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# A *Huuuge* decision of first impression for mobile applications and arbitration

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In the week before Christmas, the Ninth Circuit decided a case that not only had a huge name but potentially large implications for consumer software and online products and services. The decision, which deserved more notice than the holiday season allowed, answered a "question of first impression for [the] court[:] under what circumstances does the download or use of a mobile application (app) by a smartphone user establish constructive notice of the app's terms and conditions?" *Wilson v. Huuuge, Inc.*, No.18-36017, 2019 U.S. App. LEXIS 37952, *2 (9th Cir. Dec. 20, 2019). The answer? A list of factors to avoid if a company does not want to find itself with an unenforceable arbitration clause buried "twenty thousand leagues under the sea."

With a geographic footprint that encompasses a large portion of the United States, the Ninth Circuit makes decisions that can have an outsized effect on consumer law. The decision in *Wilson v. Huuuge, Inc*. promises to have just such an impact. [1]

## Background

Huuuge, Inc. (Huuuge) offers smartphone owners a casino gaming application (an app) they can play on their device. The app, which is free to download, allows users to entertain themselves by "gambl[ing] either with a limited number of free chips or with chips purchased through the app."[2]

Sean Wilson downloaded the Huuuge app and played it for over a year. He then sued Huuuge, on behalf of himself and a putative class of all other users of the app.[3] He claimed that Huuuge violated Washington state "gambling and consumer protection laws because it charged users for chips in its app."[4]

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[1] *Wilson v. Huuuge, Inc.*, No.18-36017, 2019 U.S. App. LEXIS 37952 (9th Cir. Dec. 20, 2019)

[2] *Id.* at *2.

[3] *Id.*

[4] *Id.* at *2-3.

In response to the lawsuit, Huuuge moved to compel arbitration under the Federal Arbitration Act.[5] Huuuge asserted that Wilson had agreed to arbitrate because the terms and conditions (the Terms) for the app included a written arbitration clause that precluded class actions. The company immediately faced a problem; however: it had no record that Wilson ever agreed to the clause.

As Huuuge had configured its app, it did "not require users to affirmatively acknowledge or agree to the Terms before downloading or while using the app."[6] Instead, users could, if they chose, "read[] the Terms before downloading the app" or "view[] the Terms during game play, which is similarly not necessary to play the game."[7] Huuuge, therefore, argued "that Wilson was on inquiry notice of" the Terms.[8] Wilson, not surprisingly, responded that "he [was] not bound by Huuuge's Terms because the notice and URL [linking to the Terms] were not sufficiently conspicuous."[9] To this, Huuuge replied, in effect, "that because Wilson played their game many times . . . shear [sic]repetition" ensured the effectiveness of the notice[10] and that "[t]he Court should take judicial notice of ubiquitous online agreements when weighing the objective standard for reasonable prudence and inquiry notice."[11]

After a review of screenshots of the app (which were included in its opinion) and a thorough analysis of analogies to existing case law, the District Court disagreed with Huuuge and refused to compel arbitration. As it put the choice, "[t]he fact is, Huuuge chose to make its Terms non-invasive so that users could charge ahead to play their game. Now, they must live with the consequences of that decision."[12]

## The Ninth Circuit's decision

Rather than live immediately "with the consequences of that decision," however, Huuuge appealed. While one of the authors of this alert has participated in informal research clearly demonstrating that most consumers firmly believe that any terms and conditions accompanying modern consumer technology are not favorable to them—whether they have ever read such terms and conditions or not—the Ninth Circuit, like the District Court, was not willing to extend constructive notice that far.

Instead, like the District Court and, like it, including detailed screenshots in its opinion, the Court of Appeals addressed the specifics of the actual Huuuge customer experience. It did not consider that experience favorable for the creation of an agreement to arbitrate.

The actual arbitration provision in the Terms provided by Huuuge stated that "ANY DISPUTE OR CLAIM" would "BE RESOLVED EXCLUSIVELY BY FINAL, BINDING ARBITRATION" that would proceed "ONLY ON AN INDIVIDUAL BASIS AND NOT IN A CLASS, CONSOLIDATED

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[5] 9 U.S.C.A. §§ 1-16 (West 2019).

[6] *Wilson v. Huuuge, Inc.*, 2019 U.S. App. LEXIS 37952, at *3.

[7] *Id.*

[8] *Id.*

[9] *Wilson v. Huuuge, Inc.*, 351 F. Supp. 3d 1308, 1310 (W.D. Wash., Nov. 13, 2018), *aff'd*, 2019 U.S. App. LEXIS 37952 (9th Cir. Dec. 20, 2019).

[10] *Id.* at 1315.

[11] *Id.* at 1316 (internal quotation marks deleted).

[12] *Id.* at 1317.

OR REPRESENTATIVE ACTION."[13] This language was not the problem. The problem was that "the user would need Sherlock Holmes's instincts to discover the Terms" that contained this language.[14]

Analytically, the Terms in the Huuuge app were "unambiguously a browsewrap agreement" and "[i]n the absence of actual knowledge, a reasonably prudent user must be on constructive notice of the terms of the contract for a browsewrap agreement to be valid."[15] In turn, constructive notice depends "on the conspicuousness and placement of the terms and conditions, as well as the content and overall design of the app."[16] Factors that the Ninth Circuit listed as weighing against finding such notice include:

> terms . . . "buried at the bottom of the page or tucked away in obscure corners of the website," especially when such scrolling is not required to use the site [or] where the terms are available only if users scroll to a different screen, [or] complete a multiple-step process of clicking non-obvious links, or parse through confusing or distracting content and advertisements . . . . Even where the terms are accessible via a conspicuous hyperlink in close proximity to a button necessary to the function of the website, courts have declined to enforce such agreements.[17]

Applying these factors, Judge M. Margaret McKeown wrote for the Court of Appeals that the terms including the arbitration clause were "not just submerged—they are buried twenty thousand leagues under the sea."[18] The process required to get to the Terms from the home page for the app—which did not include a hyperlink—"is the equivalent to admonishing a child to 'please eat your peas' only to then hide the peas."[19] And trying to find the Terms during game play "is similarly a hide-the-ball exercise" involving multiple steps to a settings menu in which a "Terms & Policy" tab "is buried among many other links, like FAQs, notifications, and sound and volume. The tab is not bolded, highlighted, or otherwise set apart."[20] As a result, no matter how many times Wilson may have played the app, he could not be presumed to have received constructive notice of its Terms, including an arbitration clause.[21]

## Conclusion

The outcome in the *Huuuge* case, to lawyers experienced in consumer arbitration issues, seems like an obvious application of contract principles long accepted as part of arbitration jurisprudence. But having drafted various arbitration provisions found in hundreds of millions of consumer clickwrap and browsewrap contracts, we think it is a valuable summary guide that all consumer companies

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[13] *Wilson v. Huuuge, Inc.*, 2019 U.S. App. LEXIS 37952, at *5.

[14] *Id.* at *3.

[15] *Id.* at *9.

[16] *Id.* at *10.

[17] *Id.* (citations omitted).

[18] *Id.* at *10.

[19] *Id.* at *11.

[20] *Id.* at *11-12.

[21] *Id.* at *12.

should consider in the design and implementation of their applications and products to ensure they can obtain the desired and not-inconsiderable benefits of arbitration in the United States.

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