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No. 85581-1

SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT IN

JARED PECK,

Plaintiff,

and JAMES BOWDEN, a Washington resident, individually and on
behalf of all the members of the class of persons similarly situated,

Plaintiff-Appellant,

v.

AT&T MOBILITY, aka CINGULAR WIRELESS LLC, et al.,

Defendants-Appellees.

Plaintiff - APPELLANT'S OPENING BRIEF

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ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ISSUE PRESENTED	4
III.	STATEMENT OF THE CASE.....	4
	A. Cingular Imposes a B&O Tax Surcharge On Washington Customers.	4
	B. Cingular Sold Service to Plaintiff at Set Prices and Added a B&O Tax Surcharge to Those Prices.	6
	C. Procedural History of This Case.	8
IV.	ARGUMENT	10
	A. The Certified Question Should be Reformulated.....	10
	B. Washington Law Does Not Permit Cingular to Add a “Surcharge” to Customers’ Bills for Its B&O Taxes.....	11
V.	CONCLUSION	15

TABLE OF AUTHORITIES

Cases

<i>Broad v. Mannesmann Anlagenbau AG</i> , 196 F.3d 1075 (9th Cir. 1999)	10
<i>Danny v. Laidlaw Transit Servs., Inc.</i> , 165 Wn.2d 200, 193 P.3d 128 (2008)	10
<i>Johnson v. Camp Automotive Inc.</i> , 148 Wn. App. 181, 199 P.3d 491 (2009)	<i>passim</i>
<i>Nelson v. Appleway Chevrolet, Inc.</i> , 129 Wn. App. 927, 121 P.3d 95 (2005), <i>aff'd</i> 160 Wn.2d 173, 157 P.3d 847 (2007).....	6
<i>Nelson v. Appleway Chevrolet, Inc.</i> , 160 Wn.2d 173, 157 P.3d 847 (2007)	<i>passim</i>
<i>Parents Involved in Comty. Sch. v. Seattle Sch. Dist. 1</i> , 149 Wn.2d 660, 72 P.3d 151 (2003).....	11
<i>Peck v. Cingular Wireless Services, LLC</i> , 535 F.2d 1053 (9th Cir. 2008)	8, 13, 15

Statutes

47 U.S.C. § 332(c)(3)(A).....	8
28 U.S.C. § 1332(d).....	8
RCW 82.04.220	4
RCW 82.04.500	<i>passim</i>

Other Authorities

<i>Webster's Third New Int'l Disctionary</i> (G & C Merriam Co. 1976)	5
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I. INTRODUCTION

The Washington Business and Occupation (B&O) tax statute prohibits businesses from construing B&O taxes “as taxes upon the purchasers or customers,” and requires that the tax be treated as “a part of the operating overhead” of the business. RCW 82.04.500. This Court applied that provision in *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 157 P.3d 847 (2007), and found that it unambiguously prohibits businesses from imposing the B&O tax directly on consumers. In *Appleway*, the plaintiff purchased a new car from the defendant; the parties negotiated a sale price, and the defendant car dealership then presented the plaintiff with a contract that listed additional charges including sales tax and a \$79 charge for the B&O tax. *Id.* at 178. This practice violated the plain language of the statute. *Id.* at 180-81. Like any “overhead” expense, businesses may include the cost of the B&O tax in their prices, but they cannot add the tax to the sale price as they would a sales tax or similar added charge. *Id.* at 181.

This case calls for application of *Appleway* to the sale of mobile phone service. The Plaintiff, James Bowden, went to a

Cingular kiosk in Silverdale, chose a calling plan with a specific price, and Cingular presented him with a contract listing that price and stating in fine print that additional charges would be added to the price each month, including a “gross receipts tax.” Excerpt of Record (“ER”) 163. Cingular then billed Mr. Bowden an additional charge every month for B&O taxes. Just as Appleway’s practice of adding B&O tax to the agreed sale price of a car violated the statute; so Cingular’s practice of adding B&O tax to the posted price of mobile phone service violates the statute.

Cingular removed this case to federal court, and the federal district court found that there was no violation of Washington law. It relied on a case from the state Court of Appeals that held that a seller may charge customers for the B&O tax if it discloses the charge “during the course of negotiating the purchase price.” *Johnson v. Camp Automotive Inc.*, 148 Wn. App. 181, 182-83, 199 P.3d 491, 492 (2009); *see* ER 7 (citing ER 16). The district court held that because Cingular listed “gross receipts taxes” in its contract, it satisfied the requirements of the B&O tax statute.

The district court misunderstood the intent of the B&O tax statute and this Court's precedent. Under *Appleway*, RCW 82.04.500 does not permit an added charge for the B&O tax, regardless whether it is somehow "disclosed" to the customer.¹ *Appleway* said only that the statute did not forbid the seller to disclose the cost of its B&O taxes if the seller wished to do so, as long as it is included in the price, not added to the price. *Appleway*, 160 Wn.2d at 181, 184 ("The statute is silent about disclosure, and *Appleway* is free to disclose and itemize any tax or cost."). The *Johnson* case cannot and did not change this clear statutory mandate or this Court's precedent.

The Ninth Circuit U.S. Court of Appeals has asked this Court to render an opinion whether RCW 82.04.500 permits Cingular to add a B&O tax surcharge to the monthly price of phone service. This Court should hold that it does not.

¹ The defendant in *Appleway* conspicuously disclosed the B&O surcharge, including its exact amount, at four different places in the contract that the plaintiff signed. *Appleway*, 160 Wn.2d at 178 n. 3.

II. ISSUE PRESENTED

Plaintiff requested that the Ninth Circuit certify several questions to this Court, including the following:

Under Revised Code of Washington (RCW) 82.04.500, may a seller impose a surcharge on its customers to recoup its B&O taxes where the seller states in fine print that it may add various surcharges but the advertised price does not include the B&O tax surcharge and there is no negotiation over the price?

The Ninth Circuit granted Plaintiff's request in part, and certified the following question:

Under Revised Code of Washington section 82.04.500, may a seller recoup its business and occupation taxes where, prior to the sale of a monthly service contract, the seller discloses that in addition to the monthly service fee, it collects a surcharge to cover gross receipts taxes?

III. STATEMENT OF THE CASE

A. Cingular Imposes a B&O Tax Surcharge On Washington Customers.

Washington State charges the B&O tax on all businesses "for the act or privilege of engaging in business activities" in the state. RCW 82.04.220. Retailers like Cingular are taxed .00417% of their

gross receipts. *See* ER 126.² In early 2002, Cingular decided to begin passing through its B&O taxes to its customers as a surcharge on their monthly bills. ER 128-29. Rather than absorb the cost of the B&O tax like any other overhead expense, or increase its advertised prices to account for it, Cingular elected to “surcharge” customers for it in an additional line item on the bill, just like a sales tax on the consumer. ER 126.³ Cingular admits it treated the B&O tax “very much like a transactional tax, which you would think that was a sales tax, et cetera.” ER 129.

Cingular was aware of the fact that Washington law forbade the practice of imposing the B&O tax on its customers. ER 131. When asked why it chose to impose B&O taxes on its customers, Cingular’s senior tax manager testified:

Cingular has charged the B&O surcharge to customers as a separate line item because we’re allowed to do that. We believe we’re allowed to do that under federal preemption.

² *See also*

<http://dor.wa.gov/Content/FindTaxesAndRates/BAndOTax/BandOrates.aspx>.

³ Webster’s defines “surcharge” as “a charge in excess of the usual or normal amount: an additional tax, cost, or impost.” *Webster’s Third New Int’l Dictionary* 2299 (G & C Merriam Co. 1976).

ER 127.⁴ Nonetheless, in February 2006, as a result of the Court of Appeals' decision in *Appleway*⁵ and Mr. Peck filing this lawsuit, Cingular ceased charging Washington customers for B&O taxes. ER 130.

B. Cingular Sold Service to Plaintiff at Set Prices and Added a B&O Tax Surcharge to Those Prices.

As set forth in the Ninth Circuit's order, Plaintiff James Bowden purchased service from Cingular at a licensed Cingular dealer "kiosk" in a shopping mall. ER 155. Cingular advertises and sells its services in a variety of "rate plans," each offering a different combination of air time and other features for a specific monthly service price. See ER 160-61. Mr. Bowden reviewed the rate plans and prices before deciding to purchase service and hardware for three wireless telephone lines; one for himself, one for his wife, and one for his teenage daughter. ER 152, Supp. Excerpts of Record ("SER") 49.

⁴ As noted below, federal preemption does not apply. *Peck v. Cingular Wireless Services, LLC*, 535 F.2d 1053, 1058 (9th Cir. 2008).

⁵ *Nelson v. Appleway Chevrolet, Inc.*, 129 Wn. App. 927, 121 P.3d 95 (2005) ("*Appleway I*"), *aff'd* 160 Wn.2d 173, 157 P.3d 847 (2007)

Cingular then had him sign three one-page "Service Agreements." ER 163-65. Each stated the "Monthly Service Fee" for the rate plan he had chosen, the per-minute charge for additional minutes used over the plan allotment, and the monthly fee for any "Optional Features." *Id.*⁶ The Agreements each contained a statement in fine print that stated:

REGULATORY COST RECOVERY FEE. Cingular also imposes the following charges: a Regulatory Cost Recovery Fee of up to \$1.25 to help defray its costs incurred in complying with obligations and charges imposed by State and Federal telecom regulation, a gross receipts surcharge, and State and Federal Universal Service charges. The Regulatory Cost Recovery Fee is not a tax or government required charge.

It is not disputed that the prices listed in the Agreement did not include the B&O tax surcharge. Cert. Order at 1331.⁷ Each month Cingular billed Plaintiff separately for a "State B&O surcharge," in addition to the prices set forth in his contracts. *See* ER 135-37.

⁶ A clearer copy of one of these agreements is appended to this brief.

⁷ It is also undisputed that the B&O tax was not included in the "Regulatory Cost Recovery Fee." *See* ER 137.

C. Procedural History of This Case.

Plaintiff Jared Peck originally filed this action in state court in Seattle in February 2006, and Cingular removed it to federal court based on alleged federal preemption. ER 280-82. In October 2006, the district court held that the Washington B&O tax statute was preempted by the Federal Communications Act, 47 U.S.C. § 332(c)(3)(A), and dismissed the case. ER 69, 279. Plaintiff appealed and on August 7, 2008, the Ninth Circuit reversed. *Peck v. Cingular Wireless Services, LLC*, 535 F.2d 1053 (9th Cir. 2008). On the Plaintiff's motion, the district court remanded the case to state court. ER 37.

Plaintiff James Bowden joined as class representative and Plaintiff Peck took a voluntary dismissal. *See* ER 211-12. Mr. Bowden moved for class certification, but while that motion was pending, Defendant removed to federal court again, this time based on diversity of citizenship under the Class Action Fairness Act, 28 U.S.C. § 1332(d). ER 213. The District Court denied Plaintiff's second motion to remand. ER 33. The parties cross-moved for summary judgment.

Meanwhile, a parallel case, *Riensch v. Cingular Wirless LLC*, No. 06-1325Z (W.D. Wash.), was remanded from a similar appeal, and Cingular moved for summary judgment in that case as well. The district court consolidated the hearing date for the summary judgment motions in both cases. ER 29. On October 2, 2009, the district court granted Cingular's motion for summary judgment in *Riensch*. ER 8. On December 15, 2009, the court granted Cingular's motion for summary judgment in this case, based on its holdings in *Riensch*, and denied Plaintiff's motion. ER 1.

Plaintiffs in both cases appealed, and the Ninth Circuit held oral argument in *Riensch* on July 13, 2010. The panel then withdrew the case from submission pending completion of the briefing in this case. No decision issued and, on November 22, 2010, Plaintiff Bowden requested certification of several issues of state law to this Court. On January 24, 2011, the court granted that motion in part, and certified the foregoing question to this Court.

IV. ARGUMENT

A. The Certified Question Should be Reformulated.

The Ninth Circuit certified a slightly different question about the B&O tax statute than Plaintiff proposed, but noted that this Court may reformulate the question as it sees fit. Cert. Order at 1334 (citing *Broad v. Mannesmann Anlagenbau AG*, 196 F.3d 1075, 1076 (9th Cir. 1999)); *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 205, 193 P.3d 128 (2008). Plaintiff suggests that the Court answer the question as he had originally proposed it.⁸ There are two substantive differences, indicated with emphasis in the margin. First, Plaintiff included the proviso that there is no negotiation over

⁸ The Plaintiff proposed the question as follows, emphasis added:

Under Revised Code of Washington (RCW) 82.04.500, may a seller impose a surcharge on its customers to recoup its B&O taxes where the seller states in fine print that it may add various surcharges but the advertised price does not include the B&O tax surcharge *and there is no negotiation over the price?*

The court reformulated the question as follows, emphasis added:

Under Revised Code of Washington section 82.04.500, may a seller recoup its business and occupation taxes where, *prior to the sale of a monthly service contract*, the seller discloses that in addition to the monthly service fee, it collects a surcharge to cover gross receipts taxes?

the price of Cingular's service. This is factually undisputed and is the fundamental distinction between this case and the precedents (*Appleway* and *Johnson*) in which the courts said "disclosure" of the B&O tax may be material. *See infra* at 13-15. Second, the Ninth Circuit included the clause "prior to the sale of a monthly service contract." This qualifier assumes facts that are not in evidence (and are untrue), and these assumed facts are immaterial to the statutory mandate that the B&O tax must be included in and not added to the price. *See infra* at 14-15.

B. Washington Law Does Not Permit Cingular to Add a "Surcharge" to Customers' Bills for Its B&O Taxes.

The Ninth Circuit referred this case to this Court because of a perceived lack of clarity between this Court's decision in *Appleway* and the Court of Appeals' decision in *Johnson*. Cert. Order at 1332. This Court's review of the question presented is *de novo*. *Parents Involved in Comty. Sch. v. Seattle Sch. Dist. 1*, 149 Wn.2d 660, 670, 72 P.3d 151 (2003).

In *Appleway* this Court held that the B&O tax statute "is not ambiguous and plainly says two things: First, the tax is not a tax on customers. Second, the tax is a tax on business and should be a part

of the operating overhead.” *Appleway*, 160 Wn.2d at 180. Many taxes, most commonly the sales tax, are routinely passed onto customers as a separate charge in addition to the price. *See id.* at 185. In contrast, “overhead costs” include the general costs of doing business “such as rent, insurance, utilities,” which are not billed separately to the customer. *Id.* at 180. By requiring that the B&O tax be treated as overhead and not as a tax on the customer, the legislature made it clear that, “unlike a sales tax, [the seller] cannot add a B&O tax to the purchase price.” *Id.* at 185. That is precisely what Cingular did. As its tax manager testified:

If you had an account that has a monthly recurring charge, let’s say 39.95 a moth or whatever it is, you would be charged the [B&O] tax on that recurring charge the same way you would be charged sales tax, federal excise tax at the time or any other taxes.

ER 107.

The Court of Appeals in *Johnson* distinguished *Appleway*. *Johnson* involved another car dealer that itemized the B&O tax to purchasers, but unlike in *Appleway*, the dealer included the tax in the negotiated price, rather than adding it to the negotiated price. *Johnson*, 148 Wn. App. at 182-83. The result in *Johnson* is

consistent with the rule established in *Appleway*: B&O taxes may be recovered from consumers as part of the price, but not as an “add-on” charge on top of the price as if it were a tax on consumers. *See Appleway* at 181; *see also Peck*, 535 F.3d at 1058 (RCW 82.04.500 “mandate[es] that businesses quote all prices inclusive of Washington’s B&O tax.”). Cingular did not include the B&O tax in its prices, it added the tax on top of those prices. ER 107.

The federal court in this case misapprehended *Johnson* and the role of “disclosures” in complying with the B&O tax statute. In *Appleway*, the defendant had protested that the law would prevent it from itemizing the B&O tax and showing the costs that make up the purchase price. *See Appleway*, 160 Wn.2d at 181. The Court rejected that argument, explaining that businesses remain free to identify any cost as part of the price, but cannot add the cost of the B&O tax to the price.

“Quite simply, the seller may disclose the B&O overhead charge to the purchaser, but it must be done while setting the final purchase price. The process here involved the negotiation of a price; hence, the information should have been disclosed as part of that process.”

Id. (quoting *Appleway I*, 129 Wn. App. at 945). As is evident, the Court contemplated itemization of the B&O tax in a negotiated transaction, where the price set through a bilateral process and not pre-determined. As the Court explained:

In other words, it is lawful for Appleway to disclose a B&O charge to Nelson *during* the course of negotiating a purchase price or later identify any claimed element of overhead. However, Appleway may not add a B&O charge as one of several fees and taxes *after* Appleway and Nelson negotiated and agreed upon a final purchase price.

Id. (emphasis in original).

Thus, where the price is negotiated, a seller can “itemize” the cost of B&O tax as part of the negotiated price, and still include that cost in the price. That is what happened in *Johnson*. Because Camp Automotive disclosed the B&O charge during the negotiations over the price, and included it in the negotiated price, the court concluded there was no violation of the statute. *Johnson*, 148 Wn. App. at 184, 185. But in *Appleway*, disclosure made no difference, because the price was negotiated and set before the B&O tax was disclosed and added to the price. *Appleway*, 160 Wn.2d at 180-81.

Likewise, where the price is unilaterally set in advance and is not negotiable, as was the case here, disclosure would make no difference, because the law forbids the seller to add the B&O tax to the price.⁹ Sellers can always “later identify any claimed element of overhead,” i.e., identify the portion of the price that will be used to pay B&O taxes, but it must “quote all prices inclusive” of those taxes. *Appleway*, 160 Wn.2d at 181; *Peck*, 535 F.3d at 1058. Cingular plainly did not do that.

Cingular’s “add-on practice” is “explicitly forbidden by the statute.” *Appleway*, 160 Wn.2d at 181. No other conclusion makes sense consistent with the statute and this Court’s decision in *Appleway*.

V. CONCLUSION

For the reasons stated above Plaintiff respectfully requests that the Court find that RCW 82.04.500 prohibits a seller from

⁹ Cingular’s disclosures were even more anemic than *Appleway Chevrolet’s*. *Appleway’s* contract clearly stated that Mr. Nelson would be charged an extra \$79 for B&O taxes. *Id.* at 178 n. 3 (noting that the B&O tax was fully disclosed repeatedly in the contract). Cingular’s contract only stated, cryptically and inconspicuously, that it “also imposes ... a gross receipts surcharge.” ER 163.

imposing a surcharge on its customers to recoup its B&O taxes, even where the seller discloses that it will add such a surcharge, if the advertised price does not include the B&O tax surcharge.

DATED this 28th day of February, 2011.

BRESKIN JOHNSON & TOWNSEND PLLC

By /s/ Daniel F. Johnson
Daniel F. Johnson, WSBA No. 27848
Attorneys for Respondents

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Certificate of Service

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I, Miriam Simmel, hereby certify that on February 28, 2011, I electronically filed the foregoing with the Clerk of the Court for the Washington Supreme Court via Email to Supreme@courts.wa.gov.

I certify that all participants listed below have been served in the manner indicated below.

/s/Miriam C. Simmel
Miriam C. Simmel, Legal Assistant

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via messenger via Email via US Postal service

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APPENDIX

Activation Date 11/27/10	Market/Region SEAWEST
Agency Code MP1RL	Salesperson WIL WACLINER
CUSTOMER INFORMATION	
Billing Name/Legal Name (First, M.I., Last) JAMES BOYDEN	
Attention Line	
Customer Piece of Property (Use PO Box Not Acceptable) 9900 KINGSTON FARM RD NE	
City KINGSTON	State VA
Zip Code 22646	
Billing Address (If Different) P.O. BOX 1532	
City KINGSTON	State VA
Zip Code 22644	
E-Mail Address	
Date of Birth REDACTED	
High Number 297-7600	Work Number
Order License No. LSA-3R 500R	Exp. Date 11/15/06
BUSINESS BILLING INFORMATION	
<input type="checkbox"/> Sole Owner <input type="checkbox"/> Partnership <input type="checkbox"/> Corporation	
Authorized Person to Sign for Account G	
Authorized Individual's Title	
Tax Exempt Tax ID No. E	
<input type="checkbox"/> FED <input type="checkbox"/> Local <input type="checkbox"/> State <input type="checkbox"/> Other	
CREDIT AND BILLING ACCOUNT INFORMATION	
Credit Check Number 1112 704E5	Advance Payment (Deposit Amount) 0
Account Number 3262113116	
WIRELESS PORT REQUEST	
If my existing number is NOT eligible to transfer (Please a initial below):	
<input type="checkbox"/> By providing your account information you are authorizing the transfer of your number from your current Service Provider to Cingular Wireless. In the unlikely event that Cingular Wireless is unable to port your number within 30 days from the date on this Wireless Service Agreement a new Cingular Wireless number will be assigned.	
<input checked="" type="checkbox"/> Not applicable.	

WIRELESS EQUIPMENT INFORMATION	
<input checked="" type="checkbox"/> Sale	<input type="checkbox"/> Service Only
1st Wireless Number 360710-1334	Unlock Code
2nd Wireless Number	Unlock Code
3rd Wireless Number	Unlock Code
4th Wireless Number	Unlock Code
SERVICE COMMITMENT	
<input type="checkbox"/> 1-Year <input checked="" type="checkbox"/> 2-Year <input type="checkbox"/> Other	
SERVICE ACTIVATION CHARGE	
Activation Charge (One-Time Charge) 18	Upgrade Fee (One-Time Charge)
MONTHLY PLAN AND PROMOTION	
Rate Plan FN5M0002	Monthly Service Fee 9.95
Included Minutes 850	Price per ADD'l Min. .35 (peak/anytime)
Promotional Min.	Promotional Min.
Promotional Other ONLIM m/m n/w	
Expires Cost after Expiration	
*For informational purposes only; in case of conflict, rate plan brochure prevails.	
Optional Features/Rate Plan Options	
Check	Feature Name
<input checked="" type="checkbox"/>	ROADSIDE ASSISTANCE
<input checked="" type="checkbox"/>	PHONE INSURANCE (see brochure for details)
<input checked="" type="checkbox"/>	TEXT
	Cost/Mo.
	\$2.99
TOTAL	

Qty	Code	Item #	Product/Description	ESN/SIM#	MSN/IMEI	Net Unit Price
1		633001	VHRD		484997000195615	\$129.99
1		63512	SIM	893201705023995019		\$0
TOTAL						\$129.99

CREDIT CHECK CONSENT AND REPORTING AUTHORIZATION I authorize any person, or consumer or credit reporting agency, to provide Cingular with any information it has on me or the entity on whose behalf I make this application. I authorize Cingular to: (a) complete this information, (b) disclose my account information including my payment history and confidential information to credit reporting agencies or private credit reporting associations, and (c) periodically obtain and use my credit report and other credit information from any source in connection with Cingular's offering of wireless and other services. I understand that if I fail to fulfill the terms of my credit obligations under this Agreement, Cingular may report my failure to a credit reporting agency.

DOOR-TO-DOOR SALE IF THIS IS A DOOR-TO-DOOR SALE, I MAY HAVE A LEGAL RIGHT TO CANCEL THIS TRANSACTION BEFORE MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THE TRANSACTION. IF APPLICABLE, I WILL REVIEW THE ASSOCIATED NOTICE OF CANCELLATION FORM AND EXPLANATION OF THIS RIGHT.

REGULATORY COST RECOVERY FEE Cingular also imposes the following charges: a Regulatory Cost Recovery Fee of up to \$1.25 to help defray its costs incurred in complying with obligations and charges imposed by State and Federal telecom regulation, a gross receipts surcharge, and State and Federal Universal Service charges. The Regulatory Cost Recovery Fee is not a tax or a government required charge.

GUARANTY If I am signing on behalf of an entity, I represent that I am authorized to sign on its behalf, and I agree to be jointly responsible with the entity for payment of any sums that become due under, and to be bound by, this Agreement. I agree you can collect directly from me without first proceeding against the entity.

CONTRACT PROVISIONS - This Agreement includes all the provisions of Cingular's current terms of service form FMSTCP11040055E, incorporated herein by reference, including a binding arbitration clause. It also includes and incorporates additional provisions contained in a separate rate plan or other brochure(s) describing the services to which I subscribed ("Rate Plan Brochure"). I agree to all of these contract provisions.

SERVICE/COVERAGE LIMITATIONS Service is not available at all times in all places. Coverage maps are available at www.cingular.com and are subject to the additional limitations described there. There are gaps in coverage within the service areas shown on coverage maps, which, by their nature, are only approximations of actual coverage. I accept Cingular's service with these limitations.

EARLY TERMINATION FEE In FL, GA, SC, NC, KY, TN, MS, LA, AL, NY, and parts of IN and NJ an Early Termination Fee in the amount of \$240 per device prorated over the term of your commitment may be assessed against you in the event that you terminate this contract before the expiration of its term. In all other areas, an Early Termination Fee of \$150 per device may be assessed against you in the event that you terminate this contract before the expiration of its term.

CANCELLATION POLICY As further set forth in this Agreement, we will cancel your service, for any reason and without imposing the Early Termination Fee, within thirty (30) days of your signing this Agreement. PROVIDED, however, that if you cancel service you will remain responsible for service fees and charges incurred. If you cancel within three (3) days of your signing this Agreement, you will be entitled to a refund of your activation fee, if any. If you exercise this option, it may be necessary for you to return handsets and associated accessories purchased in connection with your entry into this Agreement.

I HAVE READ, UNDERSTAND, AND AGREE TO BE BOUND BY THIS AGREEMENT WITH ITS TERMS OF SERVICE AND RATE PLAN BROCHURE (including Changes to Terms and Rates, Limitation of Liability and Arbitration).

Customer Signature/Authorization <i>[Signature]</i>		Sales/Dealer Signature <i>[Signature]</i>	
CINGULAR WIRELESS USE ONLY		Deposit/Advance Payment	Check #
		Purchase	Check #
		Visa/MC/Discover/AMEX Card No.	Date Received
			By
			Exp. Date

Suite 1100 CO • 5565 Glenridge Connector • Atlanta, GA 30342

ORIGINAL - CINGULAR YELLOW - SALES REP PINK - CUSTOMER WHITE - OTHER