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Left out of the Party: Court Refuses to Reconsider Arbitration Order Bouncing Lead Class Plaintiffs in Massive TCPA MDL

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Imagine being the lead Plaintiffs in a massive piece of multi-district TCPA class litigation against a large debt collector, only to have that prestigious position ripped from you by the Court compelling arbitration of your individual claims. Well that's what happened to two lead Plaintiffs in the case of *In re Midland Credit Mgmt.*, Case No. 11md2286, 2019 U.S. Dist. Lexis 65827 (S.D Cal. April 17, 2019) and the result is useful for anyone trying to prove bulk assignment of arbitration rights from a creditor to a downstream collector. (That happens more often than you might think, so pay attention.)

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Back in January the Court found two Plaintiffs in the big *Midland Credit* MDL had agreed to arbitrate their claims against the debt collector by virtue of the terms and conditions of their account agreement with the creditor. None-to-happy about that ruling, the Plaintiffs gathered themselves and sought reconsideration arguing, *inter alia*, that the creditor cannot simultaneously retain its rights to compel arbitration and yet assign those rights to the debt collector to enforce the arbitration clause. In weighing the reconsideration motion the Court shrugged at the suggestion, reminding the Plaintiffs that it had never found otherwise. Rather, the Court's ruling compelling arbitration held solely that the right to arbitrate had been assigned; the court expressed no opinion on whether the creditor could yet enforce the clause against class members simultaneously. And although the Plaintiffs cited case law to the effect that the creditor was, in fact, still enforcing clauses purportedly assigned to the collector that really didn't matter to the Court because, in its view, it simply was not called upon to consider the issue of the creditor's right to enforce the clause; i.e. *if* those other courts got it wrong as to the creditor's rights that's neither here nor there as to the collector's rights in this action.

Interesting stuff, no?

Plaintiffs also launched a robust factual challenge asserting that Defendant had not proven that the right to arbitrate had been assigned to it in the first place. It challenged the Court's reliance on affidavits and a Purchase and Sale Agreement—apparently only lobbed at the court with the Defendant's reply—as unfairly prejudicial and insufficient to prove the assignment. The Court brushed off the unfairness argument, noting that Plaintiff had challenged the assignment in Opposition opening the door to additional evidence in reply. (If Plaintiffs didn't like it they could have sought a surreply). And as to the foundation challenges, the court felt that the sum total of the evidence of several declarations plus the asset assignment agreements were sufficient to demonstrate that right to arbitrate was assigned. Importantly, the court suggests—but does not directly hold—that declarations alone might be sufficient to establish the assignment without consideration of the underlying purchase agreements —"Courts have found sufficient evidence of assignment without review of purchase and sale agreements in similar circumstances."

So there you have it. Declarations asserting that rights were assigned might be enough in and of itself to prove the right of the collector to enforce the clause. But, then again, it is probably a good idea to have that asset purchase and transfer agreement handy and properly authenticated in the first instance so you don't have to introduce it in a reply brief or otherwise draw an evidentiary challenge down the line. (Best evidence rule

anyone?)

Also interesting, the Court denied Plaintiffs' request for interlocutory appeal finding that arbitration would materially advance the conclusion of the parties case, whereas a denial of arbitration would not. By this logic—which I really enjoy and support—it seems that an order granting arbitration in a class case might never qualify for interlocutory review. Something to keep in mind TCPAWorld.