporting Morgan's petition. The U.S. Chamber of Commerce and the Restaurant Law Center **filed briefs** backing Sundance.

Justice Clarence Thomas did not participate in Monday's arguments, after **he was hospitalized** Friday with flu-like symptoms. He will participate in the consideration and decision of the case, Chief Justice John Roberts said at the start of Monday's arguments.

Morgan is represented by Karla Gilbride and Leah M. Nicholls of Public Justice PC, Charles R. Ash IV and Jason J. Thompson of Sommers Schwartz PC, Beth M. Rivers of Pitt McGehee Palmer & Rivers PC and Paige Fiedler of Fiedler Law Firm PLC.

Sundance is represented by Joel W. Rice and Scott Fanning of Fisher Phillips and by Paul D. Clement, Erin E. Murphy, Michael D. Lieberman and John C. Brinkerhoff Jr. of Kirkland & Ellis LLP.

The case is Robyn Morgan v. Sundance Inc., case number 21-328, in the U.S. Supreme Court.

--Additional reporting by Daniela Porat, J. Edward Moreno, Irene Spezzamonte, Jimmy Hoover and Jon Steingart. Editing by Haylee Pearl.