

## Recent Decisions Spotlight Arbitration Agreements in Online Delivery Service Terms and Conditions

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The global pandemic has brought about countless changes, including, for many households, increased reliance on online retail and delivery services, such as Amazon.

When consumers sign up for these services or place their orders, they are likely to see a notice regarding terms and conditions, which may include an arbitration agreement pursuant to which the consumer agrees to arbitrate disputes arising from the use of the service, rather than pursue their claims in court. Recent decisions underscore the importance of the terms of these agreements and the challenges consumers may face if they wish to avoid arbitration of disputes with service providers, especially when they continue to rely on those services.

In [Nicosia v. Amazon.com, Inc.](#), plaintiff bought a weight loss product off of Amazon.com using his wife's Amazon account. He brought suit against Amazon under Washington state law and federal consumer protection laws claiming the weight loss product contained a controlled substance that had been removed from the market. Amazon moved to compel arbitration, invoking the arbitration clause in the conditions of use on Amazon's order page. The district court granted the motion to compel arbitration, but the Second Circuit vacated that portion of the district court's order, finding reasonable minds could disagree about whether plaintiff was on reasonable notice of the conditions of use.

On remand, the district court compelled arbitration under a combination of agency and estoppel doctrines, including a doctrine called "direct benefits" estoppel, under which a non-signatory who knowingly accepts the benefit of an agreement with an arbitration clause may be bound to arbitrate.

Interestingly, when the case came back to the Second Circuit for decision on appeal, the Second Circuit affirmed the district court, but not on agency or estoppel grounds. Instead, it affirmed on ordinary contract principles of notice and assent. As the Court explained, plaintiff had received notice of the arbitration clause when Amazon filed a letter motion in the litigation in 2014 raising the arbitration clause. Plaintiff made "at least twenty-seven purchases through Amazon.com since that date," conduct which "a reasonable person would understand to constitute assent."

Notably, this was a non-precedential summary order, and in reaching its decision, the Court assumed without deciding that the arbitration clause invoked by Amazon in its 2014 motion applied retroactively to plaintiff's 2013 purchases at issue in the case, as plaintiff had forfeited the argument

on appeal.

The case thus leaves open the applicability of direct benefits estoppel to online delivery service use, as well as the extent to which plaintiffs can avoid the consequences of broad terms of service arbitration provisions when they continue to utilize a service after bringing suit, something plaintiffs may find more and more challenging during a time when households are increasingly dependent on these services.

The Second Circuit's affirmance may also have particular resonance in light of other recent decisions raising question about the limits of direct benefits estoppel. In October 2019, the district court in [\*BF v. Amazon, Inc.\*](#) declined to compel arbitration of plaintiff children's wiretapping claims based on their use of their parents' Amazon Alexa device, finding the benefit received to be indirect rather than direct. Yet, just this March, the district court in [\*Tice v. Amazon.com, Inc.\*](#) compelled arbitration of a plaintiff's wiretapping claims against Amazon for plaintiff's use of her husband's Alexa device under the direct benefits test.

Following the Tice decision, the district court in BF agreed to stay the case pending Amazon's appeal, finding the appeal made the necessary showing of a serious legal question based on the split in authority presented by the Tice decision.

How the direct benefits test evolves and whether notice and assent from post-litigation use gains traction will no doubt be an area worth following in the coming months and years as these cases and more make their way through the courts.

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