**Wells Fargo Overdraft Row Teed Up For 11th Circ. Arguments**

Law360, New York (August 23, 2017, 3:28 PM EDT) -- While Wells Fargo & Co. has lurched from one scandal to another in recent months, a decadelong fight over the bank's overdraft practices and efforts to push consumers into arbitration is set to go to oral arguments at the Eleventh Circuit Thursday.

The case pits consumers in a nationwide class action who claim the San Francisco-based bank engaged in a process known as "reordering" that caused them to pay excessive overdraft fees against Wells Fargo, which is trying to push the class members into binding arbitration. And the stakes for Wells Fargo could be high, given that the bank has already paid $203 million to settle similar claims in California alone.

The Eleventh Circuit is poised to hear arguments in an Atlanta courtroom related to class actions filed in California and Florida, which have since been consolidated in the federal district court in Miami.

The claims are against both Wells Fargo Bank NA, the bank's main retail banking unit, and Wachovia Bank NA, which Wells Fargo took over in 2009 in a financial crisis-era merger.

The classes allege that Wells Fargo said they would post charges to their checking accounts based on when the charges were made but in reality deducted charges from their accounts beginning with the highest-valued transactions in an attempt to maximize overdraft fees.

Wells Fargo is the only one of several major banks that were hit with check-ordering class actions to choose against settling and instead to fight the case in court. Bank of America Cora. reached a $410 million settlement in similar litigation in 2011 and JPMor~a, n Chase & Co. settled for $110 million in 2012.

Huntington Bancshares Inc., a $100 million bank, was the latest to settle, entering into a $16 million settlement on March.

The amount of money at issue in the case is part of the reason why Wells Fargo is trying to push the class members into arbitration. That process, which would be binding and done on an individual basis, would likely lead to a significantly smaller payout for the bank.

But U.S. District Judge James Lawrence King in Miami ruled in October that Wells Fargo could not elect to push those consumers into arbitration after first choosing to litigate the case.

"Under the circumstances, it would be unfair, and fundamentally at odds with the principles underlying the Federal Arbitration Act, to permit Wells Fargo to effectively `wait in the weeds' and invoke arbitration, after years of litigation, now that the alternate path the bank chose did not turn out as it had hoped," the judge said.

Wells Fargo is attempting to overturn that ruling, and experts say that it is not uncommon for banks and other consumer finance firms to try to push class action plaintiffs into arbitration after first litigating once a case appears to be moving in favor of the plaintiffs.

"The specific issue in the 11th Circuit case is something that comes up more often than you think," said David Seligman of the National Consumer Law Center.But the case pending before the Eleventh Circuit comes with added weight.

First, there is Wells Fargo's own recent history both of scandals, and attempts to push consumers into arbitration.

The bank attempted to push consumers affected by the fraudulent account scandal that erupted last fall when Wells Fargo agreed to a $185 million settlement with the Consumer Financial Protection Bureau, the Office of the Comptroller of the CurrencX and the Los Angeles City Attorney's Office into arbitration rather than allowing them to bring litigation in court.

After significant outcry from lawmakers and other figures, Wells Fargo relented and ultimately agreed to a $142 million class action settlement.

Overall, the NCLC says that only 215 people have gone to arbitration with Wells Fargo nationwide since 2009.

The Eleventh Circuit case also comes as the fate of the CFPB's rule eliminating class action bans from arbitration clauses on consumer finance contracts remains uncertain.

The CFPB unveiled the rule in July, and the U.S. House of Representatives has already voted to nullify it. Whether the Senate has the votes necessary to overturn the regulation, something President Donald Trump supports, is an open question.

That the CFPB's rule could be overturned makes the outcome of the Eleventh Circuit's case important for consumers who did not have Wells Fargo accounts, Seligman said.

"This case is illustrative of the problems with forced arbitrations and class waivers in consumer financial products services agreements," he said.

And on a more immediate level, a defeat for Wells Fargo on the arbitration issue means it could face yet anothermassive payout, either through a settlement or a verdict against it.

Counsel for the plaintiffs declined to comment. Wells Fargo representatives could not be reached for comment.

The plaintiffs are represented by Podhurst Orseck PA, Bruce S. Rogow PA, Grossman Roth PA, Lieff Cabraser Heimann &Bernstein LLP, Baron &Budd PC, Webb Klase & Lemond LLC, Golomb & Honik PC, and Trief & Olk, among others.

Wells Fargo is represented by Sonya D. Winner, David M. Jolley and Emily Johnson Henn of Covington & Burling LLP and Barry R. Davidson and Jamie Zysk Isani of Hunton &Williams LLP.

The appeals are Garcia, et al. v. Wachovia Bank NA, case number 16-16823, and Martinez, et al. v. Wells Fargo Bank NA, case number 16-16820, both in the U.S. Court of Appeals for the Eleventh Circuit.