



Yes, Prejudice May Be Included in a Court's Analysis of a Waiver of Arbitration

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In a recent published opinion, [Marmo & Sons General Contracting, LLC v. Biagi Farms, LLC](#), the Appellate Division affirmed the trial court's finding that a party had waived its contractual right to compel arbitration. At issue was the non-moving party's assertion that the U.S. Supreme Court's 2022 decision in [Morgan v. Sundance, Inc.](#) forbade considerations of prejudice in the seven-factor waiver analysis originally set forth in 2013 by the New Jersey Supreme Court in [Cole v. Jersey City Medical Center](#).

Cole considered whether a party could invoke an arbitration clause 21 months after actively participating in litigation. In coming to the "inexorable conclusion" that the moving party's conduct had indeed waived its right to arbitration, the *Cole* court weighed seven factors, including the delay in requesting arbitration, whether any motions had been filed, and the extent of discovery conducted. Critically here, the seventh *Cole* factor is addressed to the resulting prejudice, if any, suffered by the non-moving party.

In *Morgan*, the U.S. Supreme Court reviewed an Eighth Circuit precedent that expressly premised a waiver of arbitration upon a finding of prejudice. The Eighth Circuit's holding sprang from its desire to bolster the broader federal policy favoring arbitration. The Supreme Court, however, reversed, holding that the Federal Arbitration Act's "'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules." "[F]ederal policy is about treating arbitration contracts like all others," the Supreme Court reasoned, "not about fostering arbitration."

The multifactor balancing test in *Cole* is plainly different from the procedural requirement addressed by *Morgan*, as the Appellate Division confirmed in *Marmo & Sons*: "*Morgan* [] disallow[ed] considerations of prejudice only if [prejudice] is used by a court as a **necessary** element for waiver in the arbitration context."

(emphasis added). Because *Cole* does not mandate a showing of prejudice by the party opposing arbitration – but, rather, includes prejudice as a single non-dispositive factor to be considered by our courts – the *Cole* test remains good law.

The bottom line: A court evaluating whether a party has waived its right to arbitrate may continue to factor into its calculus the prejudice to the party opposing arbitration that stems from the movant's delay.

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