

## **Supreme Court Refuses to Enforce Class Action Lawsuit Bans Contained in Consumer Service Agreements**

07/24/07

### **Breaking Developments In Business Law**

The Washington Supreme Court recently decided two extremely important consumer rights cases -- *Scott v. Cingular Wireless Corp.* and *Dix v. ICT Group, Inc.* In these two cases, the Court considered whether prohibitions against class actions in consumer service agreements were enforceable. In one case, the Supreme Court examined a mandatory arbitration agreement that contained a provision prohibiting class action lawsuits. In the second case, the Supreme Court examined a provision that provided for dispute resolution in a state, other than Washington, which does not allow class actions for claims like the ones asserted by the consumer plaintiffs. The result was two rulings that reject class action bans in agreements with consumers that would have, in the view of the Court, prevented consumers from pursuing their substantive rights under the Washington Consumer Protection Act.

In *Scott v. Cingular Wireless Corp.* (July 12, 2007), the plaintiffs entered into standard preprinted cellular telephone service agreements with Cingular Wireless Corp. (“Cingular”) that included a clause requiring arbitration of all disputes. That arbitration clause prohibited consolidation of cases, class actions and class arbitration.

Cingular also retained the right to unilaterally revise the agreement and, in July 2003, it did so. The revised arbitration clause still prohibited class actions, but it also contained several provisions that made it easier for consumers to bring a claim against Cingular. It specified that arbitration would be conducted according to American Arbitration Association (“AAA”) rules; that Cingular would pay the filing, administrator and arbitration fees (unless the customer’s claim was found to be frivolous); that Cingular would reimburse the customer for reasonable attorney fees and expenses incurred for the arbitration (provided that the customer recovered at least the demand amount); and that the arbitration would take place in the county of the customer’s billing address. It also removed limitations on punitive damages.

The plaintiffs filed a class action lawsuit claiming that Cingular improperly billed them for long distance and/or out-of-network “roaming” calls. Cingular invoked the mandatory arbitration clause to compel the plaintiffs to arbitrate their claims individually. The plaintiffs responded by claiming that the class action waiver provision embedded in the arbitration agreement was unconscionable.

The Supreme Court agreed, and held that the class action waiver was unenforceable on public policy grounds. The Court reasoned that the one-sided waiver effectively denied large numbers of consumers the protection of Washington’s Consumer Protection Act (“CPA”), thereby effectively “exculpate[ing] Cingular from liability for a whole class of wrongful conduct.”

Significantly, the Washington Supreme Court limited its holding to the invalidation of class action waivers that prevent vindication of rights secured by the CPA, stating: “[w]e could certainly conceive of situations where a class action waiver would not prevent a consumer from vindicating his or her substantive rights under the CPA and would thus be enforceable.” The Court’s opinion also suggests that class action arbitration would be permissible.

In the second case, *Dix v. ICT Group, Inc.* (July 12, 2007), the plaintiffs alleged that America Online, Inc. (“AOL”), wrongfully and unilaterally created and charged them for secondary e-mail membership accounts in violation of the CPA. Plaintiffs maintained that when customers complained, they were connected to call center employees of ICT Group, Inc. at a center in eastern Washington, who were allegedly trained to discourage customers from seeking relief. The plaintiffs’ Terms of Service Agreement with AOL contained a forum selection clause requiring that plaintiffs bring their claims in Virginia. Virginia does not allow class action lawsuits for claims such as this one.

The Superior Court granted AOL’s motion to dismiss the case on the basis of the forum selection clause. The court of appeals, however, reversed the lower court’s ruling, again, based on public policy grounds. On appeal, the Washington Supreme Court unanimously affirmed the court of appeals. The Court held that the forum selection clause was unenforceable because the absence of a class action procedure in Virginia left the plaintiffs with no feasible avenue to seek relief under the CPA.

As in *Scott*, the Supreme Court’s holding was less than absolute. Specifically, the Court did not conclude that all forum selection clauses that effectively ban class action lawsuits are unenforceable. The Court reasoned that such a clause could be enforceable, concluding: “Where the value of an individual claim is significant or the absence of a class action option would not, when viewed objectively, be likely to deter an individual action, public policy does not defeat a forum selection clause.”

**What *Scott* and *Dix* mean for companies:**

Washington has now joined a significant number of states, including California, that generally reject class action bans. It can now be expected that Washington courts will invalidate those aspects of consumer service contracts that are deemed to seriously impair a plaintiff’s ability to pursue a CPA claim through a class action — at least without an effective alternative. Of course, the full import of the Court’s rulings and the enforceability of any particular arbitration or forum selection clause remains subject to further legal developments. Companies that are interested in exploring modifications to their dispute resolution provisions should contact counsel to discuss alternatives.

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