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Attorney General Frosh Urges Supreme Court to Protect Employees and Consumers from Corporate Gamesmanship in Pending Arbitration Cases

Frosh Co-Leads Bipartisan Amicus Brief Asking Court to Ensure Companies Cannot Seek to Compel Arbitration if Their Defense Strategy Is Unsuccessful

BALTIMORE, MD (January 7, 2022) – Maryland Attorney General Brian E. Frosh co-led, with Minnesota Attorney General Keith Ellison, a bipartisan coalition of 19 attorneys general urging the U.S. Supreme Court to protect employees and consumers from corporate gamesmanship. In an amicus brief, the coalition asked the Court to ensure that in cases when plaintiffs are employees or consumers bound by arbitration agreements, companies cannot seek two bites at the apple by strategically defending cases in court for months – sometimes dragging them out for years in an effort to drain plaintiffs' resources – then seek arbitration if their court strategy is unsuccessful.

"Arbitration clauses in employment and consumer contracts, buried deep in confusing legal verbiage, are often intentionally used by corporations to avoid taking responsibility for wrongdoing" said Attorney General Frosh. "To protect employees and consumers, we are asking the Supreme Court to put an end to unfair legal maneuvering that enables companies to enforce arbitration agreements even after many months or years of litigation."

The case in which the coalition intervened, *Morgan v. Sundance, Inc.*, arises from the experience of Robyn Morgan, a former employee of a Taco Bell in Osceola, Iowa. Ms. Morgan alleged that her former employer, Sundance, Inc., the owner of 150 Taco Bell franchises in multiple states, failed to pay her for all the hours she worked, including both regular and overtime hours. She also alleged that this failure to pay her wages was part of her employer's business model and that her employer knew or should have known that it was unlawful. Sundance denied Ms. Morgan's claims. Ms. Morgan sued her former employer in federal district court, where her suit was litigated for eight months before Sundance disclosed the existence of an arbitration agreement in her employment contract and attempted to exercise it. It's unclear whether Ms. Morgan was previously aware of the existence of the arbitration agreement or of having consented to it.

Ms. Morgan is far from alone. As the coalition states in its brief, "One study found that, as recently as 2018, more than 800 million consumer arbitration agreements were in force nationally, and possibly as many as two-thirds of American households were subject to these largely 'nonnegotiable, adhesionary contracts.' Another study found that a majority of the Nation's private-sector non-union employees work for employers that impose mandatory arbitration requirements."

In the brief, the coalition asks the Supreme Court to find that state contract law governs the issue of "waiver" under the Federal Arbitration Act. In most cases, general state contract law would require defendants in litigation to assert a right to arbitration in a timely manner, or else it's deemed waived. The coalition asks the Supreme Court to rule that federal courts may not impose an additional requirement that plaintiffs be prejudiced by the untimely assertion of arbitration before the right to arbitrate is deemed waived.

As they write in the brief, the states "seek to protect their residents from the otherwise unnecessary litigation expenses and delays that result when parties engage in such gamesmanship. Such abuses not only impose increased litigation costs on employees and consumers, they also waste judicial resources and frustrate a 'prime objective' of arbitration, which is to achieve streamlined proceedings and expeditious results."

Joining Attorneys General Frosh and Ellison in today's brief are the attorneys general of Alaska, Colorado, Delaware, the District of Columbia, Idaho, Illinois, Iowa, Maine, Massachusetts, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and Washington.

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