

## Consumer Suffered No Injury By Paying Tax on Retail Value of Discounted Cell Phone

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*California's Second District Court of Appeal, affirming the trial court's dismissal of Jessica Bower's class action complaint, concluded that Bower alleged "at the most a conjectural or hypothetical injury, not an injury in fact" by claiming she was deceived when she was told she had to pay the advertised sale price for a cell phone plus tax on the phone's retail value. The Bower decision helps define when a consumer has alleged an injury under California's consumer protection statutes and confirms that Regulation 1585(b)(3) "reflects California's general policy imposing sales tax on the retailer and permitting the retailer to collect sales tax reimbursement from the consumer."*

On June 29, 2011, the Second District Court of Appeal, in *Bower v. AT&T Mobility, LLC, et al.*, Case No. B223364, \_\_\_ Cal. App. 4th \_\_\_ (Jun. 29, 2011), affirmed the trial court's dismissal of the class action complaint against AT&T Mobility, LLC, AT&T Inc. and AT&T Corporation (collectively, AT&T). Bower's complaint stemmed from her purchase of a cell phone and accompanying airtime contract. While the cell phone price was discounted from its retail value of \$399 to \$199, the California sales tax of 7.75% Bower was charged was based on the cell phone's \$399 retail value.

Title 18 of California Code of Regulations, Section 1585(b)(3) states that, for bundled transactions, "[t]ax applies to the gross receipts from the retail sale of a wireless telecommunication device sold in a bundled transaction, measured by the unbundled sales price of that device. Tax applies to the unbundled sales price whether the wireless telecommunication device and utility service are sold for a single price or are separately itemized in the context of a sale or on a sales invoice." Under this section, retailers are "required to report and pay tax measured by the unbundled sales price of the device and may collect tax or tax reimbursement from its customer measured by the unbundled sales price." Bower denied that her complaint sought a tax reimbursement and claimed instead that she wanted recovery based on AT&T's alleged misrepresentations to her that it was required to pass on the sales tax on the unbundled price of the cell phone when she contended pass-through of the tax was merely discretionary. The trial court granted AT&T's demurrer without leave to amend. The appellate court affirmed the trial court's decision.

On appeal, the Second District noted that "[w]hether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of sale," citing California Civil Code Section 1656.1(a). It further recognized that Regulation 1585(b)(3) "reflects California's general policy imposing sales tax on the retailer and permitting the retailer to collect sales tax reimbursement from the consumer." Evaluating Bower's third amended complaint, the Second District concluded that it relied on two key allegations: (1) that, "[w]hen [she] inquired why she was paying this unexpected sales tax, she was told by an AT&T representative that 'there is nothing that can be done about it' and AT&T is 'required by law' to charge her the tax;" and (2) that she "relied on the misrepresentations and misleading statements made by [AT&T] that AT&T is legally required to charge consumers for the bundled sales tax. She was denied any opportunity [to] shop around for retailers that do not charge consumers this discretionary fee."

The Second District found Bower's third amended complaint "pleads at the most a conjectural or hypothetical injury, not an injury in fact," in part, because it does not allege that Bower could have obtained from another source a bundled transaction for a new cell phone at a lower price. In addition, it concluded that the alleged misrepresentations had not caused Bower to purchase a cell phone that she would not have bought but for the misrepresentations, the cell phone was not worth less than represented and the cell phone was not different from what she wanted and expected to purchase. Bower's alleged injury was insufficient to sustain a cause of action under California's Business & Professions Code Sections 17200, *et seq.*, and 17500, *et seq.*, or Consumers Legal Remedies Act, or principles of common law fraud.<sup>1</sup>

This is one of many anticipated opinions addressing what constitutes an injury under California's consumer protection statutory schemes following the California Supreme Court's January 27, 2011 decision in *Kwikset Corp. v. Superior Court (Benson)*, 51 Cal. 4th 310 (2011) ("plaintiffs who can truthfully allege they were deceived by a product's label into spending money to purchase the product, and would not have purchased it otherwise, have 'lost money or property' within the meaning of Proposition 64 and have standing to sue").


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If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors of this alert.

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 <sup>1</sup> In footnote 5 of its opinion, the Second District noted that the issue whether Article XIII, Section 32 of the California Constitution or Revenue and Taxation Code Section 6932 bars a consumer from filing a lawsuit against a retailer under California's Unfair Competition Law or Consumers Legal Remedies Act alleging that the retailer collected sales tax reimbursement on transactions that are not taxable currently is pending before the California Supreme Court, citing *Loeffler v. Target Corp.*, 173 Cal. App. 4th 1229 (Second Dist., Div. Three) (2009). Thus, it concluded that it need not decide whether Bower's case was one seeking a tax refund, or its relation to the cases pending before the California Supreme Court, because it concluded that sustaining the demurrer to her second amended complaint was proper on the ground that she did not sufficiently plead her causes of action.

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