

Northern District of California Denies Arbitration in TCPA Class Action, Citing Lack of Affirmative Assent to Arbitrate in Web Submissions

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On September 1, 2020, a district court in the Northern District of California weighed in on an issue of recurring importance in internet commerce: how does a business obtain a remote consumer's effective agreement to terms and conditions including arbitration provisions? The answer in this case was cautionary. In denying a motion to compel arbitration brought by a defendant in a putative class action, the court focused on the typography, location and the affirmative consent (or lack thereof) of the consumer to an arbitration provision presented by hyperlink.

In *Berman v. Freedom Financial Network*, plaintiffs Daniel Berman, Stephanie Hernandez, and Erica Russell contended that they received telemarketing text messages and prerecorded calls from two vendors promoting the services of Freedom Financial Network and Freedom Debt Relief. One of the vendors obtained leads for the text message campaign through web submissions from consumer-facing websites. The defendant contended that two of the putative class plaintiffs' claims were subject to arbitration based on the applicable terms and conditions of the web submissions.

The arbitration clause was presented to the consumer by way of hyperlink on websites; the court faulted this approach in multiple ways, noting the lack of:

- specific, affirmative means of indicating consent to the terms and conditions or arbitration clause;
- text notifying users that they would be deemed to have agreed to the terms and conditions;
- a "checkbox" or "I agree" button for the terms and conditions;
- an indication that the click-thru or "continue" button signified to consumers that they were assenting to the terms and conditions; and
- clear presentation of the hyperlink itself, as the formatting of the terms and conditions, including the monotone of the terms and conditions, as compared to the "more colorful and high-contrast fonts" on the rest of the webpage; and due to the font size of the terms and conditions, which was "exceedingly small," in contrast to the other type sizes.

The bottom line is that this court was looking for a conspicuous presentation of the hyperlink itself, including a warning that the terms and conditions found through the website contained an arbitration clause; and a statement closely and obviously associated with the “continue” button that by clicking the button the consumer was assenting to the terms and conditions, including the arbitration clause.

This case joins a growing body of recent case law addressing how agreements including as to arbitration clauses are effectively formed through use of hyperlinks on websites. We have described this case law [here](#), as well as offered compliance strategies [here](#). Companies who want to collect consumer agreements through consumer experiences on websites need to be aware of the fairly specific holdings of various courts that bear upon the location, typography, and wording used to try to form agreements by hyperlinks.

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