

Legal Alert

June 16, 2015

Michael R. King
mking@gblaw.com
602-256-4405

QUESTION: WHO CALLED THE U.S. SUPREME COURT OVER A \$30.22 SALES TAX CHARGE ON CELLULAR PHONES?

ANSWER: TELEPHONE CUSTOMERS TRIED TO DIAL-UP A CLASS-ACTION FOR EVERYONE WHO HAD BEEN CHARGED SALES TAX ON "FREE" PHONES.

Setting the ring-tone.

Vincent and Liza Concepcion purchased AT&T cellular phone service. AT&T advertised that the phones were "free" with the service contract. Mr. and Mrs. Concepcion were charged \$30.22 in sales tax on the retail value of the phones, however. *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011).

Mr. and Mrs. Concepcion sued AT&T in 2006 claiming "that AT&T had engaged in false advertising and fraud by charging sales tax on phones it advertised as free." The claim by Mr. and Mrs. Concepcion was consolidated with a class-action lawsuit for all AT&T customers who had been charged sales tax on "free" phones. A dispute over \$30.22 now looked more like your teenager's wireless bill.

AT&T tries to put it on mute!

Afraid of being "rung-up" for a big bill, AT&T checked its directory for a solution. AT&T called on the contract language requiring that all claims be resolved by binding arbitration. "The contract provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' 'individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.'" The contract also allowed AT&T to make unilateral amendments. Even though the Concepcions entered into the agreement in 2002, the version of the contract that was revised in December 2006 was controlling.

The customers could file a claim by completing a one-page form available on AT&T's Website. AT&T would then have 30 days to settle the claim or resolve it. If the claim was not resolved within 30 days, the customer could file a Demand for Arbitration. "In the event the parties proceed to arbitration, the agreement specifies that AT&T must pay all costs for non-frivolous claims; . . . that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages."

AT&T couldn't seek its attorneys' fees in arbitration. On the other hand, AT&T was required to pay a minimum of \$7,500 and double the attorneys' fees of the claimant if the claimant got an arbitration award larger than the last settlement offer by AT&T.

The U.S. Supreme Court said the arbitration provision was valid and enforceable. The Concepcions received poor reception at the Court, resulting in a dropped call.

The busy signal was the Federal Arbitration Act of 1925 preempting state laws invalidating arbitration clauses!

Under California law, the two-party arbitration clause was "unconscionable" because it was "a consumer contract of adhesion." Arbitrations did not have "the deterrent effects of class actions" and were unenforceable in California.

The Federal Arbitration Act resonates with a "liberal federal policy favoring arbitration." Arbitration is a matter of contract and arbitration clauses should be on an equal footing with other contract provisions. Arbitration contracts are to be enforced according to their terms.

The U.S. Supreme Court said that the main purpose of the Federal Arbitration Act is to make sure that arbitration agreements can "facilitate informal, streamlined proceedings." Even the District Court had thought "that the Concepcions were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action, which 'could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars.'"

The Concepcions then argued that they should be allowed to engage in class arbitration. The Supreme Court said the contract did not allow class arbitration. Moreover, the switch from two-party to class arbitration would get rid of the informality and slow the claims process. The claims process would be more costly and difficult in a class action.

Also, "class arbitration greatly increases risks to defendants." Without recourse to appeals the risk of error is "unacceptable when damages allegedly owed to thousands of claimants are aggregated and decided at once."

Don't get hung up on arbitration clauses.

Well-drafted arbitration clauses are almost always enforceable. So be careful what you ask for—you will probably get it. Arbitration is not always quicker or cheaper. Little recourse to the courts is available for pre-hearing bad behavior by the parties. Arbitration is usually binding with no realistic chance to appeal a bad decision.

If you need advice or help with arbitration contracts, please call me (wireless would be fine if it saves you the long-distance charges).

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