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The Ninth Circuit chips away at arbitration through waiver, ruling that waiver does not require a "heavy" showing and that a defendant can waive arbitration as to absent class members before class certification

by Michele Floyd

Takeaway: The Ninth Circuit ruled that a defendant can waive its right to compel absent class members to arbitrate by failing to assert that right early in class litigation—even if there is no arbitration agreement with the representative plaintiff—and then issued a short decision rejecting waiver but nevertheless warning that a finding of waiver no longer will be "disfavored." The decisions in *Hill v. Xerox Business Services, LLC*, 59 F.4th 457 (9th Cir. 2023), and *Armstrong v. Michaels Stores, Inc.*, 59 F.4th 1011 (9th Cir. 2023), confirm the much higher risk of waiver now faced by Ninth Circuit class action defendants.

In *Morgan v. Sundance*, 142 S. Ct. 1708 (2022), the Supreme Court ruled that arbitration contracts should be interpreted no differently than other contracts and eliminated the arbitration-specific element of prejudice from the test for waiver, leaving the following two factors: (1) knowledge of the right to arbitrate; and (2) acts inconsistent with the right to arbitrate.

The Ninth Circuit interpreted those factors first in *Hill,* with the majority opinion concluding that the defendant had waived its right to compel arbitration of the claims of unnamed, putative class members by litigating the named plaintiff's claim on the merits—even though the named plaintiff had *not* signed an arbitration agreement. The Court of Appeals acknowledged that Xerox could not procedurally move to compel arbitration of the claims of absent class members until the class had been certified and the notice and opt-out period had expired, but nevertheless found waiver by differentiating between Xerox's *knowledge* of the right to arbitrate and its *ability* to move to compel arbitration. It reasoned that waiver involved a "unilateral" analysis that looks only to the actions of the person holding the right and does not consider the effect of those actions on the other party. *Hill*, 59 F.4th at 469, citing *Morgan*, 142 S. Ct. at 1713.

Having found the first element satisfied, the *Hill* majority then found three "inconsistent acts" by Xerox: (1) requesting extensive discovery during the litigation; (2) failing to assert the right to arbitrate under certain arbitration agreements despite repeated opportunities to do so; and (3) actively litigating the case on the merits for several years before moving to compel the absent class members to arbitration. *Hill*, 59 F.4th at 471–79.

Judge VanDyke dissented, arguing that the majority's result constituted a "break from precedent" and "transform[ed] our clear waiver rule into an opaque forfeiture rule" under which "a defendant loses its right to arbitrate against absent class members unless it affirmatively assert the right long before it even knows who might be in the class, and even though it has no right to arbitrate with the named

plaintiff." *Id.* at 484 (VanDyke, J., dissenting).

Ten days later, the Ninth Circuit decided *Anderson*. There, the named plaintiff *had* assented to an arbitration agreement and the defendant asserted its right to arbitrate repeatedly and consistently. The *Anderson* Court addressed only the "inconsistent acts" prong of the test and formulated the following two-factor subtest: (1) whether defendant made an intentional decision not to move to compel arbitration; and (2) actively litigated the merits for a prolonged period. 59 F.4th at 1015.

Because Michaels consistently asserted its right to compel the plaintiff to arbitration in court filings and did not litigate against the named plaintiff on the merits, there was no waiver.

Even though the short *Anderson* decision did not find waiver, it nevertheless confirmed the new burdens faced by a class action defendant opposing a waiver argument:

- At least in terms of generally applicable procedural doctrines such as waiver, the Supreme Court has rejected any "strong federal policy favoring enforcement of arbitration agreements," *id.* at 1014;
- Although the party opposing arbitration still bears the burden of showing waiver, the burden is no longer 'heavy," *id.;* and
- The two-prong test that the Court developed for analyzing "inconsistent acts" would have yielded a different result in *Hill* had the Court applied it there:the defendant in *Hill* could not have made "a conscious decision not to compel arbitration" before certification because it had no ability to compel to arbitration pre-certification.