

# Gone For Good: Eleventh Circuit Court Denies Arbitration Opportunity

Article By:

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A recent decision from the United States District Court for the Southern District of *Florida* is a reminder that if a litigant intends to enforce its contractual arbitration provision, the issue must be raised at an early opportunity. Otherwise, the risk remains that the provision will not be enforced and the right to compel arbitration may be lost.

In the case, ***In re Checking Account Overdraft Litigation***, 09-MD-02036-JLK, the court held that the defendant bank could not force unnamed class members' claims into arbitration. The court concluded that the bank had litigated the matters 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. At the time, the bank argued for multidistrict litigation and that it would promote judicial efficiency and prevent the possibility of conflicting rulings. Later, the court entered an order directing the defendants to file motions to compel arbitration or to dismiss. The bank, however, did not invoke arbitration or notify the court or parties it intended to move to compel arbitration later. Instead, it 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 defendant specifically informed the court it would not pursue arbitration of the matters. When it then filed its answer and affirmative defenses, the bank did not assert arbitration as an affirmative avoidance of the litigation.

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 of the named plaintiffs' claims for the first time. Again, this was well after the deadline set by the court to file any arbitration motion and after the parties had engaged in significant discovery extending substantial time and money. The court rejected the bank's argument and denied the motion to compel arbitration, finding that any right to compel arbitration had been waived and the motion was untimely. 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 certification, the bank filed another motion to compel arbitration for the claims of the unnamed class members.

Just as it had done before, the 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. This caused the court to expend enormous amounts of time and resources, and requiring significant expense by all parties: "The bank's conduct reflects a deliberate strategy on its part to try to earn through litigation a complete victory affecting the rights, not only of the few named plaintiffs, but of the entire class." The court also noted that the bank twice had declined previously to pursue arbitration by the clear deadlines set by the court.

While the unnamed class members did not obtain official "party" status until the court entered its certification order, the bank knew the case was a putative class action lawsuit from the beginning and that the class claims were driving the cases since the time they were filed. The bulk of the litigation activity would not have occurred if only the modest claims of the plaintiffs were at stake. The bank's activities were geared toward defeating both the claims of the named plaintiffs and the unnamed class members. The court stated: "Under the circumstances, it would be unfair, and fundamentally at odds with the principles underlying the Federal Arbitration Act, to permit [the bank] to effectively 'wait in the weeds' and invoke arbitration, years after litigation, now that the alternate path the bank chose did not turn out as it had hoped." If successful, the bank's strategy would render the extensive resources spent a complete waste, resulting in gross inefficiency and conflicting with one of the fundamental tenets underlying class action practice. The court would not allow the bank to simply reverse course after failing to achieve in litigation the sweeping victory it had hoped to achieve. Its decision and corresponding conduct over the years contradicted an intent to arbitrate against either the named plaintiffs or the unnamed members of the class.

The court plainly believed that the bank had rested on its rights. Whether the bank desired to pursue arbitration with the named plaintiffs in the cases, it still had an opportunity to preserve its ability to pursue arbitration with unnamed class members, had it acted early enough. Having sat on its rights, 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 case presents a stark reminder that arbitration provisions are a contractual right that must be asserted early (and often) or the value placed on arbitration may be lost.

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