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Let Me Introduce My Affiliate: Fourth Circuit Enforces Arbitration Agreement on Motion by Affiliate, DirecTV, of Original Party to Agreement, AT&T Mobility

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On August 7, 2020, the Fourth Circuit Court of Appeals confronted the question whether this class action lawsuit against, *inter alia*, DirecTV was covered by an arbitration agreement in the contract governing plaintiff Diana Mey's cellphone service from AT&T Mobility LLC, a DirecTV affiliate. A divided panel reversed the district court's decision to deny DirecTV's motion to compel arbitration. Mey alleged that the defendants violated the Telephone Consumer Protection Act by calling her cellphone to advertise DirecTV products and services even though her telephone number was listed on the National Do Not Call Registry. In 2012, Mey agreed to the wireless customer agreement when she opened a new line of service with AT&T Mobility. In 2015, AT&T Inc. acquired DirecTV, making it the owner of DirecTV and AT&T Wireless through other corporate entities. The phone calls that formed the basis of Mey's lawsuit took place in 2017. Mey filed her class action lawsuit in December 2017. The wireless customer agreement also included an arbitration agreement, which included provisions stating: "AT&T and you agree to arbitrate **all disputes and claims** between us" and "[t]his agreement to arbitrate is intended to be broadly interpreted." It also provided that "[r]eferences to 'AT&T,' 'you,' and 'us' include our respective subsidiaries, affiliates, agents, employees, predecessors in interest, successors, and assigns, as well as all authorized or unauthorized users or beneficiaries of services or Devices under this or prior Agreements between us." On the merits, the majority (Judges Henry Floyd and Allison Jones Rushing) made short work of Mey's arguments that she did not form an agreement to arbitrate and that the agreement extended only to existing affiliates of AT&T

Wireless at the time the agreement was executed. In turn, the majority then addressed whether the scope of the arbitration agreement covered this dispute with DirecTV. On this point, the majority emphasized the "federal policy favoring arbitration" and that, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." The majority noted that the district court applied the wrong standard on this issue:

> We note at the outset that, at least in application, the district court here got the standard backwards. The court asked whether the arbitration agreement was "susceptible of a construction *limiting the duty to arbitrate* to disputes arising under or relating to the provision of cellular telephone service." In other words, the court resolved the motion to compel by asking whether the arbitration agreement could be interpreted *not* to cover this dispute. But precedent requires us to ask the opposite: whether the arbitration agreement is "'susceptible of an interpretation that covers the asserted dispute.'"

Because the "arbitration agreement here requires arbitration of '**all disputes and claims** between us,'" the majority ruled it was broader than the language in the cases Mey relied upon and concluded that, "[i]n light of the expansive text of the arbitration agreement, the categories of claims it specifically includes, and the parties' instruction to interpret its provisions broadly, we must conclude that it is 'susceptible of an interpretation' that covers Mey's TCPA claims." The majority acknowledged that the broad language in the arbitration agreement was subject to some tricky hypothetical questions. "But the question before us today is not abstract; it is tethered to the facts of this dispute and the categories of claims specifically included in this arbitration agreement." The majority noted that the district court "opined in passing that 'a construction which does not so limit the scope of the arbitration clause would be unconscionably overbroad'" and that "DirecTV argues that Mey waived any unconscionability challenge to the arbitration agreement by failing to raise it in the district court," as well as arguing against its unconscionability. Notwithstanding, the majority left questions of unconscionability (and waiver of that challenge) for the district court to address in the first instance on remand. Judge Pamela Harris dissented. She stated that she would affirm the district court "on the threshold question of contract formation: Because Mey never entered into an agreement to arbitrate her claims against DirecTV, the district court properly denied DirecTV's motion to compel arbitration." "In my view, a reasonable person procuring cell-phone service from AT&T Mobility and entering into the accompanying arbitration agreement would have no reason to believe she was signing away her right to sue any and all corporate entities that might later come under the same corporate umbrella as AT&T Mobility, regardless of whether they were connected in any way to the provision of her cell-phone service." Judge Harris ended her dissent with her view of the scope of DirecTV's argument:

> We should be clear about the consequences of DirecTV's unprecedented position in this case. AT&T Mobility is the nation's largest wireless service provider, with *165.9*

> *million* current wireless subscribers. For a sense of scale, the current population of the United States is approximately 330 million. So even without taking into account previous AT&T Mobility customers — who, as discussed above, also remain bound by the arbitration clauses in their agreements with their former wireless carrier — DirecTV's reading of the arbitration agreement means that half the country is bound to arbitrate any dispute, occurring at any time, with any entity that ever is subsumed under the massive AT&T Inc. corporate umbrella. And of course, DirecTV is not the only corporate cousin of AT&T Mobility that could take advantage of this unbounded reading of the arbitration agreement: According to AT&T Inc.'s most recent filing with the SEC, it has thirty-six principal subsidiaries — including Warner Bros., HBO, and Turner — each of which may well have its own subsidiary corporations. In DirecTV's view, every one of those entities is an "affiliate" of AT&T Mobility for the purposes of the arbitration agreement in its cell-phone service contract, so no AT&T Mobility customer — present or former — may sue any one of them, for any reason.

This is an important case for practitioners. Given the divided panel and Judge Harris' view of the expansive nature of DirecTV's argument, further filings in the Fourth Circuit or the U.S. Supreme Court may ensue. We will be following any such developments. Read the full opinion: *Mey v. DirecTV, LLC*, No. 18-1534 (4th Cir. Aug. 7, 2020).

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