



When IVRs Discriminate: A Case Study

What happened when a plaintiff took on a big telecom. The first in a two-part series

In my Winter 2018 column, I wrote about AT&T's violation of federal antidiscrimination laws stemming from its interactive voice response system, which is inaccessible to people who have difficulty speaking or having their speech understood. This follow-up column presents a real-world case study, illustrating how the judicial system often enables businesses like AT&T to discriminate with impunity. Here's some background:

AT&T's IVR Was Not Accessible to People with Speech Disabilities

AT&T's IVR previously included dual-tone multi-frequency (DTMF) so callers who had difficulty speaking or having their speech understood could use DTMF to navigate and use the system by pressing numbers on the keypad instead of speaking. But the company removed the DTMF option, offering a single method of navigation: speech.

AT&T's Inaccessible IVR Violated California State Laws

There are two applicable state laws in California. Let's call them CalOne and CalTwo. CalOne prohibits discrimination by all businesses against enumerated classes, including people who have disabilities or medical conditions. CalTwo guarantees people with disabilities or medical conditions full and equal access to the goods, services, and the like that are available to members of the general public.

To prevail under CalOne, the plaintiff in this case could prove his case on the merits or prove an Americans with Disabilities Act (ADA) violation occurred. The plaintiff need only prove his case by one of these methods. Prevailing plaintiffs are entitled to recover actual damages, in no case less than \$4,000, for each offense.

Prevailing plaintiffs under CalTwo are entitled to recover no less than \$1,000.

AT&T's Inaccessible IVR Violated Federal Rules

When people think about laws to protect people with disabilities, they usually think: The Americans with Disabilities Act. But when it comes to telecommunications, the ADA does not apply; Federal Communication Commission (FCC) rules do.

These rules require providers to ensure the service is accessible to and usable by individuals with disabilities. Further, they require providers to ensure services are operable without speech, by providing at least one mode that does not require user speech. Opting out to a live operator doesn't count.

Because the ADA is preempted by FCC rules, the plaintiff could not prevail on his state law (CalOne) claim by proving an ADA violation occurred. Arguably, though, since the FCC rules stand in the place of the ADA, the FCC violation should

similarly stand in place of the ADA violation.

The plaintiff in this case had ample evidence to support his discrimination claim under FCC rules or by proffering substantive evidence that AT&T violated state law. But what methods of redress are available?

U.S. Supreme Court Precedent Puts Limits on Plaintiffs' Litigation Options

Like many large companies, AT&T has contractual language requiring customers to arbitrate any disputes that might arise between it and the customer. When this language was challenged in court on the grounds that it unfairly benefited the defendant, AT&T sued. All the way to the U.S. Supreme Court.

And in the Supreme Court, AT&T prevailed. The court held that arbitration clauses are enforceable. That's a big deal.

Why? Because without the ability to sue in superior court or participate in a class-action lawsuit, plaintiffs are left with two bad options: arbitration or small-claims court.

Arbitration

Arbitration is not necessarily impartial. It tends to be pro-defendant; plaintiffs are limited in their ability to appeal an unfavorable decision; discovery is limited; it's expensive; and because damages are limited, it's hard to find attorneys who take these cases. Plus, arbitration results are typically confidential so, even if a company is found liable, there is no public record of wrongdoing and therefore no incentive for the defendant to cease engaging in the same wrongful conduct.

Arbitration is so pro-defendant that in September 2019, the U.S. House of Representatives passed H.R. 1423, the Forced Arbitration Injustice Repeal Act. (The FAIR Act. Get it?) It was not brought to a vote in the Senate, but at least it's on the congressional radar.

Small-Claims Court

The other bad choice is small-claims court, which benefits the defendant in that damages are limited to a few or several thousand dollars; plaintiffs cannot be represented by counsel; and decisions are not appealable.

In this case, the plaintiff chose small-claims court.

It should have been a slam dunk.

It wasn't.

Want to know what happened? I'll break it down in my next column. [✉](#)

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