

The parties to this arbitration claim are Sean P. Smith and Experian Information Solutions, Inc. (EIS or Experian). The claim is filed under the Fair Credit Reporting Act, 15 U.S.C § 1681 et seq. Mr. Smith asserts that Experian mixed his file with the file of an entirely different person, refused to correct its errors, and that the erroneous credit reports resulted in denial of favorable credit terms and other damages.

The Fair Credit Reporting Act was specifically enacted to govern the collection and reporting of consumer credit information to third parties. It defines a “consumer reporting agency” as any:

person which, for monetary fees, dues, or on a cooperative basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

Experian (EIS) is one of a very small number of consumer reporting agencies. It is governed by the Act. It does not have a direct contract with any consumers, consumers do not subscribe to its services. Instead, so long as the Act is followed, Experian is permitted to collect and disseminate information about consumers without their express consent and to provide that information to lenders, creditors, banks, and others commercial entities who need the information to transact business with the consumer. Under the Act, Mr. Smith’s rights against EIS depend entirely on the Act.

EIS is the only respondent in this matter. EIS has an affiliated company, ConsumerInfo.com, Inc, which does business as Experian Consumer Services (ECS). ECS works only with individual consumers – it does not gather or provide information to banks, lenders, or other creditors. It is not a consumer reporting agency. Rather, it provides each consumer subscriber only with information about that consumer’s own credit record and it provides related services such as credit monitoring. Consumers can create an account for free or, for a fee, obtain enhanced services. The paid services include 3 Bureau Credit Report, permitting access to credit information collected by non-affiliated consumer reporting agencies.

The Terms of Use Agreement

A description of the ECS services contained in the Terms of Use Agreement signed by Mr. Smith in 2017 provides:

For the avoidance of doubt, this Agreement expressly applies to: (a) your access to and use of the Websites; (b) any and all transactions between you and ECS through the Websites, including for the provision of any Services or of any credit, personal, financial or other information delivered as part of or in conjunction with free Services or paid Services, including any such information that may be archived to the extent made available on the Websites, such as (i) for your purchase of non-membership based Services such as the 3 Bureau Credit Report and FICO* Scores, the FICO Industry or other Base FICO Scores and/or an Experian Credit Report and FICO Score, (ii) enrollment and use of free Services (such as Experian Credit Basics), and/or enrollment, purchase and use of membership

based Services (such as Experian CreditWorks or Experian Credit Tracker); and (iii) your access to and use of calculators, credit resources, text, pictures, graphics, logos, button items, icons, images, works of authorship and other information and all revisions, modifications, and enhancements thereto contained in the Websites.

The General Description of Services contained in the Terms of Use further explains that the “Services and Websites are meant to provide you a means to review your personal and/or credit information for educational purposes only.” And that the “Services and Websites are meant for your personal use only.” The Terms of Use also makes clear that ECS does not warrant the accuracy of the information it obtains from Experian and that all efforts to correct inaccurate financial reporting must be separately undertaken with Experian or any other credit reporting company:

Accurate adverse information on your credit report cannot be changed. If you believe that your credit report contains inaccurate, non-fraudulent information, it is your responsibility to contact the relevant credit reporting company, and follow the appropriate procedures for notifying the credit reporting company that you believe that your credit report contains an inaccuracy. Any information provided to you regarding the procedures followed by the various credit reporting companies related to the removal of inaccurate, non-fraudulent information is provided without charge to you and is available for free. Any such information *is not included as part of your credit score monitoring product* but is provided free of charge to all consumers, regardless of whether they are Customers of the credit score monitoring product. (Emphasis supplied.)

The 2017 Terms of Use also provided that, “Each time you order, access or use any of the Services or websites, you signify your acceptance and agreement, without limitation or qualification, to be bound by the then current Agreement.” Experian relies upon this provision to subject Mr. Smith to the subsequent dispute resolution provisions of its terms of use. The 2017 and subsequent versions of the arbitration clause contained in the Terms of Use provided that for purposes of the arbitration provision references to “ECS”, “you,” and “us,” include “our respective parent entities, subsidiaries, affiliates, agents, employees, predecessors in interest, successors and assigns.” It was based on this language that the court held that the arbitration provision applies to Experian as an affiliated company and required that the scope of the arbitration provision be determined in this arbitration.

The arbitration clause

The arbitration clause contained in the 2017 Terms of Use reads as follows:

- (a) ECS and you agree to arbitrate all disputes and claims between us arising out of this Agreement directly related to the Services or Websites, except any disputes or claims which under governing law are not subject to arbitration. This agreement to arbitrate is intended to be broadly interpreted and to make all disputes and claims between us directly relating to the provision of any Service and/or your use of any Website subject to arbitration to the fullest extent permitted by law. *However, for the avoidance of doubt, any dispute you may have with us arising out of the Fair Credit Reporting Act*

(FCRA) relating to the information contained in your consumer disclosure or report, including but not limited to claims for alleged inaccuracies, shall not be governed by this agreement to arbitrate. The agreement to arbitrate otherwise includes, but is not limited to: claims arising out of or relating to any aspect of the relationship between us arising out of any Service or Website, whether based in contract, tort, statute (including, without limitation, the Credit Repair Organizations Act) fraud, misrepresentation or any other legal theory; claims that arose before this or any prior Agreement (including, but not limited to, claims relating to advertising); claims that are currently the subject of purported class action litigation in which you are not a member of a certified class; and claims that may arise after the termination of this Agreement. (Emphasis supplied.)

If that language is controlling, this matter would clearly fall outside of the scope of the arbitration clause. However, because Mr. Smith logged in to the website subsequent to 2017, Experian contends that a later version of the clause applies, and that version omitted the exclusionary language. The provision in the version that Experian asserts is controlling provides:

- (a) ECS and you agree to arbitrate all disputes and claims between us arising out of this Agreement directly related to the Services or Websites to the maximum extent permitted by law, except any disputes or claims which under governing law are not subject to arbitration. This agreement to arbitrate is intended to be broadly interpreted and to make all disputes and claims between us directly relating to the provision of any Service and/or your use of any Website subject to arbitration to the fullest extent permitted by law. The agreement to arbitrate includes, but is not limited to: claims arising out of or relating to any aspect of the relationship between us arising out of any Service or Website, whether based in contract, tort, statute (including, without limitation, the Credit Repair Organizations Act) fraud, misrepresentation or any other legal theory; claims that arose before this or any prior Agreement (including, but not limited to, claims relating to advertising); claims that are currently the subject of purported class action litigation in which you are not a member of a certified class; and claims that may arise after the termination of this Agreement.

Analysis

Experian argues that the law establishes that because Mr. Smith used the website after 2017, the arbitration clause that omits the express exclusionary language applies to this claim. We therefore must analyze whether that clause would include within the ambit of the obligation to arbitrate any dispute under FCRA about the failure of Experian to collect and report accurate information. It does not. The express language of the clause limits the obligation to arbitrate claims, “arising out of this Agreement *directly relating to the provision of any Service and/or your use of any Website* subject to arbitration to the fullest extent of the law.” Although Experian argues that this is a broad arbitration clause entitling it to a presumption of inclusion, it is, in fact a narrow clause by its terms limited to matters that arise out of or *directly relate to the Service and Websites provided by ECS*. It is not the same as the clauses Experian cites that specify

“Any claim or controversy arising out of or relating to the agreement” (citing *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 251 (2d Cir. 1991)). Instead, it specifies that the dispute must be directly related to the Services and Website provided by ECS. The claim asserted by Mr. Smith does not arise out of or directly relate to ECS services or websites. It pertains to Experian’s collection of information and its processes for correcting errors and disseminating correct information.

That the arbitration clause excludes claims that do not relate to ECS services or websites is confirmed by the former clause language which noted the exclusion of claims against Experian under FCRA. It specified that it did so only for purposes of “avoidance of doubt.” That language did not alter the meaning of the arbitration clause, rather it emphasized the intent. Removing the explanation in the amendment did not alter the meaning of the clause. Nor did the amendments to the clause specifically include claims against Experian for FCRA violations despite the fact that such claims have been repeatedly asserted in the interim. The omission of the language does not expand or alter the scope of the clause and does not subject the claim here to arbitration.

In addition, the filing of the lawsuit in the federal district court prior to this arbitration satisfied the option provided in the both the original and amended Terms of Use to “reject any such changes [to the arbitration provision] and require ECS to adhere to the language of this provision as written at the time of your enrollment or purchase if a dispute between us arises regarding such service.”

Under either of the arbitration provisions, this claim is not arbitrable. It must be pursued in Federal District Court.

ORDER

The claims asserted in this proceeding are not within the scope of the arbitration agreement that governs the parties’ relationship and are nonarbitrable. The claims in this matter are hereby returned to the Federal District Court for the District of New Jersey for resolution.



Dated: April 5, 2024

Laura A. Kaster, Arbitrator