PROVIDING HOPE TO CONSUMERS

The Telephone Consumer Protection Act, Arbitration, and Hopeful Court Decisions

By Victoria Grefer*

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I. Introduction

The Telephone Consumer Protection Act ("TCPA") was enacted to limit the rising number of telemarketing and debt collection calls reaching consumers during the early 1990's. To reduce these pesky calls and protect consumers' privacy, the TCPA largely limits telephone solicitation by use of automatic dialing systems and prerecorded or artificial voice messages.[1] The TCPA covers communication mediums such as phone calls, text messages, and fax machines in this limitation.[2] Consumers, however, may give telemarketers or debt collectors permission to contact them. This consent is often given in the form of a signed provision located in business contracts such as loan agreements, purchase and sales agreements, and others. These contracts also habitually include arbitration agreements that include language deferring "any claim, dispute or controversy" "arising from or out of" an agreement to arbitration. As a result, TCPA cases are commonly compelled to arbitration.[3]

However, some courts have recently refused to compel TCPA claims to arbitration, despite the broad language of the Federal Arbitration Act ("FAA") and a federal policy that favors arbitration agreements. In fact, § 3 of the FAA contains mandatory language, stating that if a lawsuit is brought on an issue referable to arbitration under an agreement in writing, "the court…shall… stay the trial of the action until such arbitration has been had…"[4] Because of the mandatory "shall" language, courts *must* compel cases to arbitration when a valid agreement to arbitrate exists and the agreement encompasses the dispute at issue.[5]

At the same time, however, "nothing in the [Federal Arbitration Act] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement."[6] Thus, litigants typically dispute whether the issue or conduct in question is covered in their respective arbitration agreements. This article will examine the debate over what conduct is covered by a contract's arbitration agreement when a TCPA action is brought.

The article begins with a discussion of a recent unpublished Eleventh Circuit case, *Gamble v. New Eng. Auto Fin., Inc.* that held differently than most courts by refusing to compel arbitration on a plaintiff's TCPA claim.[7] Additionally, it will review a district court case in the Ninth Circuit, *Briggs v. Pfvt Motors Llc*, that followed the Eleventh Circuit in their ruling.[8] Lastly, this article will discuss another district court case from the Eleventh Circuit case that ruled contrary to *Gamble* and *Briggs*.

II. Eleventh Circuit Refused to Compel Arbitration for TCPA Claim Regarding Post-Agreement Conduct

Plaintiff Hope Gamble obtained a car loan from Defendant New England Auto Finance, Inc. ("NEAF") and entered into an auto loan agreement (the "Loan Agreement") that contained a an Arbitration Provision requiring arbitration of any "claim, dispute or controversy... whether preexisting, present or future, that in any way arises from or relates to this Agreement or the Motor Vehicle securing this Agreement."[9] The Loan Agreement document also contained a provision (the "Text Consent Provision") that gave NEAF the right to send its customers "e-mails, text messages and other electronic communications."[10] However, the Loan Agreement and the Text Consent Provision required separate signatures, and Gamble signed the Loan Agreement but did not sign the Text Consent Provision.[11] After Gamble finished paying the loan off, she began to receive text messages several months later from NEAF seeking new business from her.[12] Gamble informed NEAF that she did not want to receive these text messages, but NEAF continued to send them.[13]

In 2017, Gamble, on behalf of herself and others similarly situated, brought a class action lawsuit against NEAF under the TCPA.[14] In response, NEAF filed a motion to compel arbitration, arguing that the Loan Agreement between it and Gamble contained an arbitration provision that governed Gamble's TCPA claim.[15] The district court denied NEAF's motion on the grounds that Ms. Gamble's TCPA claim fell outside the scope of the loan agreement.[16] NEAF appealed, and the Eleventh Circuit affirmed.[17]

NEAF argued that the Arbitration Provision was broad enough to encompass Gamble's TCPA claims. NEAF identified specific language in the Arbitration Provision defining ''claim" as "any claim, dispute or controversy . . . whether preexisting, present or future, that in any way arises from or relates to this Agreement," while encompassing "disputes based upon contract, tort, consumer rights . . . [and] statute."[18]

The Eleventh Circuit rejected NEAF's argument. The court noted that the plain language of the Arbitration Provision required that the dispute "arise[] from or relate[] to this Agreement or the Motor Vehicle securing this Agreement."[19] Although this language made the arbitration provision broad, the court stated that it did not make it *limitless*.[20] Gamble's TCPA claim arose not from the Loan Agreement or any breach of it, "but from *post-agreement conduct* that allegedly violated a separate, distinct federal law."[21] NEAF's sending of the text messages did not relate to or arise from its lending money to Gamble, Gamble's repayment of that loan, or the vehicle which secured the loan. Further, the court reasoned that the Text Consent Provision was a separate stand-alone provision which Ms. Gamble never signed, and thus no agreement regarding text messages existed between the parties.[22] Thus, the court rejected NEAF's argument that the Arbitration Provision was broad enough to encompass Gamble's TCPA claim and affirmed the district court's decision.[23]

III. Ninth Circuit District Court Followed the Eleventh Circuit and Refused to Compel Arbitration on TCPA Claim

Subsequently, a district court in the Ninth Circuit followed the Eleventh Circuit, relying on *Gamble*, by refusing to compel arbitration for post-agreement conduct. In *Briggs v. Pfvt Motors Llc*, the defendant allegedly sent illegal marketing text messages to solicit new business to its customer who had recently purchased a vehicle.[24] The vehicle purchase contract contained an arbitration provision applying to all disputes "which arise out of or relate to this Agreement or any resulting transaction or relationship."[25] The defendant moved to compel arbitration on the TCPA claim arguing that the texts were sent in furtherance of the relationship arising out of the agreement.[26]

The court disagreed, stating that the arbitration clause did not encompass the dispute. The court reasoned that the TCPA allegations did not "'touch matters' covered by the Agreement because this suit [was] the result of Defendant's *extra-contractual actions*, unrelated to the promises outlined in the parties' contract."[27] The court noted that while courts do interpret arbitration agreements broadly, "they must be bound by some limiting principle which excludes wholly unrelated conduct between the parties."[28] Thus, the court denied the defendants motion to compel arbitration.

IV. An Eleventh Circuit District Court Choses Not to Follow *Gamble*

Some courts, however, continue to compel arbitration on TCPA claims that concern similar extra-contractual conduct outlined in *Gamble* and *Briggs*. Recently, in *Kent v. Citibank, N.A.*, the defendant Citibank sent text messages violating the TCPA months *prior* to entering into a cardholder agreement containing an arbitration provision with the plaintiff.[29] The plaintiff subsequently filed a TCPA claim and the court granted the defendant's motion to compel arbitration. The court relied on the arbitration clause's "clear language" stating that the provision applies to "any claim ... arising out of or related to your Account, a previous related Account or our relationship," including "past, present, or future conduct."[30] Thus, the court concluded that the text messages were within the scope of the dispute and must be compelled to arbitration.[31]

Kent is similar to *Gamble* and *Briggs* because it concerned conduct that occurred outside of the timeframe of the governing contract, arguably making it "extra-contractual" conduct. However, *Kent,* an Eleventh Circuit district court case, chose not to follow *Gamble* as an unpublished Eleventh Circuit decision, and leaves open the question of how courts are going to handle this issue in the future.

V. Conclusion

While federal law and courts highly favor arbitration and read arbitration provisions broadly, recent decisions such as *Gamble* and *Briggs* indicate that courts are beginning to make important distinctions between contractual and non-contractual conduct when assessing an arbitration provision. This is a more just framework of analysis to assess a motion to compel arbitration that provides a pathway for consumers to not be forced into arbitration. While arbitration may save courts' time and costly litigation costs, it also prevents harmed consumers from having their day in court. Significantly, consumers also lose their ability to bring collective actions against TCPA violators who have caused them and others damage. While it is unclear how courts will move forward on this issue, the courts in *Gamble* and *Briggs* indicate that some courts are becoming more reluctant to compel TCPA claims to arbitration. Thus, consumers can have hope moving forward that they may not always be forced into arbitration on their TCPA actions.

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** Victoria Grefer is a 3L at the University of Houston Law Center. She received a B.A. in both history and sociology from the University of Texas at Austin.*

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1 Telephone Consumer Protection Act, 47 U.S.C. §§ 227(b)(1)(a)-(c).
2 *Id*.
3 *See generally* Mendoza v. Ad Astra Recovery Services, Inc., 2014 U.S. Dist. LEXIS 1716 (C.D. Cal. Jan. 6, 2014); Betancourt v. Green Tree Servicing, LLC, 2013 U.S. Dist. LEXIS 176728 (M.D. Fla. Dec. 17, 2013); Cyganiewicz v. Sallie Mae, Inc., 2013 U.S. Dist. LEXIS 153554 (D. Mass. Oct. 24, 2013); and Brown v. DIRECTV, LLC, 2013 U.S. Dist. LEXIS 90894 (C.D. Cal. June 26, 2013).
4 Federal Arbitration Act, 9 U.S.C. § 3.
5 Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 218, 84 L. Ed. 2d 158, 105 S. Ct. 1238 (1985).
6 E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 289, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002).

7 Gamble v. New Eng. Auto Fin., Inc., 735 F. App'x 664 (11th Cir. 2018).
8 Briggs v. Pfvt Motors Llc, 2020 WL 8613676 (D. Az. 2020).
9 Gamble, 735 F. App'x at 665.
10 *Id*.
11 *Id*.
12 *Id*. at 664.
13 *Id*. at 665.
14 *Id*.
15 Gamble v. New England Auto Fin., Inc., 281 F. Supp. 3d 1354, 1359 (N.D. Ga. 2017).
16 *Id*.
17 Gamble, 735 F. App'x at 664.
18 *Id*. at 666.
19 *Id*.
20 *Id*.
21 *Id*. (emphasis added).
22 Gamble v. New Eng. Auto Fin., Inc., 735 F. App'x 664, 666 (11th Cir. 2018).
23 *Id*. at 667.
24 Briggs v. Pfvt Motors Llc, 2020 WL 8613676 (D. Az. 2020).
25 *Id*.
26 *Id*.
27 *Id*. at 5. (emphasis added).
28 *Id*. at 6.
29 Kent v. Citibank, N.A., 2019 WL 11505347 (S.D. Fla. 2019).
30 *Id*. at *4.
31 *Id*.