

---

**Case Name and Number:** *Morgan v. Sundance, Inc.*, No. 21-328

**Introduction:** Today, the Supreme Court held in a 9-0 decision that the Federal Arbitration Act does not authorize federal courts to require the party opposing arbitration to show prejudice.

**Background:** When a party that has agreed to arbitration instead sues in federal court, the Federal Arbitration Act (FAA) entitles the defendant to move to stay the litigation pending arbitration. When the defendant does not move to stay at the outset of litigation, the plaintiff sometimes opposes the stay request by arguing that it was filed too late.

Federal courts generally address untimeliness arguments by applying federal law on waiver. The majority of courts of appeals have held that a party can waive its arbitration right only when its conduct has prejudiced the other side.

In this case, the defendant moved to stay the litigation and compel arbitration nearly eight months after the lawsuit was filed. The plaintiff opposed the motion. The Eighth Circuit held that the defendant had not waived its right to arbitrate because the plaintiff had not shown prejudice.

**Issue:** Whether the FAA authorizes federal courts to create an arbitration-specific federal procedural rule of waiver that requires the party opposing arbitration to show prejudice.

**Court's Holding:** In an opinion written by Justice Kagan, the Supreme Court unanimously held that, under the FAA, federal courts cannot require a showing of prejudice to establish a waiver of the right to arbitrate. The Court explained that “a federal court asking about waiver does not generally ask about prejudice” outside of the arbitration context, and the result should be no different for arbitration, because federal courts may not “invent special, arbitration-preferring procedural rules.”

The Court relied on the text of Section 6 of the FAA, which provides that an application under the statute “shall be made in the manner provided by law for the making and hearing of motions” (unless the statute says otherwise). The Court explained that this language “is simply a command to apply the usual federal procedural rules, including any rules relating to a motion’s timeliness.” The Court therefore vacated and remanded for the Eighth Circuit to reassess waiver without the additional prejudice requirement, or to “determine that a different procedural framework (such as forfeiture) is appropriate.”

The Court expressly declined to reach many of the issues raised by the parties, including “the role state law might play in resolving when a party’s litigation conduct results in the loss of a contractual right to arbitrate,” and whether that inquiry “involv[es] rules of waiver, forfeiture, estoppel, laches, or procedural timeliness.” The Court assumed without deciding that the Eighth Circuit and other courts of appeals have correctly applied federal law and used the terminology of waiver.

The most immediate practical consequence of the Court’s decision is that the defendant’s conduct – and not prejudice to the plaintiff – will determine whether the defendant has waived its arbitration rights. In the longer term, the Court’s decision also invites courts to revisit whether the federal law of waiver provides the correct procedural framework for resolving whether the defendant has waited too long to assert its arbitration right, and whether and how to apply the ordinary federal rules of civil procedure when resolving motions to compel arbitration.

Read the opinion [here](#).