

ARBITRATION

HIDDEN ARBITRATION AGREEMENT IS NOT ENFORCEABLE

Wilson v. HUUUGE, Inc., 944 F.3d 1212 (9th Cir. 2019).
<https://law.justia.com/cases/federal/appellate-courts/ca9/18-36017/18-36017-2019-12-20.html>

FACTS: Defendant HUUUGE, Inc. was the owner of the smartphone app HUUUGE Casino, which allowed smartphone users to purchase virtual chips used to play casino games. Plaintiff Appellee Sean Wilson downloaded the app from the Apple App Store and played HUUUGE Casino. HUUUGE did not require users to affirmatively acknowledge or agree to the usage terms (“Terms”) before downloading or while using the app. However, users could access the Terms on the Apple App Store before downloading the app or within the app during game play. The Terms included a binding arbitration provision that prohibits class actions. Wilson filed a class action lawsuit alleging HUUUGE violated Washington gambling and consumer protection laws by charging users for chips in its app.

HUUUGE moved to compel arbitration, alleging that Wilson was on inquiry notice of the Terms. The trial court denied HUUUGE’s motion. HUUUGE appealed.

HOLDING: Affirmed.

REASONING: HUUUGE argued that Wilson had actual or constructive notice of the Terms due to the Terms’ availability for access. The court rejected HUUUGE’s argument, holding that Wilson had neither actual nor constructive notice of the Terms.

The court agreed with the trial court’s determination that actual notice was not at issue because HUUUGE did not present any evidence of Wilson’s actual knowledge.

Regarding constructive notice, the court explained that users are put on constructive notice based on the conspicuousness and placement of the terms and conditions, as well as the content and overall design of the app. The court further explained that such agreements will not be enforced where terms are buried at the bottom of a page or tucked away in obscure corners of the website, or where the terms are available only if users scroll to a different screen, complete a multiple-step process of clicking non-

obvious links, or parse through confusing or distracting content and advertisements. The court stated that the terms for HUUUGE’s app were not just submerged, — they were “buried twenty thousand leagues under the sea,” requiring “Sherlock Holmes’ instincts” or “dumb luck” to find them. Because HUUUGE’s app was littered with such flaws, it did not qualify as putting users on constructive notice. Accordingly, the court held that Wilson did not have constructive notice of the Terms, and thus was not bound by the arbitration clause.

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SEVENTH CIRCUIT CREATES A NEW STANDARD FOR CLASS ACTION NOTICE WHEN ARBITRATION CLAUSE MAY EXIST.

Bigger v. Facebook, Inc., ___ F.3d ___ (7th Cir. 2020).
<http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D01-24/C:19-1944:J:Kanne:aur:T:fnOp:N:2464184:S:0>

FACTS: Plaintiff-Appellee Suzie Bigger, an employee of Defendant-Appellant Facebook, Inc., worked in a position that was classified by Facebook as ineligible for overtime pay. Bigger filed suit against Facebook on behalf of herself and similarly situated employees for violating FLSA overtime pay requirements. The trial court authorized the sending of notice of the action to a group of employees proposed by Bigger. Facebook filed a motion objecting to the notice.

The trial court denied Facebook’s motion. Facebook filed an interlocutory appeal.

HOLDING: Vacated and remanded.

REASONING: Facebook argued that sending notice to the whole group would be improper because several of the members of the proposed group had entered into prior arbitration agreements with Facebook.

The court accepted Facebook’s argument, holding that, in order to protect the neutrality of the court and not signal that it favors a plaintiff’s case, a court must follow certain steps before giving notice. The court stated that the trial court must first determine if a plaintiff contests the defendant’s assertions about the existence of a valid arbitration agreement entered by proposed notice recipients.

The court further stated that, if a plaintiff contests the defendant’s assertions, the parties must be permitted to submit additional evidence on the agreement’s existence and validity. The defendant must show by a preponderance of the evidence the existence of a valid arbitration agreement for each employee that it wants to exclude from receiving notice. If the employer makes this showing, a trial court may not authorize notice.

CHILDREN NOT BOUND BY PARENT’S ARBITRATION AGREEMENT

B.F. v. Amazon.com, Inc., ___ F. Supp. 3d ___ (D. Wash. 2020).
<https://www.courtlistener.com/recap/gov.uscourts.wawd.274148/gov.uscourts.wawd.274148.137.0.pdf>

FACTS: Twenty-three children (“Children”) through their twelve respective parents as legal guardians (“Parents”) filed suit against Amazon.com, Inc., and A2Z Development Center, Inc. (collectively, “Amazon”), alleging that Amazon’s Alexa service on devices in their homes recorded their confidential communications in violation of the laws of eight states.

Amazon moved to compel arbitration. The trial court’s magistrate judge released a report recommending that Amazon’s motion to compel arbitration be denied, finding that it is undisputed that the Parents, not the Children, accepted

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Amazon's conditions of use containing the arbitration clause. The magistrate's report argued that the Children's relationships to the Parents were not enough to bind the Children to the arbitration agreement. Amazon objected to the report and moved to compel arbitration and dismiss the Children's claims.

HOLDING: Motion denied.

REASONING: Amazon argued that the Children should be compelled to arbitration based on the doctrine of equitable estoppel, which requires a nonsignatory to arbitrate if the person "knowingly exploits" the contract with the arbitration clause. Amazon claimed that the "knowingly exploit" test should be broadly interpreted to include individuals who "directly benefit" from the contract. Amazon also argued that under the "intertwined/close relationship" test, the Children should be compelled to arbitrate their claim.

Amazon argued that the Children should be compelled to arbitration based on the doctrine of equitable estoppel.

The court rejected Amazon's argument and agreed with the magistrate judge's report. The court identified two reasons why the parent-child relationship is not sufficient to bind the Children to arbitration. First, the court explained that the Children only received "indirect benefits" from the Parents' user agreement with Amazon. Because the Children did not directly benefit from the contract, the doctrine of equitable estoppel did not apply.

Second, the court noted out that Amazon, a signatory defendant, was attempting to compel the Children, nonsignatories, to arbitration. The court stated that if Amazon wanted to include a provision in the agreement requiring the Parents to consent to arbitration on behalf of their minor children, it could have done so. Because Amazon did not include such a provision, the Children were not signatories and thus were not bound to the arbitration agreement.

COURT REFUSES TO ENFORCE ARBITRATION PROVISION WHEN PLAINTIFF CLAIMS HE NEVER VISITED THE WEBSITE

Hobbs v. Apollo Interactive, Inc., ___ F. Supp. 3d ___ (M.D. Ga. 2019).

<https://casetext.com/case/hobbs-v-apollo-interactive-inc>

FACTS: Plaintiff Hobbs alleged that Defendant Apollo Interactive, Inc., made automated telemarketing calls to him without his consent, in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227.

Defendant filed a motion to dismiss in favor of arbitration, arguing that Plaintiff agreed to arbitrate his claims.

HOLDING: Motion denied.

REASONING: Defendant argued that the only plausible inference from the evidence provided was that Plaintiff entered his contact information on Defendant's website, BestAutoInsurance.com, and clicked "submit," thereby assenting to the terms and conditions of the website, including an agreement to arbitrate any claims related to the website's terms and conditions. However, Plaintiff presented evidence that he did not visit Defendant's website and that it would have been impossible for him to access the website in the manner Defendant said he did.

The court held that Plaintiff's evidence was sufficient, stating that a reasonable factfinder could determine that Plaintiff did not enter his personal information on Defendant's website or click "submit." Thus, a reasonable factfinder could conclude that Plaintiff did not assent to the website's terms, including the arbitration provision. Because there was a genuine fact dispute as to whether Plaintiff entered an arbitration agreement with Defendant, the Court could not conclude as a matter of law that the parties had a valid agreement to arbitrate.