

6th Circ. Says Arbitrator Must Pick SmileDirectClub Suit Venue

By **Caroline Simson**

Law360 (June 28, 2021, 9:27 PM EDT) -- The Sixth Circuit has ruled that an arbitrator must decide whether false advertising claims asserted against SmileDirectClub belong in litigation or arbitration, concluding that an American Arbitration Association administrator wrongly short-circuited the claim by refusing to appoint an arbitrator.

The circuit court said in its decision on Friday that the administrator lacked the power to decide whether AAA policy mandating that the parties sign a post-dispute arbitration agreement in certain health care claims meant that the dispute had to be sent back to court.

The proposed class action was brought by a consumer, Dana Johnson, who accused the teledentistry company of false advertising and fraud for claiming that its aligners are as effective as traditional orthodontics. Although he had originally filed the litigation before a Tennessee federal court, the dispute was later sent to arbitration, resulting in the decision from the AAA administrator.

Whether the parties had agreed to arbitrate the dispute, or whether the underlying arbitration clause covered this particular dispute, is a gateway question of arbitrability, the Sixth Circuit panel wrote, noting that the parties' agreement shows that they intended to send gateway questions of arbitrability exclusively to an arbitrator.

"The procedural decisions AAA administrators make ... are more akin to 'administrative aspects of the arbitration, such as the appointment of the arbitrator ... preliminary decisions about where hearings might take place, and ... handl[ing] the fees,'" according to the decision. "So it generally wouldn't make sense to require clear intent to delegate arbitrability questions to an arbitrator but then allow either arbitrators or administrators to decide that legal question."

The panel overturned a lower court decision denying SmileDirectClub's motion to compel arbitration, and ordered that the matter go before an arbitrator.

In a dissent, U.S. Circuit Judge Eric L. Clay said he would not have overturned the lower court's decision, saying that the AAA health care policy was incorporated into the parties' agreement. The parties were aware that those rules called for an administrator to render the AAA's initial determination regarding the requirements of the organization's own rules before proceeding to arbitration, he wrote.

"To allege that the parties here wanted to contract the AAA's administrator out of the process, in the absence of any evidence to that effect, is to ignore that the parties intended to have their disputes resolved under the rules of the AAA," according to the dissent.

Michael D. Meuti, who chairs Benesch Friedlander Coplan & Aronoff LLP's appellate practice group, was part of the legal team representing SmileDirectClub.

He told Law360 on Monday that the company "is pleased that the Sixth Circuit reaffirmed the longstanding principle that arbitration is a matter of contract and that the parties' intent, as reflected in the contract text, controls over the decision of an administrator that neither party selected."

Counsel for Johnson could not immediately be reached for comment.

The claim filed by Johnson is part of a broader dispute that also involves a proposed class of dentists. All the plaintiffs have accused SmileDirectClub of engaging in a "deliberate, intentional, and well-lawyered campaign to stifle any legitimate, publicly-stated concerns or criticisms of its product and/or business practices."

SmileDirectClub allows consumers to order dental aligners by making their own dental impressions using an impression kit, which is then mailed back to SmileDirectClub so that the company can manufacture the aligners.

The dentists and consumers allege in the litigation that licensed U.S. dentists are only minimally involved in the treatment plan, which is actually prepared by independent contractors in Costa Rica, making SmileDirect's marketing claim that its aligners provide the same level of care as traditional orthodontics false.

Moreover, consumers never find out the identity of the doctors who conduct follow-up consultations every 90 days with them, meaning that no patient-doctor relationship is ever actually established, according to the suit.

The plaintiffs claim that SmileDirect has regularly threatened dentists and orthodontists who have raised concerns about the company.

The consumers' and dentists' complaint brings 13 counts against SmileDirectClub for claims including false advertising, breach of warranty, fraud and violations of various state consumer protection statutes.

The claim at issue in the Sixth Circuit's opinion was initiated by Johnson in court, though he subsequently agreed to dismiss his claim in favor of classwide arbitration before the AAA.

An AAA administrator later informed the parties that the claim couldn't be arbitrated under AAA policy that applies to certain health care claims, under which health care providers and their patients must sign an arbitration agreement after a dispute arises in certain cases unless a court has compelled arbitration.

Johnson subsequently refused to sign such an agreement and brought the claim back to court, which denied a renewed bid by SmileDirect to send the dispute to arbitration after concluding that Johnson had already completed the AAA process. SmileDirect subsequently initiated the current appeal.

Johnson is represented by Emily J. Tidmore, Robert K. Spotswood, Michael T. Sansbury and Joshua K. Payne of Spotswood Sansom & Sansbury LLC, and by Edward M. Yarbrough and W. Justin Adams of Bone McAllester Norton PLLC.

SmileDirectClub is represented by Michael D. Meuti and James R. Bedell of Benesch Friedlander Coplan & Aronoff LLP.

The case is Joseph Ciccio et al. v. SmileDirectClub LLC, case number 20-5833 in the U.S. Court of Appeals for the Sixth Circuit.

--Editing by Nicole Bleier.