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Arbitration Agreements In Calif. Require Consumer Assent

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Technology advances. Business processes evolve. Contract formation, however, remains an old-fashioned concept. A party must have notice of and actually assent to a contractual provision to be bound by it. Where a service provider includes an arbitration clause in a warranty brochure in a box containing the purchased product, and where nothing on the face of the box called the consumer's attention to the existence of the arbitration clause, the consumer — according to the Ninth Circuit — is not bound by the clause. Accordingly, the consumer's class action lawsuit was allowed to proceed in the district court.

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In Norcia v. Samsung Telecommunications America LLC, 845 F.3d 1279 (9th Cir. 2017), the consumer (Norcia) purchased a Galaxy S4 phone at a Verizon Wireless store. Norcia's receipt from Verizon, entitled a "Customer Agreement," referred in capital letters to Verizon's "Wireless Customer Agreement," also stating (again in capital letters) that the customer agreement includes an agreement to "settlement of disputes by arbitration." Verizon's "Customer Agreement," however, did not reference Samsung or any other party.

Immediately after he purchased the phone, a Verizon employee and Norcia took the phone (still in its sealed box) to a table, where they opened the box and unpacked the phone and materials, and the employee then proceeded to assist Norcia in transferring the contacts from his old phone to his new phone. Norcia then took the new phone, phone charger, and headphones as he left the store, leaving the box and the rest of its contents — including a 101-page warranty brochure containing an arbitration clause — behind.

Norcia later filed a class action complaint against Samsung, alleging (among other things) that Samsung made misleading statements about the Galaxy S4's storage capacity. Samsung moved to compel arbitration. But the district court denied the motion, ruling that Norcia's receipt of the brochure in the box did not form an agreement to arbitrate. Samsung appealed, and the Ninth Circuit affirmed the district court's ruling.

Analyzing California law of contract formation, the Ninth Circuit noted the general rule that "silence or inaction does not constitute acceptance of an offer." Id. at 1284. There are exceptions to this rule, including that "silence may be deemed to be consent when the offeree has a duty to respond to an offer and fails to act in the face of this duty." Id. at 1284-1285. Also, "silence may also be treated as consent to a contract when the party retains the benefit offered." Id. at 1285.

Neither of these exceptions applied to Nokia. First, Samsung failed to identify any California authority imposing on Nokia a duty "to act in response to receiving the Product Safety & Warranty Information brochure." Id. at 1286. Second, Norcia did not retain any benefit by failing to act. Although the warranty brochure gave Norcia an opportunity to "opt out" of the arbitration agreement, the brochure made it clear that the warranty applied regardless of whether Norcia opted-out. Id.

The Ninth Circuit rejected Samsung's arguments that the arbitration provision should be enforced as analogous to either a shrink-wrap license or as an "in-the-box contract." In distinguishing the shrink-wrap license cases cited by Samsung, the Court of Appeals emphasized a consumer must engage in the affirmative act of "opening the package" to consent to a shrink-wrap license: "Where a notice on a package states that the user agrees to certain terms by opening a package, a court could reasonably conclude, consistent with California law, that the user has a duty to act in order to negate the conclusion that the consumer has accepted the terms in the notice." Id. at 1287. In contrast, "the outside of the Galaxy S4 box did not notify the consumer that opening the box would be considered agreement to the terms set forth in the brochure." Id.

The Ninth Circuit similarly found no California authority enforcing an "in-the-box" contract in similar circumstances. Rather, those cases "concluded that even if a customer may be bound by an in-the-box contract under certain circumstances, such a contract is ineffective where the customer does not receive adequate notice of its existence." Id. at 1289. Because the brochure enclosed in the box only purported to address "safety information and the seller's warranty," a customer in Norcia's position "would not be on notice that the brochure contained a freestanding obligation outside the scope of the warranty." Id.

The Court of Appeals went on to reject Samsung's argument, relying on the Seventh Circuit's decision in Hill v. Gateway 2000 Inc., 105 F.3d 1147 (7th Cir. 1997), that "the practicalities of consumer transactions require the enforcement of in-the-box contracts and that consumers expect that products will come with additional terms." Id. at 1290. In the Ninth Circuit's view, such arguments regarding "an appropriate balance between consumer expectations and the burden on commerce" should be directed to the California state legislature, rather than the courts. Id.

The Norcia court then disposed of Samsung's reliance on the arbitration clause in Verizon's customer agreement in short order. Emphasizing that "Samsung is not a signatory" to the contract, the Ninth Circuit rejected a third-party beneficiary theory because "Samsung does not point to any evidence in the record indicating that Norcia and Verizon Wireless intended the Customer Agreement to benefit Samsung." Id. at 1290-91. Thus, the Court of Appeals affirmed the district court's ruling that Samsung had not demonstrated "the existence of a contract with Norcia to arbitrate as a matter of California law." Id. at 1291.

The same day it decided Norcia, the Ninth Circuit issued an unpublished decision in the companion case of Dang v. Samsung Electronics Co., Ltd., No. 15-16768, 2017 WL 218896 (9th Cir. Jan. 19, 2017). The Dang court reversed the district court's grant of Samsung's motion to compel arbitration, again emphasizing a lack of adequate notice to the consumer that the brochure enclosed with the phone "contained an offer to enter a bilateral contract" regarding arbitration. 2017 WL 218896, at *1. Notably, the short Dang decision contained no indication the consumer had left the brochure (or the box containing the phone) in the store, potentially undercutting an argument that unusual fact impacted the

Norcia court’s reasoning. See id.

The decisions in Norcia and Dang emphasize the importance of providing adequate notice of an arbitration agreement under California law. An entity wishing to bind a consumer to an arbitration agreement should provide notice of the agreement on external packaging if possible, and should reference the arbitration agreement in the title or on the cover of any included brochure. Such actions should go a long way in establishing old-fashioned contractual assent.

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