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HOW TO BUILD A DISCLOSURE: Court Refuses to Enforce Arbitration Provision on Humann's Website and It is Time for a Tutorial

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Johnson v. Humann, 2025 WL 606782 (N.D. Ill. Feb 25, 2025).

There a court refused to enforce an arbitration provision on a website popup ad, and the facts are worth diving into.

In *Johnson* the plaintiff visited Defendant's nutrition supplements and functional foods website and received a pop-up message offering him 15% off if he signed up to receive emails and text messages.

On the bottom of the popup ad was a disclosure that said "View terms and conditions."

In the terms hyperlink was an arbitration provision.

Plaintiff clicked on the orange "GET 15% OFF NOW" button and was brought to a separate webpage where he had to enter his personal information in order to receive messages.

Plaintiff then agreed to receive messages from Defendant but later changed his mind and texted "stop"–yet continued to receive messages from Humann.

So we can pause here and already recognize a couple of themes:

1. This is yet *another* retailer being sued in a TCPA class action over marketing text messages;
2. This is yet *another* retailer being sued in a TCPA class action over failing to honor a text message revocation; and
3. This is all going to get a LOT worse after April 11, 2025.

But although these themes are present and interesting, they are also not the point.

Defendant moved to compel arbitration relying on the little "view terms" link on the bottom of the popup. The court denied that motion finding the terms unenforceable–and THAT is the point.

Arbitration was denied on two grounds– BOTH of them interesting and important for folks to understand.

First, **the plaintiff did not directly agree to the terms and conditions.**

The disclosure merely said “view terms.” It did not say words to the effect of “by clicking this button you will ACCEPT terms.”

This is critically important. While it may be presumed that the ability to “view” terms means terms exist and you will be bound by them at some point failing to specifically advise consumers that the terms WILL bind the consumer UPON THE ACT of pressing the button or proceeding is critical. Without that language courts will not enforce the provision.

As the court in *Johnson* said: “The phrasing of the disclosure is particularly important given that Defendant has complete control over the language of its own website and could have written the disclosure in any way.”

Bingo.

Courts will strictly read website copy against the website operator just the way they will read ambiguities in a contract against the drafter. So be ultra-cautious here.

But that’s not all. The court **also denied arbitration because the website did not give reasonable notice of the terms.**

Here there were several problems:

1. Again, the consumer was never actually told that by doing something specific the terms and conditions would be deemed accepted;
2. The hyperlink for the terms and conditions was underlined but it was not blue and did not otherwise standout from the rest of the disclosure text;
3. The language was small and below the button; and, probably most importantly,
4. Although the language was close to the button it was NOT displayed on the page where the consumer was actually agreeing to receive text messages–it was displayed BEFORE the text program was entered into.

This last one deserves attention. Courts often discuss the need for a disclosure to be “spatially and temporally” connected to the act by which the disclosure is accepted.

It is easily enough to understand what “spatial” closeness means–it just means how close is the button to the disclosure.

But “temporal” closeness can be trickier to understand but really it just means did the consumer accept the disclosure *at the time* it was displayed?

In *Johnson* the “view terms” disclosure appeared on the pop up but NOT on the page where the consumer actually signed up for text messages. So there was a *temporal* gap between the disclosure and the acceptance of the disclosure. And that was fatal to Human’s arbitration effort.

Also, notice how the hyperlink wasn’t blue? Such a low hanging fruit issue folks.

Ever since Berman that issue has been crystal clear. Just such a miss that any competent lawyer working in this space would have immediately caught.

So, some guidance on the structure and format of website terms and a guide to all.

Something like this (but probably better):

1. Button should indicate terms will be accepted;
2. The disclosure should clearly state that by clicking the button the terms will be accepted;
3. The disclosure should be clearly visible and neither too small nor too faint considering the background of the website;
4. The disclosure should be very close to (and preferably above) the button;
5. The disclosure should be clearly presented at the time the disclosure is being accepted;
6. Any hyperlinks in the disclosure should be brightly colored and highly visible (not just underlined);
7. Disclosure should not to tiny; and
8. Consumer should not be distracted by other noise on the website.

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