THE
NATIONAL LAW REVIEW

Broader Is Better: Court Holds Arbitration Agreement Targeted To Medical Malpractice Lawsuits Is Ambiguous As Applied To TCPA Claims.

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- Communications, Media & Internet
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- 3rd Circuit (incl. bankruptcy)

Tuesday, April 23, 2019

As we have mentioned before at TCPAWorld, drafting clear arbitration agreements, broad enough to cover all future disputes, is critical in consumer contracts. Failure to do so can lead to a jury trial on the issue of arbitratbility or, worse, outright denial of arbitration and the prospect of a class action lawsuit. Today brings such a cautionary tale from the District of New Jersey. *See Abedi v. New Age Med. Clinic*, No. 18-14680, 2019 U.S. Dist. LEXIS 67903 (April 18, 2019). The court held that the arbitration agreement at issue is ambiguous as to whether it covers TCPA claims, meaning that arbitrability must be resolved on a summary judgment standard or, if necessary, at trial.

The defendant in *Abedi* operated a new age medical clinic but allegedly engaged in a rather old school form of marketing: telemarketing and mass texting. The plaintiff purchased a Groupon for the defendant's services (not how I would choose a doctor, but I digress) and, at some point in the process, agreed to the following arbitration agreement:

“Article 1: Agreement to Arbitrate:

It is understood that any dispute as to medical malpractice, that is, as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration pursuant to New York law, and not by a lawsuit or resort to court process except as New York law may provide for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.

Article 2: All Claims Must Be Arbitrated:

It is the intention of the parties that this agreement shall cover all claims or controversies whether in tort, contract [*5] or otherwise, and shall bind all parties whose claims may arise out of or in any way relate to treatment or services provided or not provided by the below identified physician, medical group or association, their partners, associates, associations, corporations, partnerships, employees, agents, clinics, and/or providers (hereinafter referred to as “Physician”) to a patient, including any spouse or heirs of the patient and any children, whether born or unborn, at the time of the occurrence giving rise to any claim. In the case of any pregnant mother, the term “patient” herein shall mean both the mother and the mother’s child or children.

The filing by Physician of any action in court by the Physician to collect any fee from the patient shall not waive the right to compel arbitration of any malpractice claim.”

The Court held that the agreement is ambiguous in that it could plausibly be read as limited to medical malpractice claims and, therefore, not cover TCPA claims. It’s easy to see how the court got there. Article 1 deals exclusively with medical malpractice. And although Article 2 contains broader language, it still refers specifically to claims arising out of treatment. TCPA claims can certainly give you heartburn, but they are not medical malpractice claims.

The defendant still has a chance of compelling arbitration and, thus, avoiding a putative class action in federal court. But to do so, it will have to prove that the arbitration agreement covers TCPA claims through either a summary judgment standard or, potentially, at an actual trial. Given some of the comments the judge made in the order denying the motion to compel, that could be difficult.

The upshot is that it is not difficult to avoid the pickle in which the *Abedi* defendant finds itself. Courts routinely enforce arbitration agreements that cover “all claims” – without limitation – against TCPA claims. So the lesson from the case is clear: make sure to use broad arbitration agreements in consumer contracts, not agreements tailored specifically to the claim you expect to most likely face. Doing so is particularly important for companies that will re-target past customers with telemarketing calls or texts. You may not have the TCPA in mind when setting up a new age medical clinic, but if telemarketing is going to be part of your marketing strategy, it is vital that your arbitration agreements cover it.