

TLPJ Challenges Cingular's Class Action Ban

Cingular Wireless Users in Washington State Seek Justice for Breach of Promise to Provide 'Free' Long-Distance and Roaming Services

As part of its Access to Justice Campaign, TLPJ recently filed an appeal in a case arising in a Washington state trial court on behalf of some 100,000 Cingular Wireless subscribers, in order to champion the right of cell phone customers to participate in class action lawsuits. TLPJ's brief in *Scott v. Cingular Wireless* – filed in the Washington State Court of Appeals on January 21, 2005 – argues that Cingular's attempt to insert into the fine print of its customer service agreement a clause banning customers from bringing or participating in class actions against the company cannot be enforced under Washington law.

The case arose after a group of customers discovered charges on their wireless phone bills for long-distance and roaming services that Cingular had agreed to provide free of charge. When the customers sued in state court, alleging breach of contract and violation of state consumer protection laws, Cingular moved to compel them to arbitrate their claims individually under a binding mandatory arbitration (BMA) clause that bans class actions and consolidation of claims. The trial court granted Cingular's motion, despite uncontested testimony by Washington's leading consumer law experts that the class-action ban, if enforced, would effectively prevent customers from holding the company accountable for wrongdoing.

"Corporations should not be permitted to force consumers into a one-sided, rigged deal that favors the corporation," said TLPJ Staff Attorney F. Paul Bland, Jr., lead counsel on the case. "Cingular's class-action ban is nothing more than an attempt to make it more difficult for customers to hold the company accountable – even if its actions violate state consumer protection law, and even if the consumers can prove all their claims."

Cingular claims the BMA clause at issue was sent to customers with their July 2003 bills. By inserting the crucial language requiring customers to waive their right to participate in a class action into an innocuous "bill-stuffer" included with subscribers' monthly statements, Cingular ensured that the vast majority of its estimated 100,000 Washington customers would never see – let alone read – the clause, nor understand that they were giving up their rights just by continuing to use their cell phones.

The provision states in part: "You and Cingular may bring claims against the other only in your or its individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."

TLPJ's brief argues that a class-action ban in a consumer contract like Cingular's is unenforceable for two reasons. First, as TLPJ argued successfully in the leading case *Ting v. AT&T*, given that it is inconceivable that a corporation would bring a class action against its customers, the one-sided clause effectively limits the remedies available to consumers, but not to the corporation. Courts across the country have struck down clauses that unfairly benefit one party to a contract at the expense of the other. Second, since the vast majority of wireless cell phone users have claims that are too small to bring individually, the class-action ban essentially prevents customers from holding the company legally accountable for unlawful practices that affect a large number of people but which would not result in a

large damages award for any individual plaintiff. Many courts have recognized that BMA clauses banning class action lawsuits are unconscionable and unenforceable because they place impossible burdens on individual consumers, who would be forced to file thousands of individual claims for relatively paltry amounts of money.

If the court agrees with TLPJ that the class-action ban is unenforceable, it must allow the plaintiffs to pursue their claims as a

class in court. Cingular drafted its contract in such a way that without the prohibition on class actions, the entire arbitration clause would be null and void.

"Cingular would rather have the arbitration clause stricken than face a class action in arbitration, even though arbitrators are regularly hearing class actions throughout the country," said Leslie A. Bailey, TLPJ's Brayton-Baron Fellow and co-counsel on appeal. "At bottom, this case has nothing to do with Cingular being pro-arbitration. It's about whether a corporation can devise a system that effectively makes it impossible for customers to bring legal actions against it for violating the law."

In addition to Bland and Bailey, the plaintiffs' legal team includes Seattle attorneys Douglas S. Dunham and Steven J. Crane of Crane Dunham, and Steven Rosen of the Law Offices of Steve Rosen. The appellants' opening brief in *Scott v. Cingular Wireless* is posted on TLPJ's web site, www.tlpj.org. ■

