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Ninth Circuit Decision Has Significant Implications for Terms and Conditions in Smartphone Apps

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A recent Ninth Circuit decision centered on something most consumers use many times every day: smartphone apps.

In *Wilson v. Huuuge, Inc.*, the Ninth Circuit affirmed the denial of defendant Huuuge's motion to compel arbitration against a user of its smartphone casino app. Addressing a question of first impression, the Court considered the circumstances under which an app user who downloads or uses an app can be said to have constructive notice of the app's terms and conditions. The Court ultimately held Huuuge failed to provide reasonable notice of its app's Terms of Use, which included an embedded arbitration provision, and thus the app user was not bound to the terms.Huuuge owns and operates a casino app where smartphone users can gamble or play casino games using limited free chips or chips purchased on the app. In April 2018, a user who downloaded and began using the app in early 2017 commenced a class action lawsuit alleging Huuuge was violating Washington gambling and consumer protection laws by charging users for chips. Huuuge moved to compel arbitration under the Federal Arbitration Act arguing the user was on inquiry notice of the app's terms, including an arbitration provision prohibiting class actions, but the Court found Huuuge's argument unpersuasive.

The Court examined whether a valid agreement to arbitrate was present, prompting analysis of the traditional contract law principle of mutual assent. The Court noted that in the context of online agreements—like the browsewrap agreement at issue here—the existence of mutual assent turns on whether the consumer has reasonable notice of the terms. Because Huuuge failed to raise any evidence that its user had actual notice of the relevant terms, and the Court found Huuuge similarly failed to demonstrate the user had constructive notice, the user never manifested assent to the terms and could not be bound to the terms or the arbitration clause.

Key to the Court's decision was the app's design and the questionable placement of the terms. Although users could access the terms before downloading the app or during game play, users were never required to do so. The Court commented that even a user searching for the terms would "need Sherlock Holmes's instincts to discover [them]." For example, to view the terms prior to downloading the app, users needed to scroll through several screens to locate the text of a link to the terms. Users then needed to copy and paste or manually enter the text link into a web browser, as the text was not hyperlinked. Viewing the terms after downloading required a similar multi-step process of clicking through options on the app's settings menu.

No matter when and how the terms were accessed, the Ninth Circuit concluded the process of doing so was unreasonable and app users could not have constructive notice of terms "buried twenty thousand leagues under the sea." Huuuge never required users to affirmatively acknowledge its terms at any time, and the Court saw no reason to assume users would find the terms simply because they existed somewhere on the app.

Given the growing ubiquity of smartphone apps, this decision provides important guidance for any company that owns or operates an app. Requiring app users to affirmatively assent to terms and conditions is likely the best practice, yet app operators should also ensure their terms are highlighted and easily accessible to users at all times before and after downloading. The onus is on app operators to provide users with notice of the terms to which they will be bound, as courts will not look favorably on apps that bury terms in settings menus or at the end of unnecessary scrolling.

As the Ninth Circuit cautioned Huuuge, terms and conditions must be conspicuously presented.

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