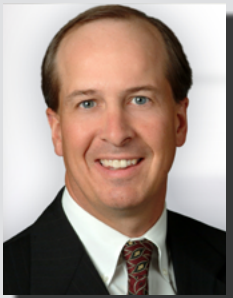


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Waiver Redux: Appeals Court Confirms That Arbitration of Unnamed Class Member Claims Not Waived Following Certification Decision

By Mark A. Olthoff

The Eleventh Circuit Court of Appeals recently held that a litigant may enforce its contractual arbitration provision as to absent class members despite not obtaining a ruling on the issue at the outset of the case. The right to compel arbitration of unnamed class member claims was not lost because there was no “party” against whom to compel arbitration unless or until a class is certified. This occurred in *Garcia et al. v. Wells Fargo Bank, N.A.*, Case No. 16-16820.

This ruling is significant because it recognizes that defendants can preserve their rights to pursue arbitration of class member claims even if not pursued at the beginning of a suit. The key issue, according to the Court, is notice to the trial court and counsel. In this way, the court and parties can efficiently structure their motion practice and discovery while still recognizing arbitration rights as to the unnamed class member agreements. Otherwise, the defendant is placed in the awkward and difficult position of seeking to compel arbitration as to persons and claims over which the trial court lacks jurisdiction unless or until a class has been certified.

Background of the Case

The district court had held that the defendant bank could not force unnamed class members’ claims into arbitration because the bank had litigated the case for several years, resulting in the expenditure of substantial court resources and the parties’ time and money. Thus, ordering the classes to arbitrate would be prejudicial.

The lawsuits were filed in 2008 and 2009. The court entered an order directing the defendants to file motions to compel arbitration or to dismiss. The bank joined an omnibus motion to dismiss which the court largely denied. Thereafter, the court provided the parties a second opportunity to demand arbitration. In response, the bank specifically informed the court it would not pursue arbitration.



Following the pleadings phase, the bank engaged in substantial discovery, including the nature and scope of the class action and the merits of the claims. Nearly a year later, the bank moved to compel arbitration as to the named plaintiffs. The court rejected the bank's argument and denied the motion to compel arbitration, finding that any right to compel arbitration had been waived. After an unsuccessful appeal, the bank again invoked the court's litigation machinery for several more months. While simultaneously opposing the named plaintiffs' class certification motion, the bank filed a "conditional motion" to compel arbitration as to unnamed class members pending a determination of the class certification motion. That conditional motion was denied and the case was certified.

Once the court granted class certification, the bank filed another motion to compel arbitration for the claims of the unnamed class members. Just as it had done before, the district court determined that the bank had waived any rights that it may have had to demand arbitration on the unnamed class members' claims. According to the court, the bank had acted inconsistently with its arbitration rights in several respects, including engaging in substantial discovery and motion practice. Whether the bank desired to pursue arbitration with the named plaintiffs in the cases, it could have preserved its ability to pursue arbitration with unnamed class members had it acted early enough. Having waited, however, the court determined that it was simply too late in the action to raise arbitration with the unnamed class members after so much time and money had been expended.

The Appeals Court Reversal

Recognizing that federal law favors arbitration, the Eleventh Circuit reversed. The Appeals Court first discussed the waiver doctrine, which prevents litigants from abusing the judicial process because acting in a manner inconsistent with one's arbitration rights, and then changing course in the middle of a case, demonstrates gamesmanship, increases cost, and creates judicial inefficiency. The judicial system is not designed to accommodate a defendant who elects to forego arbitration when it believes that the outcome in litigation will be favorable to it, proceeds with extensive discovery and court proceedings, and then suddenly changes course to

pursue arbitration when its prospects in the lawsuit appear dim.

Notably, the Court found the key ingredient in the waiver analysis is fair notice to the opposing party and the district court of a party's arbitration rights and its intent to exercise them. If the court and the opposing party have such notice at an early stage in litigation, they can manage the litigation with this contingency in mind. For example, the court can limit the scope of early discovery in order to avoid significant expenditures if it turns out that the arbitration provision governs. Fair notice early in the litigation is a primary factor in considering whether a party has acted consistently with its arbitration rights.

Here, the Court concluded that Wells Fargo did not act inconsistently with its arbitration rights as to the unnamed class members. Its conduct with respect to the class differed from its conduct as to the named plaintiffs. Wells Fargo had stated expressly in its response to the district court's scheduling order that it did not plan to seek arbitration with the named plaintiffs, and it then joined other defendants in filing an omnibus motion to dismiss the complaints. In that same response, however, which it filed well before any discovery had been conducted, Wells Fargo explained to the district court that it was not in a position to assert its arbitration rights against the unnamed plaintiffs but wanted to preserve those rights when the matter later became ripe for the court to consider them. It also cited the parties' arbitration agreements as an affirmative defense in its answers to plaintiffs' complaints. These actions had the effect of putting the court and putative class members on notice of its intent to invoke them.

The Court also considered that it would have been practically impossible to compel arbitration against unknown plaintiffs and jurisdictionally impossible for the district court to rule on those motions before the class was certified. The district court lacked jurisdiction to rule on any such motions and the unnamed class members were putative at that point. Before class certification, anyone other than those named in the complaint are speculative and beyond the reach of the court's power. Thus, framing an effective motion to compel arbitration of absent class member claims was impossible.





As a result, by ordering Wells Fargo to move to arbitrate claims not yet brought or else waive them, the district court put Wells Fargo in an untenable position and demanded one of two possible courses of action only: a shotgun motion to compel in which Wells Fargo would have made speculative arguments about speculative customer agreements made with speculative plaintiffs, a document that could not have provided any cognizable basis upon which the district court could have ruled; or a failure by Wells Fargo to raise those motions, and a consequent waiver of its contractual arbitration rights altogether.

As to the first possibility, there is no obligation of a party to file a conditional arbitration motion against possible future adversaries, *i.e.*, the putative class members, in order to avoid waiving its rights with regard to those parties. As to the second, while Wells Fargo chose not to file the speculative motion, that same purpose of notice was served by Wells Fargo's express reservation of its arbitration rights as to future plaintiffs in response to the Court's scheduling order. Accordingly, Wells Fargo did not act inconsistently with its arbitration rights, and, consequently, it did not waive those rights.



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