

## **No Prejudice, No Waiver: California District Court Allows TCPA Arbitration Defense to Proceed Despite Defendant's Alleged Delay in Raising It**

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As we have repeatedly reported on TCPAWorld, arbitration agreements are an important asset in any defense portfolio. But what happens if you are defending against a TCPA action for upwards of eight months, only to just discover that an arbitration provision exists? Can you amend your answer to assert the defense? Or has the defense (gasp!) been waived? Have no fear. According to *Dickey v. Vital One Health Plans Direct*, 2019 U.S. Dist. LEXIS 103704 (E.D. Cal. June 19, 2019), as long as the amendment does not cause undue prejudice to the plaintiff, it should be allowed.

In *Dickey*, the parties had been litigating a putative TCPA class action for over half a year. While the factual and substantive allegations in the complaint were usual (plaintiff alleged that the defendant used an ATDS and called her over 100 times without her consent), the curious matter at hand rests in the case's procedural posture.

The complaint was filed in October 2018, and the defendant answered in December 2018. The defendant then subpoenaed Precise Leads (the entity from which defendant obtained plaintiff's contact information), which responded in February 2019. Precise Leads disclosed that the plaintiff's contact information was obtained from the website of another entity, AlliedCoverage, LLC. In April 2019, defendant reviewed AlliedCoverage's website only to discover that the website's "terms and conditions" included an arbitration provision. Defendant filed a motion for leave to amend its answer to assert an arbitration defense in May 2019.

Plaintiff objected to the amendment on the ground that the defense was waived because "defendant should have been aware of a potential arbitration defense earlier than April 2019 because defendant had a contract with Precise Leads, was in direct communication with Precise Leads, and could have subpoenaed Precise Leads earlier than it did." The court disagreed, noting the "heavy burden" the plaintiff bore to demonstrate waiver.

According to the court, for waiver to apply, the defendant must act inconsistently with respect to a known right to arbitrate and the defendant's inconsistent acts must cause "prejudice to the party opposing arbitration." Even assuming the defendant's relationship with Precise Leads meant that it "should have been aware" of the arbitration agreement before April 2019, the court found that the plaintiff had failed to demonstrate waiver because "delay is not sufficient on its own" where the

plaintiff “fail[ed] to argue that she has suffered any prejudice by [defendant’s] purportedly inconsistent efforts to enforce the arbitration provision.” Succinctly put, without any evidence of real prejudice to the plaintiff (beyond the defendant’s ability to assert the arbitration defense itself), the defendant did not waive its arbitration defense, despite the delay in asserting it.

Plaintiff tried to fortify her attack by arguing that the defense was futile because of substantive issues surrounding the arbitration agreement’s potential enforceability. The court, however, refused to resolve those issues. According to the court, the “futility” analysis is akin to the Rule 12(b)(6) dismissal standard, and the defendant alleged sufficient facts to show that the arbitration defense is plausible. With plaintiff’s hand-waving cast aside, the court held that any substantive attack on arbitration must await a motion to compel it.

The takeaway? Pursue every avenue to uncover a suspected arbitration defense as early as possible to avoid a waiver argument. But even if some delay in asserting the defense is unavoidable, focus the court’s attention on the plaintiff’s “heavy burden” to show prejudice. Without evidence of undue prejudice to the plaintiff, delay alone may not waive this important defense.

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