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Arbitration Denied: Consumer Did Not "Agree" to After-Added Arbitration Clause

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Adding an arbitration clause to previously-agreed upon terms and conditions (Ts and Cs) does not automatically ensure that a subsequent TCPA dispute is arbitral – at least under New York law. It all depends – of course – on the facts.

In *Engen v. Grocery Delivery E Services USA Inc.,* 2020 U.S. Dist. LEXIS 63658, Case No. 19-cv-2433 (ECT/TNL), United States District Court for the District of Minnesota, decided April 10, 2020, Amanda Engen opened an account online with Grocery Delivery EServices USA Inc. (HelloFresh) and clicked a box next to the phrase, "I accept the terms and conditions and I have read the privacy policy."

The words "terms and conditions" were hyperlinked to the then-effective Ts and Cs (as of January 21, 2017), including the right of HelloFresh "to revise and amend… [them] from time to time to reflect changes in market conditions affecting our business, changes in technology, changes in payment methods, changes in relevant laws and regulatory requirements and changes in our system's capabilities."

The language went on to state that Mrs. Engen would be subject to "the policies and terms and conditions in force at the time that you order Products from us, unless any change to those policies or these terms and conditions is required to be made by law or governmental authority (in which case it will apply to orders previously placed by you), or if we notify you of the change to those policies or these terms and conditions before we send you the Confirmation (in which case we have the right to assume that you have accepted the change to the terms and conditions, unless you notify us to the contrary within seven working days of receipt by you of the Products)."

After agreeing, Mrs. Engen placed an order for a meal kit, but after receiving the product, she purportedly "deactivated" her account. Thereafter, in February of 2017, HelloFresh added an arbitration clause to the Ts and Cs, which was amended in June 2018 to include a class action waiver provision.

Two years after her original order, in January of 2019, the plaintiff logged on to her account, "reactivated" her meal kit subscription and placed an order, which she cancelled the same day. HelloFresh then called her several times allegedly trying to get her to "re-subscribe and purchase

meal kits." As a result of those calls, Mrs. Engen's TCPA class action lawsuit ensued.

HelloFresh moved to compel arbitration, arguing that under the original Ts and Cs it had properly added the arbitration clause, that promotional emails it had sent thereafter and before Mrs. Engen reactivated her account provided "'actual, or at least constructive notice'" of the new terms and that she had agreed to those Ts and Cs (including the arbitration clause) "by reactivating her subscription and placing the meal-kit subscription order" in January 2019. Thus, she had agreed to arbitrate disputes. Mrs. Engen asserted she had no notice and never agreed to the revised Ts and Cs, including the arbitration clause.

In the final analysis, District Judge Eric C. Tostrud sided with Mrs. Engen. Applying New York contract law, as provided under the Ts and Cs, the Court blessed the HelloFresh addition of the arbitration clause but would go no further.

As to those HelloFresh emails that ostensibly provided Mrs. Engen actual or at least constructive notice, the Court noted they were not sent to notify Mrs. Engen of the modifications to the Ts and Cs and do not even mention such changes. True, there was a single sentence with a "Terms of Use" hyperlink in each email, but "it is not clear and conspicuous. It is 'buried at the bottom of the page' where a recipient is not likely to see it and less likely to understand its significance." The Court parried HelloFresh's reliance on other cases where the purpose of the "email…was to notify customers of the revised terms of service…and mentioned the addition of an arbitration clause explicitly, and … described how a customer's continued use would bind him to the revised terms." Here that was not the case.

As for the January 2019 website visit, Judge Tostrud noted that "HelloFresh acknowledges that Mrs. Engen's January 6, 2019 visit to its website cannot alone show that she had notice of or assented to the 2018 Terms and Conditions. This makes sense. As far as the record shows, that visit did not require Mrs. Engen to affirmatively acknowledge HelloFresh's Terms and Conditions through a clickwrap or similar feature, and no record evidence suggests that the visit placed her on inquiry notice of the revised Terms and Conditions."

TCPAWorld lesson learned? – under New York law, at least, obtain affirmative acknowledgment of arbitration or other claim-related modifications to previously-agreed upon Ts and Cs as the best way to avoid the fate of HelloFresh here.

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