SANDBERG PHOENIX

CLASS ACTION BLOG

Minor's TCPA Claim Creates Major Arbitration/Class Action Mess

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Summary: A.D., a minor, filed a class action TCPA suit prosecuted by her mother against Credit One which had called A.D.'s cell phone to collect the mother's debt. The mother had used A.D.'s cell phone to access the mother's Credit One account, which Credit One's caller I.D. "capture software" used to try to collect the mother's debt. Based upon the terms of the Credit One cardholder agreement between the mother and Credit One, the district court compelled arbitration, denied A.D.'s motion for class certification, and certified for interlocutory appeal "the question whether A.D. is bound by the cardholder agreement." The 7th Circuit ruled that A.D. was not bound by the cardholder agreement either under contract law or equitable principles and further ruled that on remand the district court was not bound to follow the cardholder agreement's class action waiver any more than the arbitration clause. For that reason, the district court was permitted to reconsider its denial of the minor's motion for class certification.

A.D. v. Credit One Bank, N.A.

A.D., a minor acting through her mother, filed this TCPA class action suit in federal court for the Northern District of Illinois (even though A.D. was then living in California.) For its analysis of the cardholder agreement, the 7th Circuit looked to Nevada law, the law specified in the cardholder agreement as governing any "disputes arising under the contract." Credit One had not immediately filed a motion to compel arbitration because, at that time, "Credit One was not aware that it had a cardholder agreement with her mother." Rather, in the course of taking the mother's deposition it learned of the connection between A.D., A.D.'s cell phone, the mother, and the mother's Credit One account. In the same deposition, Credit One learned that when A.D. was about 14 years old, her mother "pre-ordered smoothie drinks for her daughter and herself from a stand at the local mall and had sent A.D. to pick them up. She had instructed A.D. to pay for the smoothies with her Credit One card."

The 7th Circuit recognized "three bedrock principles about the enforcement of arbitration agreements. First, the Federal Arbitration Act evinces a "national policy favoring arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011). Second, an arbitration agreement generally cannot bind a non-signatory. Zurich Am. Ins. Co. v. Watts Indus., Inc., 417 F.3d 682, 687 (7th Cir. 2005). Finally, arbitration agreements generally are enforceable against non-signatories only in a handful of limited circumstances, depending on the applicable state law." Id. Section 2 of the FAA requires federal courts to compel arbitration "if three elements are present: (1) an enforceable written agreement to arbitrate, (2) a dispute within the scope of the arbitration agreement, and (3) a refusal to arbitrate." *Scheurer v. Fromm Family Foods LLC*, 863 F.3d 748, 751 (7th Cir. 2017). The 7th Circuit also recognized the general rule that "non-signatories are not bound to arbitration agreements." *Zurich*, 417 F.3d at 687. The 7th Circuit would "enforce an arbitration agreement against a non-signatory if the party seeking to compel arbitration can show that an exception to this general rule applies. *Id*."

It was undisputed that A.D. was not a signatory to the cardholder agreement. The question became whether she was somehow bound by the arbitration clause within that agreement. Looking to the agreement and Nevada law, the Court found that A.D.'s use of the credit card to pick up the smoothies at her mother's direction was not a use that transformed A.D. into an "Authorized User" of her mother's Credit One account. The Court noted that there was a specific process outlined in the cardholder agreement which had not been followed and, furthermore, the agreement expressly required such an authorized user to be at least 15 years old—A.D. was 14.

Nevertheless, Credit One argued that the term "Authorized User" was not capitalized in the arbitration clause and that there were multiple categories of "authorized user" within the meaning of the cardholder agreement. The 7th Circuit pointed out that A.D. had never consented to arbitrate with Credit One. Furthermore, due to her minority, she did not have the legal capacity to enter into a contract with Credit One. Finally, due to her minority, A.D. could disaffirm any obligation entered into before she was 18 under either Nevada or California law (where A.D. resided). The Court found that A.D.'s filing of the suit was "an act of disaffirmation" as well as an act "asserting her status as a minor." The Court further rejected Credit One's waiver argument pointing out that "Credit One cannot rely on waiver when it was Credit One's burden to show that A.D. had become an Authorized User under the cardholder agreement and was therefore subject to the arbitration clause."

After concluding that the cardholder agreement's arbitration clause did not bind A.D., the Court turned to the district judge's basis for compelling arbitration, while at the same time, finding some uncertainty: "Whether principles of equity and fairness nonetheless require A.D. to arbitrate with Credit One." Although the 7th Circuit was not convinced that Nevada law should govern the equitable issues (since the cardholder agreement did not apply to her), the Court found that A.D. had waived that position by failing to "engage in a choice of law analysis to determine which state's law to apply." Although the district court had applied federal law in its estoppel analysis, the 7th Circuit chose to follow Nevada law because it follows "general common law principles of equitable estoppel."

Nevada would allow equitable estoppel to prevent a non-signatory "from refusing to comply with an arbitration clause 'when it receives a "direct benefit" from a contract containing an arbitration clause.'" Truck Ins. Exch. v. Palmer J. Swanson, Inc., 124 Nev. 629, 189 P.3d 656, 661 (2008). The Court rejected Credit One's argument that A.D. had directly benefited under the cardholder agreement when she followed her mother's instructions to use the credit card to "pick up the smoothies that her mother had ordered previously. This limited direction derived from the mother/daughter relationship. A.D. had no relationship, contractual or otherwise, with Credit One. [A.D.] derived no direct benefit from the cardholder agreement." The Court also noted that estoppel "can be premised on the character of the non-signatory's claim." Although Credit One argued that A.D.'s TCPA claim [was one] seeking benefits under the cardholder agreement," the 7th Circuit characterized that argument as "convoluted and unpersuasive." Instead, the Court found that A.D.'s TCPA claim "asserted no right under the cardholder agreement. Her action is under a completely separate statute protecting her from harassing phone calls. This is the 'core' of her case" which was in no way "premised on the cardholder agreement." Notwithstanding Credit One's argument, the 7th Circuit refused to in any way link Credit One's "consent" affirmative defense with A.D.'s TCPA claim. The Court found that to do so would "threaten to overwhelm the fundamental premise that a party cannot be compelled to arbitrate a matter without its agreement." *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347, 361 (5th Cir. 2003).

The holdings in A.D. seem facially unfair. Credit One, which was only trying to collect the debt it was owed, was likely to be "punished" by the debtor acting through her daughter, who then used her daughter's minority to escape arbitration and prosecute this class action lawsuit in her minor daughter's name. On the other hand, the 7th Circuit followed well-established law to prevent Credit One from using the terms of its cardholder agreement against a non-signatory minor, under either legal or equitable principles. The United States Supreme Court recognized that there are limitations to enforcement of the FAA when it decided *Epic Systems Corporation v. Lewis*, roughly two months later. *A.D. v. Credit One* is an example of the limitations to the enforcement of the FAA.