

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

CASE NO. 06-20734-CIV-SEITZ/MCALILEY

CARLOS PEREZ, ERIC ZIMELMAN,
ANGELA D. RIEKE and DOROTHY
HAYS, individually and on behalf
of all others similarly situated,

Plaintiffs,

vs.

ASURION CORPORATION; ASURION
INSURANCE SERVICES, INC.; ASURION
FLORIDA WARRANTY SERVICES, INC.;
LOCK/LINE, LLC; and LOCK/LINE
WARRANTY SERVICES OF FLORIDA, LLC,

Defendants.

FOURTH AMENDED CLASS ACTION COMPLAINT

Plaintiffs, CARLOS PEREZ, ERIC ZIMELMAN, ANGELA RIEKE, and DOROTHY
HAYS, individually and on behalf of all others similarly situated, bring this action against ASURION
CORPORATION, ASURION INSURANCE SERVICES, INC., ASURION FLORIDA
WARRANTY SERVICES, INC., LOCK/LINE, LLC, and LOCK/LINE WARRANTY SERVICES
OF FLORIDA, LLC, (hereinafter collectively "Defendants").

1. This case is brought against Defendants to remedy their conduct in: (1) collecting millions of dollars in monthly premiums from customers, only to (2) demand unreasonable deductibles to provide customers with, (3) refurbished and/or cellular phones of a lesser value after a loss. This ongoing practice is continuing and violates common law.

2. Specifically, this action is brought on behalf of consumers / subscribers to Defendants' respective Wireless Phone Protection Plans (the "Plans"), whereby consumers pay to Defendants a monthly fee for cellular phone equipment "coverage" intended to protect the consumer against loss or damage to their phones. As discussed below, the repair and replacement aspects of the Plans offered by Defendants are subject to deductibles charged by Defendants, the amount of which varies based on the particular Plan and the type of phone insured.

3. Plaintiffs and the putative Class allege that Defendants misrepresented and failed to adequately disclose all material terms of their Plans to consumers at the point of sale, and further, that Defendants have not complied with their legal obligations to certain subscribers regarding replacement phones provided to them pursuant to the terms and conditions of the Plans. As a result of these actions, Defendants received substantial monies from consumers under circumstances that make it inequitable for them to retain these benefits.

I. BACKGROUND FACTS

4. At least 110 million or 40% of all Americans use cellular phones. Some experts expect that worldwide subscribers will reach 1.2 billion people by the end of 2005. According to the defendants' own statistics, over 25 million cellular phones will be lost or stolen which creates a market for wireless equipment protection plans. Cellular phone companies have decided not to offer this equipment protection

plans themselves but have instead decided to allow three main insurance agents to provide such coverage for their customers. Defendants are among those companies. Defendants use the cellular phone companies to charge and collect these insurance premiums.

5. When cellular phones were first introduced, business was simple. Customers who wanted cell phone service paid for the equipment at a cost of several hundreds of dollars typically from the only provider in that region of the country.

6. The industry changed in the early 1990-s as a result of better technology and the daily battle for market share between providers. Many providers offered phones for virtually no cost (for example for 1 penny) simply to have customers so the value of the equipment was eliminated and customers had no desire and/or need to insure a worthless phone. Consequently, a customer with no equipment protection plan would call the carrier to replace a damaged or lost phone and the provider would inform the customer that the replacement phone must be purchased for \$100 to \$150 dollars. After hearing threats to cancel service, the provider would typically either subsidize these costs or simply devise a special rate so they could retain the customer.

7. Eventually, technology and evolving market increased the costs for PCS and digital cell phones which sparked an interest in creating an equipment insurance market. Today, roughly 85% of all cell phone providers provide some type of cell phone equipment protection program through "wireless insurance providers". Keeping phones in customers' hands is the top priority for providers. Industry averages show that providers spend between \$400 to \$700 to gain a customer and an average \$225 to save a disgruntled customer. With increased competition and slower growth, the main goal for providers is to retain customers and prevent customers from being out of service for extensive periods of time.

8. However, instead of creating a market that assisted and benefited their own customers, cell phone providers turned this responsibility over to these “wireless insurance agents” which themselves control the market by: (1) promoting and advertising these services to the public directly and through the cell phone providers, (2) processing and adjudicating the insurance claims directly, and (3) charging customers monthly premiums not through their own materials but instead through the use of the cell phone company billing statements. The three main “insurance agents” that provide cell phone equipment insurance to customers are: (1) The Signal Company, (2) Lock/Line, and (3) Asurion Corporation. These companies, including Asurion, charge a monthly premium to cell phone customers for this equipment protection plan sometimes as high as \$4.99 each and every month. These companies do not directly bill customers and do not receive any signed agreements/contracts directly from the customers but instead assess such charges through the monthly bill provided by the cell phone provider to the customer.

9. Defendants require customers to pay a “deductible” prior to the issuance of a replacement phone after a loss. These deductibles can range from \$35 to \$100 for each replacement phone. Moreover, Defendants make additional profits by buying and selling phones that it uses to provide replacement phones to its customers. As explained in detail below, these “replacement phones” are not new phones but are instead used and refurbished phones that have a value less much less than even the deductibles that the customers are required to pay. In some cases, these replacement phones are old models with values less than the lost phones.

10. Defendants represent to their consumers that “replacement phones” will be “of like kind and quality” only to provide phones lacking many necessary features found on the claimants original phone. Moreover, Defendants represent that this “deductible” is based on the actual value of the loss, but it is in

fact simply a flat fee charged to its customers such as Plaintiffs.

II. PARTIES

11. Plaintiff Carlos Perez (APerez@) has at all times relevant hereto been a resident of Miami-Dade County, Florida.

12. Plaintiff Eric Zimelman ("Zimelman") has at all times relevant hereto been a resident of Miami-Dade County, Florida.

13. Plaintiff Angela Rieke ("Rieke") has at all times relevant hereto been a resident of San Diego County, California.

14. Plaintiff Dorothy Hays ("Hays") has at all times relevant hereto been a resident of Miami-Dade County, Florida.

15. Defendant Asurion is and has at all times relevant hereto been a Delaware corporation whose primary place of business is in Nashville, Tennessee. Asurion serves over fourteen million subscribers through its relationships with most of the leading wireless carriers in North America and Asia and maintains five North American offices, in Nashville, Tennessee, Houston and Dallas, Texas, San Mateo, California, and Moncton, New Brunswick, Canada.

16. Defendant Asurion Insurance Services, Inc. ("AIS") is and has at all times relevant hereto been a Tennessee corporation whose primary place of business is in Nashville, Tennessee. On information and belief, AIS is a wholly-owned subsidiary of Asurion.

17. Defendant Asurion Florida Warranty Services, Inc. ("AFWS") is and has at all times relevant hereto been a Tennessee corporation whose primary place of business is in San Mateo, California.

On information and belief, AFWS is a wholly-owned subsidiary of Asurion.

18. Defendant Lock/Line is and has at all times relevant hereto maintained its primary place of business in Kansas City, Missouri. Lock/Line does business in Florida as Lock/Line Warranty Services of Florida, LLC.

19. Defendant Lock/Line Warranty Services of Florida, LLC ("LWSF") is and has at all times relevant hereto maintained its primary place of business in Kansas City, Missouri.

III. JURISDICTION AND VENUE

20. The Class Action Fairness Act of 2005 requires that this action be brought before this Court rather than in the courts of the State of Florida.

21. This Court has jurisdiction over all of the Defendants because they are either a foreign corporation authorized to do and doing business in Florida and registered with the Florida Secretary of State, or they do sufficient business, have sufficient minimum contacts with Florida, or otherwise intentionally avail themselves of the Florida consumer market, through the promotion, sale, marketing, and distribution of its insurance products in Florida, to render the exercise of jurisdiction of the Florida courts permissible under traditional notions of fair play and substantial justice.

22. Venue is proper in this forum because at all times relevant hereto, Plaintiff resided in Miami-Dade County, Florida, and a substantial portion of the practices complained of herein occurred in the Southern District of Florida and/or because the Defendants have received substantial compensation as a result of doing business in the Southern District of Florida. Moreover, Defendants, at all times material to the allegations contained herein, personally and/or through an agent:

- a. operated, conducted, engaged in and carried on a business venture in the Southern District of Florida or had an office or agency in the Southern District of Florida; and/or

b. engaged in substantial activity within this state and district.

23. Venue is also proper in this district pursuant to 28 U.S.C. §1391(c) because a substantial part of the events giving rise to Plaintiffs' claims occurred in the Southern District of Florida and, as set forth in the above, the Defendants are subject to personal jurisdiction in this District.

IV. SPECIFIC FACTUAL ALLEGATIONS

24. Defendants market, offer, and/or sell equipment protection services to wireless telephone subscribers through a program called "Wireless Phone Protection." Defendants promote, advertise and sell the purported insurance program on the Internet and through sales brochures offering that in the event of loss, theft, or damage, customers will receive replacement telephones for a small deductible charge.

25. Defendants hold out that they will adjust the "loss" of a single occurrence and subtract a deductible from the lesser amount of: a) the adjusted loss; or b) the applicable limits of insurance. The deductible applies per occurrence per subscriber.

26. The term "adjusted loss" is not defined. However, Defendants declare that the value of the property will be the cost to repair or replace the property with similar property "of like kind and quality" within a reasonable time after the loss. This means that they do not fulfill claims through cash payment or reimbursement to subscribers; instead, they fulfill a majority of claims for lost, stolen, or damages phones with refurbished and/or lesser value phone equipment.

27. Defendants define "loss" under their policies as both accidental loss and damage and determines the value of the property as the cost to repair or replace the property with similar property of like kind and quality within a reasonable time after the loss.

28. As used by Defendants, the term “deductible” is wholly deceptive and intentionally designed to mislead consumers into purchasing Wireless Phone Protection program. In the insurance industry a “deductible” is a predetermined sum that is subtracted from an actual loss payable amount. Defendants do not determine the deductible amount for any particular claim until after the claim is filed.

29. If the loss payable amount is less than the amount of the deductible, the claim will not be pursued. The so-called deductible identified in Defendants’ respective Wireless Phone Protection is a compulsory monetary charge imposed as a condition to the complete processing of claims regardless of the loss payable amount or the value of the phone equipment. In their administration of claims, they do not determine a loss payable amount from which the deductible may be subtracted and do not inform subscribers of the value of the phone equipment they will receive. With respect to a great number of claims, the compulsory monetary charge actually exceeds the value of the refurbished phone equipment defendants provide. In short, because Defendants do not identify the amount of the loss payable and do not identify the value of the refurbished equipment, insured subscribers unwittingly pay more to Defendants in the form of a so-called “deductible” than the phones they receive are worth.

30. Defendants require premium payments to be paid by Plaintiffs and the Class Members monthly. The requirement of these premium payments is deceptive in that payment of such premiums does not actually insure subscriber’s property in the event of loss. These premium payments do nothing more than create a right in Class Members to have the opportunity to pay additional monies in the form of the so-called “deductible” in order to receive a refurbished phone worth less than the deductible alone. Moreover, the procedures set up by Defendants to file a claim are unfairly burdensome and unreasonable such as requiring a police report.

V. SPECIFIC ALLEGATIONS OF THE CLASS REPRESENTATIVES

31. Class Representative Mr. Carlos Perez resides at [REDACTED]

[REDACTED] His cell phone account number is: [REDACTED]. Mr. Perez paid monthly premiums to Asurion's insurance program from January 2002 until April 2005 and then from April 2005 to January 2006. On or around July 26, 2004, Mr. Perez lost his phone and called his cell phone provider Verizon to report the loss, and they told him to call Asurion directly. On or around July 26, 2004, Asurion confirmed that Mr. Perez received a replacement phone directly from Asurion. Mr. Perez was sent a replacement "Audiovox 8100" phone. Upon information and belief, the phone Mr. Perez received from Asurion was refurbished and/or of a lesser value. Asurion informed Mr. Perez that he was required to pay a \$50 deductible to receive the replacement phone and in fact was charged to his credit card \$50 on July 26, 2004 to "Asurion Insurance Services" as a deductible for the replacement phone. After a short while, the replacement phone had many problems and simply did not work well. For example, the battery was not tightly connected and would thus continuously detach from the phone.

32. Mr. Perez was not made aware that he would make monthly insurance payments to Asurion only to be required to pay an additional fee when he lost his phone in order to receive a refurbished phone.

33. Class Representative Eric Zimelman's cell phone account number is [REDACTED] and phone number is [REDACTED]. Mr. Zimelman has made monthly premium payments to Lock/Line's insurance program post-February 2004. In September 2004, Mr. Zimelman, upon information and belief, was provided with a replacement phone that was refurbished and/or of lesser value.

34. Class Representative Angela Rieke purchased a cell phone from Verizon Wireless in February 2004, and was enrolled in Asurion's insurance program at that time. Ms. Rieke has made

premium payments post-February 2004. Ms. Rieke's cell phone was defective (it would not hold a charge), and it was replaced in May 2005, for which Ms. Rieke paid a \$50 deductible. Upon information and belief, Ms. Rieke was provided with a replacement phone that was refurbished and/or of lesser value.

35. Class Representative Dorothy Hays resides at [REDACTED], and her cell phone number is [REDACTED]. Ms. Hays has been a member of the Lock/Line insurance program for many years, and has made premium payments post-February 2004. Ms. Hays lost her phone and had it replaced in Fall 2005, and was charged a \$50 deductible by Lock/Line. Upon information and belief, the phone provided to Ms. Hays by Lock/Line was refurbished and/or of a lesser value.

VI. CLASS ACTION ALLEGATIONS

36. The individual Class Members are so numerous that joinder of all members is impracticable. Plaintiffs bring this action against Defendant pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure, and Local Rule 23.1 on behalf of themselves and all other persons similarly situated. The Class which the Plaintiffs represent are comprised of the following class:

All consumers in the United States who after February 20, 2004 were enrolled in a Wireless Phone Protection from Defendants, paid monthly premiums and received a lower-valued and/or refurbished phone. Excluded from the Class are (a) Defendants and their officers and directors, and (b) the immediate family members of Defendants and their officers and directors.

Numerosity

37. The Class, upon information and belief, consists of tens of thousands of customers, whose claims information, including the amount billed is and/or should be maintained by the Defendants. Moreover, the individual Class Members are ascertainable as the names and addresses of all Class

Members can be identified in the business records maintained by the Defendants. The precise number of Class Members can only be obtained through discovery but the numbers are clearly more than can be consolidated in one complaint and impractical for each to bring suit individually. Plaintiffs do not anticipate any difficulties in the management of the action as a class action.

Commonality

38. There are questions of law and fact that are common to the claims of Plaintiffs and entire Class. These common questions predominate over any questions that go particularly to any individual member of the Class. Among such common questions of law and fact are the following:

- a. Whether Defendants' use of the term "deductible" is deceptive;
- b. Whether Defendants recklessly and/or negligently misused the term "deductible" to induce consumers to purchase Wireless Phone Protection and make claims thereunder;
- c. Whether the Defendants clearly and unambiguously communicated to consumers that the deductible could or would exceed the value of the "refurbished" equipment used to fulfill claims;
- d. Whether Defendants recklessly and/or negligently misused the phrase "of like kind and quality" to induce consumers to purchase Wireless Phone Protection and make claims thereunder;
- e. Whether Defendants' policies contain unconscionable provisions used to unilaterally preclude claims;
- f. Whether due to Defendants' acts, as alleged herein, Defendants were unjustly enriched or received payments and/or monies that under principles of equity they cannot retain;
- g. The amount of damages the Class sustained as a result of the Defendants' wrongful conduct, and the proper measure of such damages; and
- h. What restitution is due Class Members.

Typicality

39. Plaintiffs' claims are typical of the claims of the Class because of the similarity, uniformity, and common purpose of the unlawful conduct of the Defendants. Each Class Member has sustained damage (i.e. payment of premiums and deductibles) as a result of Defendants' wrongful conduct in the same manner as Plaintiffs.

Adequacy of Representation

40. Plaintiffs are adequate representatives of the Class and will fairly and adequately protect the interests of the Class. Plaintiffs are committed to the vigorous prosecution of this action and have retained competent counsel, experienced in litigation of this nature, to represent them and the Class. There is no hostility between Plaintiffs and the unnamed Class Members. Plaintiffs anticipate no difficulty in the management of this litigation as a class action.

41. To prosecute this case, Plaintiffs have chosen the law firms of Kozyak, Tropin & Throckmorton; Harke & Clasby; Lerach, Coughlin, Stoia, et al.; and Levine, Steinberg, Miller & Huver. All of these firms are very experienced in class action litigation. These law firms have the financial and legal resources to meet the substantial costs and legal issues associated with this type of litigation.

Requirements of Fed. R. Civ. P. 23(b)(3)

42. The questions of law or fact common to the claims of Plaintiffs and of each Class Member predominate over any questions of law or fact affecting only individual members of the Class. All claims by Plaintiffs and the unnamed Class Members are based on the same "premium" payments and alleged deductibles charged by Defendants and all received refurbished and/or replacement phones of a lesser value.

43. Common issues predominate when, as here, liability can be determined on a class-wide

basis, even when there will be some individualized damages determinations.

44. As a result, when determining whether common questions predominate, courts focus on the liability issue and if the liability issue is common to the class as is the case at bar, common questions will be held to predominate over individual questions.

Superiority

45. A class action is superior to thousands of individual actions in part because of the non-exhaustive factors listed below:

- a. Joinder of all Class members would create extreme hardship and inconvenience for the affected customers as they reside all across the state.
- b. Individual claims by the Class members are impractical because the costs to pursue individual claims far exceed the value of what any one Class member has at stake. As a result, individual Class members have no interest in prosecuting and controlling separate actions.
- c. There are no known individual Class members who are interested in individually controlling the prosecution of separate actions.
- d. The interests of justice will be well served by resolving the common disputes of potential Class members in one forum.
- e. Individual suits would not be cost effective.
- f. The action is manageable as a class action; individual lawsuits are not economically maintainable as individual actions.

COUNT I

Money Payable to the Class Members for Money Had and Received for the Use of the Class

46. Plaintiffs realleges and incorporate Paragraphs 1 through 35 of this Complaint as if fully set forth herein and further alleges as follows:

Kozyak Tropin & Throckmorton, P.A.
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47. Defendants obtained money and have attempted to collect amounts for which they ought to return to the Class. Defendants should also cease their attempts to collect such amounts.

48. Defendants have an implied duty not to charge their customers greater than the value of the refurbished and lesser value phones supplied to the customers. Defendants have obtained money from the Class Members through unfair and unreasonable charges, and thus are obliged to refund the money. Defendants have taken undue advantage over the Class Members.

49. Defendants have also obtained money from the Class Members through unfair, unreasonable, and unconscionable premium charges that ultimately confer no true benefit upon Class Members, and thus are obliged to refund the money. Defendants have taken undue advantage over the Class Members in this respect as well.

50. Defendants also charged premiums beyond that which is fair and reasonable, as Class Members do not receive the benefit of their bargain for contracting to be charged as such in return for the right to pay additional monies to receive a refurbished phone and/or a phone of a lesser value. Thus, Defendants must refund such amounts that were charged and collected from the Class Members. Defendants should also be required to forever cease to attempt to collect these unreasonable amounts from the Class Members.

WHEREFORE, Plaintiffs, on behalf of themselves and all similarly situated individuals, demand judgment against Defendants for compensatory damages, pre and post judgment interest, attorneys' fees, declaratory and injunctive relief, costs incurred in bringing this action, and any other relief the Court deem just and proper.

COUNT II
Unjust Enrichment

51. Plaintiffs reallege and incorporate Paragraphs 1 through 35 of this Complaint as if fully set forth herein and further allege as follows:

52. Defendants have received, and continue to receive, a benefit at the expense of Plaintiffs and members of the Class, and have knowledge thereof.

53. Defendants have deceptively charged, attempted to collect and collected premiums and so-called deductibles from consumers, including Plaintiffs and members of the Class, for a product that provides benefits worth far less than represented and required. Accordingly, Defendants have received benefits that they have unjustly retained at the expense of the Plaintiffs and the members of the Class.

54. The circumstances are such that it would be inequitable for Defendants to retain the benefit without paying the value thereof to the members of the Class.

WHEREFORE, Plaintiffs, on behalf of themselves and all similarly situated individuals, demand judgment against Defendants for compensatory damages, pre and post judgment interest, attorney's fees, declaratory and injunctive relief, costs incurred in bringing this action, and any other relief the Court deem just and proper.

RELIEF REQUESTED

Plaintiffs respectfully requests that this Court:

- a) Certify this action as a class action under Federal Rule of Civil Procedure 23(a) and b(3).

- b) Declare that the Defendants has engaged in a deceptive and unfair pattern and/or practice, and enjoining the Defendants from further engaging in such a pattern and/or practice.
- c) Award Plaintiffs and the Class Members all common law damages as well as statutory remedies for the amounts they paid to Defendants that were greater than the actual cost of a replacement phone including pre-judgment interest on these amounts as well as disgorging all premiums paid under the policy.
- d) Award Plaintiffs and the Class their attorneys' fees, costs and expenses.
- e) Award Plaintiffs and the Class such further relief as is appropriate in the interests of justice.

DEMAND FOR JURY TRIAL

Plaintiffs request a jury trial on any and all counts for which trial by jury is permitted by law.

Respectfully submitted this 8th day of January, 2007.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. mail
and facsimile transmission this 8th day of January 2007 to:

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By: _____
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