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Third Circuit protects arbitration rights in implied waiver cases

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Takeaway: How much litigation is too much litigation before the right to arbitrate slips away? The Third Circuit recently addressed this issue in an opinion protecting the right to arbitrate and observing that a defendant may use the litigation process to support a motion to compel arbitration. In *Parkin v. Avis Rent A Car System, LLC*, --- F.4th ----, No. 25-1385, 2026 WL 2472484 (3d Cir. Aug. 24, 2026), a Third Circuit panel vacated a district court order finding that class action defendants impliedly waived their right to compel arbitration by litigating too much before the district court. The *Parkin* decision followed on the heels of the Third Circuit's decision in *Valli v. Avis Budget Group, Inc.*, 162 F.4th 396 (3d Cir. 2025), which addressed the implied waiver issue in a factually distinct scenario against another member of the same corporate family. Together, these decisions show that class defendants can engage in a substantial amount of pre-arbitration litigation without waiving the right to arbitrate—as long as that litigation is conducted in a way that preserves the right to compel arbitration and establishes the necessary prerequisites for a motion to compel arbitration.

In *Valli*, Dawn Valli rented a car from Avis Budget Group in June 2014 and was subsequently charged a $150 traffic fine (paid by Avis on her behalf), plus a $30 administrative fee. 162 F.4th at 401. Claiming that Avis's imposition of the fine and fee was deceptive and unlawful, she filed a putative class action against Avis, alleging violations of the New Jersey Consumer Fraud Act and unjust enrichment. *Id.* at 401-02. Critically, the rental agreement Valli signed in 2014 did not contain an arbitration clause. *Id.* Budget renter Anton Dubinsky—who rented his car in 2016 and was added to the suit via an amended complaint—likewise signed a rental agreement that did not contain an arbitration clause. *Id.*

It was not until April 1, 2016—after the two named plaintiffs had executed their rental contracts—that Avis updated its rental agreements to include a mandatory arbitration provision and class-action waiver. *Id.* at 402-03. Because this contractual amendment applied only prospectively, it did not apply to the named plaintiffs' rentals. But it did potentially cover a significant portion of the putative class—renters who rented from Avis after the arbitration provision took effect.

Avis proceeded to litigate the *Valli* case for a number of years before moving to compel arbitration in February 2024. *Id.* at 401, 404-05. During that time, Avis filed motions to dismiss, engaged in extensive discovery, participated in mediation, submitted class certification briefing, and consented to amendments of the complaint —all without filing a formal motion to compel. Under these circumstances, the district court found implied waiver, concluding Avis had "engag[ed] fully in the litigation for five years without ever moving to arbitrate." *Id.* at 404-05.

On appeal, the Third Circuit disagreed. Central to the *Valli* holding was the doctrine of futility—because the arbitration clause applied only to the putative class members (not the named plaintiffs), Avis could not have moved to compel arbitration until after a class was certified. Any pre-certification motion to compel directed at unnamed class members would have been futile, as the district court would have lacked jurisdiction to grant it. *Id.* at 409-10.

But *Valli* made it clear that futility does not place all pre-certification conduct beyond the reach of the waiver inquiry. The Court of Appeals held that the implied waiver analysis begins when a defendant is "on notice that a claim 'could be arbitrable'"—not when the right becomes enforceable. *Id.* at 408. A defendant must therefore provide "clear, reasonably prompt record notice of its intent to exercise its arbitration right" and then file a prompt motion to compel once the right becomes enforceable. *Id.* at 410. The Third Circuit found that Avis met this standard by consistently raising arbitration as an affirmative defense, invoking it in opposition to class certification, and promptly moving to compel after the class was certified. *Id.* at 410-12, 416.

The *Parkin* decision presents a different set of facts, though the core legal question—the implied waiver of arbitration—is the same. Jane Parkin and David Hughes, both citizens of the United Kingdom, rented vehicles from Budget in the United States on separate trips between September 2016 and November 2019. 2026 WL 2472484, at *1. They booked the rentals through third-party websites, selecting rental packages that included supplemental liability insurance. *Id.* at *1-2. At the rental counter, each signed a rental form stating they had "reviewed & agreed to all notices & terms here and in the rental jacket." *Id.* Each then received a rental jacket containing additional terms and conditions, including a mandatory arbitration clause, along with a statement that supplemental liability insurance would be provided through "an excess automobile policy issued to Budget." *Id.* at *2.

Parkin and Hughes later claimed that Budget did not actually purchase supplemental liability insurance through an excess policy, but instead self-insured. *Id.* at *1-2. They then filed a three-count putative class action complaint in September 2022 against Budget and an affiliate, asserting claims for breach of contract, fraudulent misrepresentation, and violations of the Florida Deceptive and Unfair Trade Practices Act, seeking over $5 million on behalf of nationwide, Massachusetts, and Florida classes. *Id.* at *2-3.

The Budget defendants moved to dismiss. Although their opening brief did not mention arbitration, their reply brief included a footnote expressly reserving the right to move to compel arbitration. *Id.* at *3. The motion to dismiss had mixed results: the breach-of-contract claim survived, while the fraud and Florida statutory claims were dismissed. *Id.*

After the motion to dismiss, the Budget defendants took several additional steps to preserve their arbitration rights. They pleaded arbitration as an affirmative defense in their answer, reserved the right to compel arbitration in the parties' joint discovery plan, and identified the arbitration agreement in their initial disclosures. *Id.* at *3.

But they did not immediately move to compel arbitration. Instead, they deposed Parkin and Hughes in February 2024—depositions that were necessary because of the Third Circuit's decision in a somewhat similar case, *Bacon v. Avis Budget Group, Inc.*, 959 F.3d 590 (3d Cir. 2020), where the Court of Appeals evaluated an arbitration clause contained in a rental jacket that the customer received *after* signing the rental agreement; the *Bacon* court held that the arbitration clause was *not* binding on the customer, because the customer needed to have notice of the arbitration clause when signing the rental agreement. *Parkin*, 2026 WL 2472484, at *2 (citing *Bacon*, 959 F.3d at 600-02). In light of *Bacon*, the Budget defendants therefore needed factual development—specifically, deposition testimony—to establish that the customers understood the rental jacket terms were part of their agreements. *Id.* at *2, *5. Moreover, the complaint in *Parkin* did not contain allegations sufficient to establish that Parkin and Hughes knew about the arbitration clause at the time they signed their rental forms, so there was not a basis to move to compel arbitration on the allegations in the complaint. *Id.* at *5.

About two months after obtaining that deposition testimony, the Budget defendants moved to compel arbitration. *Id.* at *3, *6. The district court, however, denied the motion, finding implied waiver based on conduct it deemed "inconsistent with a genuine intent to arbitrate," characterizing the motion to compel arbitration as a "strategic shift" after defendants realized they could not obtain an early dismissal from the district court on the merits. *Id.* at *4.

On appeal, the Third Circuit vacated and remanded, holding that the district court erred in finding implied waiver. *Id.* at *7. The *Parkin* court observed that the Budget defendants had preserved the right to arbitrate at various key points, including as an affirmative defense in the answer. *Id.* at *5-6. The Court of Appeals also explained that their motion to dismiss was "not pronounced enough to imply a waiver" because, under *Bacon*, the complaint did not provide an adequate basis to move to compel and the defendants lacked a "meaningful opportunity to move to compel arbitration." *Id.* at *5.

Most critically, *Parkin* concluded that the Budget defendants needed to develop a factual record through deposition discovery on the key issue of the plaintiffs' assent to the arbitration clause at the time they agreed to rent their cars. *Id.* at *5. The Third Circuit quoted *Valli* for the proposition that "discovery directed at non-arbitrable claims does not, by itself, waive the right to arbitrate arbitrable claims." *Id.* at *6 (quoting Valli, 162 F.4th at 412). The Court of Appeals concluded that those circumstances "do not provide the certainty needed to find an intentional relinquishment or abandonment of the expressly reserved right to compel arbitration." *Id.*