ARTICLE:
THE EVOLVING LAW OF WAIVER UNDER THE CALIFORNIA ARBITRATION ACT: PREDICTIONS FOR A POST-*QUACH* WORLD

By Carolyn Nelson Rowan[*]

Nearly a century ago, and recognizing the courts' historic hostility toward arbitration agreements, Congress, followed shortly by the California Legislature, adopted laws intended to "favor" arbitration. In recent decades, courts interpreted the enactment of the Federal Arbitration Act (FAA)[1] and California Arbitration Act (CAA)[2] as indications that arbitration should be fostered and therefore applied arbitration-specific waiver requirements intended to promote arbitration over litigation. Specifically, courts required an additional showing of prejudice to the non-moving party before a finding of waiver could be made.

This favoritism started to crumble in 2022, when the United States Supreme Court decided *Morgan v. Sundance Inc.*,[3] holding that the FAA was not intended to favor arbitration over litigation, but rather to place arbitration agreements on equal footing with other types of contracts, to overcome the tendency of courts to favor more traditional methods of dispute resolution over arbitration. As such, the Court rejected any requirement that a party asserting waiver must establish it suffered prejudice as a result of the moving party's actions under the FAA. After *Morgan*, there was some question as to what law to apply in CAA cases, but the California Supreme Court responded relatively swiftly by issuing a decision in July 2024 in *Quach v. California Commerce Club, Inc.*[4] *Quach* followed *Morgan* and similarly concluded that waiver under the CAA does not require a showing of prejudice. It also articulated a new waiver rule for the CAA: courts should apply the same rules as they would under generally applicable contract law.

This article explores how the law of waiver evolved in the federal and state courts leading up to *Quach*, makes predictions regarding how the new CAA waiver standard may be applied in future cases, and identifies common steps a practitioner might take to decrease the likelihood a court will find waiver in a given case.

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Background: The Right to Arbitration and the Evolution of the Waiver Doctrine

The Federal Arbitration Act and the California Arbitration Act

Because arbitration can offer a number of benefits, including more expeditious proceedings, simplified procedures, and relaxed rules of evidence, it is a popular means of dispute resolution. Indeed, it is common to find arbitration agreements in contracts for the sale of real property, leases, real estate broker listing agreements, construction contracts and subcontracts, architect's contracts, organizational documents of homeowners associations, title insurance policies, and other real estate contracts.[5]

Two primary statutes govern written arbitration agreements. At the federal level, the Federal Arbitration Act (FAA) was enacted roughly a century ago to reverse historic judicial hostility toward arbitration agreements.[6] It applies to written contracts for the arbitration of disputes involving interstate commerce, a broadly interpreted concept.[7] Specifically, section 2 of the FAA provides that any "contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4."[8] The state and federal courts have concurrent jurisdiction over matters subject to the FAA, but an action subject to the FAA's procedural rules must be brought in state court unless an independent basis for federal jurisdiction exists.[9]

At the state level, California's first modern arbitration statute was enacted in 1927, two years after the FAA.[10] This enactment was "part of the historical shift away from hostility toward arbitration."[11] The current arbitration statute was first adopted in 1961 and is commonly referred to as the California Arbitration Act (CAA).[12] Section 1281 of the CAA provides: "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."[13] In addition, the CAA expressly provides that a court should not order the parties to arbitrate if it determines that the right to compel has been waived by the petitioner.[14]

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Although the FAA and CAA were enacted to further a similar purpose and contain similar provisions, it is not always clear which set of rules should apply in a given case. When a case involves interstate commerce, the FAA's procedural rules and federal decisional law apply, except the CAA will apply if the agreement contains a choice of law provision specifying that California law applies.[15] And California courts generally apply the CAA's procedural rules *unless* application of the CAA is preempted or the parties have expressly agreed the FAA's procedural rules will apply.[16] Questions regarding what constitutes interstate commerce, whether the CAA is preempted, and what law applies to a given agreement are often difficult for a court to decide. Thus, the question of whether the FAA or CAA governs in a particular case can be a tricky one.

Regardless of which law governs, one important issue that has been the subject of evolving case law over the last few decades, in both federal and state courts, is that of waiver. There is no question that waiver is a defense under both the FAA and CAA, but the courts have grappled with the definition of "waiver" under both statutes. *Quach* is the California Supreme Court's most recent statement on the issue, but it is also important to understand the line of cases that led to the Court's decision.

Carcich v. Rederi A/B Nordie

In 1968, the Second Circuit Court of Appeals decided *Carcich v. Rederi A/B Nordie*,[17] a case that raised the question of whether a party waived its right to arbitration by participating in litigation. Longshoremen sued the owners (including Rederi A/B Nordic) of vessels time-chartered by Cunard Steamship Company, Ltd. (Cunard) to recover damages for injuries allegedly suffered while loading or discharging cargo from the vessels.[18] The owners then brought third-party claims against Cunard. Cunard moved to stay the third-party actions pending arbitration. The district court denied the motions based on Cunard's participation in pre-trial proceedings and because of its delay in moving for the stays.[19]

On appeal, the owners again argued that Cunard should have moved earlier for a stay and "acted inconsistently." In a relatively brief opinion, the court of appeal rejected that argument, explaining "[i]t is not 'inconsistency,' but the presence or absence of prejudice which is determinative of the issue."[20] Citing the "overriding federal policy favoring arbitration," the court stated that participation in litigation, alone, does not constitute a waiver.[21] "Waiver . . . is

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not to be lightly inferred, and mere delay in seeking a stay of the proceedings without some resultant prejudice to a party . . . cannot carry the day."[22] Accordingly, the court reversed and remanded to the district court for a determination of whether the underlying disputes were properly subject to arbitration under the time charters.[23]

Notably absent from the decision was any discussion of legislative intent to find a waiver. The court did not cite to any legislative history to support its statement that the policy favoring arbitration supported its conclusion that a showing of prejudice was required. Nevertheless, many courts subsequently cited *Carcich* as the source of the federal arbitration-specific waiver rule.

Saint Agnes Medical Center v. PacifiCare of California

In 2003, the California Supreme Court considered the issue of whether PacifiCare of California (PacifiCare) waived its contractual right to compel arbitration under the CAA.[24] PacifiCare had filed a lawsuit against Saint Agnes Medical Center (St. Agnes) in 2001, seeking to resolve disputes about the parties' rights and obligations under two health services agreements (the 1994 HSA and 2000 HSA). The initial lawsuit alleged that the 2000 HSA was void and the 1994 HSA governed the parties' dispute. Shortly thereafter, St. Agnes responded by filing its own separate action seeking damages and other relief against PacifiCare for alleged breach of the 2000 HSA. The 2000 HSA had an arbitration provision, but the 1994 HSA did not. In July 2001, PacifiCare sent a letter to St. Agnes requesting that it agree to submit seven of its 11 causes of action to arbitration on the ground they arose out of the 2000 HSA, and offering that PacifiCare would submit six of its own claims to arbitration. St. Agnes refused.[25]

On July 31, 2001, PacifiCare filed a petition to compel arbitration of portions of St. Agnes's lawsuit. St. Agnes opposed, arguing PacifiCare had waived its right to arbitration by expressly repudiating the 2000 HSA. The trial court denied the petition to compel arbitration, and the court of appeal reversed and remanded, finding the record did not establish waiver as a matter of law. The California Supreme Court granted review.[26]

The Court began by noting that the court of appeal determined the FAA governed the 2000 HSA and that the parties did not dispute that determination, but "the federal and state rules applicable in this case are very similar."[27] The Court observed that under both statutes, there is a "strong policy favoring

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arbitration agreements," waiver claims require careful scrutiny, and the party who resists arbitration bears a heavy burden.[28] The Court discussed several factors relevant to the question of waiver under California law:

> (1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) "whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and (6) *whether the delay "affected, misled, or prejudiced" the opposing party*.[29]

After rejecting arguments that PacifiCare waived its right to arbitration by challenging the validity of the 2000 HSA and by filing the lawsuit seeking to declare the 2000 HSA void and enforce its rights under the 1994 HSA, the Court reached the issue of prejudice. "More than two decades ago, we observed that '[u]nder federal law, it is clear that the mere filing of a lawsuit does not waive contractual arbitration rights. The presence or absence of prejudice from the litigation of the dispute is the determinative issue under federal law.' [citations] Our review of more recent federal authorities discloses that this rule remains largely intact."[30] The Court noted that the question of prejudice is also important to a waiver determination under California law.[31]

After noting the parties had not litigated the merits of the arbitrable claims and that PacifiCare had not used the discovery process to gain information that would have been unavailable in arbitration, PacifiCare's venue-related motion and briefing were not enough to support a finding of prejudice. The Court concluded that "the only reasonable inference to be drawn from the undisputed facts . . . is that PacifiCare did not waive its contractual right to arbitration and that therefore its petition to compel arbitration should have been granted."[32]

After 2003, California courts applied "*St. Agnes*'s framework regardless of whether the arbitration agreement at issue was governed by the procedural rules of the FAA or CAA."[33] Thus, California courts and most federal courts "applied an arbitration-specific prejudice requirement and did so regardless of whether the proceedings were governed by the FAA or the CAA."[34]

Morgan v. Sundance, Inc.

Almost 20 years after the California Supreme Court decided *St. Agnes*, the United States Supreme Court granted certiorari in *Morgan v. Sundance, Inc*.[35] to consider whether the FAA authorizes federal courts to create an arbitration-specific prejudice requirement.

The case arose when Morgan, a former Taco Bell employee, brought a nationwide collective action against Sundance in federal court for violations of the Fair Labor Standards Act. Sundance initially defended itself by moving to dismiss the suit, then, after the district court denied its motion, filing an answer to the complaint asserting 14 affirmative defenses, none of which mentioned the arbitration agreement. The parties then engaged in mediation, and Morgan's suit did not settle. Nearly eight months after the suit was filed, Sundance moved to stay the litigation and compel arbitration under the FAA. Morgan opposed, arguing Sundance had waived its right to arbitrate. The law in the Eighth Circuit Court of Appeals included an arbitration-specific prejudice element even though it was not required under general contract law. The district court found the prejudice element was met; the Eighth Circuit Court of Appeals disagreed. In a dissenting opinion, Judge Colloton called the prejudice requirement into question, noting a split among the federal circuits on the issue. The U.S. Supreme Court granted certiorari to resolve that split.[36]

The Court assumed without deciding that the courts may generally resolve these types of waiver questions as a matter of federal law and focused on the question of whether "they may create arbitration-specific variants of federal procedural rules, like those concerning waiver, based on the FAA's 'policy favoring arbitration.' "[37]

After observing that outside the arbitration context, waiver is defined as "the intentional relinquishment or abandonment of a known right," and that courts usually do not ask about prejudice or the effect of the actions of the party who held the right on the opposing party,[38] the Court traced the Eighth Circuit's arbitration-specific prejudice rule back to *Carcich v. Rederi A/B Nordie*, which, as discussed above, held that waiver "is not to be lightly inferred" and that delay, "without some resultant prejudice," was insufficient to establish waiver.[39] The Court disagreed that the FAA's "policy favoring arbitration" authorized "federal courts to invent special, arbitration-preferring procedural rules."[40] " 'Th[e] policy,' we have explained, 'is merely an acknowledgement of the FAA's com-

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mitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate *and to place such agreements upon the same footing as other contracts*.' "[41] Put differently, "[t]he policy is to make 'arbitration agreements as enforceable as other contracts, but not more so.' "[42] "The federal policy is about treating arbitration contracts like all others, not about fostering arbitration."[43]

Noting that section 6 of the FAA provides that a petition to compel arbitration "shall be made and heard in the manner provided by law for the making and hearing of motions,"[44] the Court read this language as prohibiting "custom-made rules" that favor arbitration and instructing that prejudice is not a condition of finding that a party waived its right to compel arbitration by litigating too long.[45]

The Court stated the correct waiver inquiry would focus on Sundance's conduct and ask whether it "knowingly relinquish[ed] the right to arbitrate by acting inconsistently with that right," and remanded to the Eighth Circuit so it could conduct the appropriate inquiry.[46]

Quach v. California Commerce Club, Inc.

After *Morgan*, California courts continued to follow the rule from *St. Agnes*, but doing so presented challenges. In theory, the courts had a bright-line rule: the *Morgan* rule applied in cases applying FAA procedural rules and *St. Agnes* applied in cases applying CAA procedural rules. However, the decision regarding which procedural rules to apply in any given case was not always clear. Before *Morgan*, the distinction was less important because the same waiver rule applied regardless of which procedural rules applied, which allowed courts to sidestep the question in some cases. But after *Morgan*, the distinction was more significant.

With this backdrop, the California Supreme Court granted review of the Second District Court of Appeal's decision in *Quach v. California Commerce Club, Inc*.[47]

The Court first addressed Commerce Club's argument that the Court should adhere to precedent and follow *St. Agnes*. "Our policy of adhering to precedent is rooted in our desire to promote certainty, predictability, and stability in the law—to enable people to rely on it and conform their conduct to it. . . . These considerations have special force when our precedent interprets a state statute, because in that context the Legislature has the power to correct our errors."[48]

The Court noted that this policy does not prevent correction of court-created error, but instead allows flexibility to reconsider prior precedent in appropriate circumstances, such as "when a development in the law indicates 'an earlier decision was unsound, or has become ripe for reconsideration.' "[49] Because California's arbitration-specific rule was based on the federal authority that *Morgan* disapproved, the Court concluded a reexamination of precedent was warranted.[50]

The Court began its reexamination by reciting basic principles of statutory interpretation: the Court first looks to the language of the provision at issue, considering its context and interpreting the words according to their plain meaning or well-established legal meaning; then, if the statutory meaning is unclear, the Court looks to legislative history and public policy as additional aids to determine how best to give effect to the Legislature's intent.[51]

The provision at issue, Section 1281.2, states:

> On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party to the agreement refuses to arbitrate that controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:
>
> (a) The right to compel arbitration has been waived by the petitioner. . . .[52]

Because the CAA does not expressly define "waived," the Court applied generally applicable law.[53] As further support for this reading, the Court cited parallel language in section 1281 of the CAA, which provides that an arbitration agreement is "valid, enforceable, and irrevocable, save upon such grounds as exist for the revocation of any contract," and section 2 of the FAA, which provides that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[54] "The parallel language between section 1281 and section 2 of the FAA suggests that both statutes contain the same directive and embody the same policy. . . . That policy favors the enforcement of arbitration agreements as it favors enforcement of any other contract; it requires courts to 'place arbitration agreements on an equal footing with other contracts, [citation], and enforce them according to their terms.' "[55] Since *Morgan* cited the " 'equal footing principle' to support its conclusion that 'the FAA's "policy favoring arbitration" does not authorize federal courts to invent special, arbitration-preferring procedural rules,' " the Court found section 1281 should be interpreted in a similar fashion.[56]

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The Court also noted other cases outside the waiver context had declined to enforce arbitration agreements under generally applicable state contract law, without any additional showing.[57] Following the "equal footing principle" would be consistent with those cases.[58]

Even though the Court's analysis suggested it thought the statutory language was clear, it went on to address Commerce Club's legislative history arguments, explaining the enactment of the FAA and the CAA were "part of a historical shift away from hostility toward arbitration."[59] Further, nothing in the history of section 1281.2 suggests the Legislature intended courts to apply special arbitration-preferring rules, only that courts should interpret and enforce arbitration agreements using the same principles as for contracts generally.[60] In fact, one case cited in the California Law Revision Commission's report found waiver without discussing prejudice.[61] The Court also noted that *St. Agnes* did not analyze the CAA language or its legislative history, but instead cited cases that relied on the outdated federal precedent that *Morgan* identified as the origin of the prejudice requirement under federal law.[62]

Since California's arbitration-specific prejudice requirement was adopted to conform state procedure to federal procedure, and the federal procedure changed with *Morgan*, "the desire for procedural uniformity weighs in favor of abrogating California's arbitration-specific prejudice requirement and applying the same principles in determining whether a party has lost the right to compel arbitration as would apply under generally applicable contract law."[63]

The Court therefore abrogated the state law arbitration-specific prejudice requirement and overruled *St. Agnes* and the opinions cited therein and relying upon it.[64] "[A] court should treat the arbitration agreement as it would any other contract, without applying any special rules based on a policy favoring arbitration."[65] In doing so, the Court noted that practical concerns, though not dispositive, supported its conclusion. When the FAA and CAA rules were the same, "California courts ha[d] been able to avoid the sometimes tricky choice of law and preemption questions involved in determining which statute governs proceedings to enforce an arbitration agreement."[66] By applying the same rule consistently in both contexts, courts can avoid uncertainty that could lead to additional litigation and undermine the goal of an expedient and inexpensive means of dispute resolution.[67]

Next, the Court addressed whether Commerce Club had in fact waived its

right to compel arbitration according to generally applicable contract law principles. Noting that there are also other generally applicable state contract law defenses that might apply in a case involving an arbitration agreement, such as waiver, forfeiture, estoppel, laches, and procedural timeliness, the Court's analysis focused on waiver because that was the defense Commerce Club articulated, and the Court agreed the trial court's finding of waiver was correct.[68]

"To establish waiver under generally applicable contract law, the party opposing enforcement of a contractual agreement must prove by clear and convincing evidence that the waiving party knew of the contractual right and intentionally relinquished or abandoned it."[69] The clear and convincing evidence standard requires a showing "that it is 'highly probable' the fact is true."[70] "The waiving party's knowledge of the right may be 'actual or constructive.' "[71] The exclusive focus is on the waiving party's words or conduct, "neither the effect of that conduct on the party seeking to avoid enforcement of the contractual right nor that party's subjective evaluation of the waiving party's intent is relevant."[72] There is no prejudice requirement.[73]

Reviewing the undisputed record of trial court proceedings de novo, the Court concluded there was clear and convincing evidence in the record showing that Commerce Club was aware of its right to compel arbitration, based on a declaration from its director of human resources stating that all employees were required to sign form agreements requiring arbitration of employment-related disputes, the fact Commerce Club provided Quach with a copy of his signature page before he filed suit, and the fact Commerce Club alleged in its answer to the complaint that the arbitration agreement barred suit and Quach should be compelled to arbitrate.[74] Despite the asserted failure of Commerce Club's counsel to find a complete copy of Quach's arbitration agreement sooner, these facts were sufficient to establish it was "highly probable" that Commerce Club knew of its right to compel arbitration.[75]

The Court also concluded the record demonstrated clear and convincing evidence that Commerce Club, through its words and conduct, intentionally abandoned its right to arbitrate.[76] Rather than moving to compel, Commerce Club answered the complaint, propounded discovery requests, failed to raise the issue of a motion to compel with Quach's counsel or the court, affirmatively requested a jury trial and posted jury fees, failed to check the box on a case management conference stating it was willing to participate in arbitration, and actively engaged in discovery including taking Quach's deposition (which lasted

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a full day).[77] Commerce Club waited 13 months after the initial filing of the complaint before it first sought to enforce its right to compel arbitration. These words and actions were "markedly inconsistent" with an intent to arbitrate the dispute.[78] Any other conclusion "would surely create undue delay and gamesmanship going forward."[79] Therefore, based on the record developed in the trial court, the Court concluded Commerce Club waived its right to arbitrate the dispute.[80]

The Post-*Quach* CAA Waiver Analysis

Following *Quach*, regardless of whether the FAA or CAA procedural rules apply, the issue of whether a party waived its right to compel arbitration under an agreement will focus on the actions of the party moving to compel, not the effect on the party seeking to avoid enforcement. For purposes of the CAA, the salient question is: Did the waiving party (1) know of the contractual right to arbitrate, and (2) intentionally relinquish or abandon it? It is up to the party opposing enforcement to establish the answer in the affirmative by clear and convincing evidence.[81] The Ninth Circuit has stated the rule of waiver under the FAA similarly: Did the waiving party (1) have knowledge of the right, and (2) act inconsistently with that right?[82] The *Quach* court clearly believed these tests would yield consistent results.

So how will the new CAA waiver standard be applied in future cases? One thing is clear: without a prejudice requirement, it is now easier to waive the right to arbitrate. Parties and their attorneys must take extra care not to act in a way that is inconsistent with that right unless they are certain they want to litigate their case in a judicial forum. Practitioners attempting to predict what kind of behavior will or will not constitute a waiver in the post-*Quach* world may glean common themes from a survey of Ninth Circuit Court of Appeals and California state court cases that have applied the new *Morgan*/FAA waiver analysis.

Post-Morgan FAA cases finding waiver

In one post-*Morgan* decision, the Ninth Circuit Court of Appeals found a defendant acted inconsistently with its right to compel arbitration where the defendant "exerted a significant amount of energy challenging the merits of the legal theory underlying the claims that [plaintiff] raised personally and on behalf of the class members . . .," and pursued its challenge in the district court, the Ninth Circuit Court of Appeals, and the Washington Supreme Court

without attempting to reserve its arbitration right under the relevant agreement.[83]

> While [the defendant] could not actively move to compel arbitration until the moment it did, the inferences drawn from the record all point towards waiver: namely, [the defendant] embarked on a six-year appellate journey aimed at judicially resolving the *merits*—the legal heart—of the class members' claims . . . with full knowledge that their claims were implicated by the appeal. . . . The litigation history . . . tells the story of [defendant's] tactical choice to resolve the claims judicially and reveals that [defendant] belatedly chose to retreat and to claim the benefit of arbitration under the [agreement] only once its judicial strategy failed.[84]

The defendant's conduct demonstrated it knew how to reserve its right to arbitrate but failed to do so, sought "extensive" discovery, and "actively litigated" the case including filing a motion for summary judgment.[85] Given the "totality of the circumstances," the court found the defendant had acted inconsistently with a right to arbitrate.[86]

The court went on to reject the defendant's arguments that it would have been futile to file a petition to compel arbitration before the class was certified, explaining that even if it would be too early to file a motion to compel, a party that otherwise acts inconsistently with a right to arbitrate must concretely signal its intention to raise the arbitration agreement as a defense. In other words, even if the defendant could not yet file a motion, the act of providing notice of its intention is not necessarily futile.[87] Finally, the court rejected defendant's futility argument because it did not agree a change in law had occurred that would support a finding of futility.[88]

Applying a different version of the waiver test,[89] one California court of appeal also found waiver under the FAA where a defendant asserted its right to arbitration as an affirmative defense but waited 17 months after the complaint was served to file a motion to compel. Although the defendant argued the delay was a result of substituting counsel and court closures during the COVID-19 pandemic, the court found the absence of a reasonable explanation for the delay was sufficient to support waiver.[90] Further, the defendant appeared at a case management conference, demanded a jury trial, gave its own estimate of the time of trial, represented it would be participating in written discovery, depositions, and expert discovery, and never objected to discovery on the basis the case had to be arbitrated.[91] Only after the court scheduled a jury trial and the parties had engaged in multiple rounds of discovery did defendant move to compel.[92]

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Notably, the defendant had not engaged in any motion practice related to the merits of the case, but the court found waiver nonetheless. Although "the filing of a motion to dismiss or other motion on the merits may be one factor in determining waiver, none of them declares such factor dispositive."[93] "Certainly, the cases do not hold that participating in discovery and assenting to pretrial orders, rather than filing a dispositive motion, can never amount to a waiver of arbitration."[94]

Post-Morgan FAA cases finding no waiver

In contrast to the cases finding waiver discussed above, the Ninth Circuit Court of Appeals found a defendant did *not* waive its right to arbitrate based on the "totality of the parties' actions,"[95] where the defendant "repeatedly reserved its right to arbitration, did not ask the district court to weigh in on the merits, and did not engage in any meaningful discovery," and "the only significant motion filed was [defendant's] motion to compel arbitration."[96] Although there was some delay (approximately 10 months) and the defendant did propound some discovery before moving to compel (that was also relevant to its non-arbitrable claims), its actions did not rise to the level of an intentional relinquishment of a known right.[97] The court noted that seeking a decision on the merits of a key issue would make a stronger case for waiver.[98]

And one California court of appeal found a defendant did not waive its right to arbitrate claims based on a futility argument.[99] The defendant there had filed an answer that did not include the arbitration agreement as an affirmative defense and vigorously defended itself in the trial court based on the law existing at the time the complaint was filed, but did raise arbitration as an affirmative defense promptly after the law changed. On those facts, there was no *unreasonable* delay and therefore no waiver.[100] "Failing to make a futile motion to compel arbitration surely does not constitute an intentional relinquishment of the right to compel arbitration should the law change."[101] Further, the fact defendant had engaged in settlement negotiations was inapposite. "Settlement negotiations are not inconsistent with a right to arbitration, do not create unreasonable delay (or, so far as we can tell, any delay), and again do not constitute an intentional relinquishment or abandonment of any rights."[102]

Pre-Quach CAA decisions may still hold some predictive value

In addition, California courts may still find some pre-*Quach* decisions relevant to the extent they discuss grounds for or against waiver independent of prejudice or impact on the party opposing arbitration.[103]

The *Quach* Court observed that many of the *St. Agnes* factors may be relevant to other defenses, but not to waiver.[104] Still, in analyzing the waiver defense (because that was the only defense raised), the *Quach* Court considered some of the same facts that would have been relevant under the *St. Agnes* factor test. As part of its analysis of whether Commerce Club had intentionally relinquished a known right, the Court found Commerce Club's words and conduct were inconsistent with an intent to arbitrate, irrespective of the effect on Quach. Specifically, rather than moving to compel at the outset, Commerce Club answered the complaint, propounded discovery requests, failed to raise the issue of a motion to compel with counsel or the court, affirmatively requested a jury trial and posted jury fees, failed to check the box on a case management conference stating it was willing to participate in arbitration, and actively engaged in discovery, ultimately waiting 13 months after the initial filing of the complaint before seeking to enforce its right to compel arbitration.[105]

Thus, based on *Quach*'s application of the waiver rule, it would seem many of the *St. Agnes* factors still hold relevance to a waiver analysis post-*Quach*. With respect to waiver, the key question is the first *St. Agnes* factor: whether the party's actions are inconsistent with the right to arbitrate. However, *Quach* also demonstrates that other *St. Agnes* factors, or at least portions thereof, may still be relevant to the question of whether a party acted inconsistently with its contractual right: whether the litigation machinery had been substantially invoked; whether a party either required arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; and whether the party took advantage of judicial discovery procedures not available in arbitration. Post-*Quach*, these inquiries should focus exclusively on the words and conduct of the party seeking to compel arbitration, not on the effect on the opposing party. To the extent pre-*Quach* decisions turned on these factors, *irrespective of prejudice or the effect on the party opposing arbitration*, they may still hold predictive value.

Further, to the extent the remaining *St. Agnes* factors are no longer relevant to

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a waiver determination, they may still support other defenses such as forfeiture, estoppel, and laches or timeliness, and therefore pre-*Quach* decisions applying the *St. Agnes* factor test may still hold some predictive value with respect to the viability of those defenses.

Post-Quach: Predicting what words and conduct may give rise to a finding of waiver under the CAA

From these cases, practitioners can glean certain patterns that may help predict what words and conduct will constitute waiver and avoid such an outcome:

- The more the moving party has engaged in the substance and merits of litigation, the more likely it is that a court will find waiver. However, the reverse is not necessarily true: where a moving party has actively engaged in litigation for a significant period of time but the parties have not yet argued the merits, a court may still find waiver.
- If a party's words and conduct suggest its delay in moving to compel was due to gamesmanship or a strategic decision to take advantage of being in court before moving to compel arbitration, it is more likely a court will find waiver.
- Delay in moving to compel arbitration, by itself, may not lead to a finding of waiver, but delay for many months/years while actively participating in the judicial process is more likely to support such a finding.
- Asserting the right to arbitration as an affirmative defense in an answer will not necessarily avoid waiver, but courts may be less likely to find waiver where a party has been consistently vocal about its intention to move for arbitration. And a court is much more likely to find waiver if the right to arbitration was not asserted as an affirmative defense.
- Engaging in limited pretrial discovery, by itself, may not lead to a finding of waiver.
- Pre-answer motion practice or appearing at a mandatory court conference, by itself, may not lead to a finding of waiver.
- Engaging in settlement negotiations should not support a finding of waiver.
- Failure to make a futile motion should not support a finding of waiver.

- Finally, even when one of the factors above will not, alone, lead to waiver, a finding of waiver is *much* more likely when they accumulate.

Conclusion

With the California Supreme Court's decision in *Quach*, uniformity between the standards for waiver under the FAA and CAA has been restored. This should simplify questions regarding what test to apply and in some cases avoid the need for a determination of whether the FAA or CAA governs a given case. But this simplification means that waiver is now easier to establish regardless of which procedural rules govern, given that prejudice is no longer an element of the waiver analysis under either framework. Practitioners should take great care to avoid unreasonable delay and inadvertent waiver on behalf of their clients. Even if a party is not prepared to file a motion to compel at the outset of a case, it is prudent practice to regularly express a reservation of the right to arbitrate, to avoid engaging in substantive or otherwise excessive discovery, to avoid raising the merits of the case in a judicial forum, and to move to compel at their earliest reasonable opportunity. Gamesmanship will almost certainly lead to a finding of waiver.

The evolution of the waiver rules under the FAA and CAA took place alongside an increase in popularity of arbitration as an expeditious and economical tool for dispute resolution. Although the FAA and CAA were originally enacted to combat historic judicial hostility toward arbitration, the United States Supreme Court in *Morgan*, and now the California Supreme Court in *Quach*, have recognized the FAA's and CAA's policy "favoring" arbitration, but found *promotion* of arbitration over judicial proceedings is not necessary or appropriate to fulfill that purpose. It remains to be seen how much of a difference *Quach*'s elimination of the prejudice requirement will make, but it seems very likely we will see an increase in waiver findings in the coming years. If there is a *significant* jump in the number of cases being redirected to the courts over arbitration, query whether the rules will evolve again to ensure the FAA's and CAA's purpose is met.

ENDNOTES:

[1]9 U.S.C.A. §§ 1, et seq.

[2]Civ. Proc. Code, §§ 1281, et seq.

[3]*Morgan v. Sundance, Inc.*, 596 U.S. 411, 142 S. Ct. 1708, 212 L. Ed. 2d

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753 (2022).

[4]*Quach v. California Commerce Club, Inc.*, 16 Cal. 5th 562, 323 Cal. Rptr. 3d 126, 551 P.3d 1123 (2024).

[5]12 Miller & Starr, Cal. Real Estate (4th ed. 2023) § 45:8 (2023).

[6]*Morgan v. Sundance, Inc.*, 596 U.S. at 418; *Quach v. California Commerce Club, Inc.*, 16 Cal. 5th at 575.

[7]9 U.S.C.A. §§ 1, 2; 12 Miller & Starr, Cal. Real Estate (4th ed. 2023) § 45:9.

[8]9 U.S.C.A. § 2.

[9]12 Miller & Starr, Cal. Real Estate (4th ed. 2023) § 45:9 (2023) (citing cases).

[10]12 Miller & Starr, Cal. Real Estate (4th ed. 2023) § 45:8 (2023) (citing *Broughton v. Cigna Healthplans of California*, 21 Cal. 4th 1066, 1074, 90 Cal. Rptr. 2d 334, 988 P.2d 67 (1999)).

[11]*Quach v. California Commerce Club, Inc.*, 16 Cal. 5th at 580 (citing *Keating v. Superior Court*, 31 Cal. 3d 584, 601, 183 Cal. Rptr. 360, 645 P.2d 1192 (1982).

[12]12 Miller & Starr, Cal. Real Estate (4th ed. 2023) § 45:8 (2023) (citing cases).

[13]Civ. Proc. Code, § 1281.

[14]Civ. Proc. Code, § 1281.2, subd. (a).

[15]12 Miller & Starr, Cal. Real Estate (4th ed. 2023) § 45:9 (2023).

[16]*Quach v. California Commerce Club, Inc.*, 16 Cal. 5th at 576.

[17]*Carcich v. Rederi A/B Nordie*, 389 F.2d 692 (2d Cir. 1968) (abrogated by, *Morgan v. Sundance, Inc.*, 596 U.S. 411, 142 S. Ct. 1708, 212 L. Ed. 2d 753 (2022)).

[18]*Id.* at 693. The court explained that Rederi A/B Nordic had been misnamed as Rederi A/B Nordie. *Id.* at 694.

[19]*Id.* at 694.

[20]*Id.* at 696.

[21]*Id.*

[22]*Id.*

[23]*Id.*

[24]*St. Agnes Medical Center v. PacifiCare of California*, 31 Cal. 4th 1187, 8 Cal. Rptr. 3d 517, 82 P.3d 727 (2003) (overruled by, *Quach v. California Commerce Club, Inc.*, 16 Cal. 5th 562, 323 Cal. Rptr. 3d 126, 551 P.3d 1123 (2024)).

[25]*Id.* at 1192-1193.

[26]*Id.* at 1193.

[27]*Id.* at 1194.

[28]*Id.* at 1195. As support for the strong policy and heavy burden under the CAA, the Court cited *Christensen v. Dewor Developments*, 33 Cal. 3d 778, 782, 191 Cal. Rptr. 8, 661 P.2d 1088 (1983) and *Doers v. Golden Gate Bridge etc. Dist.*, 23 Cal. 3d 180, 189, 151 Cal. Rptr. 837, 588 P.2d 1261 (1979).

[29]*Saint Agnes Medical Center v. PacifiCare of California*, 31 Cal. 4th at 1196 (quoting *Sobremonte v. Superior Court (Bank of America Nat. Trust and Sav. Ass'n)*, 61 Cal. App. 4th 980, 72 Cal. Rptr. 2d 43 (2d Dist. 1998)) (emphasis added).

[30]*Id.* at 1203.

[31]*Id.*

[32]*Id.* at 1192.

[33]*Quach v. California Commerce Club, Inc.*, 16 Cal. 5th at 574 (citing *Bower v. Inter-Con Security Systems, Inc.*, 232 Cal. App. 4th 1035, 1041-1042, 181 Cal. Rptr. 3d 729 (1st Dist. 2014) (overruled by, *Quach v. California Commerce Club, Inc.*, 16 Cal. 5th 562); *Lewis v. Fletcher Jones Motor Cars, Inc.*, 205 Cal. App. 4th 436, 444, 140 Cal. Rptr. 3d 206 (4th Dist. 2012) (overruled by, *Quach v. California Commerce Club, Inc.*, 16 Cal. 5th 562)).

[34]*Quach v. California Commerce Club, Inc.*, 16 Cal. 5th at 572.

[35]*Morgan v. Sundance, Inc.*, 596 U.S. 411, 142 S. Ct. 1708, 212 L. Ed. 2d 753 (2022).

[36]*Id.* at 416.

[37]*Id.* at 417.

[38]*Id.*

[39]*Id.* at 417-418.

[40]*Id.* at 418.

[41]*Id.* (quoting *Granite Rock Co. v. International Broth. of Teamsters*, 561 U.S. 287, 302, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010) (emph. added)).

[42]*Id.* (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 fn. 12, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)).

[43]*Id.*

[44]*Id.* at 419.

[45]*Id.*

[46]*Id.*

[47]*Quach v. California Commerce Club, Inc.*, 16 Cal. 5th 562, 323 Cal. Rptr. 3d 126, 551 P.3d 1123 (2024).

[48]*Id.* at 577.

[49]*Id.* (quoting *Moradi-Shalal v. Fireman's Fund Ins. Companies*, 46 Cal. 3d 287, 397 (1988)).

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[50] *Id.*

[51] *Id.*

[52] Civ. Proc. Code, § 1281.2.

[53] *Quach v. California Commerce Club, Inc.*, 16 Cal. 5th at 578.

[54] *Id.* at 578.

[55] *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)).

[56] *Id.*

[57] *Id.* at 578-579 (e.g., unconscionability, fraud in the execution, fraud in the inducement).

[58] *Id.* at 579.

[59] *Id.* at 580.

[60] *Id.*

[61] *Id.* (citing CLRC Recommendation at p. G-36, fn. 65; *Pneucrete Corp. v. U.S. Fidelity & Guaranty Co.*, 7 Cal. App. 2d 733, 741, 46 P.2d 1000 (2d Dist. 1935)).

[62] *Id.* at 581.

[63] *Id.* at 582.

[64] *Id.* at 582, fn. 4.

[65] *Id.* at 583.

[66] *Id.* at 582.

[67] *Id.*

[68] *Id.* at 584.

[69] *Id.* Because there was some uncertainty as to whether the trial court had applied a burden of proof equivalent to the clear and convincing evidence standard, the Court employed the clear and convincing evidence standard in its examination of the record below. However, the Court noted that "[g]oing forward, trial courts should apply a clear and convincing evidence burden of proof and reviewing courts should uphold findings of waiver when 'the record as a whole contains substantial evidence from which a reasonable fact finder could have found it highly probable' that the party knew of its contractual right to compel arbitration and intentionally relinquished or abandoned that right." *Id.* at 585, fn. 6.

[70] *Id.*

[71] *Id.* at 584.

[72] *Id.* at 585.

[73] *Id.*

[74] *Id.* at 586.

[75]*Id.*

[76]*Id.* at 586-587.

[77]*Id.*

[78]*Id.* at 587.

[79]*Id.* at 586.

[80]*Id.* at 587.

[81]*Id.* at 584.

[82]*Hill v. Xerox Business Services, LLC*, 59 F.4th 457, 460 (9th Cir. 2023).

[83]*Id.* at 473.

[84]*Id.*

[85]*Id.* at 473-476.

[86]*Id.* at 474-479.

[87]*Id.* at 480-481.

[88]*Id.* at 483.

[89]The waiver test applied in *Davis v. Shiekh Shoes, LLC*, 84 Cal. App. 5th 956, 964-965, 300 Cal. Rptr. 3d 787 (1st Dist. 2022) was a multi-factor test similar to that rejected by the Court in *Quach*. However, the case may still hold some predictive value to the extent the factors considered by the court have been identified in other cases as probative of whether a party intentionally relinquished a known right.

[90]*Davis v. Shiekh Shoes, LLC*, 84 Cal. App. 5th at 968-969.

[91]*Id.* at 969-970.

[92]*Id.* at 970.

[93]*Id.* at 971.

[94]*Id.*

[95]*Armstrong v. Michaels Stores, Inc.*, 59 F.4th 1011, 1015 (9th Cir. 2023).

[96]*Id.* at 1013.

[97]*Id.* at 1015-1016.

[98]*Id.* at 1016.

[99]*Piplack v. In-N-Out Burgers*, 88 Cal. App. 5th 1281, 1289-1290, 305 Cal. Rptr. 3d 405 (4th Dist. 2023).

[100]*Id.* at 1289-1290.

[101]*Id.* at 1290.

[102]*Id.*

[103]See *Hill v. Xerox Business Services, LLC*, 59 F.4th at 460; *Boustead Securities, LLC v. Leaping Group Co., Ltd.*, 656 F. Supp. 3d 447, 451 fn. 7 (S.D. N.Y. 2023) (observing that *Morgan* was decided on a single issue and concluding

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pre-*Morgan* decisions remained good law to the extent they discuss grounds for or against waiver independent of prejudice).

[104]*Id.* at 584.

[105]*Id.* at 586-587.

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