

California Court of Appeal Holds Defendant Did Not Waive Its Right To Compel Arbitration By Waiting Until After Class Certification Where Other Class Members--But Not Plaintiff--Had Agreed To Arbitrate

December 20, 2011 by Thomas Kaufman and Travis Anderson

In *Sky Sports, Inc. v. Superior Court*, (2nd Dist., Div. 3, Dec. 15, 2011) Case No. B233820, the California Court of Appeal held that a defendant does not waive its right to compel arbitration of a class action by waiting to file a motion to compel arbitration until the class has been certified, where some of the class members, but not the class representative, signed arbitration agreements with defendant.

Plaintiff, a private security guard, filed a class action against his employer, Sky Sports, Inc. ("Sky Sports") for failing to provide rest breaks to its security guard employees. In its answer to the complaint, Sky Sports contended the action was barred by a mandatory arbitration agreement. Although plaintiff had not signed an arbitration agreement with Sky Sports, many other putative class members had.

Plaintiff subsequently moved to certify a class of "all current and former licensed security guards." In its opposition, Sky Sports submitted a list of putative class members who had signed arbitration agreements. Sky Sports contended that plaintiff was an inadequate class representative because he had not signed such an agreement. Sky Sports further contended that plaintiff could not use the class action procedure to circumvent valid arbitration agreements. The trial court agreed with the plaintiff. It certified the class and ruled that Sky Sports had waived its right to arbitration by unreasonably delaying in filing their motion to compel arbitration. Sky Sports filed a petition for writ of mandate to overturn the trial court, and the Court of Appeal stayed the proceedings and granted the petition.

The Court of Appeal explained that Sky Sports could not have filed a petition to compel arbitration before the class was certified because the plaintiff was not a party to its arbitration agreement. California Code of Civil Procedure section 1281.2, the statute providing the procedure to file a motion to compel arbitration, requires the existence of an arbitration agreement between the parties. As a result, it would have been premature for Sky Sports to file a precertification motion to compel arbitration because the plaintiff could have "narrowed the class to include only those employees who did not sign the agreements." Therefore, Sky Sports had no choice but to wait until the class was certified before it could bring its motion to compel arbitration.

The appellate court stated that "[a] class action is a procedural device and cannot be used to subvert an otherwise enforceable contract." Because Sky Sports could not have brought its motion before the class was certified, its delay "cannot constitute a waiver . . . Until the class was certified, the pleading requirements to move to compel arbitration under section 1281.2 were not satisfied." The Court of Appeal issued a writ of mandate directing the trial court to vacate its order denying the company's motion to compel arbitration.

The court did not, however, address the issue of whether the arbitration agreement was enforceable. For example, the opinion does not specify whether the arbitration agreement contained a class action waiver and, if so, whether such a waiver would be enforceable. Instead the court simply remanded the matter to the trial court to consider the substance of the argument as to whether there was a valid arbitration agreement.

Despite the narrowness of its holding, *Sky Sports, Inc.* is a valuable case for both employers and class-action defendants alike. When the named plaintiff is not a party to an arbitration agreement, but the putative class includes members who are parties to arbitration agreements with the defendant, the defendant may wait until class certification before bringing a motion to compel arbitration. The decision also highlights that a court cannot simply ignore the arbitration agreements of putative class members, but must instead determine whether they are enforceable, and what their impact will be on class issues such as numerosity and commonality. Defendants should therefore raise the existence of arbitration agreements in opposition to class certification.

Should you have any questions regarding the application of employment or labor law to your particular situation, please contact a [labor and employment attorney at Sheppard Mullin](#) for guidance.