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WHEN A WAIVER ISN'T REALLY A WAIVER: ELEVENTH CIRCUIT ESTABLISHES NEW STANDARD FOR WAIVER OF RIGHT TO ARBITRATE AFTER FILING OF AMENDED COMPLAINT

Dustin Morgan*

I. INTRODUCTION

In *Krinsk v. SunTrust Bank, Inc.*, the Eleventh Circuit held, in a matter of first impression for the court, that by amending her complaint to include a much broader class of litigants than envisioned in the original complaint, Krinsk had materially altered the litigation.¹ As a result, SunTrust Bank (“SunTrust”) must be allowed to rescind its previous waiver of the right to arbitrate under the agreement between the two parties.² The court reasoned that while the filing of an amended complaint does not ordinarily revive all defenses or objections previously waived by the answering party, “the defendant will be allowed to plead anew in response to an amended complaint, as if it were the initial complaint, when ‘the amended complaint . . . changes the theory or scope of the case.’”³ Analogizing this principle, the court established that a defendant’s waiver of the right to arbitrate will not automatically be rescinded upon the filing of an amended complaint.⁴ A defendant will be allowed to rescind this waiver only when “it is shown that the amended complaint unexpectedly changes the scope or theory of the plaintiff’s claims.”⁵ According to the court, by amending her complaint to redefine the class of litigants in a way that would open the suit to a much broader range of parties in her suit against SunTrust, Krinsk had materially altered the scope of the litigation so as to allow SunTrust to rescind its previous waiver of its right to arbitrate under the agreement between the two parties.⁶ In so ruling, the Eleventh Circuit fundamentally changed the way in which waivers of the right to arbitrate will be enforced throughout the jurisdiction in future litigation.

II. BACKGROUND

The dispute between Sara Krinsk and SunTrust stemmed from a conflict concerning a home-equity loan that Krinsk received from SunTrust.⁷ Krinsk applied for and received a \$500,000 line of credit listing Krinsk’s Florida home as collateral.⁸ In applying for and receiving the loan, Krinsk agreed to SunTrust’s standard-form loan agreement; among the terms in the agreement was an arbitration clause that required disputes between the parties to be submitted to

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¹ *Krinsk v. SunTrust Banks, Inc.*, 654 F.3d 1194, 1203-04 (11th Cir. 2011).

² *Id.*

³ *Id.* at 1202 (citing *Brown v. E.F. Hutton & Co.*, 610 F. Supp. 76, 78 (S.D. Fla. 1985)) (omission in the original).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 1203.

⁷ *Id.* at 1196.

⁸ *Id.*

an arbitrator if either party elected to pursue arbitration.⁹ The arbitration clause contained a class action waiver that stated:

[I]f you or we elect to arbitrate a claim, neither you nor we will have the right: (a) to participate in a class action in court or in arbitration, either as a class representative, class member or class opponent; or (b) to join or consolidate [c]laims with claims of any person other than you. No arbitrator shall have authority to conduct any arbitration in violation of this provision.¹⁰

In October 2008, SunTrust made the decision to suspend Krinsk's right to access \$400,000 of her previously approved home-equity line of credit ("HELOC").¹¹ SunTrust made this decision after requesting and receiving financial information from Krinsk that it claimed provided reasonable concern that Krinsk would be unable to fulfill her financial obligations under the agreement.¹² Krinsk alleged that SunTrust's reasons for suspending her account were pretextual and served as part of a greater scheme to remove high-risk HELOC accounts from its portfolio.¹³ Krinsk further alleged that the most vulnerable targets of SunTrust's alleged scheme were the elderly, an age group from whom SunTrust expected little resistance.¹⁴

Relying on these allegations, Krinsk filed a class-action complaint on May 15, 2009 against SunTrust, SunTrust's corporate parent ("SBI"), and SBI's Chief Executive Officer ("CEO").¹⁵ The original complaint stated claims for: "financial elder abuse under Florida's Adult Protective Services Act . . . (2) breach of contract; (3) deceit; (4) negligent misrepresentation; (5) breach of fiduciary duty; (6) violation of . . . the Truth in Lending Act . . . and (7) breach of implied covenant of good faith and fair dealing."¹⁶ The original complaint defined the proposed class as:

[A]ll Florida permanent or part-time residents that entered into an agreement with SunTrust entitled "Access 3 Equity Line Account Agreement and Disclosure" and who, after attaining the age of sixty-five (65), received a letter from SunTrust between July 1, 2008 and October 16, 2008, requesting updated financial information . . . and who were subsequently informed their collateralized credit line had been suspended or reduced during the draw period for purportedly failing to provide the information requested by SunTrust.¹⁷

Krinsk estimated that the class would encompass hundreds of members in her later motion for class certification.¹⁸

SunTrust responded to the complaint on July 6, 2009 by filing a motion to dismiss challenging the sufficiency of each of Krinsk's causes of action.¹⁹ SBI and its CEO filed a joint

⁹ *Id.* at 1197.

¹⁰ *Id.* at 1197 n.1.

¹¹ *Id.* at 1197.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 1197–98.

¹⁶ *Id.* at 1198.

¹⁷ *Id.* (omission in the original).

¹⁸ *Id.*

motion to dismiss immediately after.²⁰ SunTrust did not mention the loan agreement’s arbitration clause at this time.²¹ The district court did not rule on the motion to dismiss for sixth months, during which time the litigation proceeded.²² SunTrust and Krinsk jointly filed a Case Management Report that outlined discovery plans and a discovery deadline and SunTrust levied a defense against Krinsk’s motion to certify the class outlined in the original complaint.²³ As the litigation progressed through these stages SunTrust did not assert its right to compel arbitration under the loan agreement.²⁴

The district court ruled on the motions to dismiss on January 8, 2010, “granting SunTrust’s motion to dismiss in part and dismissing all of Krinsk’s claims against SBI [and its CEO].”²⁵ The court also granted Krinsk twenty days to amend her original complaint in light of the motion to dismiss.²⁶ Krinsk’s amended complaint asserted similar claims against SunTrust and offered a new definition for the proposed class of plaintiffs.²⁷ The class would now be defined as:

All Florida residents who entered into one or more agreements for a ... [HELOC] with SunTrust Bank pursuant to its “Access 3 Equity Line Account Agreement and Disclosure” that was collateralized by real estate located in Florida, and who had the available balance of their HELOC suspended or reduced anytime between January 1, 2007 to the date of class certification.²⁸

This newly defined class would greatly increase the amount of litigants that were envisioned in the original complaint; the number of class members was now expected to be in the thousands.²⁹

SunTrust answered Krinsk’s amended complaint on February 10, 2010. In its answer, SunTrust raised its right to arbitrate its claims against Krinsk for the first time.³⁰ SunTrust also filed motions to compel arbitration under section four of the Federal Arbitration Act (“FAA”), to stay the litigation pending arbitration under FAA section three, and to prohibit the certification of Krinsk’s supposed class pursuant to the class action waiver in the arbitral agreement.³¹ Krinsk opposed these motions, arguing that SunTrust had waived its right to compel arbitration by participating in the litigation.³²

The district court denied SunTrust’s motions, agreeing with Krinsk’s argument that SunTrust had waived its right to compel arbitration under the agreement.³³ In denying SunTrust’s motions, the district court applied a two-part test examining whether ““under the totality of the

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 1199.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 1200.

³³ *Id.*

circumstances,’ the party ‘has acted inconsistently with the arbitration right,’ and second, [they] looked to see whether, by doing so, that party ‘has in some way prejudiced the other party.’”³⁴ The district court found both parts of the two-pronged test satisfied.³⁵

First, the court found that SunTrust had acted inconsistently with its right to arbitrate by participating in the litigation up to the filing of the amended complaint.³⁶ The court ruled that “[a] party that substantially invokes the litigation machinery prior to demanding arbitration may waive its right to arbitrate’ if that conduct manifests the party’s intent to waive arbitration.”³⁷ SunTrust’s participation in case management and motion practice in opposition to class certification represented a substantial invocation of the litigation machinery, according to the court.³⁸ Second, the district court found that Krinsk would be prejudiced if SunTrust was allowed to assert its right to arbitrate under the agreement.³⁹ Prejudice was apparent from both SunTrust’s delay in asserting its right to arbitrate and the costs and time that Krinsk had expended in discovery and motion practice throughout the litigation.⁴⁰ Finding both prongs of the test satisfied, the district court denied SunTrust’s motions to compel arbitration and stay the proceedings.⁴¹

III. COURT’S ANALYSIS

A. Effect of Amended Complaint on Defendant’s Answer and Affirmative Defenses

SunTrust asked the Eleventh Circuit to consider an issue that had yet to be decided by the court: what effect does an amended complaint have on a previous waiver of the right to arbitrate?⁴² Before considering this issue particularly, the court had to determine what effect an amended complaint generally has on a defendant’s answer and the defendant’s assertion of affirmative defenses.⁴³ The court reasoned that the “filing of an amended complaint does not automatically revive all defenses or objections that the defendant may have waived in response to the initial complaint.”⁴⁴ The defendant will be allowed to plead anew where the “amended complaint . . . changes the theory or scope of the case.”⁴⁵ According to the court, where the theory or scope of the case is fundamentally changed it would be unfair to allow the defendant a renewed chance to answer the complaint and offer affirmative defenses.⁴⁶

³⁴ *Id.* (citing *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1315 (11th Cir. 2002)).

³⁵ *Id.*

³⁶ *Id.* at 1200–01.

³⁷ *Id.* at 1201 (*S & H Contractors, Inc. v. A.J. Taft Coal Co.*, 906 F.2d 1507, 1514 (11th Cir. 1990)).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 1201–02.

⁴³ *Id.* at 1202.

⁴⁴ *Id.*

⁴⁵ *Id.* (citing *Brown v. E.F. Hutton & Co.*, 610 F. Supp. 76, 78 (S.D. Fla. 1985)).

⁴⁶ *Id.*

B. Effect of Amended Complaint on Defendant's Right to Arbitrate

The effect of an amended complaint on a waiver of the right to arbitrate was a matter of first impression for the Eleventh Circuit.⁴⁷ The court recognized that other circuits had considered this issue and held that “in limited circumstances, fairness dictates that a waiver of arbitration be nullified by the filing of an amended complaint.”⁴⁸ These limited circumstances were determined by analogizing the court’s general principles regarding amended complaints. As with general answers and affirmative defenses, “a defendant’s waiver of the right to compel arbitration is not automatically nullified by the plaintiff’s filing of an amended complaint.”⁴⁹ Courts will allow defendants to rescind their earlier waiver of the right to compel arbitration where “it is shown that the amended complaint unexpectedly changes the scope or theory of the plaintiff’s claims.”⁵⁰

Ordinarily the invocation and participation in the judicial process will constitute a waiver of the right to compel arbitration.⁵¹ The court reasoned that “when a plaintiff files an amended complaint that unexpectedly changes the shape of the case, the case may be ‘so alter[ed] . . . that the [defendant] should be relieved from its waiver.’”⁵² When such a case presents itself, the strong federal policy supporting arbitration dictates that the defendant’s renewed motion compelling arbitration should be granted absent further imposition of or renewed waiver by the defendant.⁵³ Where the scope of the litigation is not dramatically altered in scope or theory, however the defendant’s prior waiver should not be nullified and the defendant’s motion to compel arbitration should be denied.⁵⁴

The court did not view the changes in the amended complaint as immaterial, and concluded that SunTrust should have been allowed to rescind its waiver of the right to arbitration and its motion to compel arbitration should have been granted.⁵⁵ The significance of the amended complaint lay within the expanded class definition; where SunTrust would originally have litigated against hundreds of litigants, the new class definition would expose SunTrust to liability against thousands of parties.⁵⁶ Because this change was unforeseen at the time of SunTrust’s waiver, and this expansion of the plaintiff class so altered the scope of the litigation, even despite SunTrust’s expansive participation in the judicial process, SunTrust should have been allowed to rescind its waiver of its right to arbitrate.⁵⁷

⁴⁷ *Id.* at 1201–02.

⁴⁸ *Id.* at 1202.

⁴⁹ *Id.*; see also *Gilmore v. Shearson/Am. Express Inc.*, 811 F.2d 108, 112 (2d Cir. 1987) (“A motion to compel arbitration of a claim involves the core issue of a party’s willingness to submit a dispute to judicial resolution and, if waived, is not automatically revived by the submission of an amended complaint.”), *overruled on other grounds by McDonnell Douglas Fin. Corp. v. Penn. Power & Light Co.*, 849 F.2d 761 (2d Cir. 1988)).

⁵⁰ *Krinsk*, 654 F.3d at 1202 (citing *Gilmore*, 811 F.2d at 113).

⁵¹ *Id.* at 1203.

⁵² *Id.* (citing *Gilmore*, 811 F.2d at 113).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 1204.

IV. SIGNIFICANCE

This case is significant because it is a strong reaffirmation of the federal policy favoring arbitration.⁵⁸ By allowing a defendant to rescind a previous waiver of the right to arbitrate, the Eleventh Circuit ensures that parties who bargain for arbitration will be able to settle disputes through their chosen dispute resolution mechanism. This holding fits within FAA Section 2, which states that agreements to arbitrate shall be “valid, irrevocable, and enforceable.”⁵⁹ By allowing parties to rescind a previous waiver of the right to arbitrate, the Eleventh Circuit helps further all three of these goals. Agreements will continue to be seen as valid because the recourse to arbitration will eventually be honored, irrevocability will be strengthened even in the face of party waiver where the circumstances of the litigation change, and enforceability will become more prevalent because waivers will become less enforceable in light of this opinion.

The significance of this case is especially evident in light of the Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*. These cases fundamentally changed the way in which federal courts deal with motions to dismiss filed after the plaintiff submits a complaint.⁶⁰ Plaintiffs, after these cases, are required to advance enough facts in their complaint to show a plausible basis for relief in order to survive a motion to dismiss under Rule 12 of the Federal Rule of Civil Procedure.⁶¹ These cases add significance because it seems motions to dismiss under Rule 12 will now be granted with higher frequency; as a result, amended complaints will also become more common. The Federal Rules of Civil Procedure provide judges with a large amount of discretion in granting parties permission to file amended complaints.⁶² As a result, these types of waiver problems may become more frequent; the Eleventh Circuit has preemptively dealt with issues regarding waiver of the right to arbitrate and amended complaints.

V. CONCLUSION

Any analysis of this case must take into consideration that the arbitration at issue takes place in the consumer context. Krinsk accepted the arbitral provision as part of a standard form agreement.⁶³ The arbitration agreement was likely adhesive in nature and imposed as a condition to taking out a loan. As a result, fairness becomes a relevant concern. Should parties who assert their position and impose arbitral clauses be allowed to assert a right to arbitrate after participating in litigation? Both the FAA and the realities of contemporary litigation seem to suggest that the Eleventh Circuit took the proper approach in answering this question.

Whenever addressing a novel question concerning arbitration, a court must always be cognizant of the strong federal policy favoring arbitration.⁶⁴ The Supreme Court’s case law and

⁵⁸ See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011).

⁵⁹ 9 U.S.C. § 2 (2006).

⁶⁰ See *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

⁶¹ *Iqbal*, 129 S. Ct. at 1946; *Twombly*, 550 U.S. at 557; see also FED. R. CIV. P. 12(b)(6) (“Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion . . . failure to state a claim upon which relief can be granted.”).

⁶² FED. R. CIV. P. 15 (In all other cases, a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.).

⁶³ *Krinsk*, 654 F.3d at 1196–97.

⁶⁴ See *AT&T Mobility*, 131 S. Ct. at 1745.

the FAA impose a strong presumption in favor of the enforcement of agreements to arbitrate.⁶⁵ The Eleventh Circuit furthers this strong policy in its decision in *Krinsk*. By allowing parties to rescind their waiver of the right to arbitrate and compel arbitration after a fundamental change in litigation, the court allows the parties' underlying agreement to arbitrate to be honored. This decision is consistent with the development of both the FAA and the caselaw interpreting the Federal Rules of Civil Procedure. As a result, the decision is likely to be recognized and encompassed into case law of other federal circuits.

⁶⁵ *See id.*; 9 U.S.C. § 2.