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Move-On: Court Enforces Arbitration Agreement Contained in “Hyperlinked” TOCs–Douses Putative TCPA Class Action

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We have yet another interesting TCPA arbitration decision out of a California federal court to share with TCPAWorld. The court was tasked with deciding two issues: whether an arbitration agreement contained in a hyperlinked “terms and conditions” disclosure is enforceable, and, if so, *who* makes the critical decision of arbitrability – the court or the arbitrator. The court answered both questions in favor of the defendant, Move, Inc. (“Move”). The decision is styled *Silverman v. Move, Inc.*, 2019 U.S. Dist. LEXIS 105365 (N.D. Cal. June 24, 2019).

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Let’s break the case down a bit because its importance requires getting into a bit of the nitty-gritty of the facts.

Interestingly, the case involves a TCPA dispute between a Florida realtor and the entities behind the website Realtor.com. According to the court, Realtor.com allows realtors “to market homes to consumers” and “to develop leads on consumers’ behalves.” The website is operated by Move on behalf of the National Association of Realtors pursuant to a licensing agreement and, through this agreement, Move “promote[s] Realtor.com and its services to real estate professionals.”

In order to “connect[] consumers to real estate agents,” Realtor.com (through Move) allows real estate agents, such as plaintiff, to purchase “lead-generation products.” Plaintiff purchased one such service, called a “Connections” service. To purchase the product, plaintiff was required to place her order over the phone with a Move account executive, who was “trained to inform Connections purchasers that they will receive an email containing written confirmation of their order . . . providing all of the details and important information about their purchase and agreement with Move.”

Following her order, plaintiff received her email confirmation, which included a link to the “terms and conditions” (“TOCs”) that “apply to [her] order[.]” The email went on to provide that, “[b]y accessing or using any product or service included in your order and/or by not cancelling your order [within three days], you agree to these [TOCs].”

Per Move’s TOCs, they apply “to the provision of any Content” exchanged between the user and Move, “regardless of whether or not such Content is provided in connection with an Order.” Relevantly, the TOCs also included the following arbitration agreement:

You and Move agree that any and all disputes or claims that may arise between you and Move shall be resolved exclusively through final and binding arbitration, rather than in court, except that you may assert claims in small claims court if your claims qualify. The Federal Arbitration Act shall govern the interpretation and enforcement of this section 19. You agree that You and Move may bring claims against each other only on an individual basis and not as part of any purported class or representative action or proceeding. . . . The arbitration will be conducted by the American Arbitration Association (“AAA”) under its rules and procedures, as modified by this section 19. The AAA’s rules are available at www.adr.org. . . . The arbitrator’s award shall be final and binding and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Payment of all filing, administration and arbitrator fees will be governed by the AAA’s rules, unless otherwise stated in this

section 19.2. If a court decides that any part of this section 19.2 is invalid or unenforceable, the other parts of this section 19.2 shall still apply.

Relevant to plaintiff's TCPA claims, "Move gives real estate professionals the ability to receive text alerts containing information that might be of interest to them." While a "Connections" customer, plaintiff signed up for text message alerts from Move but later opted out. She claims that Move continued to text her even after she submitted her opt-out notice, and she filed suit seeking to assert individual and class-based TCPA claims against Move. Move "moved" to compel the dispute to arbitration based on the arbitration agreement.

The Court granted the motion to compel arbitration. Being contested were two issues: (1) whether the court or an arbitrator should determine questions of "arbitrability"; and (2) whether the arbitration agreement was unenforceable as an impermissible "browsewrap" agreement.

As to the first issue, the Court relied heavily on the U.S. Supreme Court's recent decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527 (2019), which explains that when "[a] contract 'clear[ly] and unmistakab[ly]' delegates [arbitrability] to the arbitrator 'a court may not override the contract.'"

Applying that rule to the case, the *Silverman* court found in favor of Move. Importantly, by explicit reference, the arbitration agreement stated that the Federal Arbitration Act, which "reflects a strong policy in favor of arbitration," governs its interpretation and enforcement. From there, the court was persuaded that the arbitrability of plaintiff's TCPA dispute must be decided by an AAA arbitrator because the agreement "expressly incorporate[s] the AAA rules," and prior Ninth Circuit precedent holds that, where the parties are "both sophisticated," "incorporation of the AAA rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability." (citing *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015)). The court found that plaintiff was a "sophisticated party" because "she has over 16 years' experience in the complex real estate industry, and she teaches contract and negotiation classes."

The court rejected plaintiff's argument that a contrary result was required because of the agreement's reference to a "court" having the ability to determine whether "any part of this [section] is invalid or enforceable." The court rejected this argument because "the AAA rules are incorporated as a *substantive element* of the arbitration provision, [and] the language [p]laintiff points to is included in a severability provision only." (Emphasis added).

As to the second issue, the court held that plaintiff was, at least, on "inquiry notice" of Move's TOCs. Pertinently, "[t]hough [p]laintiff did not have actual notice of the TOC, she does not dispute that the Move account executive to whom she spoke on the phone informed her that she would be receiving written confirmation of her order and that it would contain 'all of the details and important information about [her] purchase and agreement with Move.'" Because she was provided with this clear notice that she would receive further details about her "agreement with Move," and because she "continued to use the [Connections] service and did not cancel within three days," the arbitration agreement was enforceable and her "failure . . . to review the confirmatory email or the TOC does not change th[at] fact."

Thus the *Silverman* court enforced the arbitration agreement and left all remaining arguments within the jurisdiction of the AAA arbitrator.

Silverman presents a couple of important takeaways for our readers. First, as we recently blogged, arbitration agreements are effective tools and should be sought out and employed as one of a defendant's first lines of attack. Second, if an agreement to arbitrate is not explicitly presented to a consumer during a transaction, as many are not in our increasingly inter-connected world, then explicit instructions should be given to the consumer to review the relevant TOCs and that their continued use of the offered service constitutes acceptance of the full agreement (although, the burden may be higher if a non-sophisticated party is on the receiving end). Finally, to reserve issues of arbitrability to an arbitrator, it helps to explicitly incorporate the relevant rules of the chosen arbitration service as a substantive component of any arbitration agreement.

Until next time.

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