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Ninth Circuit: An enforceable arbitration agreement requires notice to and assent by the consumer

Takeaway: 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 an arbitration clause is set out in a warranty brochure in a box containing the purchased product, and there was nothing on the face of the box to call the consumer's attention to the existence of the 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.

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. 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, however. Norcia was under no duty to respond, and Norcia did not retain any benefit by failing to act (while 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.* at 1286.

The Ninth Circuit held: "Because Norcia did not give any 'outward manifestations of consent [that] would lead a reasonable person to believe the offeree has assented to the agreement,' no contract was formed between

Norcia and Samsung, and Norcia is not bound by the arbitration provision contained in the brochure.” *Id.* (citation omitted).

For similar reasons, the Ninth Circuit rejected Samsung’s arguments that the arbitration provision should be enforced either as analogous to a shrink-wrap license or as an “in-the-box contract.” On the shrink-wrap license point, the Ninth Circuit ruled: “Even if a license to copy software could be analogized to a brochure that contains contractual terms, 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.* at 1287. On the in-the-box contract point, the court ruled: “A reasonable person in Norcia’s position would not be on notice that the brochure contained a freestanding obligation outside the scope of the warranty.” *Id.* at 1289.