
Cautionary Click Tale: California Court of Appeal Holds that Online Pop-Up Provides Adequate Notice of Binding Agreement Terms

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In *B.D. v. Blizzard Entertainment, Inc.* (Mar. 29, 2022, No. D078506) __ Cal.App.5th __, the California Court of Appeal held that a pop-up license agreement used for an online videogame provided adequate notice to users that they would be bound by its terms, including a requirement for binding arbitration. This case highlights the potential risks and benefits of using pop-up license agreements.

Background

B.D., a minor, and his father (together, Plaintiffs) sued Blizzard Entertainment, Inc. (Blizzard) in March 2020, regarding Blizzard’s online videogame. Plaintiffs alleged that the in-game purchases of virtual items with randomized values constitutes unlawful gambling, in violation of the Unfair Competition Law (UCL).

Blizzard moved to compel arbitration of Plaintiffs’ claim on the basis that it fell within the scope of the dispute resolution provisions incorporated into the online license agreement presented to users when they sign up for, download, and use Blizzard’s service.

B.D. was presented with a pop-up license agreement notice at the time the user account was created in 2016. In 2017 and 2018, B.D. was also presented with pop-ups advising him of license agreement updates. The dispute resolution section of each license agreement included binding arbitration and class action waiver provisions requiring users to arbitrate disputes on an individual basis.

The trial court denied Blizzard’s effort to compel arbitration and concluded that “there was no conspicuous notice of an arbitration agreement.” The trial court reasoned that in each instance where Blizzard provided notice of its license agreement, a user is not required to review the license agreement or the arbitration provisions. Additionally, the trial court found that the pop-up language acknowledging that the user has read and understood the license

agreement does not provide notice that an affirmative click means the user agrees to the dispute resolution provisions requiring arbitration.

Appellate Court Decision

The California Court of Appeal for the Fourth Appellate District reversed the trial court's decision and held that the pop-up license agreement and notices provided sufficient notice to B.D. that by clicking on the "Continue" button of the pop-up, B.D. agreed to all of the terms of the license agreement, including the arbitration provision. The court explained that the content of the license pop-up consisted of a scrollable text box that contained the entire license, and the immediately visible text directed users to read the agreement carefully and advised that the agreement included a dispute resolution section that contained an arbitration agreement and class action waiver. The dispute resolution section was also included and titled in the scrollable text box. A direct hyperlink to the dispute resolution policy containing the arbitration agreement was clearly referenced and easily accessible. Accordingly, the court concluded that the pop-up notices sufficiently brought the user's attention to all of the terms of the license agreement, including the dispute resolution provisions.

Related Ninth Circuit Opinion

In another recent case, the Ninth Circuit came to the opposite conclusion and declined to enforce an arbitration provision embedded within an online agreement. In *Berman v. Freedom Financial Network, LLC* (9th Cir. Apr. 5, 2022, No. 20-16900) __ F.4th __, the Ninth Circuit determined that the design and content of the webpage at issue did not adequately call to attention the existence of the website's terms and conditions, or the fact that, by clicking on the "Continue" button, users were agreeing to be bound by those terms. This was due in part to the small font size used and the fact that the presence of a hyperlink leading to the terms and conditions was not readily apparent. Thus, the Ninth Circuit concluded that website users were not sufficiently notified of the mandatory arbitration provision and declined to enforce it.

Takeaways

The degree of notice provided in online or "click-wrap" agreements is important in determining whether the agreement is binding. Where the terms and conditions of the agreement are directly provided, and the legal significance of an affirmative click is made clear, online users have the requisite notice that they are agreeing to be bound by the online agreement, and the agreement will likely be enforceable.

This is a cautionary tale for public agency employers, as many software and online programs require acceptance of click-wrap agreements as a condition of utilizing the software or program. Public agencies should have policies in place dictating the process for review and approval of such agreements. Conversely, many public agencies make certain programs or services available to third parties or the general public. A public agency offering these types of programs or services can

use click-wrap or other pop-up notices and agreements to protect their own agency. For example, an agency can make access to the agency's free Wi-Fi contingent upon acceptance of a click-wrap agreement that prohibits use of the Wi-Fi for illegal activities and requires indemnification of the agency for any related claims.

If you have any questions about this case, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcasts](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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