

NATHAN RIENSCHÉ, individually and on behalf of all the members of the class of persons similarly situated, Plaintiff - Appellant, v. CINGULAR WIRELESS LLC, a Delaware limited liability company doing business as Cingular Wireless; NEW CINGULAR WIRELESS SERVICES, INC., a Delaware corporation doing business as AT&T Wireless; NEW CINGULAR WIRELESS SERVICES PURCHASING COMPANY LP, a Delaware corporation doing business as Cingular Wireless; NEW CINGULAR WIRELESS PCS LLC, a Delaware limited liability corporation doing business as Cingular Wireless, Defendants - Appellees.

No. 07-36054

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

320 Fed. Appx. 646; 2009 U.S. App. LEXIS 6154

**March 11, 2009, Argued and Submitted, Seattle, Washington
March 26, 2009, Filed**

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [1]**

Appeal from the United States District Court for the Western District of Washington. D.C. No. CV-06-01325-TSZ. Thomas S. Zilly, District Judge, Presiding.

Riensché v. Cingular Wireless LLC, 2007 U.S. Dist. LEXIS 83921 (W.D. Wash., Nov. 9, 2007)

DISPOSITION: REVERSED and REMANDED in part, VACATED in part, and AFFIRMED in part. Costs on appeal to be divided between the parties.

COUNSEL: For NATHAN RIENSCHÉ, individually and on behalf of all the members of the class of persons similarly situated, Plaintiff - Appellant: David Elliot Breskin, Esquire, Attorney, Daniel Foster Johnson, Esquire, Attor-

ney, Roger Mulford Townsend, Attorney, Breskin Johnson & Townsend PLLC, Seattle, WA.

For CINGULAR WIRELESS LLC, a Delaware limited liability company doing business as Cingular Wireless, NEW CINGULAR WIRELESS SERVICES, INC., a Delaware corporation doing business as AT&T Wireless, NEW CINGULAR WIRELESS SERVICES PURCHASING COMPANY LP, a Delaware corporation doing business as Cingular Wireless, NEW CINGULAR WIRELESS PCS LLC, a Delaware limited liability corporation doing business as Cingular Wireless, Defendants - Appellees: Bradford Joseph Axel, Shelley M. Hall, Attorney, Scott A.W. Johnson, Attorney, STOKES LAWRENCE, PS, Seattle, WA.

For NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES, Amicus Curiae: [**2] Christine A. Mailloux, Esquire, Attorney, THE UTILITY REFORM NETWORK, San Francisco, CA.

JUDGES: Before: W. FLETCHER, GOULD and TALLMAN, Circuit Judges.

OPINION

[*647] MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by *9th Cir. R. 36-3*.

Before: W. FLETCHER, GOULD and TALLMAN, Circuit Judges.

Plaintiff Nathan Riensche ("Riensche") appeals the district court's rulings in favor of Defendant Cingular Wireless ("Cingular"). The district court dismissed Riensche's claims to the extent that they relied on the Washington Business and Occupations tax ("B&O tax") statute, holding that this statute was preempted by the Federal Communications Act ("FCA"). It then granted summary judgment to Cingular on Riensche's remaining claims for breach of contract, unjust enrichment, and deceptive conduct under the Washington Consumer Protection Act ("CPA"), and sanctioned Riensche's lawyer for directing his clients not to answer questions during depositions on the grounds of attorney-client privilege. Riensche appeals all of these decisions, with the exception of the summary judgment grant on the unjust enrichment claim. We reverse the district court's dismissal of Riensche's [**3] B&O tax claim and, in light of this reversal, we vacate the grant of summary judgment on Riensche's remaining claims. We affirm the discovery sanctions order.

Riensche first claims that Cingular directly violated *RCW* β 82.04.500 by passing on the B&O tax to its customers as a surcharge assessed beyond the contract price. This claim is

not preempted by the FCA. After the district court's decision in this case, we held in a separate case that such a claim is not preempted by the FCA. *Peck v. Cingular Wireless, LLC*, 535 *F.3d* 1053, 1057-58 (9th Cir. 2008). Because this case is controlled by our decision in *Peck*, we reverse the district court's dismissal of this claim.

Riensche's claims of breach of contract and deceptive practices under the CPA may be affected by the conclusion that *RCW* β 82.04.500 is not preempted. Because the district court believed that *RCW* β 82.04.500 was invalid, it did not have the opportunity to address whether a violation of that statute could, in the circumstances of this case, produce a breach of contract or a deceptive practice under the CPA. We therefore vacate the district court's grant of summary judgment on Riensche's breach of contract and CPA claims so the [**4] district court can reassess its ruling on these questions in light of the fact that the B&O tax statute is not preempted. In doing so, the district court also may wish to wait for the Washington Supreme Court to resolve the appeal of *Schnall v. AT&T Wireless Services, Inc.*, 139 *Wn. App.* 280, 161 *P.3d* 395, 401 (*Wash. Ct. App.* 2007), before ruling on the CPA claims.

We affirm the discovery sanctions. Given that Riensche's attorney on several occasions ordered his clients not to answer questions that could have been answered without violating the attorney-client privilege, the district court did not abuse its discretion in sanctioning the attorney for this conduct.

REVERSED and REMANDED in part, VACATED in part, and AFFIRMED [*648] in part. Costs on appeal to be divided between the parties.