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Amazon Drivers Avoid Arbitration Claiming Non-delivery of Updated TOS

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The Ninth Circuit recently issued an opinion that could shape how companies draft and revise two oft-encountered types of contracts: terms of service agreements ("TOS") and arbitration clauses.

In *Jackson v. Amazon.com, Inc.*, the Ninth Circuit affirmed the district court's order denying Amazon.com, Inc.'s motion to compel arbitration in a case brought by a proposed class of "Amazon Flex" drivers. Amazon Flex is a delivery program run through a smartphone app that Amazon uses to engage individuals to make Amazon deliveries in their personal cars.

The complaint alleged Amazon violated the drivers' privacy under state and federal laws by monitoring and wiretapping the drivers' off-hours conversations in closed Facebook groups. Amazon argued that the dispute should be sent to arbitration, pointing to a broad arbitration clause in the Amazon Flex 2019 TOS applicable to the drivers, which provided that the arbitrator had jurisdiction to determine whether a claim was subject to the arbitration provision. The named plaintiff, however, asserted that Amazon's Amazon Flex 2016 TOS should apply, contending he had never received notice of the revised 2019 TOS. The parties agreed that if the 2016 TOS were applicable, then the court had the authority to decide whether the dispute is subject to arbitration and whether Amazon's motion to compel arbitration should be granted.

The Ninth Circuit agreed that the district court correctly concluded that the 2016 TOS applied and that the parties' dispute was outside the scope of the 2016 TOS's arbitration clause. The Court held that Amazon, as the party seeking arbitration, had the burden to show that it provided adequate notice of the 2019 TOS and that there was mutual assent to the arbitration agreement contained therein, consistent with California law and principles of contract law.

Amazon argued that it circulated the 2019 TOS to its Flex drivers via email and that, even if it had not, by accepting the 2016 TOS its drivers had agreed to be bound by new terms so long as they continued to perform delivery services for Amazon or access the Flex app after receiving notice of the updated terms. Specifically, the 2016 TOS stated: "Amazon may modify this Agreement, including the Program Policies, at any time by providing notice to you through the Amazon Flex app or otherwise providing notice to you." Because of this language, the Court reasoned that the key question to ask when considering which TOS applied was whether Amazon provided notice of the new terms, noting that the Supreme Court has emphasized the need for consent in the arbitration context to ensure parties are not coerced into arbitrating claims when they never assented to doing so. Amazon did not provide the court with a copy or description of the notice it claimed it delivered, nor did it make any showing that the driver had received such notice, leading the Court to conclude there was no mutual assent to the 2019 TOS and only the 2016 TOS could apply.

The 2016 TOS arbitration clause provided that it applied to "any dispute or claim … arising out of or relating in any way to this Agreement, including … participation in the program or … performance of services." The Court interpreted this language as requiring that a dispute must relate to the contract in order for it to be arbitrable. Looking at the facts as laid out in the drivers' complaint, the Court observed that there were no allegations that Amazon had violated any provision of the 2016 TOS, and none of the drivers' claims depended upon the terms of the contract that contained the arbitration clause. The Court acknowledged that the plaintiff likely joined the Facebook groups because he was an Amazon Flex driver, but any non-driver (e.g., driver spouses, union organizers) who happened to be in the same group could likely assert the same privacy-related claims against Amazon independent of the TOS. Accordingly, the Court held that the drivers' claims did not fall within the scope of the 2016 TOS's arbitration clause.

This case provides a good reminder that companies that wish to keep all disputes with contractors, customers, and other counterparties in arbitration, rather than allow some to be adjudicated in court, should (i) revisit their arbitration provisions to ensure that they are broad enough to cover all disputes, and (ii) provide notice of updates to applicable TOS and keep records of how they have provided such notice.

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